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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

APPEARANCES

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 Wednesday, 10 September 2025

2 (10.30 am)

3 THE CHAIRMAN: People are joining via live stream, so I must
4 start with a warning: an official recording is being
5 made and an authorised transcript will be produced. It
6 is strictly prohibited for anyone else to make
7 an unauthorised recording, whether audio or visual, of
8 the proceedings and breach of that provision is
9 punishable as a contempt of court.

10 Submissions by MR HOBBS (continued)

11 MR HOBBS: Thank you. Unless you have any further questions
12 arising out of submissions from yesterday evening, I'm
13 going to move to deal, first, with the case that I said
14 I would mention. The hard copy should be on your bench.
15 It's Oracle v M-Tech in the Supreme Court. I will deal
16 with that, and then I will move to my learned friend's
17 submissions on the computer Software Directive,
18 splitting - basically PI 1. And then I shall go to
19 PI 2 to sweep up what I feel is necessary, and then
20 I will hand over to my learned friend, Mr Riordan, on
21 the factualities.

22 So the reason I'm citing Oracle -- which I believe
23 you have in front of you and we have sidelined it -- the
24 reason I'm citing it is there were several occasions
25 yesterday in my learned friend's submissions where he

1 was invoking the more general principles to be found in
2 the treaty provisions. The numbers keep on changing,
3 but it's basically Articles 32 to 36 or 30 to 34. They
4 keep on changing, but we know what we're talking about
5 in the TFEU.

6 Now, the submission was -- and the authority for
7 approximate it is basically provided by this -- that
8 when you have legislation which resolves the matter on
9 the internal market, which is what these two instruments
10 do, you look to those; you don't go back to whatever the
11 law was before. You take the legislation as you find
12 it. So, if you see I've sidelined paragraph 8, that's
13 simply identifies the TFEU provisions that were current
14 at that time. This was 2012 and then the principle that
15 I am citing it for can be found if you look at 13,
16 through to 15, which I have sidelined, and noting in
17 particular the indent which the Supreme Court adopted
18 approved, the indent in 13. May I ask you, please, to
19 read 13 to 15 to yourselves?

20 THE CHAIRMAN: Yes.

21 (Pause)

22 Right.

23 MR HOBBS: Basically, you look at the legislation as you
24 have it and you assume that it's treaty compliant. It's
25 as simple as that, really.

1 THE CHAIRMAN: And how does that bite in this case?

2 MR HOBBS: Well, it's because there were several points at

3 which my learned friend was saying: go back and

4 consider -- mainly in the context of his economic

5 arguments, go back and consider the whole concept of the

6 treaty and free movement of goods and all of that. To

7 which my answer is: please stay focused on the language

8 of the legislation that you're being required to apply

9 in this case.

10 Of course, it's like interpreting claims. You look

11 at the specification; you don't forget the

12 specification. But the claims are what the claims are

13 and that delimits the exercise. Basically, it's as

14 simple as that.

15 So there was a very wide appeal yesterday in my

16 learned friend's submissions to economic concepts and

17 I am about to turn to that now.

18 So I'm going to now deal with PI 1 in more detail.

19 And this -- if I just ask you to have it on hand, my

20 first target is the material in my learned friend's

21 skeleton, running from about paragraph 8 through

22 paragraph 9 to 11. So 8 to 11. So on the internal

23 pages it's pages 3 and 4, paragraphs 8 to 11. 8 to 11,

24 I think.

25 Now, two comments. The first is that I have to

1 point out to you -- and I would be grateful if you're
2 using a hard copy that you make a marginal note against
3 paragraph 9(2) -- that is a misquote. The cited
4 paragraphs in Oracle -- UsedSoft, I should say, 26 and
5 33, do not say what is recorded there. And it's
6 relevant to -- I will pick it up when I go to UsedSoft
7 in a moment or two.

8 And then in paragraph 11(3), you see in written form
9 the concept of a non-specific copy. 11(3).

10 Now, that was new when this skeleton appeared. I'd
11 never heard it said by anybody ever, and still less had
12 it been unveiled at any point prior to it appearing in
13 this skeleton argument, which we received a few days
14 ago. And you will remember that it occupied at least
15 an hour of yesterday morning and it may even have been
16 longer, the whole question of copy, notional copy,
17 economic units and so on. Now, I'm going to tackle that
18 head on.

19 The first thing to notice, please, is the language
20 of Article 4(2) of the Software Directive, that which
21 needs to be construed:

22 "The first sale in the community of a copy of
23 a program, a program by the rightholder or with his
24 consent shall exhaust the distribution right within the
25 community of that copy."

1 The language is given to you by the legislation:
2 a copy; a program; that copy. This is entirely
3 consistent with the whole of the law of the exhaustion
4 of rights in intellectual property. It's what the
5 rightholder himself conveys which constitutes the
6 subject matter of the exhaustion.

7 Now, I'm going to show you, because I can't avoid
8 it, weary though you may be with looking at UsedSoft
9 we're going to have to go through it. There's two
10 concepts of the word "licence" in play here. There is,
11 first of all, the transfer by the rightholder of a copy
12 of a program, with respect to which the rights are
13 exhausted.

14 That labelled a licence is upgraded when it's
15 permanent, for a fixed fee, in perpetuity. You know the
16 parameters. It gets an upgrade. That thing labelled
17 a licence becomes a sale. I'm going to explain why in
18 a moment or two.

19 The user licence is downstream secondary to that.
20 That authorises whatever it authorises the first
21 acquirer to do with that copy, which has been
22 transferred to him, released to him.

23 Now, why do we have the law that we have in
24 UsedSoft?

25 Put yourselves in the position of the

1 Court of Justice in UsedSoft, in 2011, running into
2 2012.

3 They're dealing with subject matter which exists for
4 all practical purposes in the electronic world.
5 A program. It's digital. Of course you can have
6 printouts of code and so on and so forth, but that's not
7 it. The essence of it is it's a digital thing. They
8 have to make this rule work. The only way they can make
9 it work is to interpret a copy as including a digital
10 copy and not being confined to a physical copy.

11 The duality -- and that's what they did. The
12 duality is between a digital copy and a hard copy, and
13 it's ever so easy to understand. Take the bundles that
14 are sitting behind you. You have on screen the digital
15 copies and behind you, you have the physical copies.
16 It's a very intangible concept when you're dealing with
17 computer programs.

18 Now, the argument yesterday, I have noted it in
19 several respects. Not a specific copy per se,
20 an economic unit, a unit of account, a token, a notional
21 copy, and it was coming and going on different servers
22 in different places on different devices. Call them
23 workstations, call them what you will. It's coming and
24 going.

25 What is this? This is a metaphysical argument about

1 a metaphorical copy and it's coming and going like
2 Schrodinger's cat. This is nowhere near what UsedSoft
3 says or what the legislation is envisaging. It doesn't
4 come within an Olympic distance of being a correct way
5 of looking at this.

6 Now, let me say this: it's conspicuous by its
7 absence from any known case law. It seems to have
8 escaped the attention of all the advocates general and
9 the judges. There's no textbook citation for any of
10 this. This could not be more of a homespun argument
11 than it is. And my learned friend, if I understood him
12 correctly -- he will correct me if I'm wrong --
13 I understood the tenor of the argument yesterday is this
14 is an essential point to their case on PI 1, from which
15 the natural corollary must surely be: if they don't win
16 on that they lose on PI 1.

17 Now, pause on this: if this case was right, they
18 wasted their breath in UsedSoft. What on earth would
19 have been the point of saying all the things they did if
20 the answer could have come in four paragraphs? The four
21 paragraphs basically leading to the conclusion that the
22 rightholder has authorised the making of a copy and
23 sibling copies. Call them whatever you like, but that's
24 a convenient metaphor, sibling copies. And for each and
25 every one of them taken singularly the rightholder's

1 right is exhausted. And I think the logic of the
2 argument would take you to the extreme proposition that
3 when any single one of them is passed on by any one of
4 the single users, then in those circumstances, because
5 it's exhausted, anybody later down the line can multiply
6 copies as well. This is extraordinary. Extraordinary.
7 And it cannot be right.

8 And at this point, painful though it may be, I'm
9 going to have to ask you to go to tab 28 with me and
10 look at UsedSoft, please. So that's volume 2 of the
11 authorities bundle. You have it in hard, I think, 28.

12 Now, my learned friend, as you will have noticed
13 yesterday, was moving from one paragraph to another. He
14 didn't deal with the judgment in linear form. He
15 zigzagged between different paragraphs, which is fair
16 enough. But every judgment has a beginning, a middle
17 and an end. All judgments are linear.

18 So, just to get my context, please, I'm in -- the
19 judgment of the court starts on page 754 of the hard
20 copy bundle and I would like to start you, please, at
21 21, which is on page 757.

22 Now, let me make good before I go into the text on
23 what I said to you about the correction required to my
24 learned friend's skeleton. If you look at paragraph 26,
25 which they cited, it's not the downloading of multiple

1 copies; it's the downloading of a copy, explicitly, and
2 likewise at 33, it is, you see, fourth line -- third
3 line, fourth line, downloading a copy. They are
4 sticking like glue to the legislation in this judgment.
5 They're not talking about the downloading of multiple
6 copies.

7 Now, reverting, if I may, to paragraph 21, you get
8 this reference in that paragraph which you have seen
9 quite a few times now. The software is what is known as
10 client server software. Well, all right. I heard my
11 learned friend at one point say, "That can't quite be
12 right. They can't quite have meant what they said".
13 Actually, it came from the Bundesgerichtshof. It was in
14 the order for reference and the Bundesgerichtshof
15 repeated it in UsedSoft 2, when it got back to Germany.

16 But that isn't the point. The point is we're not
17 talking about some term of art here. If you see from
18 the context:

19 "The software is what is known as client server
20 software. The user right for such a program which is
21 granted by a licence agreement includes the right to
22 store a copy of the program permanently on a server and
23 to allow a certain number of users to access it by
24 downloading it to the main memory of their workstation
25 computers."

1 Then there's stuff about a maintenance agreement.

2 So the licence, the user right, the user licence on
3 that copy allows you to make siblings. That's the
4 licence granted relative to that copy and that copy is
5 the one -- forgive me -- which has been exhausted. It's
6 the one which was released by the rightholder.

7 Now, paragraph 22 is actually quite important
8 because they pick it up in later paragraphs. They
9 revert back to it, as I will show you when we get there.
10 Paragraph 22 makes the point that they were block
11 licences. In that case, Oracle offered in blocks of 25
12 users and they themselves here make the point -- and
13 this is not empty wording; this is necessary to
14 understand their later reading, later writing:

15 "An undertaking requiring licences of 27 users thus
16 has to acquire two licences."

17 The point being, which they come back to, is that
18 the user who has taken out two blocks of 25, only ever
19 wanting 27 has surplus. And the whole point about the
20 paragraphs I'm coming on to is to say they cannot use
21 that surplus. They can't sever it and disperse it.
22 It's a block licence in two blocks and the fact that
23 they only want 27 out of the 50 gives them no rights.
24 They have no right to step in and usurp the
25 rightholder's right to release what the rightholder

1 releases on the terms that the rightholder specifies.

2 On the language, it's tedious, but I cannot avoid

3 it. They religiously -- they show you the grant clause

4 in 23. It doesn't matter what label you apply to it.

5 That's the grant clause.

6 24:

7 "For that purpose UsedSoft acquires from customers

8 such user licences or parts of them where the original

9 licences relate to a greater number of users than

10 required by the first acquirer."

11 That, together with paragraph 22, is referred to in

12 the key paragraphs later in this judgment. 22 and 24

13 are brought in to the later stages of the reasoning.

14 When you get to 26 -- this is tedious, I'm sorry.

15 26:

16 "Download a copy."

17 33:

18 "Download a copy."

19 35:

20 "A copy."

21 I'm told to look at 26, the second sentence. What

22 does it say? Yes:

23 "Customers who already have --"

24 That's important, thank you:

25 "Customers already have that software ..."

1 So that's customers of UsedSoft:
2 "... and then purchased further licences for
3 additional users are induced by UsedSoft to copy the
4 program to the workstations of those users."
5 That's a point they pick up later, thank you.
6 So I was at 35:
7 "A copy."
8 36:
9 "That copy."
10 37:
11 "A copy of that program."
12 38:
13 "A copy."
14 And then you get an important point in 44:
15 "It must be observed that the downloading of a copy
16 of a computer program and the conclusion of a user
17 licence agreement for that copy form an indivisible
18 whole."
19 That is the release by the copyright holder, the
20 rightholder, which constitutes the act which gives rise
21 to exhaustion. If it does give rise to exhaustion and
22 when it does give rise to exhaustion, that's the act.
23 The licence defines the rights of the acquirer and
24 those can be contractually limited, as I'm about to show
25 you in about 20 minutes, I think. The indivisible whole

1 on that copy.

2 It's elementary in relation to the exhaustion of
3 rights that it is the rightholder's side of the
4 transaction which constitutes the parameter for what is
5 or isn't released from his rights.

6 The licensee doesn't have -- the acquirer doesn't
7 have anything except a derivative right which can be
8 circumscribed by contract. They don't have
9 an independent right to proliferate or re-organise the
10 transaction or do anything.

11 You have 44, indivisible whole.

12 45, this is all in the language of "a copy", "the
13 copy" and all the rest of it.

14 The same is true in 48: "a copy"; "a program".

15 Paragraph 60, which I take in passing because it's
16 not directly on the point I'm just discussing with you,
17 but it's important. They are noting in 60 that the rule
18 is -- they have been told the rule is different under
19 the InfoSoc Directive. They have been told that. And
20 then it's the third line of 60:

21 "However, even supposing ..."

22 This tells you that far from trying to assimilate
23 the exhaustion rule under 4(2) of Software with the
24 exhaustion rule of InfoSoc they're doing the exact
25 opposite. They're saying: let that be so, even if

1 that's so. This decision in UsedSoft has absolutely
2 nothing to say about InfoSoc Directive exhaustion. And
3 it was a long and wearying road until you get to
4 Tom Kabinet where the CJEU explicitly said, in
5 a paragraph I will pick up later, explicitly said that
6 this was a special rule mandated by the legislation in
7 the form of the Software Directive and the community
8 legislature conspicuously did not adopt that rule for
9 InfoSoc.

10 No case -- it's elementary, but no case is authority
11 for a proposition it doesn't decide. And you can see
12 here, in 60, that they steer clear of deciding anything
13 about the relative position under the InfoSoc Directive.
14 That's the whole point of saying "even supposing" and
15 the reason they say "even supposing" -- and what's the
16 supposition? Look at the words:

17 "For works covered by that directive."

18 So that's InfoSoc:

19 "The exhaustion of the distribution right concerned
20 only tangible objects."

21 Then you see this:

22 "That would not be capable of affecting the
23 interpreting of Article 4(2) of Software having regard
24 to the different intention expressed by the EU
25 legislature in the specific context of this directive."

1 They are only pronouncing on the rule under the
2 Computer Program Directive, never mind the terminology.

3 Now, may I go with you, please, to 69?

4 I had indicated earlier that this is where they
5 start to pick up what they previously said in 22 and 24
6 above. So 69 reverts you back to 22 and 24 and the
7 whole point about paragraphs 22 and 24 was to point to
8 the existence of the first acquirer having permissions
9 to multiply copies beyond his uses under the block
10 licences:

11 "It should be pointed out that if the licence
12 acquired by the first acquirer relates to a greater
13 number of users than he needs as stated in 22 and 24
14 above the acquirer is not authorised by the effect of
15 the exhaustion of the distribution right under
16 Software Directive to divide the licence and resell only
17 the user right for the computer program concerned
18 corresponding to a number of users determined by him."

19 What could be clearer?

20 You have taken two block licences. You have
21 permission for up to 50 users. You only want 27. You
22 can't divide. And the words "determined by him" are
23 important. He can't determine that and that's because
24 he can't step into the shoes of the rightholder and
25 re-organise the transaction. That is not within his

1 right, as the possessor of an exhausted subject matter.

2 And then 70, which you're familiar with, but let's
3 look at it again:

4 "An original acquirer who resells a tangible or
5 intangible copy [note that] of a computer program for
6 which the copyright holder's right of distribution is
7 exhausted under 4(2) must in order to avoid infringing
8 the exclusive rights of reproduction which belong to its
9 author laid down in 4(1)(a) of Software make his own
10 copy unusable at the time of its resale. In a situation
11 such as that mentioned in the preceding paragraph [so
12 that's 69] the customer of the copyright holder will
13 continue to use the copy of the program installed on his
14 server and will not thus make it unusable."

15 You cannot split, because if you split you're not
16 making unusable that which was conferred upon you under
17 the original transaction.

18 71, important for this case on the facts of this
19 case:

20 "Even if an acquirer of additional user rights for
21 the computer program concerned did not carry out a new
22 installation and hence a new reproduction of the program
23 on a server belonging to him, the effect of the
24 exhaustion of the distribution right under Article 4(2)
25 4(2) Software would in any event not extend to such user

1 rights. In such a case the acquisition of additional
2 user rights does not relate to the copy for which the
3 distribution right was exhausted at the time of that
4 transaction. On the contrary, it is intended solely to
5 make it possible to extend the number of users of the
6 copy which the acquirer of additional rights has himself
7 already installed on his server."

8 Short way of putting that: no augmentation.

9 So, the first acquirer cannot, using the services of
10 VL or not using the services of VL, it cannot augment
11 the rights of someone else downstream by taking a chunk
12 out of what it acquired from the rightholder and passing
13 them on. No augmentation.

14 Now, paragraph 78, they're dealing with questions 1
15 and 3 together. They reiterate the "must make unusable"
16 point. By now it's crystal clear. Must make unusable
17 the totality. The totality of what was acquired under
18 the first transaction. There's no scope for salami
19 slicing it all up.

20 Paragraph 79 is critical:

21 "Of course, it's difficult for the rightholder to
22 ascertain what happened to its software. Only with
23 great difficulty he can make sure that the original
24 acquirer has not made copies of the program which he
25 will continue to use after selling his material. To

1 solve that problem it is permissible for the distributor
2 whether classic or digital to make use of technical
3 protection measures, such as product keys."

4 Paragraph 79, if you want to make a marginal note,
5 goes together with paragraph 87. Those two paragraphs
6 are on the same point. I'm coming to 87 in just
7 a second.

8 Now, it's permissible to do that. And, by the way,
9 if that is done by the rightholder it is an integral
10 part of the UsedSoft doctrine and the UsedSoft analysis
11 that the doing of that is protected.

12 In other words, exhaustion, according to the
13 UsedSoft jurisprudence we're looking at here, cannot
14 possibly be taken to authorise short circuiting,
15 swerving around or not giving effect to technical
16 protection measures which are part of the original
17 transaction because they're there to protect the very
18 essence of it, which is that there should be deletion,
19 erasure or unusability -- it doesn't matter how you care
20 to put it -- of that which was acquired in the first
21 place. It's an essential part of the exhaustion
22 doctrine that we're looking at here.

23 Paragraph 84, you've looked at this, but it's
24 important for one reason in particular. Until I get to
25 this paragraph I'm pointing to the uses of the

1 terminology "a copy", "a program", "that copy", which
2 I took from the legislation, because that's what we all
3 have to do.

4 Paragraph 84 is where they define -- because you can
5 see that in three lines, four lines from the bottom they
6 put it in inverted commas -- this is where they define
7 "that copy". "That copy". The one with respect to
8 which the exhaustion rule bites. This is the court
9 defining the applicable legislative provisions.

10 So they reprise on the fact that they found that the
11 downloading of a copy of the computer program on the
12 rightholder's website and the conclusion of a user
13 licence for "that copy" form an indivisible whole --
14 well, we know that -- which as a whole must be
15 classified as a sale. Understood. They have elevated
16 that transaction. Call it a licence until you're blue
17 in the face, it becomes a sale. It's a sale manque.
18 A sale by any other name.

19 Having regard to that indivisible link between the
20 copy on the rightholder's website -- that's where
21 they're looking -- as subsequently corrected and
22 updated. Well, nothing turns on that, actually, on the
23 other hand and the user licence relating to the copy on
24 the other. So that's the two hands. The resale of the
25 user licence entails the resale of that copy within the

1 meaning of Article 4(2) of Software and thus benefits
2 from the exhaustion of the distribution right.

3 That copy is the one released from the rightholder's
4 website using the mechanism for transfer, whatever it
5 was at the inception of this. That's what this is
6 referring to, "that copy".

7 MR LYKIARDOPOULOS: Sorry, I don't understand that. You
8 talked about the "inception of this". What do you mean
9 by that: the inception of this?

10 MR HOBBS: The act which constitutes the indivisible whole
11 is the downloading of a copy of a computer program from
12 the rightholder's website.

13 MR LYKIARDOPOULOS: By the customer?

14 MR HOBBS: By the customer.

15 MR LYKIARDOPOULOS: Of?

16 MR HOBBS: Of the rightholder.

17 MR LYKIARDOPOULOS: But UsedSoft customers were also
18 downloading software directly from Oracle's website.

19 MR HOBBS: This isn't addressing that.

20 MR LYKIARDOPOULOS: But they were.

21 MR HOBBS: I'm coming.

22 MR LYKIARDOPOULOS: Right.

23 MR HOBBS: This isn't addressing that. This is addressing
24 the interpretation of Article 4(2). That's where it
25 says "that copy", inverted commas, within the meaning of

1 4(2) of Directive (inaudible). They're interpreting the
2 expression "that copy" as used in the relevant rule that
3 we're considering. It's the indivisible whole, the
4 mechanism for transfer, whereby the rightholder releases
5 that copy to the first acquirer is the act of exhaustion
6 of the distribution right. It is that copy dealt with
7 in that way with respect to which there is exhaustion.

8 The contrast is whatever other - many thousands, of
9 other copies the rightholder may have had in its
10 possession or conjured up, or populated on the relevant
11 website for downloading purposes, no matter how many
12 others there were, none of those will have been
13 exhausted by this transaction, the single unitary
14 transaction.

15 None of those will have been exhausted, and that's
16 because the whole -- as I keep saying, and I'm sorry to
17 repeat myself, the whole focus of this is on the
18 rightholder's position. It's not on the position of the
19 person who acquires the downstream.

20 Pressing on. So you have the point. This is where
21 the court itself defines that copy.

22 Then you have 86:

23 "It should be recalled, however, that if the licence
24 acquired by the first acquirer relates to a greater
25 number of users than he needs ..."

1 So here you are, you have the echo back to those
2 early paragraphs:

3 "... that acquirer is not authorised by the effect
4 of the exhaustion of the distribution right under
5 Article 4(2) Software to divide the licence and resell
6 only the user right for the computer program concerned
7 corresponding to a number of users determined by him as
8 explained in 69 to 71 above."

9 That is telling you quite clearly what has already
10 been told to you before: it is not open to the first
11 acquirer to step into the shoes of the rightholder and
12 re-organise the transaction, because that is the
13 rightholder's prerogative under the protected
14 intellectual property right. It is not the prerogative
15 of the first acquirer of that copy.

16 And then at 87:

17 "A copyright holder, such as Oracle, is
18 entitled ..."

19 Key word, they have the right:

20 "... in the event of a resale of a user licence
21 entailing the resale of a copy of a computer program
22 downloaded to ensure by all technical means at his
23 disposal that the copy still in the hands of the
24 reseller is made unusable."

25 All technical means. This is part of the UsedSoft

1 jurisprudence. This is part and parcel of it. There's
2 no uncoupling of the first acquirer's rights from the
3 operational effect of the technical measures that have
4 been put in place for this purpose here; this purpose
5 being a legitimate purpose.

6 And you will notice that you can use all technical
7 measures for the purposes of monitoring for security
8 purposes what's happening to your software. You can't
9 use it for the purpose of blocking the exercise of the
10 exhausted rights by the person who has acquired the
11 exhausted subject matter. You can't use it to block it,
12 but you can certainly use it for the purpose of
13 monitoring, organising -- "organising" is a word coming
14 out of the case we're looking at in a second or so --
15 organising and so on. You can certainly use it for that
16 and it's an integral part of UsedSoft. And I am going
17 to turn it to this: there is no way that a transaction
18 which short circuits the copy protection measures, the
19 technological protection measures that are factually in
20 place can be regarded as a UsedSoft fully compliant
21 transaction regardless of that fact. They're built into
22 the case law and the way in which this has been
23 interpreted by the Court of Justice. The technical
24 measures are built into it.

25 Now, let me ask you again, just let's put our heads

1 up from these papers for a while. What would have been
2 the point of saying all this if my learned friend's
3 argument was right? What on earth were they wasting
4 their time and their breath saying these things and
5 going through this another -- why did they do it, when
6 all they had to say, according to my learned friend, was
7 they sold -- call it what label they like, they sold
8 a copy of a program. They granted a user licence. The
9 user licence entitled the first acquirer to multiply
10 sibling copies, and each and every single one on the
11 acquirer's side of the transaction, each and every
12 single one is an exhausted copy, divisible, sellable.
13 They could have said that in four paragraphs.

14 No, all of them missed it.

15 There is not one shred -- I have done a lot of
16 reading, my learned friend has done a lot of reading,
17 there is no one shred of academic discussion, textbook
18 discussion. There's not an instance of anything in any
19 case law that supports the argument that you heard more
20 than an hour of time spent on yesterday morning, which
21 was said to be essential to their case on PI.

22 You may safely infer, in my respectful submission,
23 that that case is homespun. It's based on a hermeneutic
24 extraction of words scattered around the judgment,
25 darting backwards and forwards from one paragraph to

1 another and dipping into Ranks. And it's synthesised by
2 my learned friend and it owes more to the burning of
3 midnight oil in counsel's chambers than it does to any
4 legalistic reasoning and analysis of the word given to
5 you by Article 4(2).

6 THE CHAIRMAN: Could you just give me a second?

7 (Pause)

8 Sorry, Mr Hobbs, I think I left a file next door.

9 MR LYKIARDOPOULOS: Sorry, you've spent quite a lot this
10 morning explaining to us what "that copy" means and the
11 wording used by the Court of Justice on "that copy".

12 MR HOBBS: Yes.

13 MR LYKIARDOPOULOS: Also to say how the claimant's case
14 relating to notional copies --

15 MR HOBBS: Notional copies --

16 MR LYKIARDOPOULOS: -- economic unit; it may not be right.

17 And, again, I just want to understand what you're saying
18 "that copy" is in circumstances where we know from
19 UsedSoft that the customers did indeed get a licence,
20 purchased a licence to make copies from Oracle's
21 website. So it's not a question of transferring a copy
22 that was in the first customer's hands, if you like;
23 it's a question of getting a licence to get your own
24 copy from Oracle. I just want to understand --

25 MR HOBBS: Okay.

1 MR LYKIARDOPOULOS: I just want to understand because
2 I think that might be what the claimant means by
3 "notional copy".

4 MR HOBBS: You cannot read a notional copy.

5 MR LYKIARDOPOULOS: I take your point, but I just want to
6 understand what you say -- what the copy is, both in
7 this case and in the --

8 MR HOBBS: I'm happy to do that. First, let me remind you
9 that we have spelled it out in paragraphs 17 and 18 of
10 our skeleton. Actually, it's 16, 17 and 18. We have
11 spelled it out based on those paragraphs. And what
12 I have been submitting to you is counsel's elaboration
13 on that point.

14 MR LYKIARDOPOULOS: Okay.

15 MR HOBBS: Right, so it's there, but I need to -- because
16 there is -- I believe that there are nuances in the
17 question that you have just put to me, sir, and it's
18 this -- and I want to tackle them head on.

19 MR LYKIARDOPOULOS: Do.

20 MR HOBBS: I have said -- but forgive me for repeating --
21 that which is described as a licence, which is the first
22 step -- no, sorry. Let me start again.

23 There comes a point a time at which for a lump sum
24 fee, for a period of indefinite duration, a first
25 acquirer downloads a copy from the rightholder's website

1 a copy of a programme. We know that.

2 We know -- and I have tried to explain why by asking
3 you to put yourselves in the position of the
4 Court of Justice, back in 2012, trying to make Article 4
5 work in a world in which programs are by their nature
6 for all practical purposes digital.

7 They called "classified" and "systematically
8 interpreted the legislation" to mean that a transaction
9 which had those contours was a sale. And it had to be
10 a sale because the language of the Article 4(2) Software
11 says "a sale".

12 Now, Oracle were saying, "We didn't sell anything we
13 only granted and licence", and they said, "you know from
14 legal case law that a five-pronged implement is a fork,
15 no matter what you care to call it. You can't turn
16 a cow into a sheep by changing its name". So that's the
17 process. They had to find that there was a sale. How
18 could they do it?

19 They could only do it by interpreting the
20 transaction in a way that gave it the status of a sale.
21 Fine.

22 But then for the purposes of the exhaustion rule
23 it's that which was sold, and that which was sold was by
24 means of the transfer mechanism that copy to which
25 access was given on the rightholder's website. It's

1 that copy.

2 Now, I have been at great pains to emphasise -- and
3 it matters and I'm going to emphasise it again, and I'm
4 sorry if it wearies if I do it -- the supplementary user
5 licence is to do with what the acquirer of "that copy"
6 may do in relation to it.

7 I'm trying to think of examples. But suppose
8 that -- I could choose any set of chambers and whichever
9 set of chambers I choose will be provocative, so I will
10 choose my own.

11 The head of chambers at One Essex Court decides to
12 take a licence, download that copy and gets a user
13 right -- language of the court -- to allow the members
14 of chambers for the time being to access that copy on
15 their own workstations. But there's no magic in the
16 word "workstation".

17 That is what the supplementary user right allows the
18 acquirer to do with "that copy". It can't by any
19 stretch of the imagination -- and there's not a shred of
20 anything in the language of UsedSoft -- be taken to mean
21 that every individual member of chambers for the time
22 being then acquires, every time they upload or download
23 on to their computers, another exhausted copy. That's
24 that side of the transaction (Indicated).

25 What matters for exhaustion is the rightholder's

1 side of the transaction. And in relation to the
2 supplementary licence -- and here's the ambiguity -- the
3 word "licence" keeps being used in relation to the user
4 rights. It's to be contra-distinguished with the use of
5 the word "licence" that gets upgraded to a sale.

6 All those other users, they don't have any rights
7 beyond the permissive right that they get derivatively
8 from the first acquirer.

9 They can't claim that they can then go off and start
10 selling it left, right and centre. The only person that
11 can do that, in my example, is the head of chambers, who
12 has acquired it, who proposes to digest and goes through
13 the procedure. And that has to be done en bloc. And
14 you will remember it was either the first or second of
15 my submissions on headline form yesterday. The second
16 acquirer can step into the shoes of the first acquirer,
17 no more, no less.

18 Everything that I have shown you in this judgment
19 supports that. Every single thing supports that. It
20 doesn't support the contrary view. And if you were to
21 take the contrary view, you would be going off into
22 jurisprudence that doesn't exist, except possibly in one
23 respect because they make a loss of fuss about
24 Bundesgerichtshof UsedSoft 3.

25 Have I? I think I have. So I commend that point

1 for your collective consideration.

2 Now, a good time then to visit the
3 Bundesgerichtshof, which -- someone will tell me where
4 it is. It's volume 3, is it, of the authorities?
5 Tab 59, is it? I am being told it's tab 59 by reliable
6 sources.

7 THE CHAIRMAN: UsedSoft 3, is this?

8 MR HOBBS: UsedSoft 3, Bundesgerichtshof.

9 Now, you have seen in our skeleton what we say about
10 this, but there are some more points that I need to
11 accentuate in addition to the ones we have mentioned.
12 So it's 59. We address this in paragraphs 54 to 57 of
13 our skeleton. You have that, you have seen that, you've
14 read it. If you look at the case itself in the
15 certified translation -- I should say, by the way, that
16 all the translations are certified translations of these
17 foreign judgments, so there's no anxiety over that.

18 I need to show you what the position was. So on
19 bundle page 1509, this is Adobe systems, conclude
20 a 'membership agreement', and it's in inverted commas,
21 for educational institutions with -- I'm not going to
22 pronounce it, but it's an umbrella organisation and it's
23 ESV.

