

Court of Justice EU, 12 October 2016, Ranks and Vasiļevičs



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First acquirer of a computer program may not provide his back-up copy of that program when the original is damaged, destroyed or lost without authorisation of the rightholder

- It follows from all of the foregoing that Article 4(a) and (c) and Article 5(1) and (2) of Directive 91/250 must be interpreted as meaning that, although the initial acquirer of a copy of a computer program accompanied by an unlimited user licence is entitled to resell that copy and his licence to a new acquirer, he may not, however, in the case where the original material medium of the copy that was initially delivered to him has been damaged, destroyed or lost, provide his back-up copy of that program to that new acquirer without the authorisation of the rightholder.

(...)

34. 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, and not the material medium on which that copy has, as the case may be, been first offered for sale in the European Union by the copyright holder or with his consent.

35. In that respect, it follows from the Court's case-law that Article 4(2) of Directive 2009/24, which reproduces the content of Article 4(c) of Directive 91/250, refers, without further specification, to the 'sale ... of a copy of a program' and thus makes no distinction according to the tangible or intangible form of the copy in question (see, to that effect, judgment of 3 July 2012, UsedSoft, C-128/11, EU:C:2012:407, paragraph 55).

(...)

40. In that respect, it must be recalled, in the first place, that Article 5(2) of Directive 91/250 provides that the making of a back-up copy by a person having a right to use the computer program may not be prevented by contract in so far as it is necessary for that use. Article 9(1) of that directive provides that any contractual provisions contrary to Article 5(2) are to be null and void.

41. As is apparent from Article 5(2) of that directive, the making of a back-up copy of a computer program is therefore subject to two conditions. That copy must (i) be made by a person having a right to use that program and (ii) be necessary for that use.

42. That provision, laying down an exception to the exclusive reproduction right of the holder of the

copyright in a computer program must, in accordance with the settled case-law of the Court, be interpreted strictly (see, by analogy, judgment of 1 December 2011, Painer, C-145/10, EU:C:2011:798, paragraph 109).

- 43. It follows that a back-up copy of a computer program may be made and used only to meet the sole needs of the person having the right to use that program and that, accordingly, that person cannot — even though he may have damaged, destroyed or lost the original material medium — use that copy in order to resell that program to a third party.

(...)

- 51. It must, however, be noted that the circumstances of the case before the referring court differ from those of the case that gave rise to the judgment of 3 July 2012, UsedSoft (C-128/11, EU:C:2012:407). It is apparent from the documents before the Court that Mr Ranks and Mr Vasiļevičs sold, on the internet, copies of computer programs on non-original material media and there is nothing to suggest that they initially purchased and downloaded those copies from the rightholder's website.

52. Nevertheless, the situation of the lawful acquirer of a copy of a computer program, sold stored on a material medium which has been damaged, destroyed or lost, and that of the lawful acquirer of a copy of a computer program purchased and downloaded on the internet are comparable with regard to the rule of exhaustion of the distribution right and the exclusive reproduction right granted to the rightholder.

53. The lawful acquirer of the copy of a computer program, who holds an unlimited licence to use that program but who no longer has that original material medium on which that copy was initially delivered to him, because he has destroyed, damaged or lost it, cannot, for that reason alone, be deprived of any possibility of reselling that copy to a third party, since this would render ineffective the exhaustion of the distribution right under Article 4(c) of Directive 91/250 (see, to that effect, judgment of 3 July 2012, UsedSoft, C-128/11, EU:C:2012:407, paragraph 83).

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Court of Justice EU, 12 October 2016

(L. Bay Larsen, M. Vilaras (Rapporteur), J. Malenovský, M. Safjan and D. Šváby)

JUDGMENT OF THE COURT (Third Chamber)

12 October 2016 (*)

(Reference for a preliminary ruling — Intellectual property — Copyright and related rights — Directive 91/250/EEC — Article 4(a) and (c) — Article 5(1) and (2) — Directive 2009/24/EC — Article 4(1) and (2) — Article 5(1) and (2) — Legal protection of computer programs — Resale of 'used' licensed copies of computer programs on non-original material media — Exhaustion of the distribution right — Exclusive right of reproduction)

In Case C-166/15,
 REQUEST for a preliminary ruling under Article 267 TFEU from the Rīgas apgabaltiesas Kriminālietu tiesu kolēģija (Criminal Law Division of the Riga Regional Court, Latvia), made by decision of 18 March 2015, received at the Court on 13 April 2015, in the criminal proceedings against
 Aleksandrs Ranks,
 Jurijs Vasiļevičs,
 the other parties to the proceedings being:
 Finanšu un ekonomisko noziegumu izmeklēšanas prokuratūra,
 Microsoft Corp.,
 THE COURT (Third Chamber),
 composed of L. Bay Larsen, President of the Chamber, M. Vilaras (Rapporteur), J. Malenovský, M. Safjan and D. Šváby, Judges,
 Advocate General: H. Saugmandsgaard Øe,
 Registrar: I. Illéssy, Administrator,
 having regard to the written procedure and further to the hearing on 16 March 2016,
 after considering the observations submitted on behalf of:

- Mr Ranks and Mr Vasiļevičs, by M. Krūmiņš, advokāts,
- Microsoft Corp., by I. Veikša, I. Krodere and N. Tuominen, advokātes,
- the Latvian Government, by I. Kalniņš and J. Treijs-Gigulis, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, assisted by F. Varrone, avvocato dello Stato,
- the Polish Government, by B. Majczyna, acting as Agent,
- the European Commission, by J. Samnadda and A. Sauka, acting as Agents,

after hearing [the Opinion of the Advocate General](#) at the sitting on 1 June 2016,
 gives the following

Judgment

1. This request for a preliminary ruling concerns, formally, the interpretation of Article 4(2) and Article 5(1) and (2) of 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).

2. The request has been made in the context of criminal proceedings brought by the Finanšu un ekonomisko noziegumu izmeklēšanas prokuratūra (Department for the Prosecution of Economic and Financial Offences, Latvia) against Mr Aleksandrs Ranks and Mr Jurijs Vasiļevičs, charged with the unlawful sale, as part of a criminal organisation, of objects protected by copyright, intentional unlawful use of another person's trade mark, thereby causing serious harm to the lawfully protected rights and interests of that person, and carrying on unregistered economic activities, by reason of having sold, through an online marketplace, used copies of computer programs stored on non-original media.

Legal context

EU law

Directive 2009/24

3. Article 4(1)(a) and (2) of Directive 2009/24 provides as follows:

'1. Subject to the provisions of Articles 5 and 6, the exclusive rights of the rightholder within the meaning of Article 2 shall include the right to do or to authorise: (a) the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole; in so far as loading, displaying, running, transmission or storage of the computer program necessitate such reproduction, such acts shall be subject to authorisation by the rightholder;

...

2. 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.'

4. Under Article 5(1) and (2) of that directive:

'1. In the absence of specific contractual provisions, the acts referred to in points (a) and (b) of Article 4(1) shall not require authorisation by the rightholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction.

2. The making of a back-up copy by a person having a right to use the computer program may not be prevented by contract in so far as it is necessary for that use.'

Directive 91/250/EEC

5. Article 4 of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42) provided:

'Subject to the provisions of Articles 5 and 6, the exclusive rights of the rightholder, within the meaning of Article 2, shall include the right to do or to authorise:

(a) the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole. In so far as loading, displaying, running, transmission or storage of the computer program necessitate such reproduction, such acts shall be subject to authorisation by the rightholder;

...

