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Case Nos: CA-2025-001656
CA-2025-003082

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
Justin Turner KC (in appeal CA-2025-001656)
Justin Turner KC, Andrew Lykiardopoulos KC and Antony Woodgate (in appeal CA-2025-003082)
CAT Case No: 1570/5/7/22 (T)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/07/2026

Before :

CHANCELLOR OF THE HIGH COURT
LORD JUSTICE GREEN
and
LORD JUSTICE PHILLIPS

- -

Between :

JJH ENTERPRISES LIMITED (Trading as ValueLicensing)	**Respondent /Claimant**
- and -	
MICROSOFT CORPORATION and ors	**Appellants/ Defendants**
and	
ALEXANDER WOLFSON	**Intervener**

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Matthew Lavy KC, Michael Hicks, Henry Edwards and Mark Wilden (instructed by **Ghaffari Fussell LLP**) for the **Respondent**
Tony Singla KC, Hugo Leith and **Kristina Lukacova** (instructed by **Willkie Farr & Gallagher (UK) LLP**) for the **Appellant** in appeal CA-2025-001656
Geoffrey Hobbs KC, Nikolaus Grubeck and **Jaani Riordan** (instructed by **Sidley Austin LLP**) for the **Appellant** in appeal CA-2025-003082
Robert Williams KC (instructed by **Stewarts Law LLP**) for the **Intervener**

Hearing dates : 28 and 29 April 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 07 July 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Chancellor of the High Court :

1. This case is about the sale of second hand computer software and software licences. JJH Enterprises (trading as ValueLicensing) ("VL") sold (or purported to sell) second hand licences for Microsoft software products, including Microsoft Windows and Microsoft Office. VL claims that the appellants (Microsoft) stifled the supply of these licences by placing restrictions in the relevant contracts and moving customers from the use of perpetual licences onto a subscription based model. VL alleges that in doing this Microsoft committed breaches of competition law under Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and analogous provisions in the EEA Agreement and in the Competition Act 1998.

2. VL's claim is for damages as a result of the alleged breaches. The territorial scope of the claim includes the UK and the whole of the EEA, including the EU. The period of the claim runs from 1 January 2014 until 31 December 2022. It was common ground between the parties that the applicable law to determine this appeal was the EU law in force at the time (including Directives). No invitation was made by either party to consider any exercise of the court's power to depart from assimilated EU case law.

3. The parties are agreed that questions of copyright law are central to the dispute, particularly those revolving around the decision of the Court of Justice of the European Union ("CJEU") in Case C-128/11 *UsedSoft GmbH v Oracle International Corp*, EU:C:2012:407, [2012] 3 CMLR 44 ("*UsedSoft*"). The decision will need to be covered in much more detail below but in broad terms *UsedSoft* decides that the principle of exhaustion of the Distribution Right in computer program copyright applies to online, download based, sales of copies of computer programs.

4. Microsoft denies the allegations of breach of competition law. Part of Microsoft's case is a contention that the relevant copyright in the computer software which VL was reselling had not been exhausted, in which case VL had no right to do what it did and VL was in fact infringing Microsoft's copyright. Therefore Microsoft cannot have acted in breach of competition law as alleged. It is common ground that in this case if Microsoft's submissions on copyright succeed then VL's claim will fail. It is worth noting that there is no issue in these proceedings involving an allegation of abuse of dominance by the exercise of what would otherwise be a valid copyright claim.

5. In May 2025 the CAT dealt with two applications. VL applied to the CAT to direct a trial of two of the copyright issues as preliminary issues and Microsoft applied for a ruling that the CAT had no jurisdiction over the claim insofar as it raised copyright issues. It argued that those issues had to be decided by the High Court. In a ruling dated 23 May 2025 ([2025] CAT 33) Justin Turner KC (Chair) decided that the CAT did have jurisdiction, and directed a trial of the preliminary issues. Microsoft appealed (with the permission of the CAT) and that jurisdiction appeal is the first appeal before this court (CA-2025-001656).

6. In September 2025 the trial of the preliminary issues took place before Justin Turner KC (Chair), Andrew Lykiardopoulos KC and Antony Woodgate. In a ruling dated 12 November 2025 ([2025] CAT 75) the CAT decided the copyright issues in VL's favour. Microsoft appealed (with the permission of the CAT) on what are essentially two issues and that is the second appeal before this court (CA-2025-003082).

7. There are two issues in the preliminary issues appeal, which I will address in the order Microsoft put them on appeal albeit they were the other way round below.

8. The first issue, broadly, arises from the fact that Microsoft's software products, such as Office, comprise not only what copyright law would define as a computer program or programs but also other works in which copyright subsists such as graphic works (e.g. images of icons and the user interfaces). Microsoft contends that even if what VL did was within the doctrine of exhaustion in relation to the works which are computer programs, the copyright in the other "non-program works" such as graphics are subject to different provisions and that copyright is not exhausted in the relevant circumstances. The CAT held otherwise and so Microsoft appeals.

9. The second issue, broadly, is whether VL can subdivide bulk licences sold by Microsoft. Microsoft will sell collections of (say) 1000 licences purchased in bulk by a customer. The question is whether these can be disaggregated so that the customer can sell (say) 500 on to VL while keeping 500, or if VL buys all 1000 from the customer, whether VL can sell on (say) 500 to one further customer and 500 to another, and so on. Microsoft contends that the proper interpretation of *UsedSoft* does not permit this. The CAT, however, held that it was permissible and this, along with a related debate about the specific terms of the Microsoft licence agreements which the CAT found to be irrelevant, make up the second issue on the appeal.

10. There were other findings by the CAT but these are not subject to appeal.

11. On 30 March 2026 Mr Alexander Wolfson, a proposed class representative in separate collective proceedings against Microsoft, was given permission to intervene in this first appeal. The intervener's position was essentially supportive of VL's case on that first appeal.

12. We heard the two appeals together with one immediately after the other. This judgment deals with both.

The jurisdiction appeal (CA-2025-001656)

13. The jurisdiction appeal is fairly simple. The CAT's jurisdiction is governed by Section 47A and 47B of the Competition Act 1998. Section 47A provides, so far as relevant, as follows:

> (1) A person may make a claim to which this section applies in proceedings before the Tribunal, subject to the provisions of this Act and Tribunal rules.
>
> (2) This section applies to a claim of a kind specified in subsection (3) which a person who has suffered loss or damage may make in civil proceedings brought in any part of the United Kingdom in respect of an infringement decision or an alleged infringement of—
>
> > (a) the Chapter I prohibition, or
> >
> > (b) the Chapter II prohibition.