24 This entitled ESV and it's affiliated
25 institutions -- so those are, each of them, separate

1 affiliates of the ESV organisation itself -- the
2 affiliated institutions also included RZV. And RZV was
3 the one via which UsedSoft, as then was, acquired the
4 rights it claimed:

5 "Under the membership agreement ESV and affiliated
6 institutions had to be educational users, institutions
7 and end-users. The membership agreement contained the
8 following provisions ..."

9 And you can see it set out, sole purpose internal
10 distribution:

11 "The software was initially obtained in such a way
12 that CANCOM Deutschland GmbH, as the Adobe licensing
13 centre, authorised by the plaintiff provided ESV or RSV
14 with data carriers, containing the ordered software.
15 Later, delivery took place in such a way that CANCOM
16 provided ESV or RZV with the serial number under which
17 software could be downloaded and installed via an online
18 customer portal. Following a request from UsedSoft
19 AG ..."

20 So UsedSoft is now asking RZV to go in and order 40
21 licences for the Adobe Creative Suite, which they knew
22 as a package, in 2009. The order was confirmed. RZV
23 got the serial number, licence agreement was accepted
24 and so on and so forth. And then:

25 "Using the serial number RZV downloaded the software

1 from the customer portal to the working memory of
2 a computer and stored it on 11 installation data
3 carriers, so called media kit data carriers. It then
4 sent 40 licenses and 11 media kit data carriers to
5 UsedSoft AG which delivered them to defendant 1."

6 Notice -- this is -- you have seen 40 licences and
7 you notice they were all transferred en bloc. There was
8 no attempt by the first acquirer to subdivide what it
9 had acquired from Adobe. So far there is nothing,
10 leaving aside questions of compliance with security key
11 mechanisms, and so far there is no transgression of the
12 rule about preventing subdivision, which comes to you
13 from UsedSoft. They sent it all across.

14 So it's a situation where, on the face of it, the
15 second acquirer could be in a position to step into the
16 shoes of the first acquirer, and the second acquirer
17 appears to be UsedSoft AG. And it was UsedSoft AG that
18 did the splitting later down the channel of
19 distribution, as we're about to see.

20 So the software was sold together with media kit,
21 et cetera, et cetera:

22 "It submitted a notarised confirmation certifying
23 that the notary had received a statement from the
24 original licensee stating that it was the lawful owner
25 of the licenses had completely removed them from its

1 computers and the purchaser price had been paid in
2 full."

3 There's a later paragraph in here which indicates it
4 was never uploaded to their computers at all; they just
5 passed it straight on.

6 Now, page 1514, just to notice it, adjacent to
7 marginal note 13, there's the reference once again to
8 the 40 associated software licences and media kit
9 carriers, just to notice it.

10 You get another mention of the 40 -- where do you
11 get it?

12 Yes, it's not until you get to page 1519 of this
13 judgment, adjacent to marginal note 29 and going into
14 30 -- this is the first time in the judgment that you
15 get the reference to them being independent licences,
16 the 40 licences being independent licences. So, you see
17 in 29:

18 "Permitted the production of a total of 40
19 independent copies."

20 "Independent". Then, in (aa) adjacent to 30, third
21 line:

22 "It also granted RZV 40 licences which according to
23 the findings of the Court of Appeal entitled it to
24 install the software on 40 independent workstations.
25 The plaintiff's consent was therefore not limited to the

1 downloading of one copy. Rather, it extended to the
2 production of a total of 40 independent copies with the
3 help of the downloaded programs."

4 As I say, this is the first part judgment where the
5 finding about them being independent copies appears and
6 it was a finding made by the Court of Appeal in Germany,
7 whichever one of the Court of Appeals it was over there.

8 Just to push it on a bit -- so on page 1523, you get
9 paragraph 44, marginal note 44:

10 "It should be noted that the exhaustion of the
11 distribution right was not entitled in the initial
12 purchase of the split, the license acquired by it, and
13 to resell the right to use the computer program in
14 question only for a number of users determined by it."

15 And you know those paragraphs; we have been through
16 them:

17 "If the initial purchaser required a licence that
18 permits the use of the copy of the computer program
19 installed on the server by multiple users, a so-called
20 client server licence, the subsequent purchase of the
21 copy of the program can therefore only successfully
22 invoke the exhaustion and distribution right in relation
23 to its copy if the initial purchaser has rendered this
24 copy unusable."

25 We all know that.

1 Then you get what they're purporting to draw as
2 an antithesis in 45:

3 "If on the other hand the initial purchaser has
4 acquired a license that permits the use of several
5 independent copies ..."

6 See that word again:

7 "... of the computer program, a so-called volume
8 licence, it is entitled to sell the right to use the
9 program in question to a number of users specified by it
10 and to continue using it for the remaining number of
11 users."

12 Then you get this pronouncement:

13 "The individual licenses are independent rights of
14 use that can be transferred independently."

15 And what do they cite for that? They cite German
16 domestic literature. The dates on some of these books
17 are indicating, I suppose, when they were published.
18 Nobody has produced those for you to see and nobody has
19 actually checked to see whether subsequent editions of
20 any of those texts has been modified in the light of
21 subsequent developments in CJEU case law.

22 But take that as it is, be that as it may, they are
23 relying on German doctrine in those books to talk about
24 individual licences and independent rights of use.

25 Then you come to what we are very familiar with in

1 this country, very much in the ascendant, unreviewable
2 findings of lower courts. Paragraph 46:

3 "In any case it is up to the party who invokes the
4 exhaustion of the distribution right to demonstrate and,
5 if necessary, prove that initial purchaser, in this case
6 RZV has rendered its own copies of the computer program
7 unusable."

8 That, by the way, is a common thread of the
9 exhaustion rule. Wherever you look in the law of
10 intellectual property he who invokes the exhaustion rule
11 bears the burden of establishing that the exhaustion
12 rule applies. But look at (bb), opposite 47:

13 "The plaintiff's review ..."

14 That means the plaintiff's appeal:

15 "... unsuccessfully challenges the Court of Appeal's
16 finding that RZV did not acquire a uniform license for
17 40 fold access to the plaintiff's software, but rather
18 40 independent licenses. The Court of Appeal
19 assumed ..."

20 And then these key words:

21 "... without this being challenged by the
22 plaintiff's review ..."

23 They didn't challenge it on appeal:

24 "... that RZV had acquired 40 independent
25 authorisations for the permanent installation and use of

1 the program on 40 workstations. In view of this the
2 serial number assigned for the provision of the software
3 was merely an access key without any further legal
4 significance. Insofar as the plaintiff's review
5 (appeal) argues that the assignment of a single serial
6 number implies the grant of a uniform right to use the
7 software. It replaces the assessment of the judge of
8 the case with its own view in a manner that is
9 inadmissible on review without pointing out any legal
10 error on the part of the Court of Appeal."

11 So the point for which this is relied on is
12 an unchallenged finding by a German Court of Appeal on
13 facts which we don't know and can't see from this
14 judgment that there were 40 independent licences.

15 This is, on any view of it, a highly fact-specific
16 case and if you look at 48, it's the same point again:

17 "The Court of Appeal rightly assume resulting in the
18 software licences to which the plaintiff's distribution
19 right had been exhausted being inadmissibly split the
20 individual licences were each independent rights of use
21 that could be transferred independently."

22 And it goes down through 48, 49 and into marginal
23 note 49 on 1526.

24 This cannot provide this court with jurisprudence to
25 depart in any way, shape or form from UsedSoft. It's on

1 a factual matrix, which appeared to involve 40
2 independent licences and all the rest of it. Well, so
3 be it. That's what it was. We know from the other
4 German Bundesgerichtshof case which is in this bundle,
5 which is the return of UsedSoft to Germany to the
6 referring court, which was UsedSoft 2, it's called in
7 Germany, that they were straight down the line on
8 applying UsedSoft as written. And we have cited those
9 paragraphs in our skeleton, the key paragraph that comes
10 straight out of the Bundesgerichtshof UsedSoft 2.

11 This is not authority for my learned friend's case.
12 It's highly fact specific. It can't authorise you to
13 depart from the law as laid down in UsedSoft, and let me
14 go further: there isn't here, even when you look at it,
15 one shred of a basis for the argument about tokens,
16 notional copies and all the rest of it.

17 THE CHAIRMAN: Mr Hobbs, I was confused from your skeleton.

18 Are you saying this is wrong, parts of this decision are
19 wrong or are you distinguishing it on the facts?

20 MR HOBBS: Both.

21 THE CHAIRMAN: Which bits are wrong?

22 MR HOBBS: The failure to follow UsedSoft.

23 THE CHAIRMAN: Can you just give a paragraph?

24 MR HOBBS: Yes, it's the antithesis. So we have identified
25 in our skeleton. It's when I stopped over the

1 question -- yes, it's 44 and 45. 44 is orthodox. 45 is
2 heretical because there's no such distinction to be
3 found in UsedSoft in the CJEU. 45 is heretical. It's
4 based on domestic German literature. And, anyway, it's
5 highly fact specific on a ground that wasn't the subject
6 of appeal and couldn't be appealed because it was
7 within --

8 THE CHAIRMAN: So when you say 45, you mean the first two
9 sentences of 45?

10 MR HOBBS: Well, yes. They locate that within local
11 German --

12 THE CHAIRMAN: I understand that, but that's neither here
13 nor there for the purposes of whether it's right or
14 wrong.

15 MR HOBBS: Well, it's heretical.

16 THE CHAIRMAN: And the last sentence as well?

17 MR HOBBS: Yes. It doesn't stand alone because 45 is what
18 feeds into the reasoning that follows. And of course
19 it's all buttressed by that finding of fact, which I say
20 is, in any event, distinguishable from anything that
21 you're looking at here.

22 And, by the way, where is there any discussion in
23 UsedSoft of the concept of independent uses?

24 THE CHAIRMAN: And just while we're here, the software
25 that's being contemplated, including things like Adobe

1 Photoshop and Illustrator, they will inevitably have
2 artistic works associated with them?

3 MR HOBBS: Without fail.

4 THE CHAIRMAN: Yes, so -- obviously, I appreciate you're on
5 point 1. But when it comes to point 2; do you say the
6 German law should have had regard to that?

7 MR HOBBS: There's been a collective failure to observe what
8 is now revealed by Tom Kabinet in particular, but the
9 straws were in the wind before. To observe that -- when
10 you say that the Software Directive is a *lex specialis*
11 you are simultaneously saying it's not a *lex generalis*.
12 It's the same thing. It's two sides of the same coin.
13 And this is back to the coach and horses point that came
14 up colloquially in discussion here yesterday. It is
15 quite wrong to talk about a coach and horses being
16 driven into the Software Directive, when in fact the
17 attempt is to make the Software Directive drive a coach
18 and horses into the InfoSoc Directive.

19 You take the legislation as you find it. If time
20 permits, I will come to a position in which I show you
21 that you shouldn't follow the Azerbaijan Supreme Court
22 and get into the same trouble as they did in the
23 European Court of Human Rights for not protecting the
24 copyright under InfoSoc.

25 MR LYKIARDOPOULOS: But in respect of the answer you just

1 gave Mr Chairman, can I just look at paragraph 43 of
2 your skeleton?

3 MR HOBBS: One moment.

4 Yes, I am there.

5 MR LYKIARDOPOULOS: This is in relation to what we are just
6 discussing at the moment, which is subdivision, and you
7 say:

8 "The PI is concerned with Enterprise licensing,
9 typically large volumes. It doesn't relate to sale of
10 individual copies to end-users. This is important
11 because it forms no part of Microsoft's case that
12 a single licence granted to an individual cannot be
13 resold provided the requirements of UsedSoft are met."

14 That's correct, isn't?

15 MR HOBBS: I'm standing my ground on that, sir.

16 MR LYKIARDOPOULOS: You're standing your ground on that.

17 MR HOBBS: It's highly material. The sample transactions
18 here are what were described in UsedSoft, paragraph 22,
19 as volume licences.

20 THE CHAIRMAN: Because they contain artistic works?

21 MR LYKIARDOPOULOS: They contain artistic works.

22 MR HOBBS: They all do.

23 MR LYKIARDOPOULOS: Right, so they can be transferred
24 singly?

25 MR HOBBS: No, under the exhaustion rule because splitting

1 has no relationship to any other rule.

2 MR LYKIARDOPOULOS: So you're not standing your ground?

3 MR HOBBS: I am.

4 THE CHAIRMAN: You say Microsoft's case, is it not, is that

5 a single license granted to an individual cannot be

6 resold? It is your case it cannot be resold because the

7 artistic works.

8 MR HOBBS: I'm sorry, sir, the heading at the top of page 9,

9 section E, in which all of this is preliminary issue 1,

10 subdivision of licence copy. This is all to do with

11 Oracle. It has nothing to do with more general

12 questions.

13 THE CHAIRMAN: So you're saying that a general copy could be

14 resold?

15 MR LYKIARDOPOULOS: Couldn't be resold. Taking it as

16 a whole.

17 MR HOBBS: No, no, under the UsedSoft rule, exhaustion,

18 which applies only to programs as defined, only that

19 rule can attach to and bite upon a single licence.

20 MR LYKIARDOPOULOS: But taking the matters that we have to

21 consider as a whole; do we understand that Microsoft's

22 case actually is that an individual would not be able to

23 resell Windows or Office because of the non-program

24 elements?

25 MR HOBBS: If you're looking at PI 2, the answer to that

1 question is yes. But in order to make it crystal clear:
2 if in relation to a tangible copy, so it's delivered by
3 a CD, because it was delivered in a tangible copy that
4 would lead to the exhaustion of rule under Article 4(2)
5 of InfoSoc. Article 4(2) of InfoSoc is abundantly
6 clear. And actually it's understood to be common ground
7 between the parties.

8 Paragraph 42, the answer to life the universe and
9 everything, we agree. It's a different rule. There is
10 no digital exhaustion under 4(2) of the
11 InfoSoc Directive. So when I talk about subdivision
12 here, I am talking about subdivision of UsedSoft and my
13 frame of reference is solely the rule relating to
14 computer programs in 4(2).

15 MR LYKIARDOPOULOS: Just to -- because I think it may be
16 important, just so we understand Microsoft's position.
17 It's that what you say here in paragraph 43 is only
18 looking at the UsedSoft conditions?

19 MR HOBBS: Yes.

20 MR LYKIARDOPOULOS: You accept, Microsoft accepts, that
21 taken as a whole an individual would not be able to
22 resell a single licence in the circumstances of this
23 case because the non-program works?

24 MR HOBBS: Yes. And you will appreciate that as an advocate
25 there are two PIs. I can't assume success for myself on

1 either.

2 MR LYKIARDOPOULOS: It's not a criticism; it's just

3 understanding.

4 MR HOBBS: I'm so sorry.

5 MR LYKIARDOPOULOS: And thirdly, I think you just said that

6 the position would be different if it was distribution

7 by a CD ROM --

8 MR HOBBS: Yes.

9 MR LYKIARDOPOULOS: -- because then both sides of the coin,

10 if you like --

11 MR HOBBS: Yes.

12 MR LYKIARDOPOULOS: The final point, and I understand that

13 position, that the court in UsedSoft relating to --

14 MR HOBBS: In fact the CJEU.

15 MR LYKIARDOPOULOS: CJEU.

16 MR HOBBS: Yes.

17 MR LYKIARDOPOULOS: Talking settled law, I think from

18 a number of decisions of the CJEU, was concerned about

19 the principle of equal treatment, particularly in

20 relation to where there is no distinction between, here,

21 tangible or intangible. What's your position on that

22 then? Because you are saying there's a difference

23 between CD ROMs and not.

24 MR HOBBS: If this is a point of concern to you I can bring

25 you CJEU and Supreme Court authority which says quite

1 clearly that it is legitimate to discriminate between
2 digital goods and, call them, hard copy goods. It's
3 legitimate to do so. I can bring that, if it matters to
4 you.

5 THE CHAIRMAN: But a CD is not a thing in that it's a piece
6 of glass or whatever, but it's also digital. It's both,
7 isn't it?

8 MR HOBBS: Yes. But this is the policy area. This is what
9 all those travaux pr paratoires -- this is what they
10 spent hours in those meeting rooms in Geneva discussing.
11 The whole point is we always knew -- before we got to
12 this legislation we're looking at here, we always knew
13 that sound recordings, video recordings were actually
14 encoded things. We always knew that. They were
15 electronically encoded things. We always knew that.
16 But the rule was -- and the rule has stayed with us. It
17 started with Deutsche Grammophon v Metro, if you want to
18 go back that far. There's no need to do it.

19 The rule was that the rightholder had the right to
20 decide when and in what quantities, and to do it one by
21 one by one in the batch, what he would release from his
22 rights by way of tangible.

23 Now, it's tangible for this purpose -- I know, your
24 point is -- forgive me, your point is entirely valid
25 that, yes, it's tangible in one sense, in the sense that

1 you can hold something, which is the carrier of it, and
2 inside that is all the stuff that really matters, the
3 encoded stuff, but there it is.

4 This is a distinction that has been drawn. Once
5 it's been drawn between that which constitutes
6 an object, which constitutes the deliverable, once that
7 distinction has been drawn -- and, by the way, it's not
8 for us to draw it; it's drawn by the legislature -- once
9 that's been drawn that's end of it. One might not --
10 start again.

11 THE CHAIRMAN: When you say the legislature we're talking
12 about digital information on discs. Does the
13 legislature --

14 MR HOBBS: We are.

15 MR LYKIARDOPOULOS: -- grapple with that? I appreciate one
16 sees numerous references to it in the case law. But,
17 just remind me: does the legislature say that's --

18 MR HOBBS: Yes.

19 MR LYKIARDOPOULOS: That is a tangible copy of?

20 MR HOBBS: It's in the recitals. I'm forgetting the
21 numbers, but it's somewhere about 28 to 30 of the
22 recitals of InfoSoc. Those have -- and there are
23 earlier ones talking about compliance with the -- 21?

24 MR LYKIARDOPOULOS: 28 and 29, are you?

25 MR HOBBS: Is it? There are others talking about compliance

1 with the words "copyright treaty" and all of that, the
2 WIPO copyright treaty. There's all of that. And then
3 there's the interpretation of the Court of Justice
4 giving effect to those notes, the agreed notes on the
5 interpretation of Article 6 of the copyright treaty.
6 It all talks about exhaustion under InfoSoc being by
7 means of an object, a tangible object.
8 Now --
9 THE CHAIRMAN: Well, it says:
10 "Incorporated in all material mediums", is actually
11 what it says.
12 MR HOBBS: Yes, but you see "that object" are the words used
13 in 4(2) of InfoSoc.
14 MR LYKIARDOPOULOS: But, just so I understand, if you just
15 look in UsedSoft, paragraph 61 --
16 MR HOBBS: One moment, I need to turn it up.
17 MR LYKIARDOPOULOS: I'm sorry, I'm jumping around a bit.
18 MR HOBBS: Can you close Bundesgerichtshof?
19 MR LYKIARDOPOULOS: Talks about the difference between
20 CD ROMs, DVDs and downloading.
21 MR HOBBS: Yes.
22 MR LYKIARDOPOULOS: You offer to bring a large number of
23 authorities on such matters of equal treatment, but
24 I was just interested in -- UsedSoft is a case that you
25 have been citing and taking us through.

1 MR HOBBS: Yes.

2 MR LYKIARDOPOULOS: And paragraph 61, what's your answer to
3 that? I would just like to hear.

4 MR HOBBS: My answer is actually located in paragraph 60.
5 It's paragraph 60. I didn't take you through all the
6 earlier argument, which is in the antecedent paragraphs
7 to it. It's in paragraph 60, where they're saying:
8 "Let that be the rule under InfoSoc."
9 Okay? So, as you see in 60, they're saying: even
10 supposing Article 4(2) of InfoSoc interpreted in the
11 light of recitals 28 and 29 we were just looking at, and
12 in the light of the copyright treaty -- we know about
13 that -- for the works covered by that directive,
14 InfoSoc, the exhaustion of the distribution right
15 concerns only tangible objects, because the argument to
16 this court was: you have to do the same symmetrically
17 here as they do under the InfoSoc Directive.
18 That was the whole argument.
19 And they said no. They said: let that be the rule.

20 MR LYKIARDOPOULOS: Yes. They go on to say:
21 "From an economic point of view, the sale of
22 a computer program on CD ROM or DVD in the sale by
23 downloading are similar, a functional equivalence."
24 MR HOBBS: Yes, they say that.

25 MR LYKIARDOPOULOS: But you accept that, in fact, on your

1 case, very different things, results, arise.

2 MR HOBBS: It's not on my case that they arise; on the

3 legislation it's now clear, as interpreted notably by

4 the time you get to Tom Kabinet, notably. Tom Kabinet

5 is what tells that you the EU legislator took a decision

6 which was bifurcated on this very point.

7 THE CHAIRMAN: Is there not the difference between a CD ROM

8 and a digital download? Is it that a CD ROM is a single

9 thing?

10 MR HOBBS: Yes.

11 THE CHAIRMAN: So UsedSoft is trying to reach an equivalent

12 position with respect to online downloads because it's

13 saying: well, if you're going to pass it on you have to

14 delete the original.

15 When you get to Tom Kabinet, there was a problem

16 with the number of copies.

17 MR HOBBS: As well, yes.

18 THE CHAIRMAN: So is that not the guiding principle, or at

19 least --

20 MR HOBBS: Could you put that to me --

21 THE CHAIRMAN: -- a guiding consideration that, are you in

22 a situation where you have replication of copyright

23 works or whether the number of copyright works remains

24 the same? That would seem to bite on UsedSoft. That's

25 a reference to that in Tom Kabinet.

1 MR HOBBS: No, that's not the distinction. It's the
2 interpretation of the legislation.

3 THE CHAIRMAN: We will get to Tom Kabinet.

4 MR HOBBS: We will. But we should deal with this now.

5 You see, yesterday in the exchanges between Bench
6 and Bar, when I cited BSA, and the chairman said, "Well,
7 yeah, yeah, but, I can see that there's code. You know,
8 saying that the graphic user interface is not protected
9 within the scope of the Software Directive. It's not
10 a program and so on, but it's located in code". And
11 after the exchanges that occurred between Bench and Bar
12 over that issue yesterday, I think we closed on the
13 position that when there is more than -- and that was
14 the phrase that we came to -- when there is more than
15 code, then you're looking at InfoSoc protection.

16 And I actually thought about this a lot overnight
17 and I think that that expression "more than" hits the
18 nail on the head.

19 THE CHAIRMAN: So, taking our CD example, you have -- so as
20 I understand it, you have -- let's take a piece of clip
21 art or an icon from Microsoft, that has an embodiment as
22 digital code.

23 MR HOBBS: I won't go too technical; I will just agree.

24 THE CHAIRMAN: Then the first question to arise is: is that
25 a program?

1 MR HOBBS: Simply.

2 THE CHAIRMAN: If it is a program, then you're receiving
3 protection both under the InfoSoc Directive and under
4 the Software Directive for that piece of code; did we
5 reach common ground on that yesterday?

6 MR HOBBS: No, I don't think we did, because it's Nintendo
7 which says it can't be reduced to the code and,
8 therefore, it's treated as being --

9 THE CHAIRMAN: It's more than.

10 MR HOBBS: Once --

11 THE CHAIRMAN: Is it not treated as code? Or is it treated
12 as an artistic work and as code --

13 MR HOBBS: No.

14 THE CHAIRMAN: -- as two different copyrights?

15 MR HOBBS: I don't think so. I'm sorry to sound personal;
16 I'm just speaking as the dialogue goes along.

17 I don't think so. And the point being that when
18 they said in BSA that graphic user interfaces are not --

19 THE CHAIRMAN: I just want to keep off graphic user
20 interfaces for the moment and concentrate on clip art.

21 MR HOBBS: Clip art. Well, all right. It's an artistic
22 work.

23 THE CHAIRMAN: Yes.

24 MR HOBBS: It doesn't require much to acquire copyright
25 protection and it's protected under the

1 InfoSoc Directive as a copyright work.

2 THE CHAIRMAN: Yes.

3 MR HOBBS: In my view, in my submission, that's where it

4 qualifies for a protection and protection can't be

5 denied. And you can't actually avail yourself if you're

6 out there in the world at large in saying, as they said

7 in Tom Kabinet --

8 THE CHAIRMAN: Mr Hobbs, you're jumping ahead.

9 MR HOBBS: I'm sorry.

10 THE CHAIRMAN: My question hasn't gone anywhere near that

11 far.

12 MR HOBBS: You haven't, all right. Please be patient with

13 me.

14 THE CHAIRMAN: Is it also not -- that piece of code not

15 protected as a piece of software? Sorry, I shouldn't

16 use "software". As a program, under the software --

17 MR HOBBS: I'm considering it in isolation, am I? Am

18 I considering it in isolation?

19 THE CHAIRMAN: Yes.

20 MR HOBBS: Then if it's -- why not?

21 THE CHAIRMAN: If it's more convenient for your junior to

22 answer these questions --

23 MR HOBBS: Actually, I would quite like to know the answer

24 myself.

25 THE CHAIRMAN: We can come back to it.

1 MR HOBBS: We can come back to --

2 THE CHAIRMAN: Let me give you another question.

3 MR HOBBS: Can I just be clear what the question is I'm

4 going to cogitate on with able assistance.

5 THE CHAIRMAN: Okay, so my provisional view on a graphic

6 user interface, which is a complex thing, is it will

7 have an existence as a work of art and will be under the

8 InfoSoc Directive, but will also have embodied a great

9 deal of code, no doubt pretty complicated, and will have

10 protection. It may be narrower protection, but it will

11 nevertheless have protection as a piece of software and

12 that will fall under the Software Directive.

13 What the consequences of that are --

14 MR HOBBS: To be discussed.

15 THE CHAIRMAN: -- to be discussed.

16 MR HOBBS: Can I just agree with you?

17 THE CHAIRMAN: Yes.

18 MR HOBBS: Agree with you, because that seems to me to be

19 what is mandated by Article 8 of one directive and

20 Article 1(2) of the other directive.

21 THE CHAIRMAN: It's just a question of whether it's

22 a computer program that falls within the

23 Software Directive. But, with the graphic user

24 interface, the provisional view, it seems plain that it

25 would be.

1 With a piece of clip art or an icon, again, it would
2 be an artistic work, at the moment I'm a little unclear
3 whether that is a computer program because it could be
4 said it's just a binary data file. Is that a computer
5 program? Are there any authorities which really address
6 this?

7 So that's the second question.

8 The third question is -- or that's the first
9 question, actually.

10 MR HOBBS: Subdivided.

11 THE CHAIRMAN: Provisional view, first question.

12 The second question is: where you have an artistic
13 work and you put it on a DVD or CD --

14 MR HOBBS: Yes.

15 THE CHAIRMAN: -- and then you plug it into another
16 computer, an artistic work pops up again. But when it's
17 on the DVD; is it an artistic work? It seems to be only
18 a piece of code.

19 MR HOBBS: It's a physical carrier of an artistic work.

20 THE CHAIRMAN: It's also a physical character of a piece of
21 code. But is it at that stage an artistic work while
22 its on the CD, before it gets played with, run on a
23 computer.

24 MR HOBBS: Yes.

25 THE CHAIRMAN: Again, I'm going to need assistance of the

1 authority on that.

2 MR HOBBS: Let me give you an example which frequently comes
3 up in this area: when it exists in Braille, it's still
4 a literary work. It's in Braille.

5 THE CHAIRMAN: I wasn't really asking -- I'm just asking for
6 assistance on what the authorities say on that.

7 MR HOBBS: Okay.

8 THE CHAIRMAN: I can see the argument, but it's just what
9 the authorities say. Have they considered whether it's
10 an artistic work at the point it's on the DVD or do they
11 gloss over that and just look at the effect of running
12 the CD, the program, is.

13 MR HOBBS: Well, I don't think they gloss over anything.
14 I think they basically say: if you're invoking a program
15 copyright you can protect it. If you're invoking an
16 artistic copyright you can protect it. I think they say
17 both.

18 THE CHAIRMAN: Reflect on that and draw the relevant
19 authority to our attention, we would be grateful.

20 MR HOBBS: Can I just be clear with you? I won't be able to
21 do it by this afternoon, but I can identify authorities
22 that say that there is no requirement to treat digital
23 and non-digital in the same way. Would you wish to have
24 that? I can do a note on it for you after this hearing;
25 would that be all right?

1 THE CHAIRMAN: Of course, yes. In due course, yes.

2 MR HOBBS: Thank you.

3 Now -- but this loop in the conversation -- others
4 being steered to paragraph 61, I steered myself back to
5 paragraph 60, which you will have noticed. But the
6 debate that we have just had, forgive me for saying so,
7 put yourself in the position of the Court of Justice.
8 They have to find a sale and it's apropos all of that.
9 I think they're still in the realms of -- yes, question
10 2, a sale. This is all about whether they can classify
11 a transaction of the anatomy that they were looking at
12 as a sale, and they did. And you can't really -- what
13 should I say? Attack them. I can't attack them for 61
14 when we know that the subject matter of the
15 Software Directive is a program, and that the program,
16 for all intents and purposes, exists only ever in
17 electronic form, a digital form.

18 So this is a supplementary reason, in 61, for coming
19 to a conclusion. They're elaborating in 61 on why
20 they're saying that the specific context of this present
21 directive, which is Software Directive, should be
22 interpreted purposively in the way that they're doing
23 it. These are just reasons they're bringing in, and
24 I can't attack them, I won't attack them for saying that
25 when you know that the subject matter is what it is.

1 But, if you followed up on what I asked or indicated
2 ought to happen, if you looked at the AG and at the
3 court in Sony, you will see just how desiccated, if
4 I can put it that way, the copyright actually is in
5 the program. It's code, and we have reached the point
6 where it's nothing except the code.

7 MR LYKIARDOPOULOS: Sorry to interrupt again, just on the
8 list of things it would be useful to hear.

9 MR HOBBS: I hope that someone is keeping this list.

10 MR LYKIARDOPOULOS: Just -- I just want to -- because
11 I would like to understand, you said this morning that
12 what's important is the rightholder's side --

13 MR HOBBS: Yes.

14 MR LYKIARDOPOULOS: -- and the transaction, and you're
15 looking at what the transaction is, because that, we see
16 from UsedSoft, is what was interpreted as a sale and to
17 which, if I put it that way, exhaustion bites. And we
18 know from 44 that they said that they looked at both the
19 program there and the licence agreement as
20 an indivisible whole.

21 MR HOBBS: They did.

22 MR LYKIARDOPOULOS: Which is how in part they got to it
23 being sale. And they point out that downloading the
24 computer program without right to use it would be
25 useless. And they then refer by analogy to the Club

1 Hotel Loutraki case where the Court of Justice was
2 looking at what they call mixed contracts and trying to
3 work out, I think, which directive should govern the
4 contract, and they were looking at the main object or
5 predominant feature to determine that.

6 My question really is: if we are looking at the
7 transaction as a whole and looking at what has been
8 sold; does that assist in deciding which directive
9 should apply, in the sense that should we be looking at
10 as a transaction that Microsoft has decided to sell
11 a program which includes copyright works of both types?

12 MR HOBBS: No.

13 THE CHAIRMAN: And if not, why not?

14 MR HOBBS: Right. I must stress this: the exhaustion rule,
15 from whichever directive you get it, operates by law as
16 an extinction of a right. It extinguishes in each of
17 these cases the distribution right. It leaves intact
18 all the other rights, like the reproduction right and
19 the communication right, all of which the others of
20 which are completely inexhaustible under these rules.

21 You start with the legislation. When it is said
22 that there has been exhaustion under Article 4(2) of
23 Software, which is the questions we're dealing with
24 because they're all framed in terms of the exhaustion
25 rule, you look to see whether the criteria are met. And

1 this here is to do with the question of the
2 categorisation or classification of the transaction,
3 whereby the rightholder released a copy to the first
4 acquirer and you look at it holistically. True.

5 But then there are the user rights. Bigger or
6 smaller, greater or lesser, then there are the user
7 rights. But it's that release from the grip of the IP
8 right that extinguishes the distribution right.

9 If you start to go back up with theories of
10 licensing, being all pervasive, you will be actually
11 mischaracterising the exhaustion rule. We are not
12 discussing a right.

