

Judgments

usedSoft celebrates clear judgment

Trading in used Microsoft volume licenses is legal
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The Munich District Court I has declared that trading in “used” Microsoft licenses is completely lawful. The manufacturer is not permitted to intervene to prevent volume licenses, of which a master copy was given to the initial purchaser, from being split up. Transfer by means of notarial attestation, which is the method usedSoft applied in this case, is perfectly legitimate.

When it comes to trading in used software, many people feel uneasy. Is it legal? Are you liable to prosecution? Could you lose money if the manufacturer is awarded damages following legal action? That is how many potential customers think, and they prefer to steer clear of it. The software manufacturers are the main reason for this, first and foremost Microsoft and Oracle who repeatedly emphasized that they needed to give their permission for the transfer of software licenses – in particular licenses from volume agreements – and that this permission would only be granted in very few cases.

HHS usedSoft GmbH nevertheless built up its business based on trading in used licenses. The company has already survived numerous legal skirmishes and can now refer to a judgment which finally confirms that its business activities are legal.

An unusual customer

The case started strangely: a company had ordered used software valued at over 38 000 Euro which was then delivered together with the invoice. The licenses were resold to third parties, but usedSoft did not receive any money and therefore decided to file a lawsuit.

The defendant’s attorney explained that the company had some doubts about the legality of the transaction. That is why they turned to Microsoft. In an initial statement, the defendant claimed that it had been informed by Microsoft that volume licenses cannot be transferred. At a later date, the defendant claimed that there were different license conditions and that only some of them prohibited the transfer of licenses to third parties. The defendant also criticized the fact that they had not received any original data carriers.

No wonder the court ruled in favor of usedSoft given the facts. The Munich judges (file no. 30 O 8684/07 dated 11/28/2007) ruled that the fact that the defendant resold the software licenses was confirmation that the defendant had accepted the delivery and therefore must pay for the licenses.

But that is not all. In the opinion of the court, which has only been available in written form since April 2008, the Munich District Court I made it very clear that the transfer of the licenses was lawful. This question had not yet been clarified despite the numerous previous proceedings. usedSoft can now finally rest assured that trading in used software is completely legal. The judgment is now final and binding.

Judgment is not comparable to the “Oracle judgment”

In the judgment of the Hamburg District Court, to which the Munich division expressly referred (file no. 315 O 343/06 dated 6/29/2006, confirmed by the Hamburg Higher District Court on 2/7/2007, file no. 5 U 140/06), analogous argumentation was used in the opinion of the court, but the case only dealt with the question of whether or not the advertising of usedSoft was anti-competitive, and not of whether or not the company’s business model itself was legal.

The Munich judges have now confirmed this, at least under the circumstances of the present case. The situation is as follows:

- The initial customer had purchased the software licenses from Microsoft within the framework of a volume license agreement.
- Part of the agreement with Microsoft was the relinquishment of a master copy of the software.

The court made it very clear that the case must be clearly distinguished from the “Oracle judgment” (Munich District Court, file no. 7 O 7061/06 dated 3/15/2007). In that case, the software was only made available for download. The customers were given “non-transferable licenses with restricted rights in rem pertaining to the use thereof”, and reselling would have led to a “reproduction of the software” because the initial purchaser would have kept a copy of it on its servers.

Microsoft left out in the cold

The Munich District Court ruled that, in the present case, Microsoft had exhausted its right of distribution and referred to section 69 c, subsection 3, clause 2 of the German Copyright Act. In other words: the software corporation can no longer have a say in what happens to the software, insofar as the number of licenses does not increase, or in legalese: “if the usage rights given are not reproduced”, whereby each individual usage right should be treated as “a reproduction to be assessed independently”.

So, the initial purchaser was allowed to split up the licenses purchased under the volume agreement and to legally make copies of the original data carrier, the so-called “master copy”, as these were required for the sale.

The court also considered it sufficiently substantiated that the number of licenses had not increased during this business transaction. usedSoft had documented all steps by means of notarial attestation and proven the following to the purchaser:

- the original ownership of the initial purchaser
- the deletion of the licenses to be sold at the vendor’s
- the transfer of the licenses to usedSoft including the associated license number
- the payment of the purchase price

The court even generalized: "It is neither demonstrated nor apparent that the business model of the plaintiff [usedSoft] leads to an increase in the number of reproductions of the work."

The court also expressly stated that, according to the defendant's statement, they had contacted Microsoft and that the software corporation was thus made aware of the case but had not asserted any claims for violation of copyright.

New momentum

usedSoft has thus reached an important milestone that will put the company's sales approach on a new foundation. Microsoft had successfully stopped usedSoft in one case in particular. usedSoft will lodge an appeal against the injunction and future sales promotions will refer to the new judgment.

It is of critical importance to usedSoft that the judgment is based on copyright and that it was achieved at the place of jurisdiction in Munich, which is where both Microsoft and Oracle are headquartered.

The trader of used software feels well-equipped for future success as a result of its strong position. The company announced that the German federal state of North Rhine-Westphalia had recently withdrawn an invitation for bids as a direct result of their appeal. The invitation for bids with a volume of 10 million Euro was based on a basic agreement with Microsoft and was therefore only open to authorized Microsoft dealers. usedSoft stated their desire to place a bid in the event that a new invitation for bids is issued. So, the confirmation that the business model is legal came just in time!