> (3) The claims are—
>
> > (a) a claim for damages;
> >
> > (b) any other claim for a sum of money;
> >
> > (c) in proceedings in England and Wales or Northern Ireland, a claim for an injunction.
>
> (3A) This section also applies to a claim for a declaration or, in relation to Scotland, for a declarator which a person may make in respect of an infringement decision or an alleged infringement of the Chapter 1 prohibition or the Chapter II prohibition.
>
> *[…]*

14. S47B relates to collective proceedings. For present purposes all that matters is that it provides that CAT proceedings can be brought by combining two or more claims to which s47A applies.

15. Microsoft contends that the copyright issues do not fall within the CAT's jurisdiction as a matter of law, for two reasons. The first is that the copyright issues are logically anterior to the competition claim, which could not be brought unless VL is successful on the copyright issues. The second is that the copyright issues amount to, or at least include, allegations that VL has infringed copyright. Claims for copyright infringement are not within the jurisdiction of the CAT and would need to be brought in the High Court. Microsoft's point is purely one of law. Beyond the formal position, Microsoft is not arguing that in practice the High Court would be any better equipped to deal with a copyright claim than the CAT, and notably in this case two of the three judges who heard the preliminary issues have significant intellectual property experience.

16. Both submissions were made to Mr Turner KC, who did not accept that s47A needed to be read in such a narrow way. At [13] the CAT Chair said this

> "… During proceedings before this Tribunal many issues may arise which might be said to be adjacent to, or distinct from, the narrow questions of dominance or abuse. For example, questions of interpretation of contractual documents may arise, as may questions of limitation or causation. Nothing in the legislation suggests this Tribunal is not competent to decide such questions insofar as they arise in the context of a claim for damages under section 47A of the 1998 Act for breach of the Chapter I or Chapter II prohibitions. This case, insofar as it raises issues of copyright infringement, does so in the context of a claim for damages under section 47A of the 1998 Act."

17. I agree with that conclusion.

18. Starting with the ordinary meaning of the words in s47A itself, the provision means that a claim may be made in the Tribunal (i.e. the CAT) for damages, an injunction or for a declaration in respect of an alleged infringement of competition law (in other words for breach of Chapter I or Chapter II prohibitions). There is no language in s47A which

imports any limitation on the CAT's jurisdiction to deal with such a claim. That is not a promising start for the appeal.

19. Naturally the tribunal must be able to decide any issues which need to be decided in order to resolve such a claim. An example could be the interpretation of a contract, which is the example given in the quoted passage from [13]. The fact that the law of the interpretation of contracts is part of contract law rather than competition law is irrelevant.

20. Notably in *Sportradar v Football DataCo* [2020] CAT 25 the then President of the CAT, Roth J, observed at [43] that standalone competition proceedings under s47A will often raise legal issues outside pure competition law. Roth J's point was that the existence of legal issues outside pure competition law did not justify a transfer out of the CAT on case management grounds. Therefore, as a case management decision, *Sportradar* is not concerned with the same issue as on this appeal, but it is nevertheless consistent with the decision under appeal.

21. I am prepared to accept that it is fair to describe the copyright issues in this case as logically anterior to the competition law issues, in the sense that if Microsoft succeeds on copyright then in this case there can be no breach of competition law. However the fact the issues can be put in that logical sequence is irrelevant because the sequence in which the issues can be arranged does not alter the fact that it is necessary to decide the anterior issues in order to resolve the claim for breach of competition law. In my judgment any issue which it is necessary to decide in order to resolve a claim for an alleged infringement of competition law falls within the CAT's jurisdiction provided by s47A.

22. The second reason on which Microsoft relies to contend that the copyright issues do not fall within the CAT's jurisdiction is the fact that Microsoft's allegations include a cause of action for copyright infringement. By "cause of action" Microsoft employs the well known definition proposed by Diplock LJ in *Letang v Cooper* [1965] 1 QB 232, at 242 as "…a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person…".

23. Although some of the points taken on copyright do not amount to a complete cause of action, nevertheless it is clear that for some aspects of this case, a determination of the preliminary issues would establish (in the *Letang v Cooper* sense) either a cause of action for copyright infringement in Microsoft's favour, or alternatively that VL's activities were not infringing copyright. There is no need to examine in detail the distinctions between which copyright points may amount to a cause of action and which do not, since it is clear (and common ground) that the case does or rather would include a cause of action, assuming the preliminary issues were decided in Microsoft's favour.

24. However it is also important to note that Microsoft are not seeking to bring a counterclaim for copyright infringement against VL in these proceedings. There is no claim by Microsoft for any relief for copyright infringement; no damages, injunction or anything else. In other words, although it is correct that these proceedings include allegations that Microsoft has a cause of action against VL for copyright infringement, the CAT is not being asked to do anything about that except (if Microsoft is correct) dismiss the competition claim. As Microsoft correctly points out, a remedy is not the same thing as a cause of action and so it is correct to say that Microsoft would have a

cause of action (if indeed it does) even though no remedy for it is sought (see Auld LJ in *Lloyds Bank v Rogers* [1999] 3 EGLR 83 at p85-86). In any case if Microsoft did start an infringement claim in the High Court, no doubt suitable case management would avoid any risk of conflicting rulings.

25. I think one reason why emphasis is placed on the existence of "cause of action" is because of something I said in a decision of my own in the High Court in *Unwired Planet v Huawei* [2016] EWHC 958 (Pat). In that case the High Court was being asked to transfer a case from the High Court to the CAT. The case was a determination of what terms in a patent licence were FRAND (fair, reasonable and non-discriminatory)[1]. The power to transfer is s16 of the Enterprise Act 2002 and the regulations made under it.

26. I refused to order the transfer because although one way in which the right to a licence on FRAND terms arose was under competition law and could be transferred, the claim to a FRAND licence also arose in contract law. In refusing the transfer I said two things in paragraph 44 of the judgment. The first was that the power to transfer was not wide enough to transfer, for determination by the CAT, what I referred to as "a distinct cause of action which is not itself a [*competition*] infringement issue". In other words, the contract law claim could not be transferred. The second point in [44] was the observation that the contractual FRAND issues were legally distinct questions from those in competition law, and they did not need to be addressed in order to decide any issue of infringement of competition law.

