

ON APPEAL FROM:

THE COMPETITION APPEAL TRIBUNAL

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

Justin Turner KC (Chair), Andrew Lykiardopoulos KC and Antony Woodgate

Judgment dated 12 November 2025: [2025] CAT 75

B E T W E E N:

**JJH ENTERPRISES LIMITED**  
(trading as ValueLicensing)

Respondent / Claimant

- and -

(1) **MICROSOFT CORPORATION**

(2) **MICROSOFT LIMITED**

(3) **MICROSOFT IRELAND OPERATIONS LIMITED**

Appellants / Defendants

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APPELLANTS' (MICROSOFT'S) APPEAL SKELETON

**(CONFIDENTIAL REFERENCES REDACTED)**

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5 January 2026

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## Introduction

1. As described in more detail below, the Respondent (“VL”) decided in 2018 to cease using Microsoft’s zero-cost Perpetual Licence Transfer Form (“PLTF”) procedure for the orderly and fully effective transfer of ‘Enterprise Licence’ block user rights to Microsoft’s Windows and Office “Products” of the kind in issue in these proceedings. It did so on the assumption that the exhaustion rule in Art 4(2) of [Directive 2009/24/EC](#) on the legal protection of computer programs (the “Software Directive”) enabled it to achieve everything it sought to accomplish by its commercial dealings as an intermediary in ‘second hand’ sales of such user rights. [Auth/3/25]

2. However, these Products were possessed of and have always comprised an abundance of non-computer program works (“NPWs”) such as graphic user interfaces, fonts and clip art protected by copyright under [Directive 2001/29 EC](#) on the harmonisation of certain aspects of copyright and related rights in the information society (the “Infosoc Directive”). The NPWs individualise the Products to Microsoft via the user experience they provide and differentiate them from the products of its competitors. The NPWs cannot consistently or compatibly with the applicable provisions of the [WIPO Copyright Treaty](#) (“WCT”) as implemented in the governing exhaustion rule in Art 4(2) of the Infosoc Directive be redefined or recategorised as “computer programs” to which the different exhaustion rule in Art 4(2) of the Software Directive is narrowly and specifically directed and confined. [Auth/1/10] [Auth/45/891]

3. It has been recognised since at least as early as 2015 that the reasoning of the Judgment of the CJEU in [UsedSoft](#)<sup>1</sup> allowing for digital exhaustion (i.e. extinction) of the distribution right in a computer program under Art 4(2) of the Software Directive was not transposable to the different ‘fixed-tangible-copies-only’ exhaustion (i.e. extinction) of distribution right rule applicable to NPWs under Art 4(2) of the Infosoc Directive: see European Parliamentary Research Service “[Review of the EU copyright framework](#)” (PE 558.762 – October 2015) Annex I Ex-Post Impact Assessment at 1.2.4; Reinbothe and von Lewinski “[The WIPO Treaties on Copyright](#)” (2<sup>nd</sup> Edition, 2015) at ¶¶7.6.27, 7.6.28, 7.8.23 and 7.8.24; Rosati “[Copyright and the Court of Justice of the European Union](#)” (2<sup>nd</sup> Edition, 2023) at ¶¶3.2.3, 3.2.4. [Auth/20/427] [Auth/56/1120] [Auth/55/1099] [Auth/57/1135]

4. The WCT was adopted on 20 December 1996. The exclusive “**Right of Distribution**” applicable to “literary and artistic works” was defined and delimited in Art 6 as “the making available to the public of **the original and copies ... through sale or other transfer of ownership**” (emphasis added). The accompanying Agreed Statement concerning Articles 6 and 7 ([CRNR/DC/92](#)) records that: “As used in these Articles, the expressions “copies” and “originals and copies”, being subject to the right [Auth/45/891] [Auth/44/881]

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<sup>1</sup> Case C-128/11, [EU:C:2012:407](#) (“UsedSoft”).

*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.”*

5. The WCT was approved in [Council Decision 2000/278/EC](#) of 16 March 2000. It entered into force in relation to the EU and its Member States on 14 March 2010, three months after the EU’s instruments of ratification were deposited on 14 December 2009 (see European Commission Press Release) following transposition of the Infosoc Directive by all Member States. That effectively eliminated the possibility of the exclusive distribution right applicable to NPWs being subject to any exhaustion rule other than the ‘fixed-tangible-copies-only’ rule conformingly specified in Art 4(2) of the Infosoc Directive. [Auth/54/1087]

6. With the permission of the Competition Appeal Tribunal (“CAT”), Microsoft appeals the rulings (and underlying reasoning) (“**Rulings**”) of the CAT in [108], [185] and [186] of its Judgment<sup>2</sup> on the Preliminary Issues (“**PIs**”) set out in [16] of that Judgment. In short: [CB/12/183, 203, 156]

a) For the purpose of applying the ‘exhaustion of distribution right’ rules in Art 4(2) of the Software Directive and Art 4(2) of the Infosoc Directive, the CAT invented a doctrine, unknown to EU law, that the copyright in substantial artistic and other NPWs can, and should, be “*subsumed*” within the copyright in an exhausted digital copy of a computer program, thereby depriving Microsoft and others of rights expressly preserved by the Infosoc Directive; and

b) The CAT misapplied the reasoning of the judgment of the CJEU in *UsedSoft* by treating an enterprise-wide licence, granting calibrated block ‘user rights’ to Customers with a minimum of 500 users, as divisible into multiple individual licences; this was contrary to the CJEU’s clear ruling that exhaustion under Art 4(2) of the Software Directive does not permit division of block user rights.

### ***Summary of the ‘subsumed’ point***

7. Microsoft owns copyright in the computer programs for Office (e.g. the Word, Outlook, Excel, and PowerPoint executables) and Windows. It also owns copyright in a wide array of NPWs made accessible to users of these programs, e.g. some 250,000 “clip-art” graphic images (for Office users); most (although not all) of the typefaces available for Office and Windows users; sound effects; and graphic user interfaces (“**GUIs**”). The human endeavour which went into the authors’ creative expression represented in the NPWs was massive and undertaken at great cost to Microsoft in time and money.<sup>3</sup>

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<sup>2</sup> [\[2025\] CAT 75](#) (“**PI Judgment**”).

<sup>3</sup> The detail is set out in the unchallenged witness statements of Knudsen, Novak and Harris.

8. Art 4(2) of the Software Directive (as *lex specialis*) has the effect of exhausting the distribution right in relation to a copy of a protected computer program when that particular copy of the program is sold. It creates no exhaustion of or derogation from other protected rights, including in particular the copyright in NPWs protected under the Infosoc Directive. Such NPWs can only be the subject of exhaustion under Art 4(2) of the Infosoc Directive upon the first sale of a fixed tangible copy.

9. There is no warrant in case law, legislation or principle for holding that the copyright in NPWs is, or can be, “*subsumed*” within the copyright in a computer program work for the purposes of the exhaustion rule in Art 4(2) of the Software Directive, and the CAT was wrong to suppose otherwise.

### ***Summary of the ‘block user rights’ point***

10. The CAT wrongly:

- a) Failed to apply the *UsedSoft* principle (at [69]-[71] and [86]) that a first acquirer of a [CB/12/173-174, 176-177] quantity of user rights in relation to a copy of a computer program is not entitled to divide the block of user rights by selling them individually or in sub-groupings;
- b) Considered that whether or not a first acquirer could divide the block user rights depended on whether its contract with the owner of the copyright in the computer program was for a block quantity of user rights or for a fragmented plurality of separate individual user rights. That view is artificial and commercially unreal, especially when considered in the context of *UsedSoft*; and
- c) In any event, misconstrued the contractual terms applicable to the Sample Transactions, holding (PI Judgment at [70]) that they were agreements to provide a “*bundle of licences (up to [CB/12/173] an agreed number) to download, copy and use the Products*” whereas they were directly calibrated to a specific quantity of users and devices.

### **The ‘subsumed’ point in more detail**

11. The protection of the copyright in computer programs under the Software Directive and the protection of the copyright in NPWs under the Infosoc Directive are legislatively governed by separate rules within the framework of which digital exhaustion is intentionally included within the scope of the exhaustion rule in Art 4(2) of the Software Directive and intentionally excluded from the scope of the exhaustion rule in Art 4(2) of the Infosoc Directive. In more detail:

#### **Computer programs are protected under the Software Directive**

(a) In relation to the Software Directive the CJEU held in *Sony*<sup>4</sup> that:

*“the protection guaranteed by [the Software Directive] is limited to the intellectual creation as it is reflected in the source code and object code and, therefore, to the literal expression*

[Auth/33/765]

<sup>4</sup> Case C-159/23 *Sony Computer Entertainment Europe*, [EU:C:2024:887](#) at [38] (“*Sony*”).

