Appeal No. CA-2025-001656

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
[2025] CAT 33 (Mr Justin Turner KC)

BETWEEN:-

JJH ENTERPRISES LIMITED
(trading as VALUELICENSING)

Respondent/
Claimant

- and -

(1) MICROSOFT CORPORATION
(2) MICROSOFT LIMITED
(3) MICROSOFT IRELAND OPERATIONS LIMITED

Appellants/
Defendants

APPELLANTS' APPEAL SKELETON ARGUMENT

7 JULY 2025

References to the bundle are given in the format [Volume/tab/page] (where relevant). For example, the chronology of relevant events begins at [C/4/55].

I. INTRODUCTION AND OVERVIEW

1. This appeal raises an important point of law concerning the scope of the jurisdiction of the Competition Appeal Tribunal (the '**Tribunal**') and in particular whether the Tribunal has jurisdiction to determine copyright issues which give rise to causes of action in their own right. Microsoft submits the answer is plainly "no".

2. In England and Wales claims for damages in respect of an alleged infringement of Chapters I or II of the Competition Act 1998 (the '**1998 Act**') may be brought either in the High Court or in the Tribunal.

3. The Tribunal is a statutory tribunal specialising in competition law. It has "*economists as well as lawyers on its panel*", because it is "*constituted for [the] purpose… [of] making sophisticated economic analysis of a wide variety of data in competition cases*": *Merricks v Mastercard* [2020] UKSC 51 ('***Merricks***'), §63 (Lord Briggs). **[AB/13/88]** The Tribunal has "*experience and expertise in assessing matters such as evidence from expert economists, economic data and the likely impact and practical workability of economic theories in addressing claims alleging anti-competitive conduct*": §90 (Lord Sales and Lord Leggatt). **[AB/13/95]**

4. In these proceedings, the Claimant ('**VL**') alleges infringements of the 1998 Act, contending that Microsoft has breached competition law by preventing its software licensees from selling their pre-owned licences to VL or to VL's customers. But while VL makes competition law allegations, it is common ground that VL has no competition claim at all if its reselling activities infringe Microsoft's copyright, such that there is no lawful market. VL contends that its activities do not infringe Microsoft's copyright; Microsoft contends that they do. Success for VL on the copyright issues is therefore the predicate on which its competition claim rests. In short, VL must succeed in showing that under copyright law there is a lawful market in which it operates. As the Tribunal rightly stated in the ruling which is under appeal, "*important questions of copyright law… are at the heart of this dispute*": **[C/6/70]**. Reflecting the potentially dispositive nature of the copyright issues, at a hearing on 13-14 May 2025, the Tribunal ordered that there should be a preliminary trial of certain copyright issues, to take place in September 2025.

5. In this skeleton argument, the term 'Copyright Issues' is used to encompass points of law relating to the application of the principles in the *UsedSoft* judgment,[1] and specifically: (i) the points pleaded by VL in rAPOC, §§20-21 **[C/15/215-216]** and their Reply **[C/17/286-308]**; and (ii) the points pleaded by Microsoft as to the issues of Non-Program

[1] Case C-128/11 *UsedSoft GmbH v Oracle International Corp* EU:C:2012:407 '***UsedSoft***'. **[AB (PI)/20/427-467]**

Works, 'dividing' and the usability / deletion of copies.[2] These issues are explained in more detail at §§25-46 below.

6. The Copyright Issues have been pleaded by both parties in detail and raise complex questions of copyright law, some of which – particularly the application of *UsedSoft* to the specific resale practices at issue here -- have not hereto been considered by any court, including a specialist intellectual property court, in this jurisdiction; meaning a specialist competition court is being asked to address at least some of them unassisted by prior authorities. None of those issues has anything to do with competition law. Moreover, the Copyright Issues are so extensive in their scope that they amount to a cause of action in their own right. In other words, they would be sufficient in themselves to form the basis of an entirely free-standing claim by Microsoft for infringement of copyright, or conversely a claim by VL for a declaration of non-infringement. In fact, Microsoft has previously brought separate copyright infringement proceedings against VL in the High Court over the reselling of software licences, which were stayed pursuant to a Tomlin Order following a settlement, but which Microsoft has now re-activated, following evidence coming to light of further infringements occurring in the same period covered by VL's claim in the Tribunal. So the same Copyright Issues also fall to be determined in the High Court before a specialist intellectual property judge.[3]

7. The present proceedings were begun in the High Court and were then transferred to the Tribunal, subject to a reservation of any issues outside the Tribunal's jurisdiction remaining with the High Court. Microsoft's position is that the Tribunal does not have jurisdiction to determine the Copyright Issues, which accordingly were not transferred. At a hearing on 13-14 May 2025, it invited the Tribunal so to rule and to direct that these issues must be determined by the High Court. VL expressly accepted that Microsoft was fully entitled to raise the jurisdiction issue at that hearing notwithstanding that the proceedings had been on foot for some time.[4]

8. The Chairman of the Tribunal, Mr Justin Turner KC (sitting alone), rejected Microsoft's argument. He held that any "*questions insofar as they arise in the context of a claim for damages*"

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[2] See rAD, §§13.1(b)-(d) [**C/16/243-244]**, 23A-23C.1 **[C/16/249-254]**, 23C.3-24B., **[C/16/256-261]**

[3] See Microsoft Corporation v JJH Enterprises, Points of Claim, §§23-26. **[S/62/743-747]**

[4] Transcript, p. 36, lines 18-20 **[S/52/609]**, p.37 **[S/52/610]**, lines 10-11, p.79 **[S/52/612]**, lines 15-24, and line 25 – p.80, line 1. **[S/52/613]**.

for an alleged breach of the Chapter I or II prohibitions are within the Tribunal's jurisdiction. On this basis he held that all the Copyright Issues in the present case are within the Tribunal's jurisdiction and he went on to order that there should be a preliminary issues trial of certain of those issues in September 2025.

9. If the Tribunal's ruling as to jurisdiction were correct, the Tribunal would be entitled to determine whether VL's reselling activities would constitute an infringement of Microsoft's copyright. In so doing, the Tribunal would in substance be determining a non-competition cause of action, namely for breach of copyright.

10. Microsoft respectfully submits that the Tribunal's ruling is wrong. Whilst there is no direct authority on point, the ruling is inconsistent with the closest relevant authority, being a decision of Birss J (as he then was). That decision establishes that the Tribunal cannot determine a non-competition law cause of action, and that intellectual property claims are to be decided by the High Court.

