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EDITORIAL Review of the copyright reform

When I visit the biggest trade fair for computer and video games in 2023, it will be the 4th time I have attended this great event. My visits so far have left me consistently impressed. Every year I marvel at the new ideas that this sector develops and admire the creative talent of the game developers.

reading time: 8 minutes

With 265,000 visitors from more than 100 countries, this event and the industry as a whole is hugely popular and I am particularly pleased that Cologne has been found as a location in my constituency. For me, the gaming industry is to the development of digitalisation what NASA is to space policy!

The appreciation shown to creatives at gamescom is one of the best examples of what the creative world can achieve and produce. The innovations are as limitless as they are manifold. They are an asset that must be protected and promoted at all costs!

But here, too, we need a strong, enforceable copyright law. Without the recognition of individual intellectual creation, the video game scene, like all other art scenes, could not exist. Europe is characterised by its culture, which is as diverse as its member states.

Copyright, as an outgrowth of property rights, is one of the cornerstones of our European cultural economy. A free world can only function if individual value creation is respected. This is also, and even more so, true in the online world.

Although recognised in every member state, copyright is not valued equally everywhere. In France, for example, the protection of intellectual property is much more self-evident and without question copyright is strongly protected there – Germany should be guided by this.

With the reform of copyright law in 2019, a milestone was set for the protection of intellectual property. The recognition that artistic works also deserve a high level of protection on the internet was long overdue. The last reform was 17 years ago and in that time the digital world has changed so rapidly that a significant imbalance for the copyright creation chain has emerged. Since everything can be shared via platforms, artists are faced with a problematic reality that threatens their existence.

The almost unrestricted access to music and videos, films, documentaries etc. offers an immense distribution opportunity on



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the one hand. Whereas in the past an artist could only reach the customers of the record store in town, today he can distribute his works to millions of users all over the world with just one click. Gone are the days when you had to go to the retailer for a piece of music or a video game, hoping that the CD or the cartridge is not yet sold out.

On the other hand, (adequate) remuneration for the distribution of these works was far too rare. It had been less frequent the artists themselves, but third parties, mostly users who shared the work. Authorisations were by no means always available. And so it must be said that the immense possibility of distribution rather developed into a market on which illegally obtained works were passed on, but remuneration for legitimate artists was simply not made. The artist had no chance on the globally operating platforms to become even remotely in control of the situation and to recapture his work. Once uploaded on the net, it was gone and so was the income that could have been gained from it.

From the very beginning, the reform aimed to remedy this situation. If payment is to be made for works in the analogue world (e.g. in record stores or retailers), then this must also happen in the online world.

In the analogue world, the obligation to pay is not controversial. No one should be able to buy a video game in a shop without paying for their favourite items at the checkout. Intellectual property is a recognised right worth protecting. So the following must apply: "What is protected as property offline must also be protected as property online".

For this the reform provided for a new regulation of liability in its famous Article 13, now Art. 17 DSM-Directive. The centrepiece was the shift of liability from the user to the platform: instead of the individual user who uploads a work without authorisation being liable, the platform must bear the responsibility for the published content. The aim is to enable artists to sell their works to the platforms in order to earn a fair share of the online distribution channel and not go away empty-handed. The provision aims to ensure that platforms that have built their business models on the distribution of copyrighted content pay for it. A licensing obligation is required so that the rights holders, namely the artists, are also fairly remunerated for their performance. It is not acceptable that large platforms publish works, make huge profits and those who have created the works receive nothing.

Due to the immensely controversial and difficult political debates, it is a personal concern of mine to emphasise once again that this shift in liability in no way even remotely affects freedom of expression. It is solely a matter of taking protected works that are circulating illegally on the net offline or not publishing them

in the first place. Freedom of expression can NEVER refer to the copyrighted works of others, which is why a collision is ruled out.

Apart from that, the protected works may not be published by users even without Article 13 (now Article 17) DSM-Directive, of course regardless of barriers. This was also not permitted before the reform. The only thing that has changed now is the liability, which has been transferred to the platforms. This represents a clear improvement for users.

Of enormous importance was the European dimension of the directive and thus the strong signal: Europe stands behind creators, authors and copyrights holders. What is the use of defining the legal framework of the online world nationally? The distribution channel via the platforms does not stop at any border – and according to the idea of a united Europe, it should not. The common internal market is desirable and should be supported with every piece of legislation. The harmonisation of liability rules was therefore necessary. Each Member State has its own national interest, but also a common European interest, in protecting and promoting art and culture. Our culture, that is our identity.

At the same time, however, it is also an economic sector that we should by no means leave to non-European countries alone. Wouldn't it be desirable if the successes of the platforms could also be achieved in the European Union? With a European project, a European platform?

These questions and ideas are directly linked to a new topic that we in Europe should take up: artificial intelligence (AI). With its rapid development and enormous potential, it brings with it completely new development. We are challenged here as legislators to create a framework that challenges and promotes and yet guarantees the protection of our values. This includes the value of copyright. As innovative and promising as AI is, its underlying values must continue to be respected. New developments, such as text-generative models like ChatGPT, are also a challenge to copyright, as they exceed the newly created Art. 4 DSM-Directive. Training and testing of AI may be just as affected as generative development from protected works.

New technologies and digital opportunities are evolving, so we must always create and reform the legal framework so that Europe can move forward.

Brussels, August 2023

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is a Member of the European Parliament and of the EPP Group. In 2019, he was the European Parliament's negotiator for copyright reform (Directive (EU) 2019/790 of the European Parliament and of the Council of 17.4.2019 on copyright and related rights in the digital single market and amending Directive 96/9/EC and Directive 2001/29/EC).

CHRISTIAN-HENNER HENTSCH

No changes for video games under the DSM Directive?

Harmonisation of the copyright framework for games

Games industry

The DSM Directive has further harmonised the copyright framework for games. In particular, because of the uniform requirements on copyright contract law, the ECJ will in future decide not only whether and how games are protected by copyright, but also on authorship of a work. The full harmonisation of the previous copyright limitations and the new additional legal excep-

tions reinforce the trend towards collective rights management and have virtually forced the games industry to set up its own collecting society. In the case of computer programs, the ECJ, following a submission by the BGH, must interpret when a reworking exists and whether the distribution of cheat software can be prosecuted under copyright law. **reading time: 18 minutes**

I. Introduction

The games industry is a dynamically growing media industry with highly innovative business models. After major revenue leaps during the 2020 and 2021 pandemics with annual growth of 32% and 17% respectively, revenue from games, gaming hardware and gaming online services now increased further by 1% to EUR 9.87 bn in 2022, stabilising at a high level.¹

Like the market as a whole, the sub-segment with games for PCs, game consoles and mobile devices also showed stable development. Both the sale of video games (minus 1% to around EUR 1.1 billion) and in-game and in-app purchases (plus 2% to around EUR 4.5 billion) generated similar revenues compared to the previous year. These include season passes, additional levels, cosmetic content such as skins or subscription fees for individual online games. Overall, revenue from games for PCs, game consoles and mobile devices will grow by around 1% to EUR 5.5 billion in 2022. The market segment of online gaming services continues to grow strongly: Revenue from these services rose by 20% to EUR 866 million. These include paid subscription services that give access to a large selection of games, enable gaming in the cloud or functions such as online multiplayer and saving game scores in the cloud. This market segment is developing particularly dynamically.

Copyright is the decisive basis for these sales, on which complex works are created with sometimes several thousand creators from almost all trades of copyright and then exploited on different platforms with distinguished monetisation models. Games are almost always distributed internationally and sold worldwide as digital products – on data carriers or via download, as DLC (downloadable expansion) or also as in-game purchases. In this respect, the different international copyright regulations must always be taken into account. Therefore, from the point of view of the games industry, a harmonisation of copyright law in the EU is desirable and the recent DSM Directive was welcomed in principle.² This year's MMR supplement shows the importance of copyright for the games industry and is intended to be a first assessment of the situation after the implementation of the DSM Directive.

From the point of view of the German games industry, the implementation of the DSM Directive has left the framework for rightholders in the games industry largely unchanged. Howev-

er, due to the general regulations – whereby the special features of games were probably not taken into account – there are some noteworthy effects that will be illuminated in the following contributions. For example, Christian Rauda (MMR 2023, 619e) will discuss the new limitations such as the pastiche exception in Section 51a UrhG. The regulations for orphan and out-of-print works are now fully applicable to games and Kai Bodensiek (MMR 2023, 623e) will take them up against the background of the International Games Collection. Gregor Schmid (MMR 2023, 636e) and Julian Waiblinger with Jonathan Pukas (MMR 2023, 627e) deal in their contributions with the effects of the UrhDaG on the guidelines and community guidelines for Let's Plays and the enforcement of rights against structurally copyright-infringing websites, respectively. Martin Soppe and Cordula Zimmer (MMR 2023, 632e) address the new copyright contract law for games. Even before these specific contributions on DSM implementation, this introductory contribution is intended to highlight the copyright framework for games and to address general trends and challenges so that the subsequent contributions can build on them. To this end, the structure of the UrhG will first be followed by a discussion of the work character of games, licensing practice and copyright contract law, and then the relevant copyright limitations and statutory remuneration. Finally, current developments in IT copyright law and the enforcement of rights against cheat software will be discussed.

II. The video game as a work

Video games are so-called complex works because the various elements such as story, design, sound and code are fundamentally subject to their own protection regimes.³ The differentiation is particularly relevant with regard to the special rules for computer programs under Directive 2009/24/EC on the legal protection of computer programs. This concerns, for example, the requirements for the level of creation, which is largely irrelevant for computer programs according to Section 69a (3) UrhG. In addition, the rights for the commercial exploitation of computer programs are usually held by the employer (Section 69b (1) UrhG). Private copies may only be made of works pursuant to Section 53 (1) UrhG; in the case of computer programs, only backup copies are permitted pursuant to Section 69d no. 2 UrhG.

It was disputed whether, in the case of games, the technical and artistic parts of the overall work should be treated separately (separation theory) or whether the game should be considered uniformly according to the character of the overall work (concentration theory). In the Nintendo ruling, the ECJ answered the classification question by granting games protection as "hybrid

¹ Available at: www.game.de/deutscher-games-markt-stabilisiert-sich-auf-hohe-m-niveau/.

² Directive (EU) 2019/790 on copyright in the Digital Single Market (DSM Directive).

³ See Schmid, *Games und Recht*, pp. 149-173 and Hoeren/Siebert/Holznapel, *HdB Multimediarecht/Hentsch*, 58. EL, Teil 22.

works".⁴ The Federal Court of Justice also differentiates between the components of a game and, in addition to the software controlling the game, explicitly names the so-called game data, i.e. graphics, music, texts as well as "film sequences" and "models". These components could be protected by copyright "or participate in the originality of the work as a whole and enjoy copyright protection together with it".⁵ Games therefore enjoy copyright protection both as a complete work and in relation to the individual components.

The starting point for copyright protection is first of all the computer program as a linguistic work within the meaning of Section 2 (1) no. 1 UrhG in conjunction with Sections 69a ff. UrhG. Here, only the concrete form of expression of a computer program is protectable, such as the source code and the object code.⁶ The computer program is a "sequence of individual instructions which can be executed and which serves to cause the computer to perform a certain function",⁷ in this case the interactive game. However, a separation of the computer program (code) and the rules for the game is hardly possible in games. In addition, so-called engines control what happens in the game on different levels. The graphics engine, for example, controls the functions for loading, managing and displaying texts, models and graphics (3D engine). Another engine takes over the game mechanics and translates the player's commands into the game world. And the sound and level saving are also controlled by engines. In this respect, the audiovisual presentation is determined by the software controlling it.

As a written work, the underlying plot of a game is also protected by Section 2 (1) no. 1 UrhG. A great title is hardly imaginable without a good plot. Usually, a deep game world develops through various add-ons, sequels and accompanying stories, which, as in the case of the "Final Fantasy" series,⁸ is developed over many years and casts a spell over the players. Many games stories have already been made into films⁹ and in view of the condensation of concrete plot threads with specific characters, events, fates, fable jurisprudence is also applied to games and their characters such as Super Mario or Lara Croft.¹⁰ In sports simulations and tactical shooters, however, the story tends to take a back seat.

In addition to the story, protection of the introductory texts, dialogues and their translations may also be considered. In view of the case law of the BGH,¹¹ the general level of creation applies here. Purely generic naming, armour designations or dialogues probably fall short of this. But at least longer introductions or original phrases are regularly protected. This is particularly clear in the case of texts that advance the story and tell the background and also contain loving details to create a comprehensive game world. Translations can constitute a new written work according to § 3 UrhG. However, most translations (localisations) are now AI-based with the corresponding copyright challenges.

Pictorially designed computer animations such as figures, equipment or virtual buildings and game worlds are protected as works of fine or applied art, provided the level of creation is given and there is a certain aesthetic content.¹² In particular, original characters such as Super Mario or Lara Croft are therefore protected in their concrete form just like comic characters under Section 2 (1) no. 4 UrhG.¹³ Popular characters or objects such as the weapons in League of Legends are also reproduced outside the game, often by cosplayers.¹⁴

An essential component of every game is, of course, the music. This includes the background music, which is usually composed and recorded especially for the game and sometimes has cult status among fans. In any case, the music is protected by copyright under Section 2 (1) no. 2 UrhG and is also highly relevant in

view of the importance of the music for the atmosphere and because of the high recognition value. In addition, there are the rights of the performing artists according to Section 73 ff. UrhG, i.e. the singers, musicians or even orchestras. Because music is usually recorded on a sound carrier, the publisher is usually also entitled to a sound carrier producer's right under Section 87 UrhG.

But the sound, i.e. the noises in the game and the spoken dialogue, are also protectable. Although the level of creation will usually not be reached, the investment in the recording of sounds or for the payment of the dubbing actors justifies a separate protection under Section 87 UrhG.

In addition to the individual components of story, graphics and sound, film sequences (cutscenes) can also be protected as cinematographic works under Section 2 (1) no. 6 UrhG, for example very impressively in StarCraft. In the process, rights may also accrue to the film authors such as directors, cameramen and editors, and the producer (the developer) also receives his or her own right as a film producer under Section 94 UrhG.¹⁵ In some cases, film sequences are even acted out with real actors, for whom rights then also arise. If the level of creation is not given, film animations are usually at least protected under Section 95 UrhG.

Games are thus not only a hybrid work with software, but probably the most complex work protected by copyright, which includes almost all trades of copyright law.

III. Licensing practice and copyright contract law

Especially in the development of video games, it is crucial for developers and publishers of games to hold as many rights as possible – the so-called IP – for exploitation. Here, the work-made-for-hire doctrine in Anglo-Saxon legal systems is a clear advantage over continental European copyright systems. In Germany, copyright contract law provides high standards for the protection of authors. Through the harmonisation of copyright contract regulations by the DSM Directive, the German standards were extended to all EU member states as a blueprint, so to speak. In this respect, authors are no longer exclusively better or worse off under German law compared to the other European legal systems. From a German perspective, the DSM Directive may therefore be seen as a helpful harmonisation and as the creation of a level playing field. From an international perspective, however, it is more likely to be seen as weakening Europe's position in global competition.¹⁶ Martin Soppe and Cordula Zimmer

⁴ EuGH MMR 2014, 401 marginal no. 23 with comment Oehler – Nintendo/PC Box.

⁵ BGH MMR 2017, 171 with comment Biehler/Apel – World of Warcraft I, with reference to EuGH MMR 2014, 401 with comment Oehler – Nintendo/PC-Box, and BGH MMR 2013, 671 with comment Roth – Videospiel-Konsolen I.

⁶ Dreyer/Kotthoff/Meckel/Hentsch, UrhG/Dreyer, 4th ed. 2018, § 2.

⁷ Lesshaft/Ulmer CR 1993, 608.

⁸ The "main series" consists (1987 to 2020) of 15 titles so far.

⁹ Most recently the Super Mario Bros. film, which grossed more than EUR 1 billion in cinemas within a few days in 2023; game series such as The Last of Us, Warcraft, Assassins Creed, Tomb Raider or Resident Evil were also very successfully filmed.

¹⁰ BGH GRUR 1999, 984 (987) – Laras Tochter; OLG Munich NJW-RR 2000, 268 (269) – Das doppelte Lottchen.

¹¹ BGH MMR 2014, 333 with comment Hoeren – Geburtstagszug.

¹² Cf. LG Köln MMR 2008, 556 with comment Psczolla – Der virtuelle Kölner Dom.

¹³ Cf. BGH GRUR 1994, 206 – Alcolix.

¹⁴ Cf. esp. BGH GRUR 2014, 258 – Pippi-Langstrumpf-Kostüm.

¹⁵ The BGH interprets the protection for cinematographic works broadly, see BGH MMR 2013, 185 with comment Hoeren – Alone in the Dark.

¹⁶ Cf. the statement of game – Verband der deutschen Games-Branche in the legislative process on the implementation of the DSM Directive p. 20 ff., available at: www.game.de/wp-content/uploads/2020/11/2020-11-06-game-Entwurf-Stellungnahme-RefE-Umsetzung-DSM-RL.pdf.

explain the concrete changes and effects of the DSM Directive in copyright contract law in their article in this supplement.

In order to achieve the goal of the most unrestricted possible exploitation of rights to all parts of the work, most creatives are usually employed on a permanent basis, so that in Anglo-Saxon law the work-made-for-hire doctrine can apply and in Germany at least Section 43 UrhG applies. Unlike in the film industry, for example, the creators are often permanently employed for many years because they are not only employed for the creation of the game, but also for further development or other projects. Since successful game series are often developed over decades, it is not atypical for a designer to work for one employer for many years. In view of the specific knowledge required for games development and the great demand for skilled workers, creatives are not employed for the duration of the production and thus precariously, but they can often choose their own projects and then deliberately stay with a games company only for this project. This shows that users and creators meet on an equal footing and that many regulations of copyright law, which assume an imbalance, are therefore not suitable for the games industry.¹⁷

In the publishing contract between a publisher and a developer, in addition to the developer's manufacturer's right under Section 94 UrhG, secondary exploitation rights to the authors' works are usually granted. The first exploitation and thus also the application of the provisions of the copyright contract take place between the developer and his developers. The fewer rights a developer can grant, the more difficult his position is in contract negotiations with international publishers, who almost always want to distribute games worldwide and need the necessary legal certainty to do so. In Germany, most games productions are created by smaller teams, so the creators are quite identifiable here. In international developments of AAA titles with an investment volume of 100 million euros, on the other hand, thousands of employees often work on one work. With regard to the overall work, most employees probably lack creative collaboration due to the collaborative and agile way of working, so that most creatives are not authors or co-authors of the work. Only the lead designer, who can be regarded as the author, is comparable to the film authors. In the case of pre-existing works such as music, story or characters, authorship can be clearly assigned and as long as no reporting obligation arises from the licence agreement, the newly created transparency obligations can take effect here. For programmers, most of the provisions of copyright law do not apply because of the Software Directive as *lex specialis*. So far, it can be seen that there are no court decisions on games in copyright contract law. This could change as a result of EU-wide harmonisation in countries with significantly more

games developers, especially because the regulations must now be applied uniformly throughout Europe.

Publishers are very cautious about so-called pre-existing works such as music. In practice, no contracts are usually concluded with creators who are entitled to GEMA or another collecting society (§ 6 VGG). In the case of music in particular, it is customary in the industry to fall back on GEMA-free music, in particular in order to exclude a competing first-exploitation. In fact, the GEMA presumption according to §§ 48, 49 VGG is thus shaken in the area of video game music.¹⁸

IV. Copyright limitations and statutory remuneration

Games can invoke copyright limitations for the use of pre-existing works as users.¹⁹ The legal permissions are particularly important for realistic open-world games or simulations such as the Omnibus Simulator.²⁰ For games, the exceptions for quotations (Section 51 UrhG), incidental works (Section 57 UrhG) and also the new pastiche exception (Section 51a UrhG) apply in these cases. Christian Rauda explains the new exceptions in his article.

On the other hand, games are now also being used en masse and increasingly by means of reproductions under Section 16 UrhG that are not covered by a licence. The right of reproduction is defined extraordinarily broadly and includes practically every reproduction – regardless of the technology used, even when converted into another form. This includes, in particular, Let's Plays, Walkthroughs, Highlights, Role Plays, Shadow Play, recordings for support, screenshots and also recordings of eSports broadcasts on platforms and on television. Also, transformative reproductions and adaptive reproductions, i.e. reproductions of the work in an altered form, which, however, still sufficiently reveal protectable elements, regularly fall under this category.

