

# German Court rules: Key selling violates copyright!



*Regional Court of Berlin prohibits resale of product keys for computer games*

**Key Selling is a serious problem for the games industry. The resale of product keys compromises price structures and harms consumers and businesses equally. The games industry has now made a big step forward against such key selling practices. In the first case of its kind in Germany, the Regional Court of Berlin has now decided that the business model of key selling violates copyright and is illegal.**

## What happened?

A German company was running the typical key seller business: They sold the product keys of boxed computer games which allow users to download the games from Steam, Origin and other digital distribution platforms. The keys came from unknown suppliers in countries where the games are sold at a lower price than in Germany.

A large German computer game publisher and distributor who held the exclusive rights to a popular game had issued a cease and desist letter to the merchant, requesting that they cease the resale of the game's product keys. The merchant had then seized the court, asking it to declare the cease and desist letter illegal and their business model legit in order to obtain a carte blanche for the key selling industry. In particular, the plaintiff argued, it was just doing away with unnecessary shipment cost regarding the boxed products, which it claimed it purchased from partners in different EU member states.

## The court's decision

But his attempt to turn the tables boomeranged. In its decision dated 11 March 2014, the Regional Court of Berlin (docket no. 16 O 73/13) ruled that German law does not allow merchants to purchase boxed computer games and then resell the license keys only. This business model, according to the court, violates copyright in the games and, in particular, is not subject to any copyright exceptions based on the doctrine of exhaustion or the ECJ's UsedSoft decision.

According to the court, the doctrine of exhaustion, which permits the resale of individual physical copies of a copyrighted work that the copyright owner or their licensees have intentionally put onto the market within the EU, did not grant merchants the right to separate different components sold as one product – in this case the physical data medium and the license key.

## Decision in accordance with ECJ case law

Furthermore, the ECJ's UsedSoft decision, under which exhaustion could exceptionally also apply to digital copies of computer software, did not apply in such cases for the

simple reason that the initial boxed product was not itself digitally distributed by the copyright owner/licensee.

Although the court did not have to discuss in any detail, it even implied that the UsedSoft case might not be applicable to computer games at all. According to the court, games are not only simple computer software but complex hybrid works and therefore not only protected as software but also under classic copyright rules. As a result, the matter could not be compared to the UsedSoft case in any way.

## What does that mean for the games industry?

The decision is an important first step for the industry's efforts to stop the grey market resale of their products. But it is the first decision of its kind and the procedural situation was not very common. Furthermore, digital distribution and key selling are fairly new legal issues. Accordingly, many questions still remain open.

However, the decision sends a clear message: In Germany, "key selling" violates copyright. And as publishers and distributors can now take legal actions to stop merchants engaging in such business practices, it is an important landmark in the development of further strategies.

(Full disclosure: Our firm represented the defendant in this case. The plaintiff still has the right to appeal.)



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