27. However despite the reference in [44] to a "cause of action", this *Unwired Planet* decision does not undermine the decision under appeal. *Unwired Planet* is dealing with a different issue and Mr Turner KC below was correct at [17] to make that point. The contract law cause of action in *Unwired Planet* was an alternative to the competition law cause of action, whereas in the present case, the copyright cause of action is something necessary to be decided in order to resolve the competition law claim itself.

28. There is no hint in s47A that its language should be read in such a way as to include some sort of implicit exclusion of the kind necessary to produce a result in favour of the appeal. Nor can I think of any legislative purpose which would justify such an approach. The simple way in which s47A is drafted supports the idea that the legislator simply intended that the CAT would have all the jurisdiction it needed to resolve any claim for an alleged infringement of competition law.

29. For all these reasons I would dismiss the jurisdiction appeal.

The preliminary issue appeal (CA-2025-003082)

30. In a patent case called *Betts v Willmott* (1870-71) L.R. 6 Ch. App. 239 at p245 the then Lord Chancellor, Lord Hatherley dealt with a situation which today we would analyse as a matter of exhaustion of rights. Lord Hatherley explained that when someone has purchased an article from the patentee they expect to have control of it, and that this control would include the complete right by that purchaser to sell the article to someone else. In other words, as a general rule once an intellectual property rightsholder has

[1] For what FRAND is see the later Supreme Court judgment in the same dispute (*Unwired Planet v Huawei* [2020] UKSC 37).

sold an article to a buyer one might expect that the buyer ought to be free to sell it on to someone else. At that time in English law this was approached through the lens of permissions given by the vendor, but the basic concept is clear enough.

31. The Treaty of the Functioning of the European Union (TFEU) and its predecessor treaties have always had rules prohibiting restrictions on trade between member states, since such rules would run counter to the idea of a common or single market. In this context the doctrine of exhaustion became part of EU law (see AG Bot at AG43-46 in *UsedSoft*). In fact *Betts v Willmott* was also about cross-border trade, but the concept, that an intellectual property rightsholder does not generally have the right to prevent distribution of authentic products once they have been placed on the market by that rightsholder, or with their consent, applies whether or not trade is taking place across a border.

32. Inevitably, perhaps, but importantly nevertheless, the concept as I have stated it is subject to numerous specific qualifications and exceptions, and so it is necessary to examine the detailed provisions applicable to copyright in computer programs.

33. In *Wright v BTC Core* [2023] EWCA Civ 868 Arnold LJ (with whom Warby and Falk LJJ agreed) set out a detailed review of the EU provisions concerning copyright in computer programs at [20] to [60]. Much of the following summary is based on that review.

34. The starting point for copyright law is the Berne Convention of 1886. A non-exhaustive definition of literary and artistic works is given in Article 2. By Article 9 authors of literary and artistic works are to have the exclusive right of authorising the reproduction of those works (the "Reproduction Right") and by Article 20, member states can grant authors more extensive rights.

35. Next is the TRIPS treaty of 1994, which by Article 10 provided that computer programs shall be protected as literary works under the Berne Convention. Following that in 1996 the WIPO Copyright Treaty at Art 4 also provided that computer programs shall be protected as literary works within the meaning of Art 2 of the Berne Convention. In addition the WIPO Copyright Treaty provided at Article 6 for two additional rights, over and above the Reproduction Right, called the "Distribution Right" (Article 6) and the "Communication Right" (Article 8). Article 6 is as follows:

Article 6

Right of Distribution

> (1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.
>
> (2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author.[5]

36. Note that by Art 6(1) the authors of literary works have an exclusive right to authorise making copies of their work available to the public by sale, and by Art 6(2) provisions on exhaustion are a matter for the Contracting Parties. There is also a footnote reference 5. This refers to an agreed joint statement concerning Article 6 (and Art 7 – which concerns rental and is irrelevant) as follows:

> As used in these Articles, the expressions "copies" and "original and copies", being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.

37. The agreed statement provides that the copies referred to in Art 6 are tangible objects. Microsoft submitted that the reference to tangible copies in this footnote, in a software context, would refer to tangible objects such as a CD ROM carrying software, and does not include "intangible" copies such as an online or electronic copy of software stored in the memory of a computer. I agree. Microsoft also submitted that this means that exhaustion is only possible in relation to sales of tangible copies but I do not agree with that. In my judgment this agreed statement means that the requirements in Art 6 as a whole (both 6(1) and 6(2)) only apply to tangible copies. Therefore Contracting States are only required by Art 6(1) to provide a Distribution Right in relation to tangible copies – and the freedom to make provision about exhaustion applies to those tangible copies. Nothing in Art 6, read with the agreed statement, requires Contracting States who choose to provide for a Distribution Right for intangible copies to limit any exhaustion provisions to tangible copies.

38. Article 8 is:

> Right of Communication to the Public
>
> Without prejudice to the provisions of Articles 11(l)(ii), 11*bis*(l)(i) and (ii), 11*ter*(l)(i), 14(1)(i) and 14*bis*(l)(i) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.[8]
>
> [*footnote 8 is irrelevant*]

39. There is no equivalent in Article 8 of the exhaustion provision at Article 6(2).

40. Turning to EU law, the next provision is the Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, known as the InfoSoc Directive. As its full title suggests, the InfoSoc Directive partially harmonised aspects of copyright law in the context of the developments in digital technology and the internet. The InfoSoc Directive made provision for a Reproduction Right, a Communication Right and a Distribution Right at Articles 2, 3 and 4 respectively. Unlike Article 2 which contains no reference to exhaustion, Articles 3 and 4 both make provision for it, as shown below.

41. The provision in Article 3(3) of the InfoSoc Directive about exhaustion relating to the Communication Right is as follows:

> 3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article

42. So an act of communication to the public does not exhaust the Communication Right.

43. Art 4(1) of the InfoSoc Directive provides for the Distribution Right in terms corresponding to Art 6 (1) of the WIPO Copyright Treaty and then Article 4(2) addressed about exhaustion relating to that Distribution Right, as follows:

> The distribution right shall not be exhausted within the [*European Union*] in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the [*European Union*] of that object is made by the rightholder or with his consent.