Up to now, almost all games publishers have allowed the use of their copyrighted works and services by means of "licences", permissions or connivances in so-called guidelines.²¹ The idea behind this is, of course, that such images and videos increase the awareness of their games and that this represents free and wide-reaching advertising. In order to achieve this advertising character, these uses are usually made subject to reservations. In some cases, this prohibits commercial use or use in the context of pornography, hate crime, discrimination or glorification of violence. Advertising revenue from YouTube or Twitch videos is sometimes explicitly permitted. Trademarks, logos and music may not be used in most cases. In addition, permission can be revoked or updated at any time without giving reasons. With these regulations, the problem of the often illegal use of films and music on social media platforms for the games industry, which was addressed by Art. 17 of the DSM Directive, has been solved sustainably and to the satisfaction of all parties involved for many years at the sub-legal level. Section 6 UrhDaG extends the guidelines, insofar as they are explicit permissions,²² to the users, so that licensing pursuant to Section 4 UrhDaG by the platforms is not necessary in these cases. Jonathan Pukas and Julian Waiblinger discuss the enforcement of rights in games under the UrhDaG in their article.

Even though the UrhDaG hardly restricts games exploitation, the trend towards the expansion of limitations and collective rights management is clearly visible with the latest legislative changes in copyright law. This has recently led to a rethink among developers and publishers. Until now, games companies have flatly rejected the collectivisation of their rights and consequently have not asserted any legal claims for remuneration, e.g. for the legally permitted private copies of games.²³ In view

17 Cf. the statement of game – Verband der deutschen Games-Branche from 8.3.2023 on the draft of a law as well as an ordinance on the further development of skilled labour immigration with industry surveys on the need for skilled workers and salary scales, available at: www.game.de/positionen/stellungnahme-zum-entwurf-eines-gesetzes-sowie-einer-verordnung-zur-weiterentwicklung-der-fachkraefteeinwanderung/.

18 For details on the legal particularities of game music, see Berger/Wündisch, *UrhVertrR-HdB/Oehler/Wündisch*, § 34 Computerspiele und Multimediale Werke, paras. 64-68.

19 Schmid/Düwel MMR 2020, 155.

20 Here, it is often not only a matter of copyright but also of trademark rights, cf. 12.1.2023 – I ZR 86/22 and previously BGH GRUR 2010, 726 – Opel Blitz II.

21 Permission by Nintendo, available at: https://www.nintendo.co.jp/networkservice_guide/de/index.html; acquiescence by EA, available at: <https://www.ea.com/de-de/service/youtube-duldungserklaerung>; "licence" by Microsoft, available at: <https://www.xbox.com/de-de/developers/rules>; a licence directory can be found at: <https://www.game.de/themen/lizenzverzeichnis-fuer-lets-plays/>.

22 This means only licences and permissions, not tolerations. Permissions are often used when it is not certain, especially in the case of franchises, that the publisher can grant the rights.

23 Hentsch MMR 2023, 28-32.

of the many new limitations and also the new regulations on orphan and out-of-print works, which Kai Bodensiek presents in his article, the German games companies have decided that the industry association game should establish its own collecting society to administer the private copying remuneration for manufacturers' rights under Section 94 UrhG.

V. IT copyright for games and law enforcement

In terms of law enforcement, the new business models and distribution channels of the games industry have also changed the challenges and possible approaches in the fight against piracy.²⁴ In the classic sale of games on data carriers or as downloads, the technical copy protection applies in most cases because of the account binding. Structurally copyright-infringing websites are a piracy problem especially for consoles because they also offer circumvention software for download. Special attention is paid here to page-blocking procedures, which have also been applied for by games companies.²⁵ There are further challenges with free-to-play games and subscriptions with illegal trading, bots and pirate servers. For most approaches, civil law is now the remedy of choice. Criminal law is promising with regard to pirate servers but tends to lose its importance for the games industry in the prosecution of copyright infringements.

The technical copy protection measures now protect the manufacturers of games quite effectively against unauthorised copies of their works. Compared to the first protection programmes, today's encryption technologies are now so sophisticated that decryption – “cracking” – can only be done by professionals and therefore compromising a game takes longer and longer, covering at least the initial exploitation phase, which is so important for refinancing. Added to this are application protection methods such as password queries, serial numbers, dongles and hardware-based licences and region codes both for data carriers and through activation codes for downloads. As a result, the illegal use of games has decreased considerably. User-friendly offerings in closed systems – be it console or smartphone – also contribute to this. Legally acquired content can now be used on all devices and is easy to administer, whereas cracked games must first be painstakingly created with a certain IT expertise or illegally acquired and many restrictions diminish the gaming experience. In this respect, technical copyright protection is always more promising and, what's more, it can be used worldwide. Here, the focus has shifted from criminal prosecution against burner and cracker collectives²⁶ to offensive copy protection and user-friendly offers.

With the dwindling importance of law enforcement against “pirate copies”, however, law enforcement is focusing on another topic: toxic gaming behaviour (toxicity). This includes so-called bots, which players can use to gain advantages in multiplayer games, e.g. through an aim-bot that is always used to hit in a shooter. This causes distortions in competition and thus frustration for other players. If this occurs frequently and gets around, such toxicity can lead to a mass exodus of players, which ultimately not only endangers the refinancing of this specific game, but also permanently damages a brand. This is why there has been an increase in lawsuits against the providers of such bots and other cheating software (cheats) in recent years. According to the case law of the BGH,²⁷ there are numerous possibilities under contract law, copyright law, trademark law and the Unfair Competition Act to take civil action against unauthorised bots and also the distribution of such bots.²⁸ Currently in dispute is whether software that unlocks already existing features in a game (a turbo in a racing game) constitutes a modification under Section 69c no. 2 UrhG and thus a copyright infringement. The BGH referred this

question to the ECJ on 23.2.2023.²⁹ This referral question on IT copyright law also has relevance for business models in other industries, such as ad blockers in press products or seat heaters already installed in cars that can be activated by means of software. In all cases, the aim is not to sue the users, but to prevent the providers from distributing such cheat software.

VI. Conclusion

In conclusion, it can be said that copyright law applies to games without restriction, just as it does to all other creative industries. However, as a hybrid work at the interface with software copyright law, it is the most complex work that encompasses almost every “trade” in copyright law and for which the special features of Section 69a ff. UrhG must always be considered. Copyright contract law is mandatory because of the territoriality and in particular because of Section 32b UrhG, but it only fits to a limited extent because of the internationality of production and exploitation and the mostly long-term and mostly well-paid permanent positions, which is why other solutions are usually pursued here. The UrhDaG largely bypasses the business models of the games industry because of the practice of far-reaching permissions that had already been in place before. However, one collateral damage of the copyright reform is the games industry's entry into the system of collective rights management. When it comes to rights enforcement, there is a particular interest on the part of publishers in a non-toxic gaming experience without cheating, which is why the target of anti-piracy measures is often somewhat different, but the challenges are the same as for other content industries. This makes it clear once again that games are a specialised area in copyright law and that specialised games lawyers are therefore needed.

Quick read ...

- Games, as a hybrid work with software, are the most complex copyright-protected work, involving almost all trades of copyright.
- In the games sector, authors are predominantly employed on a permanent basis, and pre-existing works – especially in the field of music – are not used as far as possible.
- Collective rights licensing does not take place in the case of games, although statutory remuneration claims are to be asserted in the near future – also on the basis of the DSM Directive.
- Due to innovative business models and comprehensive technical copy protection, piracy is a comparatively minor problem; instead, action is taken primarily against the providers of cheat software.



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²⁴ An overview of challenges and new ways of legal enforcement for games is provided by Hentsch MMR Supplement 8/2019, 3-7.

²⁵ The industry association game is a founding member of the clearing house CUII for blocking structurally copyright-infringing sites; cf. on this Nordemann/Steinbrecher MMR 2021, 189 f. and Müller/Nordemann ZUM 2021, 507-518.

²⁶ In September 2020, the two leaders of one of the largest video game piracy groups in the world, Team Xecuter, were arrested in the US, available at: <https://www.justice.gov/opa/pr/two-members-notorious-videogame-piracy-group-team-xecuter-custody>.

²⁷ BGH MMR 2017, 171 with comment Biehler/Apel – World of Warcraft I.

²⁸ Excerpt on cheatbots in games Rauda MMR Supp. 8/2019, 20-23.

²⁹ EuGH MMR 2023, 355 – Action Replay.

Spin-offs, remakes, prequels and sequels in computer games

New legal assessment against the background of Section 51a UrhG?

Barrier regulation

Computer games are taking up an ever-larger social space. At the same time, the adoption of parts of works from other games for one's own games is a widespread practice. The adoption of third-party content, e.g. the "fable" of a game, also occurs in spin-offs, remakes, prequels or sequels. Here, the distance to the original work pursuant to Section 23 (1) sentence 2 UrhG is often not observed. As a result, the limitation provision of Section 51a UrhG (parody, caricature, pastiche), which entered into force on 7th of June 2021, becomes rele-

vant. The term "pastiche" in particular is a mystery, but it has considerable practical significance. After all, anyone whose work adopting other people's content does not contain a humorous or mocking component will invoke the fact that it is an "homage", which is permitted as a pastiche. However, in the case of prequels, sequels, remakes and spin-offs, there is usually no question of a pastiche because the balance of interests is typically in favour of the rightholder of the original work.

reading time: 20 minutes

I. Introduction

The development of computer games is a creative process in which several types of works are combined, most prominently works of visual art (graphics), written works (texts, dialogues) and musical works (background music). As cultural assets, computer games often adopt and reference current and older works directly or indirectly.

In some games you can even play other, older games. An example of this is the adventure game "Caren and the Tangled Tentacle"¹, in which the character Caren has an Atari VCS game console in the middle of her living room running the classic game "Pong"^{2,3}. There are several other games that contain games, but the rights for both games are in the same hand: In the adventure game "Day of the Tentacle"⁴ there is a computer on which one can play the predecessor of the game, namely "Mani-

ac Mansion"⁵ in a full version and full screen. In the game "Legend of the Mystical Ninja"⁶, you can play the shooter "Gradius"⁷, also distributed by Konami.

II. Spin-Offs, remakes, prequels and sequels

The takeover of older content also occurs with spin-offs, remakes, prequels or sequels of a game. A spin-off is a new work with a new plot in which a minor character from the original work becomes the main character.⁸ An example of a spin-off from a computer game is "Chicago Syndicate"⁹, whose main character Larcen Tyler comes from the game "Eternal Champions"¹⁰. A remake contains largely the same content as the original work, but (usually) with more contemporary aesthetics, such as improved graphics and sound. Examples of remakes of Sierra's "King's Quest" series (such as "King's Quest I: Quest for the Crown"¹¹, "King's Quest II: Romancing the Stones"¹²) and Grezzo's remake of the classic "The Legend of Zelda: Link's Awakening"¹³. A sequel is the continuation of an existing work, taking over characters, stylistic elements and content. A prequel is the story that precedes the work.¹⁴

The situation is unproblematic if the rightholder of the original game is also the licensor for the new development. It is more interesting from a copyright point of view when game developers make use of works to which they have no rights. The Federal Court of Justice (BGH) has prohibited (under the old copyright law) the film adaptation of a spin-off of the classic film "Dr. Zhivago" under the title "Lara's Daughter".¹⁵

In the context of computer games, mostly fan projects publish new developments based on well-known titles:

■ The Gameboy game "Metroid II: Return of Samus"¹⁶ was remade by a team of developers led by Milton Guasti as a PC game called "AM2R (Another Meteoroid 2 Remake)"¹⁷. Within this framework, the game was coloured and adapted for the larger screen of a PC in relation to the Gameboy. Nintendo took legal action against "AM2R".¹⁸

■ Mushroom Kingdom Fusion is a game that features various characters from very different games, each in their own level, including Mario, Sonic, Mega Man, Wario, Simon Belmont and Arthur.¹⁹

■ "DoomRL (Doom, the RogueLike)"²⁰ is based on the classic shooter "Doom"²¹. After Zenimax claimed trademark infringement, the game was renamed DRL.²²

¹ Developer: Prior Art, 2015.

² Developer: Atari, 1972.

³ For more detail, see Höltgen, *Computerspiele (Computer(Spiele)) – Referenzen, Zitate und Rekursionen des Computers als Spiel*, 2017, available at: <https://www.paidia.de/computerspiele-computerspiele-referenzen-zitate-und-rekursionen-des-computers-als-spiel/>.

⁴ Developer: Lucasfilm Games, 1993.

⁵ Developer: Lucasfilm Games, 1987.

⁶ Developer: Konami, 1991.

⁷ Developer: Konami, 1985.

⁸ Becker/Schwarz, *Der Options- und Verfilmungsvertrag/Schwarz*, 1999, pp. 201, 204, 208.

⁹ Developer: Sega, 1995.

¹⁰ Developer: Sega Interactive Development Division, 1983.

¹¹ Developer: AGD Interactive, 2001/2009.

¹² Developer: AGD Interactive, 2002.

¹³ Developer: Nintendo 1993. Developer Remake: Grezzo, 2019.

¹⁴ E.g. the film "Starwars – Episode I" from 1999, which tells the prehistory of the "Starwars" films (produced 1977-1983). An example from the world of computer games is "Resident Evil Zero" (developer: Capcom 2022), a prequel to "Resident Evil" (developer: Capcom 1996).

¹⁵ BGH Urt. v. 29.4.1999 – I ZR 65/96 = MMR 1999, 624 (Ls.) – Laras Tochter.

¹⁶ Developer: Nintendo, 1991.

¹⁷ Developer: Milton Guasti, 2016.

¹⁸ Patrick, 10 Mind-Blowing Fan Video Games You Should Play, 2020, available at: <https://gameranx.com/features/id/162351/article/10-mind-blowing-fan-video-games-you-should-play/>.

¹⁹ Developer: Various, including JudgeSpear, 2008, game description at <https://fusion-fangaming.itch.io/mushroom-kingdom-fusion>.

²⁰ Developer: ChaosForge, 2002.

²¹ Developer: id Software, 1993.

²² Available at: [https://en.wikipedia.org/wiki/DRL_\(video_game\)](https://en.wikipedia.org/wiki/DRL_(video_game)).

- “Duke Nukem 3D: Reloaded” was developed by fans of the classic “Duke Nukem 3D”²³.
- Fans of the adventure-series “King’s Quest” developed another episode under the title “King’s Quest IX: The Silver Lining”²⁴. The story of the “King’s Quest” series is continued and characters from previous episodes appear.²⁵ As part of a settlement, it was probably agreed that the game could be distributed without “King’s Quest” in the title.²⁶
- The game “Chrono Trigger: Resurrection” is a fan project that is a further development of the game “Chrono Trigger”²⁷. The game was never distributed because Square Enix, as the rightholder to the “Chrono Trigger” property, claimed injunctive relief in 2004, which was reportedly based on infringement of copyright and trademark law.²⁸
- Inspired by Capcom’s jump ‘n’ run game “Mega Man”²⁹, a fan developed the fan game “Mega Man 2.5D”. Capcom tolerated the game and even referred to it on its website.³⁰

III. Legal classification

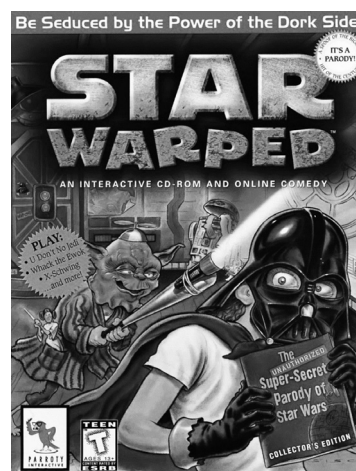
Whereas before the copyright reform, a differentiation was made between unauthorised adaptation (former Section 23 UrhG) and free use (former Section 24 UrhG) and infringement was only excluded if there was sufficient external or internal distance from the pre-existing work, a distinction must now be made between adaptation and rearrangement (Section 23 UrhG) and parody, caricature, pastiche (Section 51a UrhG). The principle remains that adaptations or other transformations of a work may only be published or exploited with the author’s consent (Section 23 (1) sentence 1 UrhG), unless the newly created work maintains a sufficient distance from the work used (Section 23 (1) sentence 2 UrhG).³¹ A sufficient distance is given if the alteration of the used original is so far-reaching “that the reproduction has its own creative expressiveness and the borrowed personal features of the original fade in the face of the uniqueness of the reproduction”.³² In this case, there is “no adaptation or other transformation within the meaning of former Section 23 sentence 1 UrhG / current Section 23 (1) sentence 1 UrhG and a fortiori no reproduction within the meaning of Section 16 UrhG, but an independent work which has been created in free use of the work of another and which may be published and exploited pursuant to former Section 24 (1) UrhG / current Section 23 (1) sentence 2 UrhG without the consent of the author of the work used”.³³ The BGH thus applies the “fading formula”³⁴ also under the new copyright law, at least in the form of “lack of recognisability”.³⁵ Only when it has been established that a use is not sufficiently distant is it examined in the next step whether a privilege based on the barrier of Section 51a UrhG (parody, caricature, pastiche) can be considered. Conversely, this means that if Section 23 (1) sentence 2 applies, the provision of Section 51a UrhG no longer needs to be examined.³⁶ When examining the distance, the degree of individuality plays a significant role.³⁷ The higher the degree of individuality, the further the new work must be removed from the old work in order for the older work to fade.³⁸ Many remakes of copyrighted parts of existing works do not comply with the distance under Section 23 (1) sentence 2 UrhG, so that Section 51a UrhG becomes relevant. This is because remakes often take over the copyrighted so-called “fable”, i.e. the plot in connection with the characters. After all, the same game is produced, only with different aesthetics. The fable enjoys protection if the game is a narrative game. Spin-offs, prequels and sequels also bear the risk of violating the fable, because plot elements are “decoupled” from the original work in order to create a basis for a new work.³⁹ The adoption of graphics also occurs, for example in the use of the appearance of computer game characters such as Mario, Sonic or Mega Man.⁴⁰ There is no question of fading here. Currently,

proceedings are pending in which an infringement of rights through the adoption of elements from the shooter “Valorant”⁴¹ is being asserted.⁴² Within the framework of these proceedings, it is being clarified whether the required distance pursuant to Section 23 (1) sentence 2 UrhG has been observed.

IV. Caricature, parody, pastiche

1. Caricature

A caricature is usually a pictorial representation that ridicules a person, a thing or an event through satirical emphasis and exaggerated depiction of characteristic features.⁴³ In legal literature, caricature is classified as a subcategory of parody.⁴⁴ The caricature is rare in the field of computer games; it is more likely that a computer game is ridiculed in a graphic caricature. An example is the cover of the game “Star Warped”,⁴⁵ a parody of the “Star Wars” world:



- 23** Developer: 3D Realms, 1996.
- 24** Developer: Phoenix Online Studios, 2010.
- 25** King Graham fights against an evil curse imposed on his children Alexander and Rosella. The last official episode of the King’s Quest series was produced by Sierra Studios in 1998-series was produced by Sierra Studios in 1998 under the title “King’s Quest VIII: The Mask of Eternity”.
- 26** Available at: <https://web.archive.org/web/20051212060506/http://pc.ign.com/articles/674/674825p1.html>
- 27** Developer: Square, 1995.
- 28** Available at: <http://www.chillingeffects.org/derivative/notice.cgi?Noticed=1416>.
- 29** Developer: Peter Sjostrand, 1987.
- 30** Available at: http://www.capcom-unity.com/s-kill/blog/2009/03/19/fan_sends_mega_man_into_the_25th_dimension; http://www.capcom-unity.com/snow_infernus/blog/2009/05/29/fan_made_mega_man_25d_gets_cooler.
- 31** For the criteria of demarcation between Section 23 (1) p. 1 UrhG and Section 23 (1) p. 2 UrhG, see. Wandtke/Bullinger, Urheberrecht, 6th ed. 2022, § 23 marginal no. 34 ff.
- 32** BGH Urt. v. 7.4.2022 – I ZR 222/20 marginal no. 56 – Porsche 911.
- 33** BGH Urt. v. 7.4.2022 – I ZR 222/20 marginal no. 56 – Porsche 911 with reference to BGH Urt. v. 16.5.2013 – I ZR 28/12 marginal no. 36 f. – Beuys-Aktion.
- 34** See Wandtke/Bullinger, Urheberrecht, 6th ed. 2022, Einl. Rn. 16.
- 35** BGH Urt. v. 7.4.2022 – I ZR 222/20 marginal no. 47 – Porsche 911.
- 36** Wandtke/Bullinger, Urheberrecht, 6th ed. 2022, § 23 marginal no. 42 writes that the examination of the sufficient detachment is prior to the question of the intervention of § 51a. Haberstumpf ZUM 2022, 795 (806), on the other hand, believes that Section 51a takes precedence as a more specific provision.
- 37** Wandtke/Bullinger, Urheberrecht, 6th ed. 2022, § 23 marginal no. 39.
- 38** Wandtke/Bullinger, Urheberrecht, 6th ed. 2022, § 23 marginal no. 39.
- 39** Consequently, the BGH has ruled that the filming of a sequel to the classic film “Dr. Zhivago” under the title “Lara’s Daughter”, BGH Urt. v. 29.4.1999 – I ZR 65/96 = MMR 1999, 624 (Ls.) – Laras Tochter.
- 40** Like in the game “Mushroom Kingdom Fusion”.
- 41** Developer: Riot Games, 2020.
- 42** Available at: <https://www.eurogamer.de/hyper-front-ist-eine-valorant-kopie-bhauptet-riot-games-und-verklagt-netease>; <https://de.scribd.com/document/613199268/Riot-Games-vs-NetEase>.
- 43** Wandtke/Bullinger, Urheberrecht, 6th ed. 2022, § 51a marginal no. 10.
- 44** Wandtke/Bullinger, Urheberrecht, 6th ed. 2022, § 51a marginal no. 10.
- 45** Developer: Parrot Interactive, 1997.

