[DE] Price-fixing for CD-ROM - the Berlin Appeal Court Decides

IRIS 1995-10:1/8

Stefanie Junker
Institute of European Media Law (EMR), Saarbrücken/Brussels

On 17 May 1995, the Cartel Chamber of the Berlin Court of Appeal upheld the Federal Cartel Office's decision of 25 May 1994, prohibiting a legal bookshop from concluding price-fixing contracts for CD-ROM products. The proceedings came about when a specialised legal bookshop, while continuing to publish its specialised journals in their normal printed form, began to issue the full texts on CD-ROM as well, and tried to fix the price of the CD-ROM edition in the same way as that of the printed version.

The CD-ROM edition makes it possible, by following certain search procedures, to locate specific texts for specific purposes. These can be called up individually or in general summary form, and sorted in accordance with various criteria. They can also be printed out.

The CD-ROM edition is available both from bookshops and computer software suppliers. The Federal Cartel Office prohibited the bookshop from concluding price-fixing contracts. It held that these contracts violated Section 15 of the GWB (Gesetz gegen Wettbewerbsbeschränkungen = Act against restrictions on competition) and were therefore invalid. The exemption provided for in Section 16 did not apply, since the CD-ROM in question were not "published matter" within the meaning of that section. They were not books or book-related products in the normal sense, but independent products of a different kind, and more versatile than conventional printed matter. CD-ROMs were mainly used in compiling extensive data banks and reference works, for interrogation via personal computer. Section 16 of the GWB was not a blanket provision, applying automatically to the book trade, as the book trade itself might choose at any time to define that term.

Books were, typically, what Section 16 of the GWB meant by published matter, and CD-ROM were not so close to books, in their general characteristics, that they had to be regarded, under the equal treatment provision of Article 3 of the Basic Law, as book-substitutes, whose prices could be fixed in the same way. If mode of production, content, use and method of sale were taken as criteria, CD-ROMs were not deemed to be so similar to books that they had to be treated as equivalent to them.

© European Audiovisual Observatory (Council of Europe) 2026

The special features of CD-ROM had led to their being marketed in special ways, which were not those normally employed in the book trade. The sellers of CD-ROM did not set out, like the sellers of printed matter, to give the purchaser ownership and thus unlimited control of the product. Operating on a subscription basis (updates), the CD-ROM trade was characterised by special obligations and restrictions which applied to purchasers. They were given permission to use the CD-ROM at a single computer work-station. To use it at several work-stations, they needed an additional network licence. On receipt of an up-dated version, they were required to return the old one.

Apart from these distinctions, there were significant content differences between CD-ROM and conventional printed matter. CD-ROM could accommodate multi-media material. In addition to printed text, they could reproduce moving pictures and recorded sound. Even when they carried text alone, being a different kind of product enhanced their value as a reference source by comparison with the conventional printed media. The court also rejected the subsidiary argument that price-fixing was legitimate because CD-ROM were a composite product, consisting of text and software, with text - whose price could be fixed - the main element. It held that to treat CD-ROM as a composite product was to make a wholly artificial distinction. CD-ROM combined stored data and access software in a single media package, and thus formed a whole, whose utility was increased by the fact of its being just that.

Urteil des Kartellsenates des Kammergerichts Berlin vom 17. Mai 1995, Kart 14/ 94, 32 S.

Judgment of the Cartel Chamber of the Berlin Court of Appeal of 17 May 1995, Kart. 14/94, 32 p.

© European Audiovisual Observatory (Council of Europe) 2026

© European Audiovisual Observatory (Council of Europe) 2026