13 Remember, the damages claim in this case is based on
14 a right that they claim to have acquired under the
15 exhaustion rule. They're not claiming that we are
16 refusing to licence in breach of a dominant position.
17 There's none of that. Not a word of that. They are not
18 claiming that they have a right on which they can found
19 a claim for umpteen millions of damages based on the
20 proposition that they would have got and should have got
21 a licence. That's a permissive thing. They are
22 claiming that our distribution rights are exhausted and
23 because they're exhausted they had a market that they
24 were denied access to.

25 This is the great confusion: jumbling up. It's part

1 of the problem with the loose terminology in the case.
2 What do you mean by "licence"? What do you mean by
3 "sale", et cetera, et cetera?
4 (12.00 pm)
5 (A short break)
6 (12.10 pm)
7 MR HOBBS: Those extremely stimulating exchanges have led to
8 some extremely stimulating exchanges between myself and
9 Mr Riordan. Would you mind if I ask Mr Riordan to get
10 up, so you have the answers on the same part of the
11 transcript, in the same place?
12 THE CHAIRMAN: Yes, of course.
13 MR HOBBS: Can I ask you to stand up and do it now?
14 Submissions by MR RIORDAN
15 MR RIORDAN: Sir, to paraphrase the question I understand
16 the Tribunal has asked as question 1, it boils down to
17 the question of whether clip art or another image
18 encoded digitally or an audio recording, perhaps, which
19 is digital and stored in a digital form; is that
20 software or not, taken in isolation?
21 THE CHAIRMAN: Is it fully within the software? Computer
22 program?
23 MR RIORDAN: Or a computer program within the scope of
24 Article 1(2) of the Software Directive.
25 When that question was posed to my learned friend

1 yesterday, I recall that his answer was, "Probably not
2 more than an art work", and we respectfully agree.

3 THE CHAIRMAN: Probably not.

4 MR RIORDAN: That was my note of the transcript yesterday.

5 THE CHAIRMAN: What was your position?

6 MR RIORDAN: We agree. It's not a computer program within
7 scope of Article 1 of the software --

8 THE CHAIRMAN: Why not? And: what's the authority for that?

9 MR RIORDAN: Let me start with the principle and the
10 explanation, and then I will take you to the relevant
11 authority.

12 THE CHAIRMAN: Yes.

13 MR RIORDAN: The expression which is being protected, the
14 intellectual emanation of the author is distinct from
15 the medium in which it happens to be stored or rendered
16 acceptable. It's akin to an oil painting which might be
17 scanned or photographed and then stored digitally. But
18 the subsistence of copyright in the original artistic
19 work, which is thereby protected, in both the physical
20 painting and the digital image, is an artistic work,
21 notwithstanding its digital representation.

22 Similarly, a digital file of an image like clip art
23 may be expressed in the form of ones and zeros. What we
24 call raw binary data. But those are not instructions to
25 a computer to provide functionality.

1 THE CHAIRMAN: Aren't they instructions to put certain
2 pixels on the screen?

3 MR RIORDAN: No, with respect. To render that digital file,
4 in other words to decode the binary data and convert it
5 into wavelengths that our eyes can see on the screen
6 requires the assistance of software - of other computer
7 programs in the form of a renderer, a decoder, something
8 that reads those ones and zeros from the disc, sends
9 them to a graphics driver, which outputs them in the
10 form of electrical signals to a monitor. There may be
11 a whole suite of different computer programs at
12 different layers of the software and hardware and
13 operating system which will input that digital file and
14 allow it to be perceived. But the digital file itself
15 is nothing more than a representation of the artistic
16 work.

17 THE CHAIRMAN: Right.

18 MR RIORDAN: It is a dumb, passive object of the digital
19 world.

20 It's comparable -- it's incapable --

21 THE CHAIRMAN: I understand that. That makes perfect sense.
22 But what, then, is a program? Mr Hobbs, yesterday --
23 and I appreciate that Mr Hobbs was dealing with matters
24 on the hoof, but he said it's code. Is it more than
25 code? Does it not have to do something?

1 MR RIORDAN: No.

2 THE CHAIRMAN: It's just --

3 MR RIORDAN: I will take you to the authority in a moment.

4 So Sony v Datel provides a convenient summary of what

5 Mr Hobbs expressed pithily is. It's code. Because what

6 the Court of Justice has held in a clear, consistent

7 series of decisions beginning with BSA and culminating

8 in Sony v Datel most recently, is that the subject

9 matter of protection within the scope of Article 1(2) of

10 the Software Directive is limited to the code elements

11 of the program, and one actually must excise any

12 elements, such as the graphical user interface, even if

13 they are expressed as code. They simply do not form

14 part of the subject matter of that directive. I will

15 show that you in one moment. There's just one more

16 point I want to make in answer in relation to the sound

17 recording question.

18 A sound recording --

19 THE CHAIRMAN: Are we concerned with the sound recordings,

20 particularly?

21 MR RIORDAN: It was posed to my learned friend yesterday and

22 it offers another convenient lens through which to view

23 the question.

24 It's the sound recording copyright which protects

25 the signal, the recording, rather than the musical work

1 underlying it. In that sense it's a signal copyright,
2 as I think Lord Justice Arnold has put it, writing
3 extracurially. But, if it takes the form of an MP3-file
4 or a WAV file on a computer system, rather than a vinyl
5 record, it is no more a computer program than when it is
6 the vinyl record. Again, it is simply the encoded
7 collection of raw binary data, ones and zeros, which are
8 themselves incapable of providing any functionality to
9 a computer system.

10 THE CHAIRMAN: But that's a binary code.

11 MR RIORDAN: No, it's binary data. There's a distinction
12 between mere data and code.

13 THE CHAIRMAN: And so what is the distinction?

14 MR RIORDAN: Code is instructions. Perhaps I can show you
15 the authority now.

16 THE CHAIRMAN: Yes.

17 MR RIORDAN: If I can invite you, please, to turn up
18 authorities tab 45B, which is the Sony v Datel decision.
19 I will just give you the key passages, which begin at
20 paragraph 33, on page 1146 of the authorities.

21 THE CHAIRMAN: Yes.

22 MR RIORDAN: So at paragraph 33, the court begins by
23 referring to Article 1 of the Software Directive, as
24 we're calling it, which defines what is meant by the
25 concept of a program as the expression in any form,

1 apart from the ideas and principles that underlie it.
2 And that reflects the relevant international framework,
3 which the court goes on to address.

4 And then there's a summary, at paragraph 34, of what
5 that means:

6 "The expression in any form of a computer program
7 permits reproduction in different computer languages,
8 such as the source code and object code."

9 Citing BSA. That's where Mr Hobbs' expression of
10 "the code" comes from.

11 Now, it's true they say "such as the object code and
12 source code", as opposed to an exhaustive statement.
13 But that is at the core of what we think of as a program
14 within the scope of the directive.

15 Then they distinguish the position of a graphical
16 user interface in 35:

17 "It is merely one element of that program by means
18 of which users make use of the features of the program."

19 In other words, it is an interface between the user
20 and the functionality provided by the program. And
21 that, summarising BSA, has been held not to fall within
22 the scope of the Software Directive. That's important
23 because what the court is telling us in BSA and
24 Sony v Datel --

25 THE CHAIRMAN: We can look at it again, but whenever I read

1 any of these statements in the cases there seems to be
2 an ambiguity. If one looks at Lord Justice Arnold --
3 MR RIORDAN: Sorry, I didn't quite catch that.
4 THE CHAIRMAN: Lord Justice Arnold, there's a decision of
5 Lord Justice Arnold on this as well. They seem to be
6 saying that the visual elements are an artistic work.
7 They don't say it's not a computer program, in the sense
8 that the code underlying it is not capable of
9 protection, and there always seems to be a little bit of
10 ambiguity there, that's all.
11 MR RIORDAN: That ambiguity, if it was once there, has now
12 been resolved by Sony v Datel and I will just continue
13 on this page, if I may.
14 THE CHAIRMAN: Just show me.
15 MR RIORDAN: Paragraph 36 goes on to explain there are
16 various other elements which may be expressed in code,
17 but which are not protected under the Software Directive
18 principles, including functionality, the format of data
19 files.
20 Just pausing there, if one is thinking about the raw
21 binary data that goes into a bitmap image or a GIF file
22 or a JPEG, which might be used to express clip art in
23 digital form, that is not a computer program.
24 THE CHAIRMAN: Sorry, just take this more slowly. So
25 paragraph 36.

1 MR RIORDAN: If I could just invite you to read
2 paragraph 36, please.
3 (Pause)
4 THE CHAIRMAN: Okay, they're saying the functionality --
5 MR RIORDAN: They give three examples.
6 THE CHAIRMAN: -- of a computer program.
7 MR RIORDAN: They give three examples, sir. One is the
8 functionality.
9 THE CHAIRMAN: There's no difference between us on that.
10 MR RIORDAN: Indeed. The second is the format of data files
11 used within a computer program, and I'm saying
12 an example of that would be an image file.
13 THE CHAIRMAN: It's talking about the format of data files,
14 not the data files themselves.
15 MR RIORDAN: Yes. That is the signal, the medium in which
16 the artistic work is encoded.
17 Now, the files themselves, I absolutely agree, have
18 protection as an artistic work in the case of clip art
19 or a sound recording in the case of an MP3-file or
20 similar. But what the court is saying is that it's most
21 definitely not a computer program.
22 THE CHAIRMAN: It's saying the format. It's not saying the
23 data files are not a computer program.
24 MR RIORDAN: With respect, there's no difference because
25 these are digital objects.

1 Put another way, if you copy that file you're not
2 infringing copyright in a computer program, you're
3 infringing copyright in the artistic work or the sound
4 recording.

5 THE CHAIRMAN: In a data file?

6 MR RIORDAN: Yes, the data file is protected as an artistic
7 work. It's not in and of itself a computer program.

8 One can read on --

9 THE CHAIRMAN: Is it talking about data files in that sense,
10 as artistic works?

11 MR RIORDAN: Yes, they're the format of data files used in
12 a computer program. So, to explain how that comes
13 about, if I have an image stored on disk, as I said
14 earlier, there's a whole suite of accessory programs
15 I would need in order to render that on screen and enjoy
16 its artistic content. One of those will be an image
17 viewer of the kind that might be supplied with an
18 operating system, and that image viewer is a computer
19 program and the data file is used in that computer
20 program in order to exploit certain of its functions.

21 THE CHAIRMAN: It's just referring back to an earlier case,
22 isn't it, SAS?

23 MR RIORDAN: It is, yes.

24 THE CHAIRMAN: Do we have that?

25 MR RIORDAN: I don't actually think that's in the bundles,

1 but it can be provided quite readily.

2 The principles that we need can be taken from these

3 passages. I would just invite you also to read

4 paragraphs 37 and 38, which are fundamental and I think

5 address the question.

6 THE CHAIRMAN: It goes back to those paragraphs in that

7 case.

8 MR RIORDAN: My learned friend reminds me it's actually in

9 supplemental bundle, tab 7.

10 THE CHAIRMAN: Yes. It says the graphic user interface

11 constitutes one element of the program.

12 MR RIORDAN: Yes, but it's not protected as a computer

13 program, despite being an element of it.

14 MR LYKIARDOPOULOS: I think that's paragraph 37 of Sony.

15 MR RIORDAN: Yes. I'm grateful. Perhaps I could just

16 invite to you read on, sir?

17 THE CHAIRMAN: Yes. Then we with better go back to the

18 other authority.

19 MR RIORDAN: So I am at paragraph 37 of the Dattel decision.

20 MR LYKIARDOPOULOS: As I understand, you're relying on, in

21 paragraph 37, where it says that they're not protected

22 by that directive, and 38, where the protection

23 guaranteed is limited to the intellectual creation as is

24 reflected in the source code and object code.

25 MR RIORDAN: Correct. 38 is the key paragraph which

1 converts what was previously a non-exhaustive, "such as
2 object code and source code", into a definitive
3 statement of the scope of protection under Article 1 of
4 the Software Directive. It is now clear that it is
5 limited to the text --

6 THE CHAIRMAN: If you just give me a second, just to re-read
7 this.

8 (Pause)

9 I'm struggling with this.

10 MR RIORDAN: It's abstract, sir. But it is, in my
11 respectful submission, clear. And what the CJEU is
12 laying down is now a bright line rule.

13 THE CHAIRMAN: It's saying it's a set of instructions. I
14 thought I put that to you and you said --

15 MR RIORDAN: You put to me --

16 THE CHAIRMAN: I said it's not just code; it has to be more
17 than code.

18 MR RIORDAN: We may be at cross-purposes because I detect in
19 some of your questions, sir, that binary data, you're
20 potentially thinking of as a kind of code. It is code
21 to a human eye, but not to a -- let me explain slightly
22 better.

23 THE CHAIRMAN: No, I understand what you're submitting from
24 a technical perspective. It's just finding that in the
25 cases that I'm struggling with a little bit.

1 MR RIORDAN: So paragraph 38 is where the court brings all
2 of these preceding paragraphs together --

3 THE CHAIRMAN: Right.

4 MR RIORDAN: -- and lays down the bright line rule that the
5 subject matter of protection of the Software Directive
6 is the text of the source code and object code, i.e. the
7 literal expression of the computer program in those
8 codes, source code and object code, which constitute
9 respectively a set of instructions according to which
10 the computer must perform its tasks.

11 Now, my answer to your question 1 is in the case of
12 a raw data file, whether that's a document or an image,
13 sound recording, that is not in and of itself source
14 code or object code. Neither party has been preceding
15 on basis --

16 THE CHAIRMAN: It's not object code?

17 MR RIORDAN: No, it's not object code. It's raw binary
18 data. It's different to object code.

19 THE CHAIRMAN: And the difference is?

20 MR RIORDAN: It's not a set of instructions according to
21 which the computer will do anything, still less any
22 tasks --

23 THE CHAIRMAN: So I can take any piece of code -- take
24 Microsoft Word, I can take a few lines and code and go:
25 that doesn't do anything on its own. You have to put it

1 all together, or at least put parts of it together,
2 before it does something.

3 And once you have the data file associated with the
4 right other bits of source code, it will then express
5 itself on a computer screen. Manifest on a computer
6 screen, I should say, not express.

7 MR RIORDAN: That may be the result of running a program.

8 THE CHAIRMAN: And then why is that not part of the program?

9 MR RIORDAN: I agree --

10 THE CHAIRMAN: If you just take it on its own it doesn't do
11 anything --

12 MR RIORDAN: "Elements of the program which are not the
13 source code or object code of the program are not
14 protected under the Software Directive."
15 That's what Datel tells us.

16 THE CHAIRMAN: Right. And:
17 "That's not part of the source code or object code."
18 Where is that said?

19 MR RIORDAN: Those parts would not express the intellectual
20 creation as is reflected in the text of the source code
21 or object code. They would express the creation of
22 an artist who designed the clip art. The fact that it's
23 encoded as raw binary data is completely irrelevant,
24 with respect.

25 Or put another way, you don't suddenly get

1 a computer program copyright just because you've scanned
2 in the photograph and stored it as an image.

3 And to be clear there will be a whole host of
4 computer programs which are necessary around that data
5 file in order to read and display it and so on. And the
6 functionality of those other programs will be expressed
7 in their source code and object code, and they will be
8 used with the data file encoded in a particular format.

9 I don't want to get too theoretical about it, but it
10 is quite important to be, with respect, intellectually
11 rigorous about where the dividing line is between each
12 of these protected and non-protected elements.

13 MR LYKIARDOPOULOS: In relation to the graphic user
14 interface; are there not a set of instructions to which
15 the computer must perform in order to work the
16 interface, and interrelate with the interface?

17 MR RIORDAN: One can have a debate about that, but the CJEU
18 is very clear that it's not protected as a computer
19 program.

20 MR LYKIARDOPOULOS: I find easier --

21 MR RIORDAN: The rationale --

22 MR LYKIARDOPOULOS: I understand the rationale of clip art
23 and things like that more, and I notice your pleading
24 includes graphical user interface, and from what you
25 have been addressing the chair and us, looking at your

1 pleading, as I understand it, you're saying that clip
2 art graphics, fonts and other resources would fall
3 within the definition -- or outside the definition of
4 "computer program" as set out in Sony.

5 MR RIORDAN: Yes, they would be merely one element by means
6 of which users may use the features of the program, for
7 example.

8 THE CHAIRMAN: Is this not saying -- I'm sorry, I'm just
9 struggling with this. So, taking paragraph 35, which is
10 the graphic user interface, they're saying it is
11 an element of a program?

12 MR RIORDAN: Yes.

13 THE CHAIRMAN: Right.

14 MR RIORDAN: But it's not protected as such.

15 THE CHAIRMAN: Well, they don't -- let's just concentrate on
16 what they say, rather than what you hope they say.

17 MR RIORDAN: It does say in terms --

18 THE CHAIRMAN: "By means of which users make use of this
19 feature does not constitute a form of expression of a
20 computer ... within the meaning of that provision."
21 But you take any piece --

22 MR RIORDAN: The one --

23 THE CHAIRMAN: You take any piece of software in isolation,
24 it may not be a computer program.

25 MR RIORDAN: No, this is specifically about user interfaces.

1 And the reason for that is that interfaces are not
2 protected. And we don't need to go through all the
3 recitals that deal with that, we obviously have --
4 there's a fair amount of case law on that which it's not
5 necessary to get into.

6 THE CHAIRMAN: It's what is meant when one says the "graphic
7 user interface". When it appears on my computer a lot
8 of code is running and that code is protected, and
9 without that code there would be no graphic user
10 interface?

11 MR RIORDAN: Well, in fact, I think the CJEU is telling us
12 that the code which creates the graphical user interface
13 is not protected as a computer program, rather one must
14 look to the InfoSoc Directive.

15 THE CHAIRMAN: Hundreds of thousands, tens of thousands of
16 lines of code.

17 MR RIORDAN: Might that be so.

18 THE CHAIRMAN: I don't -- where do they say that? I don't
19 see that being stated in paragraph 35.

20 MR RIORDAN: It falls within the concept of an interface.
21 Therefore, it is demonstrably outside the scope of
22 protection of the Software Directive.

23 THE CHAIRMAN: But it always depends what you're meaning by
24 the graphic user interface.

25 MR RIORDAN: Of course, doubtless.

1 THE CHAIRMAN: If you're referring to the artistic work,
2 then of course what's said in paragraph 35 is
3 uncontroversial. If you're talking about the software
4 that gives rise to that artistic work, then the
5 paragraph means something else and it's not clear to me
6 what the Court of Justice or indeed any of the other
7 authorities are saying. Are they saying literally: it's
8 fine to copy all the thousands of lines of code of
9 a graphic --

10 MR RIORDAN: No, because you --

11 THE CHAIRMAN: -- you can copy all those providing you
12 don't -- you only have to worry about infringing
13 artistic copyright.

14 MR RIORDAN: That would infringe the artistic copyright.

15 THE CHAIRMAN: Why doesn't it infringe -- where is the case
16 that says it doesn't infringe the software?

17 MR RIORDAN: Because it falls outside the scope of
18 protection of a computer program.

19 THE CHAIRMAN: Where is the case --

20 MR LYKIARDOPOULOS: Isn't that EBS or --

21 THE CHAIRMAN: -- you take the very same code.

22 MR RIORDAN: Perhaps then we should go back to the BSA --

23 MR LYKIARDOPOULOS: Is that not BS whatever it's called; the
24 unpronounceable one?

25 MR RIORDAN: The unpronounceable one, yes.

1 MR LYKIARDOPOULOS: That's in tab 25 of the same bundle.

2 MR RIORDAN: Yes, you're one step ahead of me.

3 MR LYKIARDOPOULOS: And possibly page 696. Sorry, just to

4 assist, I think the point comes up at 696, paragraphs 40

5 down to 50.

6 MR RIORDAN: Exactly. Perhaps I could just invite

7 Mr Chairman to read paragraphs 39 through to 44, and 44

8 in particular.

9 THE CHAIRMAN: It's the same as Lord Justice Arnold. It's

10 saying you can't protect a graphic user interface

11 through copyright in the software. You can't because

12 you can use different code to produce the same graphic

13 user interface. That's why you're not getting

14 protection. It's not saying that if you use the same

15 code you won't be infringing copyright in that code.

16 MR RIORDAN: With respect, I don't read it that way. In

17 particular, I would look at paragraph 44, which is

18 inconsistent with that theory.

19 THE CHAIRMAN: If you say the graphic user interface is the

20 visual image that you're getting on your computer,

21 you're not going to get protection from the software

22 because -- and we know there are a number of cases where

23 people produced the same graphic user interface using

24 different code and, in those circumstances, they're not

25 infringing. You can't enlarge the scope of your

1 protection under the Software Directive to the extent
2 that includes the visual representation of the graphic
3 user interface. A number of cases on that.

4 MR RIORDAN: I respectfully agree.

5 THE CHAIRMAN: And I don't see this as saying any more than
6 that. Really, in a very picky summary saying: you don't
7 protect functionality; you don't protect the graphic
8 user interface; you don't protect any of these things.

9 MR RIORDAN: Could I just read aloud paragraph 42, with
10 respect?

11 THE CHAIRMAN: Yes.

12 MR RIORDAN: "It follows that that interface [that's
13 graphical user interface] does not constitute a form of
14 expression of a computer program within the meaning of
15 Article 1(2) of the Software Directive [that's the
16 original version of it] and consequently it cannot be
17 protected specifically by copyright and computer
18 programs by virtue of that directive."

19 THE CHAIRMAN: Yes. Again, there's the same ambiguity
20 written through that.

21 MR RIORDAN: With respect, that couldn't be clearer, and
22 I don't think I can make it any clearer than that.

23 THE CHAIRMAN: Just remind me, what was the issue in that
24 case on the facts?

25 MR RIORDAN: In BSA, it was a question of whether

1 a graphical user interface was protected as subject
2 matter under the Software Directive. The questions that
3 were referred to the court are summarised at
4 paragraph 21 of the decision, on page 694:

5 "Should Article 1(2) of the Software Directive --"

6 THE CHAIRMAN: Slow down. It was really the facts I was
7 after.

8 MR RIORDAN: It doesn't really matter, with respect, what
9 specific interface was under consideration. What
10 matters is the question that was referred and the answer
11 that was given in dispositif. We don't, for example,
12 have evidence of what that particular interface looked
13 like or what software it was within.

14 THE CHAIRMAN: You see AG 65, it seems to be -- if you look
15 at AG 65:

16 "The graphic user interface alone cannot give these
17 results since its reproduction does not entail
18 reproduction of the computer's program itself. It is in
19 addition possible for computer programs having different
20 source and object codes to share the same interface."

21 That seems to be the point that runs through all
22 these cases. And for a particular piece of software
23 with the same computer code, the question then arises:
24 does that computer code obtain protection under the
25 Software Directive? That is a very different question

1 to what's being discussed here.

2 MR RIORDAN: With respect, no. That's the exact question

3 that the Court of Justice is answering "no", quite

4 definitively. It may be protected as an artistic work

5 under the InfoSoc Directive, and that artistic work is

6 expressed in the form of code and other elements, but it

7 is not within the ambit of the Software Directive

8 because it is an interface.

9 But perhaps I could just, again, refer the Tribunal

10 to the dispositif itself, at the end of that tab,

11 I think it's page 697, at the bottom. So the answer

12 which is given to the first question is:

13 "That a graphic user interface is not a form of

14 expression of a computer program and cannot be protected

15 by copyright as a computer program."

16 THE CHAIRMAN: Right. But that's not the question. The

17 question I am putting to you that the program, the

18 computer program that gives rise to the graphic user

19 interface can be protected as a computer program. This

20 is just saying ...

21 MR RIORDAN: I understand --

22 THE CHAIRMAN: That is different question and it's not

23 answered here.

24 MR RIORDAN: Well, I'm afraid I can't assist further on what

25 the authorities say. Those are the relevant authorities

1 on this question.

2 I should remind you that Sony v Datel is obviously
3 a post-IP completion date decision, but it does
4 simply --

5 THE CHAIRMAN: I'm not sure how much any of this matters,
6 but it seems there is potentially an issue as to whether
7 or not --

8 MR RIORDAN: Well, the parties seem to be agreed that the
9 raw binary data files are not computer programs. So
10 clip art is not a computer program. No doubt they will
11 submit otherwise if there is a dispute.

12 MR LAVY: Okay, since I asked the question I should make
13 clear that it's definitely not common ground that
14 computer code which creates a graphic user interface is
15 not a program; it is.

16 MR LYKIARDOPOULOS: From that, so is -- of the list of what
17 are called non-program works in this case; do you, the
18 claimant, make a distinction only with the graphic user
19 interface as opposed to the other list that I read out?

20 MR LAVY: That's the most clear and extreme example. The
21 difficulty is actually, I think, one gets quite quickly
22 into technical complexity because it may depend in some
23 cases on how it's actually sort of packaged and
24 produced.

25 Where -- to give you a sort of hypothetical example,

1 say a postscript file creates an image, but it's
2 software. It's a piece of code and technically it's
3 actually stuffed full of instructions to a computer.
4 I do agree with my learned friend that say a bitmap,
5 which is literally just a set of ones and noughts which
6 is a representation of an image, is not a computer
7 program. So it does depend on precisely what it is
8 we're talking about.

9 THE CHAIRMAN: So the icons that you click on and things;
10 where do they fall?

11 MR LAVY: So the icons, in my submission, are actually both.
12 They're in a twilight world because there you have -- on
13 one level, obviously, they're images, for sure they're
14 images. They're images that are encoded in ones and
15 zeros, as my learned friend says, which may not make
16 a difference. But, on the other hand, they're also
17 an intrinsic part of computer code. They may not be
18 coded in the source code, but they will be in the
19 binary, so they are in fact part of the thing which is
20 the computer program.

21 Now, in fact I'm not going to repeat any of my
22 submissions from yesterday. I submit that ultimately,
23 because of the way one looks at this, it doesn't matter
24 that much. But that's the position as we see it.

25 MR LYKIARDOPOULOS: As I understand it, Mr Novak discussed

1 some of this in his evidence --

2 MR LAVY: I was about to come to the evidence.

3 MR LYKIARDOPOULOS: And as I understand it, you don't

4 challenge that what Mr Novak says.

5 MR LAVY: We're not in a position to challenge it. So, in

6 that sense, no.

7 MR LYKIARDOPOULOS: You're not in a position. But, forgive

8 me, he says, for instance, resource files are separate

9 to the object code, can be utilised with the object

10 code. Resource file is not a computer program. You

11 would not be in a position to challenge that --

12 MR LAVY: That very last step, of course, is an -- the last

13 step is an analogical conclusion rather than the

14 evidence. But the rest of it, no, we don't challenge.

15 The point there is -- and we're talking about a huge

16 array of different works and for some of them no doubt

17 that's right. For others, maybe not. So it really

18 does, at that stage, depend on the detail. And with the

19 information, with the evidence the Tribunal has, I don't

20 think I can properly make a sweeping statement that, for

21 example, all the things in one category fall one or

22 other side of the line. But what I certainly do accept

23 is that there are a whole load of non-program works

24 necessarily packaged in which don't fall within the

25 computer program side.

1 MR RIORDAN: It may that be my learned friend's answer is
2 sufficient for present purposes, but I respectfully
3 agree with him that one could have a computer program a
4 function of which is to generate an image. But that is
5 not this case. We're not concerned with a postscript
6 file which outputs an image. We're concerned with the
7 raw binary files.

8 THE CHAIRMAN: That means some of the artistic works of all
9 binary files.

10 MR RIORDAN: Yes. But, in the case of an icon, which is
11 displayed in the user interface, the icon itself will
12 just be binary data. Whether that's located in the
13 executable or on disk is, in our submission, irrelevant.
14 It's not one of the protectable elements of the computer
15 program per BSA and Sony v Datel.

16 So that, I hope, provides some assistance with
17 question 1.

18 I think my learned friend Mr Hobbs already answered
19 question 2.

20 THE CHAIRMAN: Just remind me, what was question 2?

21 MR RIORDAN: That was in relation to looking at the
22 transaction on the rightholder side, rather than the
23 subsequent downstream deals and what one must look at
24 holistically in that context. So I won't rise above my
25 station.

1 In relation to the evidence, I think
2 Mr Lykiardopoulos already has the reference, but just to
3 ensure the whole panel has it, Mr Novak's evidence is in
4 bundle D2, tab 3, and page 26 in particular enumerates
5 in the context of Windows for present purposes, at
6 paragraphs 8 to 14, all the resource files which are
7 supplied to a purchaser of Windows, which include
8 a great many things which are entirely separate to the
9 executable computer program.

10 I'm oversimplifying slightly because, of course,
11 Windows is a collection of many different computer
12 programs which work together. But in addition to those
13 you have things like the font files, you have the
14 documentation and help files, you have the clip art and
15 graphics, sample wallpaper, sound recordings and so on.
16 All those are stored separately.

17 I have already made the point that the mere fact
18 that they're stored digitally doesn't give rise to
19 a computer program copyright.

20 Unless I can assist you further on that question,
21 I will sit down.

22 Further submission by MR HOBBS

23 MR HOBBS: Now you know why I didn't try to answer the
24 questions.

25 And of course, and generally, if you have any

1 further questions that we can assist you this side of
2 the Bar please don't hesitate to ask them. One knows
3 that one's thoughts evolve in discussion and debate as
4 the hearing goes on, so don't hesitate to ask.

5 Can I just take a second or so to clear up my papers
6 and get them in the correct order? Would you mind if
7 I just do that?

8 (Pause)

9 Right, what I would like to do now is to address you
10 on the Top System case and this arises in relation to
11 Article 8 of the Software Directive, which says that the
12 provisions of that directive are without prejudice to
13 contract, law of contract.

14 There is a myth that circulates through all these
15 cases and -- they will forgive me or not for saying
16 so -- the German courts seem to have a blind spot on
17 this. What you cannot prevent by contract is the
18 exercise of the exhausted right. You can't prevent
19 that.

20 There is no limitation other than that, apart from
21 the one spelt out in the second paragraph of Article 8
22 of the Software Directive. There's no other limitation
23 on what you may regulate or organise -- "organise" is
24 the word the court settled on -- organise by contract.
25 And this is teased out specifically by the

1 Advocate General and symmetrically by the
2 Court of Justice in Top System. If I could take you to
3 that, it's tab 43 in the authorities bundle, volume 2.

4 This was one of those where I think the Tribunal
5 instructed that the hard copy should contain both files.
6 That's AG's opinion and the judgment. May I just check
7 that I am right in that?

8 THE CHAIRMAN: Yes, we have both.

9 MR HOBBS: Excellent. I will start with the opinion of
10 Advocate General Szpunar. We've started on 1076, but I
11 don't need it beyond a certain point. That's the
12 lex specialis point. One never gets away from the
13 lex specialis point.

14 The nature of computer programs' expression. This
15 is all about the things that we have just been
16 discussing. By then, of course, Top System, we hadn't
17 yet reached the pinnacle of all this, which is the Sony
18 case. You see that he's distinguishing explicitly --

19 MR LYKIARDOPOULOS: Sorry, Mr Hobbs, I have lost where we
20 are.

21 MR HOBBS: I beg your pardon. I started you on 1076 where
22 you sidelined. That was the lex specialis point. I am
23 taking a run-up to the crease, if you will forgive me.
24 Or not. And you will see the sideline down 1077 and the
25 top of 1078, this is a precursor to what comes later in

1 his opinion which guided the court in the Sony case,
2 which is the latest and governing exposition. It's the
3 nature of the works and what does what.

4 In the light of the exchanges that have just taken
5 place with my learned friend, Mr Riordan, you might find
6 some of those comments illuminating to explain what the
7 subject matter is for the one directive and so on.

8 Now, the actual issue in this case was about the
9 right to decompile.

10 THE CHAIRMAN: Sorry, just picking this up again, just so we
11 get this right. They're saying the computer program
12 here, which I think is consistent with what Mr Riordan
13 was saying, utility:

14 "Not only do computer programs have a utility to
15 purpose, but that utility is very special to make
16 computers work. Such a program consists after series of
17 instructions which when executed by a computer enable
18 a computer to perform certain tasks."

19 That's what a -- to say a computer program is just
20 code is probably too much of a shorthand; it does need
21 to make the computer do something.

