

GAMES LAW

“More Than Just a Game” conference for international games law experts held in Germany for the second time

Dear reader,

Computational creativity and autonomous content generation, eSports, all-you-can-game offerings. These were the subjects of this year's “More Than Just a Game” conference in Frankfurt am Main on 17 October 2019.

“More Than Just a Game” is the Queen Mary University conference series, which has started in London in 2015 and has successfully expanded into other European cities. This is the second year MTJG returned to Frankfurt. At the heart of the format are panel discussions as well as the exchange of experience between gaming researchers and industry experts from all over the world. Like last, the conference 2019 was held at the Frankfurt office of BEITEN BURKHARDT.

Among the speakers were well-known representatives of major games publishers such as Nintendo and ZeniMax, scientists from the Queen Mary University of London as well as representatives of the German Entertainment Software Self-Regulation Board (*Unterhaltungssoftware Selbstkontrolle – USK*) and the Commission for the Protection of Minors in the Media (*Kommission für Jugendmedienschutz – KJM*). In addition, the panel on eSports featured, among other speakers, the persons in charge of the eSports programs of the German Football Association (*Deutscher Fußball-Bund e.V. – DFB*) and of Eintracht Frankfurt. As in the previous year, the audience could share their opinion at the end of the panel discussions.

In this newsletter, we present the most important topics and findings of the “More Than Just a Game” conference in Frankfurt. If you would like to get more information on the following topics or if you have any questions on other topics regarding the games industry and games law, please do not hesitate to contact us at any time. As you will see below: it's about more than just a game!

Best regards,



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eSports: who should get started?

The expert panel on eSports consisted of Holger Merk, Head of the Strategic Marketing Department at the DFB, Tim Jäger, Consultant of the Executive Board at the German Bundesliga club Eintracht Frankfurt and Markus Schneider, Managing Partner of Kerberos Management GmbH. The panel was chaired by Dr Axel von Walter, Partner at BEITEN BURKHARDT.

The focus was on the question of how the various actors approached eSports. Holger Merk, as a representative of traditional football, first revealed that he found himself in an unusual position: the top dogs in the field of eSports are the **publishers** and not the DFB. However, the latter wants to catch up in electronic football and in future profit from its role as the umbrella organisation of German football by establishing its own tournament format. For this format amateurs from the DFB member clubs will initially play against each other and later meet professional players from the “virtual Bundesliga”.

In addition, there are plans for a dedicated platform to facilitate contacts between professional Bundesliga players and eSports players.

Tim Jäger emphasised that, when including eSports in its club offer, Eintracht Frankfurt as a football club again takes a “**grass roots sports approach**”. With the increasing popularity of eSports, it is important for the clubs to establish themselves as credible institutions in this sector as well. He described Eintracht Frankfurt’s holistic concept, which combines the coaching of professional teams in all age groups with the promotion of young talent and the development of its own community. The focus, he said, is on the newly established training centre for eSports players on the club grounds as well as on community events. Many eSports players of Eintracht Frankfurt also practice physical football in addition to the electronic version. eSports players can also play the game “League of Legends” in addition to virtual football, an eSports classic not based on any traditional sports. Here in particular, Eintracht Frankfurt would like to dispense with any separation in order to, above all, extend the reach of Eintracht Frankfurt.

Markus Schneider, on the other hand, stated that eSports has so far not been particularly relevant or even profitable for most players in economic terms. Larger revenues are currently generated mainly in China, where eSports has been proclaimed as regular profession. The consideration solely of worldwide figures on popularity and reach would therefore only provide a highly distorted impression and not be representative for Europe. For this reason, **investments** in Europe bear considerable risks at this point, which in fact goes hand in hand with a relatively small reach. Also, compared to the other parts of the games industry, revenues from eSports are low. The general public’s interest in eSports is currently still at a very early stage. Markus Schneider impressively underlined this with a comparison of subscription figures on YouTube, where a professional TV format on eSports had the lowest, the German champion in FIFA a slightly higher and a so-called “unpacker” of digital Ultimate Team trading card packages for EA sports games had by far the most subscribers.

The experts agreed, however, that eSports has already changed the club culture and that this trend will continue. In addition to club sports, many members also played together in the games sector, a development even among professional athletes. Although there is no threat of an imminent disruption of classical club sport, eSports will not disappear in the foreseeable future.

eVOTING-QUESTION 1:

Should eSports be recognised as a sport?

Yes: 60%

No: 40%

eVOTING-QUESTION 2:

Is there a need for special legal regulations for eSports, e.g. for player contracts, sponsoring or “doping” / cheating?

Yes: 73%

No: 27%

(Technical) Youth protection: a surprise package

Every physical copy of a game has them: **age rating symbols**. They illustrate that video games are subject to constant critical tests and regulatory requirements when it comes to the protection of minors. Currently, the question of an adequate protection of minors in video games is being intensively debated worldwide, in view of so-called “**loot boxes**” and **other mechanics similar to gambling**.