11. The Tribunal's ruling is also unprincipled. The Tribunal acknowledged that it would not have had jurisdiction in respect of the pleaded Copyright Issues if Microsoft had counterclaimed in damages for copyright infringement at the time when it filed its defence and the proceedings were still in the High Court. In other words, the Tribunal drew a bright-line distinction between, on the one hand, cases where non-competition issues are pleaded without specific relief being claimed in respect thereof (which it considered would be within its jurisdiction) and, on the other hand, cases where relief is specifically claimed in respect of the non-competition issues (which it regarded as being outside its jurisdiction). Drawing that distinction, however, leads to the unsatisfactory outcome that the jurisdiction of the Tribunal depends on a party claiming a particular remedy, rather than the substance of the issues. This is a formalistic approach that undermines legal certainty and has no foundation in the legislation or the case law. In any event, the supposed distinction is irrelevant in the present case: VL has in fact claimed declaratory relief and any declaration in their favour would necessarily comprise a finding in VL's favour on the Copyright Issues.

12. On 25 June 2025, the Tribunal granted Microsoft permission to appeal, finding that Microsoft's appeal "*raises a short point of law as to the jurisdiction of the Tribunal to determine disputes of copyright law in the context of a competition claim*", and that the appeal has real prospects of success. **[C/7/77]**

13. As will be apparent, the appeal raises an important issue of principle as to jurisdiction where there is no authority directly on point. The breadth and centrality of the Copyright Issues in this case make it unusual; and the fact that those issues comprise a cause of action even more so. As the Chairman observed during argument, this case is at the "*far end of the spectrum*".[5] There are, however, likely to be other cases before the Tribunal (or where a transfer from the High Court to the Tribunal is under consideration) which involve extensive non-competition issues. Microsoft would respectfully invite this Court to use this appeal as an opportunity to provide guidance on the appropriate approach.

II. PROCEDURAL BACKGROUND

(i) Issue of proceedings in the High Court / transfer to the Tribunal

14. VL originally issued these proceedings in the High Court.[6] The proceedings were transferred to the Tribunal by the Order of Mr Justice Foxton dated 16 November 2022 (the "**Transfer Order**") **[S/8/82-83]**. The question of a transfer was raised by Mr Justice Foxton. At that stage (as Microsoft noted), the pleadings had not closed: a request for further information in respect of Microsoft's Defence was outstanding, and VL had not yet filed a Reply.[7] In making the Transfer Order, Mr Justice Foxton expressly provided for any aspect of the proceedings falling outside the Tribunal's jurisdiction to be reserved to the High Court in §2.

(ii) The PI Application, the jurisdiction issue and the May 2025 hearing

15. On 27 January 2025, VL applied for determination of certain of the Copyright Issues as preliminary issues (the "**PI Application**"), stating that:[8]

> *"…VL seeks the determination of certain issues of copyright law which essentially concern the compliance or otherwise by VL and other pre-owned software licence resellers with the requirements of EU Directive 2009/24 (the "**Software Directive**") as interpreted by the Court of Justice in UsedSoft (and subsequent cases) (the "**UsedSoft Conditions**") during the period with which this claim is concerned (the "**Relevant Period**")."*

[5] Transcript, 13 May 2025, p.70, lines 8-10. **[S/52/611]**

[6] Amended Claim Form dated 22 April 2021. **[C/14/207-209]**

[7] Microsoft's Submissions on Transfer dated 10 November 2022, §10. **[S/60/731]**

[8] Second Witness Statement of Charles Fussell dated 27 January 2025 ("**Fussell 2**"), §6. **[S/30/313]**

16. Following the PI Application being issued, Microsoft amended its Defence to address the Copyright Issues in detail (20 March 2025), and VL served its Reply, which deals entirely with those issues (2 April 2025).

17. The appropriateness of ordering preliminary issues was considered at a hearing on 13-14 May 2025. At that hearing, Microsoft invited the Tribunal to find that it did not have jurisdiction to determine the Copyright Issues, which led to the ruling that is the subject of this appeal. Microsoft in parallel also engaged with the PI Application. The scope of the proposed preliminary issues was agreed and then ordered by the Tribunal with minor changes. The issues ordered are those which (as explained below) would be dispositive of the entire claim: i.e., the 'dividing' of licences; and Non-Program Works. The PIs ordered are:[9]

> *"(a) Does the distribution right or the reproduction right enjoyed by the owner of the copyright in a computer program permit or prevent sub-division and resale without the consent of the rightholder of the user right obtained by the lawful acquirer on first sale of a copy of that program within Article 4(2) of the Software Directive, where the user right acquired by the lawful acquirer was obtained for:*
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> *(i) a licence covering a particular combination of multiple computer programs; and/or*
>
> *(ii) a licence covering a numerically specified plurality of users,*
>
> *by reference to a sample of five transactions entered into by or with the Claimant and their associated specific contractual terms, on the basis of which the above points of law are to be determined, […]*
>
> *(b) Does the first sale or transfer of ownership of a digital copy of Microsoft Office or Microsoft Windows in electronic form, by or with the consent of the owner of the copyright in the non-computer program works made accessible or perceptible by means or use of that product, exhaust the distribution right or the reproduction right of the copyright owner in relation to the non-computer program works under either, neither or both of: (i) Article 4(2) of the Software Directive; (ii) Article 4(2) of the Information Society Directive?"*

18. Prior to the hearing, VL had accepted that success for Microsoft on the PIs would mean that the competition claim could not be pursued. VL expressly confirmed at the hearing, that "*If Microsoft were to win, we accept we go no further*".[10] The PI trial is presently listed to be heard on 9-11 September 2025.

(iii) Related proceedings

19. Microsoft has previously brought proceedings for copyright infringement against VL: High Court claim no. IL-2018-000041, referred to as the "**Comet Proceedings**". The Comet Proceedings were issued in 2018 by the First Defendant against VL, alleging

[9] Order dated 29 May 2025. **[S/9/84-90]**

[10] Transcript, 13 May 2025, pg. 22, lines 3-4. **[S/52/608]**

copyright infringement in respect of software licences which VL purported to (i) acquire from Comet Group plc, the original purchaser that went into administration (without the licences having been fully paid up), and (ii) resell to third parties. The parties entered into a settlement agreement in 2018, by which VL undertook, *inter alia*, not to infringe Microsoft's copyright, and the proceedings were stayed pursuant to a Tomlin Order. However, further infringements of copyright have since come to light following an audit in December 2023. Microsoft applied on 28 April 2025 to enforce the terms of the settlement agreement accordingly. The same allegation of infringement of copyright is made by Microsoft against VL in respect of its reselling activities as Microsoft raises in these proceedings (as described in Section IV below), and substantially the same issues arise as here.

