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IN THE COMPETITION

Case No: 1570/5/7/22 (T)

APPEAL
TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 9th September 2025 – Wednesday 10th September 2025

Before:

Justin Turner KC
Tony Woodgate
Andrew Lykiardopoulos
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Claimants

JJH Enterprises Limited (trading as ValueLicensing)

V

Defendants

Microsoft Corporation and Others

A P P E A R A N C E S

MATTHEW LAVY K.C., HENRY EDWARDS & MARK WILDEN (Instructed by Ghaffari
Fussell LLP) on behalf of JJH Enterprises Limited.

GEOFFREY HOBBS KC, JAANI RIORDAN, NIKOLAUS GRUBECK (Instructed by CMS
Cameron McKenna Nabarro Olswang LLP) on behalf of Microsoft Corporation and Others.

1 Tuesday, 9 September 2025

2 (10.30 am)

3 Housekeeping

4 THE CHAIRMAN: Some people are joining us live stream on our
5 website. So I must give the following warning:
6 an official recording is being made and an authorised
7 transcript will be produced, but it is prohibited for
8 anyone else to make an unauthorised recording, whether
9 audio or visual of the proceedings and breach of that
10 provision is punishable as contempt of court.

11 Good morning.

12 MR LAVY: Good morning, sir. Good morning, Tribunal. As
13 you know, I appear with Mr Edwards and Mr Wilden. And
14 we have for Microsoft Mr Hobbs, Mr Grubeck and
15 Mr Riordan.

16 This is the trial, obviously, for two preliminary
17 issues. Can I just ask, hopefully not too diffidently,
18 whether you have three skeletons?

19 THE CHAIRMAN: We do.

20 MR LAVY: And bundles A to H and T.

21 THE CHAIRMAN: I think we have A to H, yes.

22 MR LAVY: Yes. I think it is (inaudible) only. I don't
23 think I propose to go to it, for what it's worth.

24 THE CHAIRMAN: It's always helpful to have the letters
25 a little bit larger.

1 MR LAVY: Yes, sorry about that.

2 THE CHAIRMAN: Not to worry.

3 MR LAVY: And authorities, there should be --

4 THE CHAIRMAN: Yes, we have those. Thank you very much.

5 MR LAVY: And supplemental authorities as well.

6 THE CHAIRMAN: Yes, thank you.

7 MR LAVY: There are hopefully only two points of

8 housekeeping and, subject to the Tribunal's view,

9 I would rather just park them, frankly, and get on.

10 The first one is how many sample transactions.

11 That's going to be a lot easier to deal with just when

12 I explain in context what I am relying on and Mr Hobbs

13 can just --

14 THE CHAIRMAN: Right, we start those relying on three. He

15 has identified them and --

16 MR LAVY: Exactly. So the other point of housekeeping is

17 the admissibility challenge to Golev. And, again,

18 I just propose saying something about that briefly when

19 the time comes, rather than diverting ourselves now.

20 THE CHAIRMAN: Very good.

21 MR LAVY: On that basis, the general order -- I agree with

22 Mr Hobbs -- very radically is that I will speak today,

23 going through both preliminary issues. He will respond

24 tomorrow and, provided I leave myself enough time,

25 I will reply briefly.

1 THE CHAIRMAN: I'm grateful. There's just a couple of
2 preliminary matters from our perspective.

3 MR LAVY: Yes.

4 THE CHAIRMAN: Correct me if I am wrong, but we haven't
5 identified any explanation as to what the programs we're
6 talking about are; what they do; what their function is.
7 Now, obviously they're well-known --

8 MR LAVY: Yes.

9 THE CHAIRMAN: -- and we have some familiarity with them,
10 but I'm not sure it's really appropriate to take
11 judicial notice of what they do. Am I right about that?
12 There's no explanation?

13 MR LAVY: There's high level explanation in the evidence,
14 very high level. And of course there are -- then there
15 is Microsoft's evidence as to what they consist of.

16 THE CHAIRMAN: So where, for example, is it explained that
17 Microsoft Word is a word processing program?

18 MR LAVY: Yes, I think the answer is that's a fair point.
19 I'm sure we can find something in the bundles which
20 makes --

21 THE CHAIRMAN: I'm not sure. I think we'd welcome a joint
22 statement as to what these programs do, what their
23 function is. I appreciate there are some more
24 controversial areas as to the extent to which the
25 artistic works are relevant. That is canvassed in the

1 evidence, but just hopefully in a non-contentious,
2 easily agreed, he says with his fingers crossed, single
3 page or so on what these --

4 MR LAVY: I would certainly be very disappointed if we
5 couldn't agree that.

6 THE CHAIRMAN: So if that could be done overnight that would
7 be very helpful.

8 MR LAVY: Of course, sir. Meanwhile, and pending that,
9 could I just make my submissions today on the assumption
10 that we basically know what Office is and Windows is?

11 THE CHAIRMAN: Yes, yes. Then the other matter
12 I just wanted to raise is we're obviously dealing with
13 at least two preliminary issues. They arise because
14 Microsoft say there's effectively -- and I am
15 paraphrasing -- but effectively there's an infringement
16 of copyright taking place. There are going to be no
17 residual copyright issues being held over for the next
18 trial, the substantive trial, are there? If there are
19 any I'd like to know what they are.

20 MR LAVY: I wouldn't quite characterise it that way, because
21 obviously it is right that implicitly, and to an extent
22 explicitly, Microsoft are saying that some of the
23 transactions infringed its copyright. But, of course,
24 in the context of these proceedings that's not quite the
25 question because --

1 THE CHAIRMAN: I appreciate that, but that's not really my
2 point. Are any copyright related issues being held over
3 for the next trial?

4 MR LAVY: Yes, because these two preliminary issues -- which
5 were of course selected because if they go a certain way
6 they're dispositive of the proceedings -- are only two
7 of a number of pleading points around the law of
8 exhaustion. And there's the CALs issue, which is
9 a contractual point that arises as to whether you can or
10 can't do things with CALs. And then there are
11 various -- I think it's paragraphs -- it's 23C,
12 primarily, of the defence, there are a whole bunch of
13 things of which we're dealing with, too.

14 THE CHAIRMAN: Sorry? Right.

15 MR LAVY: The distinction --

16 THE CHAIRMAN: We don't want to end up spending two days
17 debating the niceties of exhaustion and copyright law,
18 then to have to come back and everyone thinks they're
19 going to have another bash at all this.

20 MR LAVY: No. No, sir. They're different issues that arise
21 because these two are different in kind from all the
22 others because these two are points of principle which,
23 if they're decided a certain way, end proceedings. The
24 others -- which are different arguments, actually,
25 although in a sense they all relate to exhaustion, but

1 they're different arguments -- don't affect the entire
2 counterfactual. So they may affect quantum, but they
3 won't affect the need to carry on with proceedings to
4 have a liability trial and so on.

5 THE CHAIRMAN: Right. I think we need to understand that
6 a little better. I understand there may be other
7 transactions. If we end up having to look at
8 transaction by transaction, which we may or may not need
9 to do, then I can see that other transactions may fall
10 into different camps and there could be issues there.

11 I understand the CAL issues. It's raised in the
12 skeleton for the moment.

13 MR LAVY: Yes.

14 THE CHAIRMAN: But if there are -- I think we need further
15 assistance on what is not being decided today and what
16 is going to be decided at the next trial insofar as it
17 relates to copyright and exhaustion.

18 MR LAVY: Yes.

19 THE CHAIRMAN: Rather than do it on your feet could we hear
20 submissions on that after lunch, when you have had
21 a chance to consider it? I understand the point. The
22 Tribunal is concerned we don't end up having to
23 rearguing all this.

24 MR LAVY: No, and that is certainly not the intention.

25 THE CHAIRMAN: Points raised in the skeletons and then

1 reargued. If that's necessary, we need to understand
2 why.

3 MR LAVY: I can say unequivocally now that the two key
4 issues -- that's from my perspective -- are on the
5 agenda for today, which are the splitting issue, I can
6 call it that for shorthand --

7 THE CHAIRMAN: Yes, I understand.

8 MR LAVY: -- and the non-program works issues will not have
9 to be re-argued again. This is it.

10 THE CHAIRMAN: Yes. Mr Hobbs?

11 MR HOBBS: We are seeing this not so much through the lens
12 of copyright as such. We're seeing it as the scope and
13 effect of the exhaustion rule under that directive --
14 under that directive and the two relative to each other.

15 I can see that there may be a residual issue left on
16 the CALs. I can see that. Beyond that I can't see that
17 any of the issues on the exhaustion points, as I've just
18 outlined them to you, are going to come up again later.

19 THE CHAIRMAN: Right, that's very helpful. But I just want
20 to make sure we know exactly what's potentially being
21 stood over at 2 o'clock today.

22 MR LAVY: Of course, sir.

23 MR LYKIARDOPOULOS: And just before you go on. Just taking
24 on from giving us a joint statement on the programs,
25 there's been a recent correspondence about the question

1 of client service software over work station software.
2 And it would be useful also -- you may be addressing us
3 on that, but what your position is on that, both sides,
4 and also why it matters to the issues today and how it
5 features into the argument. It's been a recent
6 discussion that has come up in the correspondence and
7 we need to have addressed.

8 Submissions by MR LAVY

9 MR LAVY: I will definitely be dealing with that today.

10 So, cracking on, then, with preliminary issue 1.
11 I will start by sketching out the overall contours of my
12 submissions on the PI and then I will address the key
13 points in more detail.

14 The starting point, obviously, is Article 4(2) of
15 the Software Directive and that is the distribution
16 right in a copy of a computer program is exhausted on
17 the first sale of that copy. That's what the provision
18 says. And, to state the obvious, but it's an important
19 point, once the distribution right is exhausted in that
20 copy the rightholder can't prevent any further
21 distribution of that copy, whether by resale or through
22 any other means because its rights are exhausted. And
23 the buyer -- I mean, to use the language of UsedSoft and
24 in fact more generally -- is the owner of that copy.

25 Now, what UsedSoft tells us is that exhaustion on

1 first sale is not limited, when it comes to software, to
2 distribution on physical media, but can arise in respect
3 of intangible copies, too. So if someone acquires
4 a perpetual licence to use software and downloads it
5 from the rightholder's website, which of course is the
6 usual way of acquiring software in the modern world,
7 that transaction is treated as a first sale from the
8 perspective of Article 4(2) and the distribution rights
9 exhausted in that copy. And that obviously begs the
10 important question of what's meant by that copy; the
11 copy in which the distribution right is exhausted.

12 And in my submission -- which I will obviously
13 expand upon -- the answer is that it's not a literal
14 copy of the software. That's not what's meant. Rather,
15 it is a notional concept that reflects the economic and
16 practical reality of the transaction. A copy in this
17 context -- and this is my language, not the authorities'
18 language -- is it's like a token. It's an economic unit
19 corresponding to a single but non-specific copy of the
20 software, together with a user right, a right to use
21 that copy.

22 And I will obviously have to address that by
23 reference to parts of UsedSoft and so on. But, first,
24 I want to explain what I mean by considering what
25 actually is entailed when one resells an intangible copy

1 of software following the UsedSoft doctrine.

2 So, just taking the thing in stages, an original
3 licensee who resells their copy of software doesn't
4 obviously hand over anything physical. They don't go to
5 the buyer and wrench out their hard disk from their
6 computer and hand that over. That's not what's going
7 on. Instead, what UsedSoft requires them to do is
8 render their own physical copy of the software unusable,
9 so in practical terms deleting it from their hard disk.
10 And once that's done the person they have resold it to
11 is entitled to download their own copy and install a
12 fresh copy of the software from the rightholder's
13 website.

14 Of course, in that scenario no software is actually
15 being transferred from the reseller to the second
16 acquirer in any technical or any literal sense.

17 What's actually going on is that the reseller is
18 deleting their copy and the buyer, through the act of
19 downloading and installing, has made a fresh copy by
20 copying via the download.

21 But, looked at from an economic and a real world
22 perspective, a copy has transferred from seller to
23 buyer. And that's because before the resale the
24 reseller owns a copy of the software, it has a literal
25 copy installed on its computer and it has the company

1 user right in respect of that copy in perpetuity, it's a
2 perpetual licence, and after the resale it's the buyer
3 who has both of those things.

4 So, from a rightholder's perspective, there's still
5 only one copy of the software in circulation, which is
6 precisely what the original purchaser paid for, but
7 a different person has that copy.

8 So that's the reality of what's going on with these
9 transactions.

10 And if one asks in that context: what's the thing
11 which is subject of a first sale, and thus exhaustion
12 and subsequent resale? It's not a literal copy of
13 anything; what it is, it's an economic unit
14 corresponding to a single instance of the software for
15 which there's an accompanying right of use.

16 As I said earlier, another way to think about it
17 possibly is as a token, and that token represents
18 a single, notional, useable copy. Notional in the sense
19 that it's not associated with any specific literally
20 copy, but it can be associated with only one literally
21 copy at any one time.

22 What UsedSoft tells us is that this notional copy is
23 subject to exhaustion on first sale, just like
24 a physical one is or a physical one would be. That of
25 course makes complete sense because the rightsholder, by

1 selling a perpetual licence in respect of that notional
2 copy and at a price that it voluntarily sets, has
3 obtained what the authorities refer to as full economic
4 value in respect of that copy.

5 And there's therefore no basis on which the
6 rightsholder should be able to come back for more in
7 respect of that copy.

8 Now, once one appreciates that the subject of first
9 sale and exhaustion in the digital world is an economic
10 unit corresponding to a single, but non-specific useable
11 copy of software -- useable in the sense that it comes
12 with an accompanying right of use -- the answer, in my
13 submission, to the preliminary 1 is actually clear and
14 that's because if someone who owns an exhaustive copy of
15 the software is entitled to resell that copy and, as
16 UsedSoft puts it, has an ownership right in that copy,
17 it follows that someone who owns exhausted copies of two
18 different pieces of software, so, let's say, Windows and
19 Office, is entitled to sell his copy of either or both
20 pieces of software. And, if both are sold, there's no
21 reason why they have to be sold to the same buyer. The
22 reason for that is that the distribution right in
23 respect of each is exhausted, the rightsholders received
24 full economic value for those copies and it has no
25 further say in relation to the distribution of those

1 copies. That's the whole point of exhaustion.

2 And that's what it means to say that the licensee
3 has an ownership right, which is what the authorities
4 say. And, if that's right, there's no principled basis
5 to distinguish a scenario where two pieces of software
6 are required pursuant to separate transactions -- so
7 what one bought on Day 1, one bought on Day 2 -- and
8 a scenario where both pieces of software are required
9 pursuant to a single transaction, such as a volume
10 licence, because in either case there's a perpetual
11 licence to use each copy of each piece of software.

12 And that perpetual licence amounts to a first sale
13 of each of those copies of each piece of software and
14 the distribution right in respect of the licensee's copy
15 of each -- physical obviously when you're dealing with
16 a CD ROM, but intangible in the case of the UsedSoft
17 sale -- has been exhausted, in return for which the
18 rightsholders receive full economic value.

19 And for exactly the same reason someone who owns,
20 say, two exhausted copies of a single piece of software,
21 Office, for example, is entitled to resell either of
22 those copies or both of those copies. And, again, here
23 the reason is that the distribution right in each copy
24 has been exhausted. And that's, again, here the case
25 regardless of whether the copies were acquired pursuant

1 to one transaction or two and whether the licence is
2 granted under one contract or two, because there's
3 a difference between a contractual licence and a copy.

4 On a proper analysis, when we get to the Microsoft
5 volume licences, what we will see is that they involve
6 sales of large numbers of separate copies of software
7 and Microsoft has received full economic value in
8 respect of each copy.

9 And splitting of the volume licences -- by which
10 I obviously mean selling part of the part of the cost of
11 licences to some parties and part to someone else -- is
12 permitted because the distribution right is exhausted in
13 each and every licensed copy. The licensee owns each
14 and every licensed copy. That, in essence, is
15 ValueLicensing's case on PI 1. Obviously, I'm going to
16 have to unpack that and make it good.

17 I'm going to structure my unpacking of that analysis
18 around three broad propositions.

19 The first is that the doctrine of exhaustion is
20 engaged separately in relation to each copy of software
21 that's the subject of a first sale.

22 So that's obviously the first plank in my reasoning.

23 The second proposition is that, in the context of
24 digitally distributed software, a copy is a notional
25 rather than literal concept reflecting the economic and

1 practical reality of digital distribution. But copy
2 nonetheless remains the unit of account. Not
3 a contract, but a copy with its accompanying rights of
4 use. And that notional concept is the thing for which
5 the rightsholder received full economic value.

6 So that's my second proposition.

7 And the third proposition is that where you look at
8 volume licences, such as those in the sample
9 transactions, they involve first sale of multiple copies
10 of software, with the consequence that the exhaustion of
11 the distribution right arises in respect of each
12 individual copy and, therefore, each can be separately
13 resold.

14 So that's structure of the rest of the morning.

15 MR LYKIARDOPOULOS: May I just check -- you're going to come
16 to this -- but something you said? I understand that
17 products are grouped into product suites, where
18 a customer is granted a licence for that combination of
19 products. Did you just say that part of the splitting,
20 as you call it, is also the right to split up those
21 product suites or not?

22 MR LAVY: So no and yes. Can I --

23 MR LYKIARDOPOULOS: Okay.

24 MR LAVY: What I mean by that is where one takes
25 an individual product suite which is sold for a fee,

1 it's one thing packaged together -- Office is the
2 obvious example in this case -- we are not saying that
3 you can split up Office and sell Word to one person and
4 Excel to another. And in fact it's no part of
5 ValueLicensing's case that in the counterfactual that
6 would have happened because that simply doesn't arise.

7 We are saying, however, that when under one volume
8 licence you've bought some copies of Windows and Office,
9 and you happen to have bought exactly the same number of
10 Windows and Office, you can sell Windows separately from
11 Office. So that's the level at which say you can split
12 products. We don't say you can then pull apart the
13 individual products, as it were.

14 MR LYKIARDOPOULOS: Thank you.

15 MR LAVY: So proposition 1, exhaustions engaged in respect
16 of individual copies.

17 The starting point, as I think I have already said,
18 but it's the Software Directive Article 4. It is just
19 worth looking at it. I know the Tribunal is going to be
20 familiar with it. But it's in the authorities bundle,
21 tab 1 -- no, I lie, first off it is bundle tab 2, at
22 page 18.

23 So, two pages in, Software Directive. We see
24 Article 4 starts by setting out the restrictive acts and
25 that's under Article 4(1) identifying the exclusive

1 rights. All familiar stuff. Reproduction, adaptation,
2 distribution to the public. And 1(c) is the
3 distribution right:

4 "Any form of distribution to the public including
5 rental of the original program or of copies thereof."

6 And then we have Article 4(2), which is the one I'm
7 focused on:

8 "The first sale in the community of a copy of a
9 program by the rightsholder or with his consent shall
10 exhaust the distribution rights within the community of
11 that copy with the exception of the right to control
12 further rental of the program or a copy thereof."

13 So rental rights carry on. But, otherwise,
14 exhaustion in respect of that copy.

15 So we have here the notion of a first sale,
16 an exhaustion of the distribution right in that copy.

17 Now, this is all familiar and uncontroversial stuff.
18 But one point to emphasise in light of some of
19 Microsoft's submissions is that the units, the subject
20 of first sale, and in respect of which the distribution
21 right is exhausted, is not the licence; it's the copy.
22 The licence is of course highly relevant because it's
23 the means by which a perpetual user right is granted,
24 without which there would be no first sale of copy at
25 all.

1 It's also the thing which gives the copy its
2 utility, because without a licence the software isn't
3 very much use. The copy of the software isn't very much
4 use and that would, of course, apply to something bought
5 on physical media, just as much as it does when you do
6 downloads.

7 And as we will see in a moment through UsedSoft, the
8 user right granted under the licence has been held to
9 accompany and be part and parcel of what's sold on
10 a first sale. But the unit of account is nonetheless
11 a copy. That's what it says, "that copy". It's not the
12 licence.

13 Now, this is all reflected in the authorities.
14 I need to start with the Ranks case. It's a case in
15 which Microsoft itself appeared before the CJEU because
16 the case involved its software, including in fact
17 Windows and Office as it happens. It's in the
18 authorities bundle, second bundle, tab 35, and it's at
19 page 832.

20 So, thank you. Ranks, this case arose from
21 a criminal prosecution in Latvia involving what, on the
22 face of it, were the sale of counterfeit CD ROMs, and it
23 was argued that the CD ROMs could be legitimately sold
24 on the basis that they were back-ups of damaged original
25 media. And the question, therefore, for the CJEU was

1 whether back-ups made for that purpose under
2 Article 5(1) rights could be resold, and the answer is
3 they can't.

4 But, for our purposes at the moment, the relevance
5 of this case isn't what can be done with back-up copies;
6 it's what was said in the case about exhaustion. And we
7 see that if we pick it up on page 838 of the bundle, at
8 paragraph 34, right at the bottom of the page.

9 Now, rather than me reading out, because you will
10 probably hear quite enough of me today, could I possibly
11 ask the Tribunal to read paragraphs 34 through to 36?

12 (Pause)

13 THE CHAIRMAN: Okay.

14 MR LAVY: Thank you. So exhaustion applies to a copy and
15 the accompanying -- that's the word used -- user licence
16 and the copy in question can be in either tangible or
17 intangible form. So I rely on this and UsedSoft, which
18 we're about to come to, for the proposition that the
19 copy is the unit of account for exhaustion purposes.
20 Albeit that copy, of course, becomes bundled with the
21 accompanying user right, otherwise it would be of no
22 use.

23 And that therefore brings us on to my proposition 2
24 and UsedSoft, which is a copy -- proposition 2, a copy
25 is a notional concept when one is dealing with

1 intangibles, but copy nonetheless remains the unit of
2 account.

3 Now, evidence from this passage of Ranks, that
4 there's exhaustion of a distribution right on first sale
5 of a copy of software, regardless of whether it's
6 a tangible or intangible copy, because that's what it
7 says, and in both cases the thing exhausted is the copy
8 that's sold. The only difference between the tangible
9 and the intangible case is what exactly is meant by the
10 copy. And the answer to that question is all given to
11 us in UsedSoft, which is in the same bundle at tab 28.

12 Is it right to assume that the Tribunal has at least
13 some familiarity with UsedSoft --

14 THE CHAIRMAN: Of course, yes.

15 MR LAVY: -- the facts, et cetera?

16 Cracking straight on, then, with the analysis. As
17 the Tribunal knows, there were three questions in
18 UsedSoft. The one I'm focused on is the exhaustion
19 question, which was question 2, in usual CJEU way
20 slightly rephrased and done first. And the analysis of
21 the exhaustion issue starts at paragraph 35, page 760.
22 But I want to pick it up at paragraph 43, which is on
23 page 761.

24 So, right at the end of paragraph 43, we see
25 a summary of a submission by Oracle:

1 "Neither the making a copy free of charge, nor the
2 inclusion after user licence agreement involves
3 a transfer of the right of ownership of that copy."

4 And then at 44 to 48, we have the CJEU's answer to
5 that point. It's quite a long passage, but could I ask
6 the Tribunal to read 44 through 48? It's an extremely
7 important section. And I will make some points about
8 it.

9 (Pause)

10 Thank you. Sorry, I should have actually asked.
11 It's rather rude of me, but are you happy to read your
12 own bits --

13 THE CHAIRMAN: Yes, of course.

14 MR LAVY: Some tribunals like reading themselves, but some
15 prefer me to read out to them. But I say you hear
16 enough of my voice.

17 So, just to pull out a few points in particular,
18 firstly, the second sentence of paragraph 44 explains
19 the rationale for treating the downloading of a copy and
20 conclusion of a licence agreement for that copy as
21 an indivisible whole. And the thing I rely on is:

22 "Downloading a copy of a computer program is
23 pointless if the copy cannot be used by its possessor."

24 So that's where the licence comes in and what Ranks
25 calls the accompanying user licence in the passage we

1 have just seen.

2 Then the first sentence of 45, note that the CJEU
3 speaks of a right of ownership in the copy being
4 transferred.

5 So one can get -- slightly go off at a tangent,
6 wondering what that really means in the concept of
7 intangibles. But, for present purposes, the point is
8 they do speak of a right of ownership. And as always
9 with exhaustion, that's because there has been
10 an exchange. It's really an economic analysis. If a
11 rightsholder has received payment of a fee chosen by the
12 rightsholder which is defined to enable it to obtain
13 a remuneration corresponding to the economic value of
14 the copy.

15 And once that fee is received, the rightsholder no
16 longer has the right to exploit the distribution right;
17 it's relinquished its ownership of that copy. That's
18 the economic analysis.

19 And then the second sentence of 45, where it is
20 said:

21 "The making available by Oracle of a copy of its
22 computer program and the inclusion of the licence
23 agreement for that copy are thus intended to make the
24 copy useable by the customer permanently."

25 So, again, just looking at that, in my submission

1 the licence is very much -- of course it's important,
2 but it's ancillary to the copy. The copy is the thing
3 that's been purchased and the licensee now has ownership
4 rights in relation to the copy. And the user rights and
5 the licence have to pass for the copy because without
6 them the thing that the licensee bought, its copy, would
7 otherwise be useless. And that's why you get, at 46:

8 "In those circumstances the operations mentioned in
9 44 above examined as a whole involve the transfer of the
10 rights of ownership of the copy of the computer program
11 in question."

