Appeal Number: CA-2025-003082

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL

Justin Turner K.C. (Chair), Andrew Lykiardopoulos K.C., Anthony Woodgate

Judgment dated 12 November 2025: [2025] CAT 75

BETWEEN:

JJH (ENTERPRISES) LIMITED
(TRADING AS VALUELICENSING)

Claimant/ Respondent

and

(1) MICROSOFT CORPORATION

(2) MICROSOFT LIMITED

(3) MICROSOFT IRELAND OPERATIONS LIMITED

Defendants/ Appellants

RESPONDENT'S SKELETON ARGUMENT

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21 January 2026

INTRODUCTION

1. This is the appeal of a trial of two preliminary issues in the Competition Appeals Tribunal on copyright exhaustion in software products ([2025] CAT 75 (**"Judgment"**)). *[Core/12/148]*

2. The Preliminary Issues arise in the context of a competition claim brought by the Claimant ("**VL**"), alleging that the Defendants (together **"MS"**) acted unlawfully in relation to the markets for desktop operating systems and office productivity suites (RAPOC §§2-3, 9, 40). At the relevant time, VL was a re-seller of pre-owned MS products, and the conduct in issue primarily affected that market – in essence, VL alleges that MS engaged in unlawful conduct the aim of which was to stifle the sale of pre-owned licences for MS software (see Judgment [3]-[5]). By its Re-Amended Defence ("**RADEF**"), MS allege (as an "*alternative defence*") that it has *never* been lawful to re-sell pre-owned Office and Windows software distributed by MS in intangible form, that VL's business model of splitting volume licences for resale was in any event unlawful and that, in consequence, VL cannot have suffered loss because there was never a lawful market for the products VL was seeking to sell (RADEF §23D).[1] *[Core/15/211, 212, 221]* *[Core/16/151]* *[Core/16/259]*

3. The legal context in which VL's business was founded was the EU Court of Justice decision in *UsedSoft GmbH v Oracle International Corp* EU:C:2012:407 (C-128/11; **"*UsedSoft CJEU*"**). That case determined that the sale or distribution of an intangible copy of a computer program would exhaust the distribution right in that copy (such that it could then be freely re-sold by the first acquirers on a "pre-owned" basis). The Preliminary Issues relate to the scope and effect of this doctrine of digital exhaustion of copyright. The effect of the Tribunal's Judgment is that, contrary to MS's arguments, there was a lawful resale market in the EEA in the relevant period.

4. That stands to reason. From VL's incorporation in 2008, there was a large market for re-sold software in the UK and EEA, involving roughly 50 substantial businesses (Horley 2 §§6-10). MS took no steps to seek to shut down those businesses by raising the arguments advanced in PI1 and PI2 at any time in the thirteen years between 2008 and the issue of this claim. *[Supp/39/410]*

5. Although the matters in issue are primarily issues of legal principle, as set out at [12]-[15] of the Judgment, there is evidence and a partially agreed Statement of Facts (the "**SoF**"). *[Supp/7/38]*

[1] MS also rely on this point as part of an objective justification defence (RADEF §58.1). *[Core/16/278]*

The SoF includes contested material, but the Tribunal did not consider it necessary to resolve these disputes to address the Preliminary Issues (Judgment [14]). In the course of the trial, the Tribunal (on request) was provided additional information about the software products in issue. The role of this evidence was to account for the relevant background to these issues of principle. *[Core/12/155]*

6. VL submits that the Tribunal's Judgment should be upheld on both Preliminary Issues for the reasons given by the Tribunal (which reasons VL adopts in full). The Tribunal's decision is principled, gives effect to the relevant principles set out in the CJEU case law, and leads to an economically rational result that avoids the making of arbitrary distinctions on the basis of the number of licences that VL happens to resell to a particular customer (PI1) or between digital and CD-ROM distribution (PI2).

MS'S GROUNDS OF APPEAL

7. MS raise four grounds of appeal. Grounds 1 and 3 relate to PI2. Ground 2 relates to PI1. Ground 4 does not appear to be a free-standing ground of appeal. The Grounds are prolix, hard to construe and fail to lay out the parameters and substance of the appeal with any focus. Indeed, although MS principally advance two Grounds, these comprise multiple sub-grounds with the result that there are as many as 20 sub-Grounds (six in Ground 1(i), two in Ground 1(ii), two in Ground 1(iii), three in Ground 2(i), three in Ground 2(ii), and one each in Grounds 2(iii), 2(iv), 2(v), 3 and 4). Some are premised on unpleaded or new points, or challenge findings of fact or case management decisions of the Tribunal without any arguable basis. Several of these sub-Grounds appear not to be argued in MS's skeleton ("**MS Skeleton"**); VL proceeds on the assumption that it must address only those that are. *[Core/08/90]* *[Core/09/94]*

8. The PIs themselves raise novel points of law, and the Tribunal granted permission to appeal on that basis, without reference to the Grounds. This means that MS's appeal is partly premised on unarguable challenges to the Tribunal's findings of fact and to unpleaded issues. The Court is respectfully invited to be wary of this.

EU LAW AND THE RELEVANT LEGAL FRAMEWORK

9. It was (and remains) common ground that the Preliminary Issues should be resolved as a matter of general EU law rather than taking a UK-specific approach (Judgment [19] and MS Skeleton §19). The focus of the Judgment was therefore the EU Directives and CJEU case law. This approach has been taken because VL seeks damages for loss relating to an *[Core/12/157]* *[Core/09/102]*

EEA-wide market (RAPOC §2). MS's arguments are only available to them if MS can establish that it was unlawful to re-sell software throughout the EEA. *[Core/15/211]*

10. In relation specifically to the UK, this claim was issued in 2021 and seeks damages for a period between 1 January 2016 and 31 December 2022. During that period, the Copyright Designs and Patents Act 1988 ("**CDPA**") had to be construed in conformity with the EU copyright directives and CJEU case law on the basis of the *Marleasing* principle (see e.g. *Re Allied Wallet* [2022] EWHC 402 (Ch) at [56]-[57]). Section 3 of the Retained EU Law (Revocation and Reform) Act 2023 ("**2023 Act**") repealed the principle of EU law supremacy, but this repeal is prospective only and does not affect litigation concerning matters prior to the end of 2023 (s.22(5) of 2023 Act; see also *AFM & SAG-AFTRA v Sec of State* [2025] EWHC 1944 (Ch) at [101]).

11. As is well known, a purposive approach should be taken to the interpretation of the EU legislation, having regard in particular to the purpose of the legislation and its effectiveness or "*effet utile*" (*Re Olympus* [2014] EWHC 1350 (Ch) [47]-[49]). For this purpose, even where the wording of the legislation appears clear, "*it is still necessary to refer to the spirit, general scheme and the context of the provision or the practicalities of its operation*" (see *Ibid* [48]; see also *Shanning International Ltd v Lloyds TSB Bank Plc* [2001] UKHL 31 at [23]-[24] and [33]).