*of the computer program in those codes, which constitute, respectively, a set of instructions according to which the computer must perform the tasks set by the author of the program.”*

(b) A work which is not a “computer program” within the meaning of Art 1(2) of the Software Directive, as interpreted by the CJEU in *Sony*, is not a “program” for the purposes of the exhaustion rule in Art 4(2) of that Directive.

(c) Art 1(2) of the Software Directive confines the subject of protection to computer programs as such:

[Auth/3/25]

*“Protection in accordance with this Directive shall apply to the expression in any form of a computer program. Ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright under this Directive.”*

(d) Art 4(2) of the Software Directive specifies only that:

[Auth/3/25]

*“The first sale ... of a copy of a program by the rightholder or with his consent shall exhaust the distribution right ... of that copy ...”.*

It does not provide for exhaustion of any other right. Nor does it provide for the exhaustion of anything more or other than “*the distribution right*” in relation to anything more or other than “*that copy*” of the protected “*program*”.

### **NPWs are protected under the Infosoc Directive**

(a) An NPW made perceptible at the user interface by means, or use, of a computer program:

*“...does not constitute a form of expression of a computer program within the meaning of Article 1(2) of [the Software Directive] and ... consequently, it cannot be protected specifically by copyright in computer programs by virtue of that directive” but it “can be protected by the ordinary law of copyright by virtue of [the Infosoc Directive]” if “it is original in the sense that it is its author’s own intellectual creation”.*<sup>5</sup>

[Auth/18/381]

(b) That necessarily includes NPWs across the range which constitute “Protected Works” designated for protection in Art 2 of the Berne Convention.<sup>6</sup>

(c) A digital copy of an NPW is not an “object” within the meaning of Art 4(2) of the Infosoc Directive. It is excluded from the scope of the exhaustion rule in that Article in accordance with

<sup>5</sup> Case C-393/09 *Bezpečnostní Softwarová Asociace (“BSA”)* [EU:C:2010:816](#) at [39], [40]; *THJ Systems Ltd v Sheridan* [\[2023\] EWCA Civ 1354](#) at [11]–[28] (Arnold LJ), (Moynan and Asplin LJJ agreeing); *Navitaire v easyJet Airline Company* [\[2004\] EWHC 1725](#) (Ch) at [97]–[99] (Pumfrey J).

[Auth/14/254]

[Auth/9/120]

<sup>6</sup> Case C-227/23 *Kwantum Nederland BV*, [EU:C:2024:914](#) at [40].

the Agreed Statement concerning Art 6 of the WCT.<sup>7</sup>

- (d) It is not open to national courts to provide for an exhaustion rule other than that set out in that provision: *Art & Allposters*<sup>8</sup> at [30]; nor may they derogate from the exclusive rights referred to in Arts 2 to 4 of the Infosoc Directive beyond the exceptions and limitations exhaustively set out in Art 5 of that Directive, *Funke Medien*<sup>9</sup> at [62].
- (e) Nothing in *UsedSoft* decided or can even be taken to have suggested otherwise.

[Auth/22/502]

[Auth/26/584]

#### Independent coexistence of Software Directive protection and InfoSoc Directive protection

- (a) Software Directive protection and Infosoc Directive protection are provided and available independently of one another without any hierarchy between them as required by Art 8 of the Software Directive, Art 1(2) of the Infosoc Directive and the EU law principle of ‘concurrent and cumulative protection’ of IP rights. The Software Directive (*lex specialis*) does not protect or provide for exhaustion in relation to NPWs; the Infosoc Directive (*lex generalis*) protects but does not provide for digital exhaustion of NPWs, which remain protected by the Infosoc Directive and unaffected by the exhaustion rule in Art 4(2) of the Software Directive.
- (b) With regard to “**complex matter comprising not only a computer program but also graphic and sound elements, which, although encrypted in computer language, have a unique creative value which cannot be reduced to that encryption. In so far as the parts ... in this case the graphic and sound elements, are part of its originality, they are protected, together with the entire work, by copyright in the context of the system established by [the Infosoc Directive]**”: Case C-355/12 *Nintendo*, [EU:C:2014:25](#) at [22]-[23] (emphasis added).
- (c) In those paras of the Judgment in *Nintendo* the CJEU adopted and applied the reasoning of [34]-[35] of the Opinion of Advocate General Sharpston in that case ([EU:C:2013:581](#)): “... **the provisions of [the Software Directive] take precedence over those of [the Infosoc Directive] ... only where the protected material falls entirely within the scope of the former**” and “**Where complex intellectual works comprising both computer programs and other material are concerned — and where the two cannot be separated — it seems to me that the greater, and not the lesser, protection should be accorded. If that were not so, rightholders would not receive in respect of that other material the degree of protection to which they are entitled under [the Infosoc Directive]**” (emphasis added).

[Auth/21/475]

[Auth/21/488]

<sup>7</sup> Case C-263/18 *Tom Kabinet*, [EU:C:2019:1111](#) at [6], [7], [38]-[40], [42], [55] and [56].

<sup>8</sup> Case C-419/13, [EU:C:2015:27](#).

<sup>9</sup> Case C-469/17 *Funke Medien NRW GmbH*, [EU:C:2019:623](#).

[Auth/28/643]  
[Auth/28/651-2]  
[Auth/28/654]

[Auth/22]

[Auth/26]

(d) The reasoning and analysis of the CJEU in *Art & Allposters, Nintendo and Tom Kabinet* was followed and applied (as settled law requiring no reference to the CJEU) by the French Cour de Cassation in *Valve Corporation v UFC-Que Choisir* [FR:CCASS:2024:C100555](#) at [10]-[15].

[Auth/52/1071]

(e) The copyright subsisting in NPWs, which includes the distribution right, is constitutionally protected as property both under Art 17(2) of the EU Charter of Fundamental Rights (“*Intellectual property shall be protected*”) and ECHR Art 1, Protocol 1 (“*Every natural and legal person is entitled to peaceful enjoyment of his possessions*”). It is property with respect to which there is a positive obligation to provide protection, notably by way of effective remedial measures: *Safarov v Azerbaijan*<sup>10</sup> at [21]-[25], [30]-[32], [36]-[37]; *SACD*<sup>11</sup> at [60], [67]-[73], and [78].

[Auth/4/31]

[Auth/38/844]

[Auth/51/1062-3]  
[Auth/34/781-3]

(f) The protection conferred on NPWs by the Infosoc Directive is not governed or in any way neutralised or counteracted by Art 4(2) (or any other provision) of the Software Directive. To the contrary, enforcement of the copyright in NPWs is compelled — compliantly with Arts 41 and 42 of the TRIPs Agreement — on the following basis. Art 8(1) of the Infosoc Directive stipulates that: “*Member States shall provide appropriate sanctions and remedies in respect of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive*” (emphasis added). Without prejudice to that, the “*General obligation*” set out in Art 3 of Directive 2004/48/EC (the ‘Enforcement Directive’) stipulates that: “*(1) Member States shall provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by this Directive. Those measures, procedures and remedies shall be fair and equitable ... (2) Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.*” (emphasis added)

[Auth/1/12]

[Auth/2/21]

### Microsoft’s procedure for transfer of user rights

12. Microsoft has at all relevant times made available the PLTF procedure by means of which its ‘enterprise licence’ Customers can — at zero cost — ‘transfer’ their use rights to Microsoft Products of the kind in issue to ‘resell’ them as ‘second hand’. The procedure provides for the orderly and consensual transfer of blocks of user rights with associated ‘Multiple Access Keys’ (“MAKs”) or

[SB2/40/  
430-432]

<sup>10</sup> Application No. 885/12 [\[2022\] ECHR 647](#).

[Auth/51]

<sup>11</sup> Case C-182/24 *SACD*, [EU:C:2025:979](#).