12 So, consistently with Ranks, the UsedSoft analysis
13 is concerned with transfer of ownership in a copy of
14 software. I should probably say, by the way,
15 consistency with Ranks, but of course Ranks came later,
16 so I don't mean it's following it.

17 It's not a transfer of contractual rights, save in
18 the limited and ancillary sense that I have already
19 identified, the user rights have to go with the copy,
20 but it's the transfer of ownership in copies of
21 software.

22 While we're here, it's also worth noting
23 paragraph 49. Could I just ask Tribunal, please, to
24 read paragraph 49?

25 (Pause)

1 Thank you. So here, again:

2 "The notion of an exhausted copy is put in economic
3 terms by selling a perpetual licence and the price of
4 the rightholder's choosing the rightholder's
5 relinquished a right to charge further in respect of the
6 right it sold, the distribution rights exhausted, and
7 the accompanying user right attaches to the exhausted
8 copy."

9 Now, that economic point and the economic nature of
10 the analysis that the CJEU requires, in my submission,
11 is reiterated again at paragraph 63, which is at
12 page 764, which, again, could I ask you -- I promise
13 I'm not going to do it with all the authorities, but
14 UsedSoft is obviously a pretty critical one today. So
15 paragraph 63 in the middle of 764.

16 (Pause)

17 Thank you. So I'm emphasising this economic aspect
18 because it drives the CJEU's reasoning. And in my
19 submission it's really the lodestar for understanding
20 the right approach to this issue overall; it's the
21 economic analysis.

22 So what exactly is the copy that's the subject of
23 a first sale and exhaustion in the UsedSoft world? And
24 it's clear from the skeletons there's a bit of
25 a difference of view on that.

1 Microsoft says -- and this is paragraph -- sorry,
2 yes, it is paragraph 18 of its skeleton -- that it's the
3 copy sitting on the rightsholder's website. But, in my
4 submission, there are three reasons why that must be
5 wrong.

6 The first is that the copy on the rightsholder's
7 website isn't transferred to the licensee. What's
8 actually happening is that the act of downloading and
9 installing is creating an entirely new copy on the
10 licensee's own computer. The website copy remains where
11 it was, on the website.

12 Secondly, if the distribution right and the copy of
13 the rightsholder's website were exhausted on the basis
14 that it had been sold to a licensee, that would be
15 rather unworkable in practice, given the analysis in
16 UsedSoft, because it would mean that the rightsholder no
17 longer owned that copy. And it follows that the
18 rightsholder would have no business thereafter
19 continuing to host that copy on its website for other
20 customers.

21 So the consequence of UsedSoft is that although no
22 physical media is involved, we're still dealing here
23 with ownership of a copy and so it can't be the copy on
24 the rightsholder's website. That can't be what is
25 bought.

1 And, thirdly, Microsoft's analysis doesn't actually
2 reflect either the technical or, more importantly,
3 economic reality of what's going on, which is that on
4 first sale in return for a fee Microsoft has
5 relinquished its rights to have any further control over
6 the distribution of the copy that's sold.

7 Now, Microsoft relies, on paragraph 84 of UsedSoft,
8 for its submissions in this regard. That's on page 767.
9 In my submission, they read this passage far too
10 literally and they ignore the context.

11 So the paragraph starts, paragraph 84 starts by
12 paraphrasing the decision at 44 to 48. Now, we have
13 just looked at those paragraphs. The link they draw, in
14 my submission, is very clear. It is between the licence
15 and the act of downloading from the rightsholder's
16 website not between the licence and the website copy
17 itself. That's what we see at 44 to 48.

18 Now, what it then says, at 84, is:

19 "Having regards to that indivisible link between the
20 copy on the rightsholder's website as subsequently
21 corrected and updated on the one hand and the user
22 licence relating to the copy on the other, the resale of
23 the user licence entails the resale of that copy."

24 Now, Microsoft's quote in its skeleton argument
25 omits the words "as subsequently corrected and updated",

1 but they're rather important, in my submission, for
2 understanding the passage. And the reason for that is
3 one can see the context of them at paragraph 67, at the
4 bottom of page 764 to 68, and this is where the CJEU --
5 we're dealing with a slightly different issue, which is
6 the question of if the acquirer of a perpetual licence
7 enters into a service agreement whereby he can get
8 patches; are those patches then treated as part of the
9 exhausted copy? And so the reference to "as
10 subsequently corrected and updated", in 84, is
11 a reference back to the notion of them patching the copy
12 you've downloaded from the website.

13 And so the copy that's referred to as 84 as having
14 an indivisible link with the user licence isn't the copy
15 on the rightsholder's website that the licensee
16 originally downloaded; it's that copy as subsequently
17 patched. It's something different. So whatever the
18 thing is, it's not the original thing that was
19 downloaded from the website. And so once the ellipsis
20 in Microsoft quotes, replacing the actual words, 84
21 doesn't support their case. As I've already submitted,
22 their case is also, in any event, inconsistent with the
23 actual reasoning of this decision in the key paragraphs,
24 which are paragraphs 44 to 48, which is that it's the
25 act of downloading and the inclusion of a licence that

1 forms the indivisible whole.

2 MR LYKIARDOPOULOS: Could you just give me the paragraph

3 number of Microsoft's skeleton that you're referring to?

4 MR LAVY: Paragraph 18.

5 MR HOBBS: It's 17 and 18.

6 MR LAVY: I'm sorry.

7 (Pause)

8 MR LYKIARDOPOULOS: Thank you.

9 MR LAVY: So the copy that is the subject of exhaustion, in

10 my submission, isn't the one on the website.

11 So what are the alternative possibilities?

12 One is that the exhausted copy is the one created by

13 the act of downloading from the website, and the other

14 possibility is the one I have submitted already is the

15 correct possibility, which is that the copy is not

16 a literally thing at all; it's something notional, which

17 is the economic unit corresponding to a non-specific

18 copy coupled with the accompanying user right in

19 relation to that copy.

20 Now, the reason why I say that's the right one is

21 that it's the only analysis, really, that is consistent

22 with what the CJEU said in UsedSoft about the economic

23 rationale for its approach. And, also, actually, what

24 it says about download and resale.

25 To try to explain what I mean by that, the starting

1 point is paragraph 49, now, of UsedSoft, on page 762.
2 We have, I think, looked at this already. I have asked
3 the Tribunal to read it. But this time I emphasise that
4 it says:

5 "A sale of a copy of software is characterised as
6 all forms of product marketing characterised by the
7 grants of right to use a copy of a computer program for
8 an unlimited period in return for a payment of a fee
9 designed to enable the copyright holder to obtain
10 remuneration across ... economic value of the work."

11 So the actual form is irrelevant, CD ROM, download,
12 or any sort of technical mechanism one might conceive
13 of. The copy sold, according to this reasoning, is
14 an economic construct.

15 Now, similarly, at paragraph 61, which is on
16 page 763, the court refers, here, to functional
17 equivalence from an economic point of view between
18 tangible copies between CD ROM sales and internet
19 download sales. So the prism through which the CJEU is
20 looking is plainly the economic one. And that makes
21 sense, because if one then looks at paragraph 62, on
22 page 764, what that makes clear -- I should let you read
23 it, sorry.

24 MR LYKIARDOPOULOS: Before I do -- I'm sorry to keep
25 interrupting. I just like to make sure I'm following.

1 You say the important point is the copy is the economic
2 unit corresponding to a non-specific copy coupled with
3 the accompanying or user right in relation to that copy.
4 Is that another way of saying: the right to make
5 copies?
6 MR LAVY: No, it's the right to have and use a single copy.
7 MR LYKIARDOPOULOS: Have and use a single copy. But it's
8 not a specific copy?
9 MR LAVY: But not a specific copy.
10 MR LYKIARDOPOULOS: So it's actually just the right to make
11 a single copy?
12 MR LAVY: Well, yes. But it's a fungible single copy. So
13 let's say I buy a right -- let's keep it, for the
14 moment, away from Microsoft because -- software A.
15 I buy a copy, an intangible copy of software A.
16 That means I have the right -- well, I own a copy. What
17 does that really mean? It means I am allowed to install
18 and use a copy.
19 Now, let's say I do that, I install a copy on to my
20 computer. There's nothing to stop me deleting that copy
21 and installing and using a different copy. But what
22 I can't do is install two copies, one on this computer,
23 one on the one back in chambers, unless I have two
24 licences because that would require two copies. And so
25 the copy really is the -- it's this notional economic

1 construct. It's the thing that allows me to use
2 a single one. I have bought a single one, but it's not
3 a piece of paper. It's not a CD ROM. It's just -- it
4 doesn't matter which one. I can create it. I can
5 download it. I can have it on a CD ROM, if that's the
6 way I've bought it. But what I can never do is have two
7 because I have one copy. Does that make sense? It's
8 slightly nebulous, but that's because it's an economic
9 construct and not a tangible one.

10 MR LYKIARDOPOULOS: Yes, I'm just trying to unpack the words
11 you were using so I could understand exactly what you
12 meant. Thank you.

13 MR LAVY: I stand to ask whether it's clear what I meant.

14 MR LYKIARDOPOULOS: Perfectly clear for the moment.

15 MR LAVY: Thank you.

16 I think we were looking at paragraph 61, which is
17 what the court says about economic point of view.

18 And then paragraph 62, here the court is making
19 clear that the law on exhaustion is there to avoid the
20 partitioning of markets and to limit restrictions on
21 distribution to what is necessary to safeguard the
22 specific subject matter of the IP concerned.

23 And then critically, again, could I ask the Tribunal
24 to now read, please, 63?

25 THE CHAIRMAN: I think you asked us to read that already.

1 MR LAVY: I'm so sorry. In which case, having read 63,
2 precisely the mischief that the CJEU were anxious to
3 avoid would arise if the copy exhausted was the specific
4 copy of software downloaded on to the licensee's
5 computer at first sale. That's because that particular
6 copy would be stuck on the first licensee's computer
7 and, short of removing and selling their hard disk, they
8 wouldn't be able to resell it. So the exhaustion has to
9 attach to something nominal, to an economic construct,
10 otherwise the distribution right is absolutely
11 meaningless.

12 So I download a copy on to my machine, I use it,
13 I then want to resell it. Well, unless the thing I am
14 reselling is intangible, is a notional thing, how on
15 earth do I resell it? I still have my computer. I can
16 do what UsedSoft says, which is delete my copy and sell
17 my rights to have a copy to someone else. But what
18 I can't do, short of hacking my hard disk out, is
19 actually sell the copy I have on my computer. That's
20 stuck on my computer until I delete it.

21 So the whole regime only works if a copy is
22 a notional concept enshrining a nominal ownership right
23 in one, but not any specific copy of the software
24 coupled with the user right.

25 That's quite an important point. So if I have not

1 expressed that clearly I need to have another go.

2 It's also relevant in this context to note that
3 software from a website is characterised in the judgment
4 as an intangible copy, and it's not surprising, but one
5 sees that at paragraph 59, page 763. The exhaustion of
6 the distribution right concerns both tangible and
7 intangible copies of a computer program and hence also
8 copies of programs which, on the occasion of first sale,
9 have been downloaded from the internet on to the first
10 acquirer's computer.

11 Now, the downloaded physical copy is tangible, or at
12 least it's no less tangible than a CD ROM, in both cases
13 you have a disk with software on it. The intangible
14 copy, by contrast, is the notional thing that
15 constitutes the result of a transaction whereby the
16 software is downloaded and a perpetual licence for it is
17 purchased.

18 Now turning to what the court says about downloads
19 and resale in this case. If we look, please, at
20 paragraphs 77 and 78, on page 766, and, again, if I can
21 just ask you to read those two paragraphs.

22 (Pause)

23 Thank you. So a distinction here is expressly made
24 between the copy purchased and the copy downloaded. The
25 passage draws an express distinction between the

1 notional copy that's the subject of exhaustion on the
2 one hand and the copy on the first acquirer's computer
3 on the other. The original acquirer who resells
4 an exhausted copy, referred to "as that copy" in
5 paragraph 78, has to make the copy downloaded on to
6 their computer unusable. Not make that copy unusable;
7 make the copy download onto their computer unusable.

8 THE CHAIRMAN: And that applies to tangible, equally to
9 tangible copies? So if you're selling --

10 MR LAVY: Yes.

11 THE CHAIRMAN: So if you have a program on a CD, you upload
12 it on to your computer and then, when you want to sell
13 it, it may be convenient to sell it, actually sell the
14 CD, and then you would be obliged in the same way to
15 delete the original copy on your computer.

16 MR LAVY: Exactly, sir, yes. It's exactly the same
17 analysis.

18 And in fact that's what Ranks says expressly. These
19 two are functionally equivalent, CD sale and download
20 sale.

21 Now, the final two paragraphs -- if I could please
22 ask the Tribunal to read for now -- are paragraphs 80
23 and 81, on page 763.

24 THE CHAIRMAN: Are there any cases that say that?

25 MR LAVY: That say that they're equivalent?

1 THE CHAIRMAN: No, that say you must delete when you're
2 selling a computer via a tangible copy you have to
3 delete the original. It might be said that you can't
4 run the original, but whether you have to delete it.

5 MR LAVY: I will check this over the lunch break, if I may.
6 But I think, actually, Ranks says that expressly. But
7 I will check that.

8 The final two paragraphs, 80 and 81.

9 (Pause)

10 THE CHAIRMAN: Sorry, this may be a very basic question.
11 But, if you're selling the your notional copy, why do
12 you need a licence? Doesn't that get picked up by
13 Article 5 in any event?

14 MR LAVY: Well, yes. You need a licence to run it. But
15 you're right that's --

16 THE CHAIRMAN: Doesn't Article 5 give that you permission?

17 MR LAVY: Well, yes. But what the case seems to say is that
18 the accompanying user licence does run with it. But
19 it's a slightly odd logic, isn't it? Because what the
20 case also says is exactly that, that you do have a right
21 to reproduce under Article 5(1) because that's necessary
22 in order to use the software. So there's a bit of
23 a tension there in a way. But the analysis seems to be,
24 when the court is dealing with exhaustion, it says that
25 you get the accompanying user right. Then, insofar as

1 you need it, you also have rights under Article 5(1) to
2 reproduce.

3 THE CHAIRMAN: There's not a lacuna that 5(1) doesn't pick
4 up that you need a licence for?

5 MR LAVY: The answer is -- on my case, no, there probably
6 isn't. But we may have to come back to this in the
7 context of preliminary issue 2.

8 So I know I'm labouring this point, but it's quite
9 an important one, in my submission, for understanding
10 the UsedSoft approach, which is what we see here in
11 these two paragraphs, is that the mechanism for
12 reselling an exhausted copy of the software provided
13 without physical media involves the subsequent acquirer
14 getting their own physical copy of the software, in that
15 case from Oracle's website, and the first acquirer
16 deleting their physical copy.

17 So the first acquirer's downloaded copy is not being
18 transferred to the subsequent acquirer. What's
19 happening is that the copy that the first acquirer has
20 is being deleted and then the subsequent acquirer is
21 making a fresh copy through a new download. And, if one
22 looks at it in that way, what's being transferred is and
23 can only be the notional copy, what I have called the
24 economic unit, comprising a single but non-specific
25 instance of the software with its accompanying user

1 right.

2 And the deletion, of course, is a critical part of
3 this process because it's the deletion which means that
4 the same number of copies overall remain in circulation.
5 And so from the rightsholder's perspective that's the
6 important point. If you're standing back, it's actually
7 entirely unsurprising that, in the context of the
8 distribution right, copy is being treated in a notional
9 way, rather than a literal way, because it reflects the
10 practical and economic reality of what's actually going
11 on when someone buys a perpetual licence to use a copy
12 of a program. Whether one looks at it from the
13 perspective of the rightsholder or the licensee, the
14 specific physical manifestation of a copy is frankly
15 neither here nor there because practical and economic
16 reality is that a licensee who has bought one copy of
17 software has paid for the ability, both legal and
18 practical, to install and use one copy, any copy of the
19 software, and the rightsholder, who sells that copy,
20 receives payment in exchange for accepting that there's
21 going to be one additional copy of its software in
22 circulation. It doesn't matter which copy; it's the
23 quantity that matters. The fact is there's now one more
24 because you've sold one more. And that reality, in my
25 submission, is reflected in the legal position as

1 articulated by UsedSoft.

2 But coming back to where I started, perhaps the more
3 important point for present purposes is that the thing
4 that's subject to exhaustion, the thing in which the
5 purchaser acquires what the authorities call
6 an ownership right, and the thing which the purchaser is
7 entitled to resell, is copy of software with its
8 accompanying user right, not a contract, not even
9 a licence, as such, subject to the user right discussion
10 we have just been having, but a copy. And so it's
11 a copy that's the unit of currency if you're asking:
12 what is it that the licensee with perpetual licence has
13 an ownership right in?

14 And that takes me on to proposition 3, which is to
15 start looking at volume licences and what they mean.

16 The overall submission I meant is that a volume
17 licence -- and sample transactions involve volume
18 licences -- involve the first sale of multiple notional
19 copies, with the consequence that exhaustion of the
20 distribution right arises in respect of each individual
21 copy and each individual copy can be separately resold.

22 And I will start with the principle, and then I will
23 look at the sample transactions and the Microsoft case
24 in particular.

25 So once a copy of the software is subject to

1 exhaustion the rightsholder no longer has the right to
2 restrict further distribution. That's what UsedSoft
3 says in terms at the paragraphs we have just been
4 looking at. For example, paragraph 77 says it a few
5 times. And that means that the rightsholder can no
6 longer oppose the resale of that copy. And it follows
7 that the rightsholder has no say as to who each copy is
8 sold to.

9 It also follows that if the rightsholder has sold
10 not just one exhausted copy, but multiple exhausted
11 copies, it can no longer oppose the resale of any of
12 them. And the reason for that is because it no longer
13 has the distribution right in them. They have been
14 sold. The ownership right lies in the licensee. And so
15 that is the case regardless of whether all the resold is
16 to the same person or some are resold to person A and
17 some are resold to person B. And that must be so
18 regardless of whether the copies were first purchased
19 pursuant to a volume licence or through multiple
20 separate transactions. And it must be so regardless of
21 how many contracts there are. And that is because, as
22 I have already submitted, the thing that is subject to
23 exhaustion, the unit of account, as I like to put it, is
24 the copy, not the contract pursuant to which one or more
25 copies was purchased.

1 And there's actually no difference in this regard
2 between exhausted copies of software purchased pursuant
3 to a volume licence and a bulk purchase of widgets,
4 because in neither case does the fact of the bulk
5 purchase change the nature of what's purchased, even if
6 in both cases you might actually get a discount for
7 buying more of them.

8 THE CHAIRMAN: So, when you purchase the software, you may
9 have a copy on a central server, as a client, and then
10 you may have copies on work stations. Are the copies on
11 the work stations identical to the copy on the server?
12 Are they different? Is the software the same?

13 MR LAVY: That would depend on the software we're talking
14 about.

15 THE CHAIRMAN: Well, the software we're talking about.

16 MR LAVY: The software we're talking about. Yes, that
17 assumes a particular way of distributing software, which
18 may or may not be the way that is used.

19 One way one could conceive of downloading and
20 distributing software, if you buy, say, 100 licences, is
21 download it to a central server and then copy it from
22 there.

23 Now, in my submission, if you took that model -- and
24 let's just use the number 100 -- you have 100 copies.
25 The thing you put on --

1 THE CHAIRMAN: 101 copies.

2 MR LAVY: Well, no, you have 101 physical manifestations.

3 You're not entitled use the copy on the server in that

4 scenario because that's not one of your notional copies.

5 That's merely part of the carrier. It's a bit like --

6 it's no different from, say, the internet cache, where,

7 say, it's a temporary convenience copy to allow to you

8 then install the copies you're entitled to install on --

9 THE CHAIRMAN: Yes. So it's a conduit, really.

10 MR LAVY: Exactly, a conduit. But there's no -- and I will

11 come back to this on the evidence and what Microsoft say

12 about it -- but that's, of course, not the only way you

13 can install software. What you might do is, you might,

14 100 times, go to the vendor's website and download it

15 100 times.

16 MR LYKIARDOPOULOS: You're going to come to what we are

17 actually about in this case, though, are you?

18 MR LAVY: I'm sorry?

19 MR LYKIARDOUPOLOUS: You are going to come to what we are

20 actually talking about?

21 MR LAVY: Yes. We're going to look like the licences.

22 We're going to look at the distribution mechanism,

23 insofar as we know about it.

24 But it is important to sort of have very fixed, in

25 my submission, the principle first, before one then

1 applies it because otherwise it can get muddled through
2 some of what's said about the evidence.

3 THE CHAIRMAN: Right. But are we concerned here with -- you
4 have five transactions at play; were they downloaded to
5 a central server and then from the central server to the
6 workstations?

7 MR LAVY: I think the answer is the evidence doesn't
8 actually tell you, one way or the other.

9 THE CHAIRMAN: Right.

10 MR LAVY: But also, in my submission -- and you will see why
11 shortly -- it doesn't actually matter. But the short
12 answer to why it doesn't actually matter --

13 THE CHAIRMAN: We will come on to why it doesn't matter.
14 We're just trying to have some fact. As you rightly
15 point out, the evidence doesn't deal with that.

16 MR LAVY: The evidence doesn't deal with that.

17 THE CHAIRMAN: And the evidence doesn't tell us whether the
18 server is nothing more than a conduit for the
19 workstations.

20 MR LAVY: No.

21 THE CHAIRMAN: Which you've submitted.

22 MR LAVY: I have submitted as a matter of analysis, not as
23 a matter of fact. That's my position.

24 THE CHAIRMAN: Do we not need to understand this sort of
25 thing?

1 MR LAVY: Well, no, because the difficulty with that is, of
2 course, it would depend on the transactions. And we're
3 dealing with -- it just comes right back up to this
4 case. We're dealing with a counterfactual. This is all
5 relevant to a counterfactual. And the counterfactual is
6 that, but for what we say is Microsoft's infringement of
7 competition law, there would have been a bigger market.
8 And so the question is -- and then, of course, Microsoft
9 come back and say: well, no, that would have been
10 an unlawful market.

11 So, that's right, it doesn't actually matter what
12 might have happened in any particular transaction. What
13 matters is what was available as in a market in the
14 counterfactual. So could --

15 THE CHAIRMAN: That might or might not be right. Without
16 chasing hares, one can think of circumstances where that
17 could be relevant, depending on whether Mr Hobbs is
18 right in his submissions or not. But, anyway, the
19 position is we don't know.

20 MR LAVY: We don't know. But, of course, if one goes down
21 that path, the difficulty is one can't look at the
22 sample transactions; one has to look at all the
23 transactions and then there's the question --

24 THE CHAIRMAN: For example, you could say that there are
25 contracts where they're downloaded directly on to the

1 computer. There are contracts where they're downloaded
2 on to a server, and here is an example of one and here
3 is an example of another.

4 MR LAVY: I suppose so. The difficulty is those things
5 aren't contractually controlled. It's a matter of what,
6 in practice, people did.

7 THE CHAIRMAN: Right.

8 MR LAVY: So that's why -- because I could well see if one
9 had a contractual scenario that said, "This is how it
10 must be done", then that's one thing.

11 THE CHAIRMAN: When these programs are updated, they will be
12 updated directly on to the work stations or will the
13 central server get updated? Or has the central server
14 be forgotten about?

15 MR LAVY: Again, there's no evidence on it, but certainly my
16 understanding is that individual work stations get
17 updated.

18 THE CHAIRMAN: Right. So you say insofar as there are
19 servers involved, they're just a conduit for
20 distributing --

21 MR LAVY: I do. Because what we're dealing with -- or at
22 least what we're dealing with principally with in this
23 argument, and certainly exclusively for PI 2 and mainly
24 for PI 1 is desktop software. It's Microsoft's Windows
25 operating system and Microsoft Office, which as you know

1 is a desktop set of productivity tools.

2 THE CHAIRMAN: Yes.

3 MR LAVY: And we will come on to this in the client server

4 context. But we're not in this case dealing with

5 something like an Oracle database with a client and

6 server component.

7 THE CHAIRMAN: Yes. I mean, we don't know much about what

8 the situation was around Oracle. It's not really

9 explained in the decision.

10 MR LAVY: No, it's not. You get slightly more out of the

11 German decisions, but not much more.

12 THE CHAIRMAN: Not much.

13 MR LAVY: Not much. The important thing, though, from our

14 perspective, and I say it's an important -- simply

15 because it's where most of the money is, it's Windows

16 and Office. So, insofar as one is focused on

17 a particular model, it's desktop software installed on

18 workstations and the question is how they get to those

19 workstations.

20 THE CHAIRMAN: If you're the first acquirer of the software

21 and you sell on, you may have created a copy on the new

22 server that you're selling to company X, that they

23 download on to their server -- as you say, they're not

24 actually going to physically take it from you.

25 MR LAVY: They get it from Microsoft.

1 THE CHAIRMAN: They get it from Microsoft. They then
2 download it onto their server. And then from that
3 server they distribute to their 100 people. Let's
4 assume your original licence for 100, you're selling it
5 for 100, but you have created an extra copy. You now
6 have 101 copies in company X.