COPYRIGHT EXHAUSTION, THE TREATY FRAMEWORK AND THE RELEVANT EU DIRECTIVES

Relevant international treaties

12. The treaty framework applicable to copyright and copyright in computer programs is summarised in *Wright v BTC Core* [2023] EWCA Civ 868 ("***Wright***") [20]-[23]. As identified at [21] and [22] of *Wright*, signatories of the Agreement on Trade-related Aspects of Intellectual Property Rights (**"TRIPS"**) and the WIPO Copyright Treaty ("**WCT**") (which include the UK and EU) must provide copyright protection for computer programs and such programs are to be protected as "*literary works*" within the meaning of Article 2 of the Berne Convention (see Article 10(1) of TRIPS and Article 4 of the WCT).

13. The issue of exhaustion is addressed at Article 6 of the WCT (emphasis added):

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.

(2) ***Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies*** *after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author.*

14. It follows (as the Judgment correctly records at [24]), that the WCT has left contracting states free to come up with their own approach to the issue of exhaustion. Article 6(2) of the WCT is a provision which applies to all copyright works covered by the WCT without distinction. It therefore also follows that contracting states are at liberty to apply different exhaustion conditions for different types of copyright work. *[Core/12/158]*

15. This position is not affected by the Agreed Statement on Articles 6 and 7 of the WCT which reads as follows:

Agreed statement concerning Articles 6 and 7*: As used in these Articles, the expressions "copies" and "original and copies", being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.*

16. The purpose of this Agreed Statement is to impose a minimum standard on contracting states: WCT countries must provide for a distribution right under Article 6(1) that applies at least to the distribution of tangible copies of copyright works. The Agreed Statement does not affect the issue of copyright exhaustion or restrict the ability of contracting states to provide for digital exhaustion of particular types of copyright work (see WIPO Guide to the Copyright and Related Rights Treaties at CT 6.3-4 and 8.13). That interpretation of the position is supported by a decision of the Bundesgerichtshof in *UsedSoft II* at [38]-[40].

17. There is an (undeveloped) suggestion in the MS Skeleton that the Tribunal's decision is inconsistent with these treaties (see e.g. §33). That is incorrect. The issue of digital exhaustion is not harmonised at an international level and the EU is and has always been free to provide for digital exhaustion. Given that Article 6 of the WCT applies to copyright works of every kind, the effect of MS's argument is that the EU itself is in breach of its *[Core/09/105]*

international obligations in adopting digital exhaustion for works covered by the Software Directive, and has been since the Grand Chambers's decision in *Usedsoft CJEU*.

Relevant EU Directives

18. There are two relevant Directives here: the Software Directive and the Infosoc Directive.

19. **Software Directive:** this was enacted on 14 May 1991 (as Directive 91/250/EC) to harmonise copyright protection for computer programs, a category of copyright work which would later be recognised in both TRIPS and the WCT. An amended version (Directive 2009/24/EC) was enacted on 23 April 2009. The amendments are not relevant to this appeal.

20. The Software Directive requires Member States to enact three provisions to protect copyright in computer programs: (i) a reproduction right under Article 4(1)(a) relating to the copying or electronic storage of a program, (ii) an adaptation right under Article 4(1)(b) relating to the translation or alteration of a program and (iii) a distribution right under Article 4(1)(c) relating to the distribution or rental of a program. The distribution right under Article 4(1)(c) is framed in general terms and has been interpreted to cover both tangible forms of distribution (such as distribution by CD-ROM) and intangible forms of distribution (such as distribution by download from a website) (*UsedSoft CJEU* [51]-[52]).

21. In EU law, exhaustion of copyright in computer program works is governed by Article 4(2) of the Software Directive, which reads as follows:

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

22. The effect of *UsedSoft CJEU* is that certain kinds of exercise of the distribution right under Art.4(1)(c), specifically distributions which involve "*sales*" of computer programs, trigger the exhaustion of copyright in the computer program under Art.4(2) of the Directive (*UsedSoft CJEU* [38]-[42]) for intangible as well as tangible copies.

23. **Infosoc Directive:** The Infosoc Directive (Directive 2001/29/EC) was enacted on 22 May 2001. Unlike the Software Directive which related only to copyright in computer programs, the Infosoc Directive harmonised copyright protection generally and covers copyright in anything that is original and an expression of its author's own intellectual

creation (see e.g. C-227/23 *Kwantum v Vitra* EU:C:2024:914 at [48]). For this purpose, there are no closed categories of copyright works (unlike in the UK CDPA section 1(1), the Berne Convention or the WCT).

24. The Software Directive is recognised to be a *lex specialis* in relation to the Infosoc Directive (see e.g. *UsedSoft CJEU* at [51] and [56]; *Tom Kabinet* at [55]). There is a general principle that in cases covered by both a *lex generalis* and a *lex specialis*, the *lex specialis* will take precedence and the *lex generalis* will be inapplicable (T-60/06 *Italy v Commission* EU:T:2016:233 at [81]). This means that the Software Directive will apply to the exclusion of Infosoc Directive to any matter that falls within its scope.

25. In contrast to the Software Directive, the Infosoc Directive contains two rights relating to the dissemination of copies of a copyright work: a distribution right under Article 4; and a communication to the public right under Article 3 relating to "*any communication to the public of their works, by wire or wireless means*". Under Article 4(2) a "*first sale or other transfer of ownership*" under the Article 4 distribution right may give rise to exhaustion but not an exercise of the Article 3 right.

26. The exhaustion doctrine in Article 4(2) of the Infosoc Directive has been interpreted to be limited to sales of physical copies of a work which may give rise to exhaustion under its Article 4(2), not sales of intangible copies. This was first recognised in a case on copyright exhaustion and the sale of digital e-books: see C-263/18 *Nederlands Uitgeversverbond v Tom Kabinet* EU:C:2019:1111 ("***Tom Kabinet***").

27. The central question in PI2 is whether the Infosoc or Software Directive exhaustion regime applies to sales of software products that contains non-program elements.

UsedSoft CJEU

28. The CJEU key authority on Article 4(2) of the Software Directive is C-128/11 *UsedSoft GmbH v Oracle International Corp* EU:C:2012:407 ("**UsedSoft CJEU**"). The case related to the re-sale of pre-owned Oracle database software. A core point at issue was whether a "*first sale*" for these purposes applied to the distribution of software in an intangible form or just to distributions on tangible storage media ([34]). The judgment records the following material facts:

a. 85% of the Oracle software in issue was distributed to first purchasers in non-tangible form, by download from Oracle's website ([21]). As a result, the defendant reseller UsedSoft was usually unable to re-sell software by directly transferring copies of the pre-owned software on CDs or other physical media;

b. Instead, UsedSoft would provide its customer with the first acquirer's pre-owned licence ([26]). UsedSoft's customer would download a corresponding number of copies from the Oracle website, and the first acquirer would render copies of software in its possession unusable by deletion ([26] and [33]; see also [4]-[5] of I ZR 289/08 *UsedSoft II*, a decision of the Bundesgerichtshof in the underlying German proceedings).