20. Another software reseller, Discount-Licensing Limited ("**DLL**") on 28 January 2025 issued a similar claim against Microsoft in the High Court (High Court claim no. CP-2025-000001)[11] (the "**DLL Proceedings**"). There is prior history of litigation between DLL and Microsoft: the First Defendant brought proceedings against DLL in 2013, alleging copyright infringement, which settled in 2014. In its 2025 claim, DLL is alleging abuse of dominance and entry into anti-competitive agreements, also in respect of Windows and Office.[12] Like VL, DLL pleads that the resale of the licences in question is lawful under the Software Directive,[13] and that DLL's activities in reselling licences for Microsoft products, including insofar as the same involve 'dividing', are lawful.[14]

21. Proposed collective proceedings have also been issued in the Tribunal by Mr Alexander Wolfson, seeking to bring collective proceedings against Microsoft on an 'opt-out' basis. Mr Wolfson makes a similar claim of abuse of dominance as in these proceedings. Like VL and DLL, Mr Wolfson positively asserts that the resale of relevant software licences

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[11] Also founded by VL's founder and director, Mr Jonathan Horley (in 2004).

[12] Particulars of Claim in the DLL Proceedings dated 30 April 2025 ("**DLL PoC**"), §3. **[S/63/755]** DLL also alleges abuse of dominance in respect of 'client access licences' ('**CALs'**) for certain Microsoft server products, as does VL in this case. CALs are addressed further at §79 and footnote 66 below.

[13] DLL PoC, §26. **[S/63/762]**

[14] DLL PoC, §§32-33. **[S/63/763-764]**

was lawful under the Software Directive and s.18 Copyright, Designs and Patents Act 1988.

III. LEGISLATIVE FRAMEWORK

22. The 1998 Act provides that claims may be made in the Tribunal for damages, an injunction, or for a declaration, in respect of an alleged infringement of competition law. Section 47A provides:

"(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." **[AB/2/8-9]**

23. The Enterprise Act 2002 (the '**2002 Act**') provides for the transfer from the High Court to the Tribunal of proceedings, insofar as they relate to a claim under s.47A of the 1998 Act. Section 16(4) states:

"The court may transfer to the Tribunal, in accordance with rules of court, so much of any proceedings before it as relates to a claim to which section 47A of the 1998 Act applies." **[AB/3/16]**

24. Conversely, Rule 71 of the Competition Appeal Tribunal Rules 2015 permits the transfer of all or part of a claim brought under s.47A of the 1998 Act to the High Court (in England and Wales, or Northern Ireland) or the Court of Session (in Scotland). **[AB/5/22-23]**

IV. THE CLAIM

25. VL purports to be a reseller and broker of pre-owned licences for Microsoft software products, including, in particular, Windows and Office. VL's case is that Microsoft engaged in a "*campaign*" to stifle its purported sale of pre-owned licences for Microsoft

software in the UK and EEA,[15] which VL alleges gave rise to anti-competitive agreements and abuse of dominance.[16] VL seeks damages – which it initially estimated at £270m,[17] but has since revised to £140m[18] – interest, and declaratory relief.[19] The declaration sought by VL is that the terms of the various Microsoft's licences and other contractual terms said by VL to be anti-competitive are void and unenforceable.

26. VL's allegations of breaches of competition law are denied in their entirety: Microsoft's case is that there was no "*campaign*", as alleged or at all;[20] that the contractual terms complained of (which were offered in respect of two very limited and selective subsets of customers and agreements, and only for a limited period of time) constituted competition on the merits;[21] that the alleged conduct in any event had no appreciable effect;[22] and that such conduct as Microsoft did engage in was objectively justified.[23]

27. Importantly for this appeal, it is common ground that the predicate of VL's competition claim is that VL's resale of the relevant software licences was lawful and not an infringement of Microsoft's copyright. Put differently, it is common ground that VL is not entitled even to advance its competition claim unless it can establish that its business activities are lawful and not acts that infringe Microsoft's copyright. Without which, there is no lawful market in which competition could have been impacted. VL accepts that the points in respect of which a preliminary issues trial has been ordered are potentially dispositive, stating that:

   a. it "*cannot claim for loss arising from an activity which is not legally permissible*",[24] and "*it is plainly the case that if the activities which* [VL] *alleges it would have been lawful for it to pursue in the counterfactual*

[15] Re-Amended Particulars of Claim dated 13 June 2023 ("**rAPOC**"), §2. **[C/15/211]**

[16] rAPOC, §3. **[C/15/211]**

[17] rAPOC, §72. **[C/15/235]**

[18] VL's Response to Microsoft's Request for Further Information dated 25 September 2024 (Response dated 6 December 2024), Introduction, point (d). **[S/2/12]**

[19] rAPOC, §§70-75. **[C/15/235]**

[20] See, e.g., Microsoft's Re-Amended Defence dated 20 March 2025 ("**rAD**"), §39. **[C/16/268]**

[21] rAD, §§39.2(a) **[C/16/269]**, 46 **[C/16/271]**, 51 [**C/16/274]**, and 57. [**C/16/277-278]**

[22] rAD, §39.3. **[C/16/269]**

[23] rAD, §58. **[C/16/278-279]**

[24] Fussell 2, §8. **[S/30/314]**

(and on which it bases its entire claim for damages) are in fact unlawful, then [VL] *can have no claim at all.*"[25]

b. as regards the '*dividing*' issue (see below at §§32-36), VL accepts that success for Microsoft will mean that its claim would be *de minimis*.[26]

c. success for Microsoft on the 'Non-Program Works' issue (see below at §§37-40), "*will dispose of [VL's] claim in its entirety, since it would mean that the entire second-hand software market in the key Microsoft products of Office and Windows would be unlawful*".[27]

28. This foundational basis for VL's claim is pleaded in §§20-21 of the rAPOC **[C/15/215-216]** (further particularised in its Reply, §§2-3) **[C/17/287-288]**, where VL positively asserts an entitlement to resell licenses despite Microsoft's copyright and the terms of any licence granted by it as the copyright holder:

*"20. Purchasers of perpetual software licences in the Relevant Territories have at all material times been entitled to resell those licences, regardless of any purported restrictions on resale in the original licence agreement. This is the effect of art.4(2) of Directive 2009/24/EC (the "**Software Directive**", which also applies to non-EU EEA countries by virtue of the EEA Agreement) and s.18 of the Copyright, Designs and Patents Act 1988, as amended from time to time. Pursuant to those provisions:*

(1) During the Pre-Brexit Period, the first sale in the Relevant Territories of a copy of a program by the rightsholder, or with the rightsholder's consent, exhausted the distribution right within the Relevant Territories of that copy, with the exception of the right to control further rental of the program or a copy thereof.