44. So, by contrast with the Reproduction Right and the Communication Right, the Distribution Right will be exhausted by the first sale by the rightsholder (or with their consent) of an "object" which is a copy of the work. The word "object" does not appear in Art 4(1) (which just refers to the original work or copies of it).

45. In Case C-419/13 *Art & Allposters International BV v Stichting Pictoright*, EU:C:2015:27 the CJEU held that "object" in Art 4(2) InfoSoc Directive meant tangible object, such that the exhaustion of the distribution right here applies to the tangible object by which the original work or its copy has been placed on the market, see *Art & Allposters* at [40] and see also to the same effect the later Case C-263/18 *Nederlands Uitgeversverbond v Tom Kabinet Internet BV*, EU:C:2019:1111 at [52]. *Art & Allposters* was not concerned with questions of digital exhaustion and I do not need to come back to it, but I will come back to *Tom Kabinet* below.

46. It is also relevant to note Recitals 28 and 29 of the InfoSoc Directive which draw a distinction in the context of exhaustion between a work incorporated into a tangible article, for which first sale can exhaust the right to control resale of that object (Recital 28), and online services (Recital 29). As the latter Recital puts it: "unlike CD-ROM *[…]* where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides".

47. Article 9 of the InfoSoc Directive entitled "Continued application of other legal provisions" provides that the Directive is without prejudice to various other things including, for example, patent rights, unfair competition and the law of contract. Although as written Article 9 is a closed list, the corresponding recital (60) is more widely drawn and refers to other areas in general terms and a list starting "such as".

48. Finally I turn to Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs, known as the Software Directive (although note that the word "software" does not appear in it). This Directive consolidated what had been a Directive on this topic in 1991 and which had been amended in the meantime.

49. Article 1 of the Software Directive provides that Member States shall protect computer programs as literary works within the meaning of the Berne Convention. Article 4 provides for restricted acts and includes provisions implementing the Reproduction Right (at Art 4(1)(a)) and Distribution Right (at Art 4(1)(c)). The Software Directive does not make provision for a Communication Right for computer programs, which makes sense given the nature of the subject matter and the right concerned.

50. Exhaustion of the Distribution Right is provided for at Art 4(2) of the Software Directive, as follows:

> The first sale in the Community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof.

51. Note the absence of the word "object" in Art 4(2) of the Software Directive as compared to the equivalent Art 4(2) of the InfoSoc Directive. Exhaustion of the Distribution Right provided for in the Software Directive is not limited to cases involving "objects" or in other words "tangible copies".

52. Article 8 of the Software Directive ("Continued application of other legal provisions") corresponds to Art 9 InfoSoc Directive. It is drafted in a similar fashion to recital (60) InfoSoc Directive , referring to "other legal provisions" in general terms and a list starting "such as".

53. The relationship between these two EU Directives is clear enough. The Software Directive constitutes what is described in EU law as a "*lex specialis*" in relation to the InfoSoc Directive (*UsedSoft* at [51] and *Tom Kabinet* at [55]). In other words the general rules are in the InfoSoc Directive but they are overridden, for the particular circumstances to which it applies, by the Software Directive.

The authorities

54. It is convenient to address the authorities at this stage with a focus on the first issue on appeal, i.e. the non-program works. Much of it will also be relevant to the second issue on subdivision.

55. The three key CJEU cases are *UsedSoft* in 2012, *Nintendo* in 2014 (i.e. Case C-355/12 *Nintendo Co Ltd v PC Box Srl*, EU:C:2014:25), and *Tom Kabinet* in 2019.

UsedSoft

56. In *UsedSoft* the software company Oracle had been marketing database software. Most of the software was distributed to customers by downloading from the internet. [22] explains that Oracle offered group licences for a fixed number. The same paragraph states that the number was 25 users and thus a customer who required 27 licences needed to acquire two licences. The judgment refers to 25 as a minimum, which is odd, but the point is clear enough. The customer would then download the software from the Oracle website.

57. UsedSoft itself marketed second hand licences after acquiring them from customers of Oracle. UsedSoft did not acquire electronic copies of the software from the Oracle customers. What happened was that once UsedSoft's customer had acquired a second hand licence from UsedSoft, they would download the software they were going to use directly from Oracle.

58. The relevant question referred (question 3) was essentially whether a person who has acquired a second hand licence of this kind (i.e. entailing downloading of a copy of the software) can rely on the exhaustion of the rightsholder's right to distribute the copy made by the first acquirer with the rightsholder's consent, in order to download a second copy from the internet, as long as the first acquirer erases the first copy or no longer uses it. In short, the answer was yes, and as a result, UsedSoft's customers, on acquiring the second-hand licence from UsedSoft, were able to download the second copy from Oracle lawfully and use it.

59. The CJEU's decision did not follow the Advocate General's opinion. The court's reasoning was in a series of steps. First, from [44]-[48], the court concluded that the initial transaction involving both Oracle's customer downloading a copy of the software and the conclusion of a licence agreement permitting use of that copy amounted to a first sale of a copy of the program for the purposes of Art 4 Software Directive. It reached that conclusion by examining the transaction as a whole, citing the earlier case of *Club Hotel Loutraki v Ethniko Simvouli Radiotileorasis* (C-145/08 and C-149/08) [2010] ECR I-4165 at [48] and [49]) as support for the proposition that, for the purposes of legal classification, the right approach was to look at the circumstances as a whole. In *Club Hotel Loutraki* the CJEU adopted that approach in order to decide which of two different Directives governed a transaction.

60. Thus since the transaction was a sale, Art 4(2) of the Software Directive could apply to it.

61. Next the CJEU rejected a submission that the provision of the computer program amounted to a making available to the public within the meaning of the Communication Right provisions (Art 3) of the InfoSoc Directive, which are not subject to exhaustion. That was rejected at [51] because (see above) the Software Directive constitutes a *lex specialis* in relation to the InfoSoc Directive and also ([52]) because under the InfoSoc Directive itself a transfer of ownership changes an act of communication under Art 3 InfoSoc into an act of distribution under Art 4 InfoSoc.

62. Third, the CJEU held ([53] – [55] and see [59]) that Art 4(2) of the Software Directive did not limit exhaustion to tangible copies and encompassed intangible copies.