29. This approach to the distribution of used software is very similar to VL's approach in the relevant period (VL's 14 August 2025 RFI Response §§8(a) and 8(b)). *[Supp/05/23]*

30. In *UsedSoft CJEU*, the Court of Justice decided that the distribution of computer programs in non-tangible forms may exhaust the distribution right. In particular:

a. The distribution of a copy of a program in a non-tangible form involves a "*sale*" (and therefore the exhaustion of the distribution right in that copy) where the program has been distributed on the terms of a licence of unlimited duration ([45]-[48]).

b. Where copyright is exhausted, the first purchaser is entitled to re-sell its copy ([72]). Such a re-sale does not require a literal transfer of the first purchaser's copy to the purchaser (something that would be technically impracticable). Instead, a re-sale may be lawfully effected by the reseller rendering one or more copies of the software unusable and the purchaser downloading an equivalent number of copies, as subsequently corrected and updated, from the rightsholders' website ([78], [84] and [88], see also *UsedSoft II* at [43]-[44]).

31. The Court of Justice's analysis is that a qualifying sale does not exhaust the distribution right in a specific copy *per se* but instead gives rise to a transferable economic unit corresponding to a (non-specific) copy of the software and an accompanying right to use that copy. The court's approach recognises the fundamentally fungible nature of programs distributed in this way. References in *UsedSoft CJEU* and later cases to exhaustion of rights in a program "*copy*" are therefore to be understood in this sense.

32. A first sale will exhaust the distribution right in a copyright work under Art.4(1)(c) but will not exhaust the reproduction right under Art.4(1)(a): see *UsedSoft CJEU* [36] and [71]. However, the CJEU ruled that a subsequent purchaser of re-sold software is a "*lawful acquirer*" and is entitled to store or otherwise reproduce re-sold software where this is necessary for use of the software under the exception in Art.5(1) of the Directive.

33. Copyright exhaustion arises on the above basis irrespective of any terms in the software licence purporting to restrict re-sale or transfer: "[following exhaustion]*, notwithstanding the existence of contractual terms prohibiting a further transfer, the rightholder in question can no longer oppose the resale of that copy*" (*UsedSoft CJEU* [77]).

34. In essence, the Grand Chamber of the CJEU recognised that modern software distribution did not always involve physical copies and ensured that software subject to a perpetual licence could be resold regardless of the technical means of distribution.

GROUND 1: PRELIMINARY ISSUE 2

35. MS say that the presence of *any* matter in a software product other than executable source or object code is enough to prevent exhaustion arising on the *UsedSoft CJEU* basis in the software product as a whole (RADEF §§23A-23B, 23C.1, 23D, 24A.5) because the effect of *Tom Kabinet* (say MS) is that the Infosoc Directive exhaustion regime applies to each such "*non-program*" work. *[Core/16/ 249-254, 259, 260]*

36. At trial, the Tribunal tested MS's position by inquiring whether the inclusion of a single desktop icon in a software product that consists otherwise of exclusively computer program works would prevent exhaustion under the Software Directive. MS initially declined to answer, saying that "*that is not this case*", and later said: "*If I have copyright works which are not exhausted under the rule in 4(2)* [of the InfoSoc Directive], *that's the end of it*" (T2/140$_2$-144$_{14}$). *[Supp/54/ 694]*

37. MS assert that there are non-program works incorporated in Office, Windows and the other Products in issue (SoF §§110-111, 126-127). These range from the graphical user interface of each program to fonts and typefaces and the text of individual help or error messages that might be displayed during use of these programs. MS even seem to be arguing that any character strings used to encode text displayed on the user interface are themselves separate non-program works (Novak §16). *[Supp/07/ 75, 78]* *[Supp/32/ 349]*

38. The far-reaching consequence of MS's argument is that, contrary to *UsedSoft CJEU*, it would hardly ever be possible to re-sell digitally distributed copies of software products:

    a. The vast majority of software products, including substantially all enterprise software, will feature a graphical user interface, fonts, or at the very least error messages or other text encoded in character strings. This material cannot usually be severed or removed from the product without rendering it non-functional. Indeed, MS's evidence is clear that it is not possible to remove icons, error messages or other alleged non-program matter from Windows without rendering it unusable (Novak §11). *[Supp/32/348]*

    b. In the case of Office and Windows, the customer has no choice whether or not to install non-program work; it is the rightsholder's choice to bundle non-program matter with a computer program, and the customer is not able to remove all of it even if they wish to do so (SoF §§123, 139).[2] *[Supp/07/77, 81]*

39. If MS were correct, any exhaustion of the distribution right in a computer program could be thwarted by compulsory bundling of unwanted non-program matter and Art.4(2) of the Software Directive would be entirely undermined. That consequence would be contrary not only to *UsedSoft CJEU* but also to a number of decisions of EEA national courts, including the *UsedSoft II* and *UsedSoft III* decisions of the German Bundesgerichtshof. In *UsedSoft III*, the German court was concerned with Adobe products like Acrobat, Photoshop and Illustrator ([1] and [5]), each of which will incorporate similar graphical user interfaces and other "*non-program*" components to those in Office and Windows (as to which see e.g. Custer). Despite this, the German court upheld a decision to dismiss Adobe's copyright claims on the basis that copyright in each of these programs in issue had been exhausted ([13]-[14]).

Relevant legal principles: exhaustion and "complex matter"

40. A number of CJEU decisions have considered which of the two Directives should apply to so-called "*complex*" works, with both non-program and program elements. In C-355/12 *Nintendo Co. Ltd v PC Box Srl* EU:C:2014:25 ("***Nintendo***"), the CJEU considered this issue in relation to a video game. The claimant game developer brought claims under Art.6 of the Infosoc Directive to oppose use of devices used to circumvent technological

[2] MS's new assertion at Skeleton §43 that a user can customise the installation to remove such works is a new point which was not raised at trial and which is not supported by evidence: the evidence (Clarke 2 §12) relied upon does not address the issue of whether non-program works may be removed during installation. *[Core/09/108]* *[Supp/40/431]*

measures intended to prevent copyright infringement. Such claims could only be advanced if the video games were works protected under the Infosoc Directive, as there are no equivalent rights applicable to computer programs under the Software Directive.

41. The CJEU's decision was that the video game as a whole was to be treated as a work covered by the Infosoc Directive ([23], emphasis added):

> *As is apparent from the order for reference, videogames, such as those at issue in the main proceedings, constitute 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 of a videogame, 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 Directive 2001/29*** [i.e. the Infosoc Directive].

42. This passage benefits from some unpacking:

    a. The CJEU did not approach this issue on the basis that the video game was an agglomeration of discrete works, each potentially subject to one or other of the Directives. Its decision was that the "*entire work*" was subject to the Infosoc Directive, despite being "*complex matter*" with some computer program elements.

    b. The CJEU also reasoned that specific parts of the video game, namely the graphic and sound elements, if taken in isolation, would also be subject to the Infosoc Directive. However, the CJEU resolved the overall issue on the basis that Art.6 of the Directive applied to the video game work as a whole, not just to bits of it in isolation. This indicates that where an issue (such as exhaustion) relates to a work as a whole, it must be resolved by categorising the work under one or other Directive.