7 MR LAVY: Well, again, just to caveat, they may do that and,
8 frankly, that would be a sensible way of doing it.

9 THE CHAIRMAN: Yes.

10 MR LAVY: But, if you're doing that and you haven't, in my
11 world, got 101 copies. You have 101 physical copies, of
12 course you have. But as soon as you start using -- as
13 soon as you double click on Word -- you're not going to
14 install it. It's just a file. That's the difference,
15 isn't it? On the workstations, you're going to install
16 the software. It's going to be useable. Double click
17 on the Word icon, the word processor pops up and they
18 can start using it.

19 MR LYKIARDOPOULOS: Is it installed on the server?

20 MR LAVY: No, you can't install it on the server unless you
21 have a licence to. On the server -- on the model that
22 the chairman is proposing, all you have on the server is
23 an installation file. You wouldn't then install it on
24 the server. And if you did so without having a licence
25 you would be infringing copyright.

1 MR LYKIARDOPOULOS: So there's no copy on a server?

2 MR LAVY: There will be a copy -- on that hypothesis, there
3 will be a copy of the installation file, which is not a
4 form of the software that can be used.

5 THE CHAIRMAN: But you say whatever it is it's no different
6 to the rights the first acquirer had?

7 MR LAVY: Yes.

8 THE CHAIRMAN: But then, when you start splitting these
9 contracts, it's a little bit more complicated because
10 now have two servers that you're downloading to and
11 then --

12 MR LAVY: As in the first acquirer's and the second
13 acquirer's.

14 THE CHAIRMAN: Yes. So the first acquirer downloads one
15 copy on to their server and then distributes 100 copies
16 to the workstation. And you say you never run that copy
17 on the server; it's just there as an installation file.

18 MR LAVY: Yes.

19 THE CHAIRMAN: I'm not sure the relevance of that. But it's
20 not run on the central server, but you have a copy
21 there. So that licence that you got from Microsoft
22 covered the 100 workstations and also permitted download
23 on to the server for the purposes of distributing to the
24 100 workstations, and that's it. And if you then sell
25 on to company X those 100 contracts -- again, company X

1 does the same thing, goes up to Microsoft, one on to the
2 server and 100 copies to the workstation. So it's done,
3 and all the others have been deleted. But, if you sell
4 to two, X and Y, you end up with an extra copy because
5 you now still have 50 plus 50, but you have two servers.

6 MR LAVY: Well, yes. But, in that scenario, what you have
7 is -- I mean, that's where your Article 5(1) comes in.
8 Insofar as that's the way you have to install them, then
9 you have -- you're exercising a reproduction right and
10 it's a reproduction necessary to use your copy because,
11 as I say, that's --

12 (overspeaking)

13 THE CHAIRMAN: Yes.

14 MR LAVY: Yes, because the critical point is: this server,
15 on any view, is just a staging post.

16 MR LYKIARDOPOULOS: On that scenario, is it necessary?
17 Because I thought you could also get it from the
18 Microsoft server. So it's not necessary to have another
19 installation file, is it?

20 MR LAVY: Well then, if it's not necessary -- but this is --

21 THE CHAIRMAN: Because it's not necessary for use --

22 MR LAVY: This is the chairman's hypothesis. But, if that's
23 a necessary part of installing it, then you have
24 a licence to reproduce under Article 5(1). Now, if it's
25 not --

1 THE CHAIRMAN: Just explain how it falls within 5(1).

2 MR LAVY: Because if that is the method that one has to use
3 in order to get it on to a workstation.

4 THE CHAIRMAN: If?

5 MR LAVY: If, yes.

6 THE CHAIRMAN: It's also not what 5(1) says, is it? Just
7 have a look at it.

8 It's not necessary for the use of the computer
9 program because, as you rightly point out, the server is
10 not using the computer program. I say rightly, I don't
11 know if it's right. The server is just distributing it.

12 MR LAVY: Yes. Well then, if there is a mechanism -- which
13 I actually say there is, because in a sense we're
14 dealing with in that hypothetical -- whereby one can
15 download directly from Microsoft on to the workstation,
16 then one doesn't need the server copy. I can see that.

17 THE CHAIRMAN: I understand that. I have that.

18 MR LAVY: But, in that scenario, it may be that the Tribunal
19 concludes that where volume licences are split and
20 resold the distribution mechanism has to be that each of
21 the 100 workstations has to download directly from
22 Microsoft. But it doesn't fundamentally affect --
23 I mean, in a sense, I'm quite relaxed about that
24 conclusion because it doesn't affect the analysis. It
25 doesn't affect the size of the markets to which

1 ValueLicensing could have sold them to.

2 PROFESSOR LIANOS: Could it not affect the answer? Could it

3 not affect -- for instance, if it matters how many

4 copies, notional copies you end up with compared to

5 where you were at the beginning, say you have -- for

6 instance, the rights owner has grant X number of

7 licences and you now have X plus two or X plus one

8 because of a server licence or a server copy; does that

9 not matter?

10 MR LAVY: No, because I say that server copy is not

11 a notional copy. It's not something in respect of which

12 you have an ownership right and an associated right to

13 use. You only have 100. You don't have 101. So it can

14 only be a mere carrier. As soon as you click on it and

15 try to use it to run Office you're infringing copyright

16 because you don't have a licence for it. That is not

17 your copy.

18 THE CHAIRMAN: Is that a convenient moment to have

19 five minutes for the stenographer?

20 MR LAVY: Now is as good a time as any, frankly.

21 (11.43 am)

22 (A short break)

23 (11.53 am)

24 MR LAVY: So just two points. One, the chairman asked me

25 earlier about whether there was any authority to the

1 proposition that you have to delete copies.

2 THE CHAIRMAN: Yes, with CDs and so on.

3 MR LAVY: Yes. I said I thought there was something in
4 Ranks. Ranks, paragraph 55, deals with the point. And
5 although it doesn't expressly say "tangible copies"
6 neither is it expressly dealing only with intangible
7 copies. It's speaking in generalities. So that's
8 paragraph 55.

9 THE CHAIRMAN: Right.

10 MR LAVY: Now, there's just two points on this staging post
11 that we were discussing just before the break. The
12 evidential issue that arises here is that there's no
13 pleaded issue. And I'm not taking a pleading point;
14 this is just a matter of practicality. That although
15 Microsoft raise an awful lot of reasons why they say
16 that resale of bits of volume licence is unlawful, no
17 point is taken in the pleadings that putting an extra
18 copy on the server, so you can distribute, is a problem.
19 And therefore that's just not a point which has arisen.
20 It's not a point that there's evidence on. Certainly it
21 is not a point we put evidence in on.

22 But, in any event, if that was an issue, it's
23 equally an issue for the first acquirer. It's not
24 an exhaustion issue. If the way, in the real world,
25 software is distributed is you download a copy to your

1 server and then you spring it out to the workstations,
2 well, that means whenever you buy, say, 100 copies of
3 Office you have to buy 101 so you can have one sitting
4 conveniently on your server for distribution. And that,
5 in my submission, is not how it works. So I say it is
6 a non-point.

7 And if one asks why it's a non-point, it's because,
8 on analysis, those things aren't copies in the economic
9 sense, insofar as one needs to exercise the reproduction
10 right, which one obviously does if one is being legally
11 technical about it, then there must be an implied right
12 to do that, if that is the standard way in which
13 software is distributed.

14 But, as I had just before the break, I do submit,
15 actually, in the context of this case it doesn't
16 actually matter very much anyway, because if the answer
17 to the issue is that ValueLicensing's customers had to
18 be instructed to download directly to workstations from
19 Microsoft's website in each case, fine. So be it.

20 THE CHAIRMAN: As I understand, you say these proceedings
21 concern server software and desktop software?

22 MR LAVY: Yes.

23 THE CHAIRMAN: Just explain what you mean by that.

24 MR LAVY: Let's have a quick look then, shall we, at -- can
25 I ask you to look at bundle A, statement of fact? And

1 I was going to go to this later, but we may as well do
2 it now. And if I look at ... if you look at tab 2,
3 schedule 1, and this is the Rabobank enrolment. And if
4 you look at the very first page, it's a list of total
5 sales by-product in the EEA and you can see there that
6 it's 85 core infrastructure server suite data centre
7 licences, some CALs, then Office, remote desktop
8 services and Windows Server 2016 Standard Core.

9 Now, just focusing on Windows Server 2016 Standard
10 Core, that's server software, so you don't install that
11 on your workstation; you install that on your server.
12 And if --

13 THE CHAIRMAN: What does it do?

14 MR LAVY: That is just -- it's an operating system for
15 servers.

16 THE CHAIRMAN: I see, okay.

17 MR LAVY: So it's different software for different things,
18 as it were.

19 The reason for all the focus on Office and Windows
20 is that's the vast majority from a financial
21 perspective, but there are these other bits of software.
22 And, plainly, where you have server software, exactly
23 the same analysis applies. But then the question is:
24 how many copies are you allowed to install on servers?

25 THE CHAIRMAN: Yes, understood.

1 MR LAVY: So, in my submission, anything less than complete
2 freedom for a perpetual licensee to resell their
3 exhausted copies, separately or in bundles, or however
4 they choose and in whatever volumes, would be
5 an unwarranted restriction on the principle of
6 exhaustion going beyond what is necessary to safeguard
7 the specific subject matter of the IP concerned. And
8 that's an important point because if that's the case it
9 would be contrary to the objective of the principle of
10 exhaustion as explained in terms in UsedSoft, at
11 paragraph 62 and 63.

12 Now, we have looked at those paragraphs, but could
13 I ask you to look at what Mr Bot says. I was going to
14 call him the Attorney General, but the Advocate General,
15 Bot, at paragraphs 43 to 46, and that's at page 744 of
16 tab 28.

17 THE CHAIRMAN: Yes, this is just the starting point of
18 exhaustion.

19 MR LAVY: Yes. But it's just worth grounding ourselves in
20 the sort of EU law principle, which is that -- well,
21 it's Article 36, isn't it? You can't have a fetter on
22 free movement of goods beyond that. I will let you read
23 it.

24 THE CHAIRMAN: Yes, I have read it.

25 MR LAVY: Thank you. I'm sorry. I'm conflating two points.

1 It would also be an unwarranted fetter on the free
2 movement and that's the FAPL point we refer to in our
3 skeleton. I wasn't going to take you to it. But what
4 the FAPL case says -- we can look it; I'm just conscious
5 of the time -- is that in the context -- this was the
6 context of a case about the free movement of services,
7 (inaudible). But restrictions relied on to protect
8 intellectual property rights can't go beyond what's
9 necessary in order to obtain the objective of protecting
10 those rights. And the reference I give --

11 THE CHAIRMAN: Just give me a reference for the authority.
12 Which tab?

13 MR LAVY: Yes, it's authorities bundle, page 660, tab 24.
14 Football Association Premier League case.

15 MR LYKIARDOPOULOS: Is there anything more you're getting
16 out of the that than the Court of Justice say in this
17 case at paragraph 63?

18 MR LAVY: Yes, let's just have a quick look at it.

19 MR LYKIARDOUPOLOUS: They refer to it there, in
20 paragraph 63.

21 MR LAVY: Yes, that's exactly the point. It's the
22 Article 36 point.

23 And the reason the fetter will be unjustified in
24 this case is that when the distribution rights in a copy
25 has been exhausted it follows that the rightsholders

1 received full payment for that copy being in
2 circulation. So the rightsholder has no more economic
3 interest in that copy. That's the point. And that, of
4 course, is the same regardless of whether the first
5 acquirer has bought one copy, ten copies or 10,000
6 copies, because the distribution rights exhausted in
7 respect of each copy and the rightsholder has no further
8 economic interest in any of the copies because it's been
9 paid for them.

10 And as I said before, it may be that if it's been
11 lucky enough to find a licensee who wants 10,000 it's
12 offered a discount. But that's no different from any
13 walk of commercial life. It doesn't mean that in this
14 context they haven't received full economic value for
15 putting that copy in circulation; they have.

16 And that really is all there is to the principle of
17 preliminary issue 1. One has exhausted copies. They
18 have been sold. That's the language.

19 Now, I was going to move now on to the point that we
20 have sort of touched on tangentially a few times, which
21 is Microsoft's argument based on UsedSoft that you can't
22 start splitting licences. And what that argument
23 Microsoft runs does is it ignores what I submit is
24 an obvious and critical difference between a volume
25 licence and a multiuser licence for client server

1 software. Those are really fundamentally different
2 beasts. And we will look at UsedSoft in a moment.

3 But, with a volume licence, first sale has resulted,
4 as I have submitted already, in multiple exhausted
5 copies of software, each of which the licensee owns.

6 But, in the client server scenario, it's completely
7 different. There's only one copy of the server
8 software, the database in the Oracle case. The
9 accompanying user licence may permit several people to
10 access that copy and possibly even download client bits
11 of it on to their workstations. I actually think the
12 judgment is probably wrong about that, but it doesn't
13 matter. Let's take it at face value.

14 But there's still one copy of the server software
15 running on the server, and you can't go splitting,
16 obviously, that sort of user licence and selling bits to
17 different people.

18 THE CHAIRMAN: If the analysis is all notional and you're
19 just saying 'have they received the economic benefit?'
20 and so forth, and they have their money for 100 users
21 and now you want to sell it to 1,550 and everything is
22 notional and it's not about real copies; why not?

23 MR LAVY: Because it's completely different, because what
24 they have sold is 50 users, or 25 users, whatever the
25 number is, and one copy of the database server. If you

1 want to -- you're not just paying for the users. You're
2 paying to have a big, fat Oracle database running on
3 your server and that is worth something. So you have --
4 if you want two copies of the database --

5 THE CHAIRMAN: It may depend how the contracts are
6 structured. If they're structured per user or
7 structured per piece of server software -- it's not
8 clear why that conclusion is reached in UsedSoft.

9 MR LAVY: Sir, can you give me a moment?

10 THE CHAIRMAN: Of course.

11 MR LAVY: Yes, I think there may be something evidentially
12 that might help in that particular case. But, while
13 that happens -- no, because one has to separate out --
14 I understand your point, sir. It's that, in a way, if
15 you've --

16 THE CHAIRMAN: Someone is trying to help you.

17 MR LAVY: Sorry, false alarm. So maybe the way to do it is
18 this way --

19 THE CHAIRMAN: Say Oracle was selling their software, it's
20 £100 per user, and it just happened to sit on a separate
21 server, but nevertheless that's the economic value they
22 instruct, and you have the same number of users when you
23 sold the software, the fact that there are two --
24 necessarily have to be two copies on different servers,
25 I don't see why, in those circumstances, it necessarily

1 follows that that's illegitimate.

2 MR LAVY: Well, I think the answer is -- there are two

3 answers. There's the conceptual one and then there's

4 the actual one in the Oracle case. I'm going to

5 hopefully try to make this good, because I think I have

6 seen it somewhere. But, in the Oracle case, that's

7 simply not how it works. One has to pay more for

8 licence plus users on the one hand and just extra users

9 on the other. But the conceptual point is it is --

10 firstly, when you're looking at full economic value,

11 you're not asking yourself the question how many pounds

12 and pence were paid. You're asking yourself the

13 question: has the rightsholder voluntarily sold that

14 copy?

15 And the server software is fundamentally different,

16 because when you have server software serving multiple

17 users -- take the contrary database case that server

18 software is sitting there crunching away, it's

19 performing an economically valuable service. It's

20 hosting data. It's crunching data. It's doing

21 searches, whatever, whatever it's doing, and having two

22 machines sitting doing that is twice as much.

23 THE CHAIRMAN: So if it's server software --

24 MR LAVY: It's server software.

25 THE CHAIRMAN: -- and you're the first acquirer, you can't

1 then sell it to other downstream --

2 MR LAVY: Not if you only have the one copy, no, because --

3 well, we can see how this -- we will look at it in the

4 context of UsedSoft in a second.

5 MR LYKIARDOPOULOS: Do we have to worry about that with the

6 Windows Server 2016 Standard Core, for instance?

7 MR LAVY: No, because there's no argument on VL's side that

8 we're entitled to, say, take -- a little bit careful

9 here to get this right. But the Windows server software

10 that we are selling, we are selling a copy of the

11 server; we're not saying we're allowed to sell the

12 server twice and chop the licences up, if you see what

13 I mean?

14 MR LYKIARDOPOULOS: Right.

15 MR LAVY: In a way, it's exactly the same as what we say is

16 the correct analysis of Oracle. If we have Windows

17 server, we can sell it, one copy, we can sell it once.

18 It doesn't matter --

19 MR LYKIARDOPOULOS: Right. Okay, that's fine. I don't

20 think we need to --

21 THE CHAIRMAN: Okay, for now. We can see what (inaudible)

22 has to say.

23 MR LAVY: Thank you. So the distinction that I am making is

24 actually very clear, in my submission, from UsedSoft

25 itself. If one looks at paragraph 69 of UsedSoft,

1 that's page 765, we have looked at this paragraph
2 already, I think.

3 So when they say:

4 "It should be pointed out that if the licence
5 acquired by the first acquirer relates to a greater
6 number of users than he needs, as stated above, the
7 acquirer is not authorised by the effect exhaustion of a
8 distribution right to divide the licence and resell only
9 the user right for the computer program concerned
10 corresponding to the number of users determined by him."

11 That is precisely because we're dealing with client
12 server software, and you can see that at paragraph 21 of
13 UsedSoft. It's page 757:

14 "The user right for such a program which is granted
15 by a license agreement includes the right to store a
16 copy of the program permanently on a server and to allow
17 a certain number of users to access it by downloading it
18 to the main memory of their workstations."

19 As I said before, I'm not actually sure the CJEU has
20 that quite right. It seems like quite a strange
21 suggestion, but it doesn't matter. Because even taking
22 it at face value, what's being said here is that you
23 have a copy of the Oracle software installed on the
24 server and 25 users can access it, which apparently
25 involves in some way making a transient copy in the RAM

1 on their computer.

2 Now, using software obviously always involves making
3 a transient copy in RAM. The software will also be in
4 RAM of the server, otherwise you won't be able to do any
5 database serving. But, for our purposes, the critical
6 point is that the licences in question were not for 25
7 copies of Oracle's server, but one copy of Oracle's
8 server with 25 users allowed to access it. So on
9 a first sale only one server copy is exhausted and,
10 therefore, only one copy can be resold. And in fact
11 that precise problem is identified. If one then looks
12 at paragraphs 70 to 71 of UsedSoft, on page 765. Can
13 I just ask you to read that?

14 (Pause)

15 THE CHAIRMAN: Yes. I have those in mind, yes.

16 MR LAVY: Thank you. And so the nub of the issue is the
17 second sentence of paragraph 70:

18 "In situations such as that mentioned in the
19 preceding paragraph the customer of the copyright holder
20 will continue to use the copy of the program installed
21 on the server ..."

22 That's the point. And one just has to run the very
23 simple thought experiment to realise that must be right.
24 What happens if you just -- you're a first acquirer, you
25 have your 25 user licences in your database server and

1 you decide you only need 24, so you sell one of them.
2 Well then, you have an immediate problem. You no longer
3 have the right to run the server, so your 24 users are
4 stuffed.

5 So that's all that's going on here.

6 And that's not the situation we're concerned with
7 here in the context of PI 1, because -- and I will
8 promise I will go to the sample transactions in
9 a second -- the volume licences, certainly the bulk of
10 them that VL divided and resold, and the ones that on
11 VL's case would have been resold in the counterfactual
12 in far greater quantities but for what we say is the
13 infringement of competition law were licences to
14 separate copies of desktop software and, in some cases,
15 server software, but separate copies. So this is about
16 divulging bulk licences which allow to you install
17 multiple copies; it's not about multiple user access
18 rights for one copy.

19 And the real significance, then, of paragraphs 69
20 and 70 of UsedSoft, for our purposes, is really to
21 reiterate that the unit of currency under the
22 Software Directive is the copy. That is the thing in
23 which there's an ownership right. And that feeds
24 through to their client server analysis. And I say,
25 actually, it precisely supports the points I make about

1 the way copies work.

2 THE CHAIRMAN: In paragraph 70, if the original acquirer

3 hasn't deleted, it's the original acquirer who will

4 infringe?

5 MR LAVY: Yes, because it has a copy --

6 THE CHAIRMAN: Not the --

7 MR LAVY: That's exactly right.

8 THE CHAIRMAN: -- the person who has purchased.

9 MR LAVY: Yes, because it has an unlicensed copy,

10 effectively. It sold its right.

11 Now, interestingly, this splitting issue that arises

12 on our facts and this distinction I have been probably

13 rather labouring was, although it's not specifically the

14 subject of CJEU case law, it has been considered in

15 detail in UsedSoft 3. And that's Germany's highest

16 court, which I dare not pronounce. I'm just going to

17 call it the German federal court. And that we can find

18 in the third authorities bundle, tab 59, page 1506.

19 Microsoft is rather scathing about this in its

20 skeleton and I will come back to what they say about it,

21 but let's start with the authority.

22 THE CHAIRMAN: Yes, we have looked at it, so you can take us

23 through reasonably --

24 MR LAVY: Thank you very much. As you will have seen, then,

25 sir, it's discount licensing, bulk licensing, and then

1 a resale. One of the issues the court addressed was
2 whether it was permissible to split the 40 licences and
3 the court held unequivocally it was.

4 Could I just ask you to look specifically at
5 page 1523, paragraph 44.

6 THE CHAIRMAN: Just while we're looking at that, the
7 particular software that they were concerned with --
8 they refer to quite a lot of different programs in
9 paragraph 1, but then they only go on to consider 1. Is
10 that right? I wasn't quite sure.

11 MR LAVY: It's --

12 THE CHAIRMAN: The Adobe Creative Suite, which included all
13 these, did it?

14 MR LAVY: Exactly. It's Illustrator and Photoshop and all
15 those sorts of things, desktop software for image
16 manipulation, will be a high level summary.

17 THE CHAIRMAN: It may not matter, but when we come on to
18 issue 2 presumably these will have had --

19 MR LAVY: Absolutely.

20 THE CHAIRMAN: -- interfaces which --

21 MR LAVY: Yes. And, in my submission, almost all software
22 does these days. But, yes, this is an example and it's
23 an example I rely on.

24 THE CHAIRMAN: Yes. Right, sorry, I took you out of your
25 way.

1 MR LAVY: No, that's fine. So, if we pick it up at 44, so
2 this is the point from UsedSoft, paragraph 69, which we
3 have just been looking at. But then if you look at
4 what's said at paragraph 45, they drew exactly the
5 distinction that I'm seeking to draw here.

6 THE CHAIRMAN: Yes, we have that in mind.

7 MR LAVY: Thank you very much. And then, at 48, they apply
8 it to the facts. And we say the German federal court
9 had this exactly right. Just briefly going through the
10 reasons Microsoft give for disregarding what the German
11 court says here, and this is paragraph 55 of their
12 skeleton, I'm just going very briefly through each of
13 the subparagraphs of this.

14 First, they say, well, it's not -- the reasoning
15 here isn't based on UsedSoft; it's based on the German
16 authorities. Well, plainly, the UsedSoft doctrine is
17 what's being dealt with here.

18 MR LYKIARDOPOULOS: Sorry, I just -- it was just that you
19 mentioned -- you asked us to read 44 and 45 and said you
20 relied on them. Earlier on the chairman asked you,
21 looking back as to what -- who the Court of Justice said
22 was infringing if copies had not been made unusable, and
23 the Court of Justice said it was the original purchaser.

24 What the German court says, at the end of 45, is:
25 "In such a case the subsequent purchaser of copies

1 can therefore successfully invoke the exhaustion
2 principle if the initial purchaser has rendered
3 a corresponding number of copies unusable."

4 Do you say that's correct in your case or that,
5 actually, it is a matter whether or not the subsequent
6 purchaser can invoke exhaustion depends on what the
7 initial purchaser has done?

8 MR LAVY: Logically, I actually think that's probably not
9 the right analysis. And I think one has to be,
10 obviously, a little bit careful because this is all
11 rather tersely expressed. All they're really saying
12 here, in my submission, is that you can't have both,
13 because they're not looking specifically at the point
14 who might be an infringer.

15 It doesn't hugely matter for the larger point
16 I make, but --

17 THE CHAIRMAN: Sorry, I didn't mean to interrupt.

18 MR LAVY: No. But I actually think that read literally this
19 is not quite right.

20 THE CHAIRMAN: So exhaustion takes place, at what point?

21 Does it take place at the point of sale?

22 MR LAVY: Yes.

23 THE CHAIRMAN: So it's blind to whether people are going to
24 delete downstream copies when they sell on?

25 MR LAVY: Well, it must be, sir, because it's first sale, so

1 you have an exhausted copy. And that's why I say, with
2 respect, the chairman's analysis is right on what the
3 consequences of a failure to delete are.

4 THE CHAIRMAN: Failure to delete may mean there's copyright
5 infringement, but it doesn't mean there isn't
6 exhaustion?

7 MR LAVY: That, I think, is where the analysis takes one.
8 And you're absolutely right, sir, that's not what it
9 says here, but they're not specifically dealing with
10 that issue.

11 MR LYKIARDOPOULOS: I was more interested what your case was
12 based on that. You asked us to read it. It a seems to
13 me you've discussed it now.