22 MR HOBBS: I'm sorry. Do you mind me saying, without any
23 impertinence, it's not open to us to say that after Sony
24 in the CJEU.

25 THE CHAIRMAN: Right.

1 MR HOBBS: It's just not open to us.

2 THE CHAIRMAN: I'm just reading what's here. That's all.

3 That's wrong.

4 MR HOBBS: No, it's not wrong. It's not wrong. He's

5 explaining why programs are different and unique

6 relative to -- in the law of copyright. He's explaining

7 what their unique features are and this is a theme.

8 This Advocate General has been the Advocate General in

9 almost all the cases that we have been discussing here.

10 Was he in Nintendo? I can't remember. That was Eleanor

11 Sharpston.

12 Anyway, in the later cases Szpunar was the Advocate

13 General and this seems to be his domain within that

14 Court of Justice as AG.

15 It's right, of course, to say -- and there's plenty

16 of law on this -- what the Advocate General says is not

17 binding on the court, it's not binding on the parties,

18 and it's not binding on the referring court either, and

19 there's plenty of case law to that effect. And when

20 I wrote and tried to get them to reopen the oral

21 procedure in *Interflora v Marks & Spencer* they wrote

22 back and said: no, we're not going to reopen because

23 what he says is not binding.

24 But, anyway --

25 MR LYKIARDOPOULOS: At the end of that, AG 7, he's

1 explaining, isn't he, there --

2 MR HOBBS: He is.

3 MR LYKIARDOPOULOS: -- in one sense the reason for the

4 Software Directive, isn't it?

5 MR HOBBS: He is.

6 MR LYKIARDOPOULOS: Computer programs are not perceptible to

7 people and therefore normally would not be a copyright

8 protection and in fact that's --

9 MR HOBBS: He is. And you can see in that sentence

10 straightaway, just me putting it in a crude vernacular

11 way, the graphic userface (sic) is what the human beings

12 consume. The code is what the computer, the machine

13 consumes and there's a difference between them, and the

14 difference is reflected in the two parallel directives

15 that we're talking about, and that's the way it is. And

16 that, as I have said repeatedly, is a policy decision

17 which the EU legislator has taken.

18 Now, on the point I am primarily citing this case

19 for, if I turn you to page 1082, he analyses the scope

20 for contractual provisions within the latitude allowed

21 by the Software Directive.

22 Now, all this revolves around those words which you

23 see him noting in AG 29. Article 5(1) of the

24 Software Directive starts with the words:

25 "In the absence of specific contractual

1 provisions ..."

2 And so the whole debate is about: what can you do by
3 contractual provisions that is not overridden by
4 Article 5 or indeed Article 6?

5 That's what he's discussing. And he's engaged in
6 systematic interpretation of the legislation.

7 So if I can dwell on this a little bit, please, the
8 end result, he says in 30, of Article 40A and B of the
9 Software Directive is actually to permit the holder of
10 copyright in a computer program in its relations with
11 a lawful acquirer of the program to define by contract
12 in detailed terms the rules for use of that program by
13 the acquirer.

14 By contrast, in the absence of such contractual
15 provisions the acquirer is free to carry out acts
16 subject as a rule to the rightholder's exclusive rights
17 provided that the program in question continues to be
18 used in accordance with its intended purpose, which
19 includes the correction of errors.

20 Now, he digresses into recital 17, because recital
21 17 of the legislation he was looking at -- and you will
22 notice it's the predecessor to the one we're looking
23 at -- the one you're looking at is the codified version.
24 This was 91/250. I don't believe that is in material
25 respects different, but I should imagine that recital

1 17 -- can you check it? -- doesn't appear in the current
2 version.

3 Anyway, he goes through and it's instructive because
4 he says that it looks as though recital 17 is a remnant
5 of a drafting -- it should have been taken out, but it
6 survived drafting changes.

7 Anyway, he says that, as you can see, Article 5(1)
8 that's halfway down AG 31:

9 "Treats all the acts listed in 4A and 4B of the
10 directive in the same way. That provision does not
11 therefore leave any scope for interpretation which would
12 allow certain acts, namely the loading and running, to
13 be exempted from the reservation related to specific
14 contractual provisions in Article 5(1)."

15 He goes on to describe the a fortiori case in AG
16 opinion 32. I'll just speed up a little bit. In the
17 sideline packages on your bundle, page 1803, you will
18 see the last two or three lines of AG 33. The fact
19 remains that the text of Article 5(1) of directive 250,
20 the then Software Directive, that was finally adopted
21 doesn't make that distinction accordingly. The
22 provisions of any user licensing agreement for
23 a computer program may govern all aspects of such use
24 including loading, running and error correction. Then
25 please note this, paragraph AG34 is important for my

1 submissions:

2 "This is not as irrational as it would appear
3 prima facie. It is of course difficult to imagine the
4 user licence for a program which entirely prohibits that
5 program's use. However, the use of a program may be
6 restricted, for example, in terms of the number of
7 computers on which the program may be installed and
8 used, such that its loading and its running on
9 additional computers, including by the same acquirer,
10 would be prohibited."

11 So what you're seeing here is that contrary to the
12 impression that is given by counsel in argument and
13 by -- I'm sorry to say it, but by the German courts in
14 particular, it's not simply a question of pulling all
15 the contractual provisions on one side. Far from it.
16 The contractual provisions are enforceable according to
17 their terms, unless and except they actually seek to
18 prevent, prohibit the permitted transmissions from the
19 first acquirer to the second acquirer.

20 Now, the court dealt with this in the same bundle.
21 If I take you to -- forgive me. 1103 will do in the
22 same bundle. It starts in 67, where we have sidelined
23 in the judgment of the CJEU and they're referencing
24 Article 5(1), which has the provisions in the absence of
25 specific contractual provision.

1 So 67:

2 "On the other hand under that provision the holder
3 and the purchaser remain free to organise contractually
4 the manner in which that option is to be exercised.
5 Specifically, that holder and the purchaser may in
6 particular agree that the rightholder will ensure the
7 corrective maintenance of the program concerned. It
8 also follows that in the absence of specific contractual
9 provision to that effect the lawful purchaser of a
10 computer program is entitled to perform without the
11 prior consent of the rightholder the acts listed in 4A
12 and 4B, including decompilation."

13 All in the absence of contractual provisions.

14 And if you read through to the end of the
15 sidelining, you will see it ends in 74, in the last two
16 lines, with compliance being a requirement.

17 So why am I citing this?

18 The answer is this: I was at pains to emphasise when
19 we were looking at UsedSoft itself that my clients were
20 and are entitled to use all technological means at their
21 disposal for the purpose of ensuring that the first
22 acquirer does what is necessary to fulfil the deletion
23 or rendering unusable requirement which is built in to
24 UsedSoft. And that's -- my clients are free to organise
25 that contractually. And I'm emphasising that because,

1 as Mr Riordan will show you in a short while when he
2 comes to address you on the terms of the contracts, that
3 is organised contractually by means of the PLTFs, the
4 licence transfer forms, Microsoft's product licence
5 transfer forms, and those forms serve to enable my
6 clients to say exercise their entitlement -- remember
7 that word from the CJEU -- their entitlement to use
8 technical means and the technical means are the security
9 keys, the MAKs and the other security keys.

10 THE CHAIRMAN: Is there a contractual requirement the first
11 acquirer destroys copies if they --

12 MR HOBBS: I can't remember.

13 THE CHAIRMAN: -- pass on.

14 MR HOBBS: There's a contractual requirement to notify us of
15 the transposition --

16 THE CHAIRMAN: It's open to you to have a contractual term
17 that if the first acquirer is going to sell their
18 computer program that they were required to destroy it.
19 It was open to you to have --

20 MR HOBBS: I can't remember. It will be -- it's
21 complicated. He will address it in context, but we did
22 have a requirement for PLTFs to --

23 THE CHAIRMAN: I am aware of that.

24 MR HOBBS: And the purpose of that -- it is explained in the
25 evidence to you. The purpose of that is to enable us to

1 enforce our technological protection rights. As I have
2 repeatedly stressed to you, those technological
3 protection measures are our entitlement within the scope
4 of the UsedSoft doctrine.

5 THE CHAIRMAN: Can I just take you back to -- sorry, I'm not
6 sure anything particularly turns on this, but it's
7 important we get it right.

8 MR HOBBS: Are we in Top?

9 THE CHAIRMAN: No, back to Sony, where you said
10 definition -- we were having a look at the
11 Advocate General in another case.

12 MR HOBBS: In Sony?

13 THE CHAIRMAN: And I now want to go back to Sony --

14 MR HOBBS: I need to just open it up. It's 145, isn't it?

15 THE CHAIRMAN: Page 146.

16 MR HOBBS: One second, please. Yes.

17 THE CHAIRMAN: I think -- we may have been at
18 cross-purposes, but I thought you said it was a --
19 a computer program was defined as code and I was putting
20 to you that it was a bit more than code, that it
21 required some sort of functionality --

22 MR HOBBS: Well --

23 THE CHAIRMAN: -- and you said that's been decided in Sony,
24 and I just couldn't find it in Sony.

25 MR HOBBS: It's paragraph 38 on that page.

1 THE CHAIRMAN: Yes. So I think it does go perhaps a little
2 bit further.

3 MR HOBBS: It's the word "limited". Limited.

4 THE CHAIRMAN: So it says:

5 "Limited to the intellectual creation as it's
6 reflected in the text of the source code and object code
7 and therefore to the literal expression of the computer
8 program in those codes which constitutes respectively
9 a set of instructions according to which the computer
10 must perform tasks."

11 And what I was trying to get at is: not any bit of
12 code is a computer program; it has to be a set of
13 instructions to the computer, which, again, would
14 further emphasise Mr Riordan's point that would not
15 include a clip art file and so forth.

16 MR HOBBS: Yes, absolutely. Excuse me, for slipping into
17 the vernacular, but that's spot on.

18 I argued the SAS case in the Court of Appeal when it
19 came back from the Court of Justice. I argued that in
20 England. Part of the argument in the SAS case, which
21 Mr Justice Arnold rejected and which we took on appeal,
22 was that you can use the copyright in a computer program
23 to get protection against non-literal copying. You know
24 that with all forms of copyright work you can claim
25 protection against reproduction of the whole or

1 a substantial part. That includes variants of
2 expression and so on and modalities of expression, and
3 you know there's a periphery of protection around all
4 sorts of copyright works.

5 We tried to argue for that. Mr Justice Arnold
6 rejected it in first instance and the Court of Appeal
7 rejected it on appeal. But, having watched the
8 evolution of this having run through the cases,
9 Nintendo, Tom Kabinet, the consternation of the point
10 came when they finally nailed it down. It's
11 particularly these paragraphs: 35 and 38 in this
12 judgment on that page. That's where they nailed it.

13 THE CHAIRMAN: Yes, thank you. That's helpful.

14 MR HOBBS: Will it be convenient to stop there?

15 THE CHAIRMAN: Yes, I think so. How are we doing for time?

16 You had a certain amount of injury time this morning.

17 MR HOBBS: Injury time. Love that expression, yes. I will
18 limp on. I'm a little bit behind on my own horizons,
19 but then Mr Riordan is going to be responsive as to how
20 much you want to see on the facts.

21 THE CHAIRMAN: Yes, I'm not sure there's a great deal
22 between the parties on the facts, but we will see how Mr
23 Riordan does.

24 MR HOBBS: I think it's important to hear what he has to
25 say. And please do it interactively. He won't mind if

1 I say it vicariously for him. He won't mind.

2 THE CHAIRMAN: Thank you very much.

3 MR HOBBS: Let's stop there, thank you.

4 (1.02 pm)

5 (The luncheon adjournment)

6 (2.00 pm)

7 THE CHAIRMAN: Mr Hobbs, thank you.

8 MR HOBBS: Thank you. Right, so I have shown you what

9 I regard as the pertinent provisions of the Top case.

10 THE CHAIRMAN: Yes.

11 MR HOBBS: Contract, the contract can't be brushed aside.

12 I now want to go to the question of the PLTFs, as you

13 know there's a raging argument going on about what's

14 relevant and what's not.

15 Let me just say our stance has been relevance is for

16 the Tribunal. It's not for the other side to tell you

17 what is and isn't relevant. They can have their own

18 view and we can have ours.

19 With that short introduction, can I ask you, please,

20 to take -- which I know you have seen, but that's

21 refreshing our memories -- bundle D1, tab 2, and I'm

22 going to put this in context.

23 THE CHAIRMAN: The claimant's evidence or ...?

24 MR HOBBS: It's the claimant's evidence, yes. And are you

25 in electronic form or --

1 THE CHAIRMAN: No, no, hard copies.

2 MR HOBBS: Thank you. That's D2 and -- you've read this.

3 I know you've read it from some of your comments.

4 THE CHAIRMAN: D1, tab 2?

5 MR HOBBS: D1, tab 2, sorry, didn't I say? And that's

6 Mr Horley. It's his second witness statement in

7 evidence, if you call it that. It's his evidence

8 in-chief, if you call it that, for the purposes of the

9 PI trial.

10 As you know, he discusses the methodology and the

11 way they do business. But I want to draw your

12 attention, please, to pages stamped 20 and 21. It's

13 paragraph -- basically 28 and 29 I want to draw your

14 immediate attention to.

15 So 28 is telling you about their business model, not

16 sold in block amounts, as they had been purchased from

17 the seller. So it's common ground in this case that you

18 have splitting. Leave aside splitting in what

19 dimensions, but you have splitting.

20 And then, on 29, you have this:

21 "With every sale VL provided customer copies of all

22 the relevant due diligence documents set out above."

23 With every sale. This is why we write in our

24 skeleton it's their method of business, with every sale.

25 And then you will look at the first itemisation of

1 what goes into that pack. Item A, he's telling you that
2 they provide a completed Microsoft perpetual licence
3 transfer form.

4 Now, I'm going to have to give you the context for
5 this. This was on 25 July. We had a PTR hearing on
6 31 July. There was, raging in front of the chairman at
7 that point in time, the question of the statement of
8 facts and how it wasn't --

9 THE CHAIRMAN: I don't remember any raging, Mr Hobbs. It
10 was very genteel as I recall.

11 MR HOBBS: Metaphorically. Anyway, there was an issue over
12 this.

13 You need to know how we came to that position. In
14 the statement of facts it was evolving. And it was
15 evolving, you should know, because I'm about to tell
16 you, from May 30th.

17 THE CHAIRMAN: Yes.

18 MR HOBBS: Through stages, through stages, through stages.

19 Now, we got to the hearing on the PTR and the chair at
20 that hearing directed to us complete the finalisation of
21 that document, not to (inaudible) or cut it down, but to
22 finish it, which we did by about August 5, if I remember
23 that's the relevant date.

24 Mr Horley is giving evidence here in this statement,
25 on the 25th, so it's before. But it's during that

1 process in which we are contesting what I am going to
2 call the pseudo-PLTFs for the reasons you know about.

3 He knew, or his solicitors, anyway, knew we were
4 contesting that.

5 Now, hold that phrase. I am only using it as
6 a convenient label, the pseudo-PLTFs. How did they come
7 into the case?

8 Right, the first round of the statement of facts
9 comes on 30 May and it was ongoing at the PTR. On
10 28 May 2025, they disclosed 1,508 PLTFs and they came to
11 us as needless in an unindexed electronic haystack. We
12 found them and as we found them we put them in,
13 relevantly for the transactions, into the statement of
14 facts.

15 Putting them in that disclosure concededly
16 acknowledges that they're relevant documents. That's
17 the hypothesis on which you give disclosure, of course.

18 We're not clairvoyant. We had no knowledge of these
19 documents before they came to us, and it took us time to
20 dredge them up. We cannot refer to them in any document
21 until we have seen them. When we have seen them, we put
22 them into our statement of facts.

23 MR LYKIARDOPOULOS: Sorry, this disclosure was for the
24 purpose of this preliminary issue?

25 MR HOBBS: Yes. And here we are. And then I find that

1 they're giving evidence in-chief on the subject,
2 including that from Mr Horley. And then he knew -- when
3 he came to give his reply evidence, he knew what our
4 witnesses were saying about those documents because we
5 had done the initial exchange of evidence in-chief and
6 he had a full opportunity to reply, which he did in
7 witness statement 3, on 8 August, which is behind tab 3.
8 But you won't see anything in there because he ignored
9 the subject.

10 THE CHAIRMAN: Right.

11 MR HOBBS: Now, the methodology. I do need to just say
12 a word or two about the methodology that was adopted in
13 CMC-6, which is the order for the PI trial.

14 There are two ways of ordering a PI trial. You can
15 order a PI trial with pleadings, and it goes down the
16 line on that basis and then you have disclosure and
17 witness statements and so on. Or you can do what both
18 sides requested the Tribunal to do, which is to have
19 sample transactions and to provide evidence about the
20 transactions.

21 The samples, when that happens, are test cases.
22 They stand for the purpose of testing on the
23 factualities, the rival positions on the point of law,
24 which is the subject of the PI 1 and the PI 2. This is
25 not a trial about some other or different, or platonic

1 transactions. This is a trial about them as samples.

2 With respect, you deal with it in the concrete case.

3 You take the sample transactions as you find them and

4 I will add the words "warts and all" because that's the

5 exercise, and you don't shut your eyes to the facts,

6 much as they want you to do so.

7 Now, you have seen the evidence, you have seen what

8 we say in our skeleton on this issue, and I mentioned

9 yesterday in an intervention, but I need to just pin it

10 down with you now, if I may. Matters that advanced

11 after the reply stage in the evidence, so if I can ask

12 you, please, to take bundle C.

13 MR LYKIARDOPOULOS: What I didn't see from the skeleton, but

14 just I'm sure one of you will come to it, is we had why

15 the differences in between the transactions matter to

16 your case, because there are differences between the

17 transactions.

18 MR HOBBS: Yes, there are.

19 MR LYKIARDOPOULOS: I couldn't see from your skeleton why

20 they make any difference. So, when is looking at each

21 transaction, it's quite helpful to know: well, yes, they

22 have factual differences, but why do they matter to

23 the --

24 MR HOBBS: Again, I slip into the vernacular without any

25 disrespect. Spot on.

1 And the reason for this is you will have noticed
2 there was the spat about which samples should be
3 identified. That went on in the correspondence and that
4 was blipping on your radar screens five or six days ago,
5 I suppose. They named one, Carillion. But, in the
6 skeleton that they put in, they didn't discuss it from
7 beginning to end. We didn't know until we inherited
8 case being addressed yesterday what their stance was on
9 the individual samples. We knew that they wanted one.
10 We said there were differences between them.

11 There was correspondence. The last letter that came
12 in on this subject was on Monday from the solicitors on
13 the other side and it was quite skilfully worded.

14 What it actually said -- and I hope you noticed
15 it -- was the terms of the transactions don't differ.
16 That wasn't our point.

17 Our point was that the parameters, the contours, the
18 anatomy of the transactions did differ and that you
19 needed -- in order to have a dispositive effect you
20 needed to consider the three.

21 Now, if when Mr Riordan has finished addressing you
22 on the facts, which is coming up as soon as I sit down,
23 if when he has addressed you they then accept the
24 contours as he has outlined it, you may be able to
25 reduce it down to one, but shall we suck it and see?

1 THE CHAIRMAN: Yes.

2 MR HOBBS: Do you have, please, bundle C?

3 MR LYKIARDOPOULOS: Yes.

4 MR HOBBS: Right, okay. I'm going to turn you in that

5 bundle with your permission to --

6 THE CHAIRMAN: If you just give us a second.

7 (Pause)

8 Keep going for now.

9 MR HOBBS: Perhaps it's for your protection, to stop me

10 bombarding you with stuff. Editorial control. Is there

11 a recording? You will make up the gap?

12 THE CHAIRMAN: There will still be a transcript.

13 MR HOBBS: Forgive me, I am too busy laughing at my own

14 jokes to get to the right tab.

15 One second, please. Tab 12.

16 THE CHAIRMAN: Yes.

17 MR HOBBS: So this key date, 14 August.

18 After the pleadings are closed -- not the pleadings.

19 After the witness statements have gone back and forth,

20 we have a statement of facts, rival positions marked in

21 blue and red. We have had evidence in reply. There's

22 absolutely no substance in the suggestion that Mr Horley

23 hasn't had an opportunity to deal with these points.

24 But, anyway, I think it's all come out in the wash when

25 you get to this document.

1 What you're looking at, on 14 August 2025, is their
2 answers to our requests for admissions. And it's
3 supported, as you will see from 297, with a statement of
4 truth. So there you go.

5 Now, it's going to be too tedious if I do more than
6 show you the landscape of the document and point out one
7 or two things in it.

8 All this goes to the PLTFs and the MAKs security
9 keys. This is what I'm about to show you. Not the
10 whole document, but down to page 293. 293 is dealing
11 with PI issue 1. So the request that you see on 286 is
12 headed "Relevant technical facts". You see the request
13 for admissions that rundown from 1 to 6? They relate to
14 MAKs. Then you see the response. Now, 1 is admitted.
15 2 is admitted with a qualification. 3 is admitted,
16 subject to the same qualification. 4 is admitted
17 repeating the same qualification from above. There's
18 a complaint that request 5 is formulated unclearly, but
19 it is admitted and they make admissions which are
20 relevant.

21 As to request 6, they say it's no part. So they're
22 continuing to take the point about what's in and what's
23 not in scope, but then you go: it is however admitted.

24 Then use of MAKs in sample transactions. So now
25 they are coming to the agenda for the sample

1 transactions. At this point in time, all five of the
2 sample transactions are still in play, so to speak.

3 The request at 7 and 8. 7 goes to the 25 per cent
4 more activation keys. 8, there's quibbling over 8A and
5 8C, but they admit 8B. 8B is quite important.

6 Then you get the responses to 7 and 8, which run
7 down 289 and up to the top of 290. I paraphrase as I
8 go, but the main one in 289 is:

9 "Without prejudice to the foregoing it is admitted."

10 Additional 25 per cent more activations and so on,
11 and so on.

12 You get more admissions under 8 running down 290.
13 All pertinent to the case that we're putting.

14 Then you get to what I have called the pseudo-PLTF
15 forms.

16 And the requests for admissions run down the bottom
17 of 290 and through 291, and the answers come on 292,
18 running through to the top of 293. And the answer that
19 you can see, on 292, confirms our position:

20 "Following early 2018, the claimant stopped filing
21 PLTF forms. Unnecessary to seek the consent of
22 Microsoft to resell product whose copyright has been
23 exhausted. However, for each sale going forward the
24 claimant created pack of documents known as a software
25 licence pack to provide its customers with the

1 information necessary to respond to an audit if
2 Microsoft were to request one.

3 "One of the documents in this pack was a document on
4 an adapted version of one of Microsoft's PLTF templates
5 setting out certain information on the transaction,
6 including the number of products. Another was a letter
7 from the underlying vendor identifying what products had
8 been resold. To the best of the claimant's knowledge
9 there weren't any audits."

10 And so on. Then at the bottom:

11 "The references in these PLTFs to Mr Horley being
12 a director [you will remember, if you have those forms
13 in mind, he signed as a director under the name of the
14 company that was the original Microsoft product first
15 acquirer] are references to Mr Horley being a director
16 of the claimant. Microsoft's requests insinuate that
17 deliberately inaccurate information was included in this
18 document, but there's no substance to this. The wider
19 information in the software licence pack [so the wider
20 information] would have made it very clear that the
21 claimant's role in any transfer was as a broker and that
22 Mr Horley's role was as a director of the claimant and
23 not a director of the vendor company.

24 "In the context of an audit, this would have been
25 explained to Microsoft in any event. As to the sample

1 transactions, it is admitted that Microsoft didn't
2 consent to onward disposal of licences by the claimant.
3 It is denied in so far as suggested that consent was
4 required."

5 Et cetera.

6 Our case on this is that they short circuited the
7 security key mechanism, which, as I have emphasised,
8 probably repeatedly and too often, is an integral part
9 of the rightholder's rights under the UsedSoft
10 exhaustion doctrine.

11 THE CHAIRMAN: What's the consequence of that?

12 MR HOBBS: The consequence of that is that we have been
13 deprived of the opportunity to monitor the essential
14 requirement of a UsedSoft sale, which is the deletion --
15 I will call it deletion, but the making unusable of the
16 software -- no, the program, making it unusable at the
17 first acquirer level.

18 That's essential. That's an essential condition of
19 exercising a UsedSoft right.

20 You cannot possibly, in my respectful submission,
21 erect a claim for millions of pounds of damages premised
22 upon the proposition that you are exercising the
23 UsedSoft rights given to you under 4(2) of the
24 Software Directive in circumstances where you have not
25 complied with that essential requirement.

1 THE CHAIRMAN: You say exercising the rights?

2 MR HOBBS: Yes.

3 THE CHAIRMAN: The question is what rights are exhausted,
4 isn't it?

5 MR HOBBS: As I said to you yesterday, it's a circumscribed
6 right. It has conditions associated with it, and one of
7 the conditions is, as I have called it, taking out the
8 user from the first acquirer, making the product
9 unusable.

10 THE CHAIRMAN: Sorry, I may be misunderstanding. But you
11 have a contract with the first acquirer?

12 MR HOBBS: Yes.

13 THE CHAIRMAN: And that contract requires -- I'm doing this
14 from memory, correct me if I'm wrong -- among other
15 things, one of these PLTF forms to be signed in certain
16 circumstances, you explain.

17 MR HOBBS: We do.

18 THE CHAIRMAN: And let us assume, I'm putting this on
19 an assumption, the first acquirer does not do that,
20 doesn't fill in the form as you requested. Why is the
21 consequence of that that your rights aren't exhausted?

22 MR HOBBS: There is non-compliance with a condition that the
23 right of resale that they claim under 4(2).

24 THE CHAIRMAN: Can we just look at the right of resale that
25 you're referring to, the contract? Which parts of the

1 contract?

2 MR HOBBS: It's not the contract. It's not the contract.

3 Their claim -- this is why I keep saying -- their

4 claim -- it's actually, is it paragraph 20 or

5 thereabouts? 20 and 21 are the particulars of claim.

6 Their claim is to a legal right conferred, they say,

7 upon them to have access to a market via Article 4(2) of

8 the Software Directive. Perhaps we should look at that.

9 THE CHAIRMAN: I just wanted to remind myself what's in

10 their contract.

11 MR HOBBS: Mr Riordan will be taking you to the contract.

12 THE CHAIRMAN: He's going to go to the contract, very good,

13 yes.

14 MR HOBBS: Definitely, but the point I'm making is that in

15 the particulars of claim the whole of the claim is

16 erected on the basis of an exhaustion right. I am using

17 the terminology, not with great provision.

18 They say because of the exhaustion rule there are

19 people out there who are first acquirers who can

20 directly themselves, or via the services of VL, pass on.

21 We say they can't split, and part of them -- part of the

22 inability to split, which is clear, we say, from

23 UsedSoft, is the proposition that if you split you're

24 not complying with the essential condition or

25 requirement of the pass on right you claim to have

1 require that you have disabled or made unusable that you
2 which you acquire at the first step of the transaction.
3 In other words, it fails to be within the parameters of
4 the UsedSoft exhaustion right for those two reasons.
5 MR LYKIARDOPOULOS: I'm finding this a little difficult.
6 Looking back, you took us through UsedSoft carefully
7 this morning.
8 MR HOBBS: Yes.
9 MR LYKIARDOPOULOS: One can see from UsedSoft that the first
10 acquirer needs to render their copy unusable, otherwise
11 they may infringe.
12 MR HOBBS: Yes.
13 MR LYKIARDOPOULOS: It also says that Oracle, or in this
14 case Microsoft, has the right to ensure by all technical
15 means at Microsoft's disposal that the copy in the hands
16 of the reseller is made unusable.
17 MR HOBBS: Yes, it does.
18 MR LYKIARDOPOULOS: Where does it tell me that if the first
19 acquirer doesn't render it unusable that renders the
20 reseller as an infringer. And where does it tell me
21 that the reseller has to ensure not to go against any of
22 the technical means that you're doing --
23 MR HOBBS: I don't need to go to that degree --
24 MR LYKIARDOPOULOS: Why not?
25 MR HOBBS: -- of argument.

1 MR LYKIARDOPOULOS: Why not.

2 MR HOBBS: Because if it is, as I say it is, a condition
3 that you make what you have acquired on the first
4 acquisition unusable and that splitting breaches that
5 requirement, there isn't a lawful, within the scope of
6 Article 4(2) -- leave aside copyright infringement --
7 there isn't a lawful transaction going down the line.

8 MR LYKIARDOPOULOS: So then why is the first acquirer
9 infringing? Because they wouldn't be.

10 MR HOBBS: I'm saying it's not necessary to consider the
11 infringement position.

12 MR LYKIARDOPOULOS: Well, it is, isn't it? Because the
13 Court of Justice has said that it's not rendered
14 unusing -- unusable, the first acquirer is infringing.
15 Now, that suggests that what they're saying is they have
16 passed on their right and they now have
17 an infringement -- a right for which is infringing.
18 Otherwise they wouldn't infringe, there would just be
19 a void transaction.

20 MR HOBBS: That's why we have the wording "or the
21 reproduction right" in the PIs. The reproduction right
22 a never exhausted. You can't exhaust the reproduction
23 right. The only right that can be exhausted under the
24 Software Directive is the distribution right in "that
25 copy", and we have been through that this morning.

1 MR LYKIARDOPOULOS: That's wrong from Article 5(1), isn't
2 it? Because the Court of Justice has said --

3 MR HOBBS: No, that's different. 5(1) is about contract.

4 The position is -- it's clear, and there can't be
5 any dispute about this on this side of the Bar anyway.
6 You cannot exhaust the reproduction right. You cannot
7 exhaust the communication right. The only right -- and
8 it's explicitly crafted for that purpose -- that you can
9 exhaust under Article 4(2) of Software is the
10 distribution right. And what they claim on
11 the exhausted distribution right is the right to pass on
12 that right to exercise the exhausted distribution right,
13 if that's not too convoluted.

14 As I have said, the second -- my submissions early
15 on yesterday, when I got up, the second acquirer can
16 step into the shoes of the first acquirer, no more, no
17 less. And I believe that I have demonstrated that to
18 you on the face of the UsedSoft judgment. No more, no
19 less.

20 And it is clear, the CJEU has said: if you wish to
21 be someone down that tram line who moves from being
22 a first acquirer to the person who transmits to a second
23 acquirer, in order to be in that position you must
24 remove the -- make unusable, the software in your
25 possession. You must. It's obligatory.

1 And if it's obligatory it means that if you don't do
2 it you are not exercising the right which is given to
3 you on the UsedSoft interpretation legislation.

4 Consequences. You're in the realms of no immunity
5 from the reproduction right, nor is anybody you're
6 dealing with. That's the consequences.

7 But the fact of the matter is that they are erecting
8 a claim for millions of pound of damages on the basis
9 that they are working four square within Article 4(2) as
10 construed in UsedSoft, and we say you're not. And
11 that's what these sample transactions are intended to
12 test.

13 MR LYKIARDOPOULOS: Thank you. My reference to Article 5(1)
14 is where the Court of Justice, in paragraph 81, said:

15 "The resale of a copy of a program by the first
16 acquirer, the new acquirer will be able in accordance to
17 5(1) download the copy sold to him by the first
18 acquirer. A download must be regarded as a reproduction
19 of a computer program. That is necessary to enable the
20 use of the program in accordance with its intended
21 purpose."

22 MR HOBBS: Yes, but look at the heading above Article 5. In
23 the actual text of the directive, it says:

24 "Exceptions to the restricted acts."

25 You have to bring yourself within an exception, and

1 you cannot if in doing this you actually violate
2 specific contractual provisions. This is what I was
3 showing you in Top System this morning. This is
4 exceptions to restricted acts. This has nothing
5 whatever to do with the question of whether the
6 reproduction right can ever be exhausted. It can't.
7 It's impossible.

8 MR LYKIARDOPOULOS: Just on that analysis, just so
9 I understand it: why does the first acquirer end up
10 infringing?

11 MR HOBBS: Because they are not using within the scope of
12 what they acquired. They are retaining things that they
13 are purported to dispose of. They are therefore, every
14 time they run the software, engaging in the reproduction
15 right.