[Auth/34]

product keys supplied to a local ‘Key Management System’ (“KMS”) and contemporaneous de-activation of the originals for the security and protection of Microsoft’s copyright interests. The procedure permits transfer when the first purchaser has fully paid for the user rights to the Microsoft Products it ‘bought’.

13. VL originally used the PLTF procedure in the course of carrying on business as an intermediary in ‘second hand’ sales of user rights to Microsoft Products. As confirmed in its Admissions, verified by a Statement of Truth:

*“Prior to on or around early 2018, [VL’s] practice was to file a PLTF form with Microsoft for each sales transaction. Microsoft invariably acknowledged each of these PLTF filings without raising any issues, sometimes after making some factual inquiries.”*<sup>12</sup>

[SB1/5/  
26]

14. In 2018, VL decided to intermediate in such sales without recourse to Microsoft’s PLTF procedure. As confirmed in its verified Admissions: *“Following early 2018, [VL] stopped filing PLTF forms. This is because it is unnecessary to seek the consent of Microsoft to re-sell Product whose copyright has been exhausted by a first sale”* (ibid). This coincided with VL being sued by Microsoft in the High Court in London for copyright infringement.

[SB1/5/  
26]

15. Since then, VL has traded on the basis asserted in [20]-[21] of its Re-Amended Particulars of Claim, to the effect that it was entitled as of right to transact as it did in Microsoft Products by virtue of the ‘exhaustion’ rule in Art 4(2) of the Software Directive and based on this asserted entitlement brought a claim against Microsoft alleging infringements of competition law. That is how and why the parties come to be contesting their strict legal rights in the context of the present PI Trial proceedings in relation to the ‘Sample Transactions’, each involving the ‘second hand’ sale of Microsoft Products otherwise than by way of Microsoft’s (zero-cost, orderly, consensual and fully effective) PLTF procedure for transfer.

[CB/15/  
215-216]

### **The Preliminary Issues directed by the CAT**

16. The CAT ordered the trial of the two PIs at the joint request of the parties. VL has accepted that PI 2 is entirely dispositive of its claim if it is resolved in Microsoft’s favour and that if PI 1 is resolved in Microsoft’s favour, VL’s claim for damages would be reduced to a *de minimis* amount.

17. The CAT required — and the parties agreed to — the inclusion of the context specifying words *“... in the circumstances of this case ...”*. The Sample Transactions were nominated by the parties as test cases to provide the required context. It is necessary to bear in mind that: (i) Art 8 of the Software Directive provides: *“The provisions of this Directive shall be without prejudice to ... the law of contract”* subject only to the limited caveat that: *“Any contractual provisions contrary to Article 6 or*

[Auth/3/26]

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<sup>12</sup> p.7 of Admissions verified by Statement of Truth dated 14 August 2025.

[SB1/5/  
26]

to the exceptions provided for in Article 5(2) and (3) shall be null and void”; and (ii) Art 9 of the [Auth/1/12] Infosoc Directive provides without any further qualification: “This Directive shall be without prejudice to provisions concerning in particular... the law of contract.”

18. As specified in [3] of the CAT’s Order dated 31 July 2025, VL continued to be the Claimant for [SB1/10/183,203,151,194-202] the purposes of the PI Trial. It accordingly had the burden of establishing — in the context and 92] circumstances of the Sample Transactions — its claimed entitlement to act as of right and autonomously of Microsoft as an intermediary in the sale and supply of ‘second hand’ Microsoft Products under and by virtue of the ‘exhaustion’ rule in Art 4(2) of the Software Directive.

### **The Applicable Law**

19. The geographical ‘footprint’ of VL’s claim for damages covers the whole of the UK and EEA. The period of the claim runs from 1 January 2014 – 31 December 2022. The law applicable to the determination of the PIs is the EU law in force at the time of the events in question.<sup>13</sup> The obligations in Arts 220-222 of the EU-UK Trade and Cooperation Agreement requiring the UK to comply with the [Auth/47/957-8] international agreements in the field of intellectual property to which it and the EU are parties have also now been made effective in the UK by s 29 of the European Union (Future Relationship) Act 2020: [Auth/7/65] see *Iconix Luxembourg v Dream Pairs Europe*.<sup>14</sup>

### **The PI Judgment**

20. The Rulings in [108], [185] and [186] of the PI Judgment proceed on the erroneous premise that [CB/12/183,203,151,194-202] the NPWs made accessible or perceptible by means or use of the Products (defined in [2] of the PI Judgment) can and should in alignment with *UsedSoft* considerations (addressed in [157]-[182]) be 194-202] treated as “subsumed within” the computer programs by means or use of which they are made accessible or perceptible (at [177]) so as to bring them within the scope of the operation of the [CB/12/200] exhaustion rule in Art 4(2) of the Software Directive to the exclusion of the different exhaustion rule 200] in Art 4(2) of the Infosoc Directive.

21. The central tenet of that approach is wrong for multiple reasons permeating and vitiating the Rulings, as summarised in the Grounds of Appeal.

### **Ground 1(i) of the Grounds of Appeal**

22. The CAT erred by failing to proceed in conformity with the following governing principles.

23. The Software Directive operates as a *lex specialis* relative to the Infosoc Directive. It establishes a regime for *sui generis* legal protection of “computer programs, by copyright, as literary works” (Art [Auth/3/25]

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<sup>13</sup> *SkyKick UK v Sky* [2024] UKSC 36 at [511] (Lord Reid PSC) (the other Justices agreed).

<sup>14</sup> [2025] UKSC 25 at [18] per Lord Briggs and Lord Stephens JJSC (the other Justices agreed).

1). A comprehensive overview of the operation of the twin legislative regimes for the protection of computer program and NPWs is provided in the Judgment of Arnold LJ (Warby and Asplin LJJ agreeing) in *Wright v BTC Core*.<sup>15</sup> As confirmed at [39]:

[Auth/13/237]

“... claims to copyright protection in computer programs must be assessed by reference to the *Software Directive* rather than by reference to the *Information Society Directive*. This has certain consequences, for example, with regard to the applicable exceptions and limitations and the applicable exhaustion rules”.

24. As the CAT correctly held in [51] of the PI Judgment: “No consideration was given in *UsedSoft* [CB/12/168] to the impact on exhaustion of any non-program works associated with the Oracle Software and the effect of the *Infosoc Directive* on those works.” *UsedSoft* is not instructive, still less authoritative, in relation to something it did not consider or decide. All the more so, given that the CJEU made it explicit that far from equating or assimilating them, it was distinguishing between the operation and effect of Art 4(2) of the *Software Directive* on the one hand and Art 4(2) of the *Infosoc Directive* on the other (see *UsedSoft* at [60]):

[Auth/20/462]

“...even supposing that Article 4(2) of [the *Infosoc Directive*] ... indicated that, for the works covered by that directive, the exhaustion of the distribution right concerned only tangible objects, that would not be capable of affecting the interpretation of Article 4(2) of [the *Software Directive*], having regard to the different intention expressed by the European Union legislature in the specific context of that directive.”

25. Article 8 of the *Software Directive* is headed “*Continued application of other legal provisions*”. [Auth/3/26] It clearly and unequivocally states — in mandatory terms — that:

“The provisions of this Directive **shall be without prejudice to any other legal provisions such as those concerning** patent rights, trade-marks, unfair competition, trade secrets, protection of semi-conductor products or the law of contract” (emphasis added).

The emphasised words are a legislative expression of the EU law principle of ‘concurrent and cumulative protection’ of intellectual property rights. As also are Recital (60) (“The protection provided under this Directive should be without prejudice to national or Community legal provisions in other areas”) and Arts 1(2) and 9 of the *Infosoc Directive* (Art 1(2) “**Scope** ... this Directive shall leave intact and shall in no way affect the existing Community provisions relating to: (a) the legal protection of computer programs... ”); (Art. 9 “**Continued application of other legal provisions**. This Directive shall be without prejudice to provisions concerning in particular patent rights, trade marks,

[Auth/1/9]

[Auth/1/9]

[Auth/1/12]

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<sup>15</sup> [2023] EWCA Civ 868 at [20]-[60] (Arnold LJ).

[Auth/13/229]

*design rights, utility models, topographies of semi-conductor products, type faces, ...trade secrets, security, confidentiality, data protection and privacy, ... the law of contract... ”).*

26. Art 8 of the Software Directive cannot fail to guarantee the “*continued application*” of the “*legal provisions*” of the Infosoc Directive to NPWs to the full extent of the requirement imposed by Art 9(1) of the TRIPs Agreement and Art 1(4) of the WCT to treat them as “Protected Works” in accordance with Art 2 of the Berne Convention: *Kwantum Netherland BV*<sup>16</sup> at [40].