14 MR LAVY: That's absolutely a fair point. I think,
15 ultimately, my case doesn't turn on this point because
16 we say as a matter of fact we don't say in
17 a counterfactual there would have been a problem with
18 deletion. But if the logic of my analysis is that it's
19 the first sale --

20 MR LYKIARDOPOULOS: Rights can be exhausted, but it doesn't
21 mean necessarily that the first acquirer doesn't
22 infringe --

23 MR LAVY: Exactly.

24 MR LYKIARDOPOULOS: -- because if an acquirer ends up with
25 a copy that they shouldn't have.

1 MR LAVY: That's exactly the logic of my position.

2 THE CHAIRMAN: The alternative is to say -- well, say one
3 looks at the series of transactions holistically and,
4 a bit like a quantum universe, the way form doesn't
5 collapse until you know whether the original copy has
6 been destroyed. But, in principle, there's nothing
7 wrong with looking at it holistically, is there?

8 MR LAVY: Save that you have this problem -- there's
9 an analytical problem, if you look at it that way, which
10 is that on the first sale you have exhaustion. And
11 exhaustion means something in intellectual property law,
12 and so you can't retrospectively unexhaust something
13 because the sale didn't quite get (inaudible). That's
14 why I think, with respect, the chairman's analysis is
15 right, because it all varies from the fact of first sale
16 exhausting the distribution right.

17 So, just briefly, the six reasons, at 55, why we
18 have to ignore UsedSoft 3. The first one, as I say,
19 plainly it is based on UsedSoft.

20 Secondly, it is said that this doesn't apply to
21 licences that require an entire enterprise to be
22 licensed. I will come on to that point when we look at
23 the licences. But the short answer is it makes no
24 material difference whether you have to licence your
25 whole enterprise or not, and I will explain why shortly.

1 Then it's said that UsedSoft 3 contradicts UsedSoft,
2 but it doesn't. It only contradicts UsedSoft if you
3 assume what you set out to prove, which is that client
4 server programs and desktop programs are the same in
5 this regard.

6 55.4 they make an assertion which, in my submission,
7 makes no real sense, because where you have more than
8 one copy of software and you sell one copy, well, you
9 retain the other one in your possession. There's no
10 problem with that.

11 And, finally, on 55.5, the distinction that's made
12 by Microsoft between selling all licences bought under
13 a volume licence and selling only some is a distinction
14 without a difference when one looks at this through the
15 economic prism through which I say the CJEU says you
16 have to look at all this.

17 So I do say there's nothing in the criticisms of the
18 relevant aspect of UsedSoft 3 and the distinction they
19 draw between the client server scenario and the volume
20 licensing scenario is right.

21 Of course, it's not binding on the Tribunal, but
22 I do say that it's persuasive authority that can give
23 you comfort, that what I am saying about the difference
24 between volume licences and client server licences is
25 right.

1 Now, just while we're in this judgment, could I ask
2 you, please, briefly to look at 39 and 40, which is on
3 page 1522?

4 (Pause)

5 THE CHAIRMAN: Yes, we have looked at --

6 MR LAVY: This is the point, obviously, about the
7 discounting.

8 THE CHAIRMAN: Yes.

9 MR LAVY: The chairman has the point. But the real point is
10 it's a voluntary sale at a voluntary price. One doesn't
11 look at what the price is. What matters is the
12 rightsholders agreed to relinquish their rights in
13 return for it. And the same reasoning applies to the
14 points -- the reason I raise it applies to the point my
15 learned friends make in 52.4(f) of their skeleton about
16 enterprise volume discounts. It's the same thing.

17 I think I have already said that you get the same
18 with widgets, volume licences, volume purchases tend to
19 attract a discount. Great.

20 THE CHAIRMAN: The same thing happens with books. I don't
21 know if you still get discounted student books, student
22 versions of textbooks. But the student -- the student
23 is entitled to sell them on or not is a matter between
24 the student and the vendor, but it doesn't impact buying
25 the textbook off the student.

1 MR LAVY: Because the distribution right and the copy has
2 been exhausted. It's the same analysis.

3 THE CHAIRMAN: Yes.

4 MR LAVY: Right, so now time to look at the sample
5 transactions in this case. I promised I would get
6 there, sir.

7 I want to start by saying something about their
8 role, particularly in light of some of the observations
9 the Tribunal made earlier.

10 It is important to emphasise that this is not a case
11 about copyright infringement. This is not a claim by
12 Microsoft alleging copyright infringement against
13 ValueLicensing. The details of any particular
14 transaction are, in that regard, irrelevant. It doesn't
15 matter if, say, transaction 2 -- I'm just making that
16 one up -- involved a degree of copyright infringement
17 for some reason.

18 What matters and the purposes the sample
19 transactions serve are two-fold.

20 One, they're obviously rather important context.
21 They show what the counterfactual market is that we
22 say --

23 THE CHAIRMAN: Sorry, why doesn't copyright infringement
24 matter?

25 MR LAVY: Because let's say there was -- ValueLicensing has

1 loads of transactions in its history and in the
2 counterfactual it would have had more, necessarily,
3 because that's the basis of the case that but for
4 Microsoft's infringement of competition law there would
5 have been more transactions. It would have bought more
6 licences; it would have sold more licences.

7 Now, let's say in one of those transactions
8 something went wrong and, therefore, for one of those
9 transactions in the real world --

10 THE CHAIRMAN: That's looking at an extreme example.

11 Let's say that you're a serial copyright infringer,
12 maybe by authorising or colluding with people who are
13 selling the software or something, that may well be
14 relevant to the competition claim. You're engaging in
15 infringing acts, so I'm just not sure why copyright
16 infringement isn't relevant.

17 MR LAVY: For a case like that, though -- let's just take
18 that -- that would have to be pleaded and then we would
19 have a factual trial about it.

20 THE CHAIRMAN: Yes, we're in a slightly odd -- yes, yes.

21 Keeps being told it's going to be pleaded, but it hasn't
22 been, which does remind me -- sorry to interject -- but
23 we would quite like to see the pleadings in the
24 copyright case because reference has frequently been
25 made to them.

1 MR LAVY: Yes.

2 THE CHAIRMAN: Probably a dozen times by now, but we still
3 don't have a clue what that case is about. Just for
4 background.

5 MR LAVY: Would it help if I showed you now? Because we're
6 doing reasonably well for time.

7 THE CHAIRMAN: The copyright action?

8 MR LAVY: Oh, sorry -- we don't have them.

9 THE CHAIRMAN: Not now. But if you let us have them over
10 the next few days.

11 MR LAVY: Yes. But of course --

12 THE CHAIRMAN: Sorry, I interrupted. An interjection, but
13 we were on the point: why does copyright infringement
14 not matter?

15 MR LAVY: I should say, obviously, the PI trial is in these
16 proceedings and it shouldn't be used as a sort of
17 collateral attempt to have a trial in the other
18 proceedings.

19 THE CHAIRMAN: No, no, I appreciate that.

20 MR LAVY: But the reason it doesn't matter, take -- you have
21 one transaction which went wrong, I suppose one might
22 then ask: okay, well, is that a systemic issue?

23 And if it is a systemic issue, one might then have
24 to ask: what does that do to the size of the lawful
25 market in the counterfactual?

1 I can quite see that.

2 THE CHAIRMAN: Right. So you're just saying it's not the
3 pleaded case?

4 MR LAVY: Yes, exactly.

5 THE CHAIRMAN: Right.

6 MR LAVY: I'm saying it in the context of this PI trial,
7 where the sample transactions as such aren't pleaded at
8 all, they're here to give us context. They're a vehicle
9 for showing you -- obviously, it's very important to
10 know what software VL was reselling, what, sort of in
11 broad terms, what sort of resale activity it was engaged
12 in and so on. Critically, they are about showing
13 Microsoft's licensing terms and structure, because you
14 have to understand how things were licensed, at least to
15 some degree.

16 The second rather more focused purpose they serve is
17 to identify the licence splitting that VL says is lawful
18 and Microsoft says is unlawful. For that there's really
19 only one question, in my submission, which is: are we
20 dealing with multiple copies or are we dealing with
21 something different? And that's an analysis --

22 THE CHAIRMAN: But they're also there to deal with the
23 question of whether you required the vendors to delete
24 the original software.

25 MR LAVY: Well, that's a factual question, which doesn't

1 fall in the scope of this preliminary issues trial. So
2 we have evidence on that.

3 MR LYKIARDOPOULOS: Could I just ask just on that -- and
4 I don't want to take you out of your way, but if you go
5 to Microsoft's pleadings -- so bundle C, tab 3,
6 page 53 -- I just want to understand how -- maybe this
7 doesn't follow at all, this preliminary issue, but it
8 would be nice to understand. At bundle C, tab 3,
9 page 53, they have pleaded, at paragraph 23(c)(6).

10 MR LAVY: Yes.

11 MR LYKIARDOPOULOS: And they say there -- they plead there
12 that the claimant has never been entitled to rely upon
13 exhaustion unless it can prove the conditions for
14 exhaustion, including that the first acquirer has
15 ensured that any copies still in his hand is deleted or
16 rendered unusable.

17 Now, we discussed earlier on that if that hasn't
18 happened that may amount to infringement by the first
19 acquirer, but may not amount, potentially, to
20 infringement, say, by the claimant if exhaustion has
21 taken place. And we had that debate.

22 What do you say about -- or are you going to come on
23 to this? Is this something we have to resolve,
24 23(c)(6) in your case?

25 MR LAVY: In my submission, no, because there is a whole

1 debate about the scope of the preliminary issue trial.
2 It started off with potential for a rather large number
3 of issues and we have whittled it down to two
4 preliminary issues. In my submission, those two
5 preliminary issues arise out of two specific paragraphs,
6 actually, of this pleading, which don't include that
7 one.

8 Just so that I'm not wasting --

9 THE CHAIRMAN: On Mr Hobbs' case, this is central to the
10 question of exhaustion. Mr Hobbs is nodding. This is
11 absolutely central to his exhaustion case, so you
12 haven't -- you haven't -- may or may not have done this
13 or you haven't shown that you have done it.

14 MR LAVY: Yes.

15 THE CHAIRMAN: And so it's central to the preliminary issues
16 that we have to decide.

17 MR LAVY: Well, the preliminary issues are not the entirety
18 of the exhaustion case. The preliminary issues were two
19 specifics -- very important, but two sub-aspects of
20 exhaustion.

21 One is whether you can split volume licences, and
22 the other one is whether you can have exhaustion at
23 all --

24 THE CHAIRMAN: You have even dealt with this in your
25 evidence, so you can't say this wasn't part of the

1 proceedings.

2 MR HOBBS: Absolutely.

3 MR LYKIARDOPOULOS: Your evidence, I think the chairman is

4 referring to the statement of Mr Horley, where he says

5 that -- I'm sure you will come to it. But, on the

6 evidence, he says that the claimant seeks to ascertain

7 and ensure that copies have been rendered unusable. So

8 that's been traversed.

9 MR LAVY: Yes.

10 THE CHAIRMAN: Have you put in correspondence in relation to

11 that?

12 MR LYKIARDOPOULOS: Correspondence relating to that?

13 MR LAVY: It's part of the proceedings and insofar as it's

14 there and that evidence says what it says. But we

15 accept, on our side of the court, parking the exact

16 analysis of what the consequences are, that our business

17 model required the vendors of second-hand licences to

18 delete their copies. It's not in dispute that as

19 a matter of legal principle that has to happen.

20 Now --

21 THE CHAIRMAN: Well, that has to happen. But whether you

22 are required to ensure it does happen is a separate

23 question.

24 MR LYKIARDOPOULOS: The issue is whether this preliminary

25 issue is looking generally as to whether exhaustion

1 applies, if you like, to everyone down the chain or
2 whether we're looking at whether exhaustion applies to
3 what the claimant has done, whether the claimant can
4 rely on exhaustion. Or is that wrong? Are we not
5 looking? Because as I read the preliminary issue, it's
6 not entirely clear to me whether I'm looking at is the
7 claimant permitted to do what it's done because rights
8 as against it are exhausted or is it looking wider than
9 that?

10 MR LAVY: Yes. I mean, you have said the prism I'm looking
11 through it is actually narrower than that, this
12 preliminary issue. It's on the question whether
13 exhaustion that might otherwise arise, and resale
14 opportunities that might otherwise exist, is defeated
15 because VL's business involves splitting volume
16 licences. That's how we had understood the preliminary
17 issues.

18 We can do the archaeology about how we got there,
19 but that --

20 THE CHAIRMAN: Certainly, it's deal with by Mr Hobbs and
21 it's deal with in your evidence. So our provisional
22 view is we should deal with it. If you want to stop us
23 dealing with it you are going to have to show us why.

24 MR LAVY: Okay. Could we possibly park the point and I will
25 give it some thought over lunch?

1 MR HOBBS: Do you mind, for the transcript, if I just say at
2 this juncture that you have the bundle open, which is
3 bundle C? It may or may not have blipped on your radar
4 screen that behind tab 12 there is a whole series of
5 admissions supported by a statement of truth that apply
6 in relation to the first preliminary issue and also the
7 second. There is a whole series of them and they are in
8 this case, the admissions.

9 THE CHAIRMAN: That paragraph that we were just looking at
10 in the pleadings, at (c)(3), that proposition comes from
11 UsedSoft 2, does it not; it doesn't come from the CJEU?

12 MR LAVY: The 123(c)(6) is Mr Hobbs' pleading.

13 THE CHAIRMAN: Yes. The requirement to prove conditions for
14 exhaustion and including the first acquirer has ensured
15 that copy still in his hand was deleted or rendered
16 unusable, I understand that's from the German case; it's
17 not from UsedSoft.

18 MR HOBBS: It's from UsedSoft, and Mr Riordan is just
19 telling me what the paragraphs are: it's 70 something,
20 isn't it? There's two of them. It's in UsedSoft.

21 MR LYKIARDOPOULOS: The chairman was asking about the
22 requirement to prove.

23 THE CHAIRMAN: We know it has to be deleted, and we
24 discussed the consequences of that, maybe the original
25 acquirer is infringing, but the Court of Justice didn't

1 say there was any particular obligation. The
2 Court of Justice -- sorry, this is a question -- my
3 recollection is didn't say there was any obligation on
4 the vendor to make sure those copies were deleted.

5 MR LAVY: The CJEU decision I think is silent on the point.

6 THE CHAIRMAN: That's my understanding.

7 MR LAVY: I haven't checked it through that prism, but
8 I think that's the answer.

9 THE CHAIRMAN: But I think this is something that we would
10 like to determine on this.

11 MR LAVY: Just to be very clear as to precisely what you
12 would like to determine, is it that the question of
13 principle as to whether as a matter of law it was for
14 the vendor or someone else to be sure copies are
15 deleted, or is it a question of fact as to --

16 THE CHAIRMAN: Both; both, so if the vendor is required we
17 then need to look at your evidence as to what you did.
18 If the vendor is not required then it's just a question
19 of law and then what is the vendor required to do, has
20 the vendor done anything. I mean, that's been dealt
21 with in your evidence by reference to the particular
22 transactions.

23 MR LAVY: By reference to the transactions, yes.

24 THE CHAIRMAN: So we're not going to look beyond those
25 transactions.

1 MR LAVY: Maybe it's a debate for later as to where that
2 actually ultimately goes.

3 THE CHAIRMAN: And you may take the view you don't need to
4 address it in evidence because it doesn't make any
5 difference, but you have addressed it in evidence.

6 MR LAVY: Yes.

7 THE CHAIRMAN: Mr Hobbs is going to make submissions on it,
8 I'm sure.

9 MR LAVY: I will hear what he says. But I think the
10 evidence -- obviously, it's part of the evidence Mr
11 (inaudible) put in by way of background to what --

12 THE CHAIRMAN: -- (overspeaking) specific contracts.

13 MR LAVY: Well, it is. But it's not something which has
14 received any focus from our side of the court because --
15 the factual aspect of it, because the factual aspect of
16 it -- I will take it later.

17 THE CHAIRMAN: Where do we go next?

18 MR LAVY: Sample transactions, yes. Now, the subject of the
19 point that the chairman has just made about wanting to
20 make findings of fact on the sample transactions.

21 When it comes to the principles, we say there's no
22 difference between any of the transactions that are
23 material to determining the legal issues because it's
24 absolutely right that, as the other side have said, in
25 some cases ValueLicensing acts as a broker and in some

1 as a reseller. But we say that's a distinction without
2 a difference when it comes to the legal analysis. It
3 doesn't matter either way. We admit, we accept that we
4 did both things, but we don't say that our role in the
5 transactions makes any difference to the preliminary
6 issues.

7 The convenient place to start, probably, with the
8 sample transactions is paragraph 6 of the statement of
9 fact, which is A, tab 1, page 4.

10 So this is the agreed position as to Microsoft's
11 Enterprise licence structure, albeit with the caveats
12 that anyone is allowed to look at whatever terms they
13 would like.

14 The structure here is that the Enterprise customers
15 entered into program agreements which consisted of
16 a suite of documents, and we can see the suite of
17 documents at paragraph 7. There are three agreements,
18 a price sheet and a product selection form. And we see
19 also, at paragraph 7, that a customer places orders for
20 specific products or services under something called
21 an Enterprise enrolment, and that's defined, for what it
22 is worth, at paragraph 11.3 of the statement of fact.
23 But, anyway, that's something that a customer can do
24 once it's entered into an Enterprise agreement.

25 Given that nothing can be bought until you've

1 entered into an Enterprise agreement, we need to look at
2 that first.

3 And that's -- Enterprise agreement, the one referred
4 to in the statement of fact as the example, is B, tab 3,
5 page 17.

6 So the starting point for my purposes is if you look
7 at page --

8 THE CHAIRMAN: Just help me, where are we going on this?

9 Obviously, we have had a look at these --

10 MR LAVY: I'm going to show you what the licence grants are,
11 which -- so these are the licences which were sold to
12 first acquirers.

13 THE CHAIRMAN: Yes, I understand. You say the licence terms
14 are neither here nor there. So why are we looking at
15 the licence terms?

16 MR LAVY: No, the licence terms matter for the question
17 of -- or potentially matter for the purpose of working
18 out whether we're dealing with a volume licence or not.

19 THE CHAIRMAN: Right.

20 MR LAVY: So it's important.

21 THE CHAIRMAN: What's your submission on that? Just so
22 I have an idea what the target is.

23 MR LAVY: We're dealing with a volume licence because, when
24 you look at these terms together, what's clearly
25 happening is that there's a sale of separate copies of

1 software. That's the point.

2 THE CHAIRMAN: I see, right.

3 MR LAVY: And I just need to show you some of the terms to
4 make that good.

5 THE CHAIRMAN: Thank you.

6 MR LAVY: Frankly, from my perspective, this is all rather
7 of secondary importance, but we have to go through them.

8 THE CHAIRMAN: I understand.

9 MR LAVY: The licence grant is at 2A. And what one sees
10 there is a grant to download, install and use software
11 products, each in the quantity ordered under
12 an enrolment. So, to put that the other way round,
13 a quantity of products under enrolment can be downloaded
14 and installed and used.

15 Products, by the way, we don't need to go there.
16 It's not defined here, but it's defined in the master
17 agreement as:

18 "All products identified in the product terms such
19 as all software, online services and other web based
20 services."

21 Stuff including software is all we need to know.

22 And this means that under clause 2A there's a right
23 to download, install and use as many copies of the
24 software as have been ordered under an enrolment. And
25 if we now look at 2B on this page, duration of licences.

1 THE CHAIRMAN: Yes, they're perpetual.

2 MR LAVY: That's the thing which makes them perpetual.

3 After they're fully paid up. And the initial enrolment

4 term is typically three years. That's an agreed fact.

5 Now, "Licence" itself is a defined term, capital L,

6 and that's, you can see on page 17, is the right to

7 download, install, access and use a product.

8 So, now, if the Tribunal accepts my submission, one

9 has to look at copies not licences, this probably

10 doesn't matter very much. But, for what it is worth,

11 I note that where clause 2A grants a right to download,

12 install and use software products, presumably, what it

13 is granting is licences, presumably, because multiple

14 products means multiple Licences as a matter of

15 definition. But I just say that's very much a footnote

16 point from my perspective.

17 It's also clear, in my submission, from clause 2B

18 that the licence grant isn't a single unitary licence.

19 Multiple licences are envisaged because the clause

20 refers to licences, plural, becoming perpetual when

21 fully paid up and, of course, if one thinks about it,

22 that's going to happen at different times for different

23 copies under the Enterprise agreement.

24 THE CHAIRMAN: Sorry, I'm not quite following. A licence

25 means right to download, install and use a product?

1 MR LAVY: Yes.

2 THE CHAIRMAN: Product means a particular piece of software?

3 MR LAVY: Yes, product -- and other things as well.

4 THE CHAIRMAN: Other things. But it doesn't assist you. So

5 when you say it's multiple licences that could be for

6 different products, not necessarily the same product

7 multiple times?

8 MR LAVY: Yes, it could be either, I agree.

9 THE CHAIRMAN: It's not helping you on which it is?

10 MR LAVY: I see. But then, if you look at 2B, you then have

11 the licences, plural --

12 THE CHAIRMAN: Could be different, could be --

13 MR LAVY: No, that is fair. It's neutral. It's neutral.

14 THE CHAIRMAN: Neutral, yes.

15 MR LAVY: But, more importantly, if you look at these terms

16 through the prism of UsedSoft, if you licence software

17 under this agreement you have a right to download,

18 install and use as many copies as you've ordered. And

19 that's really the key point for me because that's what

20 clause 2A says. It doesn't say you can download, use

21 and install one copy; it's one copy per qualifying user

22 or per qualifying device. And what you will see is that

23 some software is licensed per qualifying user and some

24 is licensed per qualifying device.

25 And so once, then, the 3 years has expired, under

1 clause 2B, you have the right to use those copies for
2 an unlimited period in return for payment of a fee
3 designed to enable Microsoft to obtain remuneration
4 corresponding to the economic value of those copies.
5 And at that point the distribution right in those copies
6 is exhausted.

7 Now, interestingly, I think this is significant,
8 Microsoft doesn't appear to dispute this and we see that
9 in its skeleton at paragraph 51. They say there's
10 nothing prohibiting or restricting customers from
11 transferring the totality of the licences they have
12 purchased in the ordered quantities of qualifying users
13 and qualifying devices for products, where the
14 legislature prescribes conditions, for instance, of
15 distribution rights are met.

16 And in that paragraph, Microsoft also quotes
17 clause 4C of the Enterprise agreement, which says, in
18 essence, that exhaustion trumps the terms.

19 And, of course, that mirrors the legal position that
20 would subsist in any event, because you can't
21 override -- you can't get out of Article 4(2).

22 So that's all I'm taking from the Enterprise
23 agreement.

24 A sample enrolment is at tab 4. For present
25 purposes, I just note that, on page 23, unsurprisingly

1 the Enterprise agreement is incorporated into it and
2 there's something called a "product selection form" also
3 incorporated into it, which we will look at in a second.

4 And under the heading "Term" you see the 36 months.
5 So that's the three year term after which licences
6 become perpetual.

7 Now, the two definitions are needed to understand
8 the product selection form, and those are the two
9 definitions on page 24, qualified device and qualified
10 user. And what you see is the qualified device
11 essentially means -- and I'm paraphrasing --
12 a workstation, a desktop computer. There are other
13 things it can be. But, importantly, a qualified device
14 cannot be a server because that's what it says
15 expressly.

16 THE CHAIRMAN: All right. Does not include ...

17 (Reads)

18 MR LAVY: So, just going back to the conversation we were
19 having about staging servers and things, that copy
20 wouldn't be a qualified device copy and, therefore, it
21 wouldn't be one of the licensed copies that you have
22 bought.

23 So, if we then look at a qualified user -- sorry,
24 a qualified selection form, at the next tab, page 33.
25 Now, this is the example referenced in the statement of

1 fact. It happens to be transaction 4, but no
2 significance turns on that for present purposes.

3 I'm really showing you this to show you how the
4 thing works.

5 So we have step 1. There's an order here for
6 22,000-odd qualified devices and 24,000-odd -- slightly
7 different number -- qualified users.

8 Enterprise product platform is ticked yes. And
9 I think that means these are Enterprise products rather
10 than additional products, so these are ones you have to
11 buy for your entire Enterprise.

12 THE CHAIRMAN: Sorry, why is the devices different to the
13 users?

14 MR LAVY: It's different software. So you see that Office
15 Professional, for example, is per user. If you do the
16 maths you see this works out. And Windows Desktop is
17 per device, so they're just licensed on a different
18 basis.

19 THE CHAIRMAN: I see.

20 MR LAVY: Because if you look at Windows Desktop you add
21 22,388 and 79, you get to 22,467.

22 THE CHAIRMAN: Fine, fine, spare me the details.

23 MR LAVY: I'm very pleased because I haven't done the
24 calculations for them all.

25 So, pausing there, pursuant to the enrolment

1 associated with this product selection form, the fact
2 that you have quantities of 22,000-odd copies of these
3 things, in the real world this can only sensibly mean
4 the customer is entitled to download, install and use
5 22,000-odd copies of Office and 22,000-odd copies of
6 Windows. Those are the qualifying devices. Those are
7 the qualifying users.

8 And after three years and payment of the appropriate
9 fee, then what happens is the licensee has 22,000-odd
10 fully paid up perpetual licences and it has 22,000-odd
11 exhausted copies of software. That really is the only
12 way one can sensibly look at this. And it doesn't
13 matter, from a contractual perspective, that there's
14 only one transaction here and one contract.