16 MR LYKIARDOPOULOS: But if they haven't disposed of them and
17 it was purported disposal didn't work, you can't pass on
18 what you don't have, all they're doing is using the
19 copies that they're authorised to use.

20 MR HOBBS: No, they're no longer authorised to use them in
21 that way. They're violating -- the whole point is that
22 to be within the scope of the UsedSoft right to pass on,
23 you must stay within the tramlines of what you have.
24 You can't re-organise the transaction. You can't go up
25 and pretend you're the rightholder and reconfigure it.

1 You pass on all that you have, and you don't pass it on
2 unless you delete -- I call it delete -- unless you
3 render unusable that which you were holding that you
4 purported to dispose of. You have to delete. There
5 can't be a transfer.

6 MR LYKIARDOPOULOS: But, if you haven't managed to pass it
7 on because you haven't deleted, the transfer has failed
8 because you haven't --

9 MR HOBBS: It's not a lawful transfer because you haven't
10 dispossessed yourself.

11 MR LYKIARDOPOULOS: No. That means you're left with what
12 you had a right to have in the first place.

13 MR HOBBS: No, no, I'm sorry. I can't accept the
14 proposition that's being put to me. I'm very sorry,
15 I don't want to be obtuse.

16 If you want to transfer something, you have to
17 dispossess yourself of it. If you don't dispossess
18 yourself of it, you haven't transferred it.

19 MR LYKIARDOPOULOS: Exactly. I would agree with that.

20 MR HOBBS: I might bank that and stop talking. But I will
21 just carry on for a bit longer. If you don't dispossess
22 yourself --

23 MR LYKIARDOPOULOS: If I fail to pass on to you or someone
24 else something that I had, I fail to pass it on, I'm
25 left with it. What I'm left with is what I always had,

1 which is what the -- try again -- what the rights owner
2 granted me.

3 MR HOBBS: No, you've split your licence.

4 MR LYKIARDOPOULOS: But I haven't. You have told me I've
5 failed.

6 MR HOBBS: No, because what you've done is pass on -- you've
7 enabled the person to get the security keys. You
8 have -- you've equipped them with it. You can equip
9 somebody with something.

10 I think you're putting to me the point that may
11 involve the proposition you can equip somebody with
12 something without dispossessing himself. I'm sure you
13 can. That's not a point.

14 The claim for damages here has been erected on the
15 basis that they have complied with the UsedSoft
16 requirements and that they have dispossessed themselves
17 without any fragmentation; in fact they have admitted
18 fragmentation.

19 I don't know if I can improve my position and I'm
20 running out of time.

21 MR LYKIARDOPOULOS: No, no, please go on. It's been
22 interesting to have the debate.

23 THE CHAIRMAN: Mr Hobbs, at some stage -- I'm sorry, it
24 doesn't have to be now. But there was a point on the
25 pleadings about whether this is all just going to loss

1 and damage or whether it's --

2 MR HOBBS: It's not going to loss and damage.

3 THE CHAIRMAN: But, at some point, you will address us on

4 that? It doesn't have to be now, just at some point.

5 MR HOBBS: No. Could you -- at some point --

6 THE CHAIRMAN: Just while we have the pleadings open.

7 MR HOBBS: Shall we do it?

8 THE CHAIRMAN: If it's very quick.

9 MR HOBBS: Shall we do it? Where is the pleadings bundle?

10 THE CHAIRMAN: It's C. You had it open. It's why I raised

11 it now.

12 MR HOBBS: Did you say 11? Right, okay, yes. I am told

13 it's page 11.

14 THE CHAIRMAN: Page 11 internal?

15 MR HOBBS: Is it internal? External.

16 THE CHAIRMAN: Tab 2. So this is in the re-amended

17 particulars of claim.

18 MR HOBBS: It is. Although this was there from the

19 beginning. Do you have paragraphs 20 and 21?

20 THE CHAIRMAN: Right, yes. We have to keep those in mind,

21 yes.

22 MR HOBBS: Yes, you do. And this is why I keep saying to

23 you: it's tempting, it's really tempting to slide this

24 into a copyright action, but it's not. And the

25 defendant to a claim for damages in a competition law

1 claim.

2 The whole claim is erected on the proposition that
3 there is a market and that in that market there has been
4 anti-competitive behaviour, but the existence of the
5 market depends upon that rule, Article 4(2) on
6 exhaustion as interpreted by UsedSoft. The whole case
7 is erected on that basis.

8 Now, imagine, then, if I turn round and I say at
9 some trial in the future: but you haven't complied with
10 UsedSoft. You're not within the scope of what
11 Article 4(2) actually enables you to do. You've gone
12 and completely --

13 THE CHAIRMAN: I understand.

14 MR HOBBS: You have it.

15 THE CHAIRMAN: Let's press on, Mr Hobbs. I am conscious we
16 have taken up some of your time.

17 MR HOBBS: Okay, thank you.

18 Right. I'm going to show you one paragraph in
19 Tom Kabinet. So that's tab 40 in volume 2. Forgive me
20 one second.

21 Right, so on page 974 on the stamped numeration.
22 The one paragraph I'm going to show you is those two
23 paragraphs at 55 and 56. This is where the
24 Court of Justice finally nailed the point.
25 UsedSoft in 55:

1 "The relevant provisions of the Software Directive
2 make abundantly clear the intention of the legislature
3 to assimilate for the purposes of the protection laid
4 down in that directive tangible and intangible copies of
5 computer programs, so that exhaustion of the
6 distribution right under 4(2) concerns all such copies."

7 Then this -- and the world was waiting for this. It
8 was taking them so long --

9 THE CHAIRMAN: I remember it well. I could barely sleep at
10 night waiting for this.

11 MR HOBBS: Yes. I said similar things and received some
12 pretty derogatory comments in reply about me having no
13 life.

14 Paragraph 56 then, you will see it. And that's
15 where they nailed it:

16 "Such assimilation of the tangible and the
17 intangible was not however desired in the InfoSoc
18 Directive. As has been recalled at 42, it is apparent
19 from the ...(reading to the words)... that a clear
20 distinction was sought between the electronic and
21 tangible distribution of protected material."

22 Now, that goes with all the other stuff you have
23 seen, all the other stuff that is set out -- I won't say
24 ad nauseam, but set out at length in the skeleton.

25 MR LYKIARDOUPOLOUS: Neither side has taken us to the

1 travaux pr paratoires to that?

2 MR HOBBS: We have. There is a box in our skeleton.

3 THE CHAIRMAN: Oh, in that box. Okay.

4 MR LYKIARDOPOULOS: That's what I mean by the travaux --

5 okay.

6 MR HOBBS: Yes, that box. And the underlying -- the

7 materials are all in the bundle, but we have picked out

8 the paragraphs which show the evolution. We have done

9 it to the best that we can to assist you on that. So

10 you have it. That's where they nailed it. Up until

11 then we had straws in the wind, but there they nailed

12 it. And that goes with all the other case law that we

13 have identified, which says that they do take account in

14 EU law of those notes which were added to Article 6 of

15 the WIPO copyright treaty. You do take account of those

16 notes and you give effect to them in the case law, which

17 they did and we have given the references to that and

18 I'm not going to take up time going to those now if you

19 don't mind.

20 THE CHAIRMAN: The question they were deciding in

21 Tom Kabinet, if you just address us on that. How does

22 that assist us in this? It's whether it was

23 a communication to the public or not, so bear in mind

24 paragraph 69, if you could.

25 MR HOBBS: Not quite. That is part of their solution. The

1 question -- the argument in that case was that because
2 it was an eBook you should collapse it into the
3 Software Directive.

4 THE CHAIRMAN: That was one of the arguments.

5 MR HOBBS: But that's the argument they're addressing in the
6 paragraph I have just shown you.

7 THE CHAIRMAN: Yes. But what they were deciding is whether
8 or not it was a communication to the public.

9 MR HOBBS: Yes, they were. On the facts of that case there
10 was --

11 THE CHAIRMAN: The meaning of 3(1).

12 MR HOBBS: But there was a library. There was a library and
13 so you would join the Tom Kabinet library, you would
14 become a subscriber and you'd --

15 THE CHAIRMAN: Yes, I understand that.

16 MR HOBBS: That's communication to the public, which is
17 a whole area of law all over again. And they said that
18 insofar as digital communication is classifiable under
19 the directive they were looking at it would come in
20 under communication to the public.

21 THE CHAIRMAN: If we look at 69, if you need to remind
22 yourself of that, but one of the concerns they had was,
23 in the context of this case, a number of persons may
24 have access at the same time or in succession. So you
25 have this duplication of multiple communications to the

1 public going on.

2 MR HOBBS: Yes.

3 THE CHAIRMAN: So I'm not sure --

4 MR HOBBS: That's a reason why it's a communication to the

5 public.

6 THE CHAIRMAN: Yes, but it's not this case.

7 MR HOBBS: Our case?

8 THE CHAIRMAN: Not this case, where a copy is destroyed,

9 assuming it is destroyed. You do not have the problem

10 that they were grappling with. One of the problems they

11 were grappling --

12 MR HOBBS: You had the main problem they were grappling

13 with, which was the attempt to collapse the InfoSoc

14 protection into the Software Directive and to equate the

15 eBook with the software -- the program that carried it.

16 That was what they really wanted to win on in that case.

17 That was why there was a reference to the CJEU.

18 MR LYKIARDOPOULOS: It said against -- I think the claimants

19 say, they look at 59 and say the way they resolved that

20 issue was to treat it as a complex matter and then

21 decide which part of that whole was, if you like, the

22 primary part and which was, in this phrase, incidental.

23 And that's how they appear to have resolved the

24 question.

25 MR HOBBS: This court?

1 MR LYKIARDOPOULOS: Yes.

2 MR HOBBS: Not that I am seeing.

3 MR LYKIARDOPOULOS: Oh.

4 MR HOBBS: Well, because the expression -- as you know we

5 picked up on the difference between "incidental" and

6 "accessory". It doesn't require a genius to see the

7 word "accessory" in the other official language versions

8 of this judgment. The word "incidental" has crept into

9 the English translation. The other language versions

10 use the language equivalent of "accessory".

11 MR LYKIARDOPOULOS: All right. But, avoiding the

12 translation issue, what I think is against you, put

13 against you, is that the way they approached, if you

14 like, which directive to apply was to look at an eBook

15 as complex matter and decide that overall it was to be

16 protected by one directive rather than the other.

17 MR HOBBS: Then you look back to Nintendo to see -- because

18 that's where they got the expression from, "complex",

19 and when you look back at Nintendo -- shall we do it?

20 Give me the reference, somebody, please. I think it's

21 in this bundle. Tab 31, when you look back at Nintendo

22 the word "complex" -- 798. And look at the way they use

23 the word "parts" in that paragraph that runs from 21 --

24 sideline 21 to 23.

25 2001, 29, InfoSoc. 22:

1 "As regard the parts of a work it should be borne in
2 mind there is nothing in InfoSoc indicating that those
3 parts are to be treated any differently from the work as
4 a whole. It follows that they're protected by
5 a copyright since they share the originality of the
6 whole work."

7 That's InfoSoc. That finding is not weakened by the
8 fact that there's a *lex specialis* in the
9 Software Directive and this is where they introduce the
10 expression -- am I seeing it? The complex -- where is
11 the complex work? Is it here?

12 Yes, it's the fifth line:

13 "Video games such as those in the main proceedings
14 constitute complex works."

15 And what do they mean by that? Comprising not only
16 a computer program, but also graphic and sound elements,
17 which, although encrypted in computer language having
18 a unique creative value which cannot be reduced to the
19 encryption.

20 It's just -- "complex" doesn't mean anything except
21 "hybrid", if you like.

22 MR LYKIARDOPOULOS: But I think it's said against you, at
23 paragraph 22, where it says:

24 "As regards parts of a work should be borne in mind
25 there's nothing indicating those parts are to be treated

1 differently from the work as a whole."

2 I think it is said against you that is suggesting

3 that the way forward is to look at the work as a whole

4 and then decide -- which is what then they did in

5 Tom Kabinet -- which directive should apply. I think

6 that's what the claimant said.

7 MR HOBBS: 23 is saying, isn't it -- sorry, 23 is saying the

8 opposite, "comprising not only". "Comprising not only."

9 THE CHAIRMAN: I was looking at 22, and saying we're not

10 meant to be, if you like, subdividing the work into

11 parts and treat them differently. We need to treat them

12 as a whole work and then, in Tom Kabinet and this one,

13 they say the whole work is not a computer program, you

14 look at it as a whole. I'm just saying how the case as

15 I understand it is put against you.

16 MR HOBBS: Forgive me, but I'm not going to accept that.

17 I don't accept the argument that's coming the other

18 side.

19 MR LYKIARDOPOULOS: No, no, I just want to hear yours.

20 I wasn't asking you to accept it.

21 MR HOBBS: "Not only", clear enough:

22 "Not only a computer program, but also graphic and

23 sound elements."

24 Okay, do you have that? You cannot deny copyright

25 protection for InfoSoc works. If they exist, they

1 exist, and if they're protected, they're protected. And
2 it's a notice -- the penultimate and the pre-penultimate
3 lines in that same paragraph:

4 "The graphic and the sound elements are part of the
5 originality. They're protected together with the
6 overall work by copyright in the context of the
7 directive InfoSoc."

8 This argument that's come against me on this point,
9 apart from the linguistic point -- and I heard what the
10 chairman said yesterday, which was to the effect that
11 this isn't really laying down a test, and I agree, with
12 respect, with that observation.

13 This is not laying down a test. This is telling
14 you: if there's an InfoSoc work, you must protect it.
15 And nonetheless so because it's not only -- and because
16 it's not only a computer program. It's telling you.

17 THE CHAIRMAN: But we also need to keep in mind that in this
18 case, had it been a computer program, rights wouldn't
19 have been exhausted either because they didn't destroy.

20 MR HOBBS: You say "had it been"?

21 THE CHAIRMAN: Had they -- two reasons, as I understand, why
22 it fell within the InfoSoc Directive and why rights
23 weren't exhausted. One is the reason you have been
24 discussing, and the other is the reason given in 69.

25 MR HOBBS: But I don't need more than one of those reasons,

1 which is that there's no assimilation of works. There's
2 assimilation of works for the computer
3 Software Directive, but there's no assimilation of
4 digital and non-digital forms for InfoSoc. I don't need
5 more than that.

6 And if you were to follow the submission that has
7 been addressed to you on the other side, you will suffer
8 what I referred to yesterday as the fate of the
9 Supreme Court of Azerbaijan. May I show you that
10 briefly?

11 MR LYKIARDOPOULOS: Before we go to that. I don't want to
12 labour it; I just want to finally understand it. I do
13 not understand, really, how 22 works. Maybe it's
14 linguistically, because aren't you say that as regards
15 parts of the work it should be borne in mind that they
16 should be treated differently from the work as a whole?
17 What you're saying is different parts should be treated
18 differently?

19 MR HOBBS: It's obligatory. You can't eradicate or erase
20 InfoSoc protection.

21 MR LYKIARDOPOULOS: So 22 is wrong?

22 MR HOBBS: No. 22 says if they're there you must recognise
23 them. You can't subsume or assimilate. You can't
24 collapse them back into the code.

25 MR LYKIARDOPOULOS: At the moment, I don't quite see how you

1 say that 22 is correct, but it may be we're not going
2 there.

3 MR HOBBS: It's not talking about the Software Directive,
4 though. The reason is it's not talking about the
5 Software Directive; it's talking about the
6 InfoSoc Directive and it's looking to see whether there
7 are parts of the work that qualify for InfoSoc
8 protection.

9 MR LYKIARDOPOULOS: Okay.

10 MR HOBBS: Right, so I'm going to -- getting a little bit
11 short of time.

12 MR LYKIARDOPOULOS: Sorry, I will shut up.

13 MR HOBBS: No, no, I'm just concerned. Could we work on the
14 assumption that we will sit until half past four today?

15 THE CHAIRMAN: I apologise, also, for the interruptions.
16 But some of the issues here have not been necessarily
17 well trodden in all the case law and so it's --

18 MR HOBBS: Masterly British understatement.

19 MR LYKIARDOPOULOS: I'm half Greek.

20 MR HOBBS: But there we go.

21 I'm going to do you one more citation. I was
22 debating with myself whether I was going to, but I'm
23 going to.

24 I need to find it. One second. In the third
25 authorities bundle, tab 60, please.

1 THE CHAIRMAN: Sorry, which tab again, Mr Hobbs?

2 MR HOBBS: 60, sir. I'm not going to dwell too long on this
3 because of the time. But, if I just give you a tour
4 d'horizon. In 1570, you have the local law in
5 Azerbaijan, which was dealt with by the Azerbaijan
6 Supreme Court, property, economic rights. I'm not going
7 to dwell on that because it's not going to help you very
8 much.

9 Page 1572, you have relevant international law and
10 you're familiar with all of this, I think. You have the
11 Berne Convention, you've got the WIPO Copyright Treaty
12 at 22.

13 You have Article 6 of the Copyright Treaty at
14 paragraph 23, and you have the agreed statements in
15 Articles 6 and 7, and you know about all those.

16 Now, what happened was that there was
17 an adjudication in which the rights of the copyright
18 claimant were not protected under the InfoSoc Directive.

19 Now, you have on 1574 -- it's quite important, but
20 it's established law. Running down 1574 to the top of
21 1575, you have the fact that Article 1, protocol 1, and,
22 as you know, that corresponds to Article 17(2) of the EU
23 Charter you have constitutional protection for
24 intellectual property. You can't eradicate protection
25 for intellectual property.

1 There's the rights. What did they do wrong?

2 Paragraph 35, on page 1576:

3 "As to Article 15(3) of the Azerbaijan law of

4 copyright referred to by the Supreme Court, the court

5 observes that that provision concerned the rule of

6 exhaustion of right to distribution. As the wording of

7 that provision and agreed statement concerning Article 6

8 suggest, that rule referred to lawfully published and

9 fixed copies of works which were put into circulation by

10 sale of tangible objects. As apparent from the facts of

11 the present case, while the applicant had published his

12 book and physical copies were available in the book

13 market, nothing suggests that he had ever authorised its

14 reproduction and communication to the public in

15 a digital form. The Supreme Court did not explain why

16 it considered this provision relevant to the

17 circumstances in the present case, where the dispute

18 concerned not the distribution of the lawfully published

19 copies, but its reproduction in a new digital form and

20 its online publication without his consent.

21 "In sum, in the court's view the domestic courts

22 failed to provide reasons establishing that the above

23 mentioned provisions on the law of copyright could

24 constitute legal grounds."

25 Et cetera.

1 Now, the point is that it gets here that -- if there
2 has not been distribution -- exhaustion of the
3 distribution right under the InfoSoc Directive, there is
4 a copyright extant in relation to that work which must
5 be protected as constitutional property.
6 Constitutionally protected property. It's not optional.
7 It's not optional for us in the United Kingdom under the
8 Human Rights Act and the requirement to implement the
9 Convention.

10 The argument cannot run. It simply cannot run.
11 When you have the two provisions, which I have pointed
12 out to you, Article 8 of the Software Directive is
13 without prejudice to other legal provisions and
14 Article 1(2) of InfoSoc says it's without prejudice to
15 the Software Directive, once you have those two, neither
16 prejudicing the other, there is no middle ground. You
17 can't change the law and you must protect the
18 constitutionally protected property in the non-exhausted
19 copyright in the InfoSoc work.

20 MR LYKIARDOPOULOS: Is this in your favour, Mr Hobbs?

21 MR HOBBS: Is it where? In the skeleton?

22 MR LYKIARDOPOULOS: In the sense that this is a case we're
23 looking at where you have authorised reproduction and
24 communication in a digital form. The question we're
25 discussing is a slightly different one, but that doesn't

1 seem the same. What you have is the question of whether
2 that's exhausted, isn't it?

3 MR HOBBS: It's not exhausted.

4 MR LYKIARDOPOULOS: Well, I know you say that, but I'm just
5 trying to work out why --

6 MR HOBBS: If it's not exhausted, it's intact. And if it's
7 intact, it means the whole of the underpinnings of
8 paragraph 20 and 21 of the claim for damages disappear.
9 It's still intact and they have no answer to it.

10 I must stress, as I have tried to several times,
11 this case is not about licensing. It's not about
12 refusals to licence and abuse of a dominant position.
13 It's not about that. They are claiming a God given
14 right under Article 4(2). That's the whole of the
15 superstructure.

16 On burden of proof, my last comment on this. In
17 relation to exhaustion of rights the case law is clear
18 that the burden of proof is upon the person who asserts
19 that there's been exhaustion. To that must be added, in
20 the present case, that I am the defendant in these
21 proceedings --

22 THE CHAIRMAN: Sorry, where is that? You stated that very
23 emphatically and it may well be right --

24 MR HOBBS: Oh it's everywhere. There's a Makro. We need
25 the number for Makro in the bundle. There's Makro in

1 the bundle. There's a point I established in
2 Levi Straus and Davidoff and those sorts of cases. The
3 burden of proof is on the person who asserts that
4 there's been exhaustion. Exhaustion only occurs unit by
5 unit by unit by unit by unit.

6 THE CHAIRMAN: Yes, okay. The burden of proof, if you're
7 asserting anything, is normally on you in the
8 litigation.

9 MR HOBBS: And they are.

10 THE CHAIRMAN: But you're asserting there hasn't been
11 exhaustion.

12 MR HOBBS: I'm resisting their assertion. I'm resisting
13 their assertion. They're saying there's been
14 exhaustion.

15 THE CHAIRMAN: Right.

16 MR HOBBS: I'm resisting their assertion.

17 THE CHAIRMAN: Just pulling back, you're saying you're
18 entitled -- I appreciate there's been no decision as to
19 whether you've done any anti-competitive act. But as
20 I understand your case, if you've done any of those acts
21 and they would otherwise be anti-competitive, they're
22 not because you were protecting your rights because they
23 haven't been exhausted.

24 MR HOBBS: No, no. We pleaded that in that long paragraph,
25 23A. It's an answer that if you have a well-founded

1 claim for infringement of an intellectual property
2 right, it's an answer for anti-competitive behaviour in
3 almost all circumstances you could think of.

4 THE CHAIRMAN: I'm just not sure where that leaves us on
5 burden, that's all.

6 MR HOBBS: On burden of proof, I hadn't quite finished the
7 point. So I have identified Makro and there are umpteen
8 cases.

9 THE CHAIRMAN: In your skeleton?

10 MR HOBBS: In the world at large. There's just umpteen of
11 them. I would be astonished if it was at all
12 controversial. The burden of proof is on he who asserts
13 there's been exhaustion. And that's it.

14 But what you have here is a PI trial and, as the
15 chair said at the PTR, it's a trial.

16 I'm the defendant. I'm the defendant. They have,
17 as claimant in this issue, whatever evidential and
18 probative burden that there is to establish, to show
19 that the sample transactions are legitimate under
20 UsedSoft. That's what we're here to test. The burden
21 is on them, not on me.

22 THE CHAIRMAN: Burden matters for what reason? What part of
23 this case?

24 MR HOBBS: Because somebody took the point against me --
25 I can't remember where it came from. It may have

1 come -- where was it? I can't remember where it came
2 from, but somebody took the point. I think possibly,
3 chair, it was you. It may have been yesterday at some
4 point. I don't know, but I'm touching on it because it
5 blipped yesterday.

6 It's explicit in the PTR order that they're claimant
7 in the PI trial issue. It's a trial. Insofar as there
8 are evidential issues the burden is on them to establish
9 that there's been exhaustion within the scope of that
10 rule.

11 Unless you beg me to speak to you for any further
12 length of time I will sit down and shut up and let
13 Mr Riordan speak.

14 MR LYKIARDOPOULOS: I assume Mr Chairman -- Henry Carr used
15 to say burden is a fickle thing.

16 THE CHAIRMAN: I do have one more question, Mr Hobbs, before
17 you sit down.

18 So the claimant says that where you have a work
19 which is predominantly a computer program, it really
20 is -- the Software Directive really only makes sense if
21 there's exhaustion in that situation, even if there are
22 incidental artistic works. And he also says: look,
23 well, otherwise really the software, this exhaustion
24 rule in the Software Directive is for practical purposes
25 emasculated.

1 You, on the other hand, say, no, you have to analyse
2 these two instruments separately and there has to be
3 exhaustion for the artistic works, and then you consider
4 independently the positions of software.

5 They are both, if I may respectfully say, cogent
6 arguments.

7 As a matter of construction, how are we to construe
8 the directives and their relationship to one another;
9 are there any further principles we should be applying?

10 Obviously, we have been diving into UsedSoft, we
11 have been diving into Tom Kabinet. We can analyse those
12 cases, but neither of them were quite dealing with the
13 situation we have here.

14 So as a matter of construction of these instruments
15 and their relationship; how should we as a tribunal be
16 approaching this?

17 MR HOBBS: Well, we have dealt with this issue about
18 predominance and relative investment and all that at
19 length at the back of our skeleton to demonstrate. We
20 say the test is utterly unworkable. It's not known to
21 the law of copyright in the slightest.

22 The idea that you can only claim InfoSoc protection
23 for a work if --

24 THE CHAIRMAN: Suddenly you're on a different point. You're
25 arguing your case, Mr Hobbs.

1 I was saying as a matter of jurisprudence: how
2 should we approach this?

3 The fact that we have two directives that are
4 potentially bumping up against each other; how should we
5 approach this matter, try to resolve the rival positions
6 of the parties?

7 MR HOBBS: The Software Directive applies to programs
8 stricto sensu. It couldn't become clearer than it has
9 become through the Sony Entertainment case and we've
10 been through that this morning or whenever.

11 You can't have exhaustion under that directive,
12 except in relation to that which is a copy -- the sale
13 of a copy of that program.

14 It is incapable of producing exhaustion in relation
15 to anything other than a program, full stop.

16 So to that you then add the proposition that the two
17 directives each tell you relative to the other and to
18 all other laws that they must be given full force and
19 effect. Neither is with prejudice; neither prejudices
20 the operation of the other.

21 Whether one likes it or not and whether one
22 legislated for this if one had been the legislator, it's
23 too bad, you are driven to accept that if there is
24 a non-program work it can only be exhausted under 4(2)
25 of InfoSoc by the sale of a tangible --

1 THE CHAIRMAN: So your case would be just the same if it was
2 a single icon in the computer program?

3 MR HOBBS: Right.

4 THE CHAIRMAN: A single incidental artistic work, you would
5 say precisely the same principle --

6 MR HOBBS: Right, I knew that question was coming and
7 I wondered whether it would be coming sooner rather than
8 later, and the answer is this: whatever else, it is not
9 this case. It simply isn't this case.

10 THE CHAIRMAN: Right. I'm still asking the question.

11 MR HOBBS: Yes.

12 THE CHAIRMAN: You decline to answer?

13 MR HOBBS: I was about to say I'm not going to answer it,
14 but I can't say that. It's not the pertinent question.
15 It's not built into the facts and circumstances of this
16 case. I can see an argument of de minimis. De minimis
17 non curat lex.

18 More importantly, there is a doctrine in
19 European Union law and it has certain reflections in the
20 law of the United Kingdom with Aboueddrah(?). I can see
21 cases like that. That's trying to use legislation in
22 a way which is not within the terms in which it's
23 written. I can see all that.

24 But I'm going to stand my ground. And I don't want
25 to sound impertinent, but that is not this case. And

1 I don't want to argue a case that hasn't actually arisen
2 for decision. I can see that there are points that
3 could come back on that, but that's not a way of testing
4 the position on these PIs in the circumstances of this
5 case, which is built into the order.

6 MR LYKIARDOPOULOS: Taking aside cases such as de minimis;
7 don't we also have to take into account there are two
8 other things going on here because Article -- whatever
9 article it is now, was, maybe it still is 36 TFEU,
10 restrictions must be justified on grounds -- only
11 justified to safeguard the rights which constitute the
12 specific subject matter of the property. You're saying
13 that's wrong?

14 MR HOBBS: That was why I cited the Supreme Court to you
15 this morning, and that was why I showed that you built
16 into it were reference to say the case law that tell
17 you.

18 MR LYKIARDOPOULOS: Going back to -- yes.

19 MR HOBBS: You do not go back to the treaty. I haven't
20 looked at them.

21 MR LYKIARDOPOULOS: That's not going back to the treaty as
22 such. That is -- and I'm reading, for instance, there
23 from the Court of Justice in UsedSoft -- actually is
24 looking at when deciding -- one of the points here is
25 whether or not it's right that we should be, for

1 instance, allowing a software --

2 THE CHAIRMAN: Remind us of the paragraph?

3 MR LYKIARDOPOULOS: I was looking there at the AG. It also

4 comes up in the name of -- I was looking at the

5 Advocate General's 78. I'm stuck there.

6 Advocate General 78 and 79, at page 750.

7 MR HOBBS: Are you in UsedSoft?

8 MR LYKIARDOPOULOS: We can also get it from the

9 Court of Justice as well, if we want.

10 And, again, it comes back to looking at the broader

11 picture. You have situations where, in this case, the

12 rights owner has authorised a combination -- so property

13 which includes both program rights and non-program

14 rights, and has received remuneration for that; you

15 accept that those rights would be properly protected if

16 that had been done via CD ROM or disk, but not online?

17 And one might -- it might be said that, therefore, that

18 is going beyond the needs to safeguard the rights which

19 constitute the specific subject matter of the property

20 and instead may be matters that encroach on free

21 movement of goods. That's --

22 MR HOBBS: With the greatest of respect, it doesn't run. It

23 cannot run.

24 MR LYKIARDOPOULOS: Okay.

25 MR HOBBS: The legislator -- which is why I showed you the

1 solution of this in Tom Kabinet -- the legislature has
2 told you what the rule is, and the rule is that there is
3 no exhaustion of InfoSoc works by digital copy. No
4 digital exhaustion of the distribution right. None.
5 That's the law. It's not my fault. It's not your
6 fault. That's the law.

7 And you will struggle -- we live in an untidy world.
8 The desire to make things symmetrical and jigsaw with
9 one another, well, the legislature should have dealt
10 with that, but they didn't. And the whole point about
11 the *lex specialis* is that you cannot use that
12 *lex specialis* rule to drive a wedge into the
13 *lex generalis* which is not to the same effect.

14 If I have copyright works which are not exhausted
15 under the rule in 4(2), that's the end of it.

16 This is not an infringement action. And if there
17 was a question of whether the claimant had authorised or
18 not authorised acts of the kind which the defendant was
19 engaged in committing, consent would be a defence,
20 possibly estoppels, acquiescence and all those other
21 things we know about, they could possibly be defences.
22 But they cannot possibly be in play when the claim is
23 against me under those paragraphs, 20 and 21, which is
24 that the God-given right provided by exhaustion under
25 4(2) of the Software Directive allows them to have the

1 market they're claiming because it doesn't.

2 THE CHAIRMAN: You have licensed -- just take the clip art.

3 You have licensed that use of the clip art with the

4 program. But you say that licence is necessarily

5 limited to the first acquirer?

6 MR HOBBS: Well, it's a user licence under the transaction

7 which is indivisible. We have been through that this

8 morning. It's a user licence in relation to that copy.

9 THE CHAIRMAN: It's indivisible and then you sell the

10 software to the second acquirer; what's happened to the

11 licence to use the art work?

12 MR HOBBS: It's non-exhausted. By definition on my argument

13 and under the legislation, it's non-exhausted.

14 MR LYKIARDOPOULOS: Well, then it's no longer indivisible.

15 MR HOBBS: You don't even get to divisibility until you're

16 discussing the right under the Software Directive.

17 I'm not in the Software Directive. I'm answering

18 questions on the InfoSoc Directive. It is vital that

19 you don't jumble the two together, which is what they

20 told you -- what they told everybody in Kabinet,

21 Tom Kabinet. You cannot assimilate.

22 THE CHAIRMAN: Right. But under the InfoSoc Directive, get

23 this: you have sold the software --

24 MR HOBBS: Am I purely under InfoSoc?

25 THE CHAIRMAN: Well, let's just analyse the

1 InfoSoc Directive.

2 So you licence the clip art and that -- the

3 licence -- what happens to that licence when it's sold?