(c) any form of distribution to the public, including the rental, of the original computer program or of copies thereof. 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.'

6. Under Article 5(1) and (2) of that directive:

'1. In the absence of specific contractual provisions, the acts referred to in Article 4(a) and (b) shall not require authorisation by the rightholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction.

2. The making of a back-up copy by a person having a right to use the computer program may not be

prevented by contract in so far as it is necessary for that use.’

7. Article 7(1) of that directive provided as follows:

‘Without prejudice to the provisions of Articles 4, 5 and 6, Member States shall provide, in accordance with their national legislation, appropriate remedies against a person committing any of the acts listed in subparagraphs (a), (b) and (c) below:

(a) any act of putting into circulation a copy of a computer program knowing, or having reason to believe, that it is an infringing copy;

(b) the possession, for commercial purposes, of a copy of a computer program knowing, or having reason to believe, that it is an infringing copy;

...’

8. Directive 91/250 was repealed by Directive 2009/24.

Latvian law

9. Article 32 of the Autortiesību likums (Law on copyright), entitled ‘Exhaustion of distribution rights’, provides that the right to distribute a work is exhausted from the moment at which that work is sold or otherwise transferred for the first time in the European Union, if this is done by the author himself or with his consent. That provision applies only to works in tangible form or copies thereof.

The dispute in the main proceedings and the questions referred for a preliminary ruling

10. Mr Ranks and Mr Vasiļevičs are charged with having sold various copyright-protected computer programs published by Microsoft Corp., such as versions of the Microsoft Windows software and the Microsoft Office suite, on an online marketplace between 28 December 2001 and 22 December 2004.

11. The number of copies of computer programs sold, estimated at more than 3 000, could not be precisely determined in the course of the investigation, nor could the total amount obtained from those sales be precisely determined. The amount of material damage caused to Microsoft by the activities of Mr Ranks and Mr Vasiļevičs was, however, evaluated, on the basis of the sums credited to their PayPal accounts, at 293 548.40 United States dollars (USD) (approximately EUR 265 514).

12. Mr Ranks and Mr Vasiļevičs are charged with several infringements of Latvian criminal law and, specifically, with (i) the unlawful sale, as part of a criminal organisation, of objects protected by copyright, (ii) intentional unlawful use of another person’s trade mark and (iii) carrying on unregistered economic activities.

13. By judgment of 3 January 2012, they were found guilty, at first instance, of the unlawful sale, as part of a criminal organisation, of objects protected by copyright, and intentional unlawful use of another person’s trade mark, offences defined and penalised, respectively, by Article 149(3) and Article 206(2) of the Latvian Criminal Code, and were ordered to pay partial compensation to Microsoft for the damage suffered by it and to bear all the legal costs incurred in the proceedings.

14. The public prosecutor, Mr Ranks and Mr Vasiļevičs, as well as Microsoft, appealed against that judgment to the Rīgas apgabaltiesas Kriminālietu tiesu kolēģija (Criminal Law Division of the Riga Regional Court, Latvia), which, by judgment of 22 March 2013, set aside that judgment in so far as it found Mr Ranks and Mr Vasiļevičs guilty of the unlawful sale, as part of a criminal organisation, of objects protected by copyright, and in so far as it imposed a penalty on them.

15. The public prosecutor, Mr Ranks and Mr Vasiļevičs each lodged an appeal on a point of law before the Augstākās tiesas Senāts (Senate of the Supreme Court, Latvia), which, by order of 13 October 2013, set aside the judgment of the Rīgas apgabaltiesas Kriminālietu tiesu kolēģija (Criminal Law Division of the Riga Regional Court) in its entirety and referred the case back to the appeal court for re-examination.

16. In the course of the re-examination of the case, Mr Ranks and Mr Vasiļevičs asked the Rīgas apgabaltiesas Kriminālietu tiesu kolēģija (Criminal Law Division of the Riga Regional Court) to submit a request for a preliminary ruling to the Court of Justice on the interpretation of Article 4(2) and Article 5(1) and (2) of Directive 2009/24.

17. In those circumstances, the Rīgas apgabaltiesas Kriminālietu tiesu kolēģija (Criminal Law Division of the Riga Regional Court) decided to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Under Article 5(1) and Article 4(2) of Directive 2009/24, may a person who has acquired a computer program with a “used” licence on a non-original disk, which works and is not used by any other user, rely upon the exhaustion of the right to distribute a copy of that computer program, the first purchaser of which acquired it from the rightholder with the original disk, [where that disk] has been damaged, if the first purchaser has erased his copy and no longer uses it?

(2) If the answer to the first question is in the affirmative, then, does a person who may rely upon the exhaustion of the right to distribute a copy of the computer program have the right to resell that computer program on a non-original disk to a third person, in accordance with Article 4(2) and Article 5(2) of Directive 2009/24?’

Consideration of the questions referred

18. As a preliminary point, it must be noted that, [as the Advocate General pointed out in point 4 of his Opinion](#), Directive 2009/24 — Article 10 of which repealed Directive 91/250 — entered into force, pursuant to Article 11 thereof, on 25 May 2009. It is apparent from the order for reference that Mr Ranks and Mr Vasiļevičs are charged with offences allegedly committed between 28 December 2001 and 22 December 2004. It follows that the dispute in the main proceedings is covered by Directive 91/250 and not by Directive 2009/24.

19. Consequently, the two questions referred, which concern the interpretation of Article 4(2) of Directive 2009/24, establishing the rule of exhaustion of the

copyright holder's distribution right, and of Article 5(1) and (2) of that directive, laying down exceptions to that rightholder's exclusive right of reproduction, must be interpreted as referring to the equivalent provisions of Directive 91/250, namely Article 4(c) thereof, on the one hand, and Article 4(a) and Article 5(1) and (2) thereof, on the other.

Admissibility

20. The Latvian Government has expressed doubts as to the admissibility of the questions, submitting that the referring court appears to take the view that Mr Ranks and Mr Vasiļevičs lawfully acquired objects protected by copyright, even though, as is evident from the order for reference, the computer programs in question are counterfeits.

21. As to those submissions, it should be borne in mind that, in proceedings under Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is, in principle, bound to give a ruling (see judgment of 12 October 2010, *Rosenblatt*, C-45/09, EU:C:2010:601, paragraph 32 and the case-law cited).

22. It is settled case-law that questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling from a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see judgment of 12 October 2010, *Rosenblatt*, C-45/09, EU:C:2010:601, paragraph 33 and the case-law cited).

23. In the present case, the main proceedings concern the question whether the resale of used copies of computer programs carried out by Mr Ranks and Mr Vasiļevičs is lawful in the light of the requirements of Directive 91/250. The answer to that question therefore depends directly on the interpretation of Article 4(c) of that directive, establishing the rule of exhaustion of the copyright holder's distribution right, and of Article 4(a) and Article 5(1) and (2) of that directive, granting that rightholder an exclusive right of reproduction and laying down exceptions to that right.

24. It follows that the questions referred are admissible.

Substance

25. By its two questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 4(a) and (c), and Article 5(1) and (2),

of Directive 91/250 must be interpreted as meaning that the acquirer of a used copy of a computer program, stored on a non-original material medium, may, under the rule of exhaustion of the rightholder's distribution right, resell that copy where (i) the original material medium of that program, acquired by the initial acquirer, has been damaged and (ii) that initial acquirer has erased his copy or ceased to use it.