15 What matters is that there's a right to download,
16 install and use 22,000 copies of Office and 22,000
17 copies of Windows. And, now, that right is, as a matter
18 of contractual definition, a Licence, capital L. But,
19 more importantly, as a matter of law, it's a licence,
20 small L, in respect of each of those copies. And once
21 those licences are perpetual, in my submission, the
22 distribution right in each copy is exhausted. That's
23 why at that stage Microsoft has no further economic
24 interest in those 22,000 copies and they can be resold.

25 And, of course, to go back to the point earlier,

1 it's 22,000 notional copies because no one is suggesting
2 taking 22,000 hard disks out of computers and giving
3 them to someone else. What we're talking about --

4 THE CHAIRMAN: We have the point.

5 MR LAVY: You have, yes.

6 So then this really is back to the deletion issue.

7 If the Microsoft customer wants to sell some -- well, if
8 a Microsoft -- it's not really -- it's broader than
9 that -- wants to sell some, but not all their copies,
10 now then a question may arise as to whether they can do
11 that without breaching their obligation to license
12 everyone in their organisation, which is a point my
13 learned friends make.

14 Now, the answer to that is going to be: it depends.

15 It's going to be very fact specific because if, for
16 example, you have an organisation that reduces in size
17 and has a smaller workforce, then it's not going to need
18 the licences it's getting rid of and it can resell its
19 excess licences without infringing -- without breaching
20 the contractual obligation it has with Microsoft to
21 ensure that everyone is licensed.

22 But let's now consider the situation where
23 a Microsoft customer seeks to sell a subset of its
24 licences in circumstances which would leave it with
25 a shortfall. So it's now in a position where, because

1 it's sold some of its licences, it's in breach of its
2 obligations, potentially, to Microsoft.

3 Well, the answer is that Microsoft may have a cause
4 of action in breach of contract against that customer,
5 unless the customer buys more licences. But it doesn't
6 in my submission --

7 THE CHAIRMAN: We're drifting off. Those aren't the facts
8 of these cases, are they?

9 MR LAVY: Well, the answer is: they may be in the
10 counterfactual, because the point my learned friends
11 make is you can't sell some, but not all of your
12 licences, because then you will be in breach --

13 THE CHAIRMAN: Yes. But aren't there specific examples? Do
14 we have an example where you sold some licences, but not
15 all of them?

16 MR LAVY: Yes, but not in circumstances where there's
17 evidence to suggest that's a breach. And of course
18 we're dealing with serious organisations here, and it's
19 not -- these Enterprise customers, who are selling
20 licences, the Rabobanks, ABN AMRO, these are serious
21 businesses who usually might take their obligations
22 seriously. In my submission, one can't assume that they
23 would go around breaching their contractual obligations
24 to Microsoft.

25 But, if one then looks at, say, at a contrary

1 example, say -- Carillion is the example I have used.
2 Now, that -- I actually used this as the example because
3 it involved Office and Windows, both products.

4 The easiest place to pick that up is if we look at
5 the statement of facts, at paragraph 68, what you can
6 see is that they entered into a series of enrolments,
7 paragraph 68. And then there's -- at paragraph 71, it
8 says that Carillion entered into administration with PwC
9 acting as administrators. In fact that's, I'm afraid,
10 not quite right. It went into insolvent liquidation.
11 And that's apparent if you look at paragraph 72 in the
12 box, you can see from the name it's a matter of public
13 record anyway. So apologies for that; that's wrong in
14 the statement of facts.

15 But, in any event, we see that it's common ground
16 that as at 20 June 2018 Carillion was licensed for at
17 least the quantities listed in the table there. And
18 PwC, as insolvency practitioners, entered into
19 a brokerage agreement with ValueLicensing in respect of
20 them. In this particular example, after its
21 liquidation, we can assume that Carillion didn't need
22 its licences, have any more copies. Understandably, PwC
23 wants to try to get something from the assets. But we
24 have seen how this would all work. I won't take you to
25 it, but there's a product selection form, as you can

1 imagine, which lists the licences. The numbers don't
2 quite add up because the product selection form --
3 I think we have this from 2014, but this is an agreed --
4 at paragraph 73, we have an agreed number of licences
5 anyway, so it doesn't really matter that we haven't
6 traced it through, in my submission, the paperwork.

7 But then what we can see, at paragraph 80 of the
8 statement of facts, is that VL brokered a series of
9 sales as set out in schedule 3. That is at tab 4. What
10 we can see here is a total list of what ValueLicensing
11 sold. They weren't all sold in a single batch. They
12 were sold to a variety of businesses and public sector
13 organisations, and you get a sense of that if you look
14 over the page, at 63. So taking Office Professional,
15 for example, 3,000-odd were sold to a company called
16 Black Belt, 540 to DHL, 24 to (inaudible) and so on.

17 So these copies are sold in batches, smaller than
18 the Carillion enrolments. There's a dispute of fact
19 about that. They were also not sold with copies of
20 Windows. You can see that just from the numbers.
21 Again, no dispute of fact about that.

22 So what is going on is splitting, in both senses,
23 that are relevant today. We say: so what? Because
24 every individual copy is exhausted.

25 And that really is the long and the short of it, in

1 my submission.

2 Now, I have virtually finished --

3 MR LYKIARDOPOULOS: Before the short adjournment, I have one
4 question which I would like you to think about over the
5 short adjournment. It goes back to this point we
6 discussed earlier about paragraph 23(c)(6) of
7 the defence.

8 MR LAVY: Yes.

9 MR LYKIARDOPOULOS: And whether or not (a) you, as the
10 claimant, are required to show conditions have been met
11 and (b) whether it matters to what we have to decide
12 whether the conditions have been met. And as part of
13 that you mentioned that in some of these transactions
14 the software is rendered unusable and, as far as I could
15 see, that was in your evidence. But when you go to some
16 of the underlying letters, and indeed it's also in this
17 agreed statement of facts, there's a difference between
18 transactions where sometimes it says the software has
19 been rendered unusable and sometimes it says it's no
20 longer used. Of course, that is a difference. And I
21 want just to understand that if in fact it matters, we
22 have to look into what the defendant says is important
23 as to whether or not you have shown that the first
24 acquirer has rendered unusable, how you do that and
25 whether you do that and, indeed, whether it matters.

1 I just need to understand.

2 MR LAVY: No, those are all fair questions.

3 MR LYKIARDOPOULOS: Particularly on the evidence that you

4 have put in. I think we need to understand how that

5 fits together. It may not matter on your case. I don't

6 know, you may say: none of that matters. I don't have

7 to show that and, indeed, if I did, that doesn't affect

8 me.

9 That may be your position. It may be. That's

10 certainly not Mr Hobbs' position, and so we just need to

11 understand how it fits together.

12 MR LAVY: That's clear, thank you.

13 THE CHAIRMAN: Very good.

14 (1.00 pm)

15 (The luncheon adjournment)

16 (2.00 pm)

17 MR LAVY: Good afternoon. So just to deal briefly with the

18 deletion issue that was raised before lunch. I do need

19 to preface this by recording ValueLicensing's position,

20 the deletion issue is out of scope and that the purpose

21 of this PI was to decide the legal question about

22 splitting, then of course NPWs. And that's important

23 because ValueLicensing's selection of the sample

24 transactions and preparation of evidence was on that

25 basis. And also it's worth -- we have checked

1 Microsoft's skeleton over lunchtime and, so far as we
2 can see, there isn't actually even a factual case made
3 out in the skeleton that ValueLicensing failed to delete
4 in respect of any of the transactions. But, with that
5 caveat, a substantive answer to the points that were
6 raised by the Tribunal.

7 The starting point is paragraph 78 of UsedSoft,
8 because that sets out the legal position, so that's
9 authorities bundle 2, tab 28, page 766.

10 THE CHAIRMAN: Sorry, it's out of scope. Can you just take
11 us to the preliminary issues order and explain why it's
12 out of scope?

13 MR LAVY: In a sense, the most convenient place to look at
14 it is actually my learned friend's skeleton, at
15 paragraph 8.

16 MR LYKIARDOPOULOS: You may also want to go to 36.4 as well
17 of their skeleton, just so I understand.

18 MR LAVY: Yes, well, that point I can deal with quite
19 quickly because the point there is being made, as
20 I understand it, is if you sell multiple licences --
21 sorry, if you're reselling part, some, a subset of your
22 copies of software, then necessarily you still have
23 copies yourself.

24 MR LYKIARDOPOULOS: Right.

25 MR LAVY: I think that's what they're saying. And we agree,

1 we just say it doesn't matter. As a matter of fact
2 there's no dispute there.

3 MR LYKIARDOPOULOS: Sorry, you're going to go to paragraph?

4 MR LAVY: Paragraph 8, yes, the table.

5 THE CHAIRMAN: We're really interested in what the order
6 was, rather than what Mr Hobbs' interpretation --
7 Mr Hobbs can explain his interpretation in due course.

8 MR LAVY: Yes, so the order is at --

9 MR HOBBS: G, tab 19.

10 MR LAVY: Thanks. G, tab 19. For our purposes it's
11 paragraph 1A.

12 MR HOBBS: And 2.

13 MR LAVY: Hang on a second, Mr Hobbs.

14 Preliminary issue itself is at 1 and my learned
15 friends highlight, in their skeleton, the words "in the
16 circumstances of this case" and that's obviously right
17 because it's not an entirely abstract, floating issue.
18 It's linked to Microsoft's licences in this case.

19 And then paragraph 2, Mr Hobbs wants me to go to,
20 which deals with the statement of facts and, of course,
21 just under (ii) on issue 1A are the words:

22 "By reference to a sample of five transactions
23 entered into by or with the claimant and their
24 associated specific contractual terms on the basis of
25 which the above points of law are to be determined."

1 And that's really my point. The preliminary issues
2 trial is for determining points of law, not points of
3 fact.

4 THE CHAIRMAN: I have made clear that was not the case
5 during the directions hearings, when this was initially
6 ordered. So it wasn't going to be a pure point of law;
7 it was going to be in the context of particular facts.

8 MR LAVY: In the context of particular facts, absolutely.
9 The question really is then: what facts are the
10 important ones?

11 THE CHAIRMAN: I'm not sure that really helps because
12 it's -- one can look at your letters and say: as matter
13 of law; do those letters mean that rights are exhausted?

14 MR LYKIARDOPOULOS: Can I ask: I didn't quite understand
15 what you mean by that, in the sense that assume for
16 a moment against -- well, just assume for a moment that
17 we cannot say or the Tribunal cannot say on the evidence
18 that the first acquirer rendered their copies unusable.
19 Let's assume that. Does that matter to the point of
20 law? Because that's then the factual matrix that we're
21 looking at, and do you say that matters or doesn't
22 matter?

23 MR LAVY: It obviously matters -- if you were to determine
24 that needed to be shown in order for exhaustion to have
25 happened, just park whether that's right. But, if you

1 were to determine that, then it would follow that on
2 that view of the world there would be no exhaustion,
3 unless that had happened. But -- and obviously that is
4 relevant to the issue of exhaustion.

5 I do say that's not actually in the scope of the
6 specific issue we're looking at today.

7 I will give you a substantive answer to that very
8 point. But that's not what this preliminary issue is
9 about.

10 THE CHAIRMAN: And the reason you say that is? Point to the
11 words that you say means it is excluded.

12 MR LAVY: Yes:

13 "Does the distribution right or reproduction right
14 enjoyed by the owner of the copyright and computer
15 program permit or prevent subdivision and resale without
16 the consent of the rightholder, of the user right,
17 et cetera."

18 The focus of this preliminary issue is subdivision
19 of resale.

20 THE CHAIRMAN: Right.

21 MR LAVY: Which arises out of -- I think it's 23(c)(2) of
22 the pleadings on my learned friends' side. Apparently
23 it's 23(c)(3) of the pleadings. But it was a very
24 specific pleaded issue that we were looking at, as we
25 had understood it. And the reason why that issue is

1 an important one to be looking at as a preliminary issue
2 is that was one where if there was no right to split
3 a multivolume licence, then there was no
4 counterfactual --

5 THE CHAIRMAN: But the circumstances, whether that -- it's
6 in the circumstance of the case and the circumstance --
7 let's assume it's an obligation on you, fair and square,
8 to use particular words to the person you're acquiring
9 from, that is an element that is relevant in answering
10 this question because it's on those facts. It's not --
11 it may not have been the central focus of the issue, but
12 it doesn't fall outside the issue.

13 MR LAVY: Well, I suppose it does. But let's assume -- in
14 the circumstances of this case, let's assume
15 the Tribunal -- or let it decide that subdivision resale
16 is fine, but there has to be deletion of the first
17 acquirer's copy and X is responsible for ensuring that.
18 I will actually deal with the substance of that point in
19 a moment.

20 Then that's -- if that is a conclusion a tribunal
21 reaches, then that wouldn't be dispositive of the
22 proceedings, because then the question at trial will be:
23 in the counterfactual scenario, which is where this
24 matters, because all this arises out of the defence.
25 It's paragraph 5C of my learned friend's defence, which

1 is there wasn't a lawful resale market in which
2 ValueLicensing could have and would on the
3 counterfactual have engaged. That's what this case is
4 about. Then we would have to answer the quantum
5 question: what is the size and value of the market?
6 THE CHAIRMAN: Aren't we ultimately interested in whether
7 there was infringement of copyright --
8 MR LAVY: No.
9 THE CHAIRMAN: -- and whether the rights are exhausted?
10 MR LAVY: Sir, no.
11 THE CHAIRMAN: The former following the latter?
12 MR LAVY: No. Can I show you the defence in this? Because
13 this is obviously quite an important point.
14 If we look at the pleadings bundle, which is bundle
15 C ... I have temporarily lost my bundle C. Found it.
16 Tab 3, which is the re-amended defence, the starting
17 point -- and one does have to anchor it to this -- is
18 paragraph 5.2, and it's the bit that came in my
19 amendment:
20 "Further and in any event the acts complained
21 of ..."
22 That's the competition alleged infringement:
23 "... cannot have been the cause of any relevant loss
24 or damage to the claimant insofar as it would not have
25 been lawful for the claimant to resell or other

1 distribute the relevant software products and/or
2 licences by reason of the facts and matters set out in
3 paragraphs 23A to C."

4 So the structure of this is we're talking about
5 a counterfactual scenario. We're talking about what
6 would have happened in the market that would have
7 subsisted had there been no -- what we say was
8 infringement of competition law. And we say that market
9 would have been bigger. ValueLicensing would have been
10 able to buy and resell more second-hand licences of
11 Microsoft software.

12 So that's what this point goes to.

13 MR LYKIARDOPOULOS: But does that not carry with it,
14 therefore -- forgetting for a moment whether you say
15 this issue of rendering unusable should or should not be
16 properly within the scope of the order, just in relation
17 to the substance of it.

18 MR LAVY: Yes.

19 MR LYKIARDOPOULOS: Mr Hobbs has pleaded that if it has --
20 there's requirement on the claimant to prove that the
21 first acquirer assured unusability. That's what he said
22 in 23(c)(6). If that's wrong, then why does it matter?
23 Because the focus of 5.2 is whether or not it's lawful
24 for you, not lawful for anybody else.

25 MR LAVY: Yes. The answer is it may not matter. Again, one

1 has to look at the wider structure of my learned
2 friend's plea. It's interesting. It's not really
3 a positive plea. What they say is -- at 5.2, they say
4 you have to comply with UsedSoft. That's a summary.
5 Then what they do at 23A is say: and these are all
6 the things you would have to do to ensure a lawful
7 market.
8 Again, we can debate that. But where does any of it
9 go? At most, it goes to the size of the market.
10 Now, what I mean by that is --
11 THE CHAIRMAN: Why does it go to the size of the market? It
12 may go to the size of the market. I can see why that
13 would be. But it also goes to whether or not Microsoft
14 was entitled to take what may or may not be actions
15 which would otherwise be anti-competitive in
16 circumstances where they're protecting their
17 intellectual property rights.
18 MR LAVY: The objective justification.
19 THE CHAIRMAN: Objective justification, yes.
20 MR LAVY: But then they would only be able to go -- let's
21 take that example. They would only be able to go
22 against a subset of the market, sales in which, on that
23 hypothesis, the first acquirer hadn't deleted their
24 copies.
25 THE CHAIRMAN: That obviously could be subject to argument.

1 If you're infringing or somebody is infringing copyright
2 60 per cent of the time, it doesn't mean that you can't
3 take steps to stop this happening in the market. That
4 would be the subject of argument.

5 MR LAVY: Sure. But there's no pleaded factual case of that
6 nature. One can quite see that if there had been
7 a positive, pleaded factual case that ValueLicensing was
8 in fact persistently, as a matter of its business
9 practice, doing -- acting unlawfully in that sort of way
10 by failing to ensure the copies were deleted, if that's
11 an obligation on VL -- I will come back to that -- then
12 fine. Or, more broadly, if there was a pleaded case
13 that the market as a whole was rife with this sort of
14 thing going on, fine. But that's not the pleaded case.

15 All that the pleading says is: well, you have to
16 make sure that all these things are complied with.

17 And that's not enough, in my submission, to bring in
18 these sorts of issues.

19 THE CHAIRMAN: Your submission is whether or not you've
20 complied with them isn't relevant to
21 preliminary issue 1.

22 MR LAVY: I do. But, in fact, I'm just scotching this
23 particular issue. If one actually reads UsedSoft at
24 paragraph 78, in my submission it's clear that the
25 consequences of non-deletion don't affect the market at

1 all. And the consequences of non-deletion are -- this
2 is the conversation we were having earlier -- are that
3 the vendor is infringing copyright. And we won't go to
4 it because of the time, but if you could look at
5 paragraph 78, in my submission it says so in terms.
6 And, therefore, in the context of this case it doesn't
7 affect the question of whether there was a lawful market
8 in the used copies. That there was a lawful market it
9 may be that in some cases Microsoft has rights of action
10 of copyright infringement against certain companies who
11 haven't been deleting. But that's a different matter so
12 that's not what this case is about.

13 MR LYKIARDOPOULOS: So it doesn't affect whether it's lawful
14 for the claimant to resell --

15 MR LAVY: Correct.

16 MR LYKIARDOPOULOS: I understand.

17 MR LAVY: That's my point on that. And I say it's not for
18 us, actually, to establish deletion; what we have to
19 establish is that we -- in the counterfactual case would
20 have. But I'm just going to say that the copies we had
21 were exhausted copies and that's as far as we have to
22 go. And for that substantive reason I say, actually,
23 this deletion point is a bit of a red herring. But
24 that's, I think, all I probably should sensibly say at
25 this stage.

1 THE CHAIRMAN: Remind me, supporting the analysis that you
2 look at the point of sale you rely on the directive
3 itself?

4 MR LAVY: I rely -- sorry, in support of the analysis --

5 THE CHAIRMAN: That the rights are exhausted at the --

6 MR LAVY: At the point of first sale. I rely on UsedSoft
7 and Ranks and the doctrine of exhaustion more generally;
8 that what UsedSoft decides is once you have a first sale
9 the rights in that copy are exhausted and they can't
10 retrospectively unexhaust themselves.

11 That's my point on that.

12 So there was only one more point I wanted to make on
13 preliminary issue 1. And I'm sorry, we have gone
14 slightly round the houses on it. But the good news is
15 it is the longer issue of the two, though I think I have
16 picked up everything I needed to in my learned friend's
17 skeleton, except one point, and that's what they say at
18 paragraph 38.2, penultimate sentence:

19 "A single copy of the software is downloaded by the
20 licensee by Microsoft which can then be installed on all
21 qualifying devices."

22 Now, we have actually had the discussion about
23 whether that matters or not, and in my submission it
24 doesn't matter. So I'm not going to go over that again.
25 But I just wanted to flag that factual point, that's set

1 out there in 38.2, isn't, in my submission, what the
2 evidence actually says. The evidence is rather woollier
3 than that.

4 The relevant evidence, so far as we can see, is
5 Mr Clarke's evidence, which I don't propose to go to,
6 but it's paragraph 8 of Mr Clarke at D2, tab 4, page 35.
7 What he says is: a single link was provided to the
8 customer for downloading the product it ordered. That
9 doesn't mean you have to download it once and put it on
10 a server. That may be the distribution mechanism, but
11 the evidence --

12 (overspeaking)

13 THE CHAIRMAN: (overspeaking) simply uses something.

14 MR LAVY: Exactly, the evidence doesn't tell us one way or
15 the other. So I won't repeat my submission that it
16 doesn't matter anyway, because we had that debate
17 earlier.

18 So, subject to any questions from the Tribunal, that
19 was all I wanted to say at this stage on PI 1.

20 THE CHAIRMAN: Let's move to PI 2, then.

21 MR LAVY: This -- luckily I think there are no scope issues
22 around this. It can be boiled down to the question: do
23 Office and Windows fall outside of the scope of the
24 Software Directive exhaustion regime? Because they have
25 non-program works. That's the exact question.

1 Now, it's common ground that they do contain
2 non-program works. There's a dispute as to an extent.
3 I will have to come on to that. But they do contain
4 non-program works and they fall broadly into two
5 categories.

6 There are things like the user interface, bits that
7 are essential for the software to be used at all. And
8 then there are things that aren't essential, in the
9 sense that they're not necessarily for the correct
10 functioning of the software, but you can't avoid
11 downloading them because Microsoft packages them in.

12 And so, as the Tribunal will have seen from our
13 skeleton, VL accepts that there are -- that these works
14 exist and they are substantial, in the sense of
15 non-trivial and copyright subsists in them or at least
16 as a matter of principle. And my submissions today
17 proceed on that basis.

18 We don't accept that copyright subsists in
19 absolutely everything that Microsoft relies on because
20 we say, actually, there isn't adequate evidence to make
21 that sort of finding.

22 THE CHAIRMAN: It's not really relevant.

23 MR LAVY: It's not really relevant. It really doesn't
24 matter for the preliminary issue.

25 As with the first one, I will start by giving you

1 the sort of four corners of the submission and then
2 I will go into some detail where I need to.

3 The starting point is that the regimes under the
4 Software Directive and the InfoSoc Directive are
5 incompatible when it comes to exhaustion. And
6 Tom Kabinet held that for works falling under the
7 InfoSoc Directive making available for download from a
8 website constitutes communication to the public and not
9 a distribution. And it follows that there's no
10 exhaustion for intangible copies under the
11 InfoSoc Directive or, being probably more accurate about
12 it, for works that fall under the InfoSoc Directive
13 downloads aren't copies at all; they're communications
14 of the work to the public.

15 And in consequence, where a single work consists in
16 part of computer program elements and in part of
17 non-program elements, a single exhaustion regime, either
18 under Software Directive or under the InfoSoc Directive,
19 has to prevail and govern the provision for the entirety
20 of the work, in the sense that resale of an intangible
21 copy of the work can't both be permitted and not
22 permitted at the same time. And that's the problem.

23 In my submission, the question of which of the two
24 regimes prevails in those circumstances is determined by
25 looking at the work as a whole and asking how in

1 substance it's properly to be characterised.

2 So, if looked at as a whole, the working substance
3 is a computer program, albeit one which has non-program
4 work elements attached to it and all the rest of it,
5 then the exhaustion regime and the Software Directive
6 applies and, after a first sale, the whole of that work
7 can be resold, including its non-program elements. But,
8 if looked at as a whole, the work is not aptly to be
9 characterised as a computer program, then the
10 Information Society Directive applies and there's no
11 exhaustion of the whole on first sale.

12 And what I am going to seek to do over the next hour
13 or so is show that's actually the only approach that
14 works. It's the only approach that makes the Software
15 Directive regime workable in practice, it's the only one
16 that makes economic sense, and it's the only one that's
17 consistent with the broader authorities as to how you
18 deal with these things.

19 Now, when one applies that test to Office and
20 Windows -- they are both computer programs. Yes, they
21 incorporate all sorts of non-program elements and no
22 doubt a lot of investment went into those non-program
23 elements. A lot of investment goes into all aspects of
24 Microsoft software, I'm sure.

25 But the program elements -- and this is the

1 important point -- are subsidiary -- sorry, the
2 non-program elements are subsidiary to the program
3 elements from a practical and economic perspective. And
4 to put it in sort of slightly sort of vernacular terms,
5 you don't buy Windows because you want some nice icons
6 to appear on your desktop; you buy it because you need
7 an operating system. And you don't buy Office because
8 you like its clip art and its ribbon, you buy Office
9 because you want a word processor, a spreadsheet and so
10 on. In each case --

11 THE CHAIRMAN: I understand that submission, but where is
12 the evidence that supports that?

13 MR LAVY: Well, on the question of what people are buying,
14 we do have evidence that I am going to come to. Horley
15 gives some evidence on it. Golev gives some evidence on
16 it.

17 THE CHAIRMAN: But you haven't told us what the programs --
18 even in the evidence -- told us what the programs do.

19 MR LAVY: No.

20 THE CHAIRMAN: Obviously, they're very well known programs.
21 I appreciate that. But I'm just a little nervous about
22 taking judicial notice of the extent to which the
23 operating parts of the program dominate over the
24 aesthetic parts of the program, if I can put it that
25 way. It's an inaccurate description, but you get my

1 point?

2 MR LAVY: Yes. This morning, what the Tribunal said is

3 there should be an agreed statement on that, exactly

4 that.

