Case C-128/11

UsedSoft GmbH

v

Oracle International Corp.

(Reference for a preliminary ruling from the Bundesgerichtshof)

(Legal protection of computer programs — Marketing of used licences for computer programs downloaded from the internet — Directive 2009/24/EC — Articles 4(2) and 5(1) — Exhaustion of the distribution right — Concept of lawful acquirer)

Summary of the Judgment

1. *Approximation of laws — Copyright and related rights — Directive 2009/24 — Legal protection of computer programs — Restricted acts — Exhaustion of the right of distribution of a copy of a computer program — Conditions — Authorisation by the holder of the copyright in the copy of the downloading of the copy and the right to use the copy*

   (European Parliament and Council Directive 2009/24, Art. 4(2))

2. *Approximation of laws — Copyright and related rights — Directive 2009/24 — Legal protection of computer programs — Exceptions to the restricted acts — Use of the computer program by the lawful acquirer in accordance with its intended purpose — Lawful acquirer — Concept — Subsequent acquirer of a copy of the computer program originally downloaded by the first acquirer from the copyright holder's website — Included*

   (European Parliament and Council Directive 2009/24, Arts 4(2) and 5(1))

1. Article 4(2) of Directive 2009/24 on the legal protection of computer programs must be interpreted as meaning that the right of distribution of a copy of a computer program is exhausted if the copyright holder who has authorised, even free of charge, the downloading of that copy from the internet onto a data carrier has also 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.

   The downloading of a copy of a computer program and the conclusion of a user licence agreement for that copy form an indivisible whole. Downloading a copy of a computer program is pointless if the copy cannot be used by its possessor. Those two operations must therefore be examined as a whole for the purposes of their legal classification.

   Those operations involve the transfer of the right of ownership of the copy of the computer program in question, as the making available by the copyright holder of a copy of his computer program and the conclusion of a user licence agreement for that copy are intended to make the copy usable by the customer, permanently, 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 he is the proprietor. It makes no difference whether the copy of the computer program was made available to the customer by the rightholder concerned by means of a download from the rightholder's website or by means of a material medium such as a CD-ROM or DVD.

(see paras 44-47, 72, operative part 1)

2. Articles 4(2) and 5(1) of Directive 2009/24 on the legal protection of computer programs must be interpreted as meaning that, in the event of the resale of a user licence entailing the resale of a copy of a computer program downloaded from the copyright holder's website, that licence having originally been granted by that rightholder to the first acquirer for an unlimited period in return for payment of a fee intended to enable the rightholder to obtain a remuneration corresponding to the economic value of that copy of his work, the second acquirer of the licence, as well as any subsequent acquirer of it, will be able to rely on the exhaustion of the distribution right under Article 4(2) of that directive, and hence be regarded as lawful acquirers of a copy of a computer program within the meaning of Article 5(1) of that directive and benefit from the right of reproduction provided for in that provision.

(see para. 88, operative part 2)