26. In that respect, it must be noted, first of all, that, under Article 4(c) of Directive 91/250, the first sale in the European Union of a copy of a computer program by the rightholder or with his consent exhausts the right to distribute that copy within the European Union.

27. It follows from that provision that the exhaustion of the right to distribute the copy of a computer program is subject to two conditions: (i) the copy must have been placed on the market and, more specifically, sold by the rightholder or with his consent, and (ii) it must have been placed on the market in the European Union (see, by analogy, with regard to Article 4 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10), [judgments of 12 September 2006, *Laserdisken*, C-479/04, EU:C:2006:549, paragraph 21](#), and of [22 January 2015, *Art & Allposters International*, C-419/13, EU:C:2015:27, paragraph 31](#)).

28. The Court has already held that the term 'sale' in that provision, which must be given a broad interpretation, encompasses all forms of marketing of a copy of a computer program characterised by the grant of a right to use that copy, for an unlimited period, in return for payment of a fee designed to enable the copyright holder to obtain a remuneration corresponding to the economic value of that copy (see, to that effect, [judgment of 3 July 2012, *UsedSoft*, C-128/11, EU:C:2012:407, paragraph 49](#)).

29. It is common ground that the first marketing in the European Union, by the copyright holder, of a copy of his computer program stored on a material medium such as floppy discs, CD-ROMs or DVD-ROMs, constitutes a first sale of that copy within the meaning of Article 4(c) of Directive 91/250. In addition, it must be considered that, in the absence of any indication to the contrary in the order for reference, that sale is accompanied by an unlimited licence to use that copy.

30. It follows from the foregoing that, under Article 4(c) of Directive 91/250, the holder of the copyright in a computer program who has sold, in the European Union, a copy of that program on a material medium, such as a CD-ROM or a DVD-ROM, accompanied by an unlimited licence for the use of that program, can no longer oppose the resale of that copy by the initial acquirer or subsequent acquirers of that copy, notwithstanding the existence of contractual terms prohibiting any further transfer (see, to that effect, [judgment of 3 July 2012, *UsedSoft*, C-128/11, EU:C:2012:407, paragraph 77](#)).

31. However, the questions referred do not concern the resale of the used copy of a computer program, stored

on an original material medium, by its initial acquirer, but rather the resale of the used copy of a computer program, stored on a non-original material medium, by a person who acquired it from the initial acquirer or from a subsequent acquirer.

32. In their observations, Microsoft, the Italian and Polish Governments and the European Commission submit, in that respect, that the rule of exhaustion of the distribution right laid down in Article 4(c) of Directive 91/250 applies only to the original material medium (floppy disc, CD-ROM or DVD-ROM), sold to the first acquirer, containing the copy of the computer program placed on the market by the rightholder or with his consent, and not to the non-original material medium of that copy.

33. That line of argument cannot be accepted as such.

34. 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, and not the material medium on which that copy has, as the case may be, been first offered for sale in the European Union by the copyright holder or with his consent.

35. In that respect, it follows from the Court's case-law that Article 4(2) of Directive 2009/24, which reproduces the content of Article 4(c) of Directive 91/250, refers, without further specification, to the 'sale ... of a copy of a program' and thus makes no distinction according to the tangible or intangible form of the copy in question (see, to that effect, [judgment of 3 July 2012, UsedSoft, C-128/11, EU:C:2012:407, paragraph 55](#)).

36. The Court concluded from this, in particular, that the exhaustion of the distribution right laid down in Article 4(2) of Directive 2009/24 takes effect after the first sale of a copy of a computer program in the European Union by the copyright holder or with his consent, regardless of whether the sale relates to a tangible or an intangible copy of that program ([judgment of 3 July 2012, UsedSoft, C-128/11, EU:C:2012:407, paragraphs 55 and 61](#)).

37. However, Article 4(a) of Directive 91/250 also grants the holder of the copyright in a computer program the exclusive right to do or to authorise the permanent or temporary reproduction of that program by any means and in any form, in part or in whole, subject to the exceptions laid down in Articles 5 and 6 of that directive.

38. 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(c) of Directive 91/250, provided that that sale does not adversely affect the rightholder's exclusive reproduction right under Article 4(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.

39. Mr Ranks, Mr Vasiļevičs and the Commission submit in their observations that the rule of exhaustion allows the resale of a copy of a computer program stored on a non-original material medium if the original material medium has been damaged, subject to the conditions set out by the Court in its [judgment of 3 July 2012, UsedSoft \(C-128/11, EU:C:2012:407\)](#).

According to those conditions, the initial acquirer of the copy of a program stored on an original material medium must have an unlimited licence for the use of that program and must make any copy of that program remaining in his possession unusable at the time of its resale. Making a copy of a computer program on a non-original material medium would, in that case, be authorised under the exceptions to the exclusive reproduction right laid down in Article 5(1) and (2) of that directive.

40. In that respect, it must be recalled, in the first place, that Article 5(2) of Directive 91/250 provides that the making of a back-up copy by a person having a right to use the computer program may not be prevented by contract in so far as it is necessary for that use. Article 9(1) of that directive provides that any contractual provisions contrary to Article 5(2) are to be null and void.

41. As is apparent from Article 5(2) of that directive, the making of a back-up copy of a computer program is therefore subject to two conditions. That copy must (i) be made by a person having a right to use that program and (ii) be necessary for that use.

42. That provision, laying down an exception to the exclusive reproduction right of the holder of the copyright in a computer program must, in accordance with the settled case-law of the Court, be interpreted strictly (see, by analogy, [judgment of 1 December 2011, Painer, C-145/10, EU:C:2011:798, paragraph 109](#)).

43. It follows that a back-up copy of a computer program may be made and used only to meet the sole needs of the person having the right to use that program and that, accordingly, that person cannot — even though he may have damaged, destroyed or lost the original material medium — use that copy in order to resell that program to a third party.

44. Consequently, as Microsoft and the Italian and Polish Governments submit in their observations, the lawful acquirer of a copy of a computer program accompanied by an unlimited licence for the use of that program, who seeks to resell it, after the exhaustion of the copyright holder's exclusive distribution rights under Article 4(c) of Directive 91/250, cannot, without the authorisation of that rightholder, transfer to the new acquirer the back-up copy of that program made under Article 5(2) of that directive, on the ground that he has damaged, destroyed or lost the original material medium sold to him by or with the consent of that rightholder.

45. In the present case, although it is apparent from the order for reference that Mr Ranks and Mr Vasiļevičs resold copies of computer programs stored on non-original material media, it is not indicated whether they

themselves made the copies resold, as the initial acquirers of those programs, or whether those copies were made by the persons from which they acquired those programs, whether those persons were initial lawful acquirers or not.

46. It must be noted, however, that, whatever may be the circumstances in which Mr Ranks and Mr Vasiļevičs acquired the copies of computer programs that they resold, they come within the ambit of Article 7(1)(a) and (b) of Directive 91/250 if it is established that they put into circulation and possessed for commercial purposes infringing copies of computer programs.

47. It is, however, for the referring court alone to determine, in view of the evidence which it has identified, as regards each computer program copy resold by Mr Ranks and Mr Vasiļevičs, whether it is an infringing copy within the meaning of Article 7(1) of that directive and to draw, as appropriate, the necessary conclusions.