5 THE CHAIRMAN: Yes.

6 MR LAVY: That is obviously something we will address, but

7 haven't yet.

8 THE CHAIRMAN: Yes, all right. So that will be the source

9 for our -- and now, of course, it will be bitterly

10 disputed.

11 Hopefully not.

12 MR LAVY: Hopefully not. But, as a result, I say Windows

13 and Office do fall under the Software Directive

14 exhaustion regime, especially for software. And they

15 are subject to exhaustion on first sale regardless of

16 whether tangible or intangible copies.

17 Now, Microsoft's case, as I understand it, is if the

18 software contains non-program works, which it does,

19 there can be no exhaustion of intangible copies, full

20 stop.

21 But, if that's right, the decision in UsedSoft has

22 very limited application indeed because the vast

23 majority of software contains some non-program works.

24 Most modern software has a GUI. But, even forgetting

25 that, you have error messages, you have --

1 THE CHAIRMAN: An error message isn't necessarily
2 a copyright work.

3 MR LAVY: No. Although my learned friends claim error
4 messages as one of their categories --

5 THE CHAIRMAN: They may do, but it's not necessary.

6 MR LYKIARDOPOULOS: Can I ask you, just so I understand your
7 case in relation to looking at the work as a whole --

8 MR LAVY: Yes.

9 MR LYKIARDOPOULOS: -- what test do you say we should be
10 applying on that? Obviously, you have referred to the
11 Court of Justice, both in Nintendo and in the eBook case
12 about reference to -- especially eBook -- about
13 incidental.

14 MR LAVY: Yes.

15 MR LYKIARDOPOULOS: Are you relying on that as the test?

16 MR LAVY: I am. And I'm going to come on to that in some
17 detail.

18 MR LYKIARDOPOULOS: Right.

19 MR LAVY: But, yes, the test is the test in Tom Kabinet.

20 MR LYKIARDOPOULOS: Okay. The other thing -- just when you
21 come to it, not now. I don't want to take you out of
22 your way. I would also quite like you to address it.
23 Both of you, to a certain extent, have been addressing
24 this in relation to the works and asking us -- we're
25 going to come on to explain how we do it -- how the work

1 is to be characterised. When we were looking at issue 1
2 and we were looking at UsedSoft, we were looking at the
3 Court of Justice, which was looking at the downloading
4 of the copy and the user licence agreement forming
5 an indivisible whole and was looking at it almost like
6 the transaction, if I can put it that way, and
7 considering: well, what has been sold?

8 That's not so much looking at the work as what does
9 exhaustion bite on, it could be said. And I would also
10 like to hear, if you wouldn't mind, your views on
11 whether that is relevant and whether the right test is
12 looking at the work or whether it's looking at --

13 MR LAVY: The product.

14 MR LYKIARDOPOULOS: And also what has actually been --

15 MR LAVY: Sold --

16 MR LYKIARDOPOULOS: -- sold and whether that is, for
17 instance, a sale of a computer program or a sale of
18 something not.

19 MR LAVY: Yes, that's --

20 MR LYKIARDOPOULOS: I address that to both of you.

21 MR LAVY: I will give you the very short answer now, which
22 is that fundamentally one is, as with
23 preliminary issue 1 in my submission, looking at this
24 from an economic and practical perspective and not
25 a technical copyright law perspective. Although

1 obviously one has to look at copyright law as well.

2 And, therefore, it is the thing that is bought is the
3 subject matter of the test.

4 I am rather lazily -- and there are points being
5 raised -- I will try not to, but been referring to it as
6 "the work". But that's a rather overloaded term because
7 obviously the work is also the individual bits inside
8 it.

9 One is asking a question -- it's a two-phase test.

10 One: what has been with bought?

11 Two: is that thing to be characterised -- and I will
12 unpack that a bit later -- as software, a computer
13 program, or not?

14 THE CHAIRMAN: I understand that. So you have the -- you
15 will have to help us on the Tom Kabinet test, because
16 they say that computer program is incidental, but
17 I don't think they were putting that forward as
18 a universal test. So you can have at either end the
19 incidental, the incidental software or the incidental
20 artistic work. But you still have a whole bunch of
21 stuff in the middle and you have to -- Mr Hobbs will no
22 doubt say this is one of them. This is not incidental;
23 these are really important aspects of the program. So
24 we then -- if it's a -- so that's easy whether it's
25 5 per cent or 1 per cent, but what do we do with the

1 60/40s? We still have to decide which directive
2 applies. The incidental test can't be the right one
3 because that only deals with --

4 MR LAVY: I think it depends what you mean by "incidental".
5 But I will clearly address this point. It's important.
6 It is an important point.

7 Before looking at the authorities on this -- which
8 I will -- in light of just some of the points in my
9 learned friend's skeleton it is worth just spending
10 a few moments saying what we're not saying because it's
11 quite important. And I have in mind in particular the
12 sections in my learned friend's skeleton about the
13 domestic authorities and what bits of what can be
14 characterised as works under the InfoSoc Directive and
15 so on.

16 We're not saying, firstly, that there's no copyright
17 in non-program works. Obviously not. We're not saying
18 that non-program works aren't protected under the
19 InfoSoc Directive either, and so one can quite see if,
20 for example, you get -- someone takes the Microsoft
21 Office ribbon and copies it and uses it in their own
22 software, well, Microsoft has a copyright infringement
23 action, no doubt, and that's under the
24 InfoSoc Directive. We're not saying that.

25 And we're also not raising any sort of magic here.

1 We're not saying when you have non-program works which
2 are embedded within software they somehow become
3 software. We're not saying that either. They remain
4 non-program works.

5 Our point is that notwithstanding that they remain
6 non-program works, and notwithstanding that those things
7 are protected under the InfoSoc Directive, a copy of the
8 whole can nonetheless be the subject of a first sale
9 under Article 4(2) of the Software Directive. And, when
10 that happens, the consequence is that the copy of the
11 whole can be resold.

12 And so this isn't a case about the nature of
13 subsistence of copyright in various aspects of things
14 that might find their way into software.

15 It's very narrowly and specifically concerned with
16 the circumstances in which Article 4(2) of the
17 Software Directive are engaged.

18 It's also worth saying that just -- I have said
19 several times this morning, and I will no doubt say
20 again, the CJEU does require one to look at this through
21 a practical and economic prism, not a sort of a very
22 technical copyright law prism. That said, it is worth
23 emphasising, in view of some of the things my learned
24 friend has said, that applying the Software Directive in
25 the way that we suggest it need to be applied doesn't

1 actually require anything like non-program works to
2 become programs. The position could be analysed in
3 a much more straightforward way.

4 As we saw in the context of PI 1, where Article 2 of
5 the Software Directive is engaged in relation to a copy
6 of a computer program that copy carries with it the
7 accompanying user licence and that's because, as
8 UsedSoft itself explains clearly, without the licence
9 the copy will be useless and the purchaser wouldn't be
10 able to enjoy their ownership right.

11 And that logic, in my submission, can, and I say
12 does, plainly extend to the user licence relating to
13 non-program elements for precisely the same reason. If
14 it doesn't, the purchaser wouldn't be able to enjoy
15 their ownership rights in the copy of the software. And
16 that goes both for elements like user interfaces,
17 without which as a matter of technicality the software
18 can't be used, but also other non-program works which
19 the rightsholder has chosen to package in a way that
20 means you can't in fact exercise your right to resell
21 without those things because the rightholder has
22 packaged them all together in a way that doesn't allow
23 for separately downloading them.

24 So, standing back from an economic and practical
25 perspective, the exhaustion regime under the

1 Software Directive is engaged in respect of the whole,
2 where it's engaged at all, because the computer program
3 is the correct characterisation of the work. But, as
4 a matter of legal analysis, that doesn't involve
5 non-program works losing their identity as copyright
6 works in their own right subject to the
7 InfoSoc Directive.

8 MR LYKIARDOPOULOS: So, if I understand what you have just
9 said, we shouldn't be looking at the work, be it Office
10 or Windows, and trying to ascertain, just looking at
11 that work, whether or not the program elements are more
12 or less important than the non-program elements and the
13 ranking of those; we should be looking at it in terms of
14 the licence that was granted and seeing what licence was
15 granted and whether or not that included both or not,
16 and which is the most predominant element of that
17 because it's that that gives rise to the exhaustion --

18 MR LAVY: It's the thing which, as a matter of economic and
19 practical reality, was bought.

20 MR LYKIARDOPOULOS: Yes.

21 MR LAVY: Now, I (inaudible) for licence only because we
22 come back to the point about copies, and I'm currently
23 focused on one copy. So where one has -- if by
24 "licence" you mean the bundle of rights that comes with
25 a copy allowing you to use it, then I agree with you,

1 yes.

2 MR LYKIARDOPOULOS: You put it as the economic and practical
3 reality of what was bought.

4 MR LAVY: Exactly, yes.

5 MR LYKIARDOPOULOS: At the moment, I'm just assessing what
6 your submission is. And it seems to me what you're
7 asking to us look at is what you just put there, the
8 economic and practical reality of what was bought, which
9 maybe is slightly different than picking up Windows on
10 itself and trying to ascertain which bits are the most
11 important.

12 MR LAVY: It sort of depends what one means by "most
13 important". But can I come back to this once we have
14 seen the authorities?

15 MR LYKIARDOPOULOS: All right.

16 MR LAVY: Let's start with Nintendo. It's not actually the
17 most on point case, but it's the first chronologically.
18 That's at bundle 2, tab 31, and it's at page 791.

19 Now, this is not a case about exhaustion. Can
20 I assume a degree of familiarity with it?

21 THE CHAIRMAN: Yes.

22 MR LYKIARDOPOULOS: Yes.

23 MR LAVY: Thank you. That's very helpful.

24 So, I mean, it is worth emphasising that the
25 questions the court was addressing were not the same

1 issues that we're concerned with today. The relevance
2 of this case, in my submission, for today is that it
3 included, albeit somewhat en passant, a discussion of
4 whether the fact that Nintendo video games included
5 a software element meant that the InfoSoc Directive
6 didn't apply to them. So that's the interesting bit for
7 us.

8 That wasn't a question actually referred to the
9 court. The referring court had taken the view that
10 video games weren't computer programs as such. This is
11 CJEU doing their usual thing, and one sees that at
12 paragraph 16, at page 796. Just if you read that, you
13 will see what the referring court thought of the work.

14 And then the only three other paragraphs I would
15 invite the Tribunal, please, to read are 21 to 23, on
16 page 798.

17 (Pause)

18 So this passage has the usual slight element of
19 Delphic difficulty, but I draw two things from it.

20 The first is that in common with the referring court
21 the CJEU took the view that a computer game is to be
22 characterised as a complex matter and not as a computer
23 program, even though it obviously has computer program
24 elements in it.

25 And the second is that in those circumstances it's

1 not just the individual non-program elements protected
2 by the InfoSoc Directive, but the work as a whole. The
3 entirety taken as a whole.

4 Now, I will come back, I promise, in more detail to
5 the characterisation point. But I would say at this
6 stage that video games are really quite different from
7 software like Windows and Office. They're different in
8 kind and engage different principles because -- and this
9 is really the point we get out of 23 -- they contain
10 computer programs, but the program element is subsidiary
11 to what the court characterises as the narrative
12 pre-determined route.

13 Actually, that's from the referring court at
14 paragraph 16.

15 By which the authors make a group of images and
16 sounds appear together, with some conceptual autonomy.

17 So the way I would put that is that when one is
18 taking a computer game, it's not really fundamentally
19 a piece of software; it's a piece of entertainment. It
20 has a narrative; it has characters; it has everything
21 else and, of course, it's driven by a piece of software
22 without which the functionality doesn't work.

23 Now, as to the second point, because this is what I
24 want to spend time on now.

25 THE CHAIRMAN: It's more than driven by software. The

1 images and sounds are manifest in the program. They are
2 not --

3 MR LAVY: Well, they are.

4 THE CHAIRMAN: They are part of the code.

5 MR LAVY: Well, one has to be careful because it depends on
6 the facts. They may or may not be. It depends how the
7 game is developed. One can conceive of the images and
8 sound being part of the code, but one can also conceive
9 of them being resource files pulled in. But, as I say,
10 I think one has to look at this from a slightly higher
11 level perspective and ask oneself: what is one buying
12 when one buys a computer game?

13 And the answer is: one is buying a piece of
14 entertainment which consists of a whole bunch of
15 elements, graphics, sounds, narrative, game play and
16 software to stitch it all together and run it.

17 Now, as to the second point, context is really
18 important here. So Nintendo was of course a case about
19 TPM (inaudible). Those in practice apply to this as
20 a whole because either your game on a Nintendo cartridge
21 is TPM protected or it isn't. You can't have bits of it
22 protected. And because the issue affected the work as
23 a whole, it is, in my submission, rather unsurprising
24 that the court took the view that one directive had to
25 apply to the whole because anything else would be

1 unworkable.

2 The CJEU took a practical and realistic view of the
3 issue, not one which draws technical legal distinctions
4 between the computer program elements, where a slightly
5 different TPM regime would apply, and the non-program
6 elements. And when one stands back and looks at it,
7 when one asks: well, what TPM regime applies? It can
8 really only be the one.

9 Now, look at a slightly different question. If the
10 issue had been whether someone has unlawfully reverse
11 engineered part of the code, well then, plainly that
12 would be a Software Directive question and one might be
13 looking at articles 5, 3, 6 and so on. So it depends
14 what question you're asking as to how the directives are
15 engaged. And I say that's really all one can draw from
16 Nintendo, which is a case not about exhaustion as such.

17 The case which is critical to this issue is of
18 course Tom Kabinet and that's at tab 40 of the bundle,
19 starting at page 935. This time the issue of program
20 and non-program works did arise squarely in the context
21 of exhaustion.

22 Again, I will assume familiarity with the case.

23 THE CHAIRMAN: Yes, we have looked at this carefully,
24 obviously.

25 MR LAVY: Again, very grateful for that. The point of

1 particular relevance for our purposes, of course, is the
2 defendant's suggestion in that case that eBooks contain
3 software, which, interesting on the facts, it wasn't
4 clear whether the eBooks did contain software. But the
5 court was looking at: yes, but even if they did.

6 And that's the interesting point for us. And it's
7 the reasoning at paragraph 59 which is key. There's
8 plenty of other bits, but I want to start with
9 paragraph 59.

10 (Pause)

11 THE CHAIRMAN: Yes.

12 MR LAVY: So, again, here we see the whole work treatment
13 and the court asking itself whether the computer program
14 is incidental, which it says it is, or whether it's the
15 essential element of the work, which it says the book is
16 here. It's the penultimate line. So the
17 InfoSoc Directive applies to eBooks because even though
18 they may contain computer programs, those are merely
19 incidental to it. The text can't be read without it, so
20 in one way they're necessary. But the essential element
21 of the work as a whole looked at through the prism that
22 I say you look at these things is that it's a book.

23 If one asks in substance: what is an eBook? It's
24 a book. It's not a computer program; it's a piece of
25 literature.

1 And I'm obviously going to have to come back to
2 other parts of this judgment to say why they say what
3 they say in 59. But, in terms of the key principle to
4 be extracted, I say you do find it here, in 59, and the
5 key principle is that where you have a mixed work
6 containing computer programs and non-program elements
7 the question of exhaustion is addressed by reference to
8 one directive or another, not both. And the question of
9 which one prevails is determined by making an assessment
10 as to which element of the whole is the essential
11 element. That's the quote.

12 Put differently, I say the test actually is you
13 stand back and ask yourself in substance: is this thing
14 a software product or is it something else?

15 That's the test.

16 MR LYKIARDOPOULOS: I was just checking, they say at the end
17 of 59:

18 "As the Advocate General noted, at 67 of his
19 opinion, an eBook is protected because of its content,
20 which is the essential ... it must therefore be
21 considered an essential element."

22 And then he says the eBook is protected by copyright
23 not as a mere digital file, but because of its content,
24 which obviously must mean the literary content. It
25 does. That is to say literary work which it contains.

1 How are you saying that's relevant to the issue
2 before us?

3 I thought you accept that Office and Windows are
4 protected by two forms of content, both program and
5 non-program works, which doesn't seem to accord with
6 what the Attorney General on the court says here.

7 MR LAVY: I think it does. Sorry, this is my fault --

8 MR LYKIARDOPOULOS: I will happily blame you.

9 MR LAVY: Thank you. As ever these things are somewhat
10 tersely expressed, but what I say one can draw from
11 this -- and we will see why, because we have to look at
12 the context of this paragraph as well -- is that,
13 actually, it's slightly more than just saying because
14 a book is protected as a copyright work then the whole
15 thing has to be protected as a copyright work. What's
16 being said here is, to put it in the vernacular, the
17 book is the important bit. And that's why you have the
18 reference to the essential element which
19 I contra-counter with incidental.

20 MR LYKIARDOPOULOS: Then you're going to come on to how we
21 assess, in the current case, what the important bit is?
22 Or do you say that the non-program works in the current
23 case are incidental or are you --

24 MR LAVY: Well, I do say they're incidental when you look
25 properly what that means. But that really means they're

1 not the important bit. There's no magic in the word
2 "incidental".

3 MR LYKIARDOPOULOS: Are they setting out a test here at all?

4 MR LAVY: No.

5 MR LYKIARDOPOULOS: They're making an observation that the
6 computer program is incidental and they're making
7 an observation that the eBook is -- the content is
8 an essential -- is considered to be the essential
9 element.

10 MR LAVY: Yes.

11 MR LYKIARDOPOULOS: But, certainly, when one gets to the
12 incidental that doesn't seem to be a test at all. That
13 seems to be an observation.

14 MR LAVY: No, but --

15 THE CHAIRMAN: But the essential element; is that a key
16 finding in the context of that case or is that a test
17 generally? It seems to be a bit of a jump to say that's
18 a general test to be applied. It's not -- the court
19 doesn't seem to be saying that. It doesn't say: if you
20 want to know whether a work falls within a particular
21 directive you have to ask what the essential element is.
22 They're not saying that. In terms.

23 MR LAVY: They don't say that in terms, for sure. I don't
24 suggest they say that in terms.

25 What I say is that if one then -- one looks and sees

1 what they did there and -- I was about to do it again.
2 The AG -- I was about to call him the AG -- does this
3 slightly more effusively and, actually, he does come up
4 with something which is slightly closer to a test.
5 THE CHAIRMAN: But they don't follow.
6 MR LAVY: Which is why I took you to this. But, I mean, the
7 real point is, I say, if we follow it through, which
8 I am about to, it's probably fairer to say not that this
9 is the test that's being set out, but this is -- that
10 reasoning, by extension of that reasoning, by analogy of
11 that reasoning, that's what you have to do. And the
12 reason why you have to do it is because, if you don't,
13 a lot of things break.
14 THE CHAIRMAN: No, I understand.
15 MR LAVY: So, just very briefly, what's quite interesting is
16 Microsoft do accept the proposition that incidental does
17 seem to be setting out a hierarchical test. But they
18 say it's a mistranslation of a completely different
19 word.
20 I will deal with this point briefly. There's really
21 nothing in the point. If you're going to make a point
22 on translations, Google Translate doesn't get you very
23 far, not least because I typed the same stuff into
24 DeepL, for what it's worth, and I got the translation
25 "incidental" so go figure. One can't take anything from

1 that.

2 But the more important point is: one can't construe
3 words in a vacuum. I don't latch on to the word
4 "incidental" in a vacuum. I say "incidental" has to be
5 looked at as against "essential element".

6 The third point is, actually, even if you look at
7 Microsoft's table of translations, then the word
8 "incidental" doesn't sit alone, but it's "merely
9 incidental", "only incidental" and -- sorry, "only
10 accessory" in their view of the world, "merely
11 accessory".

12 So, if you actually look at the sentence as a whole,
13 it's pretty clear that what I'm drawing from the word
14 "incidental" doesn't turn on whether the word is
15 "incidental" or "accessory", but I'm not going to dwell
16 on that point.

17 Now --

18 THE CHAIRMAN: So what are you saying the test is?

19 MR LAVY: I'm saying --

20 THE CHAIRMAN: What are you saying the test is?

21 MR LAVY: The test is. One looks at the -- I'm going to
22 call it the product as a whole --

23 THE CHAIRMAN: Yes.

24 MR LAVY: And you ask yourself what, as a matter of economic
25 and practical reality, it is. You have to characterise

1 it.

2 THE CHAIRMAN: Yes, I have that bit.

3 MR LAVY: And you have.

4 THE CHAIRMAN: How do you answer that question?

5 MR LAVY: In terms of Office and Windows?

6 THE CHAIRMAN: As a legal approach, how do you answer that

7 question?

8 MR LAVY: It's like anything in that. It has to be very

9 fact dependent. In a sense it's an assessment. It's

10 not a bright line legal test. There will be some cases

11 which are completely obvious and there will be some

12 cases which are more difficult. I actually say that

13 we're in a world where it's completely obvious on our

14 particular facts. But, undoubtedly, as I say, as with

15 many legal tests, there will be -- sometimes it's quite

16 easy to apply and sometimes it's very difficult to

17 apply, but that's ultimately an evidential question.

18 But the reason I say you really have to -- the law

19 forces you down this route is not just what it says at

20 paragraph 59. But it's the conclusion that actually

21 I think is: it flows from the logic of what the court

22 has done in Tom Kabinet. It's implicit also in UsedSoft

23 and Ranks that this is the right approach. And also,

24 it's, in my submission, the only approach which is

25 consistent with wider --

1 THE CHAIRMAN: Does this point arise in UsedSoft?

2 MR LAVY: It didn't directly, no.

3 THE CHAIRMAN: It didn't arise at all?

4 MR LAVY: Well, save that the point, when raised implicitly,
5 because in UsedSoft they decided that software which is
6 certain intangible comes with the software can be
7 subject to exhaustion. They were dealing -- this is
8 2011, it wasn't sort of back in pre-historic time.
9 I don't put the UsedSoft point higher than this: it's
10 pretty surprising that no one put their hand up and
11 said: hang on a second, if this was thought to be
12 a problem, are we really suggesting that Oracle doesn't
13 have any interfaces, doesn't have any error messages,
14 doesn't have any ...

15 THE CHAIRMAN: We don't know. But the fact is the point
16 wasn't taken.

17 MR LYKIARDOPOULOS: Nor is it in Ranks.

18 THE CHAIRMAN: It wasn't argued.

19 MR LYKIARDOPOULOS: I don't think it was in Ranks either,
20 was it?

21 THE CHAIRMAN: No.

22 MR LAVY: Well, in a sense, I can only take that point so
23 far. Let's start with Tom Kabinet and the logic of
24 Tom Kabinet.
25 Paragraphs 57 and 58, which is just above where we

1 have been. So, here, the court is explaining why
2 exhaustion applies only to tangible copies under the
3 InfoSoc Directive, but to tangible and intangible copies
4 under the Software Directive. Can I ask you just to
5 read that passage?

6 THE CHAIRMAN: 57 and 58?

7 MR LAVY: Yes, please.

8 (Pause)

9 THE CHAIRMAN: Yes.

10 MR LAVY: So software and eBooks are fundamentally different
11 beasts, is the point being made here. And, again, we
12 see this looked at through an economic prism. There's
13 an economic rationale for a different regime applied,
14 and that's what we see.

15 Now, Spooner actually deals with this in more detail
16 at page 955. And I should sort of correct myself.
17 Spooner was followed; it was AG Bot and UsedSoft he
18 wasn't followed by.

19 THE CHAIRMAN: Sorry, I beg your pardon.

20 MR LAVY: And I vigorously nodded along, as tends to happen.

21 THE CHAIRMAN: Sorry.

22 MR LAVY: Can I just ask you to have a look at AG61 to 63,
23 please? So starting at the bottom of 995.

24 THE CHAIRMAN: Yes.

25 MR LAVY: So, just considering that rationale, software that

1 happens to have non-program works in it, so Microsoft
2 Office with its user interface and so on, behaves
3 economically like software. It doesn't behave
4 economically like in musical, literary or
5 cinematographic work. The rationale that leads to the
6 different treatment of eBooks and software is explained
7 by Spooner, and rather more tersely by the court,
8 suggests there should be no difference in treatment
9 between software which happens to contain non-program
10 works and software that doesn't, if there is such
11 a thing.

12 Now, that rationale also provides a potential prism
13 through which to ask -- to sort of look at the
14 assessment question, if I can put it that way. Does the
15 overall product behave like software from an economic
16 perspective or does it behave more like a literary,
17 musical or cinematographic work? I'm going to start
18 using that word. If it behaves like software, that's
19 generally going to be a good indication that it's
20 a computer program for the purposes of the analysis that
21 I say the court should adopt.

22 And standing back, what we see here is the issue of
23 exhaustion has to be approached through the prism of
24 economic and practical reality, not legal technicality.
25 Something that in substance is software from a practical

1 economic perspective engages the exhaustion regime and
2 Software Directive, even if it happens to have some
3 parts that, looked at in isolation, would fall within
4 the remit of the InfoSoc Directive because those -- the
5 fact that it contains those parts doesn't affect the
6 economic or practical behaviour of the product, or what
7 the rightsholder might want to do with it.

8 Now, at this point, it's helpful to look at the
9 Valve Corporation, which is the French case my learned
10 friends rely on, and that's in bundle 3, tab 61. And if
11 you're not using tabs, it's 1579.