(2) In the Post-Brexit Period, the same applies, save that a first sale in the UK will not exhaust the relevant distribution right in the EEA.

21. As a result, and subject to paragraph 20(2), at all material times, perpetual licences purchased in the Relevant Territories could be lawfully resold notwithstanding any purported restriction in the licence agreement."

29. In high level summary, therefore, VL's case is that the Software Directive establishes that Microsoft's distribution right as the copyright holder was exhausted by the first sale of a copy of a computer program. It then pleads its own practices in rAPOC §§22-23 **[C/15/216]**. VL alleges that it is "*one of a number of companies that specialise in acquiring and reselling pre-owned Microsoft software licences in bulk*" (§22), and that it "*… acquires and resells pre-owned perpetual volume licences for … : (1) Windows; (2) Office; and (3) Core and Enterprise CAL*

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[25] Second letter from Charles Fussell dated 28 January 2025, §4. **[S/55/718]**

[26] Letter from Charles Fussell dated 11 February 2025, §5(i). **[S/56/721]**

[27] Letter from Charles Fussell dated 11 February 2025, §5(ii). **[S/56/721]**

Suites" (§23). These are the licences which VL claims could be lawfully resold, despite Microsoft's copyright and the terms of its licences.

30. In response, Microsoft has pleaded across 12 pages to the scope of its rights as the copyright holder and to the unlawfulness of VL's actual and counterfactual conduct (paragraphs 22-24 of its rAD) **[C/16/249-259]**. VL has in turn filed a 22-page Reply dealing entirely with "*issues relating to copyright and copyright exhaustion*": §1. **[C/17/286]** Many questions of copyright law and fact have thereby been put in issue. The following high-level summary is provided to illustrate the nature of the issues arising, but the Court may find it helpful to review the pleadings on the Copyright Issues[28] so as to understand the full nature and extent of the issues and why the Tribunal referred to the copyright issues as lying at the heart of the case.

31. Determination of any one of the issues below would establish a cause of action for infringement of copyright in Microsoft's favour; or that VL's activities were non-infringing. These are the very issues that Microsoft has raised in the High Court in the Comet Proceedings. The consequence is that the determination of the Copyright Issues in this case may in effect determine the standalone copyright proceedings now pending in the High Court.

(i) 'Dividing' of licences

32. As to the pre-conditions for lawful resale of licences under the Software Directive, one of the key questions relates to the practice of 'dividing' of licences, whereby:

    a. a multi-<u>user</u> license is divided up and its divided parts are resold to multiple third parties by way of a sub-set of the original user rights; and/or

    b. a multi-<u>product</u> licence (such as a licence for Office) is divided into the individual products to resell the individual components (e.g. Word, Outlook, and/or PowerPoint).

33. The existence of the practice of dividing multi-user licences is not in dispute: it is VL's pleaded case that it purchased Microsoft "*volume licences*" from Microsoft licensees, almost

[28] That is: rAPOC, §§20-21 **[C/15/215-216]**; rAD, §§13.1 **[C/16/243]**, 23A-24B **[C/16/249-261]**; Reply (its entirety). **[C/17/286-308]**

always in quantities different from those licensed to the original licensee,[29] and that VL in turn also "*sub-divided and re-sold bulk licences of programs and/or program bundles in quantities different to their original licensed quantities*".[30] VL expressly accepts that "*its business was premised on the understanding that it is lawful to split multi-product volume licences and to re-sell the component products that are subject to such licences in quantities of its choosing.*"[31]

34. Whether these practices are lawful is in dispute. Microsoft's position is that they are not. VL cannot rely upon exhaustion of Microsoft's distribution right under the Software Directive in order to divide and resell a user right for a computer program in respect of individual users (or subsets of users) where the first sale was under a multi-user licence for a larger quantity of users.[32] Nor can it rely upon exhaustion in order to divide a multi-product licence and resell licences for individual products.[33] Accordingly, VL had no lawful right to resell or assign such licences.[34] Microsoft has the exclusive right as the owner of the copyright to distribute the work or license distribution, and absent a licence from Microsoft, the distribution of the work by another person is an infringement of Microsoft's copyright.[35]

35. VL claims that it is entitled to rely on exhaustion of Microsoft's exclusive distribution right. It specifically alleges that exhaustion of the distribution right arises on a copy-by-copy basis and that it was entitled to resell individual copies of software products "*regardless of whether such copy was sold pursuant to a standalone licence agreement or pursuant to a bulk licence that provided for the sale of multiple copies to multiple users.*"[36]

36. It is common ground that the 'dividing' issue would, if answered in the negative, effectively be dispositive of VL's competition damages claim. VL accepts that if that issue is

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[29] That is, licences sold to qualifying enterprise customers subject to minimum purchase criteria (including a minimum order quantity in respect of a multi-user licence). See rAPOC, §23 **[C/15/216]** and rAD, §23C.3. **[C/16/256]**

[30] Reply, §15.4(i). VL denies that it engages in the practice of dividing multi-product licences. **[C/17/297]**

[31] Fussell 2, §34. **[S/30/321-322]**

[32] See *UsedSoft* at [69]-[71] **[AB (PI)/20/464]**; rAD, §§23C.3 **[C/16/256]** and 23C.5. **[C/16/257]**

[33] rAD, §23C.5. **[C/16/257]**

[34] rAD, §§23C.3(b) **[C/16/256]**, 24A.1 **[C/16/259]**, 24B. **[C/16/261]**

[35] rAD, §13.1(d). **[C/16/244]**

[36] Reply, §§3.1 **[C/17/288]**, 15.3. **[C/17/296-297]**

determined in Microsoft's favour, VL will "*not be able to seek damages for a similar practice* [of sub-dividing licences] *in the counterfactual*",[37] and that this would be "*likely to reduce* [its] *claim to a de minimis amount*".[38]

(ii) Non-Program Works

37. Microsoft's case is that Office and Windows products each include or are supplied with copyright works that fall <u>outside</u> the scope of the Software Directive, such as literary and artistic works. Accordingly, the distribution right in those works is not capable of exhaustion by way of electronic transfer and delivery (in contrast to the provision of the Software Directive relied on by VL). VL's practices entail the distribution and reproduction of those works, or the authorisation thereof, which Microsoft is entitled to restrain as an infringement of copyright:

    a. The Software Directive is limited to "*computer programs*" defined in Article 1 as the text of the code of a computer program.[39] This does not include visual or audio content which might be supplied with or which might appear when a computer program is executed, or be used in conjunction with such a program.[40] The graphical user interface of such a computer program has, in particular, been held not to fall within the scope of protection of a computer program work (but may be protectable as a Non-Program Work).[41]

    b. Microsoft's copyright works comprise not only computer program works, but also other (non-computer program) copyright works, such as literary works like help files, and artistic works like icons, graphics, and fonts and typefaces, and graphical user interfaces.[42] Such <u>non</u>-computer program works were part of each relevant version of Office and Windows (the '**Non-Program Works**').[43]

    c. The Non-Program Works fall <u>outside</u> the scope of the Software Directive, and <u>within</u> the field covered by the Directive 2001/29/EC of 22 May 2001 (the '**Infosoc**

