THE VIDEO GAMES AND THE LAW

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The video games have gone a long way since the first games of tennis on a green screen[1]. In USA only, 67% of households play video games[2] and the market is estimated to be around 10 billions of dollars. In Europe, the statistics are less important but still quite convincing of the phenomena, since 24% of the population is a "gamer". The law of video and computer games, however, is still seen for most lawyers at best as a curiosity, at worse as a loss of time. The aim of this paper is to fight against these prejudices and to present the last developments of the law of video games.

Video game law is divided in three different sectors: the question of authorship of the creation, which includes application of copyright law but also of patent and trademark law, the new topic of virtual reality, which represents a fundamental transformation of the legal nature of the video game, from intangible goods to provisions of services, and the question of freedom of speech and its necessary balance with the legal protection of minors. This last part won't be analyzed in detail here as (even if it is sometimes discussed) video games do not present any specificity from a legal point of view, by comparison with other media. This position has recently been confirmed in USA by the Supreme Court in the case Brown v. Ema[3]. At issue is a California law banning the sale of such games to minors. The video-game industry argued that, unlike similar laws banning the sale of pornography to minors, the state's ban on video-game sales and rentals violates the First Amendment and asked for the law to be declared unconstitutional. The Supreme Court issued a 7-2 opinion striking the California law as unconstitutional and in other words decided to consider video game as an ordinary media, which should receive the same protection as TV, radio or the press.

We will then analyze distinctly the two other domains of the video game law and we will show that, in both cases, the technological development has completely modified the basic elements of the legal framework.

1. VIDEO GAMES AND COPYRIGHT LAW

Video games are protected by copyright. In Europe and in America, the question has been discussed for a long time, now, and it is actually possible to arrive to some conclusions about the legal nature of the video game. Also, copyright law does not only cover the games but also the consoles

[1] The first video game in history was "tennis for two", a two-dimensional, side view of a tennis court on an oscilloscope screen connected to controllers, on 1958. Source : http://www.bnl.gov/bnlweb/history/higinbotham.asp
[2] http://www.esrb.org/about/video-game-industry-statistics.jsp
[3] supremecourt.gov. 2011. Retrieved 2011-06-27.

themselves. The modern consoles are in fact a kind of personal computers with an operating system and the question of their protection involves huge economic interests.

1.1. THE VIDEO GAME, A VERY PECULIAR WORK OF MIND

The scope of this paper is to adopt a comparative approach. A first difficulty which emerges is then to determine the conditions of protection of a work of mind by copyright law. In the continental author's right system, a work of mind has to be original in order to be protected, but in the common law copyright legal system, a work of mind needs additionally to be materialized on a support, to fulfill the so called fixation requirement. In a video game, some pictures and models are already incorporated in the game, but the effects, the textures, the context are added at the moment of the execution of the video game. In the already classic decision Midway Manufacturing Co. v. Artic International, Inc. (1982) about the legal protection of the PacMan and Galaxian video game, Artic's defense to the accusation of infringement was that Midway's video games were not "fixed in any tangible medium of expression". Specifically, Artic claimed that the ROM chips in the Midway games never held pictures in any fixed medium, but rather contained instructions to generate pictures that were not themselves fixed. District Judge Bernard Decker ruled against Artic, noting that the law does not require a work to be written down in the exact way that it is perceived by the human eye. The judge was persuaded by Midway's demonstrations, showing that the images in the games' demo repeated identically every time the games were turned on. The games also repeated in similar ways during subsequent plays.

So if a video game is original and it is fixed, it enters in the scope of protection of copyright law. This point has never really been discussed either in USA or in Europe. But what is protected exactly? Most of the video games are a complex assemblage of different components: pictures, video, music, scenario, software. The question is far to be rhetorical. For example, if the video game is deemed to be an audiovisual work, in Greece, the legal framework of the collective work will probably apply, which grants the authorship of the work to the director. At the opposite, if it is not a collective work, authorship of the work is shared between the plurality of the creators under the regime of joint authorship.

In 2003, the French Cour de cassation rejected the idea that a multimedia is an audiovisual work, since at the opposite of a movie it incorporates an element of interactivity which constitutes the essence of the video game. The movie is constituted by a predetermined sequence of images, while in the video game the players choose by their actions the sequence of images[4].