63. Next, at [61] the CJEU held that from an economic point of view the sale of a computer program on a tangible medium (they referred to a CD-ROM or DVD) and the sale of a program by downloading from the internet were similar and so the principle of equal treatment means that exhaustion under Art 4(2) of the Software Directive takes place after the first sale, whether it is of a tangible or intangible copy. EU law seeks to safeguard the specific subject matter of intellectual property rights and at [63] the CJEU held that to limit exhaustion to sales of tangible copies of computer programs and thereby restrict resale of downloaded copies would go beyond what is necessary to protect the specific subject matter of the intellectual property concerned.

64. Then at [64] the CJEU examined whether this exhaustion applied to a new copy downloaded by the person to whom the licence is sold on, holding that it did apply ([72]). In this section the CJEU dealt with a number of points. One was that this exhaustion also applied to updated and corrected versions of the software ([65]-[68]). Another was that the original acquirer of the licence and the first copy of the program must make their own copy unusable at the time of resale. They (the first acquirer) need to do this to avoid infringing the Reproduction Right after resale.

65. At [69]-[71] there is a discussion about numbers of licences. This is crucial to the second ground of appeal and I will address it in context.

66. Finally at [72] the CJEU states its conclusion, which is that the Distribution Right associated with a copy of a computer program is exhausted if the copyright owner who has authorised the downloading of that copy has also conferred a right to use that copy for an unlimited period. It does not matter if the download itself is free because the licence fee is remuneration for the economic value of the copy.

67. Reflecting on *UsedSoft* one might ask what exactly it is that has been bought and sold. One needs to be clear that the copy downloaded by the first acquirer is not the same copy as the one later downloaded by the second acquirer, albeit that the CJEU's decision means that the download and use of the second acquirer's copy does not infringe because of exhaustion. The CAT at one stage used the expression "notional copy" to describe what it was that had been sold by the first acquirer to the second acquirer. I see that. Microsoft criticised this description but as long as the point I have made about the two copies is kept mind (as the CAT clearly did) then there is no basis for criticism. I prefer to say that in terms of what passes from the first acquirer to the second acquirer, the first acquirer is simply selling one of its licences to the second acquirer, but I recognise that is not a perfect description of the circumstances either.

Nintendo

68. Turning to *Nintendo*, this introduces the idea of "complex matter". In this context the complex matter refers to things which comprise a computer program (or programs) protected by the Software Directive and other elements such as text or graphics governed by the InfoSoc Directive. *Nintendo* is the earliest case cited to us in which this term is used. *Nintendo* was about computer games. The question was about the applicability of the two different regimes relating to so-called technical measures, one in the Software Directive and the other in the InfoSoc Directive. Technical measures are mechanisms such as digital rights management software which are used by rightsholders to control what happens to copies of their works, in order to prevent infringement. The two regimes were different and on the facts of *Nintendo* the provisions of the InfoSoc directive were more favourable to the rightsholder.

69. The key passages in *Nintendo* are at [21]-[23]. The approach the CJEU took was to treat the work as a whole, recognising that as complex matter, it comprised not only computer programs but also graphics and sound elements. Treating the work as a whole was not weakened by the fact the Software Directive constituted a *lex specialis* in relation to the InfoSoc Directive. The work as a whole was protected by the InfoSoc Directive and so it was those technical measures provisions which applied.

Tom Kabinet

70. *Tom Kabinet* was about ebooks. An ebook is a digital file which contains a copy of a book. The defendant in this case operated a website selling ebooks second-hand. The claimant, who owned copyright in the literary works, sued for copyright infringement. A number of points were in issue which are not germane. The key points, for present purposes, were as follows.

71. First ([52]-[58]), the CJEU held that an ebook was not a computer program and so the approach to exhaustion of the Distribution Right in the Software Directive which makes no distinction between tangible and intangible copies (citing *UsedSoft*) does not apply. The Software Directive is a *lex specialis* in relation to the InfoSoc Directive. The assimilation of tangible and intangible copies from the point of view of exhaustion in the Software Directive had not been adopted by the legislator in the InfoSoc Directive. In the InfoSoc Directive this exhaustion is only concerned with tangible distributions. The supply of a book on a material medium, and the supply of an ebook, cannot be considered equivalent from an economic and functional point of view [57]-[58], by contrast with [61] of *UsedSoft*.

72. Second, at [59], the CJEU held that even if an ebook was to be considered "complex matter" comprising both a work protected by the InfoSoc Directive and a computer program protected by the Software Directive, nevertheless "such a program is only incidental in relation to the work contained in such a book". The essential element of an ebook is its content, and so the fact the program forms part of it to enable it to be read cannot result in the application of the Software Directive to it. In identifying the ebook as complex matter, the CJEU cited *Nintendo* at [23].

73. There is a textual point to note about [59] of *Tom Kabinet*. The word "incidental" in the passage quoted from [59] in the previous paragraph appears in the English version of *Tom Kabinet*. The issue was discussed before the CAT and as the tribunal explained, other language versions of *Tom Kabinet* use terminology which can be translated as "accessory character". The intent behind these expressions is clear enough. A fair description of the character of the complex matter is that the other element (i.e. the book as a literary work) is more significant than the incidental or accessory element(s). It is not going as far as saying that the incidental or accessory elements have to be trivial or *de minimis*.

74. The problem in the present case is what to do when faced with a situation in which both the InfoSoc Directive and Software Directive are (potentially) involved but would lead to different results. Taking *Tom Kabinet* and *Nintendo* together, in my judgment the principles to be applied are clear enough. The starting point is to characterise what is involved as a whole.

75. Thus if, looking at it as a whole, the right way to characterise the subject matter is as a book, with an accessory computer program, then the correct regime is the one applicable to books, i.e. the InfoSoc Directive. This is *Tom Kabinet*. It is not reasoning based on saying that the InfoSoc Directive must always and necessarily apply to override the Software Directive if InfoSoc Directive works are involved. Nor is it reasoning based on a finding that because the InfoSoc Directive on these facts provides more protection for the rightsholder then it should apply. The approach, analogous to the approach in *Club Hotel Loutraki*, is to look as a whole and make a judgement about the proper characterisation of what is involved to decide which regime applies.

76. Note that in *Tom Kabinet* what was *not* said was that both regimes should apply to their own subject matter – with the InfoSoc Directive exhaustion regime applying to the InfoSoc works (so that those Distribution Rights were not exhausted) but the Software Directive exhaustion regime applying to the program(s) so that those Distribution Rights were exhausted. Nor was it said that the answer was to be found from interpreting the saving provisions in Arts 9 and 8 respectively of the InfoSoc Directive and Software Directive.