43. This approach to the interplay between the two Directives is carried forward in the *Tom Kabinet* decision, a decision that (unlike *Nintendo*) directly concerned exhaustion. The case concerned copyright in e-books. It was not in issue before the CJEU that these e-books would be subject to the Infosoc Directive. The referring national court had made a finding that the e-books in issue were not computer programs ([54]) and there was no evidence any element of these works could be characterised as a program. Nonetheless, the Court considered what approach it would have taken if there was evidence that there were some computer program elements in each e-book file ([59], emphasis added):

> ***Even if an e-book were to be considered complex matter*** *(see, to that effect, judgment of 23 January 2014, Nintendo and Others, C 355/12, EU:C:2014:25, paragraph 23),* ***comprising both a protected work and a computer program eligible for protection under Directive 2009/24, it would have to be concluded that such a program is only incidental in relation to the work contained in such a book****. As the Advocate General noted in point 67 of his Opinion, an e-book is protected because of its content,* ***which must therefore be considered to be the essential element of it****, and the fact that a computer program may form part of an e-book so as to enable it to be read cannot therefore result in the application of those specific provisions.*

44. Again, the Court's approach is to characterise the complex work as a whole as either subject to the Infosoc or Software Directive. It does not endorse treating different component parts of the work differently. If that was the correct approach, the CJEU would have no reason to remark that the program element of the e-book file was "*incidental*."

45. This approach is also implicit in *UsedSoft CJEU*. It had been acknowledged at the time of *UsedSoft CJEU* that computer programs might contain some non-program elements subject to the Infosoc Directive, such as the visual elements of a graphical user interface (C 393/09 *BSA* EU:C:2010:816 at [51]). Nonetheless the Court in *UsedSoft CJEU* determined that computer program products could be re-sold as a whole. Although *UsedSoft CJEU* pre-dated *Nintendo*, the Court in *Ranks*, a case concerning MS software, endorsed *UsedSoft CJEU* at [34]-[38] without qualification, two years after *Nintendo*. In the Judgment itself, the Tribunal recognised this, noting that this point had also not been taken in *UsedSoft III*, a decision of the Bundesgerichtshof, concerning exhaustion in Adobe Photoshop, Illustrator and Acrobat, software which (it was common ground) do incorporate non-program works (Judgment [114]-[115]). *[Core/12/185]*

46. It follows that the issue of which exhaustion regime applies should be resolved on the basis of a consideration of the work as a whole, and not on the basis of a separate application of different exhaustion regimes to different aspects of each work.

Relevant principles derived from case-law on free movement of goods

47. The case-law on free movement of goods is also relevant. The CJEU in *UsedSoft CJEU* specifically underlines the relevance of these principles at [61] to [63]: "*the objective of the principle of the exhaustion of the right of distribution of works*" is to promote free movement of goods and "*to avoid partitioning of markets*" (*Ibid.*, [62] and [AG43]).

48. Any restriction on the exhaustion of the distribution right must be justified under Article 36 TFEU and cannot constitute "*a means of arbitrary discrimination or a disguised restriction on trade between Member States*." Where a restriction is relied upon to protect intellectual property, "*such a restriction* [cannot] *go beyond what is necessary in order to attain the objective of protecting the intellectual property at issue*" (C-403/08 *FAPL v QC Leisure* EU:C:2011:631 ("***FAPL***") at [105]; *UsedSoft CJEU* at [62]).

49. This is to be assessed against the "*specific subject matter*" of copyright, which is "*to ensure for the right holders concerned protection of the right to exploit commercially the marketing or the making available of the protected subject-matter, by the grant of licences in return for payment of remuneration*" (*FAPL* at [107]). However, "*such remuneration must be reasonable in relation to the economic value of the service provided*" and in particular "*the actual or potential number of persons who enjoy or wish to enjoy the service*" (*Ibid.* at [109]).

50. MS argued at trial that the case-law on free movement of goods was not relevant on the basis of *Oracle v M-Tech Data* [2012] UKSC 27 (**"*M-Tech*"**). The Tribunal rightly rejected this (Judgment at [156]). VL does not rely upon Article 36 to disapply existing law, but to interpret and apply it. The CJEU took this approach in *UsedSoft* at [62]-[63], [AG77]-[AG83]. Indeed, the Supreme Court in *M-Tech* confirms at [21]-[22] that Art.36 TFEU will be relevant to the interpretation of the exhaustion provisions of EU Directives like the Software Directive in appropriate cases. *[Core/12/194]*

The Tribunal's Judgment

51. PI2 concerned the copyright in two MS products: MS Office and MS Windows. The Tribunal identified a number of categories of non-program works on the evidence before it (Judgment [117]-[137]). This included the graphic works incorporated in the user interface, program icons, ClipArt, fonts and the text incorporated in help files. *[Core/12/185]*

52. As recorded at Judgment [138]-[139], VL accepted that copyright would subsist in "*at least some*" of these non-program works and that use of MS Office and Windows would inevitably involve the reproduction of these works (in the memory of the user device on which the programs were run) (SoF §§122 and 138). *[Core/12/190]* *[Supp/07/77, 81]*

53. Materially, the Tribunal found as follows with respect to these non-program works:

a. MS Windows and Office are computer programs and are "*acquired by users for the function of providing instructions to a computer to perform the tasks set by the author of the program*" (Judgment [116]). This reflects the parties' joint position on the definition of MS Office and MS Windows. *[Core/12/185]*

b. Some of the non-program works are "*an integral part of the program and essential to the working of that program by the user*," (Judgment [141]). An example of such a work is a resource file like a character string encoding an error message (Judgment [125]): if this resource file is deleted or corrupted, Windows would not install or work properly. Other non-program works were not so essential to the functioning of the program, such as Clipart or fonts (Judgment [141]). These differences were not material to PI2 because MS's case was that the presence of <u>any</u> amount of non-program matter (whether integral to the functioning of the program or otherwise) would prevent exhaustion arising under the Software Directive (Judgment [143]). MS do not challenge this approach on this appeal, and this continues to be MS's case. *[Core/12/190]* *[Core/12/187]* *[Core/12/190]* *[Core/12/191]*

c. The Tribunal found that all of the non-program works in evidence are "*part of the Office and Windows Products and* ***<u>are ancillary to the computer program functionality for which Office and Windows are purchased and used</u>***" (Judgment [145], emphasis added). The Tribunal expanded on this finding at [174] of the Judgment (emphasis added): *[Core/12/191, 199]*

> *By ancillary or incidental we do not suggest that the non-program works are not of themselves substantial or that their creation is not the result of considerable skill and effort.* ***<u>The non-program works are ancillary to the computer programs in that they exist to enable a user to run or to use fully the programs so that those programs may fulfil their function.</u>***

d. The Tribunal found support for this in the licence agreements in evidence which did not distinguish between program and non-program components of the software products and provided for the same user rights in relation to each (Judgment [175]). *[Core/12/200]*

54. In approaching the issue of exhaustion, the Tribunal held that it was necessary to strike a balance between the interests of rightsholders and the principles of free movement of goods, applying *FAPL*: Judgment [152]-[155]. Specifically, the Tribunal noted (applying [AG45] of *UsedSoft CJEU*) that: "*the exhaustion rule is justified, economically, by the* *[Core/12/193]*

consideration that the holder of parallel rights in other Member States must not profit unduly from the exploitation of their right".

