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**Computer Law
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Security Review**

EU update



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A B S T R A C T

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This is the first edition of the DLA Piper column on developments in EU law relating to IP, IT and telecommunications. This news article summarizes recent developments that are considered important for practitioners, students and academics in a wide range of information technology, e-commerce, telecommunications and intellectual property areas. It cannot be exhaustive but intends to address the important points. This is a hard copy reference guide, but links to outside web sites are included where possible. No responsibility is assumed for the accuracy of information contained in these links.

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1. Intellectual property

1.1. Libraries may digitize books without the rights holders' prior consent

On September 11, 2014, the ECJ issued its preliminary ruling in a case opposing the Technical University of Darmstadt (the "University"), which operates a regional and academic library, to Eugen Ulmer KG ("Ulmer"), a scientific publishing house, with respect to the possibility for publicly accessible libraries to digitize books without the rights holders' prior consent.

The University digitized textbooks published by Ulmer so as to make it available to users on electronic reading points installed in its library. The users of the reading points could print out the work on paper or store it on a USB key, in part or in full, and take it out of the library in that form. As the University refused Ulmer's offer to purchase and use as electronic books, the textbooks in question, Ulmer brought an action against the University, seeking to prevent (1) the University from digitizing the textbooks and (2) users of the library from

being able to print out the books or store it on a USB key and take those reproductions out of the library.

Pursuant to Article 5(3) (n) of Directive 2001/29, "Member States may provide for exceptions or limitations to the rights [for the authors to authorize or to prohibit the reproduction and the communication to the public of their works] in case [...] [of] use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of [publicly accessible libraries] of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections[...]".

The questions referred to the ECJ by the Bundesgerichtshof were whether: (1) a work is subject to purchase or licensing terms, within the meaning of Article 5(3) (n) of Directive 2001/29, where the right holder offers to conclude with the establishments referred to therein licensing agreements for the use of that work on appropriate terms, (2) Article 5(3) (n) of Directive 2001/29 entitles the Member States to confer on those establishments the right to digitize the works contained in their collections, if that is necessary in order to make those works available on terminals, and (3) the rights which the

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Member States lay down pursuant to Article 5(3) (n) of Directive 2001/29 may go so far as to enable users of the terminals to print out on paper or store on a USB key the works made available there.

The ECJ first recalled that “the limitation under Article 5(3) (n) of Directive 2001/29 aims to promote the public interest in promoting research and private study, through the dissemination of knowledge, which constitutes, moreover, the core mission of publicly accessible libraries.” Thus, in order to realize their core mission, the libraries must be able to avail themselves of the exception provided for in favor of dedicated terminals, regardless of whether they have been offered the possibility to enter into licensing agreement with the right holders for the use of their works on appropriate terms. However, once contractual terms have actually been concluded between the right holders and the library with respect to the digitization of the work, the exception provided for in favor of dedicated terminals is ruled out.

Then, the Court held that the Directive does not prevent Member States from granting to publicly accessible libraries the right to digitize the works contained in their collections, if such act of reproduction is necessary for the purpose of making those works available to users, by means of dedicated terminals, located within those establishments. Otherwise, the right of communication of works granted to publicly accessible libraries would risk being rendered largely meaningless, or indeed ineffective, if those establishments did not have an ancillary right to digitize the works in question. The digitization of the works may notably be necessary in case of rare, delicate or very consulted works.

Lastly, the Court considered that acts such as the printing out of a work on paper or its storage on a USB key, even if made possible by the specific features of the dedicated terminals on which that work can be consulted, are not acts of communication, but rather acts of reproduction which involve the creation of a new copy of the digital copy made available to users by means of dedicated terminals. As such acts of reproduction are not necessary for the purpose of making the work available to the users of that work by dedicated terminals, the ECJ held that the right of communication held by publicly accessible libraries does not extend to acts such as the printing out of works on paper or their storage on a USB key, carried out by users from dedicated terminals installed in publicly accessible libraries. Nevertheless, the Court let to Member States the possibility to authorize such acts under national legislation, provided that fair compensation be paid to the right holders.

A copy of the ECJ's decision can be found at: <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30d63eda29101de64a488eca948d6c5488b0.e34KaxiLc3qMb40Rch0SaxuOb3f0?text=&docid=157511&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=277165>.

2. Patents

No contribution for this issue.

3. Competition

3.1. EU General Court upholds European Commission's €1.06 billion fine against Intel

On 12 June 2014, the General Court (case T-286/09) fully upheld the Commission's 2009 decision regarding Intel's abuse of dominant market position in the x86 CPU market (i.e. computer chips market) and €1.06 billion fine imposed on Intel.

In May 2009, the Commission had adopted a decision prohibiting Intel's anticompetitive conduct under Article 7 of the EU's Antitrust Regulation (Regulation 1/2003). The decision concluded that Intel had, in breach of Article 102 of the Treaty on the Functioning of the European Union (ex Article 82 of the EC Treaty), engaged in two types of abuse of its dominant position, as follows:

- (1) granting rebates to four PC and server manufacturers (Dell, HP, NEC and Lenovo) on the condition that they on them obtaining all or almost all of their supplies from Intel, and payments to one downstream computer retailer (Media Markt) conditional on it only selling PCs with Intel CPUs (“conditional rebates”); and
- (2) granting direct payments to 3 computer manufacturers (HP, Acer and Lenovo) to halt, delay or limit the launch of specific products incorporating chips from Intel's only rival, AMD (so-called “naked restrictions”).

In its decision, the Commission had found that the conditions and payments relating to such abuses were not generally written in any contracts and that Intel had tried to conceal them.

Furthermore, the Commission had also found that Intel's conduct undermined competition and innovation in the market. The Commission therefore ordered Intel to put an end to this conduct, and imposed a fine of €1.06 billion.

Intel appealed the decision to the General Court that has fully confirmed the Commission's findings. In particular, it found that:

- (1) The Commission had correctly demonstrated the existence of Intel's conditional rebates and naked restrictions;
- (2) The Commission had correctly demonstrated that Intel had attempted to conceal the anti-competitive nature of its practices;
- (3) The Commission had correctly demonstrated that the practices in question were an abuse of Intel's dominant position; and
- (4) The fine imposed by the Commission was appropriate.

4. Procurement

4.1. New public procurement directives: update on the latest developments

Early in 2014, the European Parliament approved three new directives on public procurement (the New Directives),

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