12 So this was a case brought by a consumer rights
13 organisation in France seeking removal of a contractual
14 term from the steam video game distribution platform
15 preventing resale of subscriptions. That went to the
16 Cour de Cassation. On the question of whether there
17 should have been a reference to the CJEU on the point,
18 on the point of exhaustion in video games, basically.
19 Intangible copies of video games.

20 And we can see the proposed reference at paragraph 6
21 of the judgment, on page 1581, and the court held that
22 there was no need for a reference. My learned friends
23 have cited the relevant paragraphs, but it's really 11
24 to 15 are the key ones.

25 (Pause)

1 THE CHAIRMAN: It struck me as a little bit -- just, I mean,
2 what they mean in paragraph 14 that a light software can
3 be used again and again by new players several years
4 after its -- what's the distinction?

5 MR LAVY: So, well, this is really the distinction that
6 Spooner is making in Tom Kabinet.

7 THE CHAIRMAN: Yes. I'm not sure I understand it there
8 either.

9 MR LAVY: So, as it were, where you have a computer program,
10 something you're using as a tool, you're going to buy it
11 because you need it. You'll keep it until it's
12 obsolescent and then you have to buy the new version,
13 you will upgrade it, whatever.

14 Whereas with something that's entertainment, like a
15 video game or an eBook. You read it, watch it, play
16 with it once, maybe a few times. Then you're bored of
17 it. You've done it, so you get rid of your copy, and by
18 selling it on the second-hand market, if there is
19 second-hand market, then you're on to something else.
20 The point is --

21 THE CHAIRMAN: They all become obsolete because computers
22 change and anything used on the computer -- I am often
23 told I can't do this because I need to update my system
24 software or something, and whether it's an eBook or
25 whether it's a computer program, they all seem to

1 become -- if that's what "obsolete" means, they all seem
2 to become obsolete. And we have books in the Bodleian
3 Library that are thousands of years old. I'm not quite
4 sure what this distinction is between --

5 MR LAVY: The point is it's about their ongoing worth. And
6 if you think about the reason why you're updating your
7 software, in truth it's because you're being forced to
8 by the technology. But, just setting that aside, it's
9 because the software that you bought, if you don't patch
10 it, becomes a liability, effectively stops working. It
11 stops doing you need, and it's at that point you no
12 longer have need of it.

13 The distinction --

14 THE CHAIRMAN: Would the same happen with a video game?

15 MR LAVY: No.

16 THE CHAIRMAN: Updating and patching as things change. It
17 is, in that sense, a computer program.

18 MR LAVY: It's certainly got computer programs in it. But
19 the point is, though, it's fundamentally a piece of
20 entertainment which you can be bored of and want to get
21 rid of before it's actually obsolete, so it can be
22 of value -- it's more likely to be of value on resale.

23 THE CHAIRMAN: If it's Hamlet, then you become bored of it,
24 but --

25 MR LAVY: The problem is with all these sorts of tests, at

1 one level it's always going to depend. But the broader
2 economic point that's being made here is that when you
3 take video games as a whole they behave more like, say,
4 books. They're entertainment. You use them. Once
5 you're bored of them you get rid of them.

6 Soft computer programs generally are different in
7 that you keep them until they're obsolete and then they
8 no longer have worth.

9 Now, obviously, that's not --

10 THE CHAIRMAN: Really? Anyway.

11 MR LYKIARDOPOULOS: Just so -- I am slightly lost now. What
12 is it you want to submit about this decision?

13 MR LAVY: The primary thing, and the reason I went to it
14 actually, is because my learned friends rely on it and
15 say it's a complete answer to PI 2. I say, no, it
16 isn't. If you look at the reasoning in paragraphs 14
17 and 15 in particular, it's drawing the distinction that
18 I say one should be drawing, albeit I of course accept
19 that on particular facts it can be hard to make
20 an assessment. So this is not -- this --

21 MR LYKIARDOPOULOS: You draw from this that they're, again,
22 saying one should jump one way or the other?

23 MR LAVY: Yes. Jump one way or the other. And with
24 computer games you typically don't jump the same way as
25 with software. That's the short point.

1 MR LYKIARDOPOULOS: (Overspeaking) and we accept or don't
2 accept that computer games differ in the
3 Court of Justice and the French court.

4 THE CHAIRMAN: They're different for a number of reasons.
5 I'm just not sure this is the most easily
6 understandable.

7 MR LAVY: To make it absolutely clear: had my learned
8 friends not referred to this case neither would I have
9 done.

10 So that's -- brings -- I'm not going to raise
11 UsedSoft again, but I will just say in Ranks. I'm sure,
12 Mr Chairman, you will think exactly the same point,
13 which is the point simply wasn't raised. But I say it
14 is significant. You have a case which is dealing with
15 exhaustion, dealing with -- at least discussing both
16 tangible and intangible copies.

17 You have Microsoft as one of the parties to that
18 case. It's dealing with Microsoft software, the very
19 software we're talking about in this case, and no one
20 says: hang on a minute because Office and Windows are
21 stuffed full of --

22 THE CHAIRMAN: As you point out, Microsoft only had this
23 bright idea relatively recently. Someone in the legal
24 team may or may not become a hero or heroine, we shall
25 see.

1 MR LAVY: But I don't take that point beyond that.

2 THE CHAIRMAN: It may just not --

3 MR LAVY: It may just not have arisen.

4 THE CHAIRMAN: That doesn't mean it's a bad point.

5 MR LAVY: No. I suppose this is of a piece, isn't it? As

6 the chairman knows well from previous hearings, this is

7 a market that's been going on a long time. This is --

8 the point has arisen when it's arisen.

9 MR LYKIARDOPOULOS: And, really, a better point you're

10 coming to, perhaps shortly, is whether or not it drives

11 a coach and horses through Article 4(2).

12 MR LAVY: My very next point, yes.

13 MR LYKIARDOPOULOS: Address us on that.

14 MR LAVY: EU law principles. But, really, I'm going to take

15 two together. One is the *lex specialis* point. We have

16 a *lex specialis* under Article 4(2) of the

17 Software Directive. The fact that for things within its

18 scope a *lex specialis* takes precedent is trite law. We

19 have this in the commission case. I don't propose to

20 look at it.

21 The second and related point is that directives have

22 to be interpreted in accordance with *effet utile*. They

23 have to be interpreted in a way that gives them

24 effectiveness. And, again, we have an authority

25 reference, but it's trite law. I don't propose to go to

1 it. I'm going to just focus on applying those
2 principles.

3 If the exhaustion regime under the
4 Software Directive doesn't have effect in relation to
5 software that contains non-program works, then
6 exhaustion of intangible copies under Article 4(2) --
7 and we know that Article 4(2) does deal with intangible
8 copies because that's what UsedSoft tells us -- would
9 be -- well, I say of almost no practical application
10 because, as I have already observed, almost all
11 non-trivial software is going to contain some
12 non-program works. But I don't actually have to go that
13 far because, even if there's a computer program that
14 doesn't have any non-program works, then you have
15 a cadre of computer programs for which Article 4(2)
16 isn't allowed to apply because whenever there's
17 a non-program work in a computer program the
18 Article 4(2) of the Software Directive, on my learned
19 friend's case, can't apply to that computer program.

20 THE CHAIRMAN: We don't have a feel for whether that's
21 10 per cent of computer programs, 80 per cent of
22 computer programs? I mean, I just don't know enough
23 about the computer programs used in the banking industry
24 or engineering, or how many of them have -- you're
25 making a reasonable speculation, but it would seem to be

1 a speculation.

2 MR LAVY: But, even if it's a subset of them, my points

3 still stand in respect of that subset. You have

4 a directive which purports to govern the exhaustion

5 position in relation to intangible copies of all

6 computer programs. There's, on any view, a non-trivial

7 subset of those computer programs, namely, for a start,

8 everything with a GUI, which is not, on my learned

9 friend's case, subject to that exhaustion regime.

10 Therefore you're taking a very big chunk out of the

11 effet utile even if it's only a subset. And for those

12 cases -- for all that software which does come with

13 NPWs, well then the lex specialis for software somehow

14 doesn't bite on them.

15 So I do say in a sense, even if one sets aside my

16 submission that in the real world that's most of them,

17 the point is still live. You have the lex specialis

18 problem, you have the effet utile problem because the

19 Software Directive doesn't say it's intended to deal

20 with a subset of software. It's meant to be dealing

21 with all software. So that's my point on that.

22 And if one looks back at UsedSoft, although, yes, of

23 course UsedSoft isn't dealing with this specific issue,

24 but the reasoning in UsedSoft is very, very focused on

25 effet utile and one can see that at paragraphs 48, 49.

1 In fact, it is probably worth looking briefly, if
2 I may ask you to go back to tab 28 ...

3 THE CHAIRMAN: Sorry, what -- 48, did you say?

4 MR LAVY: At tab 28, paragraphs 48 and 49, which are on
5 page 762.

6 THE CHAIRMAN: And the point you're making is?

7 MR LAVY: Is that the reasoning for the UsedSoft decision is
8 very much focused on this idea of a faire à tire giving
9 the Software Directive in Article 4(2) in particular
10 effect. And, yes, of course we're talking about
11 a different sub-issue here, but it comes back to the
12 overarching point I have been making, which is that
13 we're dealing with a world in which it's the economic
14 and practical reality of the matters. You have
15 a judgment here, the key judgment on exhaustion of
16 intangibles under Article 4(2), and what it says is, you
17 know, you have to look at the effet utile and that's
18 really what I draw from that. And the same point again
19 at 8223 and we won't go to it.

20 MR LYKIARDOPOULOS: You would also rely on paragraph 61 with
21 your economic point of view, where they say the sale of
22 a program downloaded from the internet is similar,
23 online is functional equivalent of material. Different
24 from the Court of Justice in Kabinet talked about in 59,
25 58, and 57 about eBooks and books.

1 MR LAVY: Yes. And that's the equal treatment point.

2 That's the next principle. So you have *lex specialis*,
3 you have *effet utile*, then you have this precisely this
4 point, which is the principle of equal treatment. When
5 you have things which are similar situations they have
6 to be treated in a similar way, unless a different
7 treatment is objectively justified. And that's the
8 point at 61.

9 And it is very difficult to see how differential
10 treatment of software where the user interface without,
11 for example, can actually be justified, or indeed
12 software bundled with clip art or which the purchaser
13 didn't specifically ask for, but the rightsholder chose
14 to include in software that doesn't have that. How do
15 you objectively justify that distinction?

16 So, from an economic and practical perspective, the
17 two really are the same. In both cases we have
18 a perpetual licence. The rightsholders receive full
19 consideration for the copy being in circulation. That's
20 the price that's been voluntarily charged for the
21 package of stuff that's delivered on a perpetual licence
22 basis. So, if purchase of a perpetual licence exhausts
23 the distribution rights in the computer program element,
24 well, why not the rest as a matter of just economic
25 analysis and common sense?

1 And as you say, sir, just as the principle of equal
2 treatment in Tom Kabinet was used as a rationale for
3 treating tangible and intangible copies of software in
4 the same way, but not eBooks, because they said they
5 wasn't an objective justification there, I say there's
6 an equal rationale for treating all software in the same
7 way, regardless of whether it happens to have
8 non-program works in it.

9 But there's another aspect of equal treatment, too,
10 which is if my learned friends are right it means that
11 there's no difficulty reselling tangible copies because
12 under InfoSoc, of course, that's an article -- that's no
13 drama -- than there is with intangible copies. Now,
14 what's the objective justification there of saying
15 Microsoft Office can be resold on a CD ROM, but not its
16 via internet download? I think that's an utterly
17 illogical distinction.

18 I am reminded that I need to have a transcriber
19 break.

20 THE CHAIRMAN: Yes. How are we doing?

21 MR LAVY: We're doing well, actually. We're definitely
22 going to finish before the end, and I will leave myself
23 at least a little bit of time for reply.

24 THE CHAIRMAN: Very good.

25 (3.14 pm)

1 (A short break)

2 (3.24 pm)

3 MR LAVY: So the final and related principle, which I'm not
4 going to dwell on because we have already touched on it,
5 is free movement and the Article 36 point about
6 objective justification. Just to flag that we cite
7 Deutsche Grammophon, paragraph 11, for that proposition.
8 That's tab 17, page 512. And also I'm going to flag
9 paragraph 63 of UsedSoft, which deals with that point.
10 But it's effectively the same submission, so I won't do
11 it again.

12 So those are the reasons why, in my submission, the
13 correct approach under EU law is as I say it is.

14 I need to do two more things now. One is to briefly
15 deal with a point -- I will try to do this briefly --
16 that my learned friends make about the treaties, WCT.
17 And then I want to just touch on how this applies and
18 a little bit about the evidence.

19 So, on the treaties, so really the point I have to
20 pick up is paragraph 102 of my learned friends'
21 skeletons, which says the treaties draw a fundamental
22 distinction between a program and non-program works.
23 They don't. That's simply wrong, I'm afraid, and once
24 that error is corrected Microsoft's argument about the
25 treaties fall away, because if the treaties preclude

1 digital exhaustion, which is what Microsoft suggests,
2 then UsedSoft itself has to be contrary to the treaties
3 in allowing for additional exhaustion. And even
4 Microsoft is not arguing that.

5 The true position is that there's no difficulty with
6 digital exhaustion from a treaty perspective. They
7 don't provide for it; neither do they prohibit it. And
8 really the key to unlocking this is to realise that
9 there's no distinction between programs and non-programs
10 under the treaties.

11 WCT, extended copyright protection to computer
12 programs, we have WCT in the third authorities bundle
13 and it's tab 55.

14 THE CHAIRMAN: By the way, I think there is not
15 an explanatory memorandum for the Software Directive, is
16 there?

17 One has been produced?

18 MR LAVY: I don't think so. There's -- there is -- I think
19 you've probably taken judicial notice of the fact that
20 if either party thought it was useful it would be in
21 there.

22 So page 1360 of tab 55, Article 4. This is WCT
23 dealing with computer programs. Computer programs are
24 protected as literary works in the meaning of Article 2
25 of (inaudible).

1 So that's the point there. This was how it's done.

2 There's no special category under WCT for software.

3 They're just protected as literary works. And, of

4 course, while we're here, if we flip over to the next

5 page, 1361 --

6 THE CHAIRMAN: We have the optional exhaustion.

7 MR LAVY: We have exhaustion. But what you see with the

8 exclusive right of distribution, it's authors of

9 literary and artistic works. There's nothing specific

10 about computers there. So computer programs are dealt

11 with in the same way as any other literary work under

12 Article 6.

13 So that's the first point.

14 And, by the way, it's the same under Article 10 of

15 Tribbs, but I'm not going to go there. So there is in

16 fact no distinction between computer and non-computer

17 works under the treaties. And so once one sees there

18 are no special categories for software, as I say, that

19 really is the end of my learned friend's argument on

20 this.

21 But we can see, obviously, at Article 6, how WCT

22 deals with exhaustion under Article 6(2). The only

23 point I make, apart from no special treatment for

24 software, is that contracting parties are free --

25 THE CHAIRMAN: (overspeaking).

1 MR LAVY: -- and that really is the end of it. And of
2 course the EU went a different way with Tom Kabinet, but
3 that's not a treaty problem. We have set out in our
4 skeleton why we say the agreed statement is a false
5 reliance, but given time I wasn't really proposing to go
6 there.

7 The two bits for your sort of evening reading, if I
8 could be so presumptuous, if you were interested in this
9 treaty point, the agreed statement on Article 6, at
10 paragraph 6.4.

11 THE CHAIRMAN: I understand why you're talking about that.
12 Yes, the agreed statement.

13 MR LAVY: Article 6.4 which is tab 56 --

14 THE CHAIRMAN: I have looked at that.

15 MR LAVY: The short point on that is it's talking about
16 minimal levels of protection. There's nothing to stop
17 you having an intangible distribution right. It's just
18 not prescribed. And really, as I say, one comes back to
19 the point -- and this is why I am rushing through it,
20 really -- UsedSoft says what it says. No special
21 treatment for software and that's the end of that on the
22 treaties point.

23 It is worth -- one other point, after UsedSoft went
24 back down to Germany, Oracle sought to argue precisely
25 that in Germany, that the UsedSoft decision was contrary

1 to the treaties. One sees that in UsedSoft 2.

2 THE CHAIRMAN: Yes.

3 MR LAVY: The chairman is familiar with it. It's
4 paragraph 38. The court in Germany explains why that's
5 wrong. That applies, too.

6 So application to Office and Windows. A few points
7 to make briefly on the evidence.

8 There is plainly voluminous evidence on Microsoft's
9 part as to various categories of NPWs. I do say that
10 evidence has to be -- it may not matter at the end of
11 the day, but it has to be treated with a degree of
12 caution. A few just headline points.

13 A very big play is made about how much stuff there
14 is. But, actually, what one sees if one looks at the
15 bundles, the e-bundles that deal with the actual works
16 is there's quite a lot of duplication. If you look at,
17 for example, E3, E5, E8, they seem to us to be basically
18 identical. Some of the material in those bundles, in my
19 submission, copyright simply obviously doesn't subsist
20 in them, things like just a block of black or something.
21 But that doesn't really matter for present purposes. It
22 doesn't matter.

23 More importantly, the Tribunal have been given
24 a very one-sided picture because what we have no insight
25 into at all -- because Microsoft have chosen not to tell

1 us -- is all the effort, the works and everything else
2 that goes into the computer software development. And
3 even where we do have evidence of what's purportedly
4 user interface -- so Mr Harris's statement is the
5 obvious example -- great lengths are gone to, to explain
6 how much work the redesign of Office was. Well, maybe
7 so. But as Microsoft have actually confirmed in the RFI
8 response in respect of it, that includes the developer
9 work. So all that work is not just non-program works.
10 So one has to be a little bit careful.

11 MR LYKIARDOPOULOS: Sorry, you said we had one-sided
12 picture, no evidence. Is that fair or Mr Harris in his
13 second witness statement comes back a little bit, does
14 he not? Says he has to make some investment, would have
15 been well over 20 per cent of the total amount spent for
16 Office 2007. That's the user interface.

17 MR LAVY: Well, yes, but my point is that's not the
18 non-program works element for the user interface. As
19 Microsoft have now confirmed in an RFI response, his
20 response 8 or 9 to the most recent RFI, that includes a
21 big development team. We don't know what the size of it
22 is, but a development team that was working on it. So
23 Mr Harris had his project of redesigning the user
24 interface. Yes, some of that was no doubt coming up
25 with new icons and things, but it was also about

1 developing the software for the new user interface.

2 THE CHAIRMAN: Programming as well as --

3 MR LAVY: That's right. Programming as well. That's in

4 that 20 per cent. So that's my point. One can't

5 actually tease out what truly was the investment in the

6 non-program works.

7 THE CHAIRMAN: And the RFI; can you give a reference for

8 that?

9 MR LAVY: It's C13. It's an RFI response by letter. It's

10 an RFI we put in about this evidence.

11 MR LYKIARDOPOULOS: While we're looking at it, can you just

12 take us to which paragraph you're talking about?

13 MR LAVY: The paragraph in Harris?

14 MR LYKIARDOPOULOS: In the RFI.

15 MR LAVY: Yes, of course.

16 MR LYKIARDOPOULOS: If you have it. Or someone can give it

17 to you. I don't want you to use up time.

18 MR LAVY: Response 8.1 and I think 8.9, on page 3.

19 MR LYKIARDOPOULOS: Thank you. I see.

20 MR LAVY: So there was only one party who could give

21 an insight into all of this and they haven't.

22 In a way, in my submission, perhaps it doesn't

23 matter that much, because it's not a numbers game in any

24 event. But there is, actually, potential relevance to

25 this because the proportion of effort and investment and

1 so on that goes into program works versus non-program
2 works might be a factor that goes into the overall
3 assessment that the Tribunal might want to make as to
4 whether, looked at properly, these things are computer
5 program works -- computer programs for the purposes of
6 the Software Directive or not computer programs. So it
7 might be relevant.

8 As you will have seen, that's not our primary case.
9 Really, insofar as it's relevant it's relevant as
10 a proxy. No more than a proxy, really, for what the
11 important bit is, if I can put it that way.

12 The real test, in my submission, isn't quite that.
13 It is the more economically driven real world question:
14 are we looking at a computer program or are we looking
15 at something else?

16 And actually one way of answering that question --
17 are we looking at a computer program or are we looking
18 at something else? -- is something rather helpfully
19 suggested by Mr Spooner, AG Spooner and just one
20 paragraph I don't think we have gone to yet in his
21 opinion in Tom Kabinet is at tab 40, page 955.

22 Could I just ask you to read AG57, please?

23 THE CHAIRMAN: Tab --

24 MR LAVY: Tab 40, page 955.

25 THE CHAIRMAN: Sorry, which page?

1 MR LAVY: 955.

2 MR LYKIARDOPOULOS: It came out differently on the
3 transcript.

4 MR LAVY: That's probably because it's the time of day I'm
5 speaking unintelligibly.

6 THE CHAIRMAN: Where are we going?

7 MR LAVY: We're looking at AG57, top of the page:
8 "It is true that in accordance with ..."
9 Frankly it's really the last five lines which are
10 the most important.

11 MR LYKIARDOPOULOS: Sorry, and what are we getting, are you
12 basically just submitting sort of if it quacks like
13 a duck sort of thing.

14 MR LAVY: Yes, it's a tool of software, if it's
15 entertainment it might be a video game, if you read it
16 it's a book; exactly, yes. My point is it's not
17 a bright line test; it's an assessments test, but
18 that's -- what it's sort of a piece with and why it's
19 important is it comes back to the point I've made
20 probably far too many times, which is one has to look at
21 the practical and economic reality.

22 That's what all of this jurisprudence tells us; if
23 nothing else that's what it tells us. Everything else
24 has to slot into that, and if you do that with Office
25 and Windows I submit it's plain that they're computer

1 programs in the relevant sense. Yes, they have user
2 interfaces, they're entirely functional. You have
3 a user interface because otherwise you can't use it.

4 Yes, it comes with clip art, and all sorts of other
5 bits and pieces and we have evidence on this; that's the
6 Golev evidence at paragraphs 18 to 20.

7 Now, I wasn't going to dwell on it but it's probably
8 worth a quick look because of the admissibility question
9 that's arisen.

10 THE CHAIRMAN: Do you need it?

11 MR LAVY: Well, only in this sense, sir: we're in a slightly
12 sort of surreal world and I say that with no disrespect
13 to the Tribunal whereby we all know what Office and
14 Windows is, and then there's the question of how we use
15 it. But there's the evidential point that the Tribunal
16 has properly raised. And so, therefore, what we have
17 there is evidence of someone -- it's said this is
18 inadmissible in evidence. Actually, it's not it's
19 really trade usage evidence and it's someone speaking
20 from his own experience. One can ask what the weight
21 is, but it's perfectly admissible evidence.

22 And we also have Horley, who says basically the same
23 thing in his third statement, at paragraph 34. That's
24 at page D1/224.

25 MR LYKIARDOPOULOS: Sorry, I'm behind. In relation to the

1 Golev statement; what paragraphs were you relying on?

2 MR LAVY: 18 to 20.

3 THE CHAIRMAN: Can I ask, sorry, a very basic question? My

4 ignorance, if you have a piece of clip art or an audio

5 recording which is digital; is that software or not?

6 MR LAVY: An audio recording which is digital?

7 THE CHAIRMAN: Yes.

8 MR LAVY: Well --

9 THE CHAIRMAN: Or a piece of clip art. The image which is

10 encoded digitally; does that fall within the definition

11 of software or not, taken in isolation?

12 MR LAVY: Well, taken in isolation, probably not. Taken in

13 isolation it's an art work, isn't it?

14 THE CHAIRMAN: Isn't obvious code and --

15 MR LAVY: It might be. It depends -- it could be both,

16 couldn't it?

17 THE CHAIRMAN: How might it not be?

18 MR LAVY: Because what you might have is something where,

19 rather than encoding the thing into a piece of software,

20 you might simply have a file in a standard file format

21 sitting on a disk which is then pulled in by the

22 program.

23 THE CHAIRMAN: But it would be still be -- won't it be

24 object code at some level?

25 MR LAVY: I suppose we go possibly into a philosophical

1 debate. For sure it's going to be binding. It's going
2 to be encoded in some way. But I think it's fair to say
3 that what the domestic authorities tell us is that
4 doesn't necessarily in and of itself make it software.
5 I think an answer is it's going to depend. It's going
6 to be quite factually --

7 THE CHAIRMAN: Which authority did you have in mind?

8 MR LAVY: I was thinking really of the Wright case and this
9 idea that --

10 THE CHAIRMAN: It's not really explained in that.

11 MR LAVY: No.

12 THE CHAIRMAN: It's mentioned, I think.

13 MR LYKIARDOPOULOS: Sorry, for just one -- I don't know,
14 maybe sort of coming an end, but could you just also
15 help me with one other point, just so I understand it?
16 And that's in the statement of facts, paragraph 122, and
17 my question is going to be: what does this mean? And,
18 secondly, do you say it matters?

19 MR LAVY: Let me have a look.

20 MR LYKIARDOPOULOS: Statement of facts A1, page 41. At
21 paragraph 122, and there's the equivalent at
22 paragraph 138, it is agreed between you both that use of
23 a digital copy of Office -- or the same is agreed on
24 Windows -- would inevitably result in copies of at least
25 some non-program works or a substantial part of thereof

1 being made on the computer.