48. In the second place, it must be recalled that, under Article 5(1) of Directive 91/250, where the reproduction is necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, he does not require the rightholder's authorisation, in the absence of specific contractual provisions.

49. In that respect, it follows from the case-law of the Court that when an acquirer of a copy of a computer program purchases and downloads that copy from the rightholder's website, this constitutes a reproduction which is authorised under Article 5(1) of Directive 91/250, since it is necessary for the use of the program by the lawful acquirer in accordance with its intended purpose (see, to that effect, [judgment of 3 July 2012, UsedSoft, C-128/11, EU:C:2012:407, paragraph 75](#)).

50. The Court has also held that, in the event of a resale of the copy of the computer program purchased and downloaded by the first acquirer from the rightholder's website, the new acquirer of that copy, who is a lawful acquirer within the meaning of Article 5(1) of Directive 91/250, is also entitled, under that provision, to download that copy onto his computer, since that download constitutes a reproduction that is necessary to enable him to use that program in accordance with its intended purpose (see, to that effect, [judgment of 3 July 2012, UsedSoft, C-128/11, EU:C:2012:407, paragraphs 80 and 81](#)).

51. It must, however, be noted that the circumstances of the case before the referring court differ from those of the case that gave rise to the [judgment of 3 July 2012, UsedSoft \(C-128/11, EU:C:2012:407\)](#). It is apparent from the documents before the Court that Mr Ranks and Mr Vasiļevičs sold, on the internet, copies of computer programs on non-original material media and there is nothing to suggest that they initially purchased and downloaded those copies from the rightholder's website.

52. Nevertheless, the situation of the lawful acquirer of a copy of a computer program, sold stored on a material medium which has been damaged, destroyed

or lost, and that of the lawful acquirer of a copy of a computer program purchased and downloaded on the internet are comparable with regard to the rule of exhaustion of the distribution right and the exclusive reproduction right granted to the rightholder.

53. The lawful acquirer of the copy of a computer program, who holds an unlimited licence to use that program but who no longer has that original material medium on which that copy was initially delivered to him, because he has destroyed, damaged or lost it, cannot, for that reason alone, be deprived of any possibility of reselling that copy to a third party, since this would render ineffective the exhaustion of the distribution right under Article 4(c) of Directive 91/250 (see, to that effect, [judgment of 3 July 2012, UsedSoft, C-128/11, EU:C:2012:407, paragraph 83](#)).

54. Thus, as Microsoft acknowledged in its written reply to the questions put to it by the Court, the lawful acquirer of an unlimited licence for the use of a used copy of a computer program must be able to download that program from the copyright holder's website, since that downloading constitutes a reproduction of a computer program that is necessary to enable the new acquirer to use the program in accordance with its intended purpose, as the Court held in the [judgment of 3 July 2012, UsedSoft \(C-128/11, EU:C:2012:407, paragraph 85\)](#).

55. It must be borne in mind, however, that the initial acquirer of a copy of a computer program — in respect of which the copyright holder's distribution right is exhausted in accordance with Article 4(c) of Directive 91/250 — who resells that copy must, in order to avoid infringing that rightholder's exclusive right of reproduction of his computer program, laid down in Article 4(a) of that directive, make any copy in his possession unusable at the time of its resale (see, by analogy, [judgment of 3 July 2012, UsedSoft, C-128/11, EU:C:2012:407, paragraph 70 and 78](#)).

56. It should also be specified that 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.

57. It follows from all of the foregoing that Article 4(a) and (c) and Article 5(1) and (2) of Directive 91/250 must be interpreted as meaning that, although the initial acquirer of a copy of a computer program accompanied by an unlimited user licence is entitled to resell that copy and his licence to a new acquirer, he may not, however, in the case where the original material medium of the copy that was initially delivered to him has been damaged, destroyed or lost, provide his back-up copy of that program to that new acquirer without the authorisation of the rightholder.

Costs

58. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for

that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 4(a) and (c) and Article 5(1) and (2) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs must be interpreted as meaning that, although the initial acquirer of a copy of a computer program accompanied by an unlimited user licence is entitled to resell that copy and his licence to a new acquirer, he may not, however, in the case where the original material medium of the copy that was initially delivered to him has been damaged, destroyed or lost, provide his back-up copy of that program to that new acquirer without the authorisation of the rightholder.

[Signatures]

* Language of the case: Latvian.

OPINION OF ADVOCATE GENERAL SAUGMANDSGAARD ØE

delivered on 1 June 2016 (1)

Case C-166/15

Aleksandrs Ranks

Jurijs Vasiļevičs

(Request for a preliminary ruling from the Rīgas apgabaltiesas Kriminālietu tiesu kolēģija (Criminal Law Division of the Riga Regional Court, Latvia))

(Reference for a preliminary ruling — Directive 91/250/EEC — Legal protection of computer programs — Sale of non-original copies of computer programs — Copies incorporated in a material medium other than the original material medium — Existence of an infringement of the right of distribution — Possibility of relying on exhaustion of the right of distribution — Existence of an infringement of the right of reproduction)

I – Introduction

1. By order of 18 March 2015, received at the Court on 13 April 2015, the Rīgas apgabaltiesas Kriminālietu tiesu kolēģija (Criminal Law Division of the Riga Regional Court, Latvia) referred to the Court for a preliminary ruling two questions on the interpretation of Articles 4 and 5 of 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).

2. Those questions were raised in criminal proceedings against Aleksandrs Ranks and Jurijs Vasiļevičs (together, ‘the defendants’) concerning, in particular, the alleged infringement of copyrights of Microsoft Corporation (‘Microsoft’) as a result of the sale of copies of computer programs incorporated in a material medium other than the original material medium.

II – Legal framework

3. Article 10 of Directive 2009/24 repeals Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42), as amended by Council Directive 93/98/EEC of 29

October 1993 harmonising the term of protection of copyright and certain related rights (OJ 1993 L 290, p. 9) (‘Directive 91/250’).

4. Directive 2009/24 entered into force, pursuant to Article 11 thereof, on 25 May 2009. It is apparent from the order for reference that the relevant facts in the main proceedings occurred between 28 December 2001 and 22 December 2004. Therefore, it is necessary to apply the provisions of Directive 91/250 in the present case.

5. Article 4 of Directive 91/250, entitled ‘Restricted acts’, provides:

‘Subject to the provisions of Articles 5 and 6, the exclusive rights of the rightholder within the meaning of Article 2, shall include the right to do or to authorise:

(a) the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole. Insofar as loading, displaying, running, transmission or storage of the computer program necessitate such reproduction, such acts shall be subject to authorisation by the rightholder;

...

(c) any form of distribution to the public, including the rental, of the original computer program or of copies thereof. 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.’

6. Article 5 of Directive 91/250, entitled ‘Exceptions to the restricted acts’, is worded as follows:

‘1. In the absence of specific contractual provisions, the acts referred to in Article 4(a) and (b) shall not require authorisation by the rightholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction.

2. The making of a back-up copy by a person having a right to use the computer program may not be prevented by contract insofar as it is necessary for that use.

...

7. Article 7 of Directive 91/250, entitled ‘Special measures of protection’, provides:

‘1. Without prejudice to the provisions of Articles 4, 5 and 6, Member States shall provide, in accordance with their national legislation, appropriate remedies against a person committing any of the acts listed in subparagraphs (a), (b) and (c) below:

(a) any act of putting into circulation a copy of a computer program knowing, or having reason to believe, that it is an infringing copy;

(b) the possession, for commercial purposes, of a copy of a computer program knowing, or having reason to believe, that it is an infringing copy;

...