27. The EU law principle of ‘concurrent and cumulative protection’ of IP rights is well-established in CJEU case law. For example, in *Gomboc*<sup>17</sup> at [48]–[62], the Court emphasised that EU law does not prevent the coexistence of several forms of legal protection, with the result that “*the rules of EU law concerning the registration of designs and those applicable to the registration of trade marks are independent, without any hierarchy existing as between those rules*” (at [54]). [Auth/29/669]

28. The application of the ‘concurrent and cumulative protection’ principle to the Software Directive and the Infosoc Directive is — directly and relevantly for present purposes — exemplified by *Nintendo*, where the CJEU determined (adopting and applying the reasoning of [34]-[35] of the Advocate General’s Opinion cited above): [Auth/21/475]

[22] “*As regards the parts of a work, ... there is nothing in [the Infosoc Directive] indicating that those parts are to be treated any differently from the work as a whole. It follows that they are protected by copyright since, as such, they share the originality of the whole work (see Infopaq International, paragraph 38).*”

[23] “*...complex matter comprising not only a computer program but also graphic and sound elements which, although encrypted in computer language, have a unique creative value which cannot be reduced to that encryption ... the graphic and sound elements, are part of its originality, they are protected, together with the entire work, by copyright in the context of the system established by [the Infosoc Directive]*”

29. In *Cofemel*,<sup>18</sup> at [52] the CJEU affirmed that “*protection of designs and the protection associated with copyright may, under EU law, be granted cumulatively to the same subject matter.*” The Court most recently reaffirmed in *Mio AB* and *USM*<sup>19</sup>— in terms which are transposable to the differences in subject matter and scope between the legislative regimes for Software Directive protection and Infosoc Directive protection — at [54]-[56] that: [Auth/27/597] [Auth/35/800]

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<sup>16</sup> Case C-227/23, [EU:C:2024:914](#).

<sup>17</sup> Case C-237/19, [EU:C:2020:296](#).

<sup>18</sup> Case C-683/17, [EU:C:2019:721](#).

<sup>19</sup> Joined Cases C-580/23 and C-795/23, [EU:C:2025:941](#).

[Auth/29]

[Auth/27]

[Auth/35]

“subject matter protected as a design is not as a general rule capable of being treated in the same way as subject matter constituting works protected by [the Infosoc Directive] ... there is no automatic connection between the grant of protection under the law on designs and protection under the law of copyright ... the conditions for such protection ... must not be confused ... the protection reserved for designs and the protection ensured by copyright are not mutually exclusive ... and may be granted cumulatively to the same subject matter ...” [Auth/35/801]

30. It is axiomatic that no court at the national level can lawfully alter, eliminate, reduce or undercut the scope and effect of EU legislation such as that contained in Art 4(2) (or any other provisions) of the Infosoc Directive.<sup>20</sup>

31. Decisively for present purposes the CJEU ruled in relation to Art 4(2) of the Infosoc Directive in Case C-419/13 *Art & Allposters*,<sup>21</sup> at [30] that: [Auth/22/502]

“according to the case-law of the Court, Article 4(2) does not leave it open to the Member States to provide for an exhaustion rule other than that set out in that provision”.

32. Further, it is objectively justifiable to apply different legislative treatment to the supply of digital and physical copies of a work. That is established by EU and UK Supreme Court authority.<sup>22</sup> In *RPO* [Auth/25] the CJEU was not deflected or deterred from ruling to that effect by anything it had said in *UsedSoft* (and in [44] and fn 35 of her Opinion ([EU:C:2016:664](#)) Advocate General Kokott reminded the CJEU [Auth/25/542] of what it had not long previously said in *UsedSoft* at [61] about the economic similarity between the [Auth/20/462] sale of a computer program on a CD-ROM or DVD and the sale of a computer program by downloading from the internet). In *Tom Kabinet* at [57]-[58] the Court ruled affirmatively that digital and physical [Auth/28/654] copies of a work are not economically and functionally equivalent for the purposes of copyright protection under the Infosoc Directive.

33. Such different treatment is also required by the Agreed Statement concerning Arts 6 and 7 of the WCT (“the expressions ‘copies’ and ‘original and copies’, being subject to the right of distribution ... refer exclusively to fixed copies that can be put into circulation as tangible objects”) and the obligation [Auth/45/891]

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<sup>20</sup> Case C-469/17 *Funke Medien NRW GmbH*, [EU:C:2019:623](#) at [56], [62]-[63]; Case C-661/11 *Martin Y Paz Diffusion SA*, [EU:C:2013:577](#) at [60]; Case C-500/14 *Ford Motor Company*, [EU:C:2015:680](#) at [44], [45]; [Case C-452/24 Lunapark Scandinavia Oy Ltd](#), [EU:C:2025:618](#) at [38].

<sup>21</sup> [EU:C:2015:27](#).

<sup>22</sup> Case C-390/15 *Rzecznik Praw Obywatelskich (RPO)*, [EU:C:2017:174](#) at [41], [49]-[51], [53] et seq, [Auth/25/530-2] [70], [71]; *News Corp UK & Ireland Ltd v HMRC* [\[2023\] UKSC 7](#) at [1], [55]-[58] and [115]-[117]. [Auth/12/201-2] [Auth/12/217-18]

to interpret and apply the WCT in accordance with Art 31(2)(a) of the Vienna Convention on the Law of Treaties as recognised and required by EU law: *Art & Allposters*<sup>23</sup> at [15].

[Auth/40/852]

[Auth/22/503]

34. The CJEU definitively confirmed in *Tom Kabinet*<sup>24</sup> at [55]-[56] that such different treatment is legislatively mandated for the purposes of the exhaustion rule in Art 4(2) of the Infosoc Directive:

[Auth/28/654]

*“... The relevant provisions of [the Software Directive] make abundantly clear the intention of the EU legislature to assimilate, for the purposes of the protection laid down in that directive, tangible and intangible copies of computer programs, so that exhaustion of the distribution right under Article 4(2) of [the Software Directive] concerns all such copies ... Such assimilation of tangible and intangible copies of works protected for the purposes of the relevant provisions of [the Infosoc Directive] was not, however, desired by the EU legislator when it adopted that directive. As has been recalled in paragraph 42 of the present judgment, it is apparent from the travaux préparatoires for that directive that a clear distinction was sought between the electronic and tangible distribution of protected material”.*

35. The PI Judgment correctly concluded in [183], but then failed to apply the principle, that:

[CB/12/202]

*“Non-program works have a right to protection under the Infosoc Directive which (according to Tom Kabinet) provides that online distribution of those works does not affect the distribution right and are instead communications to the public to which exhaustion does not apply.”*

36. The intentional legislative **inclusion** of digital exhaustion within the scope of Art 4(2) of the Software Directive and the intentional legislative **exclusion** of digital exhaustion from the scope of Art 4(2) of the Infosoc Directive must operate as mandatory and unmodifiable legislative obligations.

37. Article 4(2) of the Infosoc Directive accords with EU competition policy by contributing to the institution of a system ensuring that competition in the internal market is not distorted. In *Laserdisken ApS*,<sup>25</sup> at [44]-[51] under the heading “*The Treaty rules relating to the establishment of a competition policy*” the CJEU rejected claims:

[Auth/16/307-8]

*“that the exhaustion rule laid down in Article 4(2) of [the Infosoc Directive] reinforces suppliers’ control of the distribution channels, thereby adversely affecting free competition” and “gives holders of copyright and related rights a level of protection of their interests going beyond the purpose of such rights.”*

38. It did so on the basis that:

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<sup>23</sup> Case C-419/13, [EU:C:2015:27](#) at [38]-[40].

[Auth/22/503]

<sup>24</sup> Case C-263/18, [EU:C:2019:1111](#) at [55], [56]

[Auth/28/654]

<sup>25</sup> Case C-479/04, [EU:C:2006:549](#).

[Auth/16]

[48] “...according to the first recital in the preamble to [the Infosoc Directive], harmonisation [Auth/16/308]  
of the laws of the Member States on copyright and related rights contributes to the establishment  
of the internal market and to the institution of a system ensuring that competition in that market  
is not distorted.”