77. As Microsoft emphasised, C-683/17 *Cofemel v G-Star Raw* EU:C:2019:721 and other cases have recognised that different rights can be granted under EU law in the same subject matter (in that case design rights and copyright). Microsoft relied heavily on this and also argued (Ground 3 of the grounds of appeal) that the CAT had impermissibly deprived Microsoft of the legal protection for non-program works to which it is entitled under the Info SocDirective in accordance with the constitutional guarantees for the protection of intellectual property provided by Article 17(2) of the EU Charter of Fundamental Rights and ECHR Article 1, Protocol 1.

78. These are cogent points but in my judgment the CJEU's judgment in *Tom Kabinet* demonstrates that, in the particular circumstances of a case involving the question of exhaustion and of complex matter, despite the distinct nature of different intellectual property rights, a choice needs to be made. It is not sensible given the nature of exhaustion in economic and functional terms to purport to apply both at the same time (one to the program component and the other to the InfoSoc work component) since the components form an integral whole in economic and functional terms and the effect of one regime would be to override the other.

The first issue

79. It is not in dispute that the Microsoft software products in issue comprise computer programs but also other works in which copyright subsists, such as graphic works. The former are the subject of the Software Directive while the latter (non-program works) are governed by the InfoSoc Directive. The CAT's decision on this topic was as follows. The tribunal reviewed the evidence about Microsoft's products and held some of the non-program works were integral and essential, such as the user interfaces, while others were not. Overall the CAT held at [145] that a fair description of the non-program works as a whole was that they are part of the *Office* and *Windows* products and are ancillary to the computer program functionality for which those things are purchased and used. Applying *Tom Kabinet*, the CAT held at [176] that in substance what had been purchased from Microsoft by the first acquirer was a computer program, and the other works are incidental or have mere accessory character. Thus the Software Directive (and *UsedSoft*) applied and all of Microsoft's copyrights – both in the programs and the non-program works – were exhausted. The CAT also identified two consequences of Microsoft's approach which, if followed, would produce odd results. One was that there would be a distinction with the distribution of the products on CD-ROM – for which Microsoft could not control the resale market. The second was that it would mean that all that was necessary to avoid the effect of *UsedSoft* would be to incorporate some icons or clip art with the program.

80. In my judgment the CAT was right. The decision is a rational application of the principles identified from the CJEU authorities above. In order to decide which regime applied, the tribunal was required to make a decision, looking as a whole, about the

nature of what it was which had been purchased from Microsoft by the first acquirer. The CAT held that this product was in substance a computer program, and that the other works were incidental or had mere accessory character. This finding was open to the CAT and for what it is worth I agree with it. Once that is the finding, the correct application of the law would be that it is the Software Directive which governs the question whether the sale of that product exhausted Microsoft's rights. The result that, necessarily, the InfoSoc works comprised within that product are treated differently from the way they would have been treated had the InfoSoc Directive alone applied, is inevitable and correct. It is no different from the fact that in both *Tom Kabinet* and *Nintendo*, the computer programs in the ebook or the computer game were made subject to a different regime from the one in the Software Directive.

81. Microsoft emphasised the importance under EU law given to the protection of intellectual property rights and submitted that such a result was not a justifiable derogation from those rights. As I have said above, I do not accept that for two reasons. The conclusion is in accordance with the CJEU case law, which addresses the problem of which Directive to apply in circumstances in which applying them both does not make sense. Moreover, the principles of exhaustion always involve a balance between rightsholders and the wider interests of the market and consumers. It is not a derogation from the specific subject matter of the intellectual property right in question. There is nothing unbalanced in the outcome in this case.

82. At the risk of repetition, I do not trivialise the consequence that the effect of applying the Software Directive exhaustion provisions to this complex matter has the result that rights in the non-program works are exhausted in circumstances not contemplated by the InfoSoc Directive (whether the focus is on the InfoSoc Directive Distribution Right or other InfoSoc Directive rights). However it is a logical and in my judgment appropriate consequence of the law as articulated in the CJEU decisions.

83. There was a debate about a hypothetical situation of a program which had a *de minimis* amount of text or graphics comprised with in. The suggestion which had been floated by counsel for Microsoft was that the concepts of proportionality in relation to remedies for IP infringement in Enforcement Directive 2004/48/EC might provide a solution to mitigate the rigour of the appellant's case that if the InfoSoc works were present even to a minor extent the InfoSoc Directive still ought to apply. I do not believe that solution provides an answer because even if no remedy was granted there would still be infringement.

84. Part of the CAT's reasoning included the following:

> [177] The purchaser of either Office or Windows would have a legitimate right to expect to be able to continue to use and sell that computer program as if it was their own. The reason for the purchase was to obtain a desktop operating system or a productivity suite. The purpose was not to obtain a user interface, specific resource files, icons, clip art, fonts or helpfiles. They are all ancillary to the computer program and subsumed within it.

85. Microsoft focussed on the term "subsumed within", criticised it and sought to turn that criticism into a challenge of the CAT's finding of fact that the non-program works were incidental or had mere accessory character. The Court of Appeal has no jurisdiction on

findings of fact unless they reach the threshold of irrationality. That use of language in one paragraph does not come close to establishing such an error. I believe all that the Tribunal was seeking to reflect was the conclusion reached, which in my judgment was right, that it was the Software Directive's exhaustion regime which applied in this case despite the presence of InfoSoc works within the relevant products. It does not betray a material error.

86. I would dismiss the appeal on this ground.

The second issue -

87. The second issue is whether VL can subdivide volume licences sold by Microsoft. In oral submissions Microsoft's counsel helpfully summarised Microsoft's case on this issue as based on four alleged errors by the CAT. The first is that on its proper interpretation *UsedSoft* does not permit subdivision of a block or multiuser right. This is most of ground 2(ii). The second that the CAT erred in construing the Microsoft agreements in issue. This is ground 2(iii). The third (also part of ground 2(ii)) is that the CAT's reliance on a decision of the German Bundesgerichtshof (BGH) (i.e. Federal Court of Justice) on 11 December 2014 known as *UsedSoft 3* (*I ZR 8/13*), led to a result which is contrary to the CJEU *UsedSoft* decision. The fourth (grounds 2(iv) and (v)) is that the CAT erred in failing to address agreed and admitted facts in sample transactions in the defined preliminary issue. I will take the issues in more or less that order but deal with the third point about *UsedSoft 3* immediately after the first point.