2 And two questions. I don't really understand how it
3 is that only some of the non-program works would be
4 copied. And, secondly, does that matter? So do you say
5 it makes any difference if you have no non-program works
6 which are not inevitably copied? Which is what that
7 seemed to suggest.

8 MR LAVY: No, the answer to the second question is I don't
9 think it does matter.

10 I think the point this paragraph is trying to get at
11 is it is in the nature of software that in order for it
12 to be used it has to be load into the RAM of a machine.
13 That involves transient copying always. I suppose
14 insofar as bits of clip art or whatever are used, if
15 they're used they're going to be loaded in, and if
16 they're not used they're not. They're going to be
17 sitting on the thing. And they won't, I think, fall
18 within that paragraph, but I don't --

19 MR LYKIARDOPOULOS: Okay, that's what it's going to be.

20 Okay, I was trying to work out what it was -- what are
21 the words are going to.

22 MR LAVY: I think it's just an agreed position as to what
23 inevitably happens.

24 From our perspective, the only significance of
25 things like clip art is that one can't download Office

1 without them. I mean, in a way, in the counterfactual
2 world you would have been able to -- Microsoft gave you
3 an option --

4 THE CHAIRMAN: Just understanding some of the cases, they
5 all seem to proceed on the basis that the program is
6 different from the digital work. You mentioned Mr
7 Justice Armer(?) decision and also Tom Kabinet. And
8 clearly there are differences, but I'm just not sure
9 that the digital representation of the novel in
10 Tom Kabinet is properly said not to be a computer
11 program. It may or may not be, but I don't know why.
12 It's a different type of program.

13 MR LAVY: It may that be it's both, mightn't it? It may be
14 in reality it is a computer program, but that doesn't --
15 that's stopped literary copyright also --

16 THE CHAIRMAN: Yes, I understand that, but I'm not sure it
17 matters. And the legal position is clear.

18 MR LAVY: It may be that it's an example of something that
19 can be both at the same time, I suppose. Maybe there
20 are --

21 THE CHAIRMAN: Yes, that's my understanding, both. And
22 I had another question, sorry.

23 MR LAVY: Yes. I'm here to answer questions.

24 THE CHAIRMAN: Preparatory works. So software -- so it's in
25 the recitals, isn't it? And it's referred to in

1 a number of the authorities that preparatory works fall
2 within the concept. Why isn't -- and obviously I'm
3 asking Mr Hobbs the same question. Why isn't the design
4 work in which copyright is -- artistic copyright is
5 claimed -- why is that not a preparatory work?

6 MR LAVY: Yes, that is certainly a point I have thought
7 about. I think --

8 THE CHAIRMAN: It's a bit odd that an artistic work could
9 then be a literary work.

10 MR LAVY: I know. I think we may -- and I am speaking
11 slightly on the hoof here. But I think we might be in
12 the world where it could be a preparatory work. But,
13 again, that doesn't mean necessarily there are no art
14 works there as well.

15 THE CHAIRMAN: Yes, just as it could also be a program.

16 MR LAVY: Well, exactly. And I think in truth this is the
17 problem. One puts the analytical copyright --

18 THE CHAIRMAN: I suppose my question is: do we get any
19 assistance from the cases that you have in mind as to
20 what -- how you tell when something is a preparatory
21 work or what a preparatory work is?

22 MR LAVY: Yes. I mean, I don't think it's in the bundle.
23 But there is a CJEU case on this. I don't think it's --

24 THE CHAIRMAN: I found a paragraph on it somewhere, but it
25 didn't really take it --

1 MR LAVY: No.

2 THE CHAIRMAN: I can't remember which case.

3 MR LAVY: I can be reasonably confident that it's not
4 particularly helpful to the analysis because neither of
5 us have put it in and we have looked. And I'm sorry
6 I can't be more helpful because off the top of my
7 head --

8 THE CHAIRMAN: Neither party is relying on that, so.

9 MR LAVY: No. Again, what this conversation shows, though,
10 if I may say so, sir, is the difficulty with the
11 analytical overload. Copyright is a bundle of rights.
12 There are an awful lot of things going on. We have
13 these two directives. One has to cut through it somehow
14 to make sense of them both. And I think, really, it is
15 the one point you take from all of the authorities,
16 UsedSoft and Tom Kabinet in particular. You have to
17 come up with a solution that insofar as is possible
18 gives effect to everything and gives effect to the
19 economic reality. And that's really -- of course, we
20 have to go round the houses as we have done, but really
21 that is my submission in a nutshell and there's only one
22 way forward on that.

23 Could you just give me two minutes?

24 (Pause)

25 I am reminded that in fact there is, for what it is

1 worth, some evidence in the bundle on what Windows and
2 Office is, and we can see that if you look at Horley 3,
3 paragraph 7, which is in D1, tab 3, page 30, there are
4 referred to in that paragraph a bunch of exhibited
5 articles, which are in the E bundle, which are in fact
6 for the most part, I think, Wikipedia pages. But they
7 haven't been challenged and they give you the headline
8 view as to what these programs are.

9 THE CHAIRMAN: I'm not sure -- yes. I think we would still
10 like (inaudible), if possible.

11 MR LAVY: I thought you might say that. We can but try.
12 Subject to any further questions, those are my
13 submissions.

14 THE CHAIRMAN: Mr Hobbs?

15 MR HOBBS: Could I just ask whether you're going to finish
16 at 4.00?

17 THE CHAIRMAN: 4.30.

18 MR HOBBS: 4.30, right, excellent. Or not.

19 THE CHAIRMAN: If that's convenient. Unless you prefer to
20 start tomorrow.

21 Submissions by MR HOBBS

22 MR HOBBS: Let's see how I go. I'm going to make some
23 general observations, picking up on a few points in
24 a miscellaneous way. I'm then going to summarise my
25 submissions in simple form, bullet point form, as

1 a route map for you as to where I'm going to go after
2 that and, where I go after that, tomorrow might be
3 a better day to go.

4 THE CHAIRMAN: Of course, whatever is convenient.

5 MR HOBBS: Thank you. I just want to say we have had
6 a division of labour on my side and I will be addressing
7 you on the legal aspects of PI 1 and PI 2 and my learned
8 friend Mr Riordan will address you on the factual
9 aspects of both and assist you with any questions you
10 may have on that connection with the material in the
11 bundle.

12 THE CHAIRMAN: Very prudent.

13 MR HOBBS: So, in heavy black pen, a single -- I'm going to
14 pick up on a point that came late. It's part of my
15 miscellaneous points at the beginning. A single regime
16 has to prevail. Well, why? Why? One of the first
17 things you learn as a copyright lawyer is the way in
18 which copyright layers on top of other copyright. It's
19 so well-known.

20 For example, I'm going to take, just for the sake of
21 making a point, assume that you have a Japanese author
22 that wins the Nobel Prize for literature. Assume there
23 is a gifted English translator that produces a good
24 English translation. Assume there's a stage play writer
25 that wants to write it up for a dramatisation. Assume

1 that there's a screenplay writer that wants to turn the
2 play into a Hollywood production. These are not
3 imaginary things; these are everyday things.

4 Then you have the Hollywood production. Then you
5 have the videos, everything that goes with it.

6 Those copyrights all stack up and it's no defence to
7 say that you have clearance under one of them if what
8 you do when you do what you do is to invade the
9 copyright protection in relation to the others.

10 There is absolutely nothing except my learned
11 friend's rhetorical address to you to say that a single
12 regime has to prevail. Absolutely nothing. It's wrong
13 in principle.

14 Next thing I would like to pick up with is there is,
15 whether you have appreciated it yet or not, a constant
16 juggling with words going on in the way that the
17 submissions are being put.

18 The Software Directive, as we call it, doesn't use
19 the word "software" except in one recital which I will
20 show you.

21 This is why, every time you read a judgment of the
22 CJEU, it uses -- and sometimes it's very stilted on the
23 language -- program, program, program and we know from
24 the leading case on the subject of what a program is,
25 which is the Sony Entertainment case, which is the

1 recent judgment. Basically it's code; basically it's
2 code.

3 Other elasticities around the use of language: user
4 rights, user licences, products. Products, the very use
5 of the word "product" conceals the issues that you are
6 going to have to grapple with. So does the expression
7 "entire works". Works, you have to be clear what you're
8 talking about.

9 So can I just pick up with you then on the
10 Software Directive if you, as I'm going to call it,
11 because everybody calls it. To its friends -- well, to
12 its friends and its enemies it's known as the
13 Software Directive.

14 You find that, yes, I can see you probably have it
15 loose but if you haven't it's in authorities tab 2,
16 page 18.

17 So in the very heading of course it does what it
18 says on the tin for the legal protection of computer
19 programs. This is a codified version of the earlier
20 directive. My recollection is that there was
21 a (inaudible) in relation to the earlier directive,
22 although I will have a look to see whether it could be
23 of any assistance to you.

24 There is only one place in which there are
25 references to software and that's in recital number 10,

1 where there's an extended paragraph which leads up to
2 the concept of interoperability, but those are the only
3 references to software that I have found anywhere.

4 And then Article 8, there is the one and only
5 reference to the word "products" and that is completely
6 beside anything that we have on our radar screens here
7 today. That's to do with semiconductor products. It
8 does not speak at any stage in terms of software or
9 products; it speaks strictly of programs.

10 While we have paragraph 8 in front of us, this is
11 extremely important. We noted it early on in our
12 skeleton. The continued application of other legal
13 provisions. This is yet another reason given to you by
14 the community legislator, the EU legislator:

15 "The provisions of this directive shall be without
16 prejudice to any other legal provisions."

17 That of course includes the InfoSoc Directive. How
18 could it not, and these provisions here operate without
19 prejudice to InfoSoc.

20 Another thing that they operate without prejudice
21 to -- and I must bring it up now while you have
22 Article 8 in front of you -- includes the law of
23 contract and I will be showing you -- perhaps not today;
24 well, no, not today -- but I believe showing you at the
25 convenient point tomorrow that the top logistic case

1 which makes it crystal clear that you can have
2 a contractual regime which organises all the things to
3 do with the exploitation of the software, but the one
4 thing that contractual regime cannot do is to block the
5 exercise of the exhaustion right.

6 There was a discussion which it almost shot over my
7 head on the question of a quantum wave.

8 But, forgive me, I think I got the gist of it. The
9 answer to that in a nutshell is this: exhaustion, when
10 it occurs, occurs at the point of sale and the right
11 which is acquired at that point is a circumscribed
12 right. And one of the ways in which it's circumscribed
13 is that when you come to make a transfer of it you must
14 make sure that you do the deletion, erasure, whatever it
15 is to make sure the works, the code, the software that
16 you have unusable.

17 So it's not something that rambles through time; it
18 only ever always was a circumscribed right with the
19 terms and conditions that go with it.

20 MR LYKIARDOPOULOS: But that doesn't follow therefore as
21 matter for the transferor and not the transferee.

22 MR HOBBS: No, because if they don't have the right they
23 don't have the right. You can't give what you don't
24 have. It's not possible. You can't give it.

25 MR LYKIARDOPOULOS: Right.

1 MR HOBBS: And I'm going to develop that a little further in
2 my headline submissions, which I will get to in perhaps
3 about five or ten minutes.

4 THE CHAIRMAN: Can I -- sorry, Mr Hobbs.

5 MR HOBBS: Yes.

6 THE CHAIRMAN: You said Sony reminds us, recent decision
7 reminds us that the program is understood to be code.

8 MR HOBBS: Yes.

9 THE CHAIRMAN: If we could get the reference for that at
10 some point, just the reference, no need to turn it up.

11 MR HOBBS: I'm going to give it to you right now. Famous
12 last words. It's right that I should give it to you to
13 go with the submission.

14 Right, so in the reduced bundle that you asked for
15 it's tab 45. You asked only for the judgment of the
16 court to be included because this is one of those A and
17 B files.

18 THE CHAIRMAN: Yes.

19 MR HOBBS: It is in fact very instructive to read the
20 Advocate General's opinion and to get that you will have
21 to go to the authorities bundle in full. But either way
22 it's tab 45 for both and it's the last word on the
23 subject.

24 THE CHAIRMAN: Which paragraph?

25 MR HOBBS: We have marked up -- we have sidelined in the

1 paragraphs that you have in your --

2 THE CHAIRMAN: It's in those sidelines.

3 MR HOBBS: All sidelined; the relevant paragraphs are all

4 sidelined.

5 MR LYKIARDOPOULOS: And it also may come to why the

6 submission you just made to us about Article 8, how that

7 fits with Article 1(2) -- sorry, Article 1(2)(a) of

8 InfoSoc.

9 MR HOBBS: Perfectly; it fits perfectly. They each operate

10 within their own remit without prejudice to the

11 operation of the other. There's no coach and horses

12 here. None at all. And the reason there's no coach and

13 horse is that every time my learned friend wishes to use

14 the metaphor of a coach and horses being driven by the

15 InfoSoc claim for copyright protection driving into the

16 computer program directive, I can do it the other way

17 round. He's using the Computer Program Directive to

18 drive a coach and horses into the InfoSoc Directive.

19 It's a meaningless metaphor; it doesn't help us at

20 all for analysis in the slightest. Once you have it

21 clearly in mind that these two legislative provisions

22 operate according to their true meaning and effect

23 within their own domain, you have all you need to know

24 and, relative to that, if you have my skeleton, can

25 I ask you, please, to turn in there to paragraph 141,

1 internal page number 44.

2 Could I ask you to look at what we have taken and
3 quoted from Funke Medien.

4 (Pause).

5 There is no way, none at all that this Tribunal can
6 accede to the argument that you have just been listening
7 to that you can evolve or synthesise or hybridise
8 a rule. With respect, you're bound to apply 4(2) of the
9 InfoSoc Directive. You notice that -- Articles 2 to 4
10 of InfoSoc -- you can't alter any of the exceptions or
11 limitations by -- what shall I say -- judicial
12 creativity. Yes, good word, thank you. You can't do
13 it.

14 THE CHAIRMAN: So going back to the question, maybe this is
15 for Mr Riordan in due course. The question I was asking
16 about these, the clip art and the icons and so forth.

17 MR HOBBS: Yes.

18 THE CHAIRMAN: They are programs themselves; they are code.

19 MR HOBBS: Yes. Sitting --

20 THE CHAIRMAN: They're both.

21 MR HOBBS: Sitting behind.

22 THE CHAIRMAN: They're -- you've got code and they're
23 artistic works.

24 MR HOBBS: They are, and the answer comes out of the
25 paragraphs that are always cited for this by

1 Mr Justice Pumfrey in Navitaire. The software for that
2 purpose is scaffolding. He called it scaffolding; that
3 was the metaphor that he used in those paragraphs.

4 Another expression which is used is that they are
5 the chassis.

6 THE CHAIRMAN: They are embodied -- they're an embodiment of
7 the work. They're not the scaffolding of the work;
8 they're actually an embodiment of the work.

9 MR HOBBS: Without it you couldn't make it visible on the
10 screen. But that which you make visible on the screen
11 is protected by InfoSoc copyright.

12 THE CHAIRMAN: Yes.

13 MR HOBBS: That's it. And like it or not that's the law.
14 It's not my fault. It's not your fault. That's the
15 law.

16 Now, please never forget that the first -- really
17 the first definitive case on this point was decided
18 before UsedSoft and that's the BSA case. And in your --
19 where is that? BSA is tab 25. Shall we turn it up?

20 THE CHAIRMAN: Yes, that would be helpful.

21 MR HOBBS: It's in volume 2 of the authorities. It's called
22 BSA because, as you can see, there's no human being I've
23 ever met that can pronounce the name of the claimant in
24 that case.

25 So I suppose I think in the interests of brevity.

1 I mean, the AG's opinion is to the same substantive
2 effect. So, if I ask you to look at bundle page 696,
3 and we have sidelined the paragraphs.

4 (Pause)

5 I am asked to specifically refer you also to
6 paragraphs 40, 41, which are on page 485 of the Law
7 Report. I can't see what the page is in the bundle.

8 THE CHAIRMAN: Sorry, this is my fault, but I'm still
9 a little bit confused. I'm thinking about paragraph 42.
10 As I understand a number of cases have said, if you copy
11 the graphic user interface without cite of the source
12 code or the object code that's not an infringement
13 copyright in the program.

14 MR HOBBS: That's correct.

15 THE CHAIRMAN: But why is the user interface not a form of
16 expression with a computer program if every aspect of it
17 is embodied in the computer program? So if I see the
18 computer program, I know what the graphic interface is,
19 I can produce it. So I just don't understand
20 paragraph 42.

21 MR HOBBS: Well, what shall I say? It's the law. It
22 follows the interface for the reasons they have given.
23 Like it or not, doesn't constitute a form of expression
24 of a computer program. Consequently can't be protected
25 specifically by copyright and computer program --

1 THE CHAIRMAN: I understand that.

2 MR HOBBS: You do.

3 THE CHAIRMAN: Can't -- the last bit, it cannot be
4 protected, but it is the first bit.

5 MR HOBBS: But it can't be protected because it isn't what
6 it would need to be in order to constitute a computer
7 program. That's the graphic user interface.

8 THE CHAIRMAN: You can write various programs for the same
9 graphic, you say, interface, as I understand.

10 MR HOBBS: Yes.

11 THE CHAIRMAN: But the graphic user interface is recorded
12 and encapsulated by the computer program, just not in
13 all embodiments of it. Have I understood that?
14 Mr Riordan is nodding. I don't have it completely
15 wrong.

16 MR HOBBS: No, you don't have it completely wrong, and
17 I have a note as well. Because it is an interface that
18 is what takes it out of being a program.

19 THE CHAIRMAN: Well, it's both a program and the artistic
20 work --

21 MR HOBBS: No, it's not a program. It's not a program.
22 It's if you like, it's more than a program.

23 THE CHAIRMAN: More than a program. I understand.

24 MR HOBBS: Is that right? It's more than a program.

25 THE CHAIRMAN: That I understand.

1 MR HOBBS: And the bit about it being more than a program
2 leads to the conclusion that you can protect it under
3 the InfoSoc Directive because it's more than a program.

4 THE CHAIRMAN: Yes, understood.

5 MR HOBBS: So it's another reason for saying it's not all or
6 nothing. Has to be one, not the other.

7 Another comment, if I can make it at the general
8 level at this point, is that there were interchanges
9 between the bench and my learned friend on the subject
10 of the licence. So I'm back to the concept of the
11 licence, which UsedSoft, when it's a perpetual licence,
12 requires you to conceptualise into a sale, a transfer.
13 So it's perpetual. It's for a lump sum of money. Maybe
14 phased, but nevertheless it's for a lump sum of money,
15 and that licence is elevated to -- as a fully integrated
16 transaction into the nature of a sale by analogy because
17 it isn't, in the same sense, a delivery in the same way
18 that you would deliver a physical thing. It's a
19 analogised, so the process is treated as being
20 tantamount to the transfer of a widget.

21 Now, that is an expression of the exhaustion rule.
22 But forgive me if I caution you with the proposition
23 that you cannot digress into questions of licence beyond
24 exhaustion, and here's why:

25 Exhaustion is the extinction of a legal right. In

1 the relevant case, it's the distribution right in the
2 protected subject matter.

3 If there is extinction under one directive or the
4 other directive, depending on the subject matter, then
5 there is. It is an all together separate question of
6 whether the transaction by the means of which that
7 occurred involved any further, other or supplementary or
8 licensing arrangements because that is not what we're
9 discussing here.

10 The whole of the claim for damages on the other side
11 in this case is erected upon the legal right which they
12 claim to have acquired under 4(2) of the
13 Software Directive as interpreted by UsedSoft for the
14 purposes of saying that legal right opens up a market
15 with all the consequences that they say harm diminution,
16 et cetera, et cetera, et cetera.

17 The case has nothing to do with a claim for damages
18 based on a refusal to licence, for example, or anything
19 to do with a right to have a licence or a licensing
20 practice. It has only to do with the question of the
21 interpretation of the exhaustion rules. And that takes
22 me back to my intervention earlier today when I said to
23 you we're seeing this case through the lens of that
24 exhaustion rule, that exhaustion rule and how the two
25 interact, and I have just been discussing in the

1 interaction. This -- I don't want to sound impertinent.
2 This court, this Tribunal has no power to alter those
3 rules, to blend them, to hybridise them. They apply to
4 the subject matter they apply to and that's it.

5 Now, I'm going to give you my headline synopsis,
6 which will be my route map for tomorrow, if I may. So
7 let me just --

8 THE CHAIRMAN: Before you get to your route map: do you
9 accept the point you submitted on Article 8 of the
10 Software Directive, where it says the provisions shall
11 be without prejudice to other legal provisions, you said
12 that would include the InfoSoc Directive --

13 MR HOBBS: Yes.

14 MR LYKIARDOUPOLOUS: -- we should, however, read that,
15 should we not, in accordance with recital 16. Do you
16 accept that? Which says --

17 MR HOBBS: I'm just turning that up.

18 MR LYKIARDOPOULOS: The protection of computer programs
19 should be without prejudice to the application in
20 appropriate cases of other forms of protection.

21 Whereas in the InfoSoc Directive, Article 1.2A says
22 that the InfoSoc Directive shall in no way affect
23 computer programs.

24 Do you accept there is a difference there between
25 the way the two are working?

1 MR HOBBS: Not in substance. The end result is the same.
2 Each operates without prejudice to the other and 16 is
3 foreshadowing what is in fact -- and probably
4 foreshadowing what's in the second half of Article 8,
5 any contractual provisions contrary to Article 6. So
6 what you have is a -- what you have is a general saving
7 relative to which you have a specific exception and you
8 interpret the general saving according to its tenor
9 without prejudice to.

10 While I have this point, in my learned friend's
11 skeleton, the main skeleton, in paragraph 42, and you
12 see what they say there:

13 "Digital server of a works subject to the
14 Software Directive may give rise to exhaustion ...
15 UsedSoft. For works subject to the InfoSoc Directive it
16 is only sales of physical copies of the work which will
17 give rise to exhaustion under its Article 4(2)."

18 Quite so. Quite so. That's my case.

19 And I like that number 42 because anyone that is of
20 an era knows it's the answer to life, the universe and
21 everything as calculated by the enormous supercomputer
22 Deep Thought over 7.5 million years in the Hitchhiker's
23 Guide to the Galaxy. But I digress.

24 So, to summarise my route map, five points. I'm not
25 chiselling them in stone; I'm giving them to you as

1 a guide. I'm going to start with this: the law
2 according to my submissions -- so this is UsedSoft and
3 everything that runs down through it -- stands for this:
4 the second acquirer -- and note my emphasis -- the
5 second acquirer can by transfer step into the shoes of
6 the first acquirer. No more, no less. That's the
7 effect, we say, of the applicable rule.

8 Next proposition: the first acquirer cannot, still
9 less can VL, step into the shoes of the rightholder and
10 re-organise the configuration, the first sale to the
11 first acquirer. That is the rightholder's prerogative
12 and it's not the prerogative of anybody downstream under
13 the exhaustion rule to step up and alter the
14 configuration of the arrangement.

15 It's very clear -- this is my third point -- that
16 the rightholder retains the right to use all technical
17 means, especially product keys at his disposal, to
18 ensure compliance with those basic precepts that I have
19 just given you.

20 My fourth point is the one I have already made, but
21 I will say it again: Article 1(2) of the InfoSoc
22 Directive and Article 8 of the Software Directive
23 mandate parallel protection, each without prejudice to
24 the other. They mandate it. It's not optional; it's
25 obligatory.

1 And then my last point is: a work which is not
2 a computer program -- because I'm now into the
3 Software Directive, as I still have to call it for its
4 friends -- it's not a program for the purposes of
5 Article 4(2) of that directive.

6 And a digital copy of a non-program of work is not
7 an object for the purposes of Article 4(2) of InfoSoc.
8 And I have just shown you paragraph 42 of my opponent's
9 skeleton in which they agree with that proposition.

10 Would it be a convenient moment, sir, to collect my
11 thoughts?

12 THE CHAIRMAN: Yes.

13 MR HOBBS: May I just say that, based on some submissions
14 you've heard, there is an authority I will need to bring
15 tomorrow. Is there a procedure for introducing it or
16 can I bring a hard copy?

17 THE CHAIRMAN: If you need us to read it in advance,
18 obviously send it to us. But, otherwise, just bring
19 hard copies in the morning.

20 MR HOBBS: Thank you. I will send it to you via the
21 registrar.

22 THE CHAIRMAN: Yes. And we should have electronic copies
23 anyway. But if you could bring copies to hand up, as
24 well.

25 MR HOBBS: I will bring it with me in the morning to

1 discuss.

2 MR LAVY: Can I ask: if there are going to be more

3 authorities, if we know what they are, could we have

4 them as soon as --

5 MR HOBBS: Yes, it's a case called Oracle v M-Tech in the

6 Supreme Court of the United Kingdom, which explains that

7 when you have provisions such as we're looking at here

8 you don't go back to Article 36 or any of the higher

9 provisions; the legislation is taken to implement the

10 legal policy required for the purposes of all the free

11 movement rules, et cetera.

12 (4.19 pm)

13 (The hearing adjourned until 10.30 am on Wednesday,

14 10 September 2025)

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