2. Any infringing copy of a computer program shall be liable to seizure in accordance with the legislation of the Member State concerned.

...

III – The main proceedings and the questions referred

8. Between 28 December 2001 and 22 December 2004, the defendants, acting in criminal association, sold more than 3 000 copies of computer programs protected by copyright, on the online sales platform provided by the website www.ebay.com.

9. Microsoft is the holder of the copyrights in the computer programs which were sold, including the programs ‘Windows 95’, ‘Windows 98’, ‘Windows 2000 Professional’, ‘Windows Millennium’, ‘Windows XP Home 2002’, ‘Office 2000 Professional’, ‘Office XP Small Business’ and ‘Office 2003’.

10. The total amount which the defendants obtained from those sales could not be precisely determined in the course of the investigation. It has nevertheless been established that the defendants received an amount of EUR 229 724.67 through the ‘PayPal’ payment system offered by the website www.ebay.com.

11. In the context of those sales, the defendants sold, inter alia:

- one copy of the ‘Windows Millennium Edition’ program, the licensing terms of which stipulated that it was for distribution only with a new PC;
- two copies of the ‘Windows 2000 Professional OEM’ program, together with a user manual and a certificate of authenticity, which were regarded by an expert as unlawful copies of the compact disk and the installation program for ‘Microsoft Windows 2000 Professional’;
- thirty copies of the ‘Windows 98 Second Edition OEM’ program, together with a user manual and a certificate of authenticity, which were regarded by an expert as unlawful copies of the compact disks and the installation programs for ‘Microsoft Windows 98 Starts Here 4/98’ and of ‘Microsoft Windows 98 Second Edition’.

12. The referring court states that the defendants were charged with committing the following criminal offences:

- the unlawful sale as part of a criminal organisation of objects protected by copyright which are reproduced or used in any other way in breach of copyright (Article 149(3) of the Criminal Law Code, in the version in force on 17 October 2002);
- the intentional unlawful use of another person’s trade mark, in serious breach of personal rights and interests protected by law (Article 206(2) of the Criminal Law Code), and
- carrying on unregistered economic activities, causing serious damage to personal interests protected by law (Article 207(2) of the Criminal Law Code).

13. By judgment of 3 January 2012, the Rīgas pilsētas Vidzemes priekšpilsētas tiesa (Vidzeme District Court, Riga, Latvia) found the defendants guilty of committing the offences defined in Articles 149(3) and 206(2) of the Criminal Law Code and ordered them to pay partial compensation for the damage caused and to bear all the legal costs incurred in the proceedings. The defendants were found not guilty of the offence provided for in Article 207(2) of the Criminal Law Code.

14. By judgment of 22 March 2013, the referring court set aside the judgment at first instance, in so far as it concerned the conviction of the defendants under Article 149(3) of the Criminal Law Code, and the penalty imposed. However, that court convicted the defendants under Article 149(3) of the Criminal Law Code, in the version in force on 17 October 2002. The remainder of the judgment was not altered.

15. By judgment of 13 October 2013, the Latvijas Republikas Augstākās tiesas Senāts (Senate of the Latvian Supreme Court) set aside the judgment of 22 March 2013 in its entirety and referred the case back to the appeal court for re-examination.

16. By decision of 8 October 2013 the referring court agreed to re-examine the criminal case relating to the charges brought against the defendants for the offences under Article 149(3) of the Criminal Law Code (in the version in force until 31 December 2010), Article 206(2) of the Criminal Law Code and Article 207(2) of the Criminal Law Code.

17. Since it entertains doubts as to the relevance of the judgment in *UsedSoft*, (2) in the circumstances of the case in the main proceedings, the Rīgas apgabaltiesas Kriminālietu tiesu kolēģija (Criminal Law Division of the Riga Regional Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Under [Article] 5(1) and [Article] 4(2) of Directive 2009/24 ..., may a person who has acquired a computer program with a ‘used’ licence on a non-original disk, which works and is not used by any other user, rely upon the exhaustion of the right to distribute a copy of that computer program, the first purchaser of which acquired it from the rightholder with the original disk, [where the original disk] has been damaged [and] the first purchaser has erased his copy and no longer uses it?’

2. If the answer to the first question is in the affirmative, then, does a person who may rely upon the exhaustion of the right to distribute a copy of the computer program have the right to resell that computer program on a non-original disk to a third person, in accordance with [Article] 4(2) and [Article] 5(2) of Directive 2009/24?’

IV – Procedure before the Court

18. The request for a preliminary ruling was lodged at the Court Registry on 13 April 2015.

19. The defendants, Microsoft, the Latvian, Italian and Polish Governments and the European Commission have submitted written observations.

20. Representatives of the defendants and of Microsoft, the Latvian Government and the Commission appeared at the hearing of 16 March 2016 and presented their oral arguments.

V – Analysis of the questions referred

21. The questions referred to the Court relate to an infringement of copyright on account of the sale, without the rightholder’s consent, of copies of computer programs made without the rightholder’s authorisation on a material medium other than the original medium (‘non-original tangible copies’). Those

questions are therefore not concerned with the sale, by the rightholder or with his consent, of copies made by the rightholder or with his authorisation on the original material medium ('original tangible copies').

22. In the main proceedings, the defendants are accused of having sold thousands of non-original tangible copies of computer programs in which Microsoft holds the copyright. The defendants claimed in their written observations that they had bought those copies from undertakings or individuals no longer having any use for them.

23. The sale of non-original tangible copies is capable of adversely affecting two exclusive rights granted to the rightholder by Article 4(a) and (c) of Directive 91/250, namely the exclusive right to do or to authorise the permanent or temporary reproduction of a computer program ('the right of reproduction') and the exclusive right to do or to authorise any form of distribution to the public, including the rental, of the original computer program or of copies thereof ('the right of distribution' or 'the distribution right').

24. Moreover, although the questions raised refer explicitly to exhaustion of the right of distribution alone, those questions refer also to provisions establishing derogations from the right of reproduction, namely Article 5(1) and (2) of Directive 91/250.

25. I therefore consider that it is necessary to reformulate the questions referred to the Court as follows. By its questions, which should be considered together, the referring court asks, in essence, whether Article 4(a) and (c) and Article 5(1) and (2) of Directive 91/250 must be interpreted as meaning that the rightholder's exclusive rights of reproduction and distribution are infringed where a copy of a computer program is made by a user, without the rightholder's authorisation, on a material medium other than the original material medium and where that copy is sold, without the rightholder's authorisation, by that user or by another user, even in circumstances where:

- the original material medium is damaged, and
- the seller of that copy makes any other copy in his possession unusable.

A – Admissibility of the questions referred

26. The Latvian Government has expressed doubts as to the admissibility of the questions referred, insofar as those questions refer to the sale of non-original licensed tangible copies whereas the order for reference describes expert reports noting the sale of counterfeit copies. Therefore, it claims that the questions referred are not relevant in resolving the dispute in the main proceedings.