The interactivity is created by the software of the video game. If the interactivity is the fundamental part of the game[5], does this mean that the video game is in fact just a software? The judges in the

[4] CourCass, 1ère ch.civ., 28 janvier 2003, C.c./Sté Havas interactive et Dalsace.
[5] Irini Stamatoudi, Video Game as a test case, p.167, in Copyright and multimedia works, Cambridge, 2002.

past were attracted by this idea[6]. For example, the Cour de Cassation in a decision of the 27th of April 2004 decided that "since the programming of an electronic game is not dissociable of the combination of sounds and pictures forming the different phases of the game, the analysis of the elements permits to determine the originality of the software".

But the French judges have recently changed their mind in another interesting case. A society which is a video game editor created video games which incorporated some music. The society got bankrupt and the following simple problem was raised: Could a collective management society representative of the right holders of music be present in the procedure? In other words, are the video games created by the society protected as software? If they are, according to the law, the right holders can just ask a lump sum, if not, they can pretend to a proportional remuneration.

The judges decided that "The video game is a complex work of mind which can't be reduced to its only software dimension, independently of its importance, and then each of its component is ran by the legal framework that applies according to its nature "[7].

The word is given: complex ! The reality of the work of mind that constitutes a video game can't be considered just under the specter of one legal regime. The video game is by nature a work of collaboration and each author keeps copyright over her contribution. We have to recognize that this evolution for one time goes in the way of the practice. Nowadays, video games are divided in very specific units of production and for the 3D action games, most of the time the software itself, the 3D engine, is not a part of the game. The software companies rent 3D engine, software, that is used by the video game companies for their games. The fragmentation of the legal regime of the video game, while necessary, creates at the same time a lot of questions related to how can the different sectors of the protection could be juxtaposed and coordinated.

In France, the Law of the 5th of March, 2007 provides a legal definition of video games : it is a " software of leisure put in the disposition of the public on a tangible medium or online which incorporates elements of artistic or technological creation, and which proposes to one or more users a series of interactions based on a scripted framework or a simulated reality by the way of animated pictures, with or without sound".

1.2. THE CONSOLES SOFTWARE AND THE MODSHIP PROBLEMATIC

Video game industry lies primarily on the consoles' sells. The technological evolution has led to an increase of protection of video games which takes various forms, such as online activation schemes and DRM, but at the same time, the consoles, each day more like computers, have become vulnerable to manipulation. Microsoft, Sony and Nintendo started a global war against the modification of their consoles. We will analyze in more detail the situation of Sony, whose legal

[6] See for example: CA Caen, 19 déc. 1997 · CourCass, 21 juin 2000, affaire Pierre T. c/ Midway Manufacturing Company.
[7] Cour de Cassation, 25 juin 2009, arrêt Cryo .

adventures have greatly influenced the evolution of information law. Of course, the phenomenon of globalization of the industry of entertainment leads to the conclusion that the same legal problems appear everywhere. But the Italian case law on this topic is very illustrative of the problem and deserves our attention.

The case is related to the popular console "Playstation 2" which is as it has already been stated is a real computer whose capacities have been locked by the constructor in order to limit its functionality to the execution of genuine video game for PS2 only. Because the consoles are sold below their cost, in order to attract new consumers, the practice permits to Sony to gain a substantial remuneration on the sale of the video games. Also, the lock of the machine offers to Sony the possibility to compartmentalize the market in 3 different geographical zones, according to the financial capacities of the consumers of the zone. We won't discuss the questions of competition law. The main issue is to determine the legal regime of the so-called mod chips, the devices created to unlock the functionalities of the console. Are they illegal and on which legal basis ?

Article 6 of the Infosoc Directive 29/2001/EC expressly condemns the practice of circumvention of a technological measure of protection. However provisions which correspond to the same philosophy can be found in the American Digital Millenium Copyright Act (DMCA). Sony used the transposition of this article in the Italian legal system to pursue the constructors of the mod chips. But according to the Court in the decision of 2003 the mod chip's main purpose was not to allow the loading of pirated copies but to overcome monopolistic barriers and to exploit PlayStation functionalities at their best. The question is related also to the legal qualification of the video game: if the video game is a software, then the consumer is authorized to proceed to the creation of a backup copy and by consequence the mod chip finds a justification. In a third decision of this judicial saga the Italian judge made a distinction between phonograms, audiovisual works and software, deciding that the prohibition provided by article 6 of the Directive concerns only the first one. Once again the video game is assimilated to software, and the use of the mod chip is validated.