The game “Cyberpunk 2077”, published by CD Projekt RED in 2020, contained numerous programming errors (bugs) and was even temporarily removed from the PlayStation. This drew corresponding public scorn, for example in that the game’s advertising graphics were cartoonishly modified and the protagonist holds up a banana instead of a gun.

Original:



Cartoon⁴⁶:



2. Parody

According to the explanatory memorandum, parody is characterised by humour or ridicule.⁴⁷ However, the humorous or mocking debate does not have to refer to the original work itself, but can also apply, for example, to a third person, another work or a social circumstance.⁴⁸ Parody is an independent concept of European law,⁴⁹ an antithematic treatment of the pre-existing work is not (no longer) required.⁵⁰ In order not to open up the defence to every “free rider” that he is using a pre-existing work to create a parody, the legality of the act is subject to the proviso that a balancing of interests is in favour of the parodist.⁵¹

⁴⁶ Available at: <https://www.youtube.com/watch?v=YDcS6kYAcI0>.

⁴⁷ BT-Drs. 19/27426, 90.

⁴⁸ BT-Drs. 19/27426, 90.

⁴⁹ Wandtke/Bullinger, Urheberrecht, 6th ed. 2022, § 51a marginal no. 11; ECJ Judt. v. 3.9.2014 – C-201/13 – Deckmyn.

⁵⁰ BGH Urt. v. 28.7.2016 – I ZR 9/15 marginal no. 25 = MMR 2017, 138 (Ls.) – auf fett getrimmt.

⁵¹ More detailed on this Wandtke/Bullinger, Urheberrecht, 6th ed. 2022, Section 51a marginal no. 13; BGH Urt. v. 28.7.2016 – I ZR 9/15 Rn. 39 f. = MMR 2017, 138 (Ls.) – auf fett getrimmt.

⁵² In the original: “la caricature, la parodie ou le pastiche qui a pour but de railler l’œuvre parodiée, à la condition qu’ils répondent aux bons usages en la matière et notamment qu’ils n’empruntent que les éléments strictement nécessaires à la caricature et ne dénigrent pas l’œuvre”.

⁵³ BT-Drs. 19/27426, 91.

⁵⁴ Haberstumpf ZUM 2022, 795 (799); Kreutzer MMR 2022, 847; Kreutzer, Der Pastiche im Urheberrecht, 2022, p. 13, available at: https://freiheitsrechte.org/uploads/documents/Demokratie/Urheberrecht/Gutachten_Kreutzer_Pastiche.pdf.

⁵⁵ Kreutzer MMR 2022, 847; Kreutzer, Der Pastiche im Urheberrecht, 2022, p. 9, available at: https://freiheitsrechte.org/uploads/documents/Demokratie/Urheberrecht/Gutachten_Kreutzer_Pastiche.pdf.

⁵⁶ Conrad/Nolte ZUM 2021, 111 (115) with further citations.

⁵⁷ Wandtke/Bullinger, Urheberrecht, 6th ed. 2022, Section 51a marginal no. 14; Lauber-Rönsberg ZUM 2020, 733 (738).

3. Pastiche

a) Definition

The term “pastiche”, which now appears in German copyright law as a barrier in Section 51a UrhG, is a mystery. However, the German courts and lawyers will have to work with it in deliberations and decisions.

In European law, the notion of pastiche is found in Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (“InfoSoc Directive”) and in Directive 2019/790/EC of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the digital single market and amending Directive 96/9/EC and Directive 2001/29/EC (“DSM Directive”). Art. 17 (7) p. 2 DSM Directive states that Member States shall ensure “that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services:

a) [...]

(b) use for the purpose of caricature, parody or pastiche.”

In the search for the origin of the exception in the context of copyright, one comes across its presence in the French-speaking legal sphere. However, there is also considerable uncertainty there about the contours of the term. The Luxembourg Copyright Law, for example, provides in Art. 10.6 that the author cannot prohibit caricatures, parodies or pastiches which aim to ridicule the parodied work, provided that they comply with good practice in this field and, in particular, borrow only the elements strictly necessary for the caricature and do not denigrate the work.⁵² The aim of mockery (“à pour but de railler”) is an element of all three terms parody, caricature and pastiche. However, the explanatory memorandum of the government draft of the German Copyright Act is diametrically opposed to this:

“The pastiche must show an engagement with the pre-existing work or other subject matter. Unlike parody and caricature, which require a humorous or mocking component, a pastiche may also contain an expression of appreciation or reverence for the original, such as an homage”.⁵³

The term pastiche goes back to the Italian “pasticcio”, which describes a work of art painted in the style of another artist. German copyright law only protects concrete works, not artistic styles. For example, if you ask a software for generating images with the help of “artificial intelligence” (such as DALL-E2) to produce a painting of a fox in front of a skyscraper in the style of René Magritte, you (ideally) get a painting that could also have come from Magritte because it deceptively imitates his style. If a person were to create such a work, which merely imitates the style but not a concrete pre-existing work, the heirs of René Magritte would not be able to defend themselves against it.

The explanatory memorandum to the government draft of Section 51a UrhG also concedes that for this reason the pastiche must have another content in order to fulfil the function of a barrier at all.

Ultimately, the ECJ will have to define the concept of pastiche. How this will be done is currently “completely open”.⁵⁴ The term is “used in a multidisciplinary way and understood in very different ways”,⁵⁵ “the commentaries at European level are rather perplexing”.⁵⁶

The pastiche has considerable practical significance⁵⁷ because ultimately anyone who takes over another’s works or parts of works in a way that does not maintain a sufficient distance according to Section 23 (1) p. 2 UrhG and that does not contain a

humorous or mocking component will invoke the fact that it is an “homage” that is permitted as a pastiche. The pastiche thus becomes an “all-purpose weapon”.⁵⁸ Lauber-Rönsberg rightly emphasises that it is “extremely unfortunate” that “the regulatory framework for transformative uses is thus largely dependent on the previously unclarified legal concept of pastiche”.⁵⁹ As a so-called transformative use,⁶⁰ the pastiche is supposed to enable “creative work based on what already exists as an outflow of freedom of expression and artistic freedom”.⁶¹

However, the legal concept of pastiche is not a “carte blanche” for any kind of adoption. In any case, there is no pastiche if the more recent work is so close to the older one that the two can be confused with each other.⁶² Kreuzer emphasises the characteristic of originality, according to which the pastiche must “have a different effect on the viewer” than the “borrowed works”⁶³ and otherwise there is no pastiche. A “fading” of the original work, on the other hand, is not required (in contrast to Section 23 (1) p. 2 UrhG), as the explanatory memorandum to Section 51a UrhG expressly emphasises.⁶⁴

b) Three-step-test

A balancing of interests and the application of the three-step-test are intended to protect rightholders from the economic impairment becoming too severe through the application of the Section 51a UrhG barrier. This examination is the responsibility of the national courts.⁶⁵ They have “a central role in contouring the pastiche barrier”.⁶⁶ There is a danger that precisely because of the difficulty in contouring the concept of pastiche, the exception in Section 51a UrhG will be interpreted too generously in favour of those who take over parts of other works.⁶⁷ Even the phrase “in case of doubt for the accused”⁶⁸ is used in this context. Against this background, it is regrettable that Section 51a UrhG does not contain any further restrictive elements of the offence, such as that the use must be justified in its extent by the special purpose.⁶⁹ By adding elements of the offence that are not mentioned in Art. 5(3)(k) of the InfoSoc Directive, one would of course have exposed oneself to the accusation that one was not implementing the Directive lawfully.⁷⁰

Art. 5 (5) InfoSoc Directive contains the rule that all exceptions and limitations mentioned in Art. 5 (1-4) InfoSoc Directive may only be applied in certain special cases in which the normal exploitation of the work is not impaired and which do not unduly prejudice the legitimate interests of the rightholder. The test for these three conditions is, as is well known, the “three-step-test”, the three steps of which, however, are not “separable” and “clearly contoured”.⁷¹ Someone who invokes the pastiche exception in Section 51a UrhG must therefore be asked whether his type of exploitation is a “certain special case” (first step), does not “impair the normal exploitation of the work” (second step) and does not constitute an undue infringement of the rightholder’s legitimate interests (third step). It is already difficult to say what constitutes a special case that deviates from the rule. Haberstumpf rightly points out that it is precisely when the concept of pastiche is interpreted broadly that the individual cases falling under it become the rule.⁷² A significant restriction of the pastiche barrier at the first level therefore typically does not take place.⁷³ At the second level, it is more likely to be debated whether a privilege under Section 51a UrhG must be waived. According to Wandtke/Bullinger, the normal exploitation of the work is impaired if the act results in a reduction of lawful transactions.⁷⁴ However, the ECJ explicitly speaks of acts that “necessarily reduce the volume of sales or other lawful transactions relating to protected works”.⁷⁵ It is therefore not only about the distribution of the original work, but also about transactions “in connection” with the original work. Kreuzer derives from this that a use is only not permitted if it “enters into competition

with the source material” and that this is usually only conceivable in the case of complete adoption of the work.⁷⁶ This is not convincing because in the field of computer games, for example, exploitations in the area of subsidiary rights are frequent. These include merchandising products or books related to the game. Such exploitations are highly relevant economically without requiring a complete takeover of the work. Merchandising also does not compete with the source material. The pastiche may only privilege uses that do not lead to significant losses for the rightholders. This is the case with the uses of memes, mash-ups, fan art, etc. mentioned in the explanatory memorandum. However, if products compete with official merchandising articles of the game manufacturer and the resulting economic losses are not completely insignificant, justification under Section 51a UrhG fails on the second step of the three-step-test.

The third step of the three-step-test addresses not only the material interests of the rightholder but also the non-material interests and the protection of the author against distortion. The interests of the rightholder and the user are weighed. The design level of the second work also plays a role in this balancing.⁷⁷ However, the mere fact that the user is pursuing commercial purposes with his caricature, parody or pastiche does not make the use unlawful.⁷⁸ When weighing up the pros and cons, however, it must also be

⁵⁸ Peters GRUR 2022, 1482 (1483).

⁵⁹ BeckOK UrhR/Lauber-Rönsberg, 36th ed. 15.10.2022, UrhG § 51a marginal no. 17.

⁶⁰ BT-Drs. 19/27426, 89; together with caricature and parody.

⁶¹ BeckOK UrhR/Lauber-Rönsberg, 36th ed. 15.10.2022, UrhG § 51a marginal no. 17.

⁶² Stieper GRUR 2020, 699 (703).

⁶³ Kreuzer MMR 2022, 847; Kreuzer, Der Pastiche im Urheberrecht, 2022, p. 4, available at: https://freiheitsrechte.org/uploads/documents/Demokratie/Urheberrecht/Gutachten_Kreuzer_Pastiche.pdf.

⁶⁴ BT-Drs. 19/27426, 90.

⁶⁵ On parody ECJ Judt. v. 3.9.2014 – C-201/13 – Deckmyn.

⁶⁶ BeckOK UrhR/Lauber-Rönsberg, 36th ed. 15.10.2022, UrhG § 51a marginal no. 17.

⁶⁷ Lauber-Rönsberg does not share this fear, but predicts that the results will largely correspond to the previous case law on Section 24 (old version) UrhG (BeckOK UrhR/Lauber-Rönsberg, 36th ed. 15.10.2022, UrhG Section 51a marginal no. 21). However, the very cautious formulation chosen by her that “the mere imprint of a work of art on a cup without further artistic contribution of one’s own is unlikely to pass” as a permissible pastiche on the grounds that homage is paid to the work, nourishes doubts. In such a constellation, there is no room for a pastiche at all; so also Peters GRUR 2022, 1482 (1489): “Mere 1:1 copies without any significant effort on the part of the work user remain inadmissible.”

⁶⁸ Peters GRUR 2022, 1482.

⁶⁹ The government draft contained this requirement, but it was later deleted on the recommendation of the Legal Affairs Committee.

⁷⁰ Lauber-Rönsberg points out that in view of the clear case law of the ECJ on parodies, a deviation from the wording of the InfoSoc Directive would have been justifiable and more user-friendly (BeckOK UrhR/Lauber-Rönsberg, 36th ed. 15.10.2022, UrhG § 51a marginal no. 20).

⁷¹ Dreier/Schulze, UrhG/Dreier, 7th ed. 2022, vor §§ 44a ff. marginal no. 21; Kreuzer MMR 2022, 847; Kreuzer, Der Pastiche im Urheberrecht, 2022, p. 27, available at: https://freiheitsrechte.org/uploads/documents/Demokratie/Urheberrecht/Gutachten_Kreuzer_Pastiche.pdf.

⁷² Haberstumpf ZUM 2022, 795 (801).

⁷³ Kreuzer MMR 2022, 847; Kreuzer, Der Pastiche im Urheberrecht, 2022, p. 28, available at: https://freiheitsrechte.org/uploads/documents/Demokratie/Urheberrecht/Gutachten_Kreuzer_Pastiche.pdf even thinks that the first stage is even addressed exclusively to the legislator as a “design instruction”.

⁷⁴ Wandtke/Bullinger, Urheberrecht, 6th ed. 2022, InfoSoc-RL Art. 5 marginal no. 163 with reference to EuGH MMR 2017, 460 marginal no. 70 with comment Stender-Vorwachs/Steeger – Stichtung Brein I.

⁷⁵ EuGH MMR 2014, 679 para. 39 – ACI Adam/Thuiskopie.

⁷⁶ Kreuzer MMR 2022, 847; Kreuzer, Der Pastiche im Urheberrecht, 2022, p. 28, available at: https://freiheitsrechte.org/uploads/documents/Demokratie/Urheberrecht/Gutachten_Kreuzer_Pastiche.pdf.

⁷⁷ BT-Drs. 19/27426, 90; OLG Hamburg Ur. v. 28.4.2022 – 5 U 48/05 Rn. 83 = MMR 2022, 702 (Ls.) – Metall auf Metall; Stützel/Bischoff ZUM 2022, 683 (693); on parody EuGH Ur. v. 3.9.2014 – C-201/13 – Deckmyn; BGH MMR 2011, 182 Rn. 45 with comment Rössel – Perlentaucher.

⁷⁸ Münchener Anwaltshandbuch Urheber- und Medienrecht/Raue/Stang, 3rd ed. 2023, § 3 marginal no. 114.

borne in mind that European copyright law does not recognise a general restriction on free use.⁷⁹ The pastiche barrier must not be made into one. Conrad and Nolte therefore correctly write that not “every form of compilation of creative content, whether as a remix, sampling or mash-up, as appropriation art, compilation of film sequences, collages or in any other form is permissible”.⁸⁰ Since not only user-generated content can be justified by the pastiche, but also works by “normal” market participants, the courts must not be too generous with Section 51a UrhG.

d) Court decisions

Those who would like to become acquainted with the different focuses that the courts set when examining the pastiche barrier may just read the following four court decisions from Munich, Hamburg and Berlin. The district court München I rightly denied the requirements for a pastiche in a case in which the plaintiff's photograph was taken over almost identically in the defendant's use and only the caption “A picture says more than a thousand words!” was added. The minimum level of creativity for a pastiche was not achieved by adding the caption.⁸¹ The Hamburg Higher Regional Court held that the reproduction of the now famous sequence from “Metall auf Metall” and its transfer into an independent new work by way of sampling constituted a pastiche.⁸² It held that a minor encroachment on the phonogram producer's right without significant economic disadvantages was in contrast to a considerable impairment of the freedom of artistic activity and development.⁸³ The district court Berlin ruled on an adoption of a picture as a background for another picture and justified the use under Section 51a UrhG.⁸⁴ The second work had stylistically imitated the first work. The fact that the first work was not copied as a simple picture background but was placed in a new context in terms of content, was decisive for the existence of a pastiche. The Hamburg district court, on the other hand, rejected a pastiche in the use of Tagesschau excerpts that were intended to highlight grievances.⁸⁵ This was because there was no discussion of the original work. On the one hand, knowledge of the underlying political issues is already assumed.

⁷⁹ Conrad/Nolte ZUM 2021, 111 (114) with further citations.

⁸⁰ Conrad/Nolte ZUM 2021, 111 (114) with further citations.

⁸¹ LG München I MMR 2022, 907 marginal no. 39.

⁸² OLG Hamburg Ur. v. 28.4.2022 – 5 U 48/05 marginal no. 67 = MMR 2022, 702 (Ls.) – Metall auf Metall.

⁸³ OLG Hamburg Ur. v. 28.4.2022 – 5 U 48/05 Rn. 67, 79 = MMR 2022, 702 (Ls.) – Metall auf Metall.

⁸⁴ LG Berlin Ur. v. 2.11.2021 – 15 O 551/19 marginal no. 31.

⁸⁵ LG Hamburg Ur. v. 30.12.2021 – 310 O 321/21 Rn. 59.

On the other hand, the excerpts are only used to place a promotional statement at the end of the video.

e) Application of the standards to prequels, sequels, remakes and spin-offs

Due to the fact that computer games occupy an ever-larger social space, the adoption of parts from games is very attractive for third parties. As long as the economic interests of the rightholders are not unduly impaired (for example in the area of fan art), the pastiche barrier rightly promotes communication and debate. However, it should be applied by the courts with a sense of proportion. In the case of prequels, sequels, remakes and spin-offs, there is usually no question of a pastiche because the balance of interests is typically in favour of the rightholder of the original work. Such adaptations are typical of the computer games industry and would cut off considerable sources of revenue for the rightholder. The situation is different if the games constitute a parody, i.e. if they make fun of the original work. The developer of the original work must tolerate such exploitations.

Quick read ...

- Many spin-offs, remakes, prequels and sequels of computer games do not comply with the detachment pursuant to Section 23 (1) p. 2 UrhG, so that Section 51a UrhG becomes relevant.
- The pastiche has considerable practical significance because ultimately anyone whose work does not contain a humorous or mocking component will plead that it is an “homage” which is permitted as a pastiche.
- As long as the economic interests of the rightholders are not unduly impaired (for example in the area of fan art), the pastiche barrier rightly promotes communication and debate.
- In the case of prequels, sequels, remakes and spin-offs, there is usually no question of a pastiche because the balance of interests is typically in favour of the rightholder of the original work.



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KAI BODENSIEK

Digital cultural heritage and computer games

Out of print is better than orphaned

Orphan works

The new regulation of orphan and out-of-commerce works in collecting society law and in copyright law played only a subordinate role in the sometimes very heated discussions about the implementation of the DSM Directive. The extension of the provisions on out of commerce works to all categories of works, including software, opens up completely new perspectives for the permanent preservation of digital works and thus also computer games. Hardly any other cultural sector has developed so rap-

idly, and the beginnings of this sector today can often no longer be used without further ado due to a lack of suitable hardware and software. To date, there are no entries on computer games in the out-of-commerce worksregister at the “European Union Intellectual Property Office” (EUIPO). What is possible and what is not possible in this area under the new regulations should therefore be examined now that they have been implemented in German law.

reading time: 15 minutes

The games industry also has to deal with the question of orphaned or out-of-commerce works games. Not only have games been around for 50 years in their current form, but games, unlike films or books, have a much shorter exploitation cycle, which is exclusively due to technical progress. The following section will therefore examine the possibilities for preserving this latest part of our cultural heritage.