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[37] Second letter from Charles Fussell dated 28 January 2025, §5. **[S/55/718-719]**

[38] Letter from Charles Fussell dated 11 February 2025, §5(1). **[S/56/721]**

[39] rAD, §23A.2. **[C/16/249-250]**

[40] Unless it has been reduced to, or categorised as, part of the code. See rAD, §23A.7. **[C/16/251]**

[41] See Case C-393/09, *BSA*, EU:C:2010:816, [40]-[46]. **[AB (PI)/18/381]**

[42] rAD, §13.1(b). **[C/16/243]**

[43] rAD, §23C.1. **[C/16/254]**

Directive').[44] Unlike the Software Directive, pursuant to which electronic transfer and delivery of a computer program (without any transfer or delivery of a physical carrier to the purchaser) is sufficient for the purposes of copyright "*exhaustion*", the Infosoc Directive requires a tangible, non-digital transfer.[45]

d. Accordingly, in respect of Non-Program Works in the Windows and Office products, VL is not able to rely on exhaustion of distribution rights as a result of those products having been made available in electronic, non-tangible form.[46]

38. Microsoft pleads that as copyright owner, it is entitled to restrain all (or substantially all) of VL's sales, and to bring an action against VL for copyright infringement.[47] This arises from substantively the same allegations that Microsoft advances against VL in the Comet Proceedings, in which the same issues of principle also arise.

39. VL joins issue with Microsoft's case on the applicable legal principles: Reply, §13. On the question of Non-Program Works, VL accepts that some of the features covered by the licences in question "*may not be computer program works stricto sensu*". However, VL contends *inter alia* that: (i) it is for Microsoft to prove the Non-Program Works and to establish the existence of copyright in them; (ii) that the Non-Program Works are "*integral*" to the computer program works; (iii) that the Non-Program works are in any event "*subsidiary and/or incidental*" to the computer program works, and have "*no unique creative value*", such that they are capable of "*exhaustion*" under the Software Directive.[48] VL denies that Microsoft is entitled to restrain its sales as copyright owner or that Microsoft is entitled to bring an action for copyright infringement.[49] This underscores the extent of the heavy factual and legal issues going to matters of copyright, that will need to be determined in the proceedings.

40. VL expressly accepts that determination of this issue in Microsoft's favour would render VL's competition claim unviable, because: (i) the market alleged by VL in the competition

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[44] rAD, §§23A.7-23A.8. **[C/16/251]**

[45] rAD, §23A.9. **[C/16/251]**

[46] rAD, §23C.1. **[C/16/254]**

[47] rAD, §24A.5. **[C/16/260-261]**

[48] Reply, §§3.4(i) **[C/17/288-299]**, 15.1(i) and (ii). **[C/17/294-295]**

[49] Reply, §17.5. **[C/17/302]**

claim would be unlawful;[50] and (ii) VL could not engage in reselling licences in the counterfactual, since that activity would be unlawful. [51]

(iii) First copy deleted or rendered unusable by all technical means available

41. There are numerous other issues of pure copyright law which are live on the pleadings. To give one further example, it is common ground that for exhaustion of exclusive rights of distribution to occur under the Software Directive, the person that first acquired the computer program must delete their copy or render it unusable by all technical means at their disposal.[52] Microsoft's case is that VL must show that the first acquirer (from whom VL has purported to acquire a licence) has done so.[53]

42. Microsoft pleads that it is to be inferred from the available facts that VL has been unable to ensure that this has occurred, both generally[54] and in respect of the particular re-sold/assigned licences for which disclosure has been given.[55] The facts pleaded by Microsoft include references in VL's internal records to a risk that documentation provided to VL by resellers "*may not be correct or real*". Microsoft accordingly alleges that VL could not discharge the burden of proving that it was entitled to rely on the exhaustion of Microsoft's exclusive right of distribution, and had no lawful right to resell licences, including those for which it has given disclosure.[56] Microsoft has the exclusive right as the owner of the copyright to distribute the work, and absent a licence from Microsoft, for another person to perform such an act is an infringement of Microsoft's copyright.[57]

(iv) Summary

43. The Copyright Issues, both factual and legal, raised in the pleadings are extensive and significant. They raise complex questions about the substantive scope and content of copyright law and will also require a detailed investigation into the relevant facts.

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[50] Letter from Charles Fussell dated 11 February 2025, §5(ii). **[S/56/721]**

[51] Second letter from Charles Fussell dated 28 January 2025, §5. **[S/55/718-719]**, See also Fussell 2, §§10 **[S/30/314-315]**, 49 **[S/30/326]**, and 59. **[S/30/328]**

[52] rAD, §23A.4 **[C/16/260]**; Reply, §2.3. **[C/17/287]**

[53] rAD, §23C.6. **[C/16/257-258]**

[54] rAD, §§23C.6-23C.7. **[C/16/257-258]**

[55] rAD, §§24A.3 **[C/16/260]**, 24B. **[C/16/261]**

[56] rAD, §§23C.7 **[C/16/258]**, 24B. **[C/16/261]**

[57] rAD, §13.1(d). **[C/16/244]**

44. The pleaded copyright issues are so substantial that if they were to be determined by the Tribunal, the Tribunal would thereby determine (i) the parties' rights and obligations under copyright law, and (ii) whether VL's conduct infringes Microsoft's copyright. If Microsoft prevails on these issues, the consequences would be as follows:

a. The dividing, Non-Program Works, and deletion/usability issues mean that Microsoft's exclusive distribution right has not been exhausted in respect of each relevant copy of those works.

b. Microsoft retains the exclusive right to distribute such works, any distribution of those works is an infringement of copyright, and VL has no lawful right to carry on its reselling business.

c. VL's conduct infringes Microsoft's copyright in its Non-Program Works, which infringement it is entitled to restrain. Indeed, any of these issues (if established in Microsoft's favour) entitle it to various remedies including damages and delivery up of the software.

45. VL disputes each of these points. Its case is that its reselling activities are lawful and involve no infringement of Microsoft's exclusive distribution right as the copyright owner. However, and critically for the purposes of this appeal, VL accepts that if Microsoft's arguments are correct, then its reselling activities would be unlawful and VL would have no basis to bring any competition law claim.

