GAMES LAW

International Experts discuss legal issues relating to games Law

Dear reader,

Nazi symbols in computer games, streaming boxes, GDPR and a lot more. The conference “More Than Just a Game” in Frankfurt am Main on 19 October 2018 had a lot to offer for games lawyers.

“More Than Just a Game” is a series of conferences launched by the Centre of Commercial Law Studies, Queen Mary University of London which has taken place in several European metropolises already: London, Paris, Madrid – and on 19 October 2018 for the first time in Germany, too, namely at the offices of the law firm BEITEN BURKHARDT. The “More Than Just a Game” conference’s format includes panel discussions and presentations on current legal issues in the games industry. At the German premiere in Frankfurt am Main, national and international experts reported from their daily practice and discussed current legal topics, together with academics from Queen Mary University of London and University of British Columbia, and representatives of major publishers, including Nintendo, Epic Games and Wargaming. And at the end of each panel discussion the audience was asked for their opinions and answer a predetermined questions. With somewhat surprising results.

With this newsletter we would like to briefly summarise the most important results and content of the Frankfurt “More Than Just a Game” conference. Should you be interested in further information on one or more of the following topics of the “More Than Just a Game” conference in Frankfurt am Main, please feel free to contact us!

Best regards,

Dr Gaetano Dimita
LL.M. I PhD
Queen Mary University
London

Dr Andreas Lober
Lawyer
BEITEN BURKHARDT
Rechtsanwaltsgesellschaft mbH

TABLE OF CONTENTS

Youth protection, censorship & culture: is anything possible in computer games now?

The experts on the panel discussing the topic “Youth Protection, Censorship & Culture” were Prof Jon Festinger (University of British Columbia), Richard Sheridon (Assistant Manager Europe Age Ratings, Nintendo of Europe GmbH) as well as Dr Andreas Lober (Partner with BEITEN BURKHARDT Frankfurt) and Taras Derkatsch (Associate with BEITEN BURKHARDT Moscow). The panel was chaired and moderated by Petra Fröhlich, Editor in Chief, Gameswirtschaft.

Queen Mary University of London
Centre for Commercial Law Studies

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The central topic was the debate on **Nazi symbolism** in computer games which had undergone a decisive change in direction due to the decision of the German Entertainment Software Self-Regulation body (*Unterhaltungssoftware Selbstkontrolle - USK*) in August 2018. For the first time in Germany, swastikas can now, under certain conditions, be permitted in video games, for instance, if the use serves "art or science, research or education". The experts of the panel found the decision to be contemporary and a step in the right direction. The strict ban has been counterproductive in individual cases because it only drew attention to this issue and the symbols in the first place.

The experts warned, however, against the misconception that any computer game involving Nazi symbolism could now be published in Germany. It strongly depends on the individual case. The experts agreed that computer games in which players could play the role of a Nazi, for instance, would in the future still not be available in Germany.

According to the panel of experts, more liberal social and thus legal standards had evolved throughout the years also with respect to other content in video games, e.g. violence. But also in this context many cultures and jurisdictions have their red lines, for instance when it comes to **pornographic content**. Other discussion points were **loot boxes** and **computer game addiction**.

VOTING-QUESTION 1:
Do you think it is positive that under certain conditions Nazi symbols can be used in video games now?

Yes: 91.18 percent **No:** 8.82 percent

VOTING-QUESTION 2:
Do you believe that major games, set at the time of the Second World War, should in Germany no longer be ‚sanitized' of Nazi symbolism?

Yes: 84.38 percent **No:** 15.62 percent

M&A fireside chat: games are taking / taken over

Dr Gesine von der Groeben, Partner with BEITEN BURKHARDT in the field of M&A/Corporate in Frankfurt, had a conversation with Mark Miller, CEO and Managing Partner with CatCap GmbH, about M&A in the games sector. Topics discussed were, inter alia, the particularities of an **M&A deal in the games sector**, the strengths of German games companies as well the latest takeovers of German games companies by Swedish companies. The discussion also focused on how purchase prices regarding company takeovers in the games industry will develop, and on the question which activities were to be expected by Chinese investors such as Tencent on the German market in the near future. Moreover, as a former board member of Stillfront Group, Mark Miller was able to provide the highly interested audience with first-hand information on deals such as the sale of the Hamburg Goodgame Studios.

VOTING-QUESTION 3:
Do you believe that the most recent takeovers such as, for instance, by Swedish companies, are a good and beneficial thing for the German gaming industry?

Yes: 70 percent **No:** 30 percent

Streaming boxes: will we soon only play in the cloud?