[49] “It follows that the harmonisation achieved by that directive is also intended to ensure  
undistorted competition in the internal market, in accordance with Article 3(1)(g) EC.”

### **Ground 1(ii) of the Grounds of Appeal**

39. The PI Judgment was contrary to the established CJEU case law, including:

a) Sony, to the effect that:

*“the protection guaranteed by [the Software Directive] is limited to the intellectual [Auth/33/765]  
creation as it is reflected in the text of the source code and object code and, therefore, to  
the literal expression of the computer program in those codes ...”* (at [38]).

b) Sony (reiterating what the Court said in BSA) to the effect that: [Auth/18/381]

*“the graphic user interface of a computer program, which does not enable the reproduction [Auth/33/765]  
of that program, but merely constitutes one element of that program by means of which  
users make use of the features of that program, does not constitute a form of expression of  
a computer program ...”* (at [35]).

c) Nintendo to the effect that:

*“complex matter comprising not only a computer program but also graphic and sound [Auth/21/475]  
elements, which, although encrypted in computer language, have a unique creative value  
which cannot be reduced to that encryption”* (at [23]).

40. The referring court in *Sony* (the German BGH) embraced and acted upon the law as stated in (a) and (b).<sup>26</sup> If, when and because a work is **not** a “computer program”, it falls to be regarded as a work that is, in principle, capable of protection by copyright within the framework of the Infosoc Directive. Thereafter the incidents of such protection, including the applicable rule of exhaustion, follow from – and only from – the Infosoc Directive. The CAT was wrong not to recognise and apply this axiomatic principle.

### **Ground 1(iii) of the Grounds of Appeal**

41. The relative attributes and characteristics of the code which constitutes the protected expression of a “computer program” on the one hand and the creative expressions of the NPWs on the other sets

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<sup>26</sup> Case I ZR 157/21 Action Replay II (31 July 2025) at [20].

them apart for the purposes of interpreting and applying the category rule in Art 4(2) of the Software Directive and the category rule in Art 4(2) of the Infosoc Directive.

42. As Advocate General Szpunar said at [57] of his Opinion in *Tom Kabinet*:<sup>27</sup>

[Auth/28/635]

*“Although the computer program may be expressed in language comprehensible by man, in any event by those having certain qualifications (the source code), that is not the purpose of the program. Its purpose is to be understood and executed by the machine, the interest for the user of the program arising not from reading the program, but from the functioning of that machine. For the user, reading lines of a program code would be as useful as drinking a glass of diesel oil instead of pouring it into the tank of his vehicle. Thus, a computer program is more a tool than a work in a proper sense.”*

43. The NPWs made accessible or perceptible by means or use of Microsoft’s Office and Windows Products are not works which could or should on proper assessment of their relative attributes and characteristics be treated as “*subsumed*”<sup>28</sup> within any ‘computer programs’. The NPWs are — as [174] of the PI Judgment acknowledged — the expression of considerable creative skill and effort by their authors. It should also be noted that the ‘set up files’ for Office and Windows permitted the user to customise the installation to remove particular NPWs (Clarke 2, §12). Moreover, clip art and fonts, for example, can be used with any computer program and are therefore not limited to being used or rendered perceptible by means of a Microsoft program (e.g. Novak 1, §26).

[CB/12/  
199]

[SB2/40/  
431-432]

[SB1/32/  
351]

44. The NPWs are not a mere device for avoiding the operation and effect of Art 4(2) of the Software Directive (cf [180(2)] of the PI Judgment). PI 2 as formulated (“*in the circumstances of this case*”) did not require the issue to be determined by reference to abstract or outer extremity situations. It was obvious from the CAT’s findings at [174] that such a situation did not arise in the present case.

[CB/12/  
201]

[CB/12/  
199]

45. The PI Judgment at [116]-[145] fails to reflect the cogency and content of Microsoft’s unchallenged and uncontroverted evidence with regard to the NPWs. As the CJEU has held, GUIs and their constituent literary and artistic works are not computer program copyright works and are, in principle, capable of being protected under the provisions of the Infosoc Directive, not the Software Directive: *BSA* at [50]-[51]. A visual appreciation of the creative expression embodied in the NPWs in issue is necessary in order to see what makes them works “*which, although encrypted in computer language, have a unique creative value which cannot be reduced to that encryption*” (per *Nintendo* at [23]) and by the same token makes it untenable to characterise them as works which can or should be treated as “*subsumed within*” the computer programs in issue.

[CB/12/  
185-191]

[Auth/18/381]

[Auth/21/475]

<sup>27</sup> Case C-263/18, [EU:C:2019:697](#).

[Auth/28]

<sup>28</sup> [177] of the PI Judgment.

[CB/12/  
200]

46. Microsoft’s extensive evidence in that regard – which was unchallenged – was summarised in [86]-[94] of its skeleton argument for PI Trial dated 2 September 2025. Rather than re-summarising those paragraphs here, they will be provided to the Court in the Supplementary Bundle. [SB2/46/514-518]

### **Ground 2(i) of the Grounds of Appeal**

47. The central tenet of the approach referred to in §§20-21 above was wrongly integrated into the Ruling on PI 1 in [108] of the PI Judgment. That PI was designedly and in terms directed to the operation and effect of Art 4(2) of the Software Directive with respect to “*the copyright in a computer program*” and the “*first sale of a copy of that program*”. The CAT materially changed the frame of reference, turning it into a question about “*the distribution right and reproduction right enjoyed by Microsoft in the Products*” (in lieu of “*program*”) and “*subdivision and resale of the user right obtained by the first acquirer of the Products*” (in lieu of “*program*”). In that way it subsumed the NPWs into “*Products*” (as it had defined them in [2]) and thereby failed to direct its analysis to “*programs*” as required by *UsedSoft*. The reframing of PI 1 also resulted in a ruling which did not address limb (i) or limb (ii) of the PI as formulated. [CB/12/183] [CB/12/151]

48. Even if— which is not accepted — “*Products*” could serve as a proxy for “*computer program*” and “*that program*” in the context of the legal analysis required by PI 1, the Ruling and reasoning of the CAT is additionally and in any event wrong for the reasons summarised in Grounds 2(ii)-(v).

### **Ground 2(ii) of the Grounds of Appeal**

49. The CAT proceeded on the erroneous premise that Art 4(2) of the Software Directive provides for exhaustion by reference to a “*notional copy*” of the protected computer program (PI Judgment at [48] and [103]). No amount of ‘teleological or purposive’ interpretation can validate that metaphysical approach. It is contrary to the text of Art 4(2) of the Software Directive and the CJEU’s interpretation of it in *UsedSoft* at [84]. From that it can be seen that it is “*the copy on the rightholder’s website*” – not the (or any) copy made by downloading it “*onto the customer’s server*” under the “*user licence*” or any downstream copy made by the customer pursuant to that licence – which constitutes the “*copy of the computer program*” with respect to which “*the distribution right*” is exhausted on “*first sale*” by reason and by virtue of the “*indivisible link*” between “*the copy on the rightholder’s website*” and the “*user licence for that copy*”. [CB/12/167, 182] [Auth/20/466]

50. Exhaustion can only arise from the act of the rightholder in making available a copy to the purchaser on first sale. Downstream copies brought into existence by acts of the purchaser relative to the copy made available by the rightholder on first sale do not create further exhausted copies. Were it otherwise the licensee could unilaterally mint and sell any number of copies, each one of which would then be an exhausted copy and so on down the line.

51. The CAT proceeded on the erroneous premise that what was — and it accepted in [104]-[105] of the PI Judgment to be — “*a single purchase agreement*” for the downloading of a copy of the computer program from a Microsoft server “*onto a central server*” from which the customer then made and installed the requisite number of copies permitted by its licence, was to be regarded as the sale and purchase of multiple individual “*UsedSoft*” licences of the downloaded computer program (at [63]-[71]), with all such licences providing user rights free from constraints on subdivision and resale (at [89]-[107] of the PI Judgment).

[CB/12/  
182-183]

[CB/12/  
171-174]

[CB/12/  
177-183]

52. This was contrary to *UsedSoft* (and also the Judgment of the BGH on the return of that case to Germany in *UsedSoft II*) to the effect that the user right conferred on the purchaser by that form of transaction (see the CJEU at [21]-[22]) is circumscribed by all of the constraints on resale and subdivision spelled out in [22], [24], [69]-[71], [78], [79], [86] and [87] of the CJEU Judgment.