27. It must be borne in mind in this regard that, in accordance with the settled case-law of the Court, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the

questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling. (3)

28. Thus, a reference from a national court may be refused only if it is quite obvious that the interpretation of EU law sought bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. (4)

29. In the present case, and as noted by the Latvian Government itself at the hearing, the classification as 'counterfeit' will depend on the answer given by the Court to the questions referred. By way of illustration, if the Court were to hold that the making and sale of non-original tangible copies, in circumstances such as those of the main proceedings, did not adversely affect the rights of reproduction and distribution, those copies could no longer be considered counterfeit copies by the national court.

30. In those circumstances, I consider that the questions referred for a preliminary ruling have a direct connection with the subject matter of the dispute in the main proceedings and are consequently admissible.

B – The existence of an infringement of the right of distribution in respect of the sale of non-original tangible copies of computer programs

31. It is now necessary to consider whether Article 4(c) of Directive 91/250 must be interpreted as meaning that the rightholder's exclusive right of distribution is infringed in the circumstances set out in point 25 of this Opinion.

32. According to the first sentence of that provision, distribution to the public, without the rightholder's authorisation, of the original or a copy of a computer program constitutes an infringement of the right of distribution. In the main proceedings, it is common ground that the defendants sold, on the online sales platform offered by the website www.ebay.com, several thousand non-original tangible copies of computer programs without the consent of the rightholder, namely Microsoft. Nor is it disputed that those sales constitute distribution for the purposes of that provision.

33. Consequently, the sales of the copies at issue in the main proceedings constitute an infringement of Microsoft's right of distribution, unless it is established that those sales are covered by a derogation from the right of distribution. In that regard, most of the observations submitted to the Court concern the question whether such sales are covered by the rule of exhaustion of the right of distribution provided for in the second sentence of Article 4(c) of Directive 91/250.

34. Three approaches can be identified in the observations submitted to the Court regarding the possible application of the exhaustion rule to non-original tangible copies.

35. According to a strict approach advocated by Microsoft and by the Italian and Polish Governments, a non-original tangible copy can never benefit from

exhaustion of the right of distribution and therefore cannot be sold by a user without the rightholder's authorisation.

36. According to a liberal approach supported by the defendants and the Latvian Government, a non-original tangible copy benefits from exhaustion of the right of distribution where the requirements which they claim were established by the Court in the judgment in *UsedSoft* (5) are fulfilled, that is where:

- the copyright holder conferred on the original acquirer, in return for payment of a fee designed to enable the copyright holder to obtain a remuneration corresponding to the economic value of the copy of the work of which it is the proprietor, a right to use that copy for an unlimited period, and
- the original acquirer who resells a non-original tangible copy makes any other copy in his possession unusable at the time of the resale.

37. According to an intermediate approach proposed by the Commission, the solution adopted by the Court in the judgment in *UsedSoft* (6) could be extended to non-original tangible copies only in a specific situation, that is where the original tangible copy has been damaged. It is true that the making of non-original tangible copies for purposes other than those listed in Article 5 of Directive 91/250, and in particular for resale, could not benefit from exhaustion of the right of distribution. However, the making of a non-original tangible copy when the original tangible copy is damaged would be covered by Article 5(1) and (2) of Directive 91/250, since it would be necessary to enable the lawful acquirer to use the copy in accordance with its intended purpose. The Commission concludes from this that the resale of a non-original tangible copy made in such circumstances would benefit from exhaustion, provided that the conditions established in that judgment, and summarised in point 36 of this Opinion, are fulfilled.

38. The following factors seem to me to support the strict approach advocated by Microsoft and by the Italian and Polish Governments.

39. In the first place, the wording of the second sentence of Article 4(c) of Directive 91/250, which establishes the only derogation from the right of distribution in the context of that directive, seems to me irreconcilable with the liberal and intermediate approaches for the following two reasons.

40. First, the wording of that provision limits the benefit of exhaustion solely to the original copy. Under that provision, the sale of a copy of a computer program, by the rightholder or with his consent, is to 'exhaust the distribution right of that copy' (emphasis added). As Microsoft points out, the use of the term 'that copy' precludes reliance on the exhaustion rule for any copy other than the original copy sold by the rightholder or with his consent.

41. Secondly, the wording of that provision does not make exhaustion of the right of distribution subject to the condition that the reseller have rendered unusable any other copy in his possession or to the condition that the original tangible copy have deteriorated, contrary to what is argued by the defendants, the Latvian

Government and the Commission. In fact, under that provision, exhaustion of the right of distribution is applied unconditionally to any original copy sold by the rightholder or with his consent.

42. In the second place, the strict approach seems to be consistent with the overall conception of the rule of exhaustion of the right of distribution as provided for by EU copyright law, as Microsoft has argued. A provision similar to the second sentence of Article 4(c) of Directive 91/250 was, in particular, included in Article 4(2) of Directive 2001/29/EC. (7)

43. That provision was interpreted by the Court in the judgment in *Art & Allposters International*. (8) That judgment was concerned with a copyright infringement relating to images of protected works, which had, without the rightholder's authorisation, been transferred from a paper poster to a painter's canvas and then sold on that new medium. The Court held that exhaustion of the right of distribution laid down in Article 4(2) Directive 2001/29 covered only the original medium sold with the rightholder's consent (paper poster) and could not be extended to the new medium incorporating the image of the protected work (painter's canvas).

44. In my view, the fact that the original medium has deteriorated does not undermine the approach adopted by the Court in the judgment in *Art & Allposters International*. (9) Thus, any deterioration of the paper poster does not mean that the user can, without infringing the right of distribution, transfer the image to a painter's canvas and sell it without the rightholder's authorisation. Similarly, the deterioration of a book does not give its owner the right to sell a photocopy, in the same way as the deterioration of a vinyl record does not confer the right to transfer its contents to a compact disc and to resell that compact disc without the rightholder's authorisation.

45. By analogy, the exhaustion of the right of distribution provided for by the second sentence of Article 4(c) of Directive 91/250 benefits only the original medium sold by the rightholder or with his consent (the original tangible copy). Contrary to what was argued by the defendants, the Latvian Government and the Commission, the exhaustion rule cannot apply to the resale, without the rightholder's consent, of other media incorporating the computer program (non-original tangible copies), even in the event of deterioration of the original medium.

46. In the third place, the liberal and intermediate approaches seem to me to stem from a confusion between the rules governing the right of distribution and the rules governing the right of reproduction.

47. The same applies in connection with the condition that the reseller is required to 'make unusable' at the time of the resale any other copy in his possession. (10) That obligation, referred to in paragraphs 70 and 78 of the judgment in *UsedSoft*, (11) is imposed on the reseller so as not to infringe the right of reproduction. However, that obligation is not relevant for the purpose of determining whether there is an infringement of the right of distribution.

48. Similarly, the intermediate approach advocated by the Commission (12) presupposes that a user making a non-original tangible copy as provided for by Article 5(1) or (2) of Directive 91/250 has the right, under certain conditions, to distribute that copy.

49. However, those provisions establish derogations solely from the right of reproduction. Even if the copy made by a user is lawful in the light of the conditions laid down in Article 5(1) or (2) of Directive 91/250, that does not imply that that user has the right to sell that copy without infringing the right of distribution. The right to make a copy for his own use does not entail the right to sell that copy to others.

50. In the fourth place, I feel that the liberal approach advocated by the defendants and the Latvian Government and the intermediate approach proposed by the Commission would impose on the acquirer of a non-original tangible copy a burden of proof which would be difficult, if not impossible, to satisfy.