I. History

With the implementation of Directive 2012/28/EU (Orphan Works Directive)¹ in 2013, the provisions on orphan works were transposed into §§ 61 ff. UrhG. Today, these regulations can confidently be described as a failure. Since 2019, almost no significant new entries have been added to the EUIPO register of orphan works.² The search effort required under Section 61a UrhG has proved too daunting for the regulations to be of practical use. In this respect, the new regulation of “out-of-commerce works” in the DSM Directive, also in the wake of the “Soulie” decision of the ECJ,³ may well be seen as a renewed attempt to reorganise the subject of cultural heritage, especially its digital form. In the run-up to the implementation, there were a large number of contributions to the discussion about the concrete implementation,⁴ but afterwards the legal discussion about the topic of unavailable works was largely non-existent. Most recently, the GRUR Committee of Experts on Copyright and Publishing Law dealt with the draft bill on the Ordinance on Supplementary Provisions on the Use Out-of-Commerce works under the Copyright Act and the Collecting Societies Act (NwV) pursuant to Section 52d VGG and Section 61e UrhG.⁵ In the meantime, the NwV has also entered into force.

II. Significance for games

Games are a particularly young cultural form. The first commercial computer games appeared in the 1970s and have only become a mass phenomenon from the 1980s onwards.⁶ It is therefore – if you look at other media industries – almost astonishing that we already have to talk about orphaned or out-of-commerce works today. However, out-of-commerce works at least are a thoroughly relevant topic for games, since the enormous technical development of the last 40 years has also had a considerable impact on the games market. Advances in graphics processors often meant that game graphics were considered outdated and no longer in line with the market after just a few years, or that games simply could no longer run on current operating systems or hardware after a few years. This can be partially solved by so-called emulators that simulate old hardware or an old operating system, although here, too, the permissibility of the emulator under copyright law is often an issue. However, the use of emulators always requires the possession of the game itself, which can be difficult in the case of out-of-print works. A separate branch of industry has developed from this, specialising in the licensing and refurbishment of previously no longer available titles, such as the portal www.gog.com (“Good Old Games”). At least for those games that are not granted such a commercial “second life”, use by cultural heritage institutions is very much a possibility. Especially for games, the International Computer Games Collection (ICS)⁷ has set itself the goal of permanently preserving this part of the cultural heritage.

III. Orphan works

As already explained, Sections 61 ff. UrhG have hardly any practical relevance for orphan works, especially not for the games sector. This is not only because, due to the age of the works, orphaning has only rarely occurred, but also because

Section 61 (2) UrhG explicitly limits the scope of application to the categories of works named there⁸ and computer programs are not included. At the latest since the decision of the ECJ in “Nintendo/PCbox”,⁹ games are to be regarded as hybrid works. This combination of works consists, among other things, of the software part in the form of a computer program and a film-like work part perceptible on the screen.¹⁰ Since the use of the game, which may be a cinematographic work, is subject to the provisions of §§ 61 ff. UrhG as a film work without an act of use of the software part, games are likely to fall largely outside the scope of application of the provisions on orphan works.

IV. Out-of-Commerce Works

The regulations on out-of-commerce works are divided into two parts. The basic regulation is found in the Collecting Societies Act (VGG) in the form of the granting of rights by collecting societies and only when there are no corresponding collecting societies do the regulations in the UrhG come into play.

1. Collective licences (with extended effect)

Section 52 VGG regulates the granting of licences in out-of-commerce works by collecting societies, also for works that do not belong to their repertoire. Of course, collecting societies to which the administration of rights in out-of-print works has been transferred under the administration agreement may grant rights in these works. The extension of these licensing powers to works of outsiders within the meaning of Section 7 VGG in the case of the granting of rights to a cultural heritage institution pursuant to Section 52a VGG or to other users pursuant to Section 51 VGG, together with the applicability to all categories of works, is a considerable innovation. However, especially for the area of games, this provision will probably continue to lead nowhere, as has already been stated in the past,¹¹ since there is no collecting society for software or games registered with the DPMA. Whether this will change in the near future is still unclear. At least, the establishment of a collecting society for the manufacturers of games (VHG) by the industry association game – Verband der deutschen Games-Branche e.V. – was announced on 31 May 2023, even if it will not carry out any licensing for the time being.¹² Whether another collecting society in addition to the VHG will be able to carry out licensing in the future pursuant to §§ 51 ff. VGG may be doubted against the background of this step, since the industry has apparently decided to organise itself in the VGH. Even if only one other collecting society includes these rights in the administration agreement, representativeness under Section 51b VGG is likely to fail due to the refutability of the presumption of representativeness under Section 51b (2) VGG.

¹ Directive 2012/28/EU of the European Parliament and of the Council of 25.10.2012 on certain permitted uses of orphan works, OJ L 299 of 27.10.2012, p. 5-12.

² On 2.6.2023 the register contained 6,069 main works and in August 2019 it contained 5,923 works; so also Talhoff ZUM 2020, 223 (225).

³ EuGH MMR 2017, 524.

⁴ U.a. Henke ZUM 2019, 400; Wandtke NJW 2019, 1841; Talhoff ZUM 2019, 223; De la Durantaye/Kuschel ZUM 2019, 717; De la Durantaye GRUR 2020, 7; Spindler WRP 2019, 811; Dreier GRUR 219, 771; Staats ZUM 2019, 703.

⁵ Freischem/Würtenberger GRUR 2022, 1572.

⁶ Institute of Ludology, available at: <https://www.ludologie.de/spiele/computerspiele/von-den-anfaenger-der-videospiele-zu-den-ersten-computerspielen/>.

⁷ Available at: <https://www.internationale-computerspielesammlung.de/de/>.

⁸ BeckOK UrhR/Engels/Hagemeyer, UrhG § 61 marginal no. 11.

⁹ EuGH MMR 2014, 401 marginal no. 23 with comment Oehler.

¹⁰ Hentsch MMR 2023, 615e – in this issue; Nordemann/Waiblinger GRUR-RR 2023, 189 (190); Wandtke/Bullinger, UrhR/Bullinger, 6th ed. 2022, UrhG § 2 marginal no. 129, 130.

¹¹ De la Durantaye/Kuschel ZUM 2019, 717 (718).

¹² With further information on the collecting society for games producers, available at: <https://v-hg.org/>.

2. Special legally permitted uses according to UrhG

Sections 61d ff. of the UrhG were created as a catch-all provision for the case that there is no representative or otherwise authorised collecting society for a work in the context of the implementation of the DSM Directive. According to these provisions, a use of an out-of-commerce works within the meaning of Section 52b VGG by a cultural heritage organisation pursuant to Section 60d UrhG is entitled to use, reproduce and make available to the public, provided that the use has been announced in the EUIPO Register of Out-of-Commerce Works with a notice period of six months and has not been objected to by the rightsholder (Section 61d (3) UrhG). However, a prerequisite is that a copy of the work that is no longer available must be in the institution's inventory, which means that, for example, an exchange of the digitised works between such institutions is not possible if no inventory copies exist.¹³

This means that a not inconsiderable portion of today's games are already likely to fall outside these regulations, namely the entire genre of online games. Online games generally require not only the software distributed to the end customer (the so-called client software), but also software for operating the servers, which connects the many players with each other and ensures a uniform game world. This part of the games is never published, however, and represents an important trade secret for the rightsholders, since access to the server software would enable third parties to offer the game themselves or to manipulate the games. It is quite possible for a cultural heritage institution to hold a copy of the client software in its inventory, but this should be practically impossible for the server software. However, since both are required to operate an online game, this genre is currently not likely to be covered by the regulations under §§ 52 ff. VGG, §§ 61d ff. UrhG.

a) Unavailable works

The UrhG refers here to the definition in Section 52b VGG. According to the legal definition in a work is "not available" if the work is not offered to the general public in a complete version through any customary distribution channel. In this context, the term "unavailable works" deliberately goes beyond the term "out-of-commerce works" from the DSM Directive, as it is also intended to include works that have never been published, for example.¹⁴

While for other categories of works it is quite likely that unpublished works will end up in the holdings of a cultural heritage institution, e.g. private letters or photos, this is almost impossible in the case of games. Games productions are complex development processes with considerable costs and even if projects are discontinued, the work results are usually not made available to third parties. It is hard to imagine how an unpublished computer game could find its way into such an institution.

Pursuant to Section 52b (2) VGG, it is sufficient to establish that a work is not available if the institution unsuccessfully attempts with reasonable effort to obtain the complete work through the

usual distribution channels. Only a one-time search is required, which does not have to be carried out again at a later date and which may usually be limited to the member state in which the institution has its seat.¹⁵ Availability in second-hand bookshops or as second-hand goods is not relevant for the determination.¹⁶ What exactly constitutes a reasonable effort is neither clear from the law nor from the NWWV, which could have addressed this under Section 52d no. 6 VGG.

However, it is clear from the wording of the legislator that the requirements should not be set too high, especially since Art. 8 (5) subpara. 1 DSM Directive only provides for "good faith" as a benchmark and Recital 38 p. 2 of the DSM Directive refers to "easily accessible" evidence.¹⁷ This is also quite understandable against the background that the strict search obligations for the orphan works have led to these regulations remaining quasi-useless.

With regard to games, but probably also for software in general, there is probably the peculiarity that games are constantly being developed and changed, e.g. through updates, download content (DLC), add-ons, etc. For the particularly popular game "Fortnite", the developers have been publishing weekly updates since 2017, which correct errors but also provide new content, and the latest version is always required to play, so that there are no problems in the interaction of different versions. It is therefore questionable whether a game can be considered unavailable if only a special version of a game is currently no longer available, but a current version is.

Recital 37 of the DSM Directive at least provides some guidance in this regard, stating that a work is not considered to be out of commerce if there are different versions of the work, such as different cut versions of a film or subsequent editions of literary works. At the same time, however, it is also made clear that different language versions of a work or adaptations in another type of work that are available on the market do not preclude the assumption of a out-of-commerce works.

With regard to games, one may therefore assume that updates that do not significantly change the character of the game are in no case to be treated as a separate work. For example, a cultural heritage institution will not be able to offer an older version of the game "StarCraft 2", which has been successfully played as an eSport since 2010, if a current version is still available. Whether this also applies if the character of the game changes significantly through an update or a DLC, e.g. through substantial new content, is at least questionable. This question has already been raised for subsequent book editions, insofar as the content later differs significantly from the original edition, e.g. because it is outdated.¹⁸ The reference in the Directive to different cut versions of a film, which may also contain new scenes and plots, however, indicates that a work should not be considered "not available" even if at least a current version is available and there are not only insignificant differences in content compared to the older version.

b) Cultural heritage institution

The term cultural heritage institution is legally defined in Section 60d (3) no. 1 UrhG and includes museums, libraries, archives and film or audio heritage institutions, which are also supposed to include broadcasting organisations.¹⁹ In the field of games, the ICS is probably to be regarded as such a cultural heritage institution. In addition, the German Literature Archive in Marbach has also begun to build up a computer game collection.²⁰

c) Register information

Insofar as a cultural heritage institution has tried in vain with reasonable effort to obtain a work through the usual distribution

¹³ Talhoff ZUM 2020, 223 (224).

¹⁴ BeckOK UrhR/Freudenberg, VGG § 52b marginal no. 3.

¹⁵ Recital 38 p. 3, 5 DSM Directive; BeckOK UrhR/Freudenberg, VGG § 52b marginal no. 9, 10.

¹⁶ Wandtke/Bullinger, UrhR/Staats, 6th ed. 2022, VGG § 52b marginal no. 10; De la Durantaye/Kuschel ZUM 2019, 694 (696).

¹⁷ Wandtke/Bullinger, UrhR/Staats, 6th ed. 2022, VGG § 52b marginal no. 13; Dreier/Schulze, UrhR/Raue, 7th ed. 2022, VGG § 52b marginal no. 4.

¹⁸ Dreier/Schulze, UrhR/Raue, 7th ed. 2022, VGG § 52b marginal no. 3.

¹⁹ Wandtke/Bullinger, UrhR/Bullinger, 6th ed. 2022, UrhG § 60d marginal no. 20; Dreier/Schulze, UrhR/Dreier, 7th ed. 2022, UrhG § 60d marginal no. 6.

²⁰ Available at: <https://www.dla-marbach.de/bibliothek/computerspiele/>.

channels, it is irrevocably presumed under Section 52b (2) VGG that a work is not available. However, such an effort should also be documented.

Following the determination that a work is not available and thereafter during the entire period of use, the institution must provide information on the use of the work in the register of out-of-print works at the EUIPO pursuant to Section 61d (3) UrhG. Section 1 (1) NvWV specifies that the type of work, the title of the work (if known), the (co-)authors, other rightsholders and, in the case of published works, the year and, if applicable, a place of publication must be indicated.

In the case of a game, specifying the authors is likely to pose an almost insurmountable challenge to any cultural heritage institution, as the question of authorship of the overall work can hardly be answered in the case of several hundred employees. As in the area of film authorship, it depends on who has decisively shaped the overall work,²¹ which can usually only be determined with considerable insider knowledge about the specific production. Since such an indication can also lead to considerable problems in the case of unpublished works and since the law does not provide for such an indication, it may be assumed that the indication of the (co-)authors can also be omitted if they are not known. The wording “as far as possible” in the NvWV also takes this into account.

At the time of going to press, not a single game or software was on the EUIPO register.

d) Permitted acts of use

According to Section 61d (1) UrhG, cultural heritage institutions are permitted to reproduce (also by third parties) unavailable works and make them available to the public. This is explained by the intention of the law to enable the creation of digital cultural heritage archives that can be accessed by the public via the internet. The restriction applies that access may not be provided via “commercial websites”. According to the official justification, a website is also considered “commercial” if the offer is free of charge, but there is an intention to make a profit through advertising.²²

Since the making available to the public of software and especially games is often not easily possible, the provisions on computer programs in Section 69d (7) UrhG were also supplemented. According to this, in addition to reproduction and making unavailable works available to the public, the uses according to Section 69c no. 2 UrhG, i.e. translation, adaptation, arrangement and other reworking, as well as reproduction of the results obtained, are also permissible. These very extensive processing rights for software take into account the above-mentioned rapid development in the field of software and games. According to the official explanatory memorandum, the legislator even had games specifically in mind, e.g. the adaptation of a game so that it can be distributed by a computer game museum via a browser.²³ This makes it possible for cultural heritage institutions to make games accessible on modern browsers or via streaming technology that were not technically designed for this purpose or would not even run on today's systems. If – as is usually the case – there is no source code, decompilation by the cultural heritage institution or a third party commissioned by it is even permissible under Section 69e (1) UrhG.

e) Right of objection

Authors and holders of exclusive rights of use²⁴ may object the usage at any time before the EUIPO pursuant to Section 61d (2) UrhG. Such an objection only has an ex nunc effect and, contrary to the original draft legislation, does not lead to an obliga-

tion to pay remuneration for past use.²⁵ Reproductions that have already been made therefore remain lawful, although they must no longer be made available to the public.

3. Alternative solutions

In addition to using the legal permission, it is also possible for cultural heritage institutions to enter into agreements with rightsholders on a voluntary basis for the reproduction and making available to the public of their works. Since in most cases they also have access to the source codes and technical interfaces of the games, this could greatly simplify the work of cultural heritage institutions. In a first phase, the ICS, with the support of game – Verband der deutschen Games-Branche e.V., has already begun to conclude corresponding agreements with rightsholders regarding individual work components such as covers, screenshots or trailers in order to set up a database. Such cooperative models are generally preferable to the application of legal exceptions, as they can also considerably reduce the effort on the part of cultural heritage institutions. Moreover, such contractual agreements are most in line with the guiding principles of copyright law.

V. Conclusion

The new regulations for out-of-commerce works are likely to be an effective alternative instrument to individual licensing in the medium term. Whether the new VHG will also be granted the rights to license out-of-commerce works in the future cannot be estimated today. However, cultural heritage institutions such as the ICS should now have the opportunity to use the new regulations to build up a technical and organisational structure to make games accessible even after commercial exploitation has ceased, as is the purpose of a cultural heritage institution.

Quick read ...

- In the absence of a collecting society to manage the rights to out-of-commerce works, cultural heritage institutions will have to resort to the legally permitted uses in the UrhG in the medium term.
- An exploitation of out-of-commerce games against the will of exclusive rightsholders is not possible due to the right to object at any time.
- The special regulations for computer programmes also make it possible for cultural heritage institutions to adapt old games to current hardware and software.
- A game is usually not out of commerce if old versions are no longer available, but a current version is available.
- The regulations on orphan works should no longer play a role due to the search effort and because of significantly lower requirements for the use of unavailable works.



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²¹ Löwenheim, Handbuch des Urheberrechts, Schwarz/Reber, 3rd ed. 2021, § 12 Rn. 19 ff.; Brauner/Brauneck, Angemessene Vergütung von Urhebern und Künstlern/Oehler, 2022, Kapitel 6 Rn. 60 ff.

²² Amtl. Begr. BT-Drs. 19/27426, 101.

²³ Amtl. Begr. BT-Drs. 19/27426, 107.

²⁴ Wandtke/Bullinger, UrhR/Staats, 6th ed. 2022, UrhG § 61d marginal no. 23; Freischem/Würtenberger GRUR 2022, 1572.

²⁵ Wandtke/Bullinger, UrhR/Staats, 6th ed. 2022, UrhG § 61d marginal no. 24; Dreier/Schulze, UrhR/Raue, 7th ed. 2022, UrhG § 61d marginal no. 10.

Games in the age of UrhDaG

How the UrhDaG will change the enforcement of rights in games

Copyright responsibility

The Copyright Service Providers Act (UrhDaG) redefines the copyright liability of online content-sharing service providers (OCSSPs). This also affects the owners of copyright exploitation rights in games. In general, these rights are held by the publishers. However, especially in the gaming industry, a creative and individual approach to the protected works has emerged in recent years. The tolerance of Let's Plays and other

user-generated content, for example, does not rely on traditional categories of copyright contract law. This article examines to what extent the industry's customary rights management system can be supported by the UrhDaG and how the enforcement of exclusive rights is affected by the UrhDaG.

reading time: 21 minutes

I. Introduction

The Copyright Service Providers Act (UrhDaG)¹ is now two years old. Much of the dust has settled, it is now a matter of evaluating the practical effects of the German implementation of Art. 17 DSM-Directive. Along with many other branches of the creative industries, this also affects the games industry. As a rule, games publishers hold the exclusive rights of use for the exploitation of video games. On the one hand, they try to enforce their rights against illegal sharehosters, on which pirated copies of video games are made publicly available.

On the other hand, the use of Let's Plays and Walkthroughs also plays a major role for publishers. Let's Plays are user-generated video reproductions of games in which users film themselves playing the video game, i.e., record their interaction with the game and comment on it at the same time.² The content is typically prepared in such a way that one can see both the game content (screen recording) and the person playing the game (facecam recording).³ It can be non-commercial in nature, but may also be produced by commercially active game influencers. According to current legal practice, publishers mostly do not grant any rights of use for the public playback of Let's Plays.⁴ Since publishers nevertheless have an interest in their games being shown in high-quality Let's Plays and thus ultimately being made known on the market, declarations of acquiescence or similar forms of permission are customary in the industry.⁵ Publishers use them to allow the public playback of Let's Plays, provided that certain framework conditions are met. These often include the „appropriate use“ of the game material. From a copyright perspective, this toleration has no real permissive effect. Rather, publishers reserve the right to take action against inappropriate

use of their games in Let's Play videos at any time in individual cases.⁶

The article examines the extent to which illegal sharehosting of games and the handling of user-generated games content are affected by the new UrhDaG. Particularly with regard to dealing with Let's Plays and other user content, the question arises as to whether the customary practice in the industry can be safeguarded by the new enforcement mechanisms of the UrhDaG. However, we will also look at alternative concepts for dealing with user content that infringes copyright, which are made possible by the UrhDaG. Has the UrhDaG changed the enforcement of exclusive rights in games industry?

II. Overview of the provisions of the UrhDaG

In order to be able to answer the questions raised, the essential provisions of the UrhDaG should be briefly recalled. The UrhDaG – the German act for the implementation of Art. 17 of the DSM Directive (Directive 2019/790/EU) – constitutes a separate act of communication to the public by selected OCSSPs. Pursuant to Section 1 (1) UrhDaG, they perform an independent act of use under copyright law and thus, by implication, also become the infringer of a possible copyright infringement. The purpose of this provision is to close the value gap between platform operators and rightholders, which arises because platform operators have sometimes profited considerably from the marking publicly available of copyrighted content on their platform, while rightholders have hardly been able to participate in this success.⁷

However, service providers, i.e., OCSSPs who fall within the scope of application of the UrhDaG (Section 2 UrhDaG), can also obtain exculpation from liability. According to Section 1 (2) UrhDaG, this requires that they fulfil their duties and obligations under Section 4 and Sections 7 to 11 UrhDaG in accordance with high industry standards.

