



Press and Information

Court of Justice of the European Union

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Luxembourg, 3 July 2012

Judgment in Case C-128/11

UsedSoft GmbH v Oracle International Corp.

## **An author of software cannot oppose the resale of his 'used' licences allowing the use of his programs downloaded from the internet**

*The exclusive right of distribution of a copy of a computer program covered by such a licence is exhausted on its first sale*

Oracle develops and distributes, in particular by downloading from the internet, computer programs functioning as 'client-server software'. The customer downloads a copy of the program directly onto his computer from Oracle's website. The user right for such a program, which is granted by a licence agreement, includes the right to store a copy of the program permanently on a server and to allow up to 25 users to access it by downloading it to the main memory of their work-station computers. The licence agreement gives the customer a non-transferable user right for an unlimited period, exclusively for his internal business purposes. On the basis of a maintenance agreement, updated versions of the software (updates) and programs for correcting faults (patches) can also be downloaded from Oracle's website.

UsedSoft is a German undertaking which markets licences acquired from customers of Oracle. Customers of UsedSoft who are not yet in possession of the software download it directly from Oracle's website after acquiring a 'used' licence. Customers who already have that software can purchase a further licence or part of a licence for additional users. In that case they download the software to the main memory of the work stations of those other users.

Oracle brought proceedings against UsedSoft in the German courts, seeking an order for it to cease those practices. The Bundesgerichtshof (Federal Court of Justice, Germany), which has to rule on the dispute as court of final instance, made a reference to the Court of Justice for it to interpret, in this context, the directive on the legal protection of computer programs<sup>1</sup>.

Under that directive, the first sale in the EU of a copy of a computer program by the copyright holder or with his consent exhausts the right of distribution of that copy in the EU. A rightholder who has marketed a copy in the territory of a Member State of the EU thus loses the right to rely on his monopoly of exploitation in order to oppose the resale of that copy. In the present case, Oracle claims that the principle of exhaustion laid down by the directive does not apply to user licences for computer programs downloaded from the internet.

By its judgment delivered today, the Court explains that **the principle of exhaustion of the distribution right applies not only where the copyright holder markets copies of his software on a material medium (CD-ROM or DVD) but also where he distributes them by means of downloads from his website.**

**Where the copyright holder makes available to his customer a copy – tangible or intangible – and at the same time concludes, in return for payment of a fee, a licence agreement granting the customer the right to use that copy for an unlimited period, that rightholder sells the copy to the customer and thus exhausts his exclusive distribution right.** Such a transaction involves a transfer of the right of ownership of the copy. Therefore, **even if the licence**

<sup>1</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (OJ 2009 L 111, p. 16).

**agreement prohibits a further transfer, the rightholder can no longer oppose the resale of that copy.**

The Court observes in particular that limiting the application of the principle of the exhaustion of the distribution right solely to copies of computer programs that are sold on a material medium would allow the copyright holder to control the resale of copies downloaded from the internet and to demand further remuneration on the occasion of each new sale, even though the first sale of the copy had already enabled the rightholder to obtain appropriate remuneration. Such a restriction of the resale of copies of computer programs downloaded from the internet would go beyond what is necessary to safeguard the specific subject-matter of the intellectual property concerned.

**Moreover, the exhaustion of the distribution right extends to the copy of the computer program sold as corrected and updated** by the copyright holder. Even if the maintenance agreement is for a limited period, the functionalities corrected, altered or added on the basis of such an agreement form an integral part of the copy originally downloaded and can be used by the customer for an unlimited period.

The Court points out, however, that if the licence acquired by **the first acquirer** relates to a greater number of users than he needs, that acquirer **is not authorised** by the effect of the exhaustion of the distribution right **to divide the licence** and resell only part of it.

Furthermore, the Court states that **an original acquirer** of a tangible or intangible copy of a computer program for which the copyright holder's right of distribution is exhausted **must make the copy downloaded onto his own computer unusable at the time of resale**. If he continued to use it, he would infringe the copyright holder's exclusive right of *reproduction* of his computer program. In contrast to the exclusive right of *distribution*, the exclusive right of *reproduction* is not exhausted by the first sale. However, the directive authorises any reproduction that is necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose. Such reproduction may not be prohibited by contract.

In this context, the Court's answer is that any subsequent acquirer of a copy for which the copyright holder's distribution right is exhausted constitutes such a lawful acquirer. He can therefore download onto his computer the copy sold to him by the first acquirer. Such a download must be regarded as a reproduction of a computer program that is necessary to enable the new acquirer to use the program in accordance with its intended purpose.

Therefore **the new acquirer of the user licence, such as a customer of UsedSoft, may, as a lawful acquirer of the corrected and updated copy of the computer program concerned, download that copy from the copyright holder's website.**

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**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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