55. The Tribunal reasoned at [167]-[168] that the approach adopted by the CJEU in *Tom Kabinet* was to apply either the exhaustion regime in the Infosoc Directive or the exhaustion regime in the Software Directive to a complex work consisting of both non-program and program elements. The Tribunal reasoned that if one or other exhaustion regimes should apply to each element of a work separately, this is something the CJEU would have stated in *Tom Kabinet* (Judgment [171]). The touchstone for determining which Directive applies is whether the program element is the essential feature of the complex matter and whether non-program elements are "*incidental*" to this (Judgment [170]). For this purpose, the "*incidental*" does not necessarily mean "*de minimis*" or "*of no consequence*" but instead "*to have only an accessory character*" (*Ibid*). *[Core/12/197]* *[Core/12/198]* *[Core/12/198]*

56. This approach is supported by the way in which the CJEU approaches other scenarios involving subject matter falling partly within and partly outside the scope of a directive (Judgment [157] and [171], citing Cases C-145/08 and C-149/08 *Club Hotel Loutraki AE v Ethniko Simvoulio Radiotileorasis* EU:C:2010:247 [48]-[49], cited in *UsedSoft CJEU* at [44]): the question is resolved by reference to "*the main object or predominant feature*" of the matter in issue (Judgment [157]). *[Core/12/194, 198]* *[Core/12/194]*

57. The Tribunal's approach is also supported by the reasoning of AG Szpunar in *Tom Kabinet*: [AG57]-[AG63]. AG Szpunar justifies the different exhaustion regimes in the Infosoc and the Software Directives in terms of the functional nature of software products, which (unlike non-program works) are primarily used as tools and not for their content (unlike a book or film). The overall functional nature of software is not affected by the incorporation of non-program elements where these are just to assist in the use of the software.

58. The Tribunal reasoned that any other approach would defeat the underlying purpose of the exhaustion provisions of the Software Directive (Judgment [178]-[179]) and the *UsedSoft CJEU* decision (Judgment [180]). If the inclusion of a single non-program work would be sufficient to disapply the Software Directive, it would mean that two functionally equivalent software products could be subject to radically different exhaustion regimes simply through the device of adding a single non-program work (such as an error message) *[Core/12/200]* *[Core/12/201]*

to one of them. This is the sort of "*arbitrary discrimination*" which is not permitted under the *FAPL* line of cases and which is also economically nonsensical.

59. The Tribunal also reasoned that any other approach would not give proper effect to Art.1(2)(a) of the Infosoc Directive which provides that the Directive "*shall leave intact and shall in no way affect existing Community provisions relating to: (a) the legal protection of computer programs*" (Judgment [181]-[182]). *[Core/12/201]*

Ground 1(i): PI2 determination is inconsistent with principle

60. Ground 1(i) alleges that the determinations of the Tribunal are inconsistent with no less than eight principles. The principles are not separately addressed in MS's appeal skeleton, making it difficult to follow MS's arguments. However, each is briefly addressed in turn.

61. **Article 8 of the Software Directive** (Ground 1(i)(a)): Art.1(2)(a) of the Infosoc Directive provides that the Infosoc Directive "*shall leave intact and shall in no way affect existing Community provisions relating to: (a) the legal protection of computer programs*" (Judgment [181]). This provision reflects the fact that (i) the Infosoc Directive was enacted some ten years after the Software Directive and (ii) the Software Directive is a *lex specialis* with respect to the Infosoc Directive and therefore applies to the exclusion of the Infosoc Directive to matters within its scope (*UsedSoft CJEU* [51] and [56]). *[Core/12/201]*

62. Art.8 of the Software Directive simply states:

> *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.*

63. As the Tribunal correctly found, this is a vague provision which does not specifically reference the Infosoc Directive, unlike Art.1(2)(a) of the Infosoc Directive which explicitly references the Software Directive (Judgment [182]). Moreover, on its face it is directed at rights other than copyright (which is omitted from the listed rights). *[Core/12/202]*

64. The very nature of the Software Directive as a *lex specialis* means that its provisions will overlap with and undercut the scope of the Infosoc Directive. It is a matter of construction whether a particular work will fall within the overlapping scope of one or other Directive. Art.8 of the Software Directive cannot have been intended to affect this. There is no error in the Tribunal's approach.

65. **Alleged EU Law Principle of "*'concurrent and cumulative protection' of intellectual property rights*"** (Ground 1(i)(b)): MS rely on three cases to support this argument: (i) C-237/19 *Gömböc Kutató* EU:C:2020:296, a case on the inter-relationship between Directive 98/71/EC on designs and Directive 2008/95 on trade marks; (ii) C-683/17 *Cofemel v G-Star Raw* EU:C:2019:721 ("***Cofemel***"), a case that concerns in part the inter-relationship between the Infosoc Directive and Directive 98/71/EC and (iii) Joined Cases C-580/23 and C-795/23 *Mio v Konektra* EU:C:2025:941, concerning the same point as *Cofemel* (MS Skeleton §§27-29). The cases are authority that EU legislation in the field of designs is independent of EU legislation on trade marks and copyright and that design rights may arise in matter which may also be the subject of trade marks or copyright. *[Core/09/104]*

66. MS are wrong to suggest that any of these cases purport to establish any sort of general principle that is relevant to copyright exhaustion and PI2. Moreover, any such principle would be contrary to the status of the Software Directive as a *lex specialis* in respect of the Infosoc Directive. It is in the nature of its status as *lex specialis* that in some situations the Software Directive will apply to the exclusion of the Infosoc Directive.

67. **TRIPS, WCT and Berne Convention (**Ground 1(i)(c) and (f)): These arguments are addressed above. There is nothing in any of the international treaties which restrict the rights of contracting states to provide for digital exhaustion. MS Skeleton §33 misinterprets the effect of the Agreed Statement on Arts.6 and 7 of the WCT. *[Core/09/105]*

68. **Article 4(2) of the Infosoc Directive** (Ground 1(i)(d), (g) and (h)): MS allege that the Tribunal has altered or eliminated the "*protection*" provided by Article 4(2) of the Infosoc Directive. This is a circular argument which assumes the Tribunal's interpretation of the interplay between the two Directives is wrong without properly establishing this.