Subdivision

88. Before turning to *UsedSoft* itself, it is worth considering exhaustion in the context of tangible objects. If a rightsholder put a pack of multiple items onto the market, as a general proposition one might expect the purchaser to be free to sell each of those items separately. To be more precise, once a pack of multiple independent items, each separately embodying any intellectual property rights, has been placed on the market by the rightsholder or with their consent, the general rule is that those intellectual property rights would not give the rightsholder a right to restrict onward distribution of any or all of those items individually. In other words, the intellectual property rights have been exhausted. There will be all kinds of exceptions in particular special circumstances (for example moral rights in copyright are not exhausted; trade marks do work this way but there can be differences; and this is about the consequences of putting goods on the market rather than other kinds of transaction). However I stand by the general proposition. No cases have been drawn to our attention in which exhaustion in relation to tangible goods works in a different way.

89. Nevertheless digital markets are different from tangible markets and one can by no means necessarily reason from what happens in the physical world to the digital world. As Microsoft submitted, it can be objectively justifiable to apply different legislative regimes to the supply of physical and digital copies of a work (Case C-390/15 *Rzecznik Praw Obywatelskich (RPO)*, EU:C:2017:174 at [70]).

90. Microsoft's case is based on a paragraph in *UsedSoft* ([69]) in which the CJEU said:

> [69] It should be pointed out, however, that if the licence acquired by the first acquirer relates to a greater number of users

> than he needs, as stated in [22] and [24] above, the acquirer is not authorised by the effect of the exhaustion of the distribution right under art.4(2) of Directive 2009/24 to divide the licence and resell only the user right for the computer program concerned corresponding to a number of users determined by him.

91. On its face this supports Microsoft's case, in that for the scheme of exhaustion under Art 4(2) of the Software Directive, at least in certain circumstances, one cannot subdivide. The circumstances being referred to seem to be if the first acquirer has purchased more licences that they needed, although one might think that this would be a paradigm example of exhaustion, at least when considering physical objects. If goods are only available in multipacks, so that if a purchaser who only wants a few has to buy a multipack to get them, then they would be free to sell the surplus.

92. However, although I acknowledge it is not clear, I am satisfied that what the CJEU is referring to relates to a particular situation not relevant to the present case, as follows. In *UsedSoft* the software in issue was so called client-server software (see [21] of the CJEU judgment). The customer of Oracle had a central server and a set of workstations for individual users. One can think of the situation in terms of the hub and spokes of a wheel, the hub being the server, accessed by multiple users workstations (the spokes). The customer downloads a copy of the software from Oracle's website and stores it on the server. At all times the Oracle customer will continue to use their copy of the software which is installed on the server (see [70] last sentence). This is different from the situation in the present case which involves simply a collection of equivalent copies of the software, each one used independently.

93. This feature of the facts in *UsedSoft* is reflected in the term "user right" as it is used in the judgment. As used by the CJEU it does not map neatly onto the simple right of a purchaser of a thing to use that thing. The expression "user right" appears in [21] and has two dimensions. One is a right to store a copy permanently on the server and the other is a right to allow a certain number of users to access it by downloading it into the main memory of their workstations. In other words, part of the user right in that case is a right to access the single copy of the program stored on the server. So this poses a problem when an Oracle customer has bought 25 user rights in a pack but only wishes to sell some of them (say 10). In such a case the customer is going to keep using the unsold 15 user rights, keep the server copy of the program, and keep the server/hub access dimension of the user right in use by the 15 users. Therefore it makes sense in that situation to hold that one cannot subdivide in those circumstances. There is only one server copy, which is being kept in use, and thus those 25 particular kinds of user rights are not independent of one another. In my judgment that is the subdivision which the CJEU is prohibiting in *UsedSoft* at [69].

94. That reasoning is not concerned with a simpler factual situation like the present case. In the present case each copy of the software is independent and permission to use that software does not involve or require permission to access something else as in a hub and spokes arrangement. Unlike the Oracle software in issue in the *UsedSoft* CJEU decision, when the users operate the *Microsoft Windows* and *Microsoft Office* software in issue in this case they are not running a program on a central server (CAT [104]). It is true, as the CAT acknowledged, that the *Microsoft Windows* and *Microsoft Office*

software is initially downloaded onto a central server, but as the CAT explained at [104] this is only for the purpose of distributing copies to the users in the organisation.

UsedSoft 3

95. Support for this view of the CJEU's decision in *UsedSoft* as being related to the client/server arrangements, and for the conclusion that the CJEU was not there prohibiting subdivision *per se* is in the subsequent judgment the German Bundesgerichtshof (BGH) (i.e. Federal Court of Justice) on 11 December 2014 (*I ZR 8/13*) referred to as *UsedSoft 3*. The key passage in the BGH's judgment is at [44]-[45]. Of course, as Microsoft point out, this is not a binding authority. However the BGH's reasoning is persuasive support for the view of *UsedSoft* in the CJEU which I have articulated above and the CAT came to that same conclusion at [97] to [101].

96. Microsoft's submission that *UsedSoft 3* led the CAT into an erroneous view of the CJEU's *UsedSoft* decision is not right. There are further arguments about other aspects of *UsedSoft 3* but they are not relevant and there is no need to address them.

The Microsoft licences (ground 2(iii))

97. Microsoft contended that it was necessary to examine the terms of its licences in order to characterise whether they gave rise to independent rights of use or a block right, with the legal consequences that attach to that characterisation for exhaustion purposes. In my judgment what this amounted to was a submission that in this case the particular terms in its licences had the effect of making subdivision unlawful.

98. To address this I need to start with a step back. A distinct question relating to the kind of exhaustion provided for by *UsedSoft* concerns the point at which exhaustion has occurred. This is then relevant to the question of what happens if the first acquirer retains its original copy of software and carried on using it after resale to a second acquirer. The CAT analysed this at [102]-[105] as a prelude to the issue about the Microsoft licence terms. In summary I agree with the CAT that it is the first sale which exhausts the distribution right (CAT [102]). At that point in the process there is no resale and therefore necessarily one does not know whether the first acquirer will comply with their obligation on resale to not keep and use the original copy after resale. If, after resale, the first acquirer does keep and use the retained copy then it is the retained copy which is unlicensed and its use will be infringing. The infringer is the first acquirer. Such a failure by the first acquirer does not undermine the second acquirer's right to use the copy it has acquired by purchasing the licence.