The Italian Supreme Court, in 2009, pronounced itself in favor of a complex qualification of the video game which means that the protection against the circumvention of technological measures of protection applies to them.

This approach can be criticized because it focuses only on video game, where the main target of the mod chip is the console itself. By this way, the difficult question of the determination of the legal nature of video games is avoided. The operating system of the console is clearly a computer program. Does a mod chip or homebrew software which interferes with the normal execution of the computer program infringe the copyright of Sony upon it?

Another approach, which has the author's preference, would have been not to refer to article 6 of the Infosoc Directive but to the older Directive of 1991 about computer programs, which has been recently codified (The directive 2009/24/EC on legal protection of computer programs). Article 6 (1) establishes an exception to the rights of the creator of a computer program where this is necessary to achieve interoperability. Under the light of this exception, the answer to the question of mod chips and homebrew software is deemed to be contrasted according to the real purpose of the modification: while a modification which adds some functionality to the console should be seen

as a part of the rights of the lawful user, the modification which is used for goals other than to achieve the interoperability of an independently created computer program, at the opposite, will fall under the scope of application of article 7 (1) (c) of the directive (prohibition of circumvention of Software protection : (c) any act of putting into circulation, or the possession for commercial purposes of, any means the sole intended purpose of which is to facilitate the unauthorised removal or circumvention of any technical device which may have been applied to protect a computer program.).

2. VIDEO GAMES AND LAW OF CONTRACTS

The legal framework of the video game industry is characterized by a triangular relationship between the consumers of the products, -the players-, the company which publishes the game and the creators. As the nature of the video game changes gradually, this relationship strengthens itself with new obligations for every side of the triangle.

2.1. END USER LICENSE AGREEMENT (EULA)

Almost all the video game licenses possess an End User License agreement (EULA). It is an evidence to say that this license is imposed to the player. When the consumer buys the DVD of the game, the license appears in a window with the mention "accept or refuse", but there is no real choice: the player has already bought the game and the seller won't take it back since it has been opened, and, of course, the game won't be installed if the player does not choose the "accept" option. Also, these licenses most of the time stipulate that the buyer of the game is bound by all future modification of the EULA, provision which is certainly by itself an example of an unfair term[8]. The EULA regulates the conditions of use, the updates and guaranties of the video game, but also, and this is a domain which becomes more and more important every day, the conditions of access to the online services offered with the game.

In Europe, a first legal approach would be to apply the Directive on abusive terms between a professional and a consumer, since it is undeniable that the EULA is not negotiated individually. Then, each term of the EULA which demonstrates obviously an inequality in the relationship will be deemed as non-existent.

An American decision went even further. In the decision of the United States District Court for the Eastern District of Pennsylvania, in 2007, a judge had to pronounce on the EULA of the famous game "Second life". Second Life creates a virtual reality where it is virtually possible to do

[8] French TGI Nanterre, UFC Que Choisir / AOL France 2nd of June 2004.

apparently anything. A player conceived a way to buy lands (virtual lands) at a lower cost than the official market. He connected to auctions that were not public yet and bought lands for 300 dollars, while their public price was 1000 dollars. The society which runs the game decided to close his account because of the violation of the EULA and the player claimed that due to this he has lost all his virtual properties, for a value estimated to 4000 dollars. The judge qualified the contract as a contract of adhesion and limited this holding by noting that a claim that a contract is one of adhesion can be defeated if there are "'reasonably available market alternatives'" available to the weaker party. Here it was not the case, since "Second Life" is a unique service which proposes in a massive multiplayer environment to buy some kind of virtual real property. In conclusion, the Court decided not to apply the terms of the contract.

Most EULA include various terms which could be described as unfair, such as classic terms about exoneration of liability, but also terms specific to video games, such as the restriction of copyright of the players. Indeed, the video games nowadays encourage the players to create their own personages, stories, even sometimes their own universes. The editors bet that they will create this way a community of fans who will add a plus-value to the game. It is quite a new domain of the law of copyright, the distinction between actions of the players which are just a mere execution of the predetermined script of the video game and original intellectual creations which should receive a protection by copyright law. One thing is sure: the EULA can't decide that all creations in all circumstances derived from the original video games are the property of the editors of the video game. This is characteristic of an unfair term and also violates the principle of specialty of the transfer of right which applies in many copyright law systems, a principle which requires that every transfer of copyright must be specifically defined and limited.