69. **Justification to apply different legislative treatment to the supply of digital and physical copies of a work** (Ground 1(i)(e)): MS argue that there is a general principle that digital and physical forms of distribution should be treated differently in legislation. MS cite two VAT cases in support of this principle (see fn. 22 of MS Skeleton). It is not explained how this principle (if it exists) has any bearing on the Tribunal's decision. It cannot be correct that there should be a principle that physical and digital forms of distribution should <u>always</u> or <u>invariably</u> be treated differently. *[Core/09/105]*

Ground 1(ii): PI2 decision is inconsistent with scope of Software Directive

70. This Ground relates to the subject matter of the Software Directive. In a number of cases concerned with the issue of infringement, the CJEU has identified that copyright covered by the Software Directive arises in computer programs expressed in either source or object code (see C-406/10 *SAS Institute v World Programming Ltd* EU:C:2012:259 [35] ("***SAS Institute***") and C-159/23 *Sony v Datel* EU:C:2024:887 (**"*Datel*"**) [35] and [38]).

71. These cases are not concerned with and do not address the issue of exhaustion and complex matter consisting of both program and non-program elements. They are concerned instead with the issue of whether it can be an infringement of Software Directive copyright to replicate the functionality of a computer program without copying either its source or object code.

72. The cases that *do* address the issue of exhaustion (including *Tom Kabinet*) recognise the possibility that works may exist with both program and non-program elements, which may be subject to one or other exhaustion regime as a whole. The Tribunal thus made no error in approaching this issue as one of characterisation of the overall work in issue. Nothing in either *Datel* or *SAS Institute* suggests otherwise.

73. Indeed, the CJEU has specifically determined that video games are subject matter that are primarily governed by the Infosoc Directive, despite consisting (at least in part) of object code (see *Nintendo* [23]). Video games may have narratives, characters and other elements that have a "*unique creative value*" independent of the functionality of the underlying software (*Ibid*.). In this respect, video games are no different to other kinds of audio-visual works like films or television series which would be subject to Infosoc Directive. This justifies the application of the Infosoc Directive and its exhaustion provisions to products of this type.

74. The position is very different with the sort of functional productivity software in issue in this case. The non-program elements of this sort of software are entirely subordinate to the use and functionality of the software. This supports the application of the Software Directive and its exhaustion regime to such products.

Ground 1(iii): Nature of NPWs in issue

75. In essence, this Ground is a challenge to the factual findings of the Tribunal. Specifically what is challenged are the findings at [143] and [145] of the Judgment to the effect that *[Core/12/191]*

the non-program components of MS Office and Windows are "*ancillary*" to the program components of those programs.

76. This Court should be slow to disturb such findings of fact on appeal (see *Volpi v Volpi* [2022] EWCA Civ 464, [2022] 4 WLR 48 at [2](v)). Indeed, to challenge these primary findings of fact, MS must show that these findings are "*plainly wrong*" in the sense that they are findings which "*no reasonable judge could have reached*" (see *Perry v Raleys Solicitors* [2019] UKSC 5, [2019] 2 WLR 636 at [52]).

77. MS's arguments do not identify any relevant error in the Court's findings on these issues. Indeed, their arguments mischaracterise the nature of the findings. Contrary to MS Skeleton §43, the Tribunal's finding that the non-program works in issue were "*ancillary*" or "*incidental*" was not premised on a finding that the works were not substantial or the result of skill and effort (Judgment [174]). Instead, the basis of this finding was that the works were "*ancillary to the computer programs in that they exist to enable a user to run or to use fully the programs so that those programs may fulfil their function*" (*Ibid*.). There is therefore no basis on which to disturb the Tribunal's findings on this point on appeal. *[Core/09/108]* *[Core/12/199]*

GROUND 2: PRELIMINARY ISSUE 1

78. PI1 relates to the application of exhaustion to volume licences, covering multiple copies of one or more programs.

79. A large proportion of MS Enterprise software products in the relevant period were subject to volume licence arrangements covering combinations of products. As summarised at [63] to [71] of the Judgment, MS's standard Enterprise Enrolment Agreement covered a minimum of 500 Qualified Users or Devices for each enterprise customer (see [63(1)]), with each User or Device having licences to use multiple MS products (see e.g. SoF §7). The Enterprise Enrolment Agreement were the only terms available to large enterprises, and businesses re-selling MS Enterprise software in bulk could not avoid dealing in software subject to such arrangements. *[Core/12/171]* *[Supp/07/40]*

80. MS's position is that it is not permissible to re-sell individual product licences acquired under volume licences under *UsedSoft*. Instead, MS argue that volume licensed software must be re-sold *en bloc* in exactly the same quantities as covered by the customer's original Enrollment (RADEF §§23C.3-23C.4). For example, if an Enrollment Agreement covers *[Core/16/256]*

licences of 1000 copies of Windows and Office, MS argue these can only be re-sold to one customer seeking exactly this many copies.

Relevant legal principles

81. It is clear from the terms of Art.4(2) that exhaustion of the distribution right arises on a copy-by-copy basis under the Software Directive: "*The first sale in the Community of a **copy** of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of **that copy***" (emphasis added). That is confirmed by C-166/15 *Ranks v Latvia* EU:C:2016:762 ("***Ranks***") at [34] (see also *UsedSoft CJEU* at [61]):

> *The exhaustion of the distribution right laid down in Article 4(c) of Directive 91/250 concerns **the copy of the computer program itself** and the accompanying user licence, […].*

82. MS's arguments appear to depend on certain comments in UsedSoft CJEU on "*user rights*." However, the arguments are based on a mistaken understanding of this authority. *UsedSoft CJEU* concerned Oracle "*client-server software*". Such software is designed to be permanently installed on a server device and to be accessed, from there, by one or more client devices (*UsedSoft CJEU* [21]). The term "*user right*" in *UsedSoft CJEU* is used at [21] to refer to two distinct rights covered by the Oracle software licence in that case: (i) "*the right to store a copy of the program permanently on a server*"; and (ii) the right "*to allow a certain number of users to access* [the copy of the program] *by downloading it to the main memory of their work-station computers*." It is further explained at [22] that this Oracle software was licensed on a '*group*' basis, permitting a specified number of users to access *one copy* of a program stored permanently on a server.

83. It is commercially commonplace for server software licences to be structured in this way. The licence will specify a fixed number of client users. To increase the number of licensed client users, the licensee must pay higher licence fees.

84. The CJEU explains at [69]-[70] that a first acquirer of server software, cannot sell "*user rights*" separately from the underlying copy of the server software (emphasis added):

> *It should be pointed out, however, that **if the licence acquired by the first acquirer relates to a greater number of users than he needs**, as stated in paragraphs 22 and 24 above, **the acquirer is not authorised by the effect of the exhaustion of the distribution right under Article 4(2)***

of Directive 2009/24 to divide the licence and resell only the user right for the computer program concerned corresponding to a number of users determined by him.