Elisabeth Secker, managing director of the German Entertainment Software Self-Regulation Board (USK), and Dr Wolfgang Kreißig, chair of the German Commission for the Protection of Minors in the Media (KJM), delivered insights into the complex issues of creating an adequate protection of minors from a (self-) regulatory perspective. Clemens Mayer-Wegelin, LL.M., European General Counsel at Nintendo, presented the perspective of a game provider. In this context Paul Gardner, partner at Wiggins, London (UK), informed on current international challenges in legal consulting to the gaming sector, and Dr Michaela MacDonald, lecturer at the Queen Mary University of London (UK), completed the panel of experts with the academic perspective. This high-profile panel was chaired by Dr Andreas Lober, Partner at BEITEN BURKHARDT.

As an introduction into the matter, Elisabeth Secker explained the **age classification of games** by the USK, and in particular the limits of the Board’s powers with regard to gambling mechanics in games. The fundamental question, she explained, is to what extent age rating is an appropriate approach at all to handle gambling mechanics and risks of communication and interaction in games. The USK stressed the risk of blending entirely different issues for an assessment, which ultimately runs contrary to the primarily intended purpose of age rating, which is to offer clear and reliable guidance to parents.

The Board is therefore in favour of so-called “**descriptors**” to be added alongside the actual age rating. Because different subjects are mixed together by a uniform age rating for all issues without specific descriptors, such uniform approach could end up in misleading results. For example, games such as “Candy Crush” and “Call of Duty” might have the same age rating in such a uniform approach, although one is played with candy and the other with fire-arms. This would not be a helpful guide for parents. Instead, the existing age rating should remain in use, while additional descriptors show other potential risks of the use of the respective games.

Further, the panel discussed the **technical implementation of legal requirements of the youth protection**. The solution most commonly used in Germany at the time is the so-called “JusProg” software. “JusProg” is currently the main option for the games industry (besides closed systems) to comply with essential requirements of the German youth protection law with the help of technical protection measures, without needing to limit the broadcasting times online, which would prove impractical and out of touch with everyday life and expectations in the internet. Wolfgang Kreißig explained in detail why the KJM as German supervisory authority refused to consider “JusProg” as suitable technical protection measure contrary to the FSM’s investigatory result (legal proceedings here are pending). The software, he summarised, had significant protection gaps and shortcomings. Also, it was not available for mobile phones and smart TVs, at least at the time of the authority’s decision. The KJM therefore concluded that the software is not suitable as technical protection measure. New and updated solutions are required, which in particular offer a comprehensive protection on all devices.

The expert panel also discussed other **options and efforts of the gaming industry** to develop alternative technical measures to protect minors. As an example, Clemens Mayer-Wegelin illustrated the technical youth protection system that Nintendo uses on its Switch console and which is recognised under the German Interstate Treaty on the Protection of Minors in Media (*Jugendmedienschutz-Staatsvertrag – JMStV*).

Technical measures to protect minors should, first and foremost, be designed to include parents in their children’s gaming activities and support the parents’ supervisory role. Especially the **parents play an important part** in establishing an effective protection of minors. It was also pointed out that parents have to be informed more extensively, in particular on available youth protection systems, but also on time and content of the video game consumption.

The expert panel called for imposing realistic **requirements on the gaming industry**, excessive demands should be avoided. All in all, the industry also has to comply with a multitude of other requirements alongside the youth protection laws, **data protection laws** for example. As examples, Paul Gardner presented current advances in the UK, among others a code of conduct on age appropriate design of online services. It is also planned in the UK to impose a general duty of care on enterprises towards their users.

Furthermore, the **downsides** of strict technical measures to protect minors were considered: technical restrictions on access to content which are meant to protect minors could also be used to filter other content deemed undesirable. Such filtering could be applied to any opinions and thereby, in the end, help establish a digital “walled garden”. Databases for age and identity verification must also be looked at with a critical eye, in light of the principle of data minimisation. For an appropriate protection of minors these risks of abuse should be kept in mind.

eVOTING-QUESTION 3:

Should “gambling” be considered as a criterion for assessment within youth protection?

It should be taken into account for the age rating of the game: 60%

It should be labelled separately: 25%

It should not be a criterion within youth protection: 15%

eVOTING-QUESTION 4:

Effective youth protection in Europe...

has to make the parents more aware of their responsibilities: 44%

requires further legislation and regulatory controls: 44%

can be realised with more self-regulation by the gaming industry: 12%

Computational creativity and the consequences of uncertainty: do cats love witches?

Fundamental questions were discussed in the panel “Computational Creativity” of Dr Michaela MacDonald and Dr Gaetano Dimita, senior lecturer at the Queen Mary University of London: when do we refer to creative machine processes? Is there such a thing as human “collective” creativity? And what kind of creations should be protected under copyright law?

As an introduction, Michaela MacDonald presented “ANGELINA” to the audience, a neural network which is supposed to design its own video games independently from scratch. As part of the learning process, ANGELINA uses her own Twitter account to ask her followers questions, for example “Would it make sense to you for a cat to love a witch?” The sometimes rather bizarre questions are part of the **AI** system obtain knowledge about the real world. Through the answers by the community ANGELINA learns the rules of her environment. Her findings influence the process of design and elements of the designed game, for example the behaviour of objects in the game world, the game play, goal of the game or the plot. Michaela MacDonald described this approach as “continuous creativity”.