At the end, it depends of the particular qualities of each game. In a game like World of warcraft, the possibilities of original creations of the player are more limited and the term which gives all copyright prerogatives to the company does not seem unfair. However, the violation of the EULA does not mean that a work of mind is infringed automatically. In a recent decision in USA, MDY Industries, LLC v. Blizzard Entertainment et al[9]., the judge had to decide on the case of a computer program which permits to the player to play automatically ("like a bot" to use the gamer vocabulary), in order to level-up faster. The court explained that, although the use of "bots" was prohibited by the WoW Terms of Use, it did not follow that operating outside of the scope of the license resulted in copyright infringement. For this to happen, the licensee's action must (1) exceed the license's scope, and (2) implicate one of the licensor's exclusive statutory rights"[10]. In this case, the anti-bot provisions of the Terms of Use did not implicate copyright law. So, although "a Glider user violates the covenants with Blizzard," it "does not thereby commit copyright infringement because Glider does not infringe any of Blizzard's exclusive rights [such as alter or copy World of Warcraft software]." The Court stated that: "*Were we to hold otherwise, Blizzard — or any software copyright holder — could designate any disfavored conduct during software use as copyright infringement, by purporting to condition the license on the player's abstention from the disfavored*

[9] MDY Industries, LLC v. Blizzard Entertainment et al., No. 09-15932 (9th Cir. December 14, 2010).

[10] Joshua S. Jarvis, Blizzard Owns Your Software, 10.-1.2011. http://www.trademarkandcopyrightlawblog.com/ 2011/01/articles/copyright/update-blizzard-owns-your-software/

conduct. The rationale would be that because the conduct occurs while the player's computer is copying the software code into RAM in order for it to run, the violation is copyright infringement. This would allow software copyright owners far greater rights than Congress has generally conferred on copyright owners."[11].

Two contractual relationships appeared with the emergence of the massive multiplayer video game: the transfer of a virtual asset and the transfer of a virtual service. The first kind of contract refers to some virtual equipment or character, which is rare and then valuable. Is it possible to sell it? Or to steal it? It has been advanced that the philosophical theory of Locke on the justification and emergence of the right of property should apply[12]. The second kind of contract, the transfer of virtual services at first sounds strange. It is incredible for the non gamer to discover that a whole new economy has emerged, as described in the recent documentary[13] "Goldfarmer". Goldfarmer is the name given by the player to persons, Chinese most of the time, who work on a video game 8 hours a day just to level-up characters that they can sell to young and impatient American clients.

The EULA rule in the most cases (with the notable exception of the game "Second Life") the both aspects: the player is not entitled to any rights on his virtual assets and every commercial use of the game is prohibited. But if we accept that the legal effects of the EULA are limited, the following question appears: how to qualify these contracts? More and more States are concerned about the non-taxation of virtual assets. In the same idea, the mechanisms of unjust enrichment in Europe could be used in cases where the account of a player has been deleted by mistake. The editor could be obliged in this case to compensate for the virtual assets lost due to this operation. Besides, the companies are starting to change their position about the commerce of virtual property. Thus, Sony online Entertainment organizes itself the auction for virtual objects of its world "everquest II", with a 10% remuneration.

But at the end, virtual property cannot be recognized as true property in the legal sense. What would happen if the video game company decides to close its servers[14] or just to introduce a new weapon or a new rule which renders the virtual property of the gamer useless? "In Taiwan, virtual property is considered movable property and stealing such property can result in imprisonment"[15]. At first, and more particularly if it is not forbidden by the EULA, we should accept that these contracts are enforceable[16]. In my opinion, two distinct questions have to be asked: what is the legal qualification of these virtual goods and who is the owner.