4 It's only personal to the first acquirer.

5 MR HOBBS: Who says it can be sold? Under the

6 InfoSoc Directive it can't be sold because there's no

7 digital exhaustion under the InfoSoc Directive --

8 THE CHAIRMAN: (Inaudible) exhaustion. But you've given

9 your consent for its use.

10 Sorry, these are very basic questions.

11 MR HOBBS: In which case it becomes purely and entirely

12 a matter of contractual relationship between me and the

13 customer, and that is not what you're considering.

14 You're not considering whether there was a transaction

15 in which there were business arrangements around and

16 outside the scope of 4(2); you are being required to

17 consider whether there's 4(2). The textbooks are clear,

18 the case law is clear: there is no digital exhaustion

19 under InfoSoc.

20 THE CHAIRMAN: No digital exhaustion. We're talking about

21 the licence; what happened to the licence?

22 MR HOBBS: The licence is personal, like all licences are.

23 Under InfoSoc it's personal.

24 THE CHAIRMAN: But your licence says these rights can be

25 exhausted or something like that. So without prejudice

1 for the rights to be exhausted. Trying to tie all
2 those --

3 MR HOBBS: I know. But it's the putting of these concepts
4 together that I'm objecting to.

5 It's not that I don't understand a desire to make
6 sure that everything fits together perfectly, but it
7 doesn't.

8 I have been handed a note that it's admitted that
9 it's not consented to under the contract. Is that
10 right? It's not consented to?

11 Well, I am told that it is admitted that it wasn't
12 consented to under the contracts, in which case I think
13 that point becomes at least not immediately pertinent.

14 THE CHAIRMAN: That's presumably talking about the software,
15 though? I don't know. I haven't seen that admission.

16 MR HOBBS: If it's contractually -- if it's not consented to
17 under the contract, the contract didn't do it whichever
18 dimensional perspective you're looking at it from.

19 Is that right?

20 MR LYKIARDOPOULOS: We're told by UsedSoft -- I get this is
21 the problem for both sides. It depends where you start.
22 You start from the non-program elements. If one starts
23 from the program and there's no debate here that this --
24 we are dealing with a computer program, unlike in some
25 of the other cases, certainly a computer program, and

1 then we have a user licence agreement which licences
2 that in the terms of UsedSoft and the directive as
3 a first sale, because it's permanent, and that first
4 sale includes non-software works.

5 And then you have received -- the customer has
6 received that, permanently, in return for a fee designed
7 to enable the copyright owner to obtain remuneration
8 corresponding to the economic value of that work. You
9 say that it wouldn't make a difference if it were a CD.
10 And yet now, suddenly, after that has happened you
11 suggest that we should be dividing it out and I'm just
12 trying to work out where that comes from.

13 MR HOBBS: That's because you're getting to that position,
14 if you don't mind me saying so, via the contract. The
15 claim --

16 THE CHAIRMAN: The contract says:

17 "Nothing in this agreement prohibits the transfer of
18 software."

19 MR HOBBS: Yes. You're going to be addressed on it.

20 THE CHAIRMAN: "To the extent allowed under applicable law
21 if the distribution right has been exhausted."

22 So "a distribution right" has been exhausted.

23 MR HOBBS: I'm already into injury time. He will shoot me,
24 and if I get up he will shoot me again.

25 THE CHAIRMAN: Very well, let's hear from Mr Riordan.

1 MR HOBBS: Okay.

2 Further submissions by MR RIORDAN

3 MR RIORDAN: Before I get to the facts, I have been just
4 been looking assiduously in response to the questions
5 from the chair about onus of proof and there's
6 a reference in the bundle that does give you a clear
7 statement of principle on that question --

8 THE CHAIRMAN: I always get nervous when you say "clear
9 statement" --

10 MR RIORDAN: Well, we -- in my submission, it is clear. You
11 will find that in tab 35 of the authorities bundle at
12 page 841.

13 THE CHAIRMAN: Let's have a quick look. 35.

14 MR LYKIARDOPOULOS: Is this a criminal case or a civil case?

15 MR RIORDAN: It was a reference from criminal proceedings in
16 the domestic court.

17 MR LYKIARDOPOULOS: Is that any difference?

18 MR RIORDAN: No, because this is a question of harmonised EU
19 law on which the Court of Justice is expounding. It's
20 not a matter of domestic civil procedure.

21 THE CHAIRMAN: Sorry, which paragraph?

22 MR RIORDAN: 56. And in fact it might be worth reading it
23 in the context of 55, which I think my learned friend
24 took to you yesterday and relies upon it. This is
25 page 841 of the bundle.

1 So paragraph 55 is restating the exhaustion rule in
2 relation to computer programs under UsedSoft, as
3 interpreted in UsedSoft. And paragraph 56 goes on to
4 note that it should also be specified that it is for the
5 acquirer of such a licence relying on the rule of
6 exhaustion of the distribution right, having downloaded
7 a copy, to establish by any available evidence that he
8 acquired that licence in a lawful manner.

9 That is, in my submission, a clear statement as to
10 who bears the onus of proof.

11 THE CHAIRMAN: Is that -- comments like this; does it mean
12 it's binding on this Tribunal, the burden?

13 MR RIORDAN: Yes.

14 THE CHAIRMAN: Right.

15 MR RIORDAN: Yes. And this is completely consistent with
16 the other decisions mentioned by my learned leader.

17 I include in that Makro. I give this as an example
18 because it's in the bundles.

19 THE CHAIRMAN: Evidential burdens can shift. I'm not quite
20 sure what facts we're talking about here.

21 MR RIORDAN: The fact that is being talked about is the one
22 mentioned in 56.

23 THE CHAIRMAN: No, no, in our case I'm not sure.

24 MR RIORDAN: Perhaps it's easier to address that in the
25 context of the facts when I come to them. But the

1 headline submission, sir, that the fact being
2 established is that the claimant as acquired its
3 quote/unquote licence in a lawful manner. That is
4 precisely what Ranks says the burden is on the claimant
5 to establish.

6 So, the facts. There are three relevant sets of
7 facts in the context of preliminary issue 1. I had
8 provisionally budgeted well over an hour to deal with
9 these, but I'm going to try to compress it as best I can
10 given we're almost at penalties, I think.

11 The first set of facts is the circumstances of
12 Microsoft's grant to the first acquirer, the first sale,
13 construing the terms of that.

14 The second relates to VL's dealings with its
15 suppliers of licences in the sample transactions.

16 And the final set of facts relates to VL's
17 downstream dealings with its customers. And I will
18 explain why it's necessary to deal with each of them in
19 the context of the sample transactions.

20 Just to give my headline submissions, I make three
21 overall submissions as to what matters in the context of
22 the sample transactions, which I will explain by
23 reference to the documents.

24 First, on correct analysis the rights granted by
25 Microsoft to the Enterprise customer consist of a block

1 licence, which is inextricably tied to an enumerated
2 quantity of users and devices. There is no one-to-one
3 relationship between the scope of the permission under
4 that licence and the number of downstream copies which
5 may be made, brought into existence by the licensee.
6 I will make that good on the licence.

7 Second, the licence granted by Microsoft is subject
8 to restrictions and procedures, the effect of which is
9 that the contract regulates the manner in which the
10 customer may acquire and must maintain a quantity
11 corresponding exactly to the number of users and devices
12 in the entire organisation without any discretion as to
13 the quantity which may be held on the part of the
14 licensee.

15 Thirdly, the nature of the claimant's dealings, both
16 with its suppliers and with its customers, disregards
17 those restrictions and procedures and results inevitably
18 in infringements of Microsoft's distribution,
19 non-exhausted distribution right, and reproduction right
20 at every stage in the chain.

21 Subject to the Tribunal's questions, what I propose
22 to do in a slightly condensed way is to start very
23 briefly with some basic facts which I understand to be
24 common ground, which emerged from some of the Tribunal's
25 questions to my learned leader, Mr Hobbs, and to my

1 learned friend, Mr Lavy, yesterday. Then to consider
2 the licence documents, and that will occupy most time.
3 And then finally to consider some of the pertinent
4 documents showing VL's dealings in the context of the
5 sample transactions.

6 First factual point, the applicable licence terms.
7 It's common ground what they are. It's common ground
8 they changed over time, but the differences are
9 immaterial for present purposes. I will go through them
10 in a moment.

11 However, it is important to make clear, as we did
12 endeavour to say at paragraph 43 of our skeleton
13 argument, that this case is about bulk Enterprise
14 licences. It is not about retail licences granted to
15 individual consumers. Those licences, one can safely
16 infer, are granted on different terms, materially
17 different terms and which are not subject to the same
18 restrictions as an Enterprise licence, certainly not the
19 restrictions I will be making submissions on.

20 The conditions for assigning retail licences are not
21 in issue in this PI, and none of your rulings that the
22 parties are inviting to you make on PI 1 and PI 2 will
23 carry any wider consequences in the context of retail
24 licences. And that is why we said in the final sentence
25 of paragraph 43 that it forms no part of Microsoft's

1 case on PI 1 that the consequence of this
2 non-division --

3 THE CHAIRMAN: Your submissions on the InfoSoc Directive
4 apply equally to domestic -- to retail --

5 MR RIORDAN: The principle, yes. But one can't assume, for
6 example, the retail licence doesn't contain an express
7 permission in it saying: "you may assign this licence to
8 the product as a whole to someone else".

9 MR LYKIARDOPOULOS: We can't assume anything, can we?

10 MR RIORDAN: You can't assume it is there or isn't there.
11 They're different terms.

12 My point is that when one comes to consider the
13 specific Enterprise terms with which this Tribunal is
14 faced --

15 THE CHAIRMAN: Shall we have a look at them?

16 MR RIORDAN: Yes. I have a couple more points of technical
17 background that I need to explain, but I wanted to get
18 that one out of the way because it's important to have
19 in mind the scope of what we are considering and the
20 consequences of the Tribunal's ruling.

21 The second background point I just wanted to mention
22 is the technical facts concerning distribution. There's
23 been a lot of discussion about the download link, where
24 it's placed, whether there is a staging server, how it's
25 distributed to workstations within an enterprise, and

1 I just wanted really to give you some references to the
2 evidence where this is dealt with. I know one member of
3 the panel noted Mr Clarke's evidence, paragraphs 8 and
4 9, D, tab 4, page 35, which we probably don't need to go
5 to in view of time. But it is clear that the manner in
6 which Microsoft distributes all the software in question
7 is by way of a single download link which is given to
8 the customer in their VLSC, that's the volume licensing
9 software centre, I think. That is a password protected
10 platform they log into with their credentials. They can
11 then generate and see their MAKs -- I will come on to
12 that -- and download the software via a link. And that
13 copy which is downloaded is of course the one we're
14 talking about, as Mr Hobbs explained.

15 But there is evidence on that. It's unchallenged.
16 It's available in electronic form. That's the world
17 we're in.

18 What is downloaded is then the installation package,
19 as Mr Clarke explains. It still needs to be copied on
20 to the device where it's going to be used and installed.
21 You know, you double click on the installation file and
22 go through the set up wizard and so on. It can also be
23 done in an automated rollout.

24 Once installed, there's a technical measure called
25 "activation", which means that copy which is made

1 thereby on that workstation needs to be registered with
2 Microsoft to check that it's an authentic copy and that
3 it is made under a valid licence, and that is done by
4 means of MAKs and KMS keys. We will hear more about
5 those in a moment. Mr Clarke explains that at
6 paragraphs 10 to 11.

7 Each product key is tied to the Enterprise to which
8 it's issued and it is good for a large number of uses,
9 as many as 10,000 activations per key. That's
10 essentially a matter of administrative convenience. The
11 reason why Microsoft doesn't care to set that number any
12 lower is because we're talking about Enterprise licences
13 under which the entire Enterprise is licensed, so it
14 doesn't matter, from Microsoft's perspective, how many
15 copies are actually installed and activated within the
16 Enterprise. I will make that good by reference to the
17 licences in a moment.

18 The product terms also make clear -- and I will just
19 give you the reference, it's E9, tab 52, page 227 --
20 that product keys are confidential information to
21 Microsoft and the customer, and may not be disclosed to
22 third parties and may not provide access to the VLSC to
23 anyone else. And section 10 on that page is also
24 relevant. Explains the technical measures.

25 I mention all that because there is a sense of

1 unreality in some of my learned friend's submissions,
2 despite his frequent reliance upon practical reality and
3 other similar concepts, as to how VL actually transacts
4 in this material. So I will show you what they are in
5 fact transacting in - and it's not products, but product
6 keys.

7 The third fact to mention is that there are two
8 relevant layers of subdividing which are taking place in
9 the sample transactions or, more accurately, in four of
10 the sample transactions. In the fifth, there's one
11 layer of subdividing, and I will explain why we say that
12 doesn't matter.

13 It's common ground -- that's statement of facts
14 paragraph 29 -- that the customer, the Microsoft
15 customer will divide the quantity of users and devices
16 that they were licensed under their Enterprise agreement
17 and sell to the claimant in the transactions where
18 there's a sales model - a subset of that - while
19 retaining the use of a remaining quantity. So splitting
20 a grant of, I don't know, 40,000 users into a batch of
21 5,000 and keeping the rest, for example.

22 For four of the sample transactions the claimant
23 then further subdivides that split quantity and sells it
24 in further fragments of one or two, or ten or
25 a thousand, to its customers. And so in effect the

1 claimant is buying and then itself subdividing as well,
2 and that's why we say it's somewhat arid on the facts
3 whether the upstream licensee is infringing or VL is
4 infringing because certainly in most cases VL is itself
5 doing the distribution by way of subdivision as well.

6 And if the first acquirer couldn't do that then
7 neither can VL. It doesn't get a better right -- it's
8 not in a better position than the first acquirer was,
9 even if for some reason the first acquirer did pass
10 valid title or what have you to VL. If VL then does
11 precisely what the first acquirer did impermissibly, we
12 say unlawfully, then it's engaged in an unlawful
13 exercise of the distribution right.

14 The remaining sample transaction is the Carillion
15 one. Perhaps this is why my learned friend likes it;
16 I don't know. That's a brokerage arrangement, where the
17 claimant doesn't buy a block of licences and then sell
18 them on later. It connects Carillion's administrators
19 to VL's clients and says: okay, you sell that many to
20 that person and VL sort of doesn't -- they don't touch
21 VL's hands, as I understand the position.

22 As we will see, VL is deciding on the quantities in
23 each case and is working hand in glove with PwC, the
24 administrators, to determine how much subdivision to do.

25 On any sensible analysis, it's authorising any

1 distribution that is happening and is jointly engaged in
2 that course of conduct with PwC on behalf of Carillion.
3 So we say it doesn't matter on the facts, but it is
4 a potential distinction in the model which is why we
5 draw attention to it.

6 The final fact to leave you with before I move to
7 the licences, possibly after a transcriber break:
8 Microsoft did not in fact consent to any of the sample
9 transactions under the contractual framework or
10 otherwise. The admission that I referred to in the note
11 to my learned friend is at bundle C, tab 12, page 293,
12 if you want to go back to it.

13 There's obviously a dispute as to whether consent is
14 required. My learned friend's case is: he didn't need
15 consent under the contracts because distribution right
16 was exhausted; we had a statutory right to do what we
17 did.

18 THE CHAIRMAN: That may depend on how consent is made, but
19 you will obviously need to deal with the term in your
20 licence if you're going to do that.

21 MR RIORDAN: Yes. My learned friend is right to make that
22 concession, for what it is worth, because the licences
23 do lay down specific circumstances in which transfers
24 are permitted.

25 They give way to statutory principles of exhaustion

1 but no further, save for the express circumstances in
2 which it does, by Microsoft's gift, allow the licensee
3 to transfer to affiliates in the event of a divestiture,
4 mergers and acquisitions. But effectively it's common
5 ground that none of those circumstance applied here, and
6 that's important because it's not contended by the
7 claimant that it did comply with any of the contractual
8 mechanisms laid down by Microsoft to regulate the
9 transfers that could be made despite, as we will see,
10 telling its customers that it had done so.

11 I don't know whether that's a convenient moment for
12 the transcriber break.

13 (3.28 pm)

14 (A short break)

15 (3.36 pm)

16 THE CHAIRMAN: Right.

17 MR RIORDAN: Sir, I will move to my first and second topics
18 which I will, like the CJEU, take together in the
19 interests of time: the nature of the licence grant and
20 the associated restrictions and limitations that go with
21 it.

22 I am broadly following the skeleton at paragraph 44
23 onward, but I'm going to do it by reference to the
24 documents. There are three features of the contractual
25 framework that I would like to emphasise orally.

1 First is the Enterprise commitment. It makes sense
2 probably to start with the Enterprise Enrolment, which
3 is at bundle B tab 4, page 23. Perhaps I could just
4 invite the Tribunal to turn that up.

5 This is the umbrella contract that incorporates
6 everything else by reference. One can see that the
7 second paragraph refers to the master agreement, product
8 terms, product selection form and so on. Product terms
9 is particularly important. That's number 5 and we will
10 come to look at that in a moment.

11 There are also some key definitions which I should
12 just draw your attention to on the following page. The
13 first is "Enterprise Product" which is the third
14 definition from the top:

15 "Any desktop platform product that Microsoft
16 designates as such in the product terms and chosen by
17 ..."

18 Effectively by the customer under the agreement:

19 "... they must be licensed for all qualified devices
20 and qualified users on an Enterprise-wide basis under
21 this program."

22 Ie the Enterprise licensing programme.

23 For the definition of "qualified device" and
24 "qualified user", one can then further down on the same
25 page. My learned friend took you yesterday to the

1 definition of "qualified device" and made the point that
2 it doesn't include a server. That's right, because this
3 is about devices that are being used by -- I can put it
4 colloquially -- normal people. The servers don't count
5 toward devices using the software.

6 You can install any number of copies of the licensed
7 applications on a licensed device; I will give you the
8 reference in the interests of time. That's bundle E9,
9 tab 52, page 229, under the heading "Desktop
10 applications point 1". I just quoted that what says.

11 Any number of users may use it but not at once,
12 because it's an individual device. So you might have
13 multiple user accounts on Windows, for example, on that
14 device.

15 "Qualified user", then, basically means any person
16 who uses a qualified device or accesses a relevant
17 server running server software. So in the case of
18 server software the qualified users who access it will
19 count toward your licensed coverage account. We will
20 come back to that, but essentially it means anyone, not
21 just an employee contractors, just anyone who uses or
22 accesses it.

23 Crucially, the qualified user may use multiple
24 copies of the software. Multiple devices may be used by
25 the same person - a desktop, laptop, mobile, even

1 something called a work at home version on a home
2 desktop PC. All of those count toward the "qualified
3 user", but that's just one. They might have several
4 copies but one qualified user.

5 Now, these are alternatives. You will have some
6 products that will be licensed on a qualified device
7 basis, like Windows as an operating system, and some
8 products that are licensed on a qualified user basis,
9 like Office.

10 MR LYKIARDOPOULOS: When you say some products, we're only
11 dealing with Windows and Office, aren't we?

12 MR RIORDAN: No, not for PI 1. PI 2 is concerned with
13 Windows and Office. PI 1, there's a slightly larger
14 universe. I will show you what the relevant products
15 are.

16 MR LYKIARDOPOULOS: Does it matter, out of interest, to the
17 arguments?

18 MR RIORDAN: In our submission, no, the Enterprise
19 commitment is clearly applicable to Windows and Office
20 and that's at the core of this case. There is
21 a periphery, which I need fairly to show you, of
22 products which are not subject to the Enterprise-wide
23 commitment and I will show you how that arises, but they
24 account for approximately 10 per cent of the claim.

25 MR LYKIARDOPOULOS: Sorry --

1 MR RIORDAN: I think I need to show you.

2 MR LYKIARDOPOULOS: It's my fault for not understanding.

3 Why is it some products don't apply to the second

4 question?

5 MR RIORDAN: Because that's what we have agreed is the

6 formulation of the second preliminary issue.

7 MR LYKIARDOPOULOS: Are these --

8 MR RIORDAN: It was partly for reasons of practicality, sir.

9 MR LYKIARDOPOULOS: -- is this software does not have

10 non-program-related works?

11 MR RIORDAN: I can't answer that question because we're only

12 looking at Windows and Office and I'm only dealing with

13 evidence on Windows and Office, but it's partly reasons

14 of practicality because there are many other products

15 and if we had to adduce evidence on all the non-program

16 works and products then we would be taking on a huge

17 burden.

18 As it stands, you've seen the volume of evidence on

19 Windows and Office. We have, we say discharged that

20 burden amply you but if we had to do that for 20 other

21 products - we don't want that, so PI2 is more

22 circumscribed. PI 1 is about all the products that have

23 been transacted in by reference to the sample

24 transactions and they're more than just Windows and

25 Office. Windows and Office are certainly at the core of

1 the claim that is made by the claimant, so those are the
2 ones that matter economically, commercially, practically
3 for this case.

4 THE CHAIRMAN: Why do we have to concern ourselves with
5 others today?

6 MR RIORDAN: In our submission you don't, but I can't just
7 make a general submission to you that everything is
8 subject to the Enterprise commitment because --

9 MR LYKIARDOPOULOS: Let's focus on Windows and Office
10 because that's the ones we're worried about.

11 MR RIORDAN: Of course and I'd like to show you the
12 Enterprise commitment first of all, which is at
13 clause 2A on page 25.

14 There's a minimum order requirement of 500. We can
15 skip over that for present purposes. I'm interested in
16 (i) and I just invite you to read that, please.

17 We have already seen in the definition --

18 THE CHAIRMAN: We have seen this before, yes.

19 MR RIORDAN: Enterprise products must cover the whole
20 Enterprise. This is also known as a platform
21 commitment. Essentially, the customer must order enough
22 capital L "Licences", enough permissions, to cover the
23 Enterprise product for all qualified users and devices
24 in the whole organisation, and that is what the
25 Enterprise customer is signing up to when they enter

1 into this suite of agreements.

2 So Microsoft's evidence on this point is given by
3 Ms Cason, and she gives examples of Enterprise products,
4 being Windows and Office for present purposes, at D2,
5 tab 11, page 108 and she explains the Enterprise
6 commitment at paragraph 15. We don't need to go to it
7 but she explains that the products to which this
8 obligation applies are identified by means of a green
9 highlighted E against the product name in a particular
10 column of the product terms. And please take my word
11 for it, those terms have an E in them for the relevant
12 versions of Windows Enterprise and Office Professional
13 Plus with which we are concerned.

14 There are other versions of Windows, like Windows
15 Professional, which is the retail version of Windows
16 which are not subject to an Enterprise commitment, and
17 not even orderable under these agreements, so these
18 agreements only let you place orders for products
19 falling within the umbrella of the Enterprise licensing
20 program.

21 That is why, when I said earlier we're not concerned
22 with retail licences, they're actually different
23 products as well. We're concerned with Windows 10
24 Enterprise which, as its name suggests does what it says
25 on the tin; it's for Enterprises under these agreements.

1 The same is true of Office. There are other
2 editions which is you can licence individually or which
3 retail users can buy.

4 Just to give you the reference in case the detail
5 becomes important in your deliberations, the product
6 term is at bundle E9, tab 52, page 295. It explains
7 that E is the Enterprise product; and Windows is at
8 page 259 and you will note that there are different
9 editions; and Office is at page 241.

10 Incidentally, for Office at 241 it also tells you
11 all the different applications that is fall within the
12 suite of Access, Excel, Word, Project, Visio and I think
13 Skype for Business falls in, as well.

14 Now, one oddity of the claimant's case which has
15 been noted but not really remarked upon is that even the
16 claimant accepts you cannot divide the suite of computer
17 programs into the individual applications, or each
18 application into its individual executable programs.

19 Not even the claimant contends that exhaustion
20 allows it to break apart the grant with respect to the
21 suite and sell each computer program individually. That
22 was expressly conceded by my learned friend yesterday,
23 so he accepts that the first acquirer must accept the
24 configuration and combination of programs that is
25 licensed under the user licence and cannot subdivide the

1 product.

2 Now, I will come back to that a bit later, if I may,
3 but I just leave the thought.

4 I should also make clear that the server products
5 which are Exchange, for emails; SharePoint server,
6 an intranet program; Skype for Business, server for
7 telephony; and SQL server, database server software,
8 potentially similar to Oracle's database software.

9 These are all products that are not licensed on
10 a Enterprise-wide basis. That's why I mentioned earlier
11 that I cannot make this submission so broadly. Those
12 products do account for approximately 10 per cent --

13 THE CHAIRMAN: I think we're just going to focus on --

14 MR RIORDAN: We're just going to focus on the headline.

15 So it follows from the Enterprise commitment that
16 the customer is also obliged after placing their initial
17 order to top-up their order if their number of users or
18 devices grows in the organisation, and there's
19 a procedure for that which one sees at page 18 of the
20 bundle. That's in the Enterprise agreement, which is
21 another part of the suite and if one could just look at
22 the bottom of page 18 in tab 3 one sees -- I'm so sorry;
23 I've jumped ahead slightly in the interests of being
24 speedy and I've therefore gone more slowly. Can we
25 please go back to page 25 and tab 4. I do apologise.

1 MR LYKIARDOPOULOS: I assume that you're talking about
2 the --
3 (overspeaking)
4 MR RIORDAN: Precisely, that's what I was looking for, yes.
5 MR LYKIARDOPOULOS: And H(?).
6 MR RIORDAN: Yes, exactly, and it's an annual order but
7 there's a discretion to order at any time but they must
8 be covered by at least the time of the next true up
9 order. In other words, there's some administrative
10 flexibility, you can grow, you're not immediately
11 outside the scope of the licence, but you have to
12 account for that each year.
13 MR LYKIARDOPOULOS: Right. Do you accept it could be true
14 down?
15 MR RIORDAN: No, it's a one-way ratchet. However there is a
16 procedure whereby if the number of users in the
17 organisation changes by more than 10 per cent then the
18 parties will agree to negotiate in good faith. In other
19 words, Microsoft will be reasonable. If there's a good
20 reason for the change like divestiture of a division
21 then a discussion will be had commercially but the
22 starting point is it's a one-way ratchet and that's the
23 Enterprise commitment.
24 There are advantages for the licensee: they get
25 discounted prices, they get administrative convenience,

1 they get a master MAK they can use on all the devices
2 and they have various other rights which aren't
3 presently important.

4 Each year the enrolled customer has an obligation to
5 determine the number of qualified users and qualified
6 devices and place orders for any additional capital L
7 Licences that aren't already covered. And that
8 obligation is to order and maintain a licensed quantity
9 which covers the entire Enterprise for those
10 Enterprise-wide products.

11 Clause 5(f) in the same bundle I should also just
12 remind you of since reference has been made to it.
13 That's on page 28. So none of the provisions in this
14 enrolment prohibits the transfer of software to the
15 extent allowed under applicable law if the distribution
16 right has been exhausted.

17 THE CHAIRMAN: Sorry, I've just lost where you are.

18 MR RIORDAN: Sorry, page 28 of the bundle, tab 4, clause F
19 in the middle of the page there. It's clause 5(f).

20 THE CHAIRMAN: Yes, thank you.

21 MR RIORDAN: Now, in my submission, this doesn't add
22 anything to the principles that my learned leader has
23 been addressing you on; it simply says that nothing in
24 the contract is intended to prohibit something that
25 would otherwise be allowed.

1 It doesn't go further. In particular, I gather
2 potentially in some of the questions from the panel it
3 might be thought this is somehow a grant of express
4 permission to transfer the non-program elements. It is
5 not, because that would exceed the extent allowed under
6 applicable law and the distribution right would not have
7 been exhausted, so that's not a bootstrap provision;
8 it's not said to be by my learned friend and they're not
9 relying on --

10 MR LYKIARDOPOULOS: Sorry, I do not understand that.

11 Applicable law doesn't prevent the transfer of anything.

12 MR RIORDAN: No, you can agree to transfer whatever you
13 like. But it is within the rightholder's gift to grant
14 a permission which exceeds applicable law --

15 MR LYKIARDOPOULOS: Of course. Applicable law is you can
16 transfer what you want.

17 MR RIORDAN: Yes, there's a degree of circularity in that.
18 My only submission on this clause is that it doesn't
19 give any right that doesn't already exist under the
20 applicable law. It doesn't go further. I was -- maybe
21 I'm being paranoid, but I detected a --

22 THE CHAIRMAN: I was looking at it under the Enterprise
23 agreement, actually.

24 MR RIORDAN: I think there are two places --

25 THE CHAIRMAN: Are we going to it there as well?

1 MR RIORDAN: I think it's in the same terms in the
2 Enterprise agreement.

3 THE CHAIRMAN: If we go to the Enterprise agreement, then.

4 MR RIORDAN: Yes. That's at clause 4(c) on page 20 --

5 THE CHAIRMAN: Just explain how this works because -- how
6 does 4(a) work first of all? It seems to be --

7 MR RIORDAN: I'm going to come on to that in a moment, if
8 I may. I'm starting with the Enterprise commitment.
9 I'm going to come to the way in which transfers are
10 regulated as my next point, if I may.

11 THE CHAIRMAN: Right.

12 MR RIORDAN: It's very important to understand the
13 Enterprise commitment before we move any further.

14 THE CHAIRMAN: Let's press on with it, then.

15 MR RIORDAN: It's the core principle under which these
16 licences are organised.

17 Now, the claimant's evidence doesn't deal with the
18 Enterprise commitment but it does tender evidence from
19 Mr Golev, who was proffered as an expert in Microsoft
20 licensing.

21 MR LYKIARDOPOULOS: Cutting through it, what is the core
22 thing we should take from the Enterprise enrolment? You
23 said it's core; what is the core thing we should take
24 from it? You've shown me all these parts of it.
25 I just want to know what the core --

1 MR RIORDAN: This contract is totally inconsistent with
2 treating each copy that is made by the licensee as
3 an independent copy. That is what one cannot say is the
4 result of this agreement. Instead --

5 THE CHAIRMAN: Why?

6 MR RIORDAN: -- we have a block licence to the Enterprise
7 under which the licensee has no discretion whatsoever as
8 to the quantity of users and devices which is it must
9 licence. It is sold in a block corresponding to the
10 number of users in the organisation and the number of
11 devices.

12 THE CHAIRMAN: Okay, so that's the point.

13 MR RIORDAN: You will recall that in UsedSoft they were sold
14 in blocks of 25. This is slightly more sophisticated.
15 It's not 25; it's N where N is the number in the
16 organisation.

17 THE CHAIRMAN: Right, okay. Anything else we need in this?

18 MR RIORDAN: Yes. The second point -- I was just going to
19 give you the reference to Mr Golev's statements about
20 the Enterprise commitment.

21 THE CHAIRMAN: I thought you didn't want to go to Mr Golev.

22 MR RIORDAN: They're not in his statement. They're things
23 he said publicly, and I will just give you the
24 reference, it's E78 --

25 THE CHAIRMAN: I don't think we need to bother with that.

1 MR RIORDAN: The second feature of the licence and in
2 particular the Enterprise Agreement, which we're
3 currently in, which reinforces all I have just said, is
4 the operative licence grant and we do need to have
5 a look at that.

6 THE CHAIRMAN: Which page are you at?

7 MR RIORDAN: Page 17, clause -- so 17 is the Enterprise
8 agreement. One can see a few definitions of "Customer,
9 "Affiliate, "Enterprise". Broadly we're talking about
10 the customer and the other entities within its corporate
11 group under common control, but I'm paraphrasing.

12 Note the definition of "Licence". It's the right to
13 download, install, access and use a product. As
14 the Tribunal will have observed yesterday, there are of
15 course plural "Licences" because there are plural
16 products. It is just a permission; there is no more to
17 it than that. It perhaps is slightly confusing
18 terminology.

19 Clause 2(a), however, is the operative grant, which
20 is a grant to the Enterprise of a non-exclusive right to
21 download, install and use software "Products". And,
22 just to remind you, capital P is a reference to the
23 Products identified in the "Product Terms", so they're
24 back-to-back.

25 If I could just invite you to read again

1 clause 2(a).

2 THE CHAIRMAN: Yes, we read that.

3 MR RIORDAN: I know my learned friend took you to it but the
4 key points are these: it's a grant to the Enterprise as
5 a whole, it's a grant of a right to download, install
6 and use software by way of obtaining the digital copy
7 from Microsoft and installing and using it within the
8 Enterprise.