[Auth/48/995-6]

[Auth/20/456]

[Auth/20/457]  
[Auth/20/464]  
[Auth/20/

53. The Judgment of the BGH in *UsedSoft III* is not authority to the contrary: it was a fact specific Judgment based on unappealed findings of the lower courts in Germany as to the operation and effect of the particular licence arrangements put in place in that case. It appears to have relied decisively on German domestic case law and textbook materials; it is not binding or instructive with regard to the Sample Transactions in issue here. The CAT should not have disregarded or departed from the reasoning of the CJEU in *UsedSoft* (as applied by the BGH in *UsedSoft II*) on the basis of anything said in *UsedSoft III*.

[Auth/49/  
1015-16]

54. The CAT tied itself to the proposition that it would not affect the lawfulness of VL’s business or activities, or its claim in the present proceedings, if VL received and dealt in a copy of a program which had been made and/or resold by an upstream acquirer or reseller otherwise than in compliance with the conditions necessary to establish exhaustion of the distribution right (at [103] and [105] of the PI Judgment). This was contrary to *Ranks and Vasilevics*,<sup>29</sup> where the CJEU held at [38] that:

[CB/12/  
182-183]

“*The lawful acquirer of a copy of a computer program, placed on the market by the rightholder or with his consent, may, consequently, resell that program, under the rule of exhaustion of the distribution right laid down in [Article 4(2) of the Software Directive], provided that that sale does not adversely affect the rightholder’s exclusive reproduction right under [Article 4(1)(a)] of that directive and therefore subject to the condition that any acts of reproduction of that program must be authorised by that rightholder or be covered by the exceptions laid down in Articles 5 and 6 of that directive*” (emphasis added).

[Auth/24/520]

55. On proper analysis:

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<sup>29</sup> Case C-166/15, [EU:C:2016:762](#).

- a) By organising and arranging the implementation of a non-compliant transaction VL would itself have been perpetrating or participating in infringement of the distribution and/or reproduction right by its supplier;
- b) Such transactions could not be effective to pass any lawful right to use and reproduce the computer programs concerned, which would exceed the rights of the supplier;
- c) VL and its downstream purchasers would not be “*lawful acquirers*” under Art 5(2) of the Software Directive;
- d) Even if a valid user right to use the computer program did pass to VL and/or its customers, VL’s business activity would still depend upon and necessarily derive from wrongful interference with Microsoft’s copyright protected interests such that no claim by VL for damages could legitimately be founded on loss of the opportunity to profit therefrom.

56. The CAT also proceeded on the erroneous premise that the onus was on Microsoft to establish that VL’s dealings in and in relation to Microsoft’s computer programs in the Sample Transactions were not compliant with all applicable constraints on resale and distribution (at [106], [107] of the PI Judgment). [CB/12/183]

57. This was contrary to *Ranks and Vasilevics*, where the CJEU held at [56] that: [Auth/24/522]

*“...it is for the acquirer of an unlimited licence for the use of a used copy of a computer program who, relying on the rule of exhaustion of the distribution right, downloads a copy of that program onto his computer from the rightholder’s website, to establish by any available evidence, that he acquired that licence in a lawful manner”.*

58. Consistently with this principle and with it being the Claimant in the PI Trial, VL had the onus of establishing that its dealings in and in relation to Microsoft’s computer programs in the Sample Transactions were compliant with all applicable constraints on reproduction and distribution.

**Ground 2(iii) of the Grounds of Appeal**

59. The CAT misconstrued the licence agreements applicable to the Sample Transactions, wrongly holding that the relevant transactions were “*an agreement to provide a bundle of licences (up to an agreed number) to download, copy and use the Products from the Microsoft server*” (PI Judgment at [70]). The terms of the agreements made clear that usage rights were granted in a block corresponding to the greater of: (a) the specified minimum; and (b) the specific number of eligible users and/or devices within the customer’s organisation (the latter representing the licensee’s ‘Enterprise Commitment’ by which it undertook, in exchange for favourable pricing and payment terms, to secure licensing for the relevant Microsoft Products on an enterprise-wide basis). In doing so, the CAT failed to have regard to the nature of the customer’s obligation to order and maintain a specific quantity of user rights. [CB/12/173]  
[SB1/34/366-369]

60. This PI relates to enterprise licensing in large volumes; it does not relate to sale of individual copies to end users or SMEs.

61. The Sample Transactions conferred block user rights (with correspondingly beneficial commercial terms, including significant volume discounts over the price of individual consumer user rights) bilaterally between Microsoft and a named Enterprise pursuant to a suite of contracts – the ‘Enterprise Program Agreements’ (SoF §§7-20) under which:

[SB1/7/  
40-46]

a) An umbrella contract called the Enterprise Enrollment is entered into between a named Microsoft enterprise customer (“**Customer**”), which incorporates other contractual terms including an ‘Enterprise Agreement’ and ‘Master Business and Services Agreement’;

b) A key feature of the Enterprise Enrollment is that, to participate, the Customer must give the volume licensing commitments set out in clause 2(a), namely:

[SB1/13/  
110]

i. To have a minimum of 500 ‘Qualified Users’ (a person who uses a Qualified Device or accesses server software) or ‘Qualified Devices’ (a client device used by or for the benefit of the Enterprise, such as a desktop computer or laptop); and

ii. To order ‘enough Licenses from the Product pool for each Enterprise Product ordered to cover all Qualified Users and/or all Qualified Devices’ (the ‘Enterprise Commitment’);

c) VL’s witness, Mr Golev, described the Enterprise Program as “*its core licensing condition, its core principle*”. He explains the commitment in his training materials:

[SB/29/310]

*“for your end-user computing base, you have to commit to buy a license for every user or every computer depending on the type of the “platform product” that you select. You get all the benefits of an Enterprise Agreement in exchange for that commitment to license everyone or everything with a certain platform product or a set of platform products”.*

d) Increasing or reducing the number of Qualified Users or Qualified Devices requires contractual adjustment. This is done according to specific contractual provisions agreed between Microsoft and the licensee for increasing or reducing the number of Qualified Users and Qualified Devices on an annual basis (the ‘true-up’ procedure): see clause 2(h). A further procedure exists under the Enterprise Agreement where an acquisition or divestiture results in a substantial change to the licensed quantity required by the Customer: see clause 2(g);

[SB1/13/  
110-111]

[SB1/12/  
104-105]

e) The effect of the Enterprise Agreement is to permit the Enterprise (including any of its ‘Enrolled Affiliates’, such as wholly-owned subsidiaries) to “*download, install and use*” the ordered Microsoft Products (such as Office and Windows) placed by the Customer. The operative licence grant is that set out at clause 2(a) of the Enterprise Agreement which is in these terms:

[SB1/12/  
104]

*“License Grant. Microsoft grants the Enterprise a non-exclusive, worldwide and limited right to download, install and use software Products ... **each in the quantity ordered under an Enrollment**. The rights granted are subject to the terms of this agreement, the Use Rights and the Product Terms. Microsoft reserves all rights not expressly granted in this agreement”;*

f) The term ‘License’ is defined in clause 1 of the Enterprise Agreement as *“the right to download, install, access and use a Product”*. The License Quantity is therefore the number of Qualifying Users or Qualifying Devices who may download, install, access and use each Product which has been ordered in a particular quantity under an Enrollment; [SB1/12/103]

g) The Customer is permitted to make *“as many copies of Products as it needs to distribute them within the Enterprise”* (clause 3(a)) subject to the terms of the Enterprise Agreement (i.e. up to the limits of the quantity of Qualified Users and Qualified Devices); [SB1/12/105]

h) The Product Selection Form stipulates a single agreed price with specified parameters for licensed use of the purchased Product(s) up to the limits set by the prescribed number of ‘Qualified Users’ and ‘Qualified Devices’. These limits are set out in the column ‘Enterprise Quantity’ against each product; and [SB1/14/117]

i) Based on the quantity ordered by the Customer for each ‘Product pool’, one of four price levels (A, B, C, or D) is ascribed: as one might expect, pricing becomes more favourable to the Customer the greater the ordered quantity: see clause 3(a). [SB1/13/112]

62. The significance of these points is that they identify how the transaction (i.e. the first sale said to give rise to exhaustion) is actually implemented within the contractual framework and specify the parameters and scope of the licence purchased.

