	***SOFTWARE DIRECTIVE***	
Dr. Péter Mezei	Chapter 3 aims to introduce the content and case law related to the Software Directive.	***60 minutes***

Reading task
Please read the following case accessible via the attached link, and answer/discuss the questions/notes below.

Case C-128/11 - UsedSoft GmbH v. **Oracle International Corp., Judgment of the Court of 3 July 2012**

http://curia.europa.eu/juris/document/document.jsf?docid=124564&doclang=EN

Please pay close attention to the fact that this preliminary ruling is the first in the row of rulings discussing aspects of exhaustion in the digital age. Some other rulings will be addressed later (under the InfoSoc Directive). Please also note that the ruling is heavily contested by many (and hailed by many as well).

Questions to the reading

1. In its preliminary ruling the CJEU concluded that a licence might be characterized as a sale if the right to use a computer program (1) lasts for an indefinite period, and (2) "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". Furthermore, (3) merely calling a contract a licence is not enough "to circumvent the rule of exhaustion and divest it of all scope". ***Are these features enough to treat an agreement sale rather than licence? What about Oracle's prohibition of the transfer of computer programs? Is the right to use an intangible software an equivalent of property ownership over physical goods?***
2. The CJEU differentiated between two types of Internet uses. In the first scenario, uses that do not lead to the permanent reproduction or sale of any copy of a protected subject matter governed by the making available to the public right. Such an example might be the posting of content on a website, on-demand streaming or dissemination of files via P2P file-sharing applications. Under the second scenario, a permanent copy is received by the end-user in exchange of consideration and is retained on a permanent basis. The best example might be the purchase of a track from iTunes. The *UsedSoft* case serves as another great

example. The CJEU declared this second category as sale and distribution of copies of works. ***Is the CJEU's syllogism correct?***

3. 3. ***Is the theory of functional equivalence applicable to copyrightable subject matter other than computer programs?*** Referring back to the CJEU's point according to which the online transmission of computer program is from an economic (and at the same time from a technological) perspective functionally the same as selling a data carrier in a tangible format, the answer shall be a clear "no". Sound recordings, audiovisual contents or audio books have multiple ways of exploitation, including the distribution of copies on tangible data carriers, making available to the public or selling a digital copy via the Internet, communication to the public by wire or wireless means, public performance/display etc. ***Is it correct, if we paraphrase the CJEU's logic in the following way: "from an economic point of view, the sale of a sound recording/audio-book on a physical data carrier and the sale of the said content by downloading from the Internet are not similar. The on-line transmission method is not the functional equivalent of the supply of a material medium"? Is the outcome the same from the technological point of view?***

Further recommended readings

http://copyrightblog.kluweriplaw.com/2012/07/05/welcome-to-the-brave-old-world-usedsoft-and-the-full-online-exhaustion/

http://ipkitten.blogspot.com/2012/07/usedsoft-and-principle-of-exhaustion.html

Péter Mezei: Digital First Sale Doctrine Ante Portas – Exhaustion in the Online Environment, *JIPITEC*, Issue 1/2015, p. 27-29. (https://ssrn.com/abstract=2615552)

Péter Mezei: The Theory of Functional Equivalence and Digital Exhaustion – An Almost Concurring Opinion to the UsedSoft v. Oracle Decision. In: Gellén Klára - Görög Márta (Szerk.): Lege et Fide: Ünnepi tanulmányok Szabó Imre 65. születésnapjára, A Pólay Elemér Alapítvány Könyvtára, 65., Iurisperitus Bt., Szeged, 2016: p. 387-400. (https://ssrn.com/abstract=2496876)

Further questions/tasks to the chapter's content

1. Please discuss whether copyright law is the most optimal solution for the protection of computer programs.
2. What is the meaning of "originality" under the Software Directive?
3. What is a computer program? How could you define source and object code?
4. What are the negative externalities of the Nintendo ruling of the CJEU? (Consider the applicability of the doctrine of exhaustion to such "mixed works".)
5. What is the main function of the back-up copy exception?
6. What is the main function of the reverse engineering copy exception?
7. What might be the negative externalities of the technical protection measures?

List of relevant definitions/concepts
Please think these definitions/concepts over again, as they are crucial in understanding copyright law in the EU.

originality, source code, object code, functionality, authorship, ownership, exclusive rights, limitations and exceptions, back-up copy, reverse engineering, TPM (technical protection measures)

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