Cloud gaming is considered to be the next step for the games industry. In the future, players will no longer need expensive hardware to play games with high resolution graphics but can experience the game entirely on the internet via so-called **streaming boxes**. Spotify and Apple Music have shown the way for the music industry, and Netflix and Amazon Prime did so for the movie and television industry

In his presentation on "Streaming Boxes", Prof. Jon Festinger outlined the legal implications of Cloud gaming for the games sector. With regard to the legal practice, the **Streaming of Games** will at first affect the drafting of contracts. This is, on the one hand due to the fact that streaming is different from previous forms of distribution, e.g. in physical form on discs or other storage mediums or in digital form as downloads. Therefore, such technology will, for example, have **effects on licensing agreements**. In this context, games providers should pay attention to have all their provided content sufficiently licensed. On the other hand, streaming technology will also lead to different business models such as, for instance, subscription models instead of individual purchases, and thus other contractual relationships with players (long-term contracts instead of individual purchase contracts). This may raise issues with regard to players' support, for example if game providers decide to discontinue certain services.

Prof. Festinger also spoke about the new technical possibilities arising for game providers through continuous streaming, and the related legal questions. In the future, streaming will allow providers to precisely record and document the game actions performed by the players, in order to obtain **information on user behaviour and user preferences**. This will first of all raise issues related to data protection law. But as the providers may be able to adapt their game to the player demands through such information and the use of algorithms and artificial intelligence, streaming technology will raise further, yet unpredictable legal questions in the more distant future.

VOTING-QUESTION 4:
Do you believe that streaming boxes will replace gaming PCs and consoles until 2023?

Yes: 36.36 percent **No:** 63.64 percent

Right of withdrawal for digital content

Virtual items, which players can purchase for real money in an in-game shop, are part of almost every free-to-play game. These items include not only weapons or skins, but also **virtual currencies**. Due to the fact that the purchase of virtual items is performed online (and thus legally under distance contracts), the player is usually entitled to withdraw from the respective purchase contract. In his presentation on the right of withdrawal for digital content Felix Hilgert, Counsel at Osborne Clarke, outlined the statutory provisions as well as the relevant corresponding case law applicable to the games sector.

The problem with the **right of withdrawal** for game provider is that: according to section 357 (9) German Civil Code (BGB) a consumer does not have to pay compensation for lost value for the virtual item after the withdrawal from the contract. In principle, the consumer can simply use the item, then withdraw from the contract and reclaim the money. But the statutory provisions provide a solution for the game providers: according to section 356 (5) BGB the consumer's right of withdrawal (here the withdrawal right of the players) expires for digital content if the entrepreneur (here the game provider) has commenced with the execution of the contract after the player (1) has expressly agreed that the game provider may already start with the performance before the end of the withdrawal period and (2) has acknowledged that this request means the withdrawal right lapses as soon as the performance of the game provider begins.

But how exactly does the player have to waive his or her right of withdrawal in order to ensure that the right effectively lapses? And how can the game provider implement this in practice? The player should confirm his or her waiver of the right of withdrawal in the course of the purchase procedure via a separate check box beside the pay button. Next to the pay button, the provider should also point out to the player in clear and legible language that the player will lose the right of withdrawal when clicking the check box and the pay button because through such action the player agrees that the game provider may start with the performance. Thereby the player also acknowledges that this request means the withdrawal right lapses as soon as the performance of the game provider begins. Under no circum-stances will it be sufficient for the game provider to merely refer to this legal consequence in the terms of use / general terms and conditions.

VOTING-QUESTION 5:
Do you believe that the player has a right of withdrawal when purchasing in-game currencies?

Yes: 57.69 percent **No:** 42.31 percent

VOTING-QUESTION 6:
Do you believe that the player has a right of withdrawal when spending the in-game currency for in-game items?

Yes: 18.51 percent **No:** 81.48 percent

Filesharing from a judge's point of view

The entertainment industry have already been dealing with illegal **filesharing** for a long time. The same applies to the courts. Through the years a certain line of jurisprudence has been developed by the courts to get such cases under control. Nevertheless, there is still a wide range of difficult matters and unanswered questions in this field. Dr Olaf Weber LL.M., Judge at the Local Court of Saarbrücken, presented in his lecture "Filesharing - insides and anecdotes from a judge" some of the particularly difficult and complex cases from a judge's point of view.

This included cases where right holders have identified the internet access through which the illegal filesharing was committed, yet the access owner denied having committed the filesharing actions himself. Apart from the **burden of presentation and proof** the balancing between the protection of the family and the rights of right holders is often difficult in this context, especially the question, whether and to what extent the access owner can be required to provide further details on the acts of violation, committed by the family member responsible for the filesharing. This issue has now been decided by the ECJ in favour of the right holders (ECJ ruling of 18 October 2018 – C-149/17 and we are now waiting for the application of this decision by national courts.).

Other problematic issues are the **scope of liability in cases of filesharing** when committed by multiple persons and the **liability of operators of open Wifi hotspots**.

VOTING-QUESTION 7:
Do you believe that the number of filesharing cases in the games sector will increase or decrease?