99. With that background, I can turn to Microsoft's point about licence terms. The CAT at [105] accurately encapsulates the point and the tribunal's decision on it:

> [105] Microsoft contend that, correctly analysed, the Enterprise Agreements in issue are not for a collection of licences but for a single licence. We agree that there is a single purchase agreement but for the reasons explained above we see no sound basis for saying this only gives rise to a single licence for multiple devices rather than a contract for multiple licences. No sound criteria have been advanced by Microsoft by which a single licence may be distinguished from multiple licences.

> What matters, in our judgment, is not this contractual distinction, but whether the first acquirer's actions in failing to dispose of copies it has acquired means there are more copies in circulation than originally licenced. If that is the case then the first acquirer may be infringing the exclusive right of reproduction. This is the case whether or not the contract is analysed as a contract for a single licence or multiple licences. The point is the same. The first acquirer is permitted to re-sell what it purchased. If it does not render unusable its own copy following a resale, then it may infringe. But that does not affect the validity of what was purchased by the purchaser.

100. I agree. Exhaustion of rights takes place by operation of law notwithstanding contract terms which might purport to prevent or undermine it (see *UsedSoft* at [77] and [84] and what the Advocate General said at [48]-[49] in Case C-16/03 *Peak Holding AB v Axolin-Elinor AB* EU:C:2004:324.)

101. Microsoft seeks to characterise each of their licences in issue as a single licence for multiple devices and therefore indivisible. However, the CAT was right and entitled to hold that in this case what had taken place amounted to the provision of multiple software licences. Microsoft's case involves the contention that there is some relevance in the distinction it seeks to draw based on the fact that its customers often distribute the copies of the Microsoft software internally by loading them onto a central server from which the customer then installs the required number of copies. The CAT's point is that this makes no difference. I agree.

102. Therefore to resolve the preliminary issues there was no need to examine the terms of the Microsoft licences in any more detail than the CAT did.

Failure to address agreed and admitted facts in the sample transactions

103. Ground 2(iv) is that the CAT should have determined that the sample transactions identified in the preliminary issue had not been carried out in compliance with the *UsedSoft* requirements. This adds nothing, however, to the previous points. It is not in dispute that VL subdivided licences in quantities different from and smaller than the quantities acquired by Microsoft's customers. Microsoft employs a scheme involving product keys called 'Multiple Access Keys' ("MAKs") supplied to a local 'Key Management System' ("KMS"). It is not in dispute that VL dealt in freestanding product keys (i.e. MAKs) which Microsoft regard as customer, product and version specific. Nor is it in dispute that VL did not receive or pass on any copy of software from the customer. VL directed its customers to download and access for themselves a copy of the Microsoft software directly from Microsoft.

104. Microsoft takes two points. The first relates to forms called Perpetual Licence Transfer Forms (PLTFs). These are provided for in the licence contracts in order to effect a transfer of the so called block user rights in the licences. Microsoft contends that VL ought to have used them. However this could only matter if the resale of software in which Microsoft's rights were exhausted still nevertheless required Microsoft's consent. It did not and therefore the fact VL did not use a transfer mechanism provided for in the Microsoft contracts is irrelevant.

105. The second point is spelled out in ground 2(v). It is an allegation of breach of Microsoft's rights under the technical measures provisions of Art 6 of the InfoSoc Directive relating to VL's use of Microsoft product keys to facilitate resale. VL submitted that this ground was an attempt by Microsoft to seek determination of an unpleaded claim under the technical measures provisions. I agree. There is no need for this court to deal with it.

Microsoft's remaining detailed grounds.

106. Although I have dealt with the main way in which Microsoft's case was put, I will briefly examine the other grounds of appeal or parts of them to ensure I have covered everything necessary.

107. Ground 2(i)(a) linked the decision on the first issue (about the presence of other non-computer program copyright works in the products) to the decision on this second sub-division issue. The point was that in the context of the second issue the CAT referred to the "product" – i.e. the package as a whole comprising both kinds of work. However given the dismissal of the appeal on the first issue, that point does not add anything.

108. Ground 2(i)(b) suggested that the CAT had failed to address limbs (i) and (ii) of the first preliminary issue. There is nothing in this. Limb (i) is about what might be called sub-subdivision, i.e. not simply division of multiple licences into small qualities, but splitting a "product" such as *Office*, which is in fact a suite of products such as *Word* and *Excel*, into its constituent parts and separating them. VL's submission (unanswered) is that there was no suggestion that VL had done this and so the point does not arise. Limb (ii) is about licence splitting and has been dealt with.

109. Ground 2(ii) contended that the CAT proceeded on three erroneous premises. The first criticised the use of the term "notional copy". I have addressed this above in the section dealing with the non-program works issues. The second is about the terms of Microsoft licences and has been addressed above. The third was said to be that it was incumbent on VL to establish, as the person relying on exhaustion, that the correct kind of licence for use of a used copy had been acquired compliantly with all applicable constraints. This involves two points. One is about the burden of proof (see below) and other is just a different way of running the argument about licence terms which has already been dealt with.

110. What the burden of proof point is really about is the question whether the first acquirer has deleted or rendered unusable its own copy of the software for which the licence has been resold. I have addressed this above. Microsoft seeks to contend that the person relying on exhaustion needs to prove that this part of *UsedSoft* has been complied with. The CAT's answer, which I agree with, is that the proof or otherwise of that fact is not an essential element of establishing exhaustion because exhaustion operates at the point of distribution. Since that fact is not something which is necessary to establish to show that exhaustion applies, there is no question of who bears the burden of proving it. The normal rules for the legal and evidential burdens of proof in civil justice will apply. Microsoft referred in this context to the *Ranks* decision in the CJEU (C-166/15 *Ranks v Latvia* EU:C:2016:762) but all that requires is that VL show it acquired the software in a lawful manner, which it has done.

111. All the other parts of Grounds 1, 2 and 3 have been covered above. Ground 4 is not a free standing point and should be dismissed if all other grounds fail.

Conclusions

112. I would dismiss the appeal.

Lord Justice Green:

113. I agree.

Lord Justice Phillips:

114. I also agree.