9 However, that right is tied to the specific quantity
10 which is ordered under the enrolment. The right is also
11 expressly subject to the other terms of the agreements.
12 To take the obvious point, there's only one agreement
13 per Enterprise covering the entire quantity, not
14 multiple agreements and not separate, independent grants
15 of independent rights.

16 MR LYKIARDOPOULOS: I'm not sure I entirely follow. Why is
17 it that where you have to -- I'm just looking at the
18 minimum order requirements. I have to include at least
19 500 licences in a single product pool for Enterprise
20 products. Why is it if I order 250 licences that has to
21 be looked at as one licence and not 250 individual
22 licences? I don't quite understand why.

23 MR RIORDAN: So you're putting a slightly different point to
24 me, which is about the minimum threshold.

25 MR LYKIARDOPOULOS: No, why is it a single -- you said the

1 most important thing I take from the Enterprise
2 enrolment is it's not individual licence; it's a single
3 block licence.

4 THE CHAIRMAN: It may be a single contract --

5 (overspeaking)

6 MR LYKIARDOPOULOS: This tells me that the Enterprise
7 involved says, for instance: I need -- obviously the
8 minimum is 500. So he says: I need a thousand. Why am
9 I therefore restrained here to think of that as one
10 licence and not a thousand licences?

11 MR RIORDAN: Well, in a sense there's no material
12 distinction for present purposes because you may have
13 a thousand permissions to make -- for people to use it.

14 MR LYKIARDOPOULOS: That's another word for licence.

15 MR RIORDAN: Precisely, but it's not the bargain that is
16 being entered into; the transaction. The transaction
17 was a commitment to licence the entire Enterprise, not
18 250, but 15,000 or whatever the number is. You cannot
19 place an order for 250 licences if you have 15,000
20 employees. You cannot. And I just -- just to remind
21 you, sir, the clause 2(a) minimum order requirement is
22 not the same as the Enterprise commitment. It's sort of
23 a lower limit. You can't have an Enterprise that's
24 fewer than 500 people.

25 THE CHAIRMAN: Right. So where do we go next?

1 MR RIORDAN: So it is a block.

2 Just to remind you of the adjustments to the licence
3 quantity which emphasises this point, that's clause 2(g)
4 on page 25. This is another mechanism for adding
5 products and adding licences. I've mentioned the true
6 up requirements. In view of the time I might just skip
7 over that.

8 THE CHAIRMAN: Right.

9 MR RIORDAN: Clause 3(a), back in the enterprise
10 agreement -- sorry to jump around -- at page 19. This
11 is extremely important. The licensee may make as many
12 copies of products as it needs to distribute them within
13 the Enterprise.

14 THE CHAIRMAN: Right.

15 MR RIORDAN: So there is no one-to-one relationship between
16 the licensed quantity and the number of copies. The
17 only test here is need. It's completely up to the
18 Enterprise how many copies --

19 THE CHAIRMAN: Right, you have said they have to take out a
20 licence corresponding to everybody within in the
21 organisation.

22 MR RIORDAN: Once they have the licence --

23 THE CHAIRMAN: And then they can distribute it to everyone
24 in the organisation.

25 MR RIORDAN: And they can make copies for their laptops and

1 their mobiles and their at-home and so on, but there's
2 no direct relationship between the quantity that's
3 ordered and the number of copies that will be brought
4 into existence downstream of that. The only thing one
5 can say with absolute certainty is that all of those
6 downstream copies will be obtained from the master copy
7 which has been downloaded by the customer from the VLSC
8 and those copies may only be used and made internally
9 within the Enterprise. So this is, we say, an important
10 feature of this licence grant.

11 It's delimited not by a specific number of copies
12 that are permitted independently to be made and used and
13 enjoyed. There is no quantifiable limit. Rather, it is
14 defined by its whole of Enterprise --

15 THE CHAIRMAN: Right, I think we have that point.

16 MR RIORDAN: I am repeating myself.

17 So, in short, the Enterprise has a right to make as
18 many downstream copies as it needs --

19 THE CHAIRMAN: But it has a limit.

20 MR RIORDAN: -- but only for use by the qualified users and
21 on the qualified devices and that reflects the
22 Enterprise commitment. The Enterprise gets that
23 flexibility as a key advantage in having the right to do
24 this; the permission that they get because they have
25 committed to take the licence that covers all users in

1 the organisation, all the devices.

2 It does not follow from that that there is
3 a separate divisible licence with respect to each
4 internal copy that is then made. They may be within the
5 scope of the licence but each licenced copy is not
6 independent of the others; they're subject to the terms
7 of the Enterprise Agreement, per clause 3(a), and one
8 can consider the extreme consequences of reaching
9 a contrary conclusion.

10 An Enterprise with 5,000 users might obtain
11 Enterprise-wide coverage for Office for all those
12 qualified users. It downloads its one copy by the link
13 in VLSC, it then proceeds via its IT administrator to
14 make and install 5,000 copies on to the desktop PCs of
15 all the qualified users. Each user might, a few years
16 later, be issued with a laptop and they install another
17 5,000 --

18 THE CHAIRMAN: I think we have this point.

19 MR RIORDAN: Are there now 10, 15,000 exhausted copies?

20 Plainly not. It's simply alchemy to say otherwise. So
21 it follows from all this that the customer must place
22 specific orders for specific products in a specific
23 Enterprise quantity which forms the subject of the
24 licence grant in clause 3(a) of the Enterprise agreement
25 and, in return for that, they get this right to make

1 downstream copies. One cannot divide --

2 THE CHAIRMAN: We have --

3 MR RIORDAN: -- the parts of the bargain. All right. The

4 critical feature: there's no discretion as to the

5 quantity.

6 Just to make good the point that this is how the

7 order is placed, can I just show you, just for the sake

8 of illustration, Carillion's product order form. That's

9 at tab 13 --

10 THE CHAIRMAN: Have you finished with this agreement or not?

11 MR RIORDAN: Yes, I think so.

12 THE CHAIRMAN: All right. I would like to go to 4, please.

13 Can you explain how this works.

14 MR RIORDAN: I'm sorry, tab 4?

15 THE CHAIRMAN: No, the next --

16 MR RIORDAN: Sorry to be unclear. I'm coming to the

17 transfer procedures once I have dealt with the terms of

18 the agreements because they fall to be considered

19 together.

20 MR LYKIARDOPOULOS: What are we getting from this other

21 document you want to go to; just that you can make as

22 many copies as you like?

23 MR RIORDAN: No. Tab 13, page 201, bundle B is the order

24 form, the product selection form, that Carillion used to

25 place its order for Office and Windows. And I didn't

1 pluck 15,000 out of the air; that's the Enterprise
2 quantity which it ordered, and you can see the user
3 licensing model is qualified users, 15,000; qualified
4 devices, 15,000; Enterprise -- it's an Enterprise
5 product -- and you can see what it's ordered.

6 THE CHAIRMAN: Right, okay.

7 MR RIORDAN: That is the sense in which I say there is
8 a block licence in that quantity and that includes
9 within it permissions to make the downstream copies.

10 I better come to the transfers. Could one then go
11 to clause 4(a) of the Enterprise agreements and I will
12 explain our case on this.

13 In specific circumstances, Microsoft provides
14 a contractual mechanism for transferring fully paid
15 perpetual Licences, capital L, in limited circumstances.
16 One can see there in clause 4(a) they are to
17 an affiliate, so another member of corporate group, to
18 a third party but only in connection with the transfer
19 of higher employees as part of an M&A sort of
20 transaction.

21 Now, the customer can do that, but upon such
22 transfer the customer must uninstall and discontinue
23 using the licensed product and render any copies
24 unusable.

25 The key word there is "any" and upon such

1 transfer -- yes, clause 4(b) -- they must notify the
2 transfer as well. That's an important aspect.

3 THE CHAIRMAN: We're not concerned with this, are we,
4 because we're not talking about transfers to affiliates.

5 MR RIORDAN: It's common ground that the claimant didn't
6 seek or obtain consent under this procedure.

7 THE CHAIRMAN: We're not within 4(a) because we're not
8 concerned with transfers to affiliates.

9 MR RIORDAN: Correct, so none of the sample transactions
10 fall within these circumstances in which there is
11 a contractual right to transfer. I draw attention to
12 clause 4(b), because notification is mandatory and the
13 transfer is not valid unless the transferee accepts in
14 writing the rights, restrictions and limitations of the
15 agreement.

16 THE CHAIRMAN: Again, that's referring back to 4(a).

17 MR RIORDAN: That's 4(b).

18 THE CHAIRMAN: Yes, but that's contemplating the transfers
19 that have been referred to in 4(a).

20 MR RIORDAN: As we will see -- I will show you the form, but
21 there is another category of transfer which is a sort of
22 transfer with the blessing of the copyright owner. In
23 other words, you can ask for consent and they can give
24 it or withhold it.

25 THE CHAIRMAN: Yes, but we're the concerned with any of

1 these in this case. We're talking about circumstances
2 where you haven't consented and that's common ground.
3 MR RIORDAN: Correct.
4 MR LYKIARDOPOULOS: Neither party says they felt they fell
5 within any of these -- no.
6 MR RIORDAN: No, the point is the contract does contain
7 provisions which regulate --
8 THE CHAIRMAN: We understand --
9 MR RIORDAN: The procedure and the mechanism for --
10 THE CHAIRMAN: We understand. We needn't look at them in
11 any detail, I don't think.
12 MR RIORDAN: I hesitate. There is one point I would like to
13 come back to on this.
14 THE CHAIRMAN: Right, let's have a look at 4(c), then. How
15 does that --
16 MR RIORDAN: So nothing prohibits transfer if the
17 distribution right in the software has been exhausted to
18 the extent allowed under applicable law. It goes no
19 further beyond applicable law. It's simply clarifying
20 that nothing in A and B are intended to derogate from
21 what applicable law guarantees as the right to transfer.
22 THE CHAIRMAN: But your position is transfer is prohibited?
23 MR RIORDAN: Well, our position is applicable law doesn't
24 confer a right to transfer in the circumstances of the
25 sample transactions and, therefore, clause C is not

1 engaged.

2 MR LYKIARDOPOULOS: Well, you accept, I think, the

3 distribution right in the computer program has been

4 exhausted, subject to your --

5 MR RIORDAN: Well, subject to the requirements being

6 satisfied.

7 MR LYKIARDOPOULOS: The requirements being satisfied. So on

8 part 2, question 2.

9 MR RIORDAN: I'm sorry, I've been in PI 1 mode. I may not

10 have grasped the question.

11 MR LYKIARDOPOULOS: If we work on the basis, if we work on

12 the assumption, which is the assumption that question 2

13 precedes, that the distribution right on the computer

14 program has been exhausted; is this saying that nothing,

15 then, is going to prohibit transfer of the rest of the

16 software?

17 MR RIORDAN: No, because it's saying it's only to the extent

18 allowed under applicable law if the distribution right

19 has been exhausted. One must construe that as

20 a reference to what the position is under the applicable

21 law with respect to the relevant subject matter. This

22 is not saying -- this is not a positive grant of rights

23 to transfer something that has not been exhausted.

24 That's why I made the submission earlier that this

25 doesn't go beyond what applicable law says. So what

1 Mr Hobbs said to you is the start point and the end
2 point. The contract doesn't derogate.

3 And my learned friend doesn't have a case that goes
4 beyond that. The alpha and the omega.

5 Right, I need to press on, I'm afraid. So just to
6 show you one example of a PLTF and how that actually is
7 meant to work, if I could just invite to you look at
8 tab 6 of this bundle, page 36.

9 THE CHAIRMAN: So why are we concerned with PLTFs?

10 MR RIORDAN: Because they show first of all what the
11 transferor must do, they must uninstall and render
12 unusable the software.

13 THE CHAIRMAN: Not if they're under 4(c).

14 MR RIORDAN: Well, UsedSoft says they must anyway.

15 THE CHAIRMAN: It doesn't say you have to -- the PLTF.

16 MR RIORDAN: Just to explain, I'm addressing the question
17 that I think you put to my learned leader, Mr Hobbs:
18 where does it say that you need to uninstall the
19 software when you transfer? And so I'm going to give
20 you an answer to that question.

21 THE CHAIRMAN: Right. But only in the circumstances of
22 4(a)?

23 MR RIORDAN: Well, yes. Obviously, if you don't fall within
24 4(a) you don't have a right to transfer at all, so in
25 a sense --

1 THE CHAIRMAN: That's what the hearing is to determine. But
2 if you do have a right to transfer there's no
3 requirement in this agreement to do anything, to fill
4 in -- if you're within 4(c) -- if you're outside 4(a)
5 and within 4(c) there's no requirement in this licence
6 to do anything. It may come from UsedSoft.

7 MR RIORDAN: With respect, that's not in my submission
8 a correct analysis of clause 4(b).

9 4(b) is a requirement that regulates the manner in
10 which any transfer may be exercised.

11 Clause 4(c) is saying none of this is meant to
12 prohibit a transfer you would otherwise have a statutory
13 right to make. But one of the conditions that you must
14 comply with as a matter of contractual regulation, per
15 Top System, and the manner in which that right is to be
16 exercised is to give notice under clause 4(b). The
17 means by which that is done is a Microsoft PLTF, which
18 is filed and submitted to Microsoft giving particulars
19 of the transfer and crucially ensuring that the
20 transferee accede to all the contractual restrictions.
21 They can't just get the copy and not accede to the
22 contractual limitations that go with it and, on
23 UsedSoft's own analysis, form an indivisible whole.

24 MR WOODGATE: Can I just ask one question: if the PLTF
25 mechanism is used under 4(a); were there cases where

1 that was used? And it was because -- perhaps this is
2 the picture -- it was divested? And exactly how does
3 the -- and it was agreed to by Microsoft.

4 MR RIORDAN: The answers are yes and yes and yes so far.

5 MR WOODGATE: Exactly how was the:

6 "Upon such transfer customer involved affiliate must
7 uninstall and discontinue using the licensed product and
8 render any copies unusable."

9 Exactly what happened; the parent that divested a
10 subsidiary or division they created stopped using?

11 MR RIORDAN: Yes. So I'm not in a position to give you
12 evidence as to what that specific entity did at that
13 time. That's not an issue I'm --

14 MR WOODGATE: That's what it says here. That's what it
15 says.

16 MR RIORDAN: Sorry, may I be slightly misunderstanding the
17 question. Can I just show you an example? I think --

18 MR WOODGATE: I asked you the question: if an Enterprise
19 customer formed a division to sell to another
20 undertaking and operate a PLTF mechanism; does 4(a),
21 final words, say:

22 "The original Enterprise enrolment customer must
23 uninstall and discontinue using the licenced product as
24 observed?"

25 MR RIORDAN: Well, we assume that enterprisers comply with

1 the terms of the contracts they are subject to.
2 Microsoft trusts its enterprisers to behave in
3 accordance with their contractual obligations. That
4 trust is backed by audit rights.

5 I'm not aware, standing before you today, of
6 anything to suggest that the valid PLTFs we have in the
7 bundle were not validly complied with as to their
8 conditions.

9 Could I show you an example and the associated
10 circumstances?

11 MR WOODGATE: It seems to me that means the original
12 Enterprise agreement is over, and maybe a whole new set
13 of agreements and downloads are needed to set up the
14 parent who makes the disposal as a properly licensed
15 Enterprise customer; isn't that what this is?

16 MR RIORDAN: No, with respect. So the requirement, when
17 you -- so the PLTF -- I really need to show you the
18 document to show how the mechanism works. But the PLTF
19 says you can transfer the Licences to a Product, all of
20 them, to an Enterprise that is an Affiliate in these
21 circumstance or a divested entity. Rabobank did that on
22 two occasions when they sold subsidiaries. And we have
23 the forms, they're in tabs 8 and 9 of bundle B. They're
24 filled in, they were sent to Microsoft Ireland. They
25 were reviewed by the licence transfer team. We have the

1 stamps, the signatures, the approvals. The checklist
2 was followed, everything was correct. It was approved
3 and off it went.

4 We have no reason to believe that the transferring
5 parent company didn't uninstall the relevant product.

6 But I may be misunderstanding the question.

7 MR WOODGATE: So did Rabobank, having made a divestiture of
8 a part uninstall its own copies under the original
9 enrolment agreement?

10 MR RIORDAN: I'm not in a position to give you evidence from
11 the bar table as to what happened in that specific case.
12 It's not for me to prove that they did or didn't, with
13 respect.

14 One starts with the presumption that they behaved
15 lawfully and my case doesn't in any way depend on what
16 Rabobank did or didn't do when they had valid transfers,
17 and it is common ground that the effect of those
18 transfers was to reduce the available licenced quantity.
19 But that was done with Microsoft's consent.

20 THE CHAIRMAN: Do you agree with me that the final word in
21 4(a) says if Rabobank makes that transfer -- do I read
22 customer as Rabobank?

23 MR RIORDAN: Yes.

24 MR WOODGATE: "Must uninstall and discontinue using the
25 licensed product and render it unusable."

1 MR RIORDAN: Yes. And that's entirely consistent with what
2 the form actually says, which is at tab 6. And one can
3 see tab 6, page 38, the customer, the one transferring,
4 so Rabobank, has to represent and warrant a number of
5 things. And the final one, H, is that the customer has
6 uninstalled and is no longer using and will no longer
7 use the software licence under the licence, et cetera.

8 MR WOODGATE: Thank you.

9 MR RIORDAN: And then the transferee has to give certain
10 warranties, as well. And note at the bottom of page 38,
11 below those Roman numerals:

12 "The transfer is only valid if representations and
13 warranties made above are true and accurate."

14 So there is an automatic sort of safety net. If for
15 some reason someone has misrepresented something, well,
16 it's not effective. It's not an effective novation.

17 One other point just to pick up on there, second to
18 last paragraph:

19 "Microsoft reserves the right to audit ... volume
20 licensing keys or media are not provided to transferee
21 with the transfer of Licences."

22 In other words, they have to get in touch with
23 Microsoft and get their own MAK and Microsoft will of
24 course give it to them because they will have been
25 notified of the transfer. But that MAK that they get

1 will be different and it will be specific to their
2 Enterprise.

3 Now, all this happens under a framework which is
4 intended to allow the rightholder to regulate the
5 transfers and how those transfers are conducted in order
6 to ensure that unauthorised copying doesn't take place.

7 In my submission, this is all entirely consistent
8 with the case my learned leader was putting to you, that
9 when one considers the contractual scheme of regulation
10 per Top System one can't simply extract a copy from
11 a block licence like this and divest it of all its
12 associated conditions and limitations. The contract
13 doesn't prohibit the transfer outright. It couldn't,
14 but it does regulate the means by which that may be
15 done. That's the essential significance of these
16 documents.

17 THE CHAIRMAN: Can I just ask: and Top System says in terms
18 that a licence can be granted without the right to be
19 decompile to correct errors, and in circumstances where
20 exhaustion operated, the grant would only have been
21 a grant limited in that way and that will continue to be
22 effective. And that's the best case for you on this
23 particular part of the argument; is that right?

24 MR RIORDAN: So the decompilation issue in Top System is
25 a slightly different point which doesn't arise here.

1 Decompilation is a right which cannot be restricted
2 by contract. That's Article 8, paragraph 2 of the
3 Software Directive. And so what the CJEU was
4 essentially asked to resolve is whether the licence
5 could restrict that right and whether the transferee
6 would get that right.

7 Answer: they do because it's a statutory right they
8 enjoy as a lawful user. And the transferee is the
9 lawful user, so they get that right with it. But we're
10 not in that territory here.

11 MR LYKIARDOPOULOS: I'm sorry, we had a discussion earlier
12 on about that passage in your skeleton argument where
13 under this, question 1, you accepted that nothing would
14 prevent transfer to a single person and a single
15 licence; are you saying that if --

16 MR RIORDAN: Retail, retail licence. So the point at
17 paragraph 43 was just -- we're talking about Enterprise
18 licences under the Enterprise terms. Nothing that we're
19 saying is intended to be meant to be saying that the
20 same results would necessarily pertain to individual
21 consumer licences.

22 MR LYKIARDOPOULOS: Yes, but you said -- this is Enterprise
23 licencing in large volumes:

24 "It is important because it forms no part of
25 Microsoft's case that single licence to an individual

1 could not be resold provided the requirement of UsedSoft
2 are met."

3 Are you now adding to that and also you could
4 prevent that by having a notification provision like
5 this?

6 MR RIORDAN: No, we couldn't prevent it.

7 MR LYKIARDOPOULOS: So what am I looking at? Why am
8 I looking at the notification provision? I thought you
9 were relying on this to say it's not permitted
10 because --

11 MR RIORDAN: I see. I think there may be --

12 MR LYKIARDOPOULOS: Maybe I'm misunderstanding.

13 MR RIORDAN: No, it's an entirely fair question, and perhaps
14 we need to consider our language more carefully as well,
15 in the skeleton and me on my feet.

16 What Top System says is that whilst you cannot
17 outright prohibit the transfers the rightholder is
18 entitled to regulate contractually the conditions under
19 which the licence is organised.

20 And if you do not comply with those conditions --
21 I think your question goes to the consequence, which is
22 particularly the case. In our submission, the result
23 would be an infringement because it wouldn't be
24 effective to pass any rights under the licence to the
25 second acquirer. And so the first acquirer will be

1 authorising infringement --

2 THE CHAIRMAN: Go back to this -- sorry, so you have 4(a)

3 contemplating some transfers which we're not concerned

4 with. 4(b) seems naturally to follow from 4(a). 4(c),

5 which would include this case because we're outside

6 4(a), says:

7 "Nothing in this agreement prohibits the transfer of

8 software allowed under applicable law."

9 So it doesn't say: and by the way, you also have to

10 comply with 4(b) --

11 It says quite the opposite. It says nothing in this

12 agreement, i.e. 4(b) does not prohibit transfer of

13 software to the extent that it's allowed under the

14 applicable law.

15 MR RIORDAN: I make two submissions in response to that.

16 Firstly, 4(c) is a for the avoidance of doubt provision.

17 It's not --

18 THE CHAIRMAN: So what?

19 MR RIORDAN: It's not detracting from 4(b).

20 Second submission: if one reads 4(b), one must read

21 it together with the form. And I will show you why the

22 form covers the circumstance of 4(b) as well. I need to

23 show you the form as well.

24 THE CHAIRMAN: Okay, is the form part of this contract?

25 MR RIORDAN: Yes. It's incorporated by reference. That's

1 the form that must be used under 4(b). As matter of
2 construction, one has to look at the form to understand
3 what the obligation is to notify.

4 MR LYKIARDOPOULOS: But you are saying -- what you say this
5 is saying is: if you want to fall under UsedSoft
6 conditions you must have notified us?

7 MR RIORDAN: Yes. But Top System says we can do that. We
8 can regulate the conditions under which that transfer
9 right may be exercised.

10 Now, ex hypothesi if you don't comply with those
11 conditions, the consequence must be that your transfer
12 is invalid. How could it be otherwise? Could I just
13 show why I say the form applies to both UsedSoft and
14 non-UsedSoft transfers?

15 THE CHAIRMAN: But it's talking about -- but 4(b) is talking
16 about 4(a) because it's just talked about an affiliate
17 and then it says:

18 "The customer or the enrolled affiliate must notify
19 Microsoft of a contractual licence transfer."

20 MR RIORDAN: The claimant certainly thought --

21 THE CHAIRMAN: It's not reading on to 4(c).

22 MR RIORDAN: The claimant certainly thought that it did.

23 4(c) is a negative provision, with respect. It's not
24 saying that any of the other requirements can be
25 ignored. It's saying: for the avoidance of doubt --

1 THE CHAIRMAN: It's saying nothing in this agreement
2 prohibits. So no term in this agreement prohibits your
3 rights under UsedSoft, is what it's saying.

4 MR RIORDAN: Yes.

5 MR LYKIARDOPOULOS: Isn't it pretty clear that 4(a) is
6 saying: if you want to transfer to your affiliate or for
7 these reasons you must make the copies unusable.

8 Then (b) is saying: then you have to notify us using
9 this form.

10 MR RIORDAN: The error, if I may say with respect, is
11 construing those words without looking at the form.

12 THE CHAIRMAN: All right, let's look at the form, then.

13 MR RIORDAN: So, at tab 6, we see a specimen form. It's
14 common ground this is representative of the ones during
15 the relevant period, although this one dates
16 from February 2021, that's immaterial.

17 It starts on page 36 of bundle B, and you can see it
18 refers in this first paragraph to the transferee entity
19 and so on, and refers back to the volume licensing
20 agreements.

21 The reason for licence transfer in section 3, at the
22 bottom of page 36, one can see that under subparagraph A
23 there's a box for an affiliate. Then the divestiture
24 and merger case. And that corresponds to clause 4A,
25 I would entirely respectfully agree.

1 However, option B is another category of transfer,
2 admittedly only with Microsoft's written consent. And
3 the exclusion is a certain perpetual licence, and if the
4 customer is seeking consent to transfer the perpetual
5 licence in other circumstances, then they must provide
6 a reason, and of course still notify Microsoft. And
7 then the customer is required to give certain
8 acknowledgements. I have taken you to some of those
9 already.

10 THE CHAIRMAN: We're not dealing with that either.

11 MR RIORDAN: Well --

12 THE CHAIRMAN: We're not in 4A, we're not in 3A, we're not
13 in 3B.

14 MR RIORDAN: While it's true that UsedSoft doesn't require
15 the rightholder's consent, the rightholder is, as per
16 Top System, entitled to regulate the means in which that
17 transfer may be effected and that's what this form is
18 doing.

19 MR LYKIARDOPOULOS: I'm sure if the customer is seeking
20 Microsoft's consent to transfer, then this is the form
21 they use. We're not talking about that, are we?

22 MR RIORDAN: Well, it's just that VL filled in these forms
23 for many years, then chose to stop submitting them. But
24 clearly it thought it needed to fill them in. That may
25 be by-the-by.

1 THE CHAIRMAN: I thought it was common ground that VL did
2 not have your consent?

3 MR RIORDAN: It is.

4 THE CHAIRMAN: How does this possibly assist us?

5 MR RIORDAN: It's simply showing the procedure that
6 Microsoft imposes contractually.

7 THE CHAIRMAN: Surely, it can't impact the construction of
8 clause 4 in the Enterprise agreement? You say we have
9 to read clause 4 in a special way because you go to the
10 form and then the scales fall from your eyes. But,
11 I mean, you come to the form it has nothing to do with
12 it.

13 MR RIORDAN: But it does tell that you the form applies to
14 more than just 4A. There are other boxes.

15 THE CHAIRMAN: It doesn't say it applies to 4C.

16 MR RIORDAN: No, but 4C is not carving out any positive
17 ground in the contract. It's a negative for the
18 avoidance of doubt provision.

19 I confess this argument has taken me slightly on my
20 feet because my learned friend doesn't make it. It's
21 not an argument that's been foreshadowed in any of the
22 evidence or pleadings and, with respect, it shouldn't
23 alter the Tribunal's analysis of the overall character
24 of the licence.

25 THE CHAIRMAN: I'm not sure we necessarily agree with that.

1 We want to get to the right answer.

2 MR RIORDAN: I entirely respectfully agree. I am however

3 mindful of time and I do have other submissions I would

4 like the opportunity to make.

5 THE CHAIRMAN: Press on.

6 MR LAVY: Sorry to interrupt, just conscious. I did so far

7 have six brief points in reply.

8 THE CHAIRMAN: How long will you need?

9 MR LAVY: No more than 20 minutes.

10 THE CHAIRMAN: Another 15 minutes.

11 MR RIORDAN: I will do my best, thank you, sir.

12 So my learned friend made two points about the

13 Enterprise agreement, which I will just give you our

14 response to briefly.

15 First, he said:

16 "The licence grant is not a single unitary licence,

17 but multiple licences are envisaged, one per copy."

18 Those were his exact words.

19 Whatever else may be said about this agreement,

20 there is not a separate independent licence per copy for

21 the reasons I have articulated.

22 THE CHAIRMAN: You've covered that.

23 MR RIORDAN: VL's submission just doesn't work because the

24 downstream copy is not unlicensed and nor can they just

25 be ignored, because on VL's case they would all be

1 exhausted. Doesn't work.

2 Second point he made was that the licences become
3 perpetual and fully paid up, and that will happen at
4 different times for different products, so they have to
5 therefore be independent. That's not a correct
6 analysis.

7 You place the order form. When you place that order
8 under the Enterprise agreement one of the benefits for
9 the customer is they can split their payments into
10 one-third, one-third, one-third over the three years.
11 That's an advantage, cash flow for the customer. It's
12 one of the benefits they get in return for the
13 Enterprise commitment. But once that three-year period
14 is up the entire order becomes fully paid.

15 Now, I accept things might get more complicated if
16 you start totting up and adding additional orders.
17 I don't actually know how the pricing is or isn't
18 arranged in those circumstance. It may be that they get
19 prorated into the payment scheme. I don't know.

20 It doesn't matter, in my submission. The point is
21 that for any given order it's all going to be perpetual
22 at the same time, contrary to the submission that is
23 made.

24 So drawing all this together, mindful of the time,
25 I would invite the Tribunal to make four findings as to

1 the nature of the rights that are granted by Microsoft
2 to the first acquirer under the specific contracts by
3 reference to which PI 1 falls to be resolved.

4 First, there is the core feature, the requirement of
5 the licensed quantity corresponds exactly to the number
6 of users and devices. Made that point. And there's no
7 flexibility on the licensee to order less. So we are in
8 a situation where, like Oracle, you have to buy a block
9 of 25, even if you only want 20. You have to buy
10 a block of 50, even if you only want 27. It's even more
11 restrictive here because you can't just buy 50 or 100,
12 you have to buy 15,000 or whatever it might be.

13 Second, the licence is only granted to the
14 Enterprise in the block corresponding to that number of
15 users or devices in that precise quantity.

16 Third, the resulting licence does not give rise to
17 15,000 independent copies that are severable from one
18 another. Quite the contrary. It may give rise to many
19 more copies, all of which are downstream of the one copy
20 that is made available to the customer. And then they
21 are permitted indivisibly under the terms of this
22 licence to copy internally up to the licensed limits.

23 It's a single licence grant for a single Enterprise
24 as a result of the order being placed.

25 So it follows, in my submission, that copies made

1 pursuant to that licence are not in any relevant sense
2 independent copies, whatever may be --

3 THE CHAIRMAN: That is a point you've emphasised.

4 MR RIORDAN: So, fourth, there is an ability to transfer to
5 affiliates and in other certain circumstances by
6 consent. I think we're all in agreement that's not
7 relevant here.

8 Right, in the slightly less than 15 minutes I have
9 left I need to address you on the sample transactions.

10 (Pause)

11 THE CHAIRMAN: Sample transactions?

12 MR RIORDAN: Firstly, what the claimant actually obtained
13 and supplied, the basic mechanics. These are common to
14 all the sample transactions.

15 It's common ground, as my learned leader explained,
16 that the claimant did not deal in any specific copies of
17 the Microsoft products. Rather, it dealt with MAKs, I'm
18 going to show you that.

19 It's also common ground that they required the
20 Microsoft licensee to provide it with 25 per cent more
21 activations for MAKs than the quantity made available by
22 Microsoft to the customer and licensed to the customer.

23 Could I just show you one example of that? H3.

24 MR LYKIARDOPOULOS: Is it in dispute? I thought it wasn't
25 disputed they --

1 MR RIORDAN: There's no dispute. I will give you the
2 reference. It's H3/50 for your note.

3 MR LYKIARDOPOULOS: Sorry, Mr Chairman, but to my mind
4 I would prefer to know why it matters because I don't
5 think the actual facts are in dispute. Those two facts.
6 So, I mean, on the fact you just said --

7 MR RIORDAN: VL is equipping itself to sell in larger
8 quantities than were ever licensed to the Enterprise.
9 Each MAK can be used by each of VL's customers to
10 activate as much as 10,000 actual not notional copies,
11 even if they're only buying 24 and VL gives these MAKs
12 to each of its customers, uses the same MAKs.

