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Executive Director  
**Herbert C. Wamsley**

July 6, 2011

Dear Sir or Madam,

The Intellectual Property Owners Association (IPO) urges that your government file observations in the European Court of Justice in the copyright case of *Oracle v. usedSoft, C-128/11*. We believe that an adverse decision will have serious consequences for innovation and competition in the software industry in Europe and will lead to higher prices to consumers of software.

IPO is a trade association founded in 1972 representing companies and individuals in all industries and fields of technology including software who own or are interested in intellectual property rights. Our focus is on ensuring that strong and balanced intellectual property regimes throughout the world reward innovation, foster competition, and stimulate economic growth. IPO's membership includes more than 200 U.S. and European companies and a total of over 12,000 individuals throughout the world who are involved in the association either through their companies or as inventor, author, executive, attorney or law firm members. The members of IPO's Board of Directors approved the filing of these comments. Based on our members' experiences in using technology to both compete and help countries develop throughout the world, we believe that IPO is in an excellent position to understand the issues in this case.<sup>1</sup>

### Background

usedSoft's business is based on encouraging companies that have no license to copy copyrighted software. usedSoft does not have a license from Oracle or any other software company for creating copies.

We understand that usedSoft provides its customers with documents certifying that an original licensee of the software has ceased using the software, and sells these "used" licenses to its customers.

Neither usedSoft nor the original licensee who ceased using the software transfers copies to the usedSoft customers. Rather, at usedSoft's urging, the usedSoft customers download entirely new copies from the internet or find other sources for copies of the software and then claim the license they "bought" from usedSoft. This practice contravenes the prohibition in the license against transfer or sale.

In this case, Oracle sued usedSoft for inducing copyright infringement in the Munich Regional Court. Both the trial court and the Higher Regional Court concluded that the licenses prohibited assignment and therefore usedSoft had induced copyright infringement.

<sup>1</sup> No counsel for a party authored this submission in whole or in part, and no such counsel or party made a monetary contribution intended to fund this submission. While Oracle is a member of the board of directors of the IPO, Oracle's representative to the IPO's board recused himself from the consideration of the issues in this case. Siemens Corp. is also a member of IPO's board of directors and did not participate in consideration of this case or drafting these comments.

## INTELLECTUAL PROPERTY OWNERS ASSOCIATION

On appeal, the German Federal Court of Justice (FCJ) agreed with lower courts that the licenses prohibited any transfer and that provision was enforceable. However, the FCJ decided to seek clarification of whether usedSoft could gain the benefit of Article 4.2 of the EU's Directive on the Legal Protection of Computer Programs (the "Computer Program Directive" or "directive"). The questions that the FCJ asked are (1) whether Oracle's licenses somehow had exhausted its copyright in the software that Oracle licensed to its original customer; (2) whether that right is exhausted when the copy that the usedSoft customer copied was not the original copy that Oracle provided to its licensee but rather a separate copy that was downloaded from the internet; and (3) whether the directive provides that the usedSoft customer is a lawful purchaser due to exhaustion if the original customer will not use its copy of the software in the future.

### Legal Arguments

By its express terms, Article 4.2 of the Computer Program Directive is inapplicable as that directive is tied to the specific copy that has been sold:

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.

Even if the license by Oracle were to qualify as a sale, the fundamental problem with usedSoft's position is that the copies Oracle originally licensed are not transferred here. Rather, as we understand it the software copies that usedSoft's customers download are entirely different copies that may well be different versions of the software. Often they may be downloaded years after the original Oracle licensee separately downloaded the earlier version. Since the usedSoft's customer's copy is not the same copy as the original licensee's software, the directive is inapplicable by its terms, which only apply to copies actually sold.

Unlicensed downloading would frustrate the licenses to which Oracle and the original licensee agreed. These licenses are not sales of single copies. Rather, they are often complicated commercial transactions where Oracle permits enterprises to make copies for their own internal uses at agreed upon prices. The subsequent sale of the license was never originally contemplated, and was indeed forbidden.

Disregarding the license terms will discourage innovation. Oracle's and other software licensors' licensing fees are structured on the idea that additional licensees who become usedSoft's customers will have to pay a license fee to Oracle if they want copies of the Oracle software. If usedSoft can instead take that revenue, the result will be that Oracle will have to increase prices.

A common scenario today in the software industry is that licensors grant licenses for entire enterprises or specific sites. These license fees are generally based upon the size of the licensee or the specific site of the licensee. If a small, local business using a hundred copies with an enterprise license can transfer its license to a multinational corporation that will then create tens of thousands of copies, Oracle will be deprived of the fundamental value of its intellectual property.

These licenses are also often predicated on facts that go far beyond the size of the licensee and the number of copies that the licensee will make. For advanced software such as Oracle databases, support by the original vendor to the licensee is often a critical consideration and may in fact be far more valuable than the original software. If the user of the software changes from a sophisticated company to an unsophisticated company or the usedSoft customer is located much further away from the licensor's support site, the licensor such as Oracle may face substantially higher costs. By permitting radical

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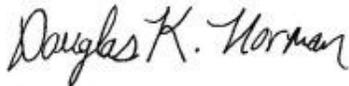
changes in ownership that were never contemplated, Oracle may also face disclosure of trade secrets buried in the code to competitors who may be purchasers from usedSoft.

Further, software licensors often license students and universities at substantial discounts to foster education. If those students or universities may freely transfer a right to download other copies, software vendors will have to cease this highly beneficial practice.

Also, a finding for usedSoft would put Europe at odds with the rest of the world, where courts and governments enforce prohibitions in licenses against transfer of the software. Serious questions would be raised regarding whether the Union would be in compliance with Article 9 of the Berne Convention as incorporated in TRIPS. That article vests in the copyright owners the right to control who may copy their works and how often their works may be copied "except in special cases."

We therefore respectfully urge your government to file observations with the European Court of Justice urging that the court find against the use of the Computer Program Directive in this case.

Sincerely,

A handwritten signature in black ink that reads "Douglas K. Norman". The signature is written in a cursive, flowing style.

Douglas K. Norman  
President