These obligations include, on the one hand, a licensing obligation established in Section 4 UrhDaG.⁸ According to this, service providers are obliged to make „best efforts“ to acquire the necessary rights of use for communication to the public. If a licence is concluded, this licence also works in favour of such platform users who do not generate significant income from uploading copyright-protected content (Section 6 (1) UrhDaG). As a result, this content must no longer be blocked by the service provider.

For all other content – or if no rights of use are acquired – it applies that service providers must in particular fulfil a qualified blocking obligation (Section 7 UrhDaG). It primarily has a general preventive effect and can in fact only be realised through au-

¹ Copyright Service Provider Act v. 31.5.2021, BGBl. I 1204, 1215.

² Hentsch/Falk, HdB Games und Recht/Furch, 2022, § 30 marginal no. 5; cf. also Rauda MMR 2023, 619e – in this issue.

³ Hentsch/Falk, HdB Games und Recht/Furch, 2022, § 30 marginal no. 5.

⁴ Hentsch/Falk, HdB Games und Recht/Furch, 2022, § 30 marginal no. 34; for the licence directory for Let's Plays of the game association, see: <https://www.game.de/themen/lizenzverzeichnis-fuer-lets-plays>.

⁵ Hentsch/Falk, HdB Games und Recht/Furch, 2022, § 30 marginal no. 35 ff.

⁶ Hentsch/Falk, HdB Games und Recht/Furch, 2022, § 30 marginal no. 37.

⁷ BT-Drs. 19/27426, 62; cf. recital 61 DSM-Directive; BeckOK Urheberrecht/Oster, 37th ed. 1.2.2023, UrhDaG § 1 marginal no. 5; on the term and further critically also Wimmers/Barudi GRUR 2017, 327 (328).

⁸ BeckOK Urheberrecht/Oster, 37th ed. 1.2.2023, UrhDaG § 4 marginal no. 18; Dreier/Schulze, Urheberrechtsgesetz/Raue, 7th ed. 2022, UrhDaG § 4 marginal no. 1; Klass ZRP 2021, 74 (75); Metzger/Pravemann ZUM 2021, 288 (291); Spindler CR 2017, 277 marginal no. 51; Wandtke/Hauck ZUM 2020, 671 (675); Kaesling/Kapp MMR 2021, 11 (12); BT-Drs. 19/27426, 134; critical Hofmann ZUM 2020, 665 (667); Hofmann NJW 2021, 1905 marginal no. 9; with differing view also Wandtke/Bullinger, Praxiskommentar Urheberrecht/Rauer, 6th ed. 2022, UrhDaG § 4 marginal no. 9.

tomated upload filters.⁹ In order for OCSSPs to be required to block the upload of protected subject matter, the rightholders must first provide the information necessary for this.¹⁰ There is no completely proactive blocking obligation.

For copyright-infringing content that could not be blocked despite the filtering measures, or if no qualified blocking of the work is requested, rightholders can finally also demand a simple blocking of the concrete infringing content in each individual case (Section 8 UrhDaG). With their help, therefore, a concrete infringement is terminated.

However, the UrhDaG also provides for various instruments to protect users' fundamental rights. These include, above all, that when automated, qualified filtering technologies are used, so-called presumably authorised uses must not be blocked, but must first be made publicly available (Section 7 (2) sentence 2, Sections 9 to 11 UrhDaG). Service providers can terminate this reproduction if they initiate a complaint procedure pursuant to Section 14 UrhDaG and the copyright infringement of the content is established in the process.

Finally, the UrhDaG applies not only to original copyrights, but also to related rights (Section 21 UrhDaG), such as the neighbouring copyrights of film and sound carrier producers (Sections 85, 94 UrhG). The owners of these rights can therefore also demand qualified blocking of their content pursuant to Section 7 UrhDaG.

III. Enforcement of games rights and the UrhDaG

As shown below, the provisions of the UrhDaG bring about various changes in the enforcement of exclusive copyright rights in games.

1. Action against illegal sharehosters

Probably one of the biggest challenges for rightholders in the games industry are illegal sharehosters, who often illegally offer copies of entire libraries of video games for third party download. The current copyright law makes it difficult for rightholders to take action against the uploaders of the infringing copies. The reason for this is, for example, the right to information against the intermediaries under Section 101 UrhG, which does not include the email, IP address or telephone number of the users of the hosting service (here: the share hoster).¹¹ Often, elaborate concealment techniques are also used. The goal of games publishers is therefore often to take action against the sharehosters themselves in order to put an end to copyright-infringing user uploads and, in particular, to oblige sharehosters to provide proactive security mechanisms against infringements on their platforms. However, taking action against the sharehosters has already proved difficult in principle, since, as intermediary market players, they can only be held liable for copyright-infringing user uploads of games content if they fulfil increased requirements.¹²

In principle, the UrhDaG does not simplify action against illegal sharehosters. It is true that the regulatory mechanism provided for in the UrhDaG provides for stricter obligations that must be fulfilled in order to achieve copyright liability exculpation. In particular, service providers are obliged under Section 1(2) and Section 7 UrhDaG to take qualified blocking measures, which are intended in particular to prevent ex ante the public reproduction of infringing content such as pirate copies of games from the outset. Within the scope of this qualified blocking obligation, sharehosters would therefore have to ensure that pirate copies of games are not made available to the public via their platform.

However, in order for publishers in particular, but also all other rightholders in games rights, to benefit from the special enforce-

ment mechanisms of the UrhDaG against illegal file sharing of pirated copies, the sharehosters in question must fall within the scope of the regulation. This is defined in Section 2 UrhDaG and includes providers of information society services whose main purpose is exclusively or at least also to store and make publicly available a large amount of copyrighted content uploaded by third parties. For sharehosters to qualify as service providers within the meaning of the UrhDaG, they must also organise the uploaded user content and advertise it for the purpose of making a profit. Finally, a competitive relationship with other online content services for the same target group is also necessary.

Sharehosters, which are used solely for sharing pirated games, pursue the main purpose of at least also storing copyright-protected material uploaded by users on a large scale and making it publicly available. Typically, however, there is no organisation and promotion of the content. Classic sharehosters are therefore not service providers within the meaning of Section 2 UrhDaG.¹³ Therefore, sharehosters on which illegal pirated games are offered do not fall within the scope of application of the UrhDaG.

It follows that games publishers cannot use the legal instruments of the UrhDaG to enforce their exclusive copyright rights against sharehosters. In this case, the rightholders in games cannot therefore benefit from the improved legal enforcement possibilities brought about by the UrhDaG.

This also applies if the main purpose of the sharehosters is to enable or facilitate copyright infringements by users. It is true that Section 1 (4) UrhDaG provides for increased liability for such service providers. Service providers who fall under this regulation cannot, for example, exempt themselves from their copyright liability by implementing blocking measures. However, the regulation only applies to OCSSPs in terms of Section 2 UrhDaG, so that it cannot be applied to classic sharehosters, who already do not fall within the scope of the UrhDaG itself.

Next to the legal developments in context to the UrhDaG, the new legal developments in the field of the copyright liability regime for other host providers must be kept in mind when taking action against illegal sharehosters.¹⁴ This is because other host providers – i.e., host providers that do not fall within the scope of the UrhDaG – must also take appropriate technical measures if they know that their platform is generally used for copyright infringements by users.¹⁵ For platforms that provide user uploads on a large scale, life experience also suggests that copyright infringements are generally committed also. For large share hosting providers, this leads to a presumption of the necessary knowledge establishing liability.¹⁶ Consequently, even without the application of the UrhDaG, they can be required to take appropriate technical measures to protect against copy-

⁹ EuGH MMR 2022, 544 para 54 – Upload-Filter; for the lit. e.g. Dreier GRUR 2019, 771 (776); Hofmann GRUR 2019, 1219 (1220); Pravemann GRUR 2019, 783 (784); Senftleben ZUM 2019, 369 (371); Spindler CR 2019, 285 para 53; Volkman CR 2019, 376 para 2.

¹⁰ On the question of what information is to be transmitted for this purpose in a specific case, see Fromm/Nordemann, Urheberrecht, 13th ed.

¹¹ EuGH MMR 2020, 676 with comment Neubauer – YouTube-Drittsankunft.

¹² Cf. on these requirements, which also differentiate according to the various types of intermediary market participants Hentsch/Falk, HdB Games und Recht/Waiblinger/Pukas, 2022, § 20 marginal no. 63 ff.; also Fromm/Nordemann, Urheberrecht/J. B. Nordemann, 12th ed. 2018, UrhG § 97 Rn. 148a ff, 154 ff.

¹³ As here also Dreier/Schulze, Urheberrecht/Raue, 7th ed. 2022, UrhDaG § 2 marginal no. 16.

¹⁴ The case law EuGH MMR 2021, 705 – YouTube und Cyando as well as the subsequent decisions BGH MMR 2022, 870 – YouTube II; BGH MMR 2022, 879 – uploaded II; BGH MMR 2022, 881 – uploaded III; on this in total Nordemann ZUM 2022, 806 ff.

¹⁵ EuGH MMR 2021, 705 para. 102 – YouTube und Cyando.

¹⁶ Nordemann ZUM 2022, 806 (811).

right infringements. These measures must also be preventive.¹⁷ Even if the case law has not yet been further specified here, it can probably be assumed that the implementation of measures comparable to the qualified blocking mechanism will be necessary for such sharehosters. Sharehosters not covered by the UrhDaG have thus also experienced a tightening of copyright liability. In principle, publishers of games will also benefit from this.

2. „Qualified blocking“ of games content

Even if the UrhDaG cannot support rightholders in taking action against sharehosters who distribute illegal copies of games, there could still be effects on a secondary level when dealing with Let's Plays and similar content.

Since Let's Plays are usually made available on platforms such as Twitch, YouTube or Vimeo, i.e., online platforms for sharing copyrighted content through user uploads, the UrhDaG is applicable in the context of the enforcement of exclusive copyright rights in these cases. This is because platforms such as YouTube or Vimeo are typical use cases of service providers within the meaning of the UrhDaG.

The core of the UrhDaG is the qualified blocking obligation of service providers (Section 7 UrhDaG). The regulation is based on a general idea: If publishers want to prevent the copyright-infringing publicly making available of content from their video games, they can submit a qualified blocking request to the service provider. After providing sufficient information, the service provider is obliged to stop copyright-infringing user uploads and to prevent copyright-infringing uploads of the protected video game content by users in the future. The qualified blocking obligation thus standardises an effective instrument – from a regulatory perspective – to take action against a large number of infringing user uploads.

However, in the qualified blocking obligation, no differentiation can be made between desired and „inappropriate“ uses, e.g., the explanation of hacks and cheats. The law only differentiates between user uploads that infringe and those that conform to copyright, whereby the latter may not be blocked (cf. Section 7 (2) UrhDaG). If publishers want to set up different criteria when dealing with Let's Plays – it is customary in the market, for example, to restrict Let's Plays to non-commercial purposes, to require the publisher's link or to allow Let's Plays only on the premise that no cheats are shown¹⁸ – these criteria cannot be reflected by the qualified blocking obligation of the UrhDaG. Either publishers make a qualified blocking request, as a result of which copyright-infringing Let's Plays are blocked, or they waive this, in which case they cannot benefit from the general preventive effect of the qualified blocking mechanism. It therefore follows that the qualified blocking obligation under Section 7 UrhDaG is not suitable to reflect the usual market strategy in dealing with Let's Plays.

Only the flagging of potentially lawful content by platform users, i.e., by uploaders of Let's Plays, could be different. In particular, if users upload videos to online platforms that contain a work

no more than half and combine it with other content, they can flag their upload as lawful pursuant to Section 11 UrhDaG (cf. Section 9 UrhDaG). A prerequisite for this, however, is that users assume, after analysing their own content, that the use is in conformity with copyright law, because a copyright exception provision (Sections 44a ff. UrhG) may apply. The consequence of flagging a use as permitted is that it is rebuttably presumed that the user upload is legally permitted (Section 9 (2) UrhDaG). This means that service providers may not initially block the content. Rather, it must be publicly made available until a complaint procedure initiated by the rightholder has been able to rebut the presumption rule (Section 9 (1) UrhDaG). The legal privilege in favour of presumably authorised uses, whose conformity with EU law is doubtful, but at least with regard to Sections 9 to 11 UrhDaG is to be affirmed,¹⁹ thus leads to a reversal of the burden of action, which is now once again incumbent on the rightholders.

If platform users flag their Let's Plays made publicly available as legally permitted (Section 11 UrhDaG), the content is consequently initially made publicly available despite a qualified blocking request. This also applies if the use is actually unlawful, e.g., because the requirements of a copyright exception provision are not met. In a second step, it is now up to the publishers to initiate a complaint against a user upload in the individual case (Section 14 UrhDaG), or not. The decision on this is solely at the discretion of the rightholder; the UrhDaG makes no stipulations in this regard. It could therefore be made dependent on whether the content produced by users is „appropriate“ in the sense of the toleration declarations declared according to previous legal practice and therefore constitutes an acceptable copyright infringement or not.

If a qualified blocking of copyright-infringing Let's Plays, walkthroughs and other user content is nevertheless sought, the limited technical effectiveness of blocking mechanisms in the area of audiovisual content must finally also be taken into account. This is because video content is usually compared with each other on the basis of average brightness values and blocked from a predefined similarity value to the original content.²⁰ Especially when games allow for different viewing perspectives, especially when it comes to open-world titles, the possible audiovisual recordings are so diverse that matches between a reference file and the user content based on average brightness values are likely to be difficult to establish. Moreover, blocking still images from videos is not reliably possible according to the current state of the art.²¹ Publishers must therefore currently assume that the majority of user videos cannot be captured by the filter mechanisms.²²

3. Notice-and-take-down of unlawful content after the UrhDaG comes into force

In addition to the qualified blocking mechanism, the UrhDaG also provides for a so-called „simple“ blocking of lawful content. It finds its basis in Section 8 UrhDaG. The provision contains a notice-and-take-down procedure,²³ which can be initiated against specific copyright-infringing user uploads. This legal instrument is – similar to the classic copyright claim for removal and injunctive relief – of a specifically repressive nature.

In order for publishers to obtain the simple blocking of copyright-infringing user uploads on online platforms of service providers, e.g. copyright-infringing and not tolerated Let's Plays, they must submit a sufficiently substantiated notice of copyright infringement to the OCSSP and request the blocking of the specific user upload (Section 8 (1) UrhDaG). The standard for the justification is that the service provider can recognise the copyright infringement quickly and without further legal research.

¹⁷ BGH MMR 2021, 870 marginal no. 88 – YouTube II; BGH MMR 879 marginal no. 33 – uploaded II; further cf. Nordemann ZUM 2022, 806 (811).

¹⁸ Cf. for example Hentsch/Falk, HdB Games und Recht/Furch, 2022, § 30 marginal no. 44 ff.

¹⁹ On this, see in total Dreier/Schulze, Urheberrecht/Specht-Riemenschneider, 7th ed. 2022, UrhDaG § 9 marginal no. 3 with further citations; also Hofmann GRUR 2021, 895 (903); Metzger/Pravemann ZUM 2021, 288 (294); Conrad/Nolte ZUM 2021, 111 (120 f.).

²⁰ Raue/Steinebach ZUM 2020, 355 (360 f.).

²¹ Raue/Steinebach ZUM 2020, 355 (361).

²² In this sense also Hentsch MMR 2019, 351 (354).

²³ BT-Drs. 19/27426, 138.

However, the simple blocking obligation is not limited to obvious infringements.²⁴ If a suitable blocking request has been submitted by the publishers, the OCSSP must fulfil the blocking request without delay, usually within a few days to a week.²⁵ However, service providers must always ensure that no lawful user content is blocked (Section 8 (2) UrhDaG). For this reason, the applicability of copyright exception provisions continues to be of great importance. In particular, the new exception for pastiche (Section 51a UrhG) could play an important role here. An intervention of other exceptions for Let's Plays and similar user content seems rather unlikely.

In order to take action against specifically infringing user uploads on online platforms such as YouTube, Vimeo or Instagram, publishers within the scope of application of the UrhDaG must now resort to simple blocking pursuant to Section 8 UrhDaG. In this respect, however, it must be taken into account that even before the UrhDaG came into force, service providers as host providers could at least be held liable as interferers for the removal of a concrete infringement. The requirements were comparable to those of Section 8 UrhDaG.²⁶ Accordingly, there has been no substantial change in the possibilities for games publishers to enforce their exclusive rights.

4. Licensing obligation of the service providers

However, the UrhDaG could change the practical enforcement of copyright exploitation rights in games not only through the introduction of new blocking obligations. The licensing obligation regulated in Section 4 UrhDaG could also have an influence on the enforcement strategy of games publishers. The reason for this is that service providers must acquire rights of use to the game content from publishers if the prerequisite of Section 4 UrhDaG is met in order to obtain the liability-ending effect of Section 1 (2) UrhDaG. If service providers acquire such rights of use under copyright law, e.g. for the public reproduction of audiovisual game sequences in Let's Plays by platform users, this authorisation of use pursuant to Section 6 (1) UrhDaG also applies to all platform users who do not generate substantial income by uploading their content. Since the reproduction of the content covered by the licence agreement is not (any longer) unlawful from the user's perspective in these cases, the content may no longer be blocked (Sections 7 (2), 8 (2) UrhDaG). However, particularly popular Let's Players who generate considerable income with their videos would not be covered by such agreements.

The flexibility customary in the market in dealing with Let's Plays and walkthroughs²⁷ could only be maintained in the granting of rights of use to service providers if it is possible to limit the granting of rights of use under copyright law to „appropriate“ uses, e.g. uses in which no cheats are presented. The consequence of such a limitation of the granting of rights of use would be that publishers could then take action against „unreasonable“ uses in any case via the simple blocking obligation under Section 8 UrhDaG.

However, it is questionable whether it is possible to restrict the granting of the right of use to „reasonable“ uses. Firstly, the UrhDaG does not provide any statutory provisions that regulate the limitation of the granting of rights for publicly making available copyright protected. That suggests that a restriction to „reasonable“ uses might be possible. Nevertheless, the granting of rights of use is a legal act in rem, which must meet certain clarity requirements to ensure legal certainty. It follows that a limitation of the granting of rights in rem is only possible insofar as the remaining type of use is independent and clearly delimitable according to the perception of the market.²⁸ However, a limitation of the granting of rights to „appropriate“ uses is very vague. It therefore does not satisfy the clarity requirement of the granting

of rights in rem. The appropriateness of the use is therefore not a criterion that can be used as a delimitation criterion for a grant of a right in rem. Consequently, it is not possible to limit the granting of a licence within the meaning of Section 4 UrhDaG to reasonable uses of the games. Consequently, it remains the case that the customary, flexible practice of toleration for Let's Plays and other user content cannot be represented by licence agreements in terms of the licensing obligation under Section 4 UrhDaG.

However, it should be noted that the licensing obligation under Section 4 UrhDaG could also open up new exploitation opportunities for games publishers. This is because the conclusion of a licence is linked to the payment of an appropriate remuneration to the publishers (cf. Section 32 UrhG). While the publicly making available of Let's Plays on online platforms could previously be flexibly structured by means of legally non-binding declarations of acquiescence, but typically did not guarantee the publishers any remuneration, the licensing obligation under Section 4 UrhDaG now makes it possible to acquire remuneration payments by the service providers for the making available of protected content in Let's Plays and other user content. For this, however, it would have to be accepted that a more comprehensive granting of rights in rem for publishers would be accompanied by a loss of flexibility.

Conversely, in order to trigger the licensing obligation of the OCSSPs pursuant to Section 4 UrhDaG, the licence offers must first meet qualified requirements. These relate to the origin (Section 4 (1) UrhDaG) and the scope (Section 4 (2) UrhDaG) of the rights of use. It is particularly important for games publishers that a licence offer does not necessarily have to be made by a collecting society. However, processing via a collecting society would sometimes be advantageous from an efficiency point of view. Furthermore, the licence offers must also apply to content which the service provider obviously makes publicly available in more than negligible quantities. It should be noted that service providers can influence through their terms of use which types of content they manifestly make publicly available in more than marginal quantities.²⁹ This criterion is therefore to be understood normatively. However, large service providers in particular, which reproduce a large number of different user content and thus also user content from the games sector such as Let's Plays, will regularly fulfil the obviousness criterion for Let's Plays, walkthroughs or other secondary contents.

