

Media and Games Law

Overview

- I. Copyrights for computer games**
- II. Usage of real objects and persons**
- III. Privacy law**
- IV. Consumer protection law**
- V. Individual cases**

Copyrights for computer games

Copyright law

Copyrightability

Condition: Personal intellectual creation of a work

- a) **Personal** (only human works are copyrightable)
 - b) **intellectual creation of a work:** *„the work must attain a certain level of creativity/level of originality that goes beyond pure craftsmanship and the ordinary.“*
- e.g. linguistic works, computer programs, fine arts, music works, movie works, photographic works
 - No copyrightability for “ideas” (e.g. jump and run game) only for the concrete form / expression of the work (e.g. Super Mario)

Copyright law

Copyrightable elements in Computer Games

- Computer program itself - § 69a ff. UrhG
- Idea and Concept of the Game (only in rare cases)
- Design-Script/ Game Design Document
- Graphic Designs (Characters, Vehicles, Buildings etc.)
- Music
- But also the whole game! (Regularly protected as a cinematographic work)
 - Especially linear games that are comparable to a movie
 - Rather not if it is a multiplayer Game without a linear storyline

Therefore: Many different copyrightable elements in one Game.

Copyright law

- Every single copyright always belongs to its creator
 - e.g. Code -> Coder
 - Design of the main character -> Designer
 - General rule: the company itself does not own the copyright, it is only automatically granted a usage right (§§ 43 UrhG, 69b UrhG)
- Anyway contractual granting of usage rights is recommended!

Copyright law

Open source software

- Use of open source software: not without documentation!
- Check license terms (copy left; scope of permitted use!)
- Employees / contributors / freelancers etc.: no employment without contract with comprehensive granting of rights and clear regulation on open source software!

Usage of real Objects and Persons

Usage of real objects

- Objects could be protected by copy- and designrights and trademarks (e.g. special buildings (Pentagon), cars (Porsche 911) or even (Tattoos))
- Copyright protection until 70 years after the death of the last author (e.g. the Mona Lisa could be used); Design protection is max. 25 years
- Possible limitations of copyrights (e.g. panorama freedom for buildings – not applicable for 3D animations; citation right – high requirements; free use through alienation – e.g. modified statue of libert in GTA IV)
- Unclear if well-known trademarks can be used without license

Usage of a real person

- Name and image of a person are protected by personality rights
- The use of name and images of famous can be justified in single cases (Public interest in information is weighed against personal rights)
- OLG Hamburg: usage of name and picture of Oliver Kahn for “FIFA-Game” without his consent infringing his personality rights

Privacy

Privacy

- Every processing of personal data needs a legal basis (e.g. consent, contract, legitimate interest)
- privacy information for data subjects (Art. 13 f. GDPR)
- Think of data processing agreements (e.g. with host providers)
- Technical and organizational measures for data protection are required
- Where is the data stored? (caution for third countries outside the EU especially USA)

Consumer law protection

Consumer law protection

- clauses on unilateral price and contract changes are often unlawful under GTC law
- In electronic business transactions, the consumer's right of withdrawal must be observed (this applies for games but also for the purchase of virtual objects / currencies)
- Games provider should observe that the right of withdrawal needs to be expired
 - consumer must explicitly agree to the immediate fulfillment of the contract and confirm his knowledge of the expiry of the right of withdrawal

Consumer law protection

- Clauses which prohibit the trade with virtual object (e.g. in world of warcraft) are probably valid for games (argument: impairment of the gaming incentive)
 - cease and desist letter could be a consequence
- GTCs and EULAs versus consumers shall be used german language (at least if the website is in german language, KG Berlin, WhatsApp case)
- contracts against payment with minors are (pendingly) invalid
- Clause which prohibits the resale of an User-Account is valid (BGH, Half-Life 2)

Individual cases

Cheat-Bots

Bots could infringe copyright and unfair competition law (depending von the GTC of the game, BGH- World of Warcraft I and II).

Reselling of licence keys (Keyselling)

- Used-Soft-Decision concerning non-physical software distribution (European Court of Justice (ECJ))
- Rights holder cannot prohibit the resale of non-physical software if the following requirements are met (then the rights are exhausted):
 - The computer program was placed on the market within the European Economic Area (EEA) with the consent of the rights holder.
 - The computer program was placed on the market by way of purchase, the first acquirer has obtained permanent and not merely temporary rights of use.
 - The seller proves that he has no further copies of the computer program and has deleted any copies
 - The rights holder had the opportunity to receive appropriate remuneration for the program copy

Key-Selling (II.)

- Problem: Is the Used-Soft Decision applicable to games?
 - Uncertain, because the Usedsoft-Decision applies only to software; but games are also protected as a cinematographic works for which the used soft decision does not apply
- Anyway rights are exhausted if the game was physically distributed by the rightsholder within the EEA
- If they have not been activated yet, rights are not exhausted
- Often non „EEA“-keys are sold (no exhaustion of the right)



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I have been a lawyer since 2013 and advise and represent clients in particular in the areas of IP/IT law (e.g. license agreements, privacy law, trademark law, advertising and copyright law). Another focus of my work is commercial and distribution law, in particular the drafting, review and negotiation of contracts.

DORNKAMP is a law firm specializing in IP/IT, copyright, unfair competition and corporate law. It develops and uses legal tech applications and was awarded the Legal Tech Kanzleipreis of the German Bar Association in 2022 and in 2023 the PMN Award for Newcomer Lawfirms