13 THE CHAIRMAN: That would apply to the first purchaser as
14 well?

15 MR RIORDAN: The first purchaser is licensed in the quantity
16 they have acquired.

17 THE CHAIRMAN: But they could download more than they're
18 entitled to.

19 MR RIORDAN: Well, they could, but they would be in breach
20 of their licence agreement.

21 THE CHAIRMAN: Well, anyone in this case could, as a matter
22 of theory, act in reality --

23 MR RIORDAN: Well --

24 THE CHAIRMAN: -- VL have done this.

25 MR LYKIARDOPOULOS: Does this go to an intention to --

1 I don't quite understand if you've 25 per cent more MAKs
2 than you use, that might show, in your view,
3 an intention to behave in a way you shouldn't in the
4 future. But why does it matter if you haven't used
5 them? The exhaustion that we're looking at because --
6 MR RIORDAN: It highlights the problem of subdivision.
7 MR LYKIARDOPOULOS: Is it a prejudice point more than
8 anything else?
9 MR RIORDAN: No, it's not a prejudice point. It explains
10 the policy against subdivision of the block licence,
11 because where before you had one Enterprise that could
12 be audited, which was tied to the MAK, which is a
13 technical protection measure for the purpose of
14 administrative convenience for that Enterprise to make
15 its internal copies, which it was permitted to make in
16 general under that licence. Now you have a situation
17 where it might be fractured into hundreds or even
18 thousands of second and third acquirers, VL's
19 customers -- VL, the second acquirer -- each of whom can
20 make further copies. It's impossible, practically, for
21 Microsoft to police or even be aware of what's going on.
22 That's the policy against subdivision. That's why the
23 CJEU says in terms, paragraph 69, you can't do that.
24 THE CHAIRMAN: Paragraph 69 of?
25 MR RIORDAN: UsedSoft.

1 MR RIORDAN: There's nothing in UsedSoft which positively
2 authorises such a scheme. And it doesn't positively
3 authorise it, well, we're back -- it's an exception to
4 an exclusive right. We're back in the exclusive right.

5 MR LYKIARDOPOULOS: You can't go for a greater number of
6 users than you took. So, if you had ten users, you
7 can't then say: well, I will sell on the further ten?
8 But I don't -- where are --

9 MR RIORDAN: It says the opposite.

10 MR LYKIARDOPOULOS: -- policy against subdivision assuming
11 that there's been -- they talk about the rendering
12 unusable, but where's the policy against subdivision,
13 just boldly, so like that.

14 MR RIORDAN: Sorry, just, with respect, to correct one
15 observation that was just made.

16 MR LYKIARDOPOULOS: I may have misspoken.

17 MR RIORDAN: 69 says that if the licence acquired by the
18 first acquirer refers to a greater number of users than
19 he needs, he's not authorised by the effect of
20 exhaustion to divide the licence and resell only some
21 smaller quantity determined by him. Full stop.

22 And what I am giving you with the MAKs and the
23 practical problems to which that gives rise is a reason
24 why that is sound policy, because we have
25 a proliferation of MAKs each of which can be used to

1 activate, potentially, a very large number of copies
2 without notification, without the ability to regulate
3 that, if --

4 MR LYKIARDOPOULOS: Is this not just saying where the
5 licence says a minimum of 25 and he needed 20, he takes
6 20. He's made 20 copies. He can't resell the remaining
7 five, that's because it's referring to back to 22 and
8 24.

9 MR RIORDAN: No, by the same token, if you acquire 15,000
10 qualified users and you only need 500, you can't sell
11 14,500 user rights, even if you never installed it on
12 those devices. It's a single block, same principle.

13 And actually while we're there, paragraph 70 deals
14 with the opposite scenario from the perspective of the
15 acquirer, right?

16 So look at -- where it says "original acquirer",
17 that's the Microsoft licensee. If they resell -- I'm
18 sorry, 71, the acquirer of additional user rights. This
19 is the person in the second acquirer position, i.e. VL
20 for most of the sample transactions. If they acquire
21 additional user rights, but didn't carry out a new
22 installation and hence a new reproduction, the effect of
23 exhaustion would in any event not extend to such user
24 rights. In other words, VL can't buy some extra rights.
25 It's not installing software itself. Ditto for VL's

1 customers --

2 MR LYKIARDOPOULOS: But that's like the 25 per cent more

3 MAKs. But in circumstances where they haven't used

4 those MAKs; are we --

5 MR RIORDAN: Because were this a copyright infringement

6 claim, that would go to damage. But this is going to

7 the foundational precondition of VL's claim.

8 MR LYKIARDOPOULOS: But I'm assuming there's no suggestion

9 that these 25 -- you're not saying they have been used?

10 MR RIORDAN: We don't know. We haven't had disclosure on

11 that question.

12 MR LYKIARDOPOULOS: But at the moment we know there 25 per

13 cent more --

14 MR RIORDAN: I should point out they shouldn't even exist.

15 MR LYKIARDOPOULOS: Right.

16 MR RIORDAN: Just to explain how those MAKs are created:

17 they will involve someone logging on to the VLSC and

18 requesting Microsoft under a pretext for an additional

19 MAK beyond what they have been issued, notionally to

20 make additional copies within their Enterprise that they

21 are licensed to make up to their contractual limit.

22 MR LYKIARDOPOULOS: I'm just a bit concerned that this is

23 trespassing upon stuff that is really beyond what this

24 trial is looking at. The lawfulness or otherwise of

25 making additional MAKs, I just don't feel this is

1 something --

2 MR RIORDAN: This is not a claim for infringement of

3 Article 6 TPMs or a section 296A of the CDPO. But what

4 I am explaining to you, with respect, is that

5 paragraph 71 of UsedSoft is dealing with this precise

6 circumstance, and it's saying the exhaustion principle

7 does not allow someone in VL's position, or VL's

8 customers' position even less, to acquire additional

9 user rights for an existing copy.

10 THE CHAIRMAN: I think that's common ground.

11 MR LYKIARDOPOULOS: I think it's common ground.

12 MR RIORDAN: We say that's the end of preliminary issue 1 in

13 our favour. They should never have acquired additional

14 rights. So --

15 MR LYKIARDOPOULOS: So the additional rights that you rely

16 on are the 25 per cent more MAKs?

17 MR RIORDAN: And indeed any number of subdivided user

18 rights.

19 MR LYKIARDOPOULOS: They --

20 MR RIORDAN: It may be 10. It may be 2,000. It may be

21 20,000 in one batch.

22 THE CHAIRMAN: We have that point.

23 MR RIORDAN: That's the relevance.

24 But what it also shows is that VL is stepping into

25 the shoes of the rightholder, as Mr Hobbs put it, and in

1 some cases actually logging in to the customer's VLSC to
2 generate additional MAKs for itself. We see an example
3 at H11/149. Don't have to go to it.

4 THE CHAIRMAN: Okay.

5 MR RIORDAN: Can I just also then deal with the point about
6 deletion and failure to render the original copy
7 unusable?

8 THE CHAIRMAN: Yes.

9 MR RIORDAN: This is important. In short, the significance
10 of this point is that the claimant did not obtain proof
11 for any of the sample transactions that the original
12 licensed copy, or any copy, had been deleted or disabled
13 by its supplier. It was prepared to accept a letter
14 asserting that a particular number of copies was no
15 longer in use. Deletion of the original copy is central
16 to exhaustion and it is also central to the rationale
17 for non-division.

18 THE CHAIRMAN: Why do they have to obtain a letter, on what
19 basis? Are you saying because of the physical contract
20 or are you saying because the German authority says so?

21 MR RIORDAN: I'm not relying on the German authority.
22 UsedSoft says that.

23 THE CHAIRMAN: Where does UsedSoft say you have to get
24 a letter?

25 MR RIORDAN: Sorry, no, we're at cross-purposes. UsedSoft

1 says that you must delete or render unusable the
2 original copy.

3 THE CHAIRMAN: The first acquirer?

4 MR RIORDAN: Yes.

5 THE CHAIRMAN: Where is the burden on VL to do that?

6 MR RIORDAN: I see the question. The contract says that the
7 transferor must do that. It also says that the --

8 THE CHAIRMAN: You are relying on your contract.

9 MR RIORDAN: I'm sorry?

10 THE CHAIRMAN: You're relying on your contract.

11 MR RIORDAN: And your next point will be that the contract
12 doesn't apply to the transferee. But UsedSoft says that
13 the contract and the copy form an indivisible whole.
14 The second acquirer cannot be in a better position than
15 the first.

16 THE CHAIRMAN: We have had that submission many times. We
17 understand that submission.

18 MR RIORDAN: It's a common answer --

19 THE CHAIRMAN: But you're relying on the terms of your
20 contract. You're not relying on the German authority.

21 MR RIORDAN: No. What the German court might regard as
22 proof or not of anything is a matter for the German
23 court on the facts of that case. I'm certainly not
24 saying --

25 THE CHAIRMAN: So you're relying on your contractual terms

1 we have heard submissions on?

2 MR RIORDAN: Yes. And the starting point that in the
3 absence of exhaustion it's an infringement. If I may
4 just have a moment, sir.

5 I am reminded that the claimant has to establish the
6 facts relevant to each of the sample transactions as the
7 claimant, and it must establish that the conditions for
8 exhaustion were met. One of those conditions is
9 deletion.

10 THE CHAIRMAN: We dealt with the fact that actually the
11 rights are exhausted once the licence is paid. And the
12 consequence of failing to --

13 MR RIORDAN: I don't think we accepted -- I don't want to
14 trespass on Mr Hobbs' toes --

15 THE CHAIRMAN: Mr Hobbs made --

16 MR RIORDAN: There is a temporal --

17 THE CHAIRMAN: Temporal loop of some sort.

18 MR RIORDAN: Question. Yes, this is the sort of the quantum
19 question. There is one ...

20 THE CHAIRMAN: You acquire contingent rights, in a sense.

21 MR RIORDAN: Yes. It can't be right that as soon as there's
22 the first sale there is automatically exhaustion
23 regardless of whether you ever respect the conditions
24 for exhaustion. It may that be the analysis is there's
25 a first sale which in principle is capable of exhausting

1 distribution right in that copy. Whether you in fact
2 fall within that principle depends on what you, the
3 first acquirer, subsequently do. And that would be my
4 submission and proper temporal analysis. It's not
5 an absolute right.

6 THE CHAIRMAN: Contingent right.

7 MR RIORDAN: Contingent right. However one chooses to frame
8 it.

9 THE CHAIRMAN: Circumscribed.

10 MR RIORDAN: Circumscribed right. That you must, as the
11 first acquirer, discharge your duty in relation to the
12 rightholder before you can engage in the transfer.
13 That's why UsedSoft says you must render it unusable at
14 the time of re-sale.

15 MR LYKIARDOPOULOS: The consideration we're concerned with
16 arises in the context of a larger action. Do
17 I understand your submission: if it were the case that
18 the first acquirer had not done what UsedSoft says they
19 should do, and under UsedSoft therefore may themselves
20 be an infringer. But assume for a moment that that
21 doesn't affect what a reseller may do. So, in this
22 case, the claimant was -- did -- the claimant is fine,
23 the problem is for the first acquirer. If that was the
24 answer, then that would answer preliminary issue 1,
25 wouldn't it?

1 It doesn't matter that the first acquirer may be in
2 breach if it doesn't affect the claimant; is that not
3 correct as an analysis?

4 MR RIORDAN: Respectfully, no. The whole point of
5 preliminary issue 1 is that the claimant can't found
6 a cause of action on illegality. He can't found
7 an assertion that there is a lawful market if its role
8 in that market relies on an unlawful activity.

9 For that purpose, whether it's unlawful tortious
10 activity by VL or an upstream supplier is entirely
11 irrelevant.

12 MR LYKIARDOPOULOS: So the claimant wasn't infringing
13 copyright at all, but the first acquirer was, you say
14 that means --

15 MR RIORDAN: It can't get what it has without infringement.
16 It can't enter that market without some upstream
17 infringement by the first acquirer or another unlawful
18 act like breach of contract. It doesn't matter for this
19 purpose. That's why preliminary issue 1 is so
20 essential, central to the case, because it explodes the
21 foundational proposition, paragraph 20 of the
22 particulars of claim.

23 THE CHAIRMAN: Very good.

24 MR RIORDAN: I'm very mindful of the time and I haven't
25 actually been able to make submissions on the documents,

1 sirs.

2 THE CHAIRMAN: Right. We have read the document. We have
3 seen the letters. I understand your submission that
4 some of the letters say they're no longer being used.

5 MR RIORDAN: Could I just give the references to the letters
6 in question? Because I need to make this good on the
7 facts. I won't take you --

8 THE CHAIRMAN: Yes.

9 MR RIORDAN: The Carillion letter is at E9, tab 72,
10 page 554. And at page 549 VL represents that it will
11 countersign and send a transfer form to Microsoft --

12 THE CHAIRMAN: Yes, we have read that.

13 MR RIORDAN: ABN AMRO is at E9, 75, page 651. One can see
14 all the MAKs and keys that were given, at 646.

15 Rabobank is at E9/76, page 693, asserting the
16 licences are no longer in use in each case.

17 One member of the panel yesterday had in mind that
18 one of the letters was different. That was the Volvo
19 letter at page 736, which states that the copies had
20 been rendered unusable. That may be the one that you
21 had in mind.

22 Now, we have a pleaded case at bundle C, tab 3,
23 page 54, that there is an adverse inference to be drawn
24 from a lack of disclosure and a lack of evidence on the
25 claimant's side as to the deletion of those copies,

1 whether they were in fact rendered unusable. We have
2 not had evidence on this. Over the burden of proof
3 those inferences stand all the more.

4 In the case of Volvo, even the assertion in that
5 form is valueless and, in my submission, I invite to you
6 find as a matter of fact that there is no proof that has
7 in fact occurred. It is not backed by a statement of
8 truth. No particulars are given as to what was done and
9 when. It doesn't alter the fact that Volvo divided its
10 Enterprise --

11 THE CHAIRMAN: You say for the exhaustion of rights to have
12 occurred -- what would have satisfied you?

13 MR RIORDAN: So, in that example of the 15,000 order from
14 Carillion, we would need to see a transfer of the 15,000
15 all together --

16 THE CHAIRMAN: The point about the letter. I'm not talking
17 about the block licences.

18 MR RIORDAN: You need evidence.

19 THE CHAIRMAN: And you have the letter there saying -- no
20 longer being used. What is it -- what would satisfy
21 you?

22 MR RIORDAN: The letter is in the bundle, it's admissible.
23 My submission is it's not to be given weight because
24 it's not supported by a statement of truth and there is
25 no evidence before you.

1 THE CHAIRMAN: So for a party to conduct this business they
2 have to do what?

3 MR RIORDAN: They need to verify and obtain proof from the
4 first acquirer that they have already have uninstalled
5 and rendered unusable all copies.

6 THE CHAIRMAN: What would satisfy as you proof?

7 MR RIORDAN: Yes. In fact, there's one technical means that
8 Microsoft makes available, which is the MAK. They could
9 log into their VLSC and disable the MAK. Of course,
10 that won't deactivate existing copies. They could ask
11 Microsoft to deactivate them. I think that technical
12 facility exists.

13 THE CHAIRMAN: Right, but you have --

14 MR RIORDAN: Paragraph 13.

15 THE CHAIRMAN: -- at no stage communicated that requirement
16 to any of your customers?

17 MR RIORDAN: It's not our duty. Oracle and M-Tech. It's
18 not the duty of the rightholder to provide information
19 to make exhaustion easier.

20 I don't shy away from that, sir. The duty is on the
21 person seeking to avail themselves of the exhaustion
22 principle to prove that the conditions have been met.

23 Now, in the circumstances, one might have expected
24 a business in the claimant's position to go very far
25 indeed to ensure that it had obtained good proof that

1 this had happened. In fact it's very conspicuous that
2 these are just form letters signed by someone in the
3 business. We don't know whether they went and did some
4 internal audit and actually physically, you know,
5 uninstalled the copies of Windows --

6 MR LYKIARDOPOULOS: -- they do try -- I thought the evidence
7 from the claimant was that they do try and ascertain
8 these things. And there's a list of things. They said
9 they read closely the UsedSoft decision and try to
10 comply with it. It's not quite fair.

11 MR RIORDAN: Since you mentioned it, Mr Horley's evidence
12 does accept in terms that it is a requirement of
13 UsedSoft that the original licensor render unusable.
14 That's paragraph 19 of Horley 2. On any view, at least
15 four of these letters don't do that. And you can't
16 infer. I don't want to repeat myself.

17 THE CHAIRMAN: Thank you very much.

18 MR RIORDAN: I haven't addressed you on PI 2.

19 THE CHAIRMAN: Right. And what do you want to say on that?
20 What is it you wanted to say?

21 MR RIORDAN: No. I can only do so much in the time
22 available and I don't want to trespass beyond my
23 welcome. However --

24 THE CHAIRMAN: What are the topics you need to address us
25 on?

1 MR RIORDAN: I need to show you some of the non-program
2 works to explain why the submission against me that
3 they're incidental is wrong on the facts.

4 THE CHAIRMAN: They're not -- I thought incidental was -- we
5 know what they are.

6 MR RIORDAN: You know what they are.

7 THE CHAIRMAN: They are not insignificant. That is a point
8 that incidental doesn't mean -- I'm not sure we need to
9 see them. We have looked at them.

10 MR RIORDAN: If that is the position and we are where we
11 are, given there is no positive challenge to any of this
12 evidence, all I would invite you to do is to accept as
13 unchallenged the evidence of Microsoft's witnesses as to
14 the nature, identity of the non-program works, the
15 manner of their creation, their extent and their --

16 THE CHAIRMAN: I don't think there is any challenge to that.

17 MR RIORDAN: But this is very important, because whatever
18 view you come to on what the law is, what the test is,
19 we want that finding of fact and it would be remiss of
20 me not to make submissions to enable you to make that
21 finding of fact.

22 THE CHAIRMAN: As I understand the submission, these are
23 copyright works and they're not like the example I gave
24 to Mr Hobbs. They're not trivial. They are an integral
25 part of the programs.

1 MR RIORDAN: I'm going to have to respectfully --

2 THE CHAIRMAN: What is your submission as to what --

3 MR RIORDAN: They're not an integral part of the programs,
4 at least not always. They're separate and independent
5 copyright works, and not just any kind of copyright
6 works, literary and artistic works, sound recordings.

7 THE CHAIRMAN: That's common ground. There's no dispute
8 about that.

9 MR RIORDAN: As Mr Hobbs points out, they're as good as
10 an eBook.

11 MR HOBBS: In their own way.

12 MR RIORDAN: I was going to show one example of some of the
13 documentation, which is clearly akin to a paper manual,
14 a book showing you how to use the software, supplied to
15 users with Windows.

16 THE CHAIRMAN: Yes.

17 MR RIORDAN: I just give you the reference: E7, page 1827.

18 THE CHAIRMAN: You better show us.

19 MR RIORDAN: I don't want to make that my one and only
20 example.

21 THE CHAIRMAN: We have seen the materials. We appreciate
22 that an awful lot of work has gone into these works.
23 I don't think that could seriously be challenged or
24 challenged at all by the claimants, and I'm not quite
25 sure why turning the pages again is particularly going

1 to assist us.

2 MR RIORDAN: If I am duly reassured that the pages have been
3 turned, I won't seek to turn them again. But I just
4 give you -- I just commend to you the evidence that
5 this --

6 MR LYKIARDOPOULOS: Just tell us quickly the pages that you
7 would like us to go to. Don't go to them.

8 MR RIORDAN: D2, tab 9, page 84. E9, tab 34, the
9 documentation supplied with Windows. Hundreds and
10 hundreds of separate books, effectively, eBooks. One
11 example, E7, page 1827, a 200-page narrative document
12 with all sorts of remarks and observations, literary
13 content. It's not Dickens, but it's a literary work.
14 It's original. The fonts evidence. The fact that these
15 are separately stored files which are separate to the
16 computer programs on disk.

17 THE CHAIRMAN: And you give witness statements in relation
18 to two fonts in particular?

19 MR RIORDAN: We do. And we cite the relevant provisions in
20 our skeleton argument and we rely in particular on what
21 Mr Tankard said says at paragraphs 14 to 48 in relation
22 to Gabriola, I think. And Mr Hudson -- sorry,
23 Mr Hudson in relation to Gabriola, paragraphs 42 to 52.
24 That's D2, tab 7. These are award winning typeface
25 designers that have invested years of their life

1 creating these fonts.

2 So, even if for any reason you were against the

3 submissions on this side as to the test, on no

4 conceivable version of the test can these be disregarded

5 as incidental or accessory, nor can they be subsumed

6 within the computer program.

7 THE CHAIRMAN: Whether they're accessory is -- they are.

8 They could be said to be accessory, but it's

9 a question -- looking at them doesn't help answer that

10 question. Big or small something can be an accessory.

11 MR RIORDAN: There the significance and the volume really do

12 matter.

13 THE CHAIRMAN: Why?

14 MR RIORDAN: I can only commend the submissions of my

15 learned leader in relation to Tom Kabinet.

16 THE CHAIRMAN: In Tom Kabinet, the literary work was all

17 about -- the customers wanted the literary work. That's

18 why they wanted the eBook.

19 MR RIORDAN: With respect, that's irrelevant.

20 THE CHAIRMAN: And if you say you have manual which may be

21 twice as long as the novel in Tom Kabinet, it's

22 definitely qualitatively different. It's --

23 MR RIORDAN: It's not a question of length; it's

24 a question --

25 THE CHAIRMAN: Exactly, it's not a question of -- that's

1 what I just put to you.

2 MR RIORDAN: Well, I was jibing at the expression that it's

3 integral to the program because it's not. It's

4 separate.

5 THE CHAIRMAN: I understand.

6 MR RIORDAN: And one must be careful. We had a good debate

7 about GUIs, which whatever one's view of them they are

8 integral in that sense.

9 MR LYKIARDOPOULOS: We understand there's a difference.

10 MR RIORDAN: There are other categories of non-program works

11 and one cannot necessarily analyse them all together

12 depending on which version of the test you are minded to

13 go with.

14 MR LYKIARDOPOULOS: While you have been discussing with the

15 chair, I have also looked at them. I am looking now

16 and --

17 MR RIORDAN: We have done our homework on this, in my

18 respectful submission. We have produced very good

19 evidence enumerating all the files in each version; all

20 the fonts; all the clip art; how they're represented;

21 how they're separately stored; how they can be

22 separately removed and dealt in, or not.

23 Can I just in one minute respond to VL's three

24 submissions on the facts in relation to PI 2? Because

25 they were made yesterday. There were three very odd

1 submissions made at paragraph 64 of my learned friend's
2 skeleton.

3 The first is that there are 100 million lines of
4 code in Office, and that is somehow to guide your
5 assessment of the significance or otherwise of the
6 non-program works. To which we say: so what? It's not
7 a numbers game. It's not about length. My learned
8 friend conceded yesterday it's not a numbers game. It's
9 logically irrelevant to the question of what non-program
10 works there are to consider how much program works there
11 are. They're just in separate buckets.

12 Second point that's made is that incidental matter
13 like the design of individual fonts, typefaces or
14 program icons, should just be disregarded. And so it is
15 critical to their submission as to the facts that this
16 is to be treated as incidental matter.

17 Now, I can only commend to you the evidence on
18 fonts, typefaces and icons to show you that this is in
19 no sense incidental matter. These are the subject of
20 multi-year developments by hundreds of people. It might
21 seem trivial to talk about comic sans MS --

22 THE CHAIRMAN: That's not what incidental means and it
23 certainly wasn't the way that incidental was being used.

24 MR LYKIARDOPOULOS: Please don't be concerned that -- we
25 have read the evidence and I don't think you have to be

1 concerned. I don't think it can be suggested that it's
2 all trivial, of no consequence --

3 MR RIORDAN: No, my learned leader made a point. This is
4 not that sort of case. That does matter when one
5 considers how the test should be applied to this sort of
6 material. But, of course, as my learned leader has
7 explained, it's not a hierarchical relativity as to
8 which is more numerous or more valuable than the other.

9 And even if that were the test, these are of very
10 substantial value. You have seen the evidence on that.

11 The third point that he makes is 20 per cent of the
12 Office 2007 investment related to the GUI, but this
13 includes developers who are writing code.

14 THE CHAIRMAN: We saw that.

15 MR RIORDAN: Again, I say so what.

16 Developers implement the design. We have had the
17 discussion about whether that's an artistic work or
18 computer program. I say it's an artistic work. And so
19 the fact the developers might be contributing to what
20 becomes the artistic work, irrelevant.

21 In any case, the submission confuses the medium and
22 the content. Code is what is used to express the GUI.

23 THE CHAIRMAN: But your case is even if we thought it was
24 incidental, your case is it's irrelevant --

25 MR RIORDAN: We're at layer 3 of the submissions, but yes.

1 MR LYKIARDOPOULOS: It doesn't matter.

2 MR RIORDAN: It doesn't matter.

3 MR RIORDAN: It just doesn't get off the ground on the
4 evidence.

5 Now, I just commend you Harris 2, paragraph 9, D2,
6 page 159. And Harris 1, paragraph 11, D2, tab 13,
7 page 125. They work with an entire design team,
8 hundreds of employees who designed, wrote, tested,
9 designed -- visual design, wrote the code, tested the
10 resulting implementation. That's one of the single
11 largest investments, he says, in terms of time and IP,
12 ever put into the Office software product. That's his
13 evidence. It's unchallenged. In fact Mr Horley agrees
14 with it in his Horley 3. It's one of the points he
15 addresses in reply.

16 THE CHAIRMAN: As I understand what you're submitting at the
17 moment is: on your case none of this matters because
18 unless it's de minimis it's irrelevant.

19 MR RIORDAN: Yes.

20 MR LYKIARDOPOULOS: On the claimant's case, if it's right
21 that it's a qualitative assessment, then --

22 MR RIORDAN: We say:
23 Either way they fail.

24 MR LYKIARDOPOULOS: I understand.

25 MR RIORDAN: The final sentence of paragraph 64,

1 subparagraph 3 merits comment because as non sequitur.
2 He invites this Tribunal to infer as a matter of fact
3 that the majority of the investment was irrelevant
4 because it related to program elements of the interface
5 or non-subsisting matter.
6 This just doesn't follow and is irrelevant, for the
7 reasons I've already explained. There's still
8 a subsisting artistic copyright.
9 THE CHAIRMAN: I think we have that point.
10 MR RIORDAN: And investment is not the test.
11 I'm very grateful for the indulgence in time.
12 I hope I have been of assistance.
13 THE CHAIRMAN: Thank you.
14 MR LAVY: I just wondered -- sorry, I was going to make
15 a proposal that subject to what the Tribunal wants to do
16 it may be better if we put in brief, by which I mean no
17 more than five pages, written reply on Friday as opposed
18 to speaking now. But I'm in your hands, obviously.
19 THE CHAIRMAN: I do want to ask you about the extra keys.
20 Why does your client need these extra keys?
21 Submissions in reply by MR LAVY
22 MR LAVY: Well, the question of needed the extra keys.
23 THE CHAIRMAN: Why does he obtain the extra keys?
24 MR LAVY: I'm speaking slightly off the hoof. The evidence
25 is what it is. I should say I caveat this, this hasn't

1 been properly investigated. I do take an important
2 pleading point because the allegation of fact around
3 what happened is something that really did need to be
4 pleaded. It's the same with PLTFs, the sort of --
5 THE CHAIRMAN: It has been raised in the evidence.
6 MR LAVY: It's been raised in the evidence as part of --
7 THE CHAIRMAN: You must have considered it. There's
8 instructions on it.
9 MR LAVY: Yes, but only in the context of the basic model,
10 the way the transactions worked. What hasn't been done
11 is there's simply been no factual investigation of
12 precisely why these things are needed, what they're for.
13 And there's certainly -- the very high level answer to
14 it is the obvious one, which is you have 25 per cent
15 more keys, you have some spare keys so that you can make
16 sure that the people who are buying licences are able to
17 enjoy those licences and you can make sure you have
18 enough.
19 But beyond that I can't take it today, because
20 there's been no detailed factual investigation of how
21 often this occurred, where it occurred and what
22 triggered it.
23 MR LYKIARDOPOULOS: Is it right that had they been -- do we
24 know if they have even been used, these 25 per cent
25 extra?

1 MR LAVY: No, there's certainly no evidence that they have.
2 So I think -- I'm being a little bit careful because
3 I don't want to make up evidence. But, from my side,
4 I think the answer is no.
5 MR LYKIARDOPOULOS: There's no evidence either way? We
6 don't know?
7 MR LAVY: There is no evidence either. These MAKs are
8 not -- it's a whole separate factual enquiry if they
9 have been used. I mean, there's a question of whether
10 whatever it is 296ZA is engaged, who that relates to
11 anyway, what the relevance is to the claimant in this
12 case because they are not the Microsoft customer.
13 But the very short point -- and that's why I say
14 none of this is actually relevant to the exhaustion.
15 But insofar as it's a factual issue that concerns
16 the Tribunal, I do say that there is this fundamental
17 point that these sorts of factual questions do have to
18 be pleaded if it's going to be alleged that MAKs --
19 I think wait my learned friend put it is ValueLicensing
20 didn't a deal in licences or didn't deal in copies, it
21 dealt in MAKs. That is not something you find anywhere
22 in the pleaded case, and that is important, in my
23 submission.
24 MR LYKIARDOPOULOS: But might it not matter on the basis
25 that one of the arguments is -- if I put it this way,

1 you shouldn't end up with more copies of a licence than
2 you started with. Might it not matter to that if you
3 potentially have 25 per cent more?

4 MR LAVY: Well, no, because MAK isn't a copy. MAK is just
5 a technical key.

6 MR LYKIARDOPOULOS: Isn't it allowing it an access to get
7 more copies and if --

8 MR LAVY: If they have been used, as I say, there may be
9 some issue of copyright infringement somewhere by
10 someone. But it doesn't affect the question of which
11 copies are subject to first sale in which there's
12 an exhaustion.

13 THE CHAIRMAN: So you can have five pages to put in as your
14 reply.

15 Mr Hobbs, you can have a further two pages by
16 rejoinder.

17 MR HOBBS: Can we have a timeline? You said Friday,
18 I think.

19 MR LAVY: Only just because it's in writing we shouldn't let
20 it all spin out.

21 THE CHAIRMAN: By Friday. And if you could put it in by
22 Wednesday, Mr Hobbs, if you have anything further.

23 MR HOBBS: Thank you. Can we do a quick audit of what else
24 you're going to need by material? I'm allowed to put in
25 the case law which shows that there is a -- you don't

1 have to assume equivalence between the digital and the
2 non-digital. It's not discriminatory to treat one
3 differently from the other; do you remember that point?
4 THE CHAIRMAN: Yes, vaguely. Yes.
5 MR HOBBS: When would you like that?
6 THE CHAIRMAN: When would you it be suitable?
7 MR HOBBS: It's fine, we can do them both together. And
8 then there's a sort of guide to -- a short guide to what
9 the programs in the suites do.
10 THE CHAIRMAN: I think we have been given that.
11 MR HOBBS: You have that?
12 MR LYKIARDOPOULOS: You're on a need to know basis.
13 MR HOBBS: Yes, that's a famous saying, isn't it? They
14 treat me like a mushroom.
15 THE CHAIRMAN: Thank you very much for that.
16 MR HOBBS: And please, I always end my hearings by saying
17 this, but I genuinely mean it: if there's anything you
18 want any assistance on --
19 THE CHAIRMAN: We will let the parties know.
20 MR HOBBS: I don't want to end up in another court with
21 someone saying: you didn't help the judges enough.
22 THE CHAIRMAN: It's not secret that this is not
23 a straightforward matter, and if we need further
24 assistance we will notify all the parties.
25 MR LAVY: On that front, Mr Chairman, the last thing you

1 probably need is more documents. But if there's going
2 to be not only a reply to my reply, but also something
3 new, on new cases.

4 THE CHAIRMAN: We will see. I'm not giving permission. If
5 you need to respond to something --

6 MR LAVY: If I need to respond --

7 THE CHAIRMAN: Sensible proportions are necessary. We will
8 of course read it.

9 MR LAVY: That's very helpful, thank you.

10 MR HOBBS: Thank you all for your patience and courtesy.

11 (5.00 pm)

12 (The hearing concluded)

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