IV. New monetisation model for games rights?

Finally, the UrhDaG could also result in new opportunities for publishers to amortise their investment in game development.

One possibility that can be mentioned here is the possibility of concluding licensing agreements with service providers (if the requirements of Section 4 UrhDaG are met), which secure royal-

²⁴ See also, as here, Lennartz/Möllers GRUR 2021, 1109 (1112 f.); with differing view Dreier/Schulze, Urheberrecht/Raue, 7th ed. 2022, § 8 marginal no. 6; Opinion of Advocate General Saugmandsgaard Øe of 15.7.2021 – C-401/19 marginal no. 170, 198, 205; COM (2021) 288 final p. 24 f.; similarly Jäger ZUM 2021, 903 (907).

²⁵ Immediacy results from an interpretation in conformity with the Directive, see Art. 17(4)(c) DSM Directive.

²⁶ Cf. on the liability of interference of host providers under the old legal situation Fromm/Nordemann, Urheberrecht/J. B. Nordemann/Ohly, 12th ed. 2018, UrhG § 97 marginal no. 162 with further citations.

²⁷ See III. 2. for some examples.

²⁸ BGH MMR 2017, 171 marginal no. 46 (Biehler/Apel – World of Warcraft I); HdB Urheberrecht/Loewenheim/J. B. Nordemann/Ohly, 3rd ed. 2021, § 27 marginal no. 2 with further citations, including from case law.

²⁹ BT-Drs. 19/27426, 133.

ties for publishers (see above under III. 4.). However, even if no licence agreements are concluded with service providers, the UrhDaG provides for new remuneration claims for rightholders. The statutory remuneration claim for presumably permitted uses in Section 12 (1) UrhDaG should be emphasised here. It applies in particular when users mark their content as legally permitted. If users assume that Let's Plays or walkthroughs published by them are covered by a copyright exception provision and therefore mark their upload as legally permitted (Section 11 UrhDaG), this triggers the statutory claim to remuneration under Section 12 (1) UrhDaG. This applies *expressis verbis* only in favour of the authors. However, since the UrhDaG also applies to neighbouring rights (Section 21 UrhDaG) including the film producer's right (Section 94 UrhG), the statutory remuneration claim under Section 12 (1) UrhDaG is also due for the owners of this neighbouring right.³⁰ The film producer's right also arises in the development of games.³¹ Games developers are initially entitled, but the film producer's right is fully transferable to publishers.³² Developers or publishers are thus entitled to claim remuneration for the publicly making available of games specific user uploads, while at the same time they can decide whether to lodge a complaint against the user content in individual cases pursuant to Section 14 UrhDaG if they consider it to be copyright-infringing and intolerable, e.g., because it shows inappropriate content such as cheats.

However, the claim to remuneration for content marked as authorised can only be asserted by collecting societies (Section 12 (1) sentence 2 UrhDaG in conjunction with Section 5 (2) sentence 3 UrhDaG). In this context, it remains to be seen how the work of the newly founded collecting society for games producers (VHG) will develop. There may be potential here, but at the moment there are no plans to assert the statutory remuneration claim.

V. Conclusion

All in all, action against illegal sharehosters is outside the scope of application of the new UrhDaG, which means that the tried and tested legal bases must be used here. However, important is the stricter copyright liability for host providers outside the scope of application of the UrhDaG, which the CJEU established with its „YouTube/Cyando“ decision.³³

Dealing with Let's Plays, walkthroughs and other user content can hardly benefit from the UrhDaG. This is because the customary practice of tolerating appropriate user content cannot be re-

flected by the qualified blocking obligation and the licensing obligation of the UrhDaG. If the tried and tested guidelines for dealing with such user content are to be maintained, the only option is to file a simple blocking request in individual cases pursuant to Section 8 UrhDaG. Even if there are differences in detail, the legal consequences that can be achieved with the simple blocking are, in principle, comparable to those of the host provider's liability for interference before the UrhDaG came into force, with regard to removal and injunction. If qualified blocking of video content is nevertheless sought, no excessive expectations should be placed on the accuracy of the blocking. This is due to the technical limits of the blocking mechanisms available on the market.

Ultimately, however, the UrhDaG offers opportunities to develop new monetisation models for dealing with Let's Plays and other user content. The basis for this is the licensing obligation of service providers under Section 4 UrhDaG. In addition, the statutory claim to remuneration for uses marked as permitted must be taken into account. This is anchored in Section 12 (1) UrhDaG. Game developers or publishers are entitled to this claim, as both may be the original owners of the film producer's right. All in all, however, the UrhDaG should not have changed too much in the games industry.

Quick read ...

- The UrhDaG does not lead to improvements in the possibilities of legal enforcement against illegal sharehosters. However, the new CJEU decision „YouTube/Cyando“ and the following BGH decisions must be taken into account. They establish stricter obligations for host providers outside the scope of the UrhDaG.
- The flexible handling of Let's Plays and other user content can neither be reflected in the qualified blocking obligation under Section 7 UrhDaG nor in the licensing obligations of OCSSPs. For rightholders in games, they therefore have only limited relevance.
- Nevertheless, new monetisation models can be based on the UrhDaG.



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³⁰ Also Dreier/Schulze, *Urheberrecht/Specht-Riemenschneider*, 7th ed. 2022, UrhDaG § 12 marginal no. 10.

³¹ *Münchener Anwaltshdb. GewRS/Nordemann/Czychowski*, 6th ed. 2022, § 40 marginal no. 439 with further citations.

³² Cf. Hentsch/Falk, *HdB Games und Recht/Furch*, 2022, § 30 marginal no. 23.

³³ EuGH MMR 2021, 705 – YouTube und Cyando.

Copyright contract law in the games sector

Specific copyright analysis of diversity of participants, contributions and uses

Neighbouring rights

The EU-wide codification of certain aspects of copyright contract law contained in Art. 18–22 of the DSM Directive has brought copyright contract law overall into sharper focus. Even if the legal changes brought about by the DSM Directive in Germany may be generally manageable because the Directive is in many respects based on the previously existing national German law, the EU-wide amendment has also led to industries increasingly dealing with this area, for which this was often not the case before. This includes the still relatively young games industry, which has long since surpassed some of the tradition-

al media sectors governed by copyright law in terms of creative output, employment figures and general economic importance. To date, there is hardly any case law on copyright law in the games sector. Nevertheless, Section 31 et seq. UrhG, in which German copyright contract law is codified, are in principle fully applicable to the copyright-relevant aspects of the production and distribution of games. Given this background, this article explains the essential provisions of copyright contract law and their significance and special features in the games sector.

reading time: 19 minutes

I. Purpose, scope of application and subject matter of copyright contract law

With its Directive (EU) 2019/790 (DSM Directive)¹, which had to be transposed into national law by the Member States by 7 June 2021, the European legislator has harmonised some areas of the still very nationally determined copyright law throughout the Union. This applies in particular to the copyright contract law contained in Art. 18 et seq. DSM Directive, which regulates the legal relationships of authors and beneficiaries with the users of their works or performances, to whom they have granted rights of use.² Since the pre-existing German law in Section 31 et seq. UrhG provided the blueprint for the Union regulations, the changes to German copyright contract law prompted by the DSM Directive are manageable.³ Nevertheless, against the background of the EU-wide regulations and the legal policy discussions conducted in this context, copyright contract law has also come to the attention of a broader (professional) public in Germany, which now extends far beyond the traditional media sectors.⁴

According to recital 72 of the DSM Directive, the legislator regularly considers authors and performers⁵ to be in a weaker negotiating position when it comes to granting licences or transferring their rights for the purpose of exploitation in return for remuneration,⁶ so that it is necessary to provide them with special protection. This protection consists of a series of claims granted to authors and beneficiaries of neighbouring rights vis-à-vis their contractual partners as the exploiters of their works or performances. To be mentioned here are in particular⁷

- the right to appropriate remuneration, Art. 18 DSM-RL or Section 32 UrhG;
- the right to appropriate further participation, Art. 20 DSM-RL or Section 32a UrhG;
- Ancillary rights of the author, above all an obligation of the exploiter to provide information about the revenues generated by the exploitation of the work, Art. 19 DSM-RL or Section 32d UrhG.

These claims are not contractually excludable (Art. 23(1) DSM Directive or the respective paragraph 3 sentence 1 of Sections 32, 32a and 32d UrhG). However, they do not apply to authors of computer programs (Art. 23 (2) DSM Directive or Section 69a (5) UrhG).

The claims have in common that they presuppose an author⁸ who has created a copyrightable work⁹, the exploitation of

which is later at issue, either by the author's contractual partner or by a third party downstream in the licensing chain.¹⁰ An analogous application to objects that are not protectable under copyright law, e.g. due to lack of individuality or design height,¹¹ is excluded.¹² If, on the other hand, several authors are involved in the creation of a work or related works, their relationship to each other is governed by Section 8 UrhG or Section 9 UrhG. The burden of presentation and proof for the existence of the claim prerequisites regularly lies with the author, whereby Section 10 UrhG admittedly contains a presumption rule. Regarding the duty to provide information under Section 32d UrhG, which is independent of the claim, the users must determine for themselves whether they are obliged to provide information and, if so, about whom and to what extent.¹³

II. Special Copyright Contractual Features in the Games Industry

Against this regulatory background, the games industry is characterised by several special features that do not allow a simple transfer of copyright law findings from other industries. These

1 Directive (EU) 2019/790 v. 17.4.2019 on copyright and related rights in the Digital Single Market and amending Directive 96/9/EC and Directive 2001/29/EC (Digital Single Market Directive – DSM Directive).

2 On the subject matter of copyright contract law in general, see for example BekKOK UrhR/Soppe, 38th ed. 1.2.2023, UrhG § 31 marginal no. 1 ff.

3 Cf. BT-Drs. 19/27426, 50.

4 As the case law of the highest courts shows, copyright contract law has long played a role for book and press publishers, see for example BGH NJW 2010, 771 – Talking to Addison and BGH GRUR 2012, 1031 – Honorarbedingungen Freie Journalisten, as well as in the field of film and television, see for example BGH GRUR 2012, 1248 – Fluch der Karibik and BGH GRUR 2012, 496 – Das Boot.

5 ISd Holder of other neighbouring rights pursuant to §§ 70 ff. UrhG.

6 Critical of this premise – which, as far as can be seen, is not empirically supported – is Soppe NJW 2018, 729 (730).

7 In addition, since 2008, Sections 31a, 32c UrhG contain special provisions for the granting of hitherto unknown rights of use.

8 Or an ancillary copyright holder; in the following, for reasons of simplification, we will only speak of authors, unless otherwise stated.

9 Or a performance eligible for ancillary copyright protection; in the following also included by the term "work" for the sake of simplicity.

10 See Section 32a (2) UrhG.

11 On these requirements of a "work", see for example Bullinger in Wandtke/Bullinger, UrhR, 6th ed. 2022, § 2 marginal no. 21 ff.

12 BeckOK UrhR/Soppe, 38th ed. 1.2.2023, UrhG § 32 marginal no. 16.

13 The tool available free of charge at <https://urheberauskunftinabox.osborneclark.de.com/> can assist in this determination.

particularities concern both the concept of the author (see II.3.) and the area of the copyright work (see II.2.), as well as the exploitation of games and their individual elements (see II.1.).

1. Evaluation of games and their elements

An obvious difference in the evaluation of games compared to classical media is the fact that a book is read, a film is watched, whereas a game is played. In the case of a game, the use is always interactive, the users interact with the game and, depending on the genre, also with other users, while the use of other media regularly represents pure reception. This inclusion of the players in the use of the work already leads to the fact that games differ from the classic media used for reception alone.

Above all, however, the following applies: While a book, regardless of its presentation, is always exploited as a single work attributed to an author¹⁴ and a film, regardless of its distribution channels¹⁵, is used as a single self-contained work, such a general form of exploitation cannot be established in the field of games. This is primarily due to the fact that the breadth of the generic term "games" is much wider than for any other medium: "Games" encompass many different types of digital games and experiences, e.g. console games, computer/PC games, online games, mobile games, social games, VR/AR games, multi-player games, virtual worlds. The breadth of the "game" experience ranges from less complex single-player games that function like a digital version of classic non-digital games (e.g. like word and number puzzles) to single- or multi-player adventure games on consoles to highly complex virtual environments in which players communicate with each other, play together and even help (further) develop the game.

This goes hand in hand with the fact that games today are rarely distributed as self-contained works on a carrier medium,¹⁶ and the download of a "finished" game independent of a carrier medium is by no means the rule today. Rather, the ambition of development studios to provide players with varied gaming experiences over a long period of time has led to many games not being planned, developed, released and then evaluated in a linear sequence as originally published. Today, many games are understood as offers that are continuously developed, enriched with new elements and supplemented with further facets

(Games as a Service).¹⁷ In this way, entire entertainment platforms with many additional offers and individual game experiences are gradually emerging. The operation of a game as a permanent and constantly evolving service takes place especially in games that users can play free of charge. But even in games where players pay an initial fee for use, updates are offered again and again over the duration of the offer, which can also include further developments. For this purpose, the developer studios have so-called live operations teams that concentrate on the further development of a live game and the integration of new, varied features.¹⁸ In some games, however, the players also develop new elements, e.g. new characters, equipment and game worlds, in the course of their interaction with the game or their fellow players, often with the result that there is never a "final" version of the game, but always only changing snapshots. What all complex games have in common is that there is no number of game constellations fixed by the developer or publisher, but that the game surfaces and thus also the concretely used and experienced content can vary almost infinitely. Especially in games with multi-player components, the users create the individual game experience, which is not specified by the provider, for example in the positions of the players, the game objects and any opponents in relation to each other.¹⁹ This leads to some games being played for years.²⁰

For the commercial evaluation of games, two special features must be considered:

- On the one hand, the exploitation of a game often takes place internationally, i.e. across national, linguistic and cultural borders. Translations of internationally popular games into the respective national language are by no means the rule, even for large language areas, unlike, for example, the elaborately produced synchronizations in the film sector.²¹ In the context of copyright contract law, this can lead to the question of which law is applicable to the exploitations in different countries.²²
- On the other hand, different monetisation models have been established in the industry, depending on the distribution channel and evaluation.²³ For example, there are games that are offered for a one-time payment, where the player pays an initial one-time fee and receives access to the game in return, e.g. by means of data carrier, download or permanent activation of online access.

Another model is subscriptions, where players pay a fixed amount at regular intervals, usually monthly, to have access to the game or special content. There are also games that monetise via microtransactions: These games are basically available for free, but players can spend money on additional content or speed up the gameplay. Finally, there are games that are always free for players, but in which advertisements for third-party offers are displayed, i.e. the monetisation is ad-based. The differences in monetisation can lead to the question of which "revenues from the exploitation of the works or performances" are "relevant" within the meaning of Art. 20 (1) DTMR: In addition to the proceeds from the sale of the game, does this also include the ongoing subscription payments or even the advertising revenues – which are independent of the game itself?²⁴ For an author who was only involved in the creation of the basic version: Do revenues generated years later after possibly complex game additions and expansions still belong to the revenues that are relevant for the consideration of his remuneration? Can revenues be attributed to works at all if the game and its creative elements change so much during its evaluation?

2. The game – a work?

The production of a game corresponds to these differentiated forms of exploitation, which must be distinguished from classic media: this is often highly complex, extremely costly²⁵ and also different from other media genres in terms of copyright.

¹⁴ And it does so both in the various physical distribution forms of hardcover, paperback, book club edition, etc. and in its digital form as an e-book.

¹⁵ E.g. in cinemas, on linear television, on audiovisual image/sound carriers (video cassettes, DVD etc) or as a digital streaming offer (video-on-demand).

¹⁶ This is practically only the case with DVD games without any online components.

¹⁷ At least this is the case with online games and apps, in contrast to console games, for example.

¹⁸ As far as each of these further developments is finalised at some point, it could be a "work" in itself, see under II.2.

¹⁹ This becomes particularly clear in VR/AR games, in which "the players" move independently through the completely or partially virtual, constantly changing game world. In contrast, the audiovisual experience in a film always remains unchanged, independent of the viewers.

²⁰ E.g. "World of Warcraft" has been live since 2004, since then several expansions of the original version have been released. Mobile games such as "Candy Crush" (released in 2012) or "Clash of Clans" (released in 2012) can also be successfully evaluated over long periods of time.

²¹ Cf. the decisions on Pirates of the Caribbean on claims by the German dubbing actor of the male lead, for example BGH GRUR 2012, 1248 – Pirates of the Caribbean.

²² But see Section 32b UrhG; on the choice of law with regard to German copyright contract law, see also Hoeren/Sieber/Holzngel, HdB Multimediarecht/Hentsch, 58th EL March 2022, Part 22 marginal no. 12.

²³ These models are also occasionally combined with each other.

²⁴ On the parallel question in § 32a UrhG, see for example BeckOK UrhR/Soppe, 38th ed. 1.2.2023, UrhG § 32a marginal no. 18.1.

²⁵ According to <https://www.pcwelt.de/article/1663806/500-millionen-us-dollar-die-zehn-teuersten-videospiele-aller-zeiten.html>, the production costs of Red Dead Redemption 2 were over 500 million USD.

This is because games are created iteratively and interactively with the participation of the various works and trades involved.

On the one hand, the interlocking of the individual trades in coordination processes and decisions on important issues is likely to be much closer than in other multi-copyright works (e.g. films). Even in the concept phase for a game or a single new feature, which can take months, game designers²⁶ and product managers in particular work closely with authors and graphic designers to develop the basic game mechanics and player guidance of a game or feature that is interesting for players and to adjust and improve it again and again in many consultations. Later, many other participants are added who contribute to the game design in different roles. It should be emphasised that many games are created by very international teams whose members work all over the world.²⁷ However, those involved in game development do not usually work together on the game as a whole, but regularly work only on specific components assigned to them. Irrespective of their copyrightability as individual works²⁸, the game as a complete work is only created from the composition of these components.

On the other hand, a game is regularly not developed linearly in the sense that there is first a rough concept (treatment), then a detailed concept (script) and then an implementation of these existing concepts. Instead, a simple prototype is often developed first to test an initial concept, and the test results then influence the further conceptualisation. In the implementation phase, the production, the game or feature is created with the participation of all trades. This is done iteratively in constantly repeating cycles so that the game or feature is created incrementally to optimise creative and technological quality. Even after completion and before release, the game is tested and, if necessary, again iteratively changed and improved. Even in games that have been on the market for years, new features are tested extensively before release, including by first releasing them to specific groups of players for testing purposes or by non-public testing by even smaller groups of testers. The results obtained are analysed and in turn have an impact on further adjustments in concept and implementation with regard to the software, but also the game design, artistic and narrative elements of the game, etc.

These particularities of production, which mean that the individual creators do not subordinate themselves to a common overall idea, mean that the creators do not become co-authors (Section 8 UrhG) of the game as an overall work.²⁹ Rather, games are complex collective works consisting of a multitude of copyright-protected works and copyright-ineligible elements, each of which has different significance for the overall work and interacts with each other.³⁰ Since this interaction is not regularly due to the fact that the individual authors have combined their works for joint exploitation, there is also no case of Section 9 UrhG.³¹

Insofar as participants create copyrightable works, they therefore enjoy copyright protection, but this protection is limited to the respective work.³²

3. Those involved in the creation of a game – creators, but also creators?

Depending on the genre, the planned distribution channel and monetisation of the game as well as the size of the production, the following roles belong to those involved in the creation of a game. If one also considers the distribution and operation of a game, there are many other participants, for example in the areas of marketing, analytics, customer care, community relations, etc., who, however, do not regularly make copyright-rele-

vant contributions and will therefore not be considered in this context.

■ **Game designers** are responsible for the conception of the game idea and the mechanics of the game or individual features. They develop game loops and the game mechanics, i.e. the basic concept and the intended course of the game (gameplay).³³ Depending on their complexity, games have an overarching core loop and further subordinate (feature) loops embedded in it.³⁴ In addition to the conception of the game mechanics, the interaction and the concrete weighting of all elements of the game and the game mechanics, the balancing, is extremely important.³⁵ Feature designers as a subgroup of game designers design individual game elements and their loops. Another subgroup is concerned with the conception of levels for existing game mechanics or the adaptation of difficulty levels. Depending on how a game is commercially exploited, economy designers may also be involved in game development. In this context, the activity of game designers is to be classified as creative. Whether the game mechanics can be protected by copyright as an individual creation must be decided in each individual case.³⁶

■ **Product managers** or **product owners** are responsible for the (commercial) success of the game or a component of the game, e.g. a certain feature. They know the target group and the market for the game or its component and develop the marketing approach based on this. They are also involved in the development of the product with regard to the consideration of the target group and the business objectives. However, they regularly do not provide any copyright-relevant services in the process.