46. Neither of the parties, nor the Tribunal, has ever suggested that competition law has any bearing at all on the determination of the copyright issues. Nor could they; in and of themselves the copyright issues have nothing whatsoever to do with competition law. Rather, these issues would arise in a claim for copyright infringement, such as the Comet Proceedings, in which there is no competition law issue at all.

V. THE RULING UNDER APPEAL

47. The question of jurisdiction was addressed at the 13-14 May 2025 hearing, which was held shortly after Microsoft amended its Defence and VL served its Reply on the copyright issues. Microsoft sought a ruling that the Tribunal does not have jurisdiction over the issues of copyright law, which are for determination by the High Court: **[C/6/68]** Microsoft's position is that those issues had not been transferred to the Tribunal at all, in view of §2 of the Transfer Order. **[S/8/82]**

48. In its Ruling, the Tribunal rightly held that "*These are important questions of copyright law which fall for determination on the facts of this case and which, as Microsoft submits, are at the heart of this dispute.*": **[C/6/70]**. The Tribunal had made the same observation during the hearing: [58]

"*But this case is unusual, in that at the heart of the case are difficulty questions of copyright law. That is not -- many other cases, IP issues will arise, questions of contractual interpretation. You say damages, all sorts of things will arise, but this case is unusual, in that now, the way it is pleading out, it is at its heart a copyright claim.*"

49. Nevertheless, the Tribunal held that it did have jurisdiction over the Copyright Issues, and so rejected Microsoft's jurisdiction challenge. It held that all issues that "*arise in the context of a claim for damages under section 47A of the 1998 Act for a breach of the Chapter I or Chapter II prohibitions*" are within the Tribunal's jurisdiction: **[C/6/71-72]**

"*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 suggest 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.*"

50. The Tribunal drew a distinction between a claim for damages under s.47A of the 1998 Act for a breach of competition law, and a claim for damages for infringement of copyright: **[C/6/72]**

"These are proceedings alleging breach of Chapter I and Chapter II prohibitions for which VL is claiming damages. They therefore fall within the explicit scope of subsections 47A(2) and (3) of the 1998 Act. Such proceedings are to be distinguished from, say, a claim for damages arising from breach of the Copyright Designs and Patents Act 1988, in respect of which this Tribunal may not have jurisdiction because such proceedings would not fall within the scope of section 47A."

51. Applying that test, the Tribunal held that the copyright issues are within the jurisdiction of the Tribunal: **[C/6/73]**

"For these reasons I rule that the Tribunal does have jurisdiction to hear all aspects of this claim for breach of competition law including copyright disputes insofar as they arise in the context of this claim."

[58] Transcript, 13 May 2025, p.70, lines 1-7. **[S/52/611]**

VI. GROUNDS OF APPEAL

52. The Tribunal has granted Microsoft permission to appeal on a single ground: The Tribunal erred in law in holding that the Copyright Issues in dispute in the present proceedings fall within the scope of the Tribunal's jurisdiction. This ground has two parts (PTA Application, §4). **[C/1/15]**

53. **First**, that the test that the Tribunal applied was wrong in law. The Tribunal held that it has jurisdiction over all non-competition law issues that arise "*in the context of*" that claim unless relief is specifically claimed in relation to those non-competition law issues.

54. This is, with respect to the Tribunal, incorrect. The Tribunal does not have jurisdiction to determine issues that in substance comprise a non-competition law cause of action, regardless of whether a remedy is claimed for such a cause of action. The pleaded Copyright Issues in this case in substance amount to causes of action under non-competition law.

55. The **second** error was that the Tribunal in any event erred in its application of its own test and was wrong to hold that the copyright issues arise "*in the context of*" the s.47A claim and/or that it has jurisdiction over them. This is because the claim for breach of competition law is conditional upon VL first succeeding in relation to the copyright issues, such that if Microsoft succeeds on them, there can be no competition claim at all. VL also claims declaratory relief, which would implicitly declare that VL was successful on the Copyright Issues. Insofar as declaratory relief is sought from the Tribunal, it means that (on the Tribunal's analysis) VL does in substance seek a remedy under copyright law in the Tribunal, and the determination of this cause of action would not be within the jurisdiction of the Tribunal as articulated by the Tribunal.

(i) First error: Legal principles as to the limits on the Tribunal's jurisdiction

<u>Cause of action arising under non-competition law</u>

56. Limitations on the power to transfer proceedings to the Tribunal and its jurisdiction have been identified in previous authority. *Unwired Planet International v Huawei* [2016] EWHC 958 (Pat); [2016] Bus LR 796 was cited by both parties before the Tribunal. *Unwired Planet* made claims for infringement of patents and counterclaims were made for alleged infringements of competition law. In its patent infringement case, Unwired Planet alleged that it had met its contractual obligations by offering to licence its patents on FRAND (fair, reasonable and non-discriminatory) terms, which the defendants (Huawei and

Samsung) had rejected. Huawei and Samsung disputed this, and in their competition counterclaim contended that the terms offered by Unwired Planet were not FRAND. FRAND issues therefore arose under both claims, and so were inter-related and closely connected.

57. Samsung contended that the competition law aspects of the case should be transferred to the Tribunal. Birss J declined to do so, on the basis that it was not possible to transfer the contractual FRAND issues, with the consequence that the FRAND aspect of the proceedings would be split (§45). **[AB/14/124]** Birss J held (at §44) that s.16 of the 2002 Act (and the associated rules), which permit the transfer of proceedings, "…*are not wide enough to transfer for determination* ***a distinct cause of action*** *which is not itself an infringement issue for it to be determined by the CAT.*" (emphasis added) **[AB/14/124]**

58. While *Unwired Planet* concerned a transfer of an "*infringement issue*" under s.16(1)(a)[59] of the 2002 Act (rather than, as here, a transfer of a s.47A claim under s.16(4)), the logic of Birss J's reasoning supports Microsoft's position in the present case.

59. Birss J went on to explain, at §44: "*Patent and contract claims fall to be decided by the High Court. …The CAT is a specialist tribunal for dealing with infringements of competition law.*" **[AB/14/124]** In other words, Birss J took the view that matters that give rise to a non-competition cause of action could not be transferred to the Tribunal because of the Tribunal's role as a specialist tribunal for competition law only, and that non-competition claims (such as IP or contractual claims) are determined by the High Court.

60. It is accordingly not correct that (as the Tribunal here held) any issue which arises "*in the context*" of a claim alleging an infringement of Chapter I or Chapter II is within the Tribunal's jurisdiction. That is too blunt an approach. Rather, the position is more nuanced. If particular issues in proceedings give rise as a matter of substance to a non-competition cause of action, then whether or not relief is specifically claimed in respect of the non-competition issues, the Tribunal does not have jurisdiction to decide those issues.