An original acquirer who resells a tangible or intangible copy of a computer program for which the copyright holder's right of distribution is exhausted in accordance with Article 4(2) of Directive 2009/24 must, in order to avoid infringing the exclusive right of reproduction of a computer program which belongs to its author, laid down in Article 4(1)(a) of Directive 2009/24, make his own copy unusable at the time of its resale. ***In a situation such as that mentioned in the preceding paragraph, the customer of the copyright holder will continue to use the copy of the program installed on his server and will not thus make it unusable.***

85. It is clear from the above that the CJEU is using the term "*user right*" here in the second sense set out at [21] of the Judgment to refer to rights granted under a server software licence permitting one or more client users to remotely access the software. Such client user rights for server software may not be re-sold on their own. Instead, they may only be re-sold alongside a copy of the underlying software as a component of the accompanying user licence, as envisaged in *UsedSoft CJEU* [85] and [86]. Exhaustion applies to copies of software; not bare user rights.

86. None of these comments in *Usedsoft* about server-client licences supports MS's wider arguments about volume licences. On the contrary, the CJEU's reasoning implicitly proceeds on the basis that exhaustion arises on a copy-by-copy basis. Moreover, the restrictions argued for by MS have no rational connection to "*the objective of protecting the intellectual property at issue*" in the sense set out in the free movement of goods cases. MS's objection to the sub-division of a volume licence is not based on any argument that such a re-sale deprives it of remuneration to which they are reasonably entitled. MS have no objection to the re-sale of volume licensed products so long as any re-sale involves the sale to one purchaser of exactly the same quantity of products as was initially acquired.

87. The German Bundesgerichtshof specifically rejected the argument that MS now runs in *UsedSoft III*. The arguments are addressed at [45] and were rejected for much the same reasons outlined above. This is compelling support for VL's analysis. The German Court's interpretation at [44] of the observations on "*user rights*" in *UsedSoft CJEU* is also consistent with VL's submissions.

The Tribunal's Judgment

88. The Tribunal approached this issue on the footing that exhaustion does not depend on the contract terms relevant to the sale, and that a rightsholder cannot contract out of exhaustion (see Judgment [89]-[91] and [96]). That principle is well-established: see [AG48] of Case C-16/03 *Peak Holding AB v Axolin-Elinor AB*, EU:C:2004:324 and *UsedSoft CJEU* itself at [77] and [84]. *[Core/12/177, 180]*

89. On this basis, the Tribunal rejected MS's argument that the nature of the MS Enterprise Enrollment Agreement as a volume licence covering multiple program copies somehow conditions the circumstances in which exhaustion occurs (see [105]). In the same paragraph they also rejected MS's construction of the Agreement as a single licence covering multiple devices (as opposed to a contract for multiple licences). *[Core/12/182]*

90. The Tribunal rejected MS's interpretation of *UsedSoft CJEU*, finding that the reasoning on "*user rights*" was principally concerned with ensuring that dealings in second-hand copies of client-server software did not introduce additional copies of client-server software beyond those first distributed by the rightsholder (see [98]-[104]). *[Core/12/180]*

Ground 2(i): Formulation of PI1

91. MS's first complaint (at Ground 2(i)(a)) relates to the terms in which the Tribunal answered PI1 at [108], specifically that they addressed it in terms of "*products*" and not "*computer programs*." There is nothing to this complaint. In addressing a preliminary issue, the Tribunal's core concern is to articulate a clear answer on a correct legal basis. There is no authority that a Tribunal is fettered by the wording of the preliminary issue (which may be formulated by the parties). Indeed, as MS has itself stressed, the Preliminary Issues fell to be considered "*in the circumstances of this case*". *[Core/12/183]*

92. MS do not argue that the wording of [108] reveals any legal error in the Tribunal's Judgment or should make any difference to the outcome of the decision. MS itself addressed PI1 in its trial skeleton in terms of the sub-division or re-sale of "*products*": see MS's Trial Skeleton §§37, 44.3-8, 52.4, 56, 74.1, 78 and 80.1. *[Supp/46/498, 500, 503, 506, 512]*

93. Ground 2(i)(b) alleges that the Tribunal failed to address limbs (i) and (ii) of PI1 as formulated. This is restated without elaboration or explanation in MS's Skeleton at §47. This goes nowhere. Limb (i) concerned sub-division of user rights obtained for "*a licence covering a particular combination of multiple computer programs*", on which no *[Core/09/109]*

submissions were made because splitting of products does not arise on the facts. Limb (ii) concerned user rights obtained for "*a licence covering a numerically specified plurality of users*", which the Tribunal expressly addressed in the decision at [97]-[105] under the heading "*Is it permissible to sell a proportion of user rights from a bulk licence to different customers?*". MS does not identify anything that was not addressed in the decision, either in its Grounds of Appeal or in its Skeleton. *[Core/12/180]*

Ground 2(ii)(a): Notional copy

94. MS objects to the Tribunal's analysis that in the circumstances of sale of intangible copies of software "*what is sold may be thought of as a notional copy*": [48] and [103]. MS's position is that the distribution right is exhausted in "*the copy on the rightholder's website*" and only in that copy: MS Skeleton §§49-50. *[Core/12/167, 182]* *[Core/09/109]*

95. This argument proceeds without any regard to the facts of *UsedSoft CJEU* and the exhaustion analysis adopted by the CJEU in response to them. As explained above, *UsedSoft CJEU* concerned a scenario where there was no direct transfer of any copy of the re-sold software from first acquirer to the subsequent purchaser. Instead the first acquirer deletes one or more copies of the re-sold program and the purchaser downloads an equivalent copy from the rightsholder's website (see [44] and [84]).

96. The Tribunal used the term "*notional copy*" to reflect the fact that there is no direct transfer of any actual copy of software on these facts (see Judgment [48]). Beyond a vague assertion that this is inconsistent with the literal terms of Art.4(2) of the Software Directive (MS Skeleton §49), MS has not engaged with this analysis which plainly reflects the CJEU's purposive interpretation of this provision in *UsedSoft CJEU*. It is in any event impossible to see how the distribution right could be exhausted in the copy on the rightholder's website, as it would preclude sale by the rightholder to multiple customers. *[Core/12/167]* *[Core/09]109]*

Ground 2(ii)(b): Single purchase agreement for downloading a copy onto a central server

97. MS's arguments at MS Skeleton §§51-53 attack the Tribunal's reasoning that, in the circumstances of this case, a single Enterprise Enrolment Agreement gave rise to an agreement for multiple software licences, and not to a single licence for multiple devices: Judgment [70], [105]. *[Core/09/110]* *[Core/12/173, 182]*

98. MS focuses on the fact that often customers distribute these copies internally by loading them onto "*a central server from which the customer then installs the requisite number of*

copies permitted by its licence". However, MS does not explain why this is said to make any difference (MS Skeleton §51); it is merely asserted that the Tribunal's findings on this are contrary to *UsedSoft CJEU* and *UsedSoft II*. That is incorrect. *UsedSoft II* did not consider volume licences at all. It is of note that *UsedSoft III*, a decision of the same Court, adopted the same approach to volume licences as the Tribunal (see [44] and [45]). The position in *UsedSoft CJEU* is addressed above. *[Core/09/110]*

