

[DE] Berlin District Court rules that “keyselling” business model breaches Copyright

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In a decision of 11 March 2014 (case no. 16 O 73/13), the *Landgericht Berlin* (Berlin District Court) ruled that the isolated sale of computer game product keys, known as “keyselling”, breaches copyright.

The plaintiff runs an online shop, from which he sells computer game product keys that he has obtained from business partners in Great Britain and Poland. The defendant, who sells a computer game in Germany, sent a warning letter to the plaintiff on 12 December 2012 concerning his business practice relating to the game. The letter asked the plaintiff to stop reselling serial numbers of the game. In an action for a declaration of non-infringement, the plaintiff challenged the warning before the court.

The court held that the defendant had been entitled to caution the plaintiff. The plaintiff had infringed the defendant’s reproduction right under Article 16 of the *Urhebergesetz* (Copyright Act - UrhG) by enabling third parties to download the game from the Internet using a product key and thereby reproduce it themselves. The judges thought the plaintiff was wrong to argue that the reproduction right had been exhausted, since the exhaustion principle only applied to the form in which the product had originally been distributed. In the present case, the form in which the rightsholder had distributed the product had been changed. The exhaustion principle was therefore only relevant to the combination of the physical data carrier with the product key, and not to the separate sale of product keys.

Contrary to the plaintiff’s argument, the CJEU’s “UsedSoft” decision did not suggest anything different. Firstly, the “UsedSoft” decision concerned a case in which the rightsholder itself had distributed the product in an intangible form. Furthermore, the product had been a computer program which, according to the CJEU, was exclusively subject to the Software Directive 2009/24/EC. A computer game, on the other hand, was a so-called hybrid product and, not least on account of the film sequences that it contained, was also subject to the InfoSoc Directive 2001/29/EC, under which the exhaustion principle only applied to physical reproductions.

Urteil des LG Berlin vom 11. März 2014 (Az. 16 O 73/13)

<http://www.telemedicus.info/urteile/Urheberrecht/1443-LG-Berlin-Az-16-O-7313-Erschoepfungsgrundsatz-gilt-bei-Keyselling-nicht.html>