[59] Section 16(1)(a) of the 2002 Act provides (and provided at the time when *Unwired Planet* was decided): "*The Lord Chancellor may by regulations – (a) make provisions enabling the court – (i) to transfer to the Tribunal for its determination* ***so much of any proceedings*** *before the court as* ***relates to an infringement issue****; and (ii) to give effect to the determination of that issue by the Tribunal.*"(emphasis added). **[AB/4/19]**

61. Importantly, the existence (and pleading) of a cause of action does not depend on a remedy being sought. Rather, a cause of action is, "*…a factual situation the existence of which* ***entitles*** *one person to obtain from the Court a remedy against another person…*" (emphasis added): *Letang v Cooper* [1965] 1 QB 232, at 242 (Diplock LJ) **[AB/10/37]** (recently approved in *Mulalley v Martlet Homes* [2022] EWCA Civ 32; [2022] BLR 198, §40). **[AB/17/169]**

62. The judgment of this Court in *Lloyds Bank v Rogers* [1999] 38 E.G.83 ('***Lloyds***') (approved in *Aldi Stores v Holmes Buildings plc* [2003] EWCA Civ 1882; [2005] PNLR 9 ('***Aldi***'), §21) **[AB/12/58]** considered *Letang v Cooper*. This judgment makes clear that a cause of action is different from, and not dependent on, any remedy that could be claimed; and that a "cause of action" is different from a "claim".

63. Lloyds had brought a claim for possession of mortgaged property. It sought to amend its case to add a new claim for principal and interest due under an associated guarantee and an overdraft. This was opposed on the grounds that the amendment was made after the expiry of the limitation period. Lloyds' case was that the proposed amendment did not add a new cause of action and so was permissible under s.35, Limitation Act 1980.

64. Auld LJ's judgment (Evans LJ agreeing) records the parties' opposing submissions on what constitutes a cause of action. Mr Rogers argued that, "*pleaded facts carrying an entitlement to a remedy require a specific prayer for that remedy to turn it into a cause of action*". Lloyds, "*submitted that pleaded facts carrying an entitlement to a remedy do not need a prayer for that remedy to turn it into a cause of action.*" **[AB/11/46]**

65. The Court accepted Lloyds' argument. Auld LJ referred to *Letang v Cooper* (p.85) and held:

"*Diplock LJ's widely accepted definition of a cause of action in Letang v. Cooper [1965] 1 QB 232 , CA, at 242–3, as "simply a factual situation the existence of which entitles one party to obtain from the court a remedy against another person", as distinct from "a form of action … used as a convenient and succinct description of a particular category of factual situation", is of importance. It makes plain that* ***a claim and a cause of action are not the same thing***." (emphasis added) **[AB/11/46]**

66. Auld LJ therefore accepted Lloyds' argument that the addition of a new remedy does not create a new cause of action. An amendment seeking a new remedy would only entail a new cause of action, "*if the claimant seeks, by amendment, to justify it on a different factual basis from that originally pleaded. But it is not, even if made for the first time, if it does not involve the addition or substitution of an allegation of new facts constituting such a new cause of action.*" **[AB/11/47]**

67. VL's argument, which the Tribunal appears to have accepted, was that the Tribunal's jurisdiction would only be excluded if a remedy was actually sought in the proceedings in respect of non-competition issues. Thus, the Tribunal distinguished the present case from

"***a claim*** *for damages arising from a breach of the Copyright Designs and Patents Act 1988*": **[C/6/72]** (emphasis added). The Tribunal therefore appears to have focussed on the question of whether there was a claim for a specific (non-competition law) remedy. This distinction is contrary to authority. As set out above:

a. The Tribunal does not have jurisdiction over a non-competition cause of action (*Unwired Planet*).

b. A cause of action arises where the matters alleged establish a person's entitlement to claim a remedy from the court (*Letang*). A cause of action is not dependent on a remedy having been claimed (*Letang; Lloyds*).

c. The Tribunal's reference (**[C/6/72]**) to a "*claim for damages*" under the Copyright Act does not address the question of whether a cause of action has been alleged. A "*cause of action*" and a "*claim*" for a remedy are not the same (*Lloyds*; *Aldi*).

68. As well as being contrary to authority, the Tribunal's focus on remedy is formalistic and would lead to arbitrary results and undermine legal certainty. It would mean that the scope of the Tribunal's jurisdiction to determine the fundamental question of whether a cause of action is established would depend on – and wax and wane according to – whether a particular remedy had been claimed. It would also enable abuse of the High Court and Tribunal's jurisdiction by pleading or not pleading a non-competition remedy.

69. The Tribunal's approach would also mean that the existence of a non-competition cause of action could be determined by the Tribunal, but any remedies could not and would then need to be sent to the High Court. The High Court and the parties, however, would be bound by the Tribunal's findings on the cause of action itself, which would give rise to issue estoppel with the associated implications that entitle remedies to be obtained in the High Court (demonstrating why the reliance on whether a remedy is sought in the Tribunal is the wrong matter to focus upon). This would be entirely illogical and highly inefficient, particularly where the remedies in matters such as intellectual property may require an understanding of the issues that were determined as giving rise to a right to a remedy, as well as contradicting Birss J's observation in *Unwired Planet* that IP and contract claims are to be decided by the High Court.

70. In support of its approach, the Tribunal noted that questions of causation, limitation, or contractual interpretation may arise in the context of claims under section 47A of the 1998 Act: **[C/6/72]**. Those examples of individual issues, however, do not establish that the Tribunal has jurisdiction to determine issues establishing a non-competition cause of

action. The fact that a competition claim may or may not be time-barred, for example, would not establish any cause of action. Similarly, determination of whether causation in respect of competition allegations is established or not, does not determine any other non-competition cause of action.

71. The limitation on the Tribunal's jurisdiction submitted by Microsoft is compatible with the wording of the statute. Section 47A provides that a person may make a claim in the Tribunal for damages, an injunction or a declaration in respect of an alleged breach of Chapter I or II of the 1998 Act. **[AB/2/8]** Such claims could still be brought, on Microsoft's approach. Microsoft's approach would entail specific issues arising in those proceedings being determined by the High Court where those issues amounted, as a matter of substance, to a cause of action in and of themselves (which may be relatively unusual). That approach is also consistent with the Tribunal's rules, which provide that even where s.47A proceedings are before the Tribunal, part of those proceedings may be transferred to the High Court: Rule 71. **[AB/5/22-23]**

72. The Tribunal's procedures also provide mechanisms to avoid practical problems of fragmentation. Where a claim in the Tribunal involves some issues outside the jurisdiction of the Tribunal, the remainder of the issues could be transferred to the High Court on a discretionary basis and/or on case management grounds. A further possibility would be for a Tribunal panel chaired by a High Court judge to determine the competition claim; and for the issues outside the Tribunal's jurisdiction to be determined by the very same judge individually sitting as the High Court.