■ **Project managers** or **producers** are responsible for production planning and coordination and are the interface between all the

²⁶ For the individual roles of those involved in the conception and production of a game, see under II.3.

²⁷ For example, the idea and concept of a game is developed in a development studio in Germany. The story of the game is created by a writer in France, the editors are located in the USA. A team based in Canada creates the artistic concept of the game world, characters and other visual elements. The 3D modelling of certain visual elements is done by a team in India. The conversion of all these components into executable software is developed by programmers in Ukraine.

²⁸ For example, graphic elements may be protected as works of visual art under Section 2 (1) No. 4 UrhG, dialogues as works of speech under Section 2 (1) No. 1 UrhG, sounds and music as works of music under Section 2 (1) No. 2 UrhG and audiovisual sequences as cinematographic works within the meaning of Section 2 (1) No. 6 UrhG. 1 No. 6 UrhG, cf. generally Brauner/Brauneck, *Angemessene Vergütung von Urhebern und Künstlern/Oehler*, 2022, § 6 marginal no. 24 ff.; also in Berger/Wündisch, *UrhVR/Oehler/Wündisch*, 3rd ed. 2022, § 34 marginal no. 9 ff.

²⁹ BGH MMR 2005, 845 – *Fash 2000* (for a complex computer programme); Hoeren/Sieber/Holznapel, *HdB Multimediarecht/Hentsch*, 58th EL March 2022, Part 22 marginal no. 13; Brauner/Brauneck, *Angemessene Vergütung von Urhebern und Künstlern/Oehler*, 2022, § 6 marginal no. 63 et seq.

³⁰ Cf. Brauner/Brauneck, *Angemessene Vergütung von Urhebern und Künstlern/Oehler*, 2022, § 6 marginal no. 62.

³¹ Oehler, in Brauner/Brauneck, *Angemessene Vergütung von Urhebern und Künstlern*, 2022, § 6 marginal no. 69; for the film sector see, for example, OLG München MMR 2007, 254 (255) – *GEMA claims*.

³² Cf. Brauner/Brauneck, *Angemessene Vergütung von Urhebern und Künstlern/Oehler*, 2022, § 6 marginal no. 70.

³³ An example of a simple and classic puzzle game loop is “Tetris”: Blocks of different shapes move from the top of the screen to the bottom. Players should try to place the blocks at the bottom by rotating and moving them in such a way that closed horizontal rows of blocks are created. If a horizontal row is completely filled, it disappears and the player receives points and space for more rows. Incomplete rows remain until they reach the top of the screen, causing the game-ender to lose.

³⁴ Explained using the example of “Clash of Clans” at <https://blog.theknightsofnity.com/core-loop-in-game-development/>.

³⁵ E.g. in adventure role-playing games, Game Loop and all components of the game such as game world and story, dialogue, graphic elements, music and sound effects, mission completion, combat, interactions with other players etc are to be related and weighted in such a way that it results in the best possible experience for the player.

³⁶ Schrickler/Loewenheim, *UrhR/Loewenheim/Leistner*, 6th ed. 2020, § 2 marginal no. 217.

trades/crafts directly involved in the development and stakeholders outside the production. Larger productions have several producers who then coordinate the development of different features or other components of the game. Producers develop a project plan and schedule from the product features and requirements with the steps and resources (e.g. staff, budget, tools) required until completion³⁷. In the development phase, they monitor compliance with these steps in the specified time frame and all cross-functional coordination processes within and outside of the immediate production.³⁸ However, they do not usually provide any copyright-relevant services.

■ **Artists** create all the visual elements of a game. From the conceptualisation of the game's style to the development of the concept art for the locations, characters, objects, animals, plants, fantasy figures, maps, landscapes, etc. to the user interface, i.e. the elements of the user interface and control centre for the players, and many other elements, their achievements shape a game and the game experience as significantly as few other crafts in production. Depending on their responsibilities, there are many different roles in the group of artists, which can also overlap.³⁹ As far as their works are personal intellectual creations, they enjoy copyright protection.

■ **Authors** (also writer or narrative designers) design and describe the game world, game story, geographies, characters, background stories, action plots, dialogues and often also their respective interaction with the actions to be completed by the players. Insofar as this leads to personal intellectual creations, these are protectable by copyright. Other contributors with a focus on text and language elements are editors, translators and speakers, whose activities are also eligible for copyright and ancillary copyright protection.

■ **Sound designers** and **composers** create the audible elements in a game. Hardly any computer game can do without a variety of sounds to make the player's experience more immersive and to give the players audible feedback on their final game action. Sounds can range from short noises (e.g. a tick for the placement of a decorative object) to complex sound effects that accompany the execution of a certain action or trig-

gered reaction (e.g. the collapse of a building) in the game. Sound designers conceive and develop these audio elements. In many games, the gameplay is accompanied by music, and some games even have a soundtrack. These are based on the creations of composers who compose music that is individual to the theme and setting of the game as well as game sequences. Since music within the meaning of Section 2 (1) no. 2 UrhG can be sounds of any kind,⁴⁰ both the achievements of the sound designers and those of the composers can be protected by copyright. If the composers themselves also record works, they may also be entitled to ancillary copyrights to these recordings.

■ **Quality assurance testers** check games and features before their release to ensure that they work properly and as expected. This includes functional and usability tests to confirm that the controls of the game are intuitive, tests to check compatibility on different platforms, consoles and devices, error and bug tests to identify malfunctions and program crashes, game tests to determine whether the story and dialogue are logical and tutorials are comprehensible. The process of quality assurance becomes more complex as the complexity of the game or feature increases but does not usually constitute a copyrightable service.

■ **Programmers** are essential to computer game development. They develop and implement the code that is essential for the game to run. Software enables the game mechanics and all components of the game to run. Programmers often specialise in certain components,⁴¹ it is only in the case of small productions that their respective scope of duties is broader. Since the regulations of copyright law are not applicable to programmers,⁴² they should not be considered here.

■ Many games today are developed with the support of so-called game engines, i.e. with the help of software platforms which, with a multitude of resources and functions, form a basis for the programming of games and accelerate them.⁴³ Their programmers (**game engine developers**) are specialised in the development of a game engine and its components, but the copyright regulations do not apply to them either.⁴⁴

III. Result: Who is the author of what?

Based on the above consideration of the individual participants involved in the production of a game and their work, it can be concluded that the contractual copyright situation in this industry is anything but clear. First of all, the premise is clear that authors in the games industry are also entitled to claims under copyright law for the exploitation of their works. But who among the many participants is actually the author of a work pursuant to Section 2 UrhG and what exactly this work consists of requires a more detailed analysis.⁴⁵ Furthermore, it must be examined which persons were involved as further authors in the creation of the respective work in question, because the single author phenotypically presupposed by copyright law practically does not exist in games production.⁴⁶ Conversely, with regard to the overall work Game, there will be often a lack of joint authorship pursuant to Section 8 UrhG due to the lack of a common overall idea.⁴⁷ And finally, it will also be necessary to look closely at the relevant acts of exploitation. After all, the claims under copyright law⁴⁸ are all linked to the "use of the work", so that it must be examined in each case to what extent the work in question has actually been used as such and this use has led to revenues⁴⁹ as required by §§ 32 ff. UrhG.

Oehler's question, aptly phrased for general copyright law in the games sector: "Who is the author of what?"⁵⁰ would therefore have to read in full of a contractual copyright law perspective: "Who, together with whom, is the author of what, how is this used and what revenues has this led to?"

³⁷ This planning phase is also called pre-production.

³⁸ Examples of coordination with functions outside production: marketing to coordinate marketing activities planned for the release, involvement of the data protection officer to coordinate with programmers on data flows, reports to the finance department on budget updates, reports to management on production risks.

³⁹ Examples are artists for Concept, Characters, Environment, UI, 2D, 3D Artists, Animation or Visual Effects.

⁴⁰ Schricker/Loewenheim, UrhR/Loewenheim/Leistner, 6th ed., § 2 marginal no. 144 mwN.

⁴¹ Even for medium-sized productions, the following can be mentioned: Programmers who focus on the game client (the software application on the user's device) develop and implement the software to execute the user-side components and processes, especially gameplay and user operation. Graphics programmers are responsible for the development of graphics and visualisation software and implement the visual components of the game. Audio programmers develop and design software for audio elements. Backend programmers focus on programming and implementing the server side, backend and network functions, especially in multiplayer games; important aspects of their work are network architecture and server programming as well as efficient communication between server and game client. Data engineers develop and manage the data infrastructure and integration, often in close coordination with analysts and data scientists.

⁴² S. Art. 23 (2) DSM Directive or Section 69a (5) UrhG as well as already under I.

⁴³ Examples are Unity by Unity Technologies, Unreal Engine by Epic Games, GameMaker by YoYo Games.

⁴⁴ S. Art. 23 (2) DSM Directive or Section 69a (5) UrhG as well as already under I.

⁴⁵ See under II.3.

⁴⁶ For the different roles, see II.3.

⁴⁷ See under II.2.

⁴⁸ As well as the obligation under Section 32d (1) UrhG.

⁴⁹ Also: when and in what amount?

⁵⁰ Brauner/Brauneck, Angemessene Vergütung von Urhebern und Künstlern/Oehler, 2022, § 6 marginal no. 60.

Quick read ...

- The rules of the copyright contract law, which was most recently amended on the basis of the DSM Directive, are applicable to the games sector. This results, among other things, in claims to appropriate remuneration and further appropriate participation.
- Compared to other media, the production of games is characterised by some special features, e.g. with regard to the number and location of the participants, the characteristics of their respective contributions, the complexity of their interaction, etc., which have an impact on the qualifications as authors or copyright-protected works.



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- The same applies to the evaluation of games, in which the player is always interactively involved, albeit to varying degrees. In addition, a variety of monetization models exist with a focus on distribution and/or marketing revenues in the domestic market and abroad. All of this can have an impact on how the works are used and what revenues result.
- As a result of these industry-specific peculiarities, a specific analysis of the party affected by the claim in question, its contribution and its use is required in each case for the granting of claims under contractual copyright law.



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GREGOR SCHMID

Guidelines and policies for Let's Plays, copyright and the „UrhDaG“

Thoughts regarding copyright and civil law

Gaming Video Content

So-called „Let's Plays“ – video formats in which one or more people film and comment on themselves playing a computer game – are widespread in the games industry and sometimes have millions of followers. At the same time, there is a practice of rightsholders, some of which have been established for years, to allow this use to a certain extent and to establish their

own regulations in this regard. This article takes a look at these processes under copyright and civil law and sheds light on some questions arising after the Act on the Copyright Liability of Online Content Sharing Service Providers (Urheberrechts-Diensteanbieter-Gesetz – „UrhDaG“) came into force.

reading time: 20 minutes

I. Let's Plays – relevance and meaning

1. From the niche to mainstream

Let's Plays have developed from a niche phenomenon to an independent media format with hundreds of millions of views. Current figures speak for themselves: influencer PewDiePie, for example, runs a YouTube channel with currently 111 million subscribers.¹ A number of influencers have high double-digit million subscriber or follower figures;² the Let's Player Ninja on Twitch has 18.5 million subscribers³ and – especially in German-speaking countries – Let's Players such as Gronkh or Paluten can boast almost 5 million subscribers.⁴ Against this background, the economic importance of Let's Plays is obvious. Let's Plays serve various interests (see also IV.): The Let's Players are interested in increasing their reach and possibly also monetisation, while the studios and publishers are interested in preserving the integrity and exclusive exploitation of their games on the one hand, and promoting their games and making them better known to users on the other. Users can discover new game content through Let's Plays and, the respective platforms generate relevant traffic with the increasing popularity of Let's Plays.

2. Terminology

Let's Plays are video formats in which one or more people film themselves playing a computer game, i.e. record their own interaction with the game and comment on it. These videos are

broadcast live (livestream) and/or recorded and then made available for viewing on popular platforms for gaming video content such as YouTube, Twitch or Facebook.⁵ Usually, Let's Plays are presented as a combination of the game content as a screen recording with a simultaneous insertion of the player via webcam.

In contrast to tutorials or walkthroughs, whose purpose is primarily to explain the rules of the game to the user and to improve his or her playing skills, it is crucial that the Let's Player presents his or her individual playing experience and that the presentation of the gameplay is accompanied by commentary.⁶

3. Typical components of Let's Play guidelines

A comprehensive directory of current licences for Let's Plays can be found on the website of game – The German Games Industry Association.⁷ The directory itself does not claim to be complete, but it offers a good starting point.

¹ Available at: <https://www.youtube.com/user/pewdiepie>. The controversies surrounding some of his statements are only referred to here.

² Available at: <https://ninjapromo.io/top-10-gaming-influencers>.

³ Available at: https://en.wikipedia.org/wiki/List_of_most-followed_Twitch_channels#:~:text=As%20of%20April%202023%2C%20the,Ninja's%20followers%20at%209.3%20million.

⁴ The figures are available under the corresponding channels, see also <https://blog.de.influence4you.com/die-top-20-gaming-youtuber-2022/>.

⁵ Hentsch/Falk, Games und Recht/Furch, 2022, § 30 marginal no. 5.

⁶ Hentsch/Falk, Games und Recht/Furch, 2022, § 30 marginal no. 6.

⁷ Available at: <https://www.game.de/themen/lizenzverzeichnis-fuer-lets-plays/>

All in all, the content and scope of the guidelines vary greatly. From the title alone, some of them are called guidelines or policies,⁸ some are merely short notes in the FAQ⁹, some are mere entries in blogs,¹⁰ and it is also conceivable to include the guidelines in the EULA (End User Licence Agreement). Overall, however, typical components can be identified:

- Permission, licensing or a different forms of authorization to show the game content in (on-demand) videos or livestreams: different formulations are chosen here, often colloquial („you may „),¹¹ sometimes as an explicit licence¹² or permission/authorization,¹³ or acquiescence, which is likely the most common;¹⁴
- Content and conduct regulations, such as a ban on racism, sexism, insults and the violation of third party rights;¹⁵
- Statements on commercial purposes and monetisation: commercial use in terms of sales and, above all, access barriers through paywalls etc. are generally prohibited, while monetisation via the YouTube partner program or similar programs is regularly permitted¹⁶;
- References to music,¹⁷ such as the requirement to separately clear the rights for (background) music used by the Let's Player;

8 For the sake of simplicity, the term „guidelines“ will be used throughout this paper.

9 See for example Daedalic at: <https://www.daedalic.com/en/faq.html?open=collapse20-4>.

10 See, for example, Taleworlds at: <https://forums.taleworlds.com/index.php?threads/monetizing-youtube-videos.226904/>.

11 According to Astragon's guidelines: „...you are welcome to share content you have created such as videos and livestreams on YouTube, Twitch or other platforms“, available at: <https://www.astragon.de/presse/content-creator-guidelines>.

12 Microsoft's: „Subject to compliance with the following rules („Rules“), Microsoft grants a personal, non-exclusive, non-licensable to third parties, non-transferable, revocable limited licence...“, available at: <https://www.xbox.com/de-de/developers/rules>.

13 For example, Bethesda: „If you wish to post this content on video services such as YouTube or your own website or blog, you have our explicit permission to do so“, available at: <https://bethesda.net/de/article/3XrnHrB0iAesac8844yeuo/bethesda-videorichtlinien>; see also Blizzard: „...may you...“, available at: <https://www.blizzard.com/de-de/legal/2068564f-f427-4c1c-8664-c107c90b34d5/blizzard-videorichtlinien>.

14 See, for example, EA's „declaration of acquiescence“: „...no objections...“, available at: <https://www.ea.com/de-de/service/youtube-duldungserklaerung>; likewise Rockstar, available at: <https://support.rockstargames.com/de/articles/200153756/Richtlinien-fuer-das-Veroeffentlichen-von-urheberrechtlich-geschuetztem-Materialial-von-Rockstar-Games>; Mojang: „...almost anything is possible in this regard...“, available at: https://www.minecraft.net/de-de/terms#terms-brand_guide_lines; Nintendo: „we raise no objection“, available at: https://www.nintendo.com.jp/networkservice_guideline/de/index.html.

15 See, for example, CD Projekt Red, available at: <https://www.cdprojektred.com/de/fan-content> (linked in <https://www.cdprojektred.com/en/videopolicy>) but practically all other guidelines also contain corresponding regulations.

16 These are the guidelines cited by Astragon, Nintendo, CD Projekt Red, as well as Square Enix, available at: https://www.square-enix-games.com/de_DE/documents/materialusagepolicy, or Valve, available at: https://store.steampowered.com/video_policy.

17 See most of the guidelines cited above, as well as <https://www.thqnordic.com/company/video-policy>.

18 See for example Astragon, Bethesda, Nintendo, Valve under the links cited above.

19 See for example Astragon, CD Projekt Red, Rockstar under the links cited above.

20 However, it should be noted that the guidelines are often older, which indicates a rather constant practice of the rightsholders.

21 EuGH MMR 2014, 401 marginal no. 21 ff. with comment Oehler – Nintendo/PC Box; BGH MMR 2017, 171 marginal no. 34 note Biehler/Apel – World of Warcraft I; see also the overview in Hentsch/Falk, Games und Recht/Schmid, 2022, § 9 marginal no. 5 ff. with further citations.

22 Hentsch/Falk, Games und Recht/Schmid, 2022, § 9 marginal no. 12.

23 Hentsch/Falk, Games und Recht/Schmid, 2022, § 9 marginal no. 5 ff.; Hentsch/Falk, Games und Recht/Furch, 2022, § 30 marginal no. 13 ff.

24 Hentsch/Falk, Games und Recht/Schmid, 2022, § 9 Rn. 5 ff., 29.

25 Hentsch MMR 2019, 351 (353) rightly points to the private copying remuneration in this context, this can be claimed in future by the newly founded collecting society for the producers of games (VHG), see under II. 2. d).

26 Somewhat more generous Hentsch/Falk, Games und Recht/Furch, 2022, § 30 marginal no. 29.

■ A prohibition on creating the impression of sponsorship or a similar commercial association with the rightsholder/developer/publisher;

■ Rules on sources; prohibition of the use of content before the official release of the game; integrity of the game and a ban on the separate sale of game assets;¹⁸

■ Revocability, adjustments: The regulations are usually expressly revocable and subject to change.¹⁹ In this way, rightsholders reserve the right to flexibly adapt their respective practices.²⁰

II. Initial copyright situation

In the creation and performance of Let's Plays, copyright is affected in various aspects.

1. Copyright protected components

It is generally acknowledged that video games enjoy copyright protection in many ways.²¹ A distinction can be made between the protection of the game as a whole and between its individual components. According to the prevailing opinion, the computer game as a whole is to be classified as a „film-like“ work within the meaning of Section 2 (1) no. 6 of the German Copyright Act (Urheberrechtsgesetz – „UrhG“).²² In addition, the software, the characters and virtual figures, music and sound, graphics and photographs, voice recordings, texts, motion capture, incorporated film sequences and moving images enjoy protection, as well as real or virtual objects used in the game, if any, to the extent that they themselves enjoy protection. Above all, protection under Section 2 (1) no. 1 UrhG (literary works), no. 2 (musical works), no. 4 (works of visual art), no. 5 (photographic works), no. 6 UrhG (cinematographic works, also Section 94 UrhG), Section 72 UrhG (photographs), Section 95 UrhG (moving images), Section 4 UrhG (database works) and Sections 87a ff. UrhG (sui generis databases) may be considered.²³

2. Uses affecting Copyright

Depending on the concrete form of the Let's Play, copyright-relevant exploitations and uses are made, whereby a distinction can be made between the creation of the Let's Play and the subsequent communication or making available to the public.

a) Reproduction and editing

The creation of a Let's Play always involves copying by recording the content of the game. It does not harm that the course of the game is not fixed in advance, because protection is granted not only to the game as a whole, but also to its components, such as, in particular, any film sequences or moving images, characters, protectable objects and assets used.²⁴ Even if the gameplay is influenced by the player, it does not change the fact that copyright-protected parts are reproduced.