51. To my knowledge, the Court has never expressly ruled on the burden of proof of exhaustion in the context of Directive 91/250. Nevertheless, according to the general principles governing the burden of proof, it is for the party relying on a ground of defence to establish that it fulfils the requirements laid down for that purpose. In the area of trade mark law, the Court has held, in accordance with those principles, that it is for the person relying on exhaustion to establish that he fulfils the requirements laid down for that purpose. (13) In matters of copyright, I see no reason to depart from that approach, which is also supported by the legal literature. (14)

52. In application of those principles, it would be for the acquirer of a non-original tangible copy to establish that the requirements proposed by the defendants, the Latvian Government and the Commission are fulfilled, in particular by adducing evidence that the original copy has deteriorated and that the reseller has rendered unusable any other copy in his possession. In my view it would be difficult or even impossible for the acquirer to adduce such evidence, especially in the context of transactions at a distance such as those at issue in the main proceedings. I would add that, if the acquirer cannot prove that the purchased copy benefits from exhaustion, he would be exposed to a risk of seizure of that infringing copy under Article 7(2) of Directive 91/250.

53. In the fifth and last place, I feel that the liberal approach advocated by the defendants and the Latvian Government and the intermediate approach proposed by the Commission would significantly complicate any measures to combat counterfeit copies. As Microsoft has stated, it is often impossible in practice to distinguish a back-up copy which is lawful (since it is made in accordance with Article 5(2) of Directive 91/250) from a counterfeit copy. Therefore, allowing the sale of back-up copies, as suggested by the defendants, the Latvian Government and the Commission, would cause major practical difficulties for the authorities responsible for measures to combat counterfeiting.

54. In the light of all those reasons, I consider that Article 4(c) of Directive 91/250 must be interpreted as meaning that the rightholder's exclusive right of distribution is infringed in the circumstances identified in point 25 of this Opinion.

C – The existence of an infringement of the right of reproduction on account of the sale of non-original tangible copies of computer programs

55. Although the finding that there has been an infringement of the right of distribution could be sufficient as a response to the questions referred to the Court, it seems to me important, in the light of the doubts expressed by the referring court and of the provisions of Directive 91/250 to which it refers, to examine whether Article 4(a) and Article 5(1) and (2) of Directive 91/250 must be interpreted as meaning that the rightholder's exclusive right of reproduction is infringed in the circumstances identified in point 25 of this Opinion.

56. In the main proceedings, it is common ground that the defendants sold several non-original tangible copies of computer programs, which were made without the authorisation of the rightholder, namely Microsoft. The making of such copies infringes Microsoft's right of reproduction, unless it is established that they are covered by a derogation from the right of reproduction.

57. Article 5 of Directive 91/250 establishes two derogations which are potentially relevant in the circumstances of the dispute in the main proceedings and were referred to by the referring court. The act of reproduction is, in principle, not subject to the rightholder's authorisation, first, where it is necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose (Article 5(1) and, secondly, where it consists in the making of a back-up copy necessary for its use (Article 5(2)).

58. It is for the referring court to determine whether, at the time they were made, the non-original tangible copies at issue in the main proceedings actually constituted copies necessary for the use of the programs or back-up copies within the meaning of those provisions. The factual findings in the order for reference contain, in my view, no indication in that regard.

59. However, even assuming that the non-original tangible copies at issue in the main proceedings fell within the scope of the derogations provided for in Article 5 of Directive 91/250 at the time those copies were made, I consider that their subsequent sale results in the loss of the benefit of those derogations, for the following reasons.

60. First, it is apparent from the wording of Article 5(1) of Directive 91/250 that the non-original tangible copy must be made by the lawful acquirer to allow him to use the computer program in accordance with its intended purpose. However, in the event of the resale of the computer program, that lawful acquirer transfers his rights to use that program and must stop using it. Accordingly, it is no longer possible for him to satisfy the requirement that the non-original tangible copy

must allow him to use the computer program in accordance with its intended purpose. As noted by the Commission, the term ‘use’ in that provision cannot be interpreted as meaning that it includes the making of non-original tangible copies for resale.

61. Secondly, Article 5(2) of Directive 91/250 presupposes that the person having a right to use the computer program makes a back-up copy ‘insofar as it is necessary for that use’. Once again, in the event of the resale of the computer program, the possessor will have to stop using it and can no longer satisfy that requirement.

62. It follows from the foregoing that, as has been argued by Microsoft and the Italian Government, the sale of a non-original tangible copy — which, by definition, has not been authorised by the rightholder — will result in an infringement of the right of reproduction, due to the loss of the benefit of the derogations set out in Article 5(1) and (2) of Directive 91/250.

63. Paragraphs 70 and 78 of the judgment in *UsedSoft* (15) seem to me to support that interpretation, since the Court held that the reseller must make unusable any copy in his possession other than the copy resold, so as not to infringe the right of reproduction. In my view, the copies which must be made unusable include, in particular, copies made by the reseller in accordance with Article 5(1) or (2) of Directive 91/250.

64. The defendants claimed in their written observations that they bought all the copies of the computer programs at issue in the main proceedings from undertakings or individuals who no longer had any use for them.

65. It is clearly not for the Court but for the referring court to rule on that factual matter. If it is established that the defendants actually sold non-original tangible copies made by third-parties, the infringement of the right of reproduction provided for in Article 4(a) of Directive 91/250 cannot, as such, be attributed to defendants.

66. In that situation, the defendants could nonetheless be caught by Article 7(1)(a) or (b) of Directive 91/250. In that regard, it is for the referring court to determine whether the defendants satisfy the conditions imposed by those provisions, in particular whether they knew or had reason to believe that the copies at issue in the main proceedings were infringing copies.

67. I would add that infringing copies of a computer program are liable to seizure in accordance with the legislation of the Member State concerned, pursuant to Article 7(2) of Directive 91/250.

68. In view of the foregoing, I consider that the Article 4(a) and Article 5(1) and (2) of Directive 91/250 must be interpreted as meaning that the rightholder’s exclusive right of reproduction is infringed in the circumstances identified in point 25 of this Opinion.

D – The scope of the judgment in *UsedSoft* in the context of the present case

69. The defendants, the Latvian Government and the Commission have relied in their observations on several passages of the judgment in *UsedSoft*. (16) The

referring court also raises the question of whether that judgment is relevant in the circumstances of the dispute in the main proceedings.

70. Having examined whether there is an infringement of the right of distribution and an infringement of the right of reproduction in circumstances such as those of the dispute in the main proceedings, I am of the view that it is still important to set out the reasons why I consider that that judgment is of only limited relevance in the present case.

71. It should be recalled that that case concerned the resale, by *UsedSoft*, of user licences for used intangible copies of a computer program downloaded from the Internet site of the rightholder, Oracle. The latter was opposed to that resale practice, arguing in particular that the rule of the exhaustion of the right of distribution did not apply to intangible copies of that kind. (17)

72. The Court held that the exhaustion rule must apply to both tangible and intangible copies of a computer program. (18) With regard specifically to intangible copies, the Court held that exhaustion should benefit an intangible copy downloaded via the Internet, where the rightholder has conferred, in return for payment of a fee intended to enable him to obtain a remuneration corresponding to the economic value of the copy of the work of which he is the proprietor, a right to use that copy for an unlimited period. (19)

73. Moreover, and in order to preserve the effectiveness of the exhaustion rule, the Court held that, notwithstanding the rightholder’s exclusive right of reproduction, the second acquirer of an intangible copy of that kind has the right to make a copy of it on his computer in order to use the program in accordance with its intended purpose, pursuant to Article 5(1) of Directive 91/250. (20)

74. In my view, the solution adopted by the Court in that judgment was dictated by the desire to preserve the effectiveness of exhaustion of the right of distribution by extending its scope to intangible copies of computer programs. The opposite result would have encouraged rightholders to distribute their computer programs in an intangible form in order to escape the exhaustion rule.