Increase: 14.81 percent **Decrease:** 85.19 percent

"GDPR everywhere": computer games and data protection

In his keynote Prof. Dr. Michael Ronellenfitsch, **Commissioner for Data Protection and Freedom of Information of Hesse**, talked about the EU General Data Protection Regulation (GDPR) and the different approaches of German data protection authorities in case of violations of data protection law. While the data protection authorities in the Northern states of Germany were very strict in the interpretation of applicable regulations, interpretation in the South of Germany was somewhat more liberal so that, after all, it does make a difference which data protection authority in Germany is responsible for a company.

The subsequent expert panel discussing the topic "GDPR how you never knew it" consisted of Mike Atamas (Company lawyer with **Epic Games**), Prof. Dr Michael Ronellenfitsch (Commissioner for Data Protection and Freedom of Information of Hesse), Susanne Klein, LL.M. (Partner with BEITEN BURKHARDT), Darya Firsava (Company lawyer with Wargaming) and Beata Sobkow, LL.M., CIPP/E (Lawyer with Harbottle & Lewis). The panel was chaired and moderated by Dr Andreas Lober, Partner with BEITEN BURHARDT.

The effects of the GDPR are clearly noticeable in the games industry just as in any other sector. And the game providers have reacted: As Epic Games wishes to provide users of the online game "**Fortnite**" all over the world with the same gaming experience, according to Mike Atamas, one of the effects of the GDPR is that Epic complies with its strict requirements around the world, irrespective of whether the player concerned plays in a EU member state or not ("GDPR everywhere").

According to Mike Atamas the **GDPR is among the strictest data protection legislations** in the world, only South Korean data protection regulations are even stricter. Further, the GDPR provides data subjects with more possibilities to assert their rights. This was also confirmed by Susanne Klein of BEITEN BURKHARDT. The data subjects had a clearly greater awareness for data protection issues and the rights they are entitled to than before. That is why, since the entry into force of the GDPR, data subjects have increasingly asserted their rights also vis-à-vis games enterprises, e.g. their right to information pursuant to Art. 15 GDPR, which could in many cases result in collisions with entrepreneurial interest in the protection of their business secrets. Beata Sobkow of Harbottle & Lewis and Darya Firsava of Wargaming agreed to this observation.

This is, in particular, reflected in the field of **anti-cheat measures**. By way of asserting GDPR claims, users would increasingly request information on anti-cheat mechanisms implemented by the games companies, said Darya Firsava. But according to Firsava of Wargaming, such information was not made available as from Wargaming's point of view such information constituted trade secrets. In fact, at Wargaming such information serves to identify some 70 percent of all users of cheat software, said Firsava. Disclosure of such information would, thus, present a risk for the games companies.

Another topic was the legal admissibility of **personalised advertising in mobile games**. Darya Firsava of Wargaming reported in this context on her work at Wargaming with respect to the promotion of own products and the difficulty in considering whether a separate consent of the user had to be obtained in each case or not.

VOTING-QUESTION 8:
Does the GDPR constitute a competitive disadvantage for European companies?

Yes: 33.33 percent **No:** 66.67 percent

VOTING-QUESTION 9:
Would you recommend to place personalised advertising in mobile games without having obtained the relevant consent of the player?

Yes: 23.08 percent **No:**: 76.92 percent

VOTING-QUESTION 10:
Does in your view the banning of cheaters constitute an automated decision within the meaning of Art. 22 GDPR?

Yes: : 26.32 percent **No:** 73.68 percent

VOTING-QUESTION 11:
Do you consider blacklisting on the basis of hardware ID to identify cheat software a good idea?

Yes: 58.33 percent **No:** 41.67 percent

Crypto meets games

Dr Christof Aha, Partner at BEITEN BURKHARDT, led the audience through the regulatory framework conditions of an Initial Coin Offering (ICO) in Germany according to which it is, in general, possible for games companies to switch to crypto currencies.

Then Benjamin Robson, Senior Business Development at The Laurel Foundry Lt., and Andreas Schemm, CEO of Shaping Games AG, described the advantages of a crypto currency or the blockchain technology for the games industry.

VOTING-QUESTION 12:
Do you believe that crypto currencies will be established as a payment method for the purchase of games or virtual items?

Yes: 31.25 percent **No:** 68.75 percent

The Epic BOT Battle: Good Bot, Bad Bot

In a presentation with the title "The Epic BOT Battle" Marian Härtel, lawyer of a known bot developer, and Mark Brown, Partner with Bristows who had represented a famous provider of online computer games in proceedings against a bot provider, talked about their experiences with regard to admissibility of bot software. Here, Mark Brown at first reported on proceedings conducted in England against a provider of **bot software**. He explained that his approach against the bot provider was mainly based on the line of argument that the bot software would encourage users to violate the licensing terms of the provider, thus would induce players to infringe copyright. These terms expressly provided that players lose their right of use when using bot software. Then Marian Härtel explained why he considered it too general that any type of bot adversely affects an **online computer game**. Certain bot software could, in fact, even be beneficial for the game and the players as it takes over tedious and trivial tasks of the players. This would in most cases even increase the gaming fun. According to Härtel, it was therefore important to take into account the functionality of the bots.