Under an economic approach of law, every act which produces some value leads to a creation of a form of property. The virtual goods create a real property[17], but if the player has the usus and the fructus, it is impossible to recognize to the player the abusus in the continental legal tradition. Or to

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[11] MDY Industries, LLC v. Blizzard Entertainment et al., No. 09-15932 (9th Cir. December 14, 2010).
[12] F. Gregory Lastowka & Dan Hunter, The Laws of the Virtual Worlds, 92 CAL. L. REV. 1, 44-50 (2004).
[13] http://chinesegoldfarmers.com/
[14] Bennett, C. Massively multiplayer games and the law. In internet and e-commerce law in Canada. (2007.08) 8 I.E.C.L.C. p36.
[15] Spratley D. Virtual Property and the law.
[16] Bennett, C. Contracts in the MMO world. www.VideoGameLawBlog.com
[17] DahCunha N., Virtual Property, real concerns, Akron Intellect Prop J 4 no1 2010 p. 35-72.

take a common law approach, we should consider that the player is somehow a trustee of the virtual goods: he has some rights according to the condition of the trust to sell and make profit of his virtual assets, but the beneficiary of the trust, the company, has the option to take back the ownership of the good. The problematic could be resolved also by reference to the concept of derivative works, given that the virtual assets possess enough originality.

2.2. THE VIDEO GAME AS A PROVISION OF SERVICES

Since the contractual relationships concerning videogames are nowadays more a provision of services than a contract of sale, the legal rights of the player have evolved but also, concurrently, the obligations of the editor have changed. The most illustrative example of this change is given by the very recent actuality. The Sony network for online video game for PlayStation users has been hacked and millions of confidential information, such as the credit card number of the players, has been stolen. Could this constitute a breach of an implicit term of the contract? In USA, a class action has been opened against Sony, for its failure to protect the personal data of its consumers. In Europe, the situation is more complicated: class action does not exist and each player should sue individually Sony. Moreover, in most European countries, the judge in civil actions does not grant anymore punitive damages. The player would have to prove the actual prejudice of the failure of Sony. In Canada, some lawyers have advanced a radical argument: the fall of the network of one of the protagonist worldwide in the domain of the new technologies is somehow synonym of despair and fear: if Sony can't protect our personal data, who can you trust? How many times a day should anyone consult his bank account and how much he can trust the bank anymore? By consequence, their client asks for one billion dollars of damages.

Another issue of this phenomenon is related to the information given to the victims. In these situations, victims are not only the companies which suffer the hacking but also the users, victims of the personal data leak. The video game companies could be thus tempted to avoid any liability just by hiding the fact of the hacking. Thus, the players would be victims without any knowledge of their situation. This issue has been envisaged by the recent Directive[18] 2009/140 on electronic communications networks and services, which obliges the companies to declare every breach of personal data that they are aware of.

2.3. THE LEGAL RELATIONSHIP BETWEEN THE CREATOR AND THE EDITOR

A new trend appears also, with the development of a new market for the video game: the smartphone. The video games for smartphones are simpler, smaller and cheaper. With the democratization of the knowledge, everyone could decide one day to create his own video game.

[18] Directive 2009/140 amending Directives 2002/21, 2002/19, and 2002/20 on electronic communications networks and service. Official Journal of the European Union L 337/37, 18.12.2009.

We assist in the domain of the video game a kind of return to the origins, where creators and editors were dissociated. However, the contractual relationship between the creator of the game and the editor cannot be described as equal.

Once again, the practices of the protagonists of the industry of new technologies deviate a lot from legal orthodoxy. For example, the very recent decision of Amazon to start an offer of video games created a lot of reactions. The contract that Amazon proposes stipulates that Amazon has every right to freely modify the price of the games. It is a classic term in these contracts, in order to give a legal framework to the special sales and reductions that are organized from time to time. In all cases, the creator of the game receives as royalties 70% of the retail price. But another term of the contract provides that the creator of the game is entitled to receive only 20% of the original price if these 20% are superior to the 70% of the retail price. This leads to important differences as regards the remuneration of the creator. Let's imagine a video game which is a success: in order to gain some clients from its competitors, Amazon could decide discretionarily to offer a reduction on the game and the creator of the game will be bound by the contract to accept a decrease of his royalties.

3. CONCLUSION

The purpose of this paper was, through this short tour to the law of video games, to highlight the main debates who have arisen recently in this constantly evolving domain. From the classic issue of the legal definition of video games in the frame of copyright law, we reached a new challenge, this of the qualification and of the legal effects of the transactions of virtual assets. The virtual worlds are a new whole world of gaming for the players, of course, but also a new whole world which is offered for discussion for the IT lawyers. But it could be an error to believe that these discussions are only rhetorical. With 50% of the population of developed countries playing video games and with the everyday development of new smartphones applications, what is at stake about virtual reality becomes very real.