

GRUR meets Brussels 2008

The principle of exhaustion in European law - Inconsistencies between digital services and digital goods

On October 14, 2008, the German Association for the Protection of Intellectual Property (GRUR) welcomed invited guests and representatives of the European Parliament, the European Commission and the European Council as well as further interested parties to its **GRUR meets Brussels** Workshop at the Representation of the State of North Rhine-Westphalia to the European Union in Brussels for the third time.

The event focused on the issue of „**The principle of exhaustion in European law - Inconsistencies between digital services and digital goods**". The speakers included Prof. Dr. Andreas Wiebe, LL.M. (Vienna University of Economics and Business Administration, Austria), Dr. Jens Gaster (EU Commission) and Sandra Heuser (Microsoft Deutschland GmbH, Germany). Furthermore, Mr. Andreas Kammholz from the Federation of German Wholesale and Foreign Trade (Bundesverband des Deutschen Groß- und Außenhandels e. V.) took part in the panel discussion following the lectures.

The workshop started with a lecture of Prof. Wiebe. Prof. Wiebe explained the differences between the exhaustion of digital goods and digital services relating to European Law. He pointed out that the distinction between goods and services in EC directives is a mistake. The principle of exhaustion limits the copyright law interests. That limitation is justifiable in consideration of the fundamental freedom. This applies all the more because the increased trading pace via online transmission has necessitated different ways of handling. Expansion of the principle of exhaustion to the digital transfer of goods is not possible with the law in force. This may change if the DAM systems are further developed.

The representative of Microsoft, Ms. Sandra Heuser, made the same conclusion concerning the law in force, i.e. that the principle of exhaustion does not apply to downloaded software and that it only applies to software connected to a holder. The question is how far these principles are applicable by analogy. The representative of Microsoft also referred to the DAM systems and rightly stated that the legal protection of the interests of an author will get more important in future.

Dr. Jens Gaster, DG Market D. 2 from the European Commission, emphasised the necessity of a consistent exhaustion rule. He referred to 12 regulations and directives of the European Community, which deal with the exhaustion problems. He presented each of these 12 rules and shortly summed up the European Law *de lege lata*. He pointed out that there still are gaps as regards the services. Thereafter, he described how the European law should develop from his point of view in these areas not regulated, in particular that the media should be included, that the introduction and further development of DRMS systems might reduce the risks and that the right of distribution should to be clearly distinguished from the right of reproduction.

The representative of the German Federation of Wholesale and Foreign Trade (Bundesverband des Deutschen Groß- und Außenhandels e.V.), Mr. Andreas

Kammholz, strongly lobbied for the principle of exhaustion, both in case of re-imports as in today's topic and in case of the sale of digital goods as music or software.

He believes that from a regulation point of view this principle is the only correct answer to a new form of distribution which is voluntarily chosen by the producer and which leads to the same result as offline distribution. Moreover, this principle is to "our own benefit", e.g. to the benefit of companies that want to resell software which they bought once but do not need anymore. Software which can be sold in cases of bankruptcy to the benefit of all creditors and of course as a possibility of saving money by buying more inexpensive second-hand software. Thus, he asserts that the companies of the German Federation of Wholesale and Foreign Trade have the same economic interests as all consumers of software: private consumers as well as public bodies.

On the national level the German Federation of Wholesale and Foreign Trade asked the legislator for clarification as regards the principle of exhaustion and at the moment the Ministry of Justice examines the need for such a clarification.

After the lectures a panel discussion followed, during which the lecturers could exchange their different viewpoints. Moreover, the audience was invited to ask questions or express their opinion on the issue of the workshop.