Ground 2(ii)(c): Burden of proof of compliance with UsedSoft requirements

99. The Tribunal addressed the burden of proof at [100]-[107], holding that the consequence of an original acquirer's failure to delete any re-sold copies was that the original acquirer's retention of the copies would infringe the rightholder's copyright. This would not affect exhaustion or render subsequent dealings by resellers in re-sold software unlawful. This reflects *UsedSoft CJEU* [70] and the principle that exhaustion arises once for and all following a qualifying sale and is not conditional on subsequent acts of the purchaser: Judgment [102]. *[Core/12/181]* *[Core/12/181]*

100. The Tribunal found that there was no evidence that the original purchasers had not deleted and/or continued to use software resold by VL: Judgment [106]. VL required letters from every purchaser confirming this: Horley 2 §§19-20; Judgment [80], [82] and [84]. In any event, the Tribunal held on these facts that a failure to delete re-sold software would be an infringement on the part of the first acquirer but not on the part of VL. *[Core/12/183]* *[Supp/39/415]* *[Core/12/175]*

101. MS argue that it was incumbent on VL to establish that the original acquirer of computer programs from MS deleted their copies of the software at the time of resale and argue that the Tribunal erred in finding otherwise. MS argue (a) that VL was the Claimant in the action, and so held the burden of proof on this issue (MS Skeleton §18); and (b) that *Ranks* determined that the burden rests on the acquirer of second-hand licences to show that the original acquirer had complied with *UsedSoft* (MS Skeleton §§57-58, relying on *Ranks* [56]). As to this: *[Core/09/102]* *[Core/09/111]*

    a. *Status as Claimant*: As the Tribunal noted at T2/135$_{15}$-136$_{14}$, the burden in litigation is on the person making an assertion, and in this case it is MS asserting that there has not been exhaustion. In any event, MS's arguments as to the lack of exhaustion are raised in its defence in the action, and so are MS's to prove. *[Supp/54/693]*

b. *Ranks*: VL addressed this point in its Reply Submissions at §§4-7. All that *Ranks* requires is that the purchaser acquires the re-sold software "*in a lawful manner*" and the purchaser should show this "*by all **available evidence***" (emphasis added) (see *Ranks* at [56]). This does not require the subsequent purchaser to provide exhaustive proof that the first acquirer has complied with *UsedSoft CJEU*, limited as it is to "*available evidence*." Instead, it requires VL to show by the available evidence that it acquired the software "*in a lawful manner*". VL did this through the Seller Letters that are in evidence. *[Supp/48/544]*

102. MS also argue that VL is somehow complicit or an accessory to any infringement committed by the original acquirer and cannot therefore be a "*lawful acquirer"* (Skeleton §55). This allegation of complicity was not argued at the trial and has never been pleaded. It is a point that would require pleading and evidence. It cannot be taken on this appeal. *[Core/09/110]*

Ground 2(iii): Construction of MS's licence terms

103. MS argue at Skeleton §59 that the Tribunal "*failed to have regard to the nature of the customer's obligation to order and maintain a specific quantity of user rights*." That is wrong. The Tribunal carefully considered the terms of the relevant agreements at Judgment [63]-[71] and [89]-[98] and MS identify no flaw in their reasoning. *[Core/09/111]* *[Core/12/171, 177]*

104. This Ground is, in any event, moot on the basis of the principle identified at [89]-[91] and [96] of the Judgment that the terms of a contract cannot limit or restrict exhaustion once it arises. MS do not grapple with this point in their Skeleton. *[Core/12/177, 180]*

Ground 2(iv): Determinations of compliance with UsedSoft requirements in this case

105. MS contend that the Tribunal "*should have determined on the basis of the evidence and materials before it*" that the Sample Transactions had not been carried out compliantly with the *UsedSoft* exhaustion requirements. This adds no legal arguments to those already made under Grounds 2(ii)(c) and (iii). Instead, MS focus on VL's use of PLTFs (MS Skeleton §§75-78). However, this issue goes nowhere for reasons identified by the Tribunal at Trial (see T2/185_{6}-186_{2} and 192_{7}-198_{24}): PLTFs only apply to transfers requiring MS's consent, and no such consent is required for the distribution of exhausted software. There was never any obligation on VL or the first acquirer to provide PLTFs to MS in any of the Sample Transactions. *[Core/09/116]* *[Supp/54/706, 707]*

Ground 2(v): Findings of fact relating to Article 6 Infosoc

106. Under Ground 2(v), MS seeks the determination of an unpleaded claim under Article 6 of the Infosoc Directive relating to VL's use of Multiple Access Keys (MS product keys) to facilitate resales of MS software. S.296ZA CDPA 1988 (the UK legislation which implements Article 6) raises a wholly distinct cause of action to copyright infringement. MS articulated these arguments for the first time in its trial skeleton.

107. The Tribunal correctly found that this was irrelevant for the Preliminary Issues Trial (see [65]-[66] and [76]-[79]). MS has no pleaded case based on s.296ZA CDPA 1988 or Article 6 of the Infosoc Directive, nor has it sought to amend its pleadings to add one. Even if there were a pleaded case based on these arguments, the Tribunal would not need to address it in order to answer the Preliminary Issues as framed at [16] of the Decision. In the circumstances it is no surprise that the Tribunal ruled that this was not an issue for the Preliminary Issues Trial. The insinuation of wrongdoing in relation to MAKs and PLTFs at 74-78 of the MS Skeleton is inappropriate in circumstances where the factual position was (rightly) not explored in any detail at the PI trial and where there was no live evidence. *[Core/12/ 172, 174]* *[Core/12/ 156]* *[Core/09/ 115]*

GROUND 3: ARTICLE 17(2) OF THE EU CHARTER OF FUNDAMENTAL RIGHTS AND ECHR ARTICLE 1, PROTOCOL 1

108. This point is addressed in a single paragraph of MS's Appeal Skeleton at §84, apparently as something of an afterthought. No CJEU case law is identified that substantiates the allegations of breach of Article 17(2) of the EU Charter of Fundamental Rights. Moreover, *Saforov v Azerbaijan* [2022] ECHR 647 is not relevant for the reasons identified by the Tribunal at [173]: a breach of Article 1, Protocol 1 was found in that case because the Supreme Court of Azerbaijan had not properly applied the Azerbaijan Law on Copyright and had failed to provide reasons to support its decision (see [32]-[36]). To argue that the same principle applies here is circular: the argument assumes the Tribunal has wrongly applied the relevant principles, without actually identifying the supposed error. *[Core/09/ 119]* *[Core/12/ 199]*

GROUND 4 AND CONCLUSION

109. Ground 4 is not free-standing and falls to be dismissed if Grounds 1 to 3 are rejected.

110. The Tribunal's careful reasoning on both PIs should be upheld. The Court is respectfully invited to dismiss MS's appeal on all grounds.