75. However, the circumstances of the dispute in the main proceedings differ significantly from those which gave rise to the judgment in *UsedSoft*. (21)

76. First, there is nothing in the documents before the Court in the present case to suggest that the defendants sold user licences for intangible copies, the subject matter of the judgment in *UsedSoft*. (22) On the contrary, it is common ground that the dispute in the main proceedings concerns non-original tangible copies of computer programs.

77. Secondly, the reasons which led the Court to the solution adopted in that judgment cannot be applied to the present case. In the more ‘traditional’ context of original tangible copies sold with the rightholder’s consent, there is no particular risk to the effectiveness of the rule of exhaustion of the right of distribution. I would point out in that regard that Microsoft does not dispute that original tangible copies of its computer

programs, sold by it or with its consent, benefit from exhaustion of the right of distribution. Thus, unlike Oracle in *UsedSoft*, (23) Microsoft is opposed not to the emergence of a market for the sale of used original copies, but rather to the emergence of a market for the sale of non-original copies made and sold without its consent.

78. In the light of those differences between the circumstances of the present case and the circumstances in the case that gave rise to the judgment in *UsedSoft*, (24) I consider that that judgment is of only limited relevance in the present case. As rightly observed by the Commission, the issue of the resale of non-original tangible copies was simply not examined by the Court in that judgment.

79. The importance of that clarification is not solely theoretical. It follows from it that the solution adopted in that judgment, which establishes the conditions under which the resale of an intangible copy does not infringe the right of distribution, is not applicable by analogy to circumstances such as those in the dispute in the main proceedings, contrary to what the defendants, the Latvian Government and the Commission claim. (25)

80. In summary, the solution adopted in the judgment in *UsedSoft* (26) covers the specific context of the sale of user licences for intangible copies of computer programs, which was not explicitly envisaged by the EU legislature when adopting Directive 91/250. Outside that specific context, it is appropriate to apply in a traditional way the provisions governing the exclusive rights of distribution and reproduction, in particular Articles 4 and 5 of Directive 91/250.

E – The practical consequences of the proposed approach

81. The practical consequences of the approach which I am proposing to the Court are the following.

82. Where the original copy of a computer program, sold by the rightholder or with his consent, is incorporated in a material medium, only that original tangible copy benefits from the rule of exhaustion of the right of distribution. Moreover, the reseller of such a copy is required to make unusable any other copy in his possession, so as not to infringe the right of reproduction. Consequently, that approach would constitute a legal barrier to the emergence of a market for used non-original tangible copies of computer programs, but would not impede the emergence of such a market for original copies.

83. Where the original copy is not incorporated in a material medium, it is appropriate to apply the solution adopted by the Court in the judgment in *UsedSoft* (27) in order to preserve the effectiveness of the exhaustion rule. Thus, the right of distribution in respect of the intangible copy is exhausted if the rightholder has conferred, in return for payment of a fee intended to enable him to obtain a remuneration corresponding to the economic value of the copy of the work of which he is the proprietor, a right to use that copy for an unlimited period (paragraph 72). The reseller is also required to make any other copy in his possession

unusable, so as not to infringe the right of reproduction (paragraphs 70 and 78). That solution allows the emergence of a market for used intangible copies of computer programs.

VI – Conclusion

84. Having regard to all the foregoing considerations, I propose that the Court give the following answer to the questions referred by the Rīgas apgabaltiesas Krimināllietu tiesu kolēģija (Criminal Law Division of the Riga Regional Court):

Article 4(a) and (c) and Article 5(1) and (2) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, as amended by Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights, must be interpreted as meaning that the rightholder's exclusive rights of reproduction and distribution are infringed where a copy of a computer program is made by a user, without the rightholder's authorisation, on a material medium other than the original material medium and where that copy is sold, without the rightholder's authorisation, by that user or another user, even in circumstances where:

- the original material medium is damaged, and
- the seller of that copy makes any other copy in his possession unusable.

1 – Language of the case: French.

2 – Judgment of 3 July 2012 (C-128/11, EU:C:2012:407).

3 – See, in particular, judgment of 6 October 2015, *Delvigne* (C-650/13, EU:C:2015:648, paragraph 36 and case-law cited).

4 – See, in particular, judgment of 6 October 2015, *Delvigne* (C-650/13, EU:C:2015:648, paragraph 37 and case-law cited).

5 – Judgment of 3 July 2012 (C-128/11, EU:C:2012:407).

6 – Judgment of 3 July 2012 (C-128/11, EU:C:2012:407).

7 – Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10). According to Article 4(2) thereof, 'the distribution right shall not be exhausted within the [European Union] in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the [European Union] of that object is made by the rightholder or with his consent.' (emphasis added).

8 – Judgment of 22 January 2015 (C-419/13, EU:C:2015:27).

9 – Judgment of 22 January 2015 (C-419/13, EU:C:2015:27).

10 – See point 36 of this Opinion.

11 – Judgment of 3 July 2012 (C-128/11, EU:C:2012:407).

12 – See point 37 of this Opinion.

13 – See, to that effect, judgment in Zino Davidoff and Levi Strauss (C-414/99 to C-416/99, EU:C:2001:617, paragraph 54). The Court also held that Articles 34 and 36 TFEU do not preclude a national rule providing that the conditions for exhaustion must be established by the person who relies on it, except where such a rule enables the trade-mark owner to partition national markets. See, to that effect, judgment of 8 April 2003, Van Doren + Q (C-244/00, EU:C:2003:204, paragraphs 35 to 42).

14 – Walter, M., and von Lewinski, S., *European Copyright Law: A Commentary*, Oxford University Press, Oxford, 2010, No 5.4.33: ‘Whoever alleges that the right of distribution with regard to a specific copy is exhausted, in principle, has to bear the burden of proof according to the general rules.’

15 – Judgment of 3 July 2012 (C-128/11, EU:C:2012:407).

16 – Judgment of 3 July 2012 (C-128/11, EU:C:2012:407).

17 – Judgment of 3 July 2012, UsedSoft (C-128/11, EU:C:2012:407, paragraph 53).

18 – Judgment of 3 July 2012, UsedSoft (C-128/11, EU:C:2012:407, paragraph 59).

19 – Judgment of 3 July 2012, UsedSoft (C-128/11, EU:C:2012:407, paragraph 72).

20 – Judgment of 3 July 2012, UsedSoft (C-128/11, EU:C:2012:407, paragraphs 83 and 88).

21 – Judgment of 3 July 2012 (C-128/11, EU:C:2012:407).

22 – Judgment of 3 July 2012 (C-128/11, EU:C:2012:407).

23 – Judgment of 3 July 2012 (C-128/11, EU:C:2012:407).

24 – Judgment of 3 July 2012 (C-128/11, EU:C:2012:407).

25 – See points 36 and 37 of this Opinion.

26 – Judgment of 3 July 2012 (C-128/11, EU:C:2012:407).

27 – Judgment of 3 July 2012 (C-128/11, EU:C:2012:407).