63. The delivery of the purchased Product(s) is effected by authorising and enabling the Enterprise to login to a dedicated Microsoft website called the VLSC, from which the Customer may securely download a copy of the ordered Product(s) in copy-protected form. The relevant technical measures comprise product keys known as MAKs and KMS and a technical process of activation which is necessary to use the Product(s). MAKs are unique product keys issued to the Enterprise; they are specific to the Customer, Product and version. Where there is a genuine business reason for an additional or replacement MAK (e.g. to activate more Qualified Users), they may be requested from Microsoft according to a specific procedure and will remain unique to that Enterprise. [SB1/35/374-376] [SB2/40/430-432] [SB2/43/456-458]

64. As noted above, a specific procedure exists under clause 4 of the Enterprise Agreement for transferring ‘Licenses’ for an ordered Product. Clause 4(b) of the Enterprise Agreement requires that the Customer must notify Microsoft of the proposed transfer by completing a Microsoft-published [SB1/12/106]

template, the PLTF. There were successive versions of the PLTF applicable at different times; only the current version was to be used at the time of any transfer: Iglesias 1 §16, §35. [SB2/41/439, 442]

65. The PLTF sets out a number of requirements for transfer, including that: (i) the relevant licence is fully-paid and perpetual; (ii) the particulars of the transfer are specified; (iii) the quantity of ‘Licenses’ being transferred is specified; and (iv) the Customer nominates which of the three categories the proposed transfer falls within. [SB1/15/119-123]

66. The three categories are: (a) transfer to an Affiliate (i.e. intra-group transfers); (b) transfer to a third party solely in connection with the transfer of hardware or employees to whom the Licenses have been assigned as part of a divestiture or merger; or (c) transfer with Microsoft’s consent. It is common ground that this mechanism was not used for the Sample Transactions.<sup>30</sup> In particular, it is common ground that no consent was sought or obtained by VL for a category (c) transfer in relation to any of the Sample Transactions: Iglesias 1 §§19-28. [SB2/41/439-441]

67. The Customer is required to provide to the transferee, such that the transferee “*accepts in writing, documents sufficient to enable the transferee to ascertain the scope, purpose and limitations of the rights granted by Microsoft under the Licenses being transferred*” (see clause 4(b)). It is therefore a necessary feature of the PLTF that it must be signed on behalf of the Customer, the Transferee, and Microsoft. [SB1/12/106]

### **Ground 2(iv) of the Grounds of Appeal**

68. The CAT failed to apply to the Sample Transactions the constraints on sub-division and resale which should have been applied to them in accordance with the requirements of Art 4(2) of the Software Directive as interpreted by the CJEU in *UsedSoft* and omitted to determine as it should have determined on the basis of the evidence and materials before it (which included relevant and comprehensive admissions from VL) that the Sample Transactions had not been carried out compliantly with those constraints.

69. The five Sample Transactions together account for sources of supply covering nearly [REDACTED] of VL’s total sales,<sup>31</sup> or [REDACTED]. They share several common features.

70. In each instance, VL acquired or brokered the sale of a quantity of user rights which was different to — and smaller than — any quantity of Qualified Users or Qualified Devices which had been acquired by VL’s supplier from Microsoft (i.e. the original Enterprise Customer).<sup>32</sup>

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<sup>30</sup> Nor was it used for any of VL’s transactions with its suppliers or acts of further resale.

<sup>31</sup> [REDACTED].

<sup>32</sup> SoF §29.

71. The total licensed quantities of each Microsoft Enterprise Customer, and the subsets of those rights purchased in ‘batches’ by VL, are set out for each Sample Transaction in the Statement of Facts dated 16 August 2025 produced for the purposes of the PI Trial (“SoF”): see the tables at §41, §48, §50, §52 (Rabobank); §58, §63, §65 (Volvo); §73 & Schedule 3 (Carillion), §84, §89, §91 (Achmea); and §97, §102 and §104 (ABN AMRO). In summary, Microsoft had granted an Enterprise Licence over certain products to each of the five customers, specifying the size of each block of user rights. VL went on to agree to purchase from each customer one or more divided portions of these blocks, each portion being less than the size of the block originally granted by Microsoft. VL then went on to contract to sell further divided portions of each block to over two-hundred customers, together with an agreement to provide unlocking keys equivalent to 125% of the end-customer’s requirement. [SB1/7/53, 55-58, 60-63, 65, 67-72]

72. VL did not receive (still less pass on) any copy of the licensed software from the original Enterprise Customer. Instead VL received and dealt in freestanding product keys in the form of MAKs and KMSs. It directed customers to access and download for themselves a copy of the protected software directly from Microsoft. There was no indivisible link between the copy originally licensed by the Customer, on the one hand, and the copy later obtained and made by VL’s customer, on the other. Details of the keys being transacted and instructions for downloading a copy of the Product are set out in VL’s ‘Software Licence Packs’ for each transaction: (a) Rabobank: MAKs and KMS keys; (b) Volvo: MAKs and KMS keys; (c) Carillion: MAKs and KMS keys; (d) Achmea: MAKs and KMS keys; and (e) ABN AMRO: MAKs, KMS keys and one ‘set-up key’ (understood to have been a ‘host key’ used to set up a KMS server). [SB1/25/281] [SB1/20/190] [SB1/21/232]

73. These were dealings — not in copies by means of ‘forward-and-delete’ — but in information (i.e. confidential security keys) to facilitate what was — because it was taking place without the consent and participation of Microsoft — circumvention of effective technological protection measures required for the security and protection of Microsoft’s copyright interests.

74. Under its agreements with Rabobank, Volvo, Carillion, Achmea and ABN AMRO, VL required those Microsoft licensees to procure from Microsoft and supply to VL at least 25% more MAKs than the quantity corresponding to the number of users licensed by Microsoft to the Customer in the first place. VL never explained the reasons for this (see PI Judgment at [77]-[78]): it instead maintained that they are irrelevant to the determination of PI 1, even though PI 1 was expressly directed and required to be determined “*in the circumstances of this case*”. VL’s sub-dividing was evidently conducted on the basis that more MAKs would be needed downstream of its dealings for the clients seeking to activate the new copies that they proposed to download. If using a particular MAK resulted in them being flagged and blocked for suspicious activity, VL would then have a ready supply of other MAKs to give to affected clients. [CB/12/175]

75. In each case VL provided to its customers — as part of the ‘Software Licence Pack’ due diligence documentation — a document entitled ‘Perpetual License Transfer Form’ bearing the Microsoft logo and closely resembling – but not identical to – the July 2011 Microsoft PLTF template. VL had made a number of changes to the Microsoft template, most notably to remove the signature block for the original Microsoft Customer and the transferee, and with it the requirement that the transferee accede to the relevant contractual framework of the Customer. Although VL’s altered version was **not** a genuine Microsoft PLTF, it was visually designed to give the impression to VL’s customers that the transaction had been notified to Microsoft in accordance with the requirements of its established contractual framework. These ‘VL Forms’ have accurately and correctly been designated and listed by VL’s solicitors in disclosure as “[Purported] PLTF under Enrollment [ ]”: five examples [SB1/16/124-138] (representative of many hundreds) were before the CAT.