The right of reproduction is held by the rightsholder as an exclusive right of exploitation (Section 16 UrhG). The private copying exception of Section 53 (1) sentence 1 UrhG can be applied, which, however, requires that only individual copies are made by a natural person for private use, which may neither directly nor indirectly serve the purpose of making a profit.²⁵ At any rate, this limit may be exceeded in the case of professional game influencers or Let's Players.²⁶

Whether a game or its components are also edited depends on the individual case. In the case of a mere commentary, this should not be the case, as long as the game is recorded unchanged. If, on the other hand, cuts are used intensively, etc., a relevant adaptation within the meaning of Section 23 UrhG may also be considered, since an adaptation may exist not only in the case of a change of the original, but also in the case of a different

overall impression.²⁷ The changes usually do not represent a „free use“, which used to be regulated in Section 24 UrhG and which would exclude an infringement. According to the more recent case law of the Federal Court of Justice, this presupposes a „fading“ and, in particular, a „lack of recognisability“ of the creative elements that are the basis for protection.²⁸ In Let's Plays, however, it would make little sense to alienate the game to such an extent that it is no longer recognisable; the Let's Player is interested in allowing the viewers to participate in the gaming experience.

b) Communication to the public

Two variants are relevant for the public communication of Let's Plays. In the case of livestreams, i.e. simultaneous public communication by webcast to an indefinite number of viewers,²⁹ the broadcasting right under Section 20 UrhG is relevant. If, on the other hand, the Let's Play is made available for viewing on YouTube, Twitch or other common platforms, as is often the case, the right of making it available to the public under Section 19a UrhG applies.³⁰

In the case of a live screening, for example at the Gamescom exhibition, the screening right under Section 19 (4) UrhG may also be relevant.³¹ For pre-existing works made available at the same time or used to create the live stream, which are not as such part of the video game, either Section 19 (4) UrhG, Section 21 UrhG or Section 22 UrhG come into consideration.³²

c) Do copyright exceptions apply?

For the question of the treatment of the described uses under copyright law, the question arises as to whether the Let's Players can invoke copyright limitations. A differentiation must be made for each creation or exploitation process.

Regarding the private copying exception under Section 53 (1) sentence 1 UrhG, it has already been explained that this exception is often not relevant, because it only applies to purely private copying that does not serve any commercial purposes. The right of quotation under Section 51 UrhG would in principle cover the reproduction and communication to the public relevant here, but a quotation always requires the existence of a „quotation purpose“, i.e. in particular the aim of using the quotation to explain other content or to substantiate one's own statement.³³ General statements on this are hardly possible, but it remains to be noted that the quotation requirements must be met for every corresponding use – which is conceivable in the case of Let's Plays, but will rarely be the case in practice.

The situation is similar as regards the restriction under Section 51a UrhG for caricature, parody and pastiche.³⁴ This exception also permits reproduction and communication to the public, although it must be for the purpose of caricature, parody and pastiche. Alterations in this context are permitted under Section 62 (4a) UrhG. Even though the restriction allows potentially far-reaching uses and the German explanatory memorandum to the law mentions quoting, imitating and borrowing cultural techniques such as „remix, meme, GIF, mashup, fanfiction etc.“ as examples,³⁵ which are also at least conceivable in the context of Let's Plays, what has been said about quotations also applies here.

d) Collective rights management only to a limited extent

Until recently, there was no collective management of rights in the games sector. Since May 2023, a new collecting society for games exists, with which game companies will be able to claim the private copying remuneration according to §§ 54 ff. UrhG.³⁶ Further rights, including the rights relevant here, cannot be acquired through this collecting society.

III. In particular: how to classify of the permits granted

As already mentioned, the guidelines are applied in different forms. With regard to the legal classification and „licensing effect“, a distinction can be made between the following variants:

1. Licensing

Some guidelines speak of a genuine „licence“. A licence in the sense of copyright law is the „strongest“ form of granting rights and leads (at least according to German legal understanding) to a granting of rights with effect *in rem*.³⁷ However, there are doubts as to whether a contract is actually concluded with the Let's Player – even if it is designated as a licence – and whether a corresponding effect is intended. It seems at least arguable to see the actual performance of the Let's Plays by the Let's Player in knowledge of the guidelines as closing a contract by implication.³⁸ However, the mere use of a website by a user normally will not be regarded as sufficient for the conclusion of a contract. There are also doubts about the intention of the parties involved to be legally bound.³⁹ Therefore, an agreement as is required for licensing is often lacking. The situation is different if the guidelines are integrated into the EULA or other general terms and conditions, to which the Let's Player has previously agreed.⁴⁰

2. Permission

A „permission“ is also conceivable. A permission comes into consideration above all if the use in the context of Let's Plays is merely „permitted“ or „allowed“. According to the prevailing view, a permission has effect under the law of contract, without having any effect on third parties, i.e. the recipient is authorised to perform the permitted act, but is not granted any rights of use under copyright law.⁴¹ However, even a permission under the law of obligations requires an agreement in the „classical“ sense of contract law, i.e. concurring declarations of intent and a corresponding intention to be legally bound on the part of the parties involved.⁴² Corresponding to the licence (see III. 1.), this is conceivable, but in these cases there is often a lack of intent to be legally bound in the case of mere use.

3. „Acquiescence“ a simple consent

Finally, a mere „acquiescence“ of the actions of the Let's Player is also conceivable, without the rightsholder wanting to bind

²⁷ Dreier/Schulze, UrhG/Schulze, 17th ed. 2022, § 23 marginal no. 19 ff.

²⁸ BGH Urt. v. 7.4.2022 – I ZR 222/20 Rn. 47 ff. – Porsche 911; Datta ZUM 2022, 558 (559 f.); Schmid/Düwel ZUM 2022, 561 (562 f.); Hentsch/Falk, Games und Recht/Schmid, 2022, § 9 Rn. 39.

²⁹ For example, Rocket Beans TV, but also livestreams on YouTube or Twitch.

³⁰ Hentsch/Falk, Games und Recht/Furch, 2022, § 30 marginal no. 30.

³¹ See Dreier/Schulze, UrhG/Dreier, 17th ed. 2022, § 19 marginal no. 16.

³² Dreier/Schulze, UrhG/Dreier, 17th ed. 2022, § 19 marginal no. 16.

³³ In this regard Hentsch/Falk, Games und Recht/Schmid, 2022, § 9 marginal no. 42; Schmid/Düwel MMR 2020, 155 (158).

³⁴ Rauda MMR 2023, 619e – in this issue; on pastiche in general also Kreutzer MMR 2022, 847.

³⁵ BT-Drs. 19/27426, 91.

³⁶ VHG Verwertungsgesellschaft für die Hersteller von Games, see PM v. 31.5. 2023, available at: <https://www.game.de/game-verband-gruendet-verwertungsgesellschaft/>.

³⁷ Cf. Schricker/Loewenheim, UrhG/Ohly, 6th ed. 2020, Section 29, paras. 20, 23, 26.

³⁸ An implied granting of rights has been addressed, but rejected in the result, by BGH MMR 2010, 475 marginal no. 29 ff.

³⁹ See also Hentsch/Falk, Games und Recht/Furch, 2022, § 30 marginal no. 34.

⁴⁰ The above-mentioned Mojang guidelines, for example, are part of the general terms and conditions.

⁴¹ Discussed, but in the end also rejected, in BGH MMR 2010, 475 marginal no. 32 with comment Rössel – preview images; see also Schricker/Loewenheim, UrhG/Ohly, 6th ed. 2020, § 29 marginal no. 23, 27 f.

⁴² BGH MMR 2010, 475 marginal no. 32, with comment Rössel – Vorschaubilder; Schricker/Loewenheim, UrhG/Ohly, 6th ed. 2020, § 29 marginal no. 23, 27 f.

himself to a licensing or permission beyond that. An acquiescence is particularly likely if the rightsholder merely declares in the guidelines that there are „no complaints“ or „no objection“ to the Let’s Plays,⁴³ that he is „pleased“ about fan content,⁴⁴ or the rightsholder „reserves the right to object“ to the use.⁴⁵ It can be assumed if the rightsholder is not promised any consideration and the Let’s Player does not assume any obligations on his part,⁴⁶ or if the rightsholder/publisher/developer does not undoubtedly have all the rights to actively grant a permission.⁴⁷ This arrangement can be classified with the German Federal Supreme Court’s (Bundesgerichtshof – „BGH“) case law as so-called „simple consent“. The simple consent leads to the legality of the action as permission, but the recipient does not acquire a right of use in rem or a right under the law of obligations or any other enforceable right. It is regarded as a unilateral legal transaction and therefore does not require the parties’ declarations of intent to coincide.⁴⁸ In some cases, it is also classified as a declaration similar to a legal transaction.⁴⁹ Simple consent is also freely revocable.⁵⁰ Implied consent is also conceivable.⁵¹ From the perspective of the rightsholder, simple consent allows the greatest possible flexibility, however, it does not provide the recipient (i.e. the Let’s Player) with a reliable legal position.

Whether mere inaction or silence also constitutes such consent is questionable.⁵² Although implied consent is conceivable in accordance with the above, mere silence does not usually have any legal effect.⁵³

If, on the other hand, one does not want to recognise the legal concept of simple consent, the corresponding declarations in the guidelines could in any case be understood in such a way that the rightsholder is prevented in good faith from taking action against Let’s Plays that comply with the rules.⁵⁴

4. Interpretation

Which of the variants presented applies, is ultimately to be determined on the basis of the concrete individual case by way of interpretation.⁵⁵ The wording is not decisive, but the designation has an indicative effect.⁵⁶ In many cases, „simple consent“

is likely to serve the interests of the parties well⁵⁷: on the one hand, the rightsholder can use the positive (advertising) effect of the Let’s Plays, on the other hand, regulate the conditions and react to changed circumstances by adapting them. The Let’s Player also assumes no obligations of his own and is not bound to a licensing relationship (he must, of course, adhere to the guidelines if he wants to take advantage of the permission).

Simple consent could also be used in constellations in which the wording speaks in favour of a licence or permission, but there is no intention to be legally bound or there are no corresponding declarations of intent. Here, simple consent could at least serve as a fallback provision.

5. Applicable law

Finally, the question arises as to which law applies to Let’s Plays and their copyright treatment in cross-border situations. As far as can be seen, the Let’s Play guidelines do not contain any statements in this regard – which is not surprising, especially as regards such guidelines that are not designed as a contractual regulation. In principle, two connecting factors can be considered. On the one hand, the provisions of Art. 3 ff. Rome I Regulation apply.⁵⁸ In principle, this also applies to Let’s Play licence agreements, insofar as they are „genuine“ licence agreements, as well as to contractual permissions. Guidelines that are not to be regarded as (licensing) contracts but as „simple consents“ do not have a contractual character. Since – as explained above – they are to be regarded as unilateral legal transactions or acts similar to legal transactions, the provisions of contract law can at least be applied by analogy.⁵⁹ If one does not follow this approach, the private international law rules for copyright infringements and thus Art. 8 (1) Rome II Regulation and the law of the country of protection would have to be applied instead in these cases.⁶⁰

IV. Let’s Plays and UrhDaG

The Act on the Copyright Liability of Online Content Sharing Service Providers (Urheberrechts-Diensteanbieter-Gesetz – „UrhDaG“) was introduced in 2021 in German law to implement Art. 17 of the DSM Copyright Directive (Directive (EU) 2019/790 of 17 April 2019) The platforms on which Let’s Plays predominantly take place, such as YouTube, Twitch or Facebook, are regularly to be regarded as „online content sharing service providers“ („OCSSP“s“) within the meaning of Section 2 UrhDaG and therefore fall under the provisions of Sections 1 ff. UrhDaG.⁶¹ For these OCSSPs, Section 1 UrhDaG, which implements Art. 17 (1) of the DSM Copyright Directive and provides that the OCSSP performs its own act of communication to the public when it makes user-generated content (UGC) accessible on its platform that has been uploaded by users of the service.⁶²

This results in a number of obligations and other legal consequences. For example, the OCSSP is obliged to make best efforts to license (Section 4 UrhDaG). Irrespective of the contractual granting of rights, some uses are permitted by law under Section 5 (1) UrhDaG. The cases covered by subparagraph 1 are quotations under Section 51 UrhG, caricature, parody and pastiche under Section 51a UrhG and the other uses permitted by the exceptions under Sections 44a ff. UrhG. However, as shown above, these are of only minor importance for Let’s Plays.

The law also regulates the obligation to carry out a „qualified blocking“ pursuant to Section 7 UrhDaG or a „simple blocking“ pursuant to Section 8 UrhDaG upon request. With regard to guidelines for Let’s Plays, with which the rightsholders allow the use under the conditions they set (see above under III.), frictions may arise. In particular, qualified blocking cannot reflect the differentiated guidelines of the rightsholders.⁶³

43 This is the case with EA or Nintendo under the above links.

44 CD Project Red at the above links.

45 Square Enix at the above links.

46 Schricker/Loewenheim, *UrhG/Ohly*, 6th ed. 2020, § 29 marginal no. 29.

47 Hentsch/Falk, *Games und Recht/Furch*, 2022, § 30 marginal no. 34.

48 Schricker/Loewenheim, *UrhG/Ohly*, 6th ed. 2020, § 29 marginal no. 29; BGH MMR 2010, 475 with comment Rössel – Vorschaubilder.

49 Schricker/Loewenheim, *UrhG/Ohly*, 6th ed. 2020, § 29 marginal no. 30.

50 Schricker/Loewenheim, *UrhG/Ohly*, 6th ed. 2020, § 29 marginal no. 29 f.; BGH MMR 2010, 475 with comment Rössel – Vorschaubilder.

51 Schricker/Loewenheim, *UrhG/Ohly*, 6th ed. 2020, § 29 marginal no. 31: „However, the conduct in question must have explanatory value from the objective recipient’s horizon, i.e. it must express that the rightsholder agrees to the act in question“; probably also BGH MMR 2010, 475 marginal no. 33 with comment Rössel – Vorschaubilder.

52 „Passive“ or „silent acquiescence“, see also Hentsch/Falk, *Games und Recht/Furch*, 2022, § 30 marginal no. 39.

53 Schricker/Loewenheim, *UrhG/Ohly*, 6th ed. 2020, § 29 marginal no. 31.

54 Defence of the prohibition of contradictory conduct, § 242 BGB, see Grüneberg, *BGB/Grüneberg*, 82nd ed. 2023, BGB § 242 Rn. 55 ff.

55 Schricker/Loewenheim, *UrhG/Ohly*, 6th ed. 2020, § 29. marginal no. 24.

56 Grüneberg, *BGB/Grüneberg*, 82nd ed. 2023, BGB § 133 marginal no. 14.

57 This is also the conclusion of Hentsch/Falk, *Games und Recht/Furch*, 2022, § 30 marginal no. 36 ff.

58 Hentsch/Falk, *Games und Recht/Schmid*, 2022, § 9 marginal no. 59 ff.

59 See Schricker/Loewenheim, *UrhG/Ohly*, 6th ed. 2020, § 29 marginal no. 30; BeckOK/Paulus, 1.3.2023, Rome I Regulation Art. 1 marginal no. 32.

60 Hentsch/Falk, *Games und Recht/Schmid*, 2022, § 9 marginal no. 58 with further citations.

61 BeckOK *UrhR/Oster*, 38th ed. 1.5.2023, *UrhDaG* § 2 marginal no. 19.

62 BT-Drs. 19/27426, 44; Hentsch MMR 2019, 351 (353 ff.).

63 Pukas/Waiblinger MMR 2023, 627e – in this issue.

In the present context, it is of particular interest whether and in which constellations the so-called extension pursuant to Section 6 UrhDaG can be applied in connection with Let's Plays.

1. Section 6 (1) UrhDaG

Section 6 UrhDaG regulates the extension of permissions. Section 6 (1) UrhDaG implements Art. 17 (2) DSM Directive and provides that if the service provider is permitted to communicate the work to the public, this permission also works in favour of the user, provided that the user does not act commercially or does not generate substantial income. The permission obtained by the service provider therefore works in favour of the user: the licence acquired by the service provider for the communication of a work to the public also covers the related acts of communication to the public of the user who uploads the content. However, this extension of the contractual permission only applies if the user does not act commercially or does not generate substantial income from his commercial activity.

In the case of guidelines for Let's Plays, however, Section 6 (1) UrhDaG would generally not apply: This is because the guidelines are designed in such a way that the permission is granted directly to the Let's Player or works in his favour. This refers to the reverse case of Section 6 (2) UrhDaG (see IV.2.).

However, the provision can be significant if one follows the view that the extension under Section 6 (2) UrhDaG does not cover simple consent or mere acquiescence of the Let's Play.

2. Section 6 (2) UrhDaG

The reverse case is regulated by Section 6 (2) UrhDaG. This provides that if the user has a permission to communicate a work to the public via a service provider, this permission also works in favour of the service provider. This provision is not to be found in Art. 17 of the DSM Directive, but rather in recital 69 sentence 2 of the DSM Copyright Directive, whereby the German legislator sees this as a merely clarifying provision.⁶⁴ Any restrictions on the permission granted to the user must be taken into account.⁶⁵

However, it is questionable whether „permission“ includes any form of Let's Plays permissions. There is probably agreement that genuine copyright licences are covered.⁶⁶ Other forms of legal permissions, such as permission under the law of obligations, can also be considered to be covered. The legal situation is less clear in the case of simple consent or mere acquiescence.⁶⁷

The wording of the statute („permissions“) seems to rather speak for the fact that only permissions in the narrow sense similar to legal transactions are covered.⁶⁸ However, simple consent is regarded as a unilateral legal transaction or at least as an act similar to a legal transaction.⁶⁹ It therefore seems justifiable that Section 6 (2) UrhDaG also applies to these cases, at least by analogy. Such an interpretation would also be in line with the purpose of the provision that the acts permitted by the rightsholder in an autonomous manner also have an effect in favour of the OCSSP. The decision is not taken out of the hands of the rightsholder; he is still free to formulate his guidelines and the resulting effect of permission himself. However, it remains to be seen how practice and case law will develop here. At present, this case is still fraught with legal uncertainty. The new statutory

rules therefore raise new questions, where there already is a functioning system.⁷⁰

Another controversial question is whether the extension under Section 6 (2) UrhDaG is also relevant in the case of „merely“ statutory permissions, i.e. in the case of exceptions. Even if the explanatory memorandum to the UrhDaG assumes at one point that the licensing obligation under Section 4 (1) UrhDaG continues to exist,⁷¹ the better reasons speak for Section 6 (2) UrhDaG also applying in these cases.⁷²

V. Conclusion

The above explanations show that the autonomous and „self-regulatory“ system of licensing, permitting or acquiescing Let's Plays developed by means of guidelines works and can be classified in the categories of German law. At the same time, the interests of the Let's Players, the rightsholders/publishers/developers and the platforms are protected. Accordingly, there should currently be little interest in substantially changing the established system; rather, it will be in the interest of the players to maintain the current practice also under the UrhDaG.

Quick read ...

- Let's Plays have gained considerable practical and also economic importance in the game industry community.
- Let's Play guidelines have typical components such as permission, prohibition of commercial uses and paywalls while allowing monetisation via the typical platforms, content rules and rules of conduct, and the reservation of revocation or changes.
- Under civil law, the guidelines can be interpreted as licences, permissions, often also as simple consent.
- The UrhDaG and the DSM Directive give rise to a number of frictions, which, however, appear to be solvable through interpretation and/or analogous application.
- A substantial need on the part of the stakeholders to change the system and practice that has functioned up to now cannot be observed at present.



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⁶⁴ BT-Drs. 19/27426, 137; also Dreier/Schulze/Raue, UrhG, 17th ed. 2022, UrhDaG § 6 marginal no. 10.

⁶⁵ BT-Drs. 19/27426, 137.

⁶⁶ Cf. recital 69 DSM-RL.

⁶⁷ Hentsch MMR 2019, 351 (354); Hentsch/Falk, Games und Recht/Waiblinger, 2022, § 30 marginal no. 43.

⁶⁸ Wandtke/Bullinger, Urheberrecht/Rauer, 6th ed. 2022, UrhDaG § 6 marginal no. 17.

⁶⁹ See under III. 3. and Schricker/Loewenheim, UrhG/Ohly, 6th ed. 2020, § 29 marginal no. 30.

⁷⁰ This is rightly pointed out by Hentsch MMR 2019, 351 (354).

⁷¹ BT-Drs. 19/27426, 132.

⁷² BT-Drs. 19/27426, 45, 136, probably also p. 132; Barudi, Das neue Urheberrecht, 2021, p. 56 f.; Wandtke/Bullinger, Urheberrecht/Rauer, 6th ed. 2022, UrhDaG § 6 Rn. 17.