This development brings about **many legal questions**: who should hold the rights to “collectively” created works? Should there even be an exploitation of these works at all, and if so, could that also be asserted “collectively”?

Subsequently, Gaetano Dimita illuminated the European **Copyright Law** in the context of current developments. In some game sectors he has observed a discrepancy between the actual legal

situation and the public perception, for example with respect to the development of modifications (“mods”) by smaller developers, or Let’s Play videos and game streaming. The public often does not even recognise such behaviour as legal infringement also because of the barely noticeable difference between deliberate toleration and a mere lack of assertion of rights by the holders of such rights.

It is similar when it comes to the **assumed purchase of digital contents or virtual objects**. A majority of users would simply assume to have full and permanent right to use, sell or otherwise transfer a digital song, film or in-game item. In most cases, however, these expectations are not supported by the actually granted rights of use.

The conflict only becomes fully visible if major providers disconnect their servers or cease to operate the respective services. Gaetano Dimita predicts that digital contents and virtual objects will be a lasting concern for the industry, regarding legal questions and the development of a suitable corporate strategy.

Streaming, cloud & flat rate Models: an industry is changing

Google Stadia, GeForce Now or Project xCloud show that many providers see potential in **cloud gaming and streaming services**. Here, players no longer need powerful and expensive hardware to play elaborate game titles. Instead, providers make their computer capacities and memory space available to the players online. Further, **game flat rates** have been launched or announced by various providers.

Christopher Millard, Professor at the Queen Mary University of London, Dr Andreas Lober, Partner at BEITEN BURKHARDT and Leonard Bendel, European General Counsel at ZeniMax, outlined the **legal and also technical framework**, as well as potential consequences of this development, chaired by Petra Fröhlich, Editor in Chief at the magazine GamesWirtschaft.

Looking closer, these services are not a mere vision of the future. Some publishers already use the server infrastructure of third providers, mostly for multiplayer games with sometimes extremely high server load. Here the question comes up how the offer of such game titles and the related mutual dependencies as well as the technical infrastructure for these offers are going to develop, if games are offered everywhere through cloud gaming services. Classical IT companies with already established server infrastructures, such as Amazon, Google and IBM could take on a **significant role for the distribution** of such game titles through cloud gaming services. This, however, would give rise to more questions, for example who would be the contact for the customer, and who would establish and maintain the relationship to the customer.

Streaming offers like Google Stadia and games subscriptions or flat rates are considered trends for the future by many companies and observers. However, from a legal perspective, **numerous problems are yet to be solved**: who will decide on blocking a player who infringes the EULAs and the rules of the game? How will solutions to identify and avoid cheating be implemented, and who will implement them? What are the consequences if a service subscription is cancelled, also with respect to a later continuation of the use by the customer? Who will be responsible that the players’ consumer rights are observed, and how? These questions will come up in particular because users may be faced with two providers: the publisher and the provider of the respective service.

Also, complex **regulatory issues** must be taken into account for cloud gaming services, inter alia compliance with antitrust prohibitions, handling net neutrality and the provisions for advertisement in video games.

Some ideas how to deal with these intricate issues could be derived from the developments in the film and music industry. Parts of the aforementioned questions also arose in the film and music industry, especially with the establishment of streaming services for these media. Hence, experiences with classical media might also offer helpful approaches as to how to deal with changes or which detrimental decisions should be avoided. Still, games have due to their interactive nature many particularities that are certainly going to present a number of new challenges to the industry.

eVOTING-QUESTION 5:

What will generate more global games revenue in 2022?

Gaming flat rates: 57%

Single products: 43%

eVOTING-QUESTION 6:

Who will dominate the games streaming business?

Traditional game companies (Microsoft, Nintendo, Sony): 12%

Non-endemic companies (Google, Apple, Facebook, Amazon): 88%

eVOTING-QUESTION 7:

Will games flat rates attract a bigger games audience?

Yes – price matters: 45%

No – flat rates are a core gamer product: 55%

Instant update privacy: there is need for action

Even more than one year since the **General Data Protection Regulation (GDPR)** has come into force in May 2018, it continues to provide issues which fill entire discussions. The practical implementation of the GDPR shows: Many subjects have not been fully clarified, standards and reliable solutions are yet to be established. With the GDPR the supervisory authorities' powers to punish infringements have been strengthened as well, not least be **significantly higher upper limits for fines**.

For practical handling of the GDPR it is therefore important to keep an eye on the supervisory authorities' actions. An overview of current measures and complaints at German and European level was provided by Susanne Klein, LL.M., Partner at BEITEN BURKHARDT. In addition to the most recent spectacular fine proceedings, Susanne Klein also outlined the current criteria of the **German supervisory authority for assessing the amount of a fine**.

In view of most recent developments the consequences for the data processing and data protection which might result from the **Brexit** were detailed in addition.

We are glad to keep you informed on current developments. You can simply subscribe to our [Privacy Ticker](#) or our other newsletters. Please find up-to-date details on the concept of the data protection authorities for assessing fines [here](#).



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