76. The VL Forms also shared a number of other obfuscating features, including:

a) Mr Horley, VL’s Managing Director, names himself as the representative of the Microsoft Customer that is transferring the licences despite not being part of its Enterprise: Iglesias 1 §§38-42. As Ms Iglesias explains, had these VL Forms been notified to Microsoft, they would have raised a red flag, as the reuse of his name and email address does not match the customer contacts under the Microsoft licences: see Iglesias 1 §36. [SB2/41/443-444]

b) The VL Forms were not sent to Microsoft, and no notice was given of the transfers, contrary to clause 4(b) of the Enterprise Agreement. Had they been sent to Microsoft the transfers would not have been approved – which is presumably why they were not sent. [SB1/12/106]

77. Before the CAT, VL’s position on the VL Forms was (to put it no higher) difficult to follow:

a) Its position in the SoF was that: “*The purpose of the VL transfer form ... was to document the transfer to the Customer and record the quantities of Products subject to it*”: SoF §32. VL’s evidence did not support this and the Tribunal made no finding to that effect, instead (wrongly) dismissing these matters as irrelevant at [79] of the PI Judgment; [SB1/7/50] [CB/12/175]

b) VL also asserted in the SoF that “*there is no pleading on PLTFs*” and “*PLTFs have no relevance to either of the Preliminary Issues*”: SoF §34.3. This ignored the facts set out by Microsoft in the SoF itself, in accordance with the CAT’s direction in §3 of the CMC-6 Order and ignored the concededly relevant (albeit late) disclosure of the VL Forms; [SB1/7/51] [SB1/9/86-87]

c) VL’s (Mr Horley’s) evidence was that the material supplied to VL’s customers included: “*A completed Microsoft Perpetual Licence Transfer Form*” (Horley 2 §29(a)). He made no reference to the alterations made to the July 2011 template, its historic and non-standard nature, or his role in completing it; and [SB2/39/420-421]

d) Despite providing witness statement evidence in reply in Horley 3, Mr Horley did not [SB2/44/461-465] respond to Iglesias 1 or address any of the points relating to PLTFs.

78. Contrary to the CAT’s reasoning at [79] of the PI Judgment, the VL Forms formed an important [CB/12/175] part of the factual circumstances in which PI 1 falls to be determined “*in the circumstances of this case*” under the CMC-6 Order:

a) They show that VL’s business model relied on receiving a transfer of a sub-set of the Microsoft Customer’s user rights, in a quantity determined by VL and the Customer but not sanctioned by, or notified to, Microsoft;

b) VL evidently found it necessary to equip itself with “[*Purported*] PLTF” documentation visibly designed to give the impression to its customers that Microsoft had been notified of, and inferentially approved, the transfers; and

c) They highlight the practical difficulties to which sub-dividing gives rise – particularly the difficulty it presents for rightholders in policing the protection of their rights in circumstances of transfers of fractional quantities to multiple third parties, none of which are notified to the rightholder. Without notification, Microsoft has no way of knowing whether VL has ‘sold’ more than it purchased. It has no contract with VL giving it auditing rights and the downstream customer of VL would not have acceded to the associated licensing terms. This amply demonstrates the policy justifications in favour of the bright line rule laid down by the CJEU in *UsedSoft* – namely that block user rights can only be bought and sold as a block under the exhaustion rule in Art 4(2) of the Software Directive.

### **Ground 2(v) of the Grounds of Appeal**

79. Microsoft’s position on PLTFs and MAKs was advanced in the SoF, in accordance with the procedure directed and required by the CAT for the conduct of the PI Trial in the Order made on 29 May 2025 at the joint request of the parties. VL not only had ample opportunity to address, but did substantively address these matters: in the SoF; in evidence filed, and in submissions made for the purposes of the PI Trial, as well as by way of extensive Admissions made and verified by a Statement of Truth for the purposes of the PI Trial.

80. The CAT proceeded on the erroneous premise that it was not relevant (at [76]–[79] of the PI [CB/12/174-175] Judgment) for it to make findings with regard to the matters referred to in those paragraphs on the basis of the evidence, documentary materials and verified Admissions that were before it. This failed to give effect to the requirement (per *Ranks and Vasilevics* at [38] and [56]) for VL to establish lawful [Auth/24/520] acquisition of the licence “*for the use of a used copy of a computer program ... relying on the rule of [Auth/24/522] exhaustion of the distribution right*”.

81. Having regard to the information provided by VL on disclosure concerning the Sample Transactions, the CAT should have approached the evidence and materials before it on the basis that:

a) Article 6 of the Infosoc Directive mandates the protection of technological measures, *i.e.*: [Auth/1/11]

*“any technology, device or component that ... is designed to prevent or restrict acts, in respect of works or other subject matter, which are not authorised by the rightholder of any copyright or any right related to copyright”* (see Article 6(3));

b) In *UsedSoft* the CJEU confirmed that the rightholder may use *“technical protective* [Auth/20/465]

*measures such as product keys”* (at [79]) so as *“to ensure by all technical means at his disposal that the copy still in the hands of the reseller is made unusable”* (at [87]); and [Auth/20/466]

c) The legal obligation to implement protection of technological measures is further reinforced by Art 11 WCT and Art 234 EU–UK Trade and Cooperation Agreement. [Auth/45/894]  
[Auth/47/964]

82. VL’s disclosure in relation to the Sample Transactions showed that it had been operating in a manner which disregarded Microsoft’s right to protection of technological measures. More specifically:

a) VL did not transact in *“that copy”* or any copy in respect of which there had even arguably been exhaustion. It supplied product keys to its customers so they could download fresh copies from Microsoft;

b) There is therefore no *“indivisible link”* between any copy the subject of a transaction by or with Microsoft’s consent in the EEA, the material in which VL and its clients transact, and the further copy which its clients proceed to make and use (cf §§49 and 72 above);

c) VL sold or brokered the sale of special volume licence product keys (MAKs) which it required its suppliers to provide in a higher ratio than the number of licences VL purported to be acquiring. As the PI Judgment records at [77], VL’s supplier contracts in evidence mandated the relevant supplier of Microsoft licences to obtain MAKs sufficient to cover 125% of the licensed quantity being sold to VL (see, e.g., cl 5.1.1 of Carillion); [CB/12/175]  
[SB1/18/143]

d) VL’s supplier sold to it only a sub-set of the licensed quantity which it had acquired from Microsoft, meaning that the downloaded copy obtained from Microsoft remained in the hands of the supplier – along with any remaining versions of the software on Qualified Devices – and available for use by the Customer. Necessarily those retained activated copies would use the same MAKs as were being transferred to VL and its clients;

e) VL created documentation for each transaction based on an historic 2011 version of a Microsoft-branded template ‘Perpetual Licence Transfer Form’. But it had modified these forms to remove the requirement for the supplier and transferee to sign. This avoided an important

mechanism used by Microsoft to require accession by the acquiring party to the contractual terms and conditions under which Enterprise volume licences are granted; and

f) Contrary to the contract terms and mechanisms between Microsoft and VL's suppliers, transfers were not notified and no genuine PLTF was completed or sent to Microsoft.

83. The determination of PI 1 should have recognised that a 'transfer' from the first lawful acquirer of a copy of a computer program to a subsequent acquirer cannot in any event be found to have been implemented validly and effectively within the scope of Art 4(2) of the Software Directive by making a product key available to the subsequent acquirer unless the first acquirer has destroyed or made unusable — and is shown by the person relying on Art 4(2) of the Software Directive to have destroyed or made unusable — all copies of what he lawfully acquired (as recognised by the BGH in *Green-IT*).<sup>33</sup> That was not shown here, and could not be shown in the circumstances of the Sample Transactions, since (as was common ground) the original Microsoft Customer retained copies of the licensed computer programs within its possession for its ongoing use after its purported disposal of the subset of user rights.

[Auth/50/  
1051-2]

### **Ground 3 of the Grounds of Appeal**

84. The Ruling on PI 2 impermissibly deprives Microsoft of legal protection for its property, the distribution right reserved to it by the copyrights conferred by the *Infosoc Directive*, in the NPWs. There is a positive obligation to provide protection for intellectual property<sup>34</sup> notably by way of effective remedial measures: *Safarov v Azerbaijan*,<sup>35</sup> Case C-182/24 *SACD*<sup>36</sup> at [60], [67]-[73], [78].

[Auth/51/1062-3]  
[Auth/34/781-3]

### **Ground 4 of the Grounds of Appeal**

85. The CAT should have ruled to the effect set out in Section 9 of the Appellant's Notice, reiterating [146.1] and [146.2] of Microsoft's skeleton argument for the PI Trial dated 2 September 2025.

[SB2/46/  
534]

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<sup>33</sup> [Case I ZR 4/14](#) at [49]-[52].

[Auth/50/1051-2]

<sup>34</sup> The guarantees provided by Article 17(2) of the EU *Charter of Fundamental Rights* and ECHR Art 1, Protocol 1.

[Auth/4/31]  
[Auth/38/844]

<sup>35</sup> Application No. 885/12 [\[2022\] ECHR 647](#) at [21]-[25], [30]-[32], [36], [37].

[Auth/51/1062-3]  
[Auth/51/1064-5]  
[Auth/51/1066]

<sup>36</sup> [EU:C:2025:979](#).

[Auth/34]