73. As noted above, the Tribunal has a specialisation in competition law and related questions of economics: see the references to *Merricks* in §1, above. That expertise does not extend to determining claims under other legal norms. The general demarcation of responsibilities is, as Birss J recognised in *Unwired Planet*, that claims under contract law or IP law (and by extension, other legal rules outside Chapter I and II) are determined by the High Court. This demarcation is *a fortiori* in intellectual property cases, where a dedicated list and specialised courts have been established to deal precisely with such issues: see Chancery Guide, Chapter 22, and CPR Part 63.[60]

[60] A claim for infringement of copyright must be commenced in the Chancery Division of the High Court, the Intellectual Property Enterprise Court or (in certain circumstances) a County Court: see CPR r 63.13.

74. This demarcation provides additional grounds for recognising the limitation on the Tribunal's jurisdiction in circumstances where (as here) there is a clear division in proceedings between the issues arising under the non-competition cause of action; and the competition issues.

(ii) First error: application of the principles to the present case

75. The parties' pleadings raise issues that in substance comprise non-competition law causes of action albeit that no remedy has been claimed by Microsoft for breach of copyright – it does that in the *Comet* Proceedings.

76. VL pleads that Microsoft's exclusive distribution rights as the copyright holder have been exhausted and thus that its reselling activities do not infringe Microsoft's copyright or licensing terms, and are lawful. In principle, were VL to establish those allegations following a trial, it could seek declaratory relief. In the High Court, declaratory relief may be granted regardless of whether any remedy is claimed: CPR 40.20.

77. The Court's power to grant declaratory relief is discretionary and can be granted where a party establishes non-infringement of copyright: see e.g. *Sheeran v Kokri* [2022] FSR 15, §208. The grant of such a declaration depends on justice to the claimant and defendant, any commercial reason for the person seeking the declaration to have standing and whether any claim has been formulated against the party seeking the declaration. Here, the parties would have had a trial on the law and the facts; the non-infringement would concern VL's business practices (and hence its commercial interests); and VL faces claims of infringement in respect of those practices. While the Court's grant of declaratory relief is discretionary, VL would have a proper basis to seek such a remedy.

78. As to Microsoft's positive case, as set out in §§25-46 above:

    a. Microsoft's case is that its exclusive distribution rights have not been exhausted (in view of the dividing, Non-Program Works, and deletion/usability issues). Microsoft further pleads that it retains the exclusive right to distribute the works, and any distribution of those works is an infringement of copyright. Microsoft would be entitled to seek (at the least) declaratory relief to that effect.

    b. Microsoft expressly alleges that VL's conduct amounts to an infringement of its copyright in its Non-Program Works, that it is entitled to restrain. This is plainly a cause of action. The same remedies could be sought in respect of an infringement established on the basis of the dividing or deletion/usability issues.

79. On the principles set out above, it follows that the Tribunal does not have jurisdiction over these issues.[61]

(iii) Second error: mis-application of the Tribunal's test

80. In any event, even on the Tribunal's own approach to the principles on jurisdiction, it erred in its conclusion.

81. The Tribunal held that it has jurisdiction over the copyright issues where they arise "*in the context of*" a claim for damages under s.47A of the 1998 Act. Here, however, if Microsoft succeeds on the Copyright Issues (or some of them), no claim under s.47A could be brought because (as is common ground and set out above) a lawful market is a pre-requisite for a competition law claim. Unless and until the Copyright Issues are determined in VL's favour, it cannot be said that there is any competition damages claim at all.

82. The Tribunal acknowledged this argument (**[C/6/71]**) but failed to grapple with it. Instead, it cited other issues, such as limitation, causation, or contractual construction, which are "*adjacent to, or distinct from*" questions of competition law, but which nevertheless arise: **[C/6/71-72]**. With respect to the Tribunal, however, these examples do not concern anterior issues. The issues of causation and limitation that might arise in a competition claim are core components of the competition cause of action, i.e. breach of statutory duty. By contrast, in the present case, the Copyright Issues are free-standing and logically anterior to the competition claim: see §28 above. The competition claim cannot even be brought unless VL is successful on them and so the Copyright Issues logically do not arise "*in the context of*" that claim.

83. Further and in any event, even if the Tribunal were correct to hold that the question of jurisdiction in respect of non-competition issues is to be determined by reference to whether relief is sought in respect of those issues (see e.g. its reasoning in relation to a

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[61] The copyright issues are the subject of particular consideration in this appeal because the point arose before the Tribunal in the context of the application for the determination of preliminary issues on copyright. This Court's ruling on the correct legal approach to jurisdiction may also have a bearing on other non-competition issues, such as client access licences, or 'CALs'. The Tribunal's jurisdiction to determine such issues would fall to be considered in view of this Court's judgment on the principles. For the Court's reference, the CAL issue is addressed in the pleadings at rAPOC, §§19 **[C/15/215]**, 23 **[C/15/216]**; rAD, §§12.1 **[C/16/242]**, 23C.2 **[C/16/254-255]**; Reply §15.2. **[C/17/295-296]**

claim for damages for copyright infringement: (**[C/6/72]**), the Tribunal failed to acknowledge that VL does here seek declaratory relief.[62] That relief could only be granted if VL was to succeed in its competition claim, and it is common ground that VL could only do so if it was first to succeed on the copyright issues. The declaratory relief claimed by VL in substance encompasses a declaration of non-infringement of copyright. Even on the Tribunal's own approach, therefore, it lacks jurisdiction.

VII. CONCLUSION

84. For these reasons, it is submitted that Microsoft's appeal should be allowed and this Court should conclude that the Tribunal does not have jurisdiction in respect of the Copyright Issues (as defined at paragraph 5 above).

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7 July 2025

[62] At the time the Transfer Order was made, the Tribunal did not have power to grant declarations, but s.47A of the 1998 Act has since been amended by the introduction of s47A(3A) that deals with claims for a declaration. **[AB/2/9]** The factual basis on which VL seeks a declaration is the same as for the rest of its claim, and so VL presumably invites the Tribunal to make that declaration, were it to succeed. If, by contrast, it was thought that the prayer for a declaration remained reserved to the High Court, such that on the Tribunal's approach, no non-competition remedy has been sought and the Tribunal lacks jurisdiction, that illustrates the arbitrary nature of the distinction drawn by the Tribunal.