VOTING-QUESTION 13:
Do you consider bot software harmful to the success of an online game?

Yes: 73.33 percent **No:** 26.67 percent

BGB 2.0: A new purchase right for digital content

According to the plans of the European legislator, the sale of digital content to consumers shall soon be fundamentally revised and regulated by a new directive ("Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content"). In his lecture on "Civil law 2.0: The Digital Content Directive" Dr Axel von Walter, Partner at BEITEN BURKHARDT Munich, presented the key aspects of the proposed directive to the audience.

The scope of application of the proposed directive shall comprise all contracts between traders and consumers on the **provision of digital content** (data in digital form, including software, video, audio and e-books) and the provision of digital services (including Cloud Computing, Social Media). Hence, the directive shall also cover providers of online and mobile games. Prerequisite for the application of the directive is that digital content is provided for a consideration of the consumer. Such **consideration** can on the one hand be a fee, yet on the other hand, and this is new, it could be **data** (e.g. the consumer's personal data) that are treated as non-monetary consideration. The proposal for a directive is aimed at a maximum harmonisation, i.e. in their national legal systems the EU member states may not provide for any regulations neither more beneficial nor more hostile to the consumer in fields falling within the scope of the directive.

In his lecture Dr von Walter addressed some selected regulations, including the regulations for the provision of digital content, defects, liability and responsibility, the burden of presentation and proof, guarantee, rescission and its consequences.

In relation to **defect-related rights** the requirements that must be met so that digital content is deemed to be compliant with the contract (Art. 6), are very similar to the German provi-sions under the Law on the Sale of Goods. So, digital content is, *inter alia*, deemed to be compliant with the contract if such content has the contractually agreed characteristics such as, for instance, a specific scope of functions, a defined duration or the compatibility with other products or content, or if it is suited for the purposes for which such content is normally used. An important aspect in this context is the **burden of presentation and proof**: According to the proposal for a directive, such burden generally rests with the provider (Art. 9), i.e. if the consumer claims that the content or the service was defective, it is for the provider to provide evidence to the contrary. **Warranty rights** are also structured similarly to the German Law on the Sale of Goods (Art. 12 und 13). To start with, the consumer has a right to cure and then, in the event of failure of such cure, a right of rescission or reduction. Should the provider provide the content not at all, the consumer can rescind the contract immediately (Art. 11).

The proposal for a directive also provides for **special regulations** for contracts with a duration exceeding 12 months (Art. 16). The consumer may terminate such contracts after the expiration of the first 12 months at any time. These special regulations could also affect game providers if those, for instance, offer "**Games as a Service**", and also on their pricing models.

With a view to the expected adoption of the directive by the EU Parliament in 2019, games companies should, thus, review both their contracts with consumers and their business models with regard to the envisaged regulations.

VOTING-QUESTION 14:
Will the directive on digital content, in your opinion, entail more advantages or disadvantages for the games industry?

Advantages: 36.84 percent

Disadvantages: 63.16 percent

Susanne Klein
Lawyer | LL.M. | Licensed Specialist for Information Technology Law
BEITEN BURKHARDT
Rechtsanwaltsgesellschaft mbH
Frankfurt am Main

Wojtek Ropel
Lawyer
BEITEN BURKHARDT
Rechtsanwaltsgesellschaft mbH
Frankfurt am Main

Peter Tzschentke
Lawyer
BEITEN BURKHARDT
Rechtsanwaltsgesellschaft mbH
Frankfurt am Main

Timo Conraths
Lawyer
BEITEN BURKHARDT
Rechtsanwaltsgesellschaft mbH
Frankfurt am Main

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EDITOR IN CHARGE
Dr Andreas Lober | Lawyer | Partner

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IHRE ANSPRECHPARTNER

FRANKFURT AM MAIN
Mainzer Landstrasse 36 | 60325 Frankfurt am Main
Dr Andreas Lober | Lawyer | Partner
Tel.: +49 69 756095-582 | Andreas.Lober@bblaw.com

MUNICH
Ganghoferstrasse 33 | 80339 Munich
Dr Axel von Walter | Lawyer | Licensed Specialist for Copyright and Media Law | Licensed Specialist for Information Technology Law | Partner
Tel.: +49 89 35065-1321 | Axel.Walter@bblaw.com
Dr Holger Weimann | Lawyer | Partner
Tel.: +49 89 35065-1312 | Holger.Weimann@bblaw.com