

# IP and Videogames

## Global Digital Encounters

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### Final Report

During, and further to the COVID Crisis, digital business, and access to digital products and services increased exponentially. In this context, the video games sector, including e-sports, is by far one of the fastest growing sectors, with an immense development potential. This development does not interface easily with Intellectual Property rules established progressively over the last 150 years for a traditional environment, and raises many questions: could video games be defined as a piece of art, with all its meanings in terms of copyright? What are the boundaries on copyright protection for video games? What about the image rights of celebrities used in video games? How can the doctrine of IP exhaustion be applied to the case of video games? How does consumer protection law interact with video games under the current IP framework? Which role for platforms and Internet Service Providers? Should IP Protection be currently further enhanced? For this Session of our Global Digital Encounters, Speakers with a variety of opinions and / or stakeholders' approaches will provide a worldwide picture of the future of IP and video games, including on re-imagining IP in this area in favor of both business and consumers / society.

### REPORT

The 18<sup>th</sup> Encounter addressed timely issues related to videogames and IP. The panel took a global, 360° view on the topic, by not limiting itself to the European dimension of issues related to videogames and IP.

**Prof. Laurent Manderieux** stated in his welcoming words that video games are one of the fastest growing sectors with the digitalization of the economy. It is currently facing challenges having regard to intellectual property aspects, in particular with copyright, and related relations with consumer rights and regulation of society for privacy issues.

**Prof. Javier Fernández-Lasquetty** then added that the gaming sector is not only about the games, but also a sector that is significantly contributing to the economy. He continued by giving a few examples on the figures the game sector accounts for in Spain. There are 650 developers in the game industry and the sector yields 1 700 million euros in revenue. And these numbers are estimated to grow in the near future.

**Moderator Carmelo Fontana** pointed out that the topic of the IP and videogames is interesting, not only to those directly involved with the questions related to IP and games, but also to a larger public. Whenever you are analyzing trends, dynamics and industry issues concerning a sector which is exploding in growth, such as the gaming sector, you can also gather some general dynamics on how the legal system is reacting to challenges. And the challenges with the video gaming industry are not only legal, but also cultural, social and intertwined with the very concept of creativity. There is a concept of "gamification" which entails that interactive features become more and more part of our everyday life. As a final note prior to the panel discussion, **Carmelo Fontana** pointed out that the gaming industry had 178 billion turnover in 2021, and as a comparison to the content industry, movies and music, those sectors do not even come close to the turnover the video game industry in latest years. The turnover growth of the industry is also projected to amount to 250 billion by 2025.

**Carmelo Fontana** and the Participants raised the following questions:

## 1 : HOW DO YOU VIEW THESE CURRENT TRENDS IN THE VIDEO GAME INDUSTRY? HOW HAS THE EXPLOSION OF THE INDUSTRY AFFECTED THE VERY ESSENCE OF VIDEO GAMES?

**Speaker Andrea Rizzi** started by pointing out that the evolution in the game industry has taken place quickly. Initially, video games would be regarded as physical products: they came with a disk embedding a software and the other content. Consumer would then pay one off lump sum for the game. The advancement of the internet changed the game significantly. The digital distribution models have enabled the introduction of the idea of games-as-a-service. Since the game publishers own the rights to the games, they also have the possibility to add content to the original games, thus extending the lifecycle of games and allowing right holders more time to (hopefully) recoup the increasingly significant development and marketing costs. It has become more and more common, that the games get additional content, new layers and levels which extend beyond the content the consumer had originally purchased. This means that consumers engage, beyond the initial purchase, into several micro-transactions in order to gain access to additional content.

**Andrea Rizzi** also drew a parallel to the Hollywood film industry, where the largest revenues would concentrate on very few big titles. That kind of development is also something that can be seen in the gaming industry where the most played titles take a significant proportion of the revenues.

**Speaker Alina Trapova** joined into the discussion by pointing out that related to the revenues, and to compare the gaming industry with the other creative industries, we are seeing lowest levels of online piracy in gaming. Several years ago, a study made on global online piracy conducted by the University of Amsterdam's Institute for Information Law (iVIR) showed that the gaming industry is seeing the lowest levels of online piracy: indeed, the industry itself has pushed for the games-as-a-service model - the games are created for the digital ecosystem. This leads consumers to crave for the real deal and pay for the content. And this point leads to the question of the relation between IP and videogames, and more concretely to copyright. This issue was thought to have been settled some years

ago, but recent developments show that that is not quite the case. Questions arise as to whether video games are to be regarded as software or as audiovisual works, or as something more and hybrid. The European Court of Justice (CJEU) has touched upon the categorization of the video games and concluded that video games are "complex subject matter" (in Case C-355/12 Nintendo). They are not only software, but contain also audiovisual content. This is very much apparent in the modern video games, such as *Cyberpunk 2077*. These modern games come together with movie stars, premiers, suspension, musical scores, and stars. The notion of a video game has definitely moved towards being a service rather than a product. However, the law still tends to struggle with the categorization of video games, partly because, from a copyright perspective, there are two different legal instruments in the EU that come into play - the Software Directive 2009/24/EC and the InfoSoc Directive 2001/29/EC.

**Andrea Rizzi** added that now we are entering towards an era of games-as-a-platform. The video games are starting to have elements of social media as one of their main features. This takes video games to the next level. The shift towards "metaverse" has ramifications, not only from a perspective of IP but also from a regulatory perspective. While the interactivity and the social features are becoming an essential part of gaming, the amount of user-generated content might create new problems for the industry because of the potential liability questions.

**Carmelo Fontana** pointed out that, referring to his opening words, the dynamics of an industry can be illustrating how a legal system reacts to current challenges. Now we are heading towards a situation where the gaming industry might be invoking platform liability immunity rules under the E-Commerce Directive. The current developments might also entail that the game producers themselves might have to ensure compliance with additional layers of regulation that have traditionally governed the activities of online platforms, such as platform-to-business rules, unfair commercial practices, misleading advertising, consumer protection, and other

similar rules. These rules are in a way targeted to tackle separate issues and might also collide with the traditional creativity of the video games, where you would have partly the artistic creativity within the video game but also creativity in marketing on how to sell services or third-party services within a video game. This is a complex scenario.

## 2 : COULD YOU ELABORATE MORE ON THE TRADITIONAL IP/ COPYRIGHT SPECIFIC ISSUES WITH THE VIDEO GAMES, SUCH AS THE DISTRIBUTION RIGHT AND COMMUNICATION TO THE PUBLIC RIGHT TENSION? HOW IS THE VIDEO GAME INDUSTRY SHAKING THE FOUNDATIONS OF COPYRIGHT LAW?

**Alina Trapova** noted that she very much agrees on the regulatory challenges, especially with the Digital Services Act in the making, and the CDSM Directive (Directive 2019/790), which we still do not know how it works in practice. As a general note, we can see a trend that online platforms are expected to act more responsibly in relation to the content they host. This entails more liability for the platforms. Platforms are the gatekeepers in the online environment, and the European legislator is hence pushing for more regulation on online platforms. All of this is still very specific to Europe. However, if the EU legislators' efforts prove to be successful then the law would certainly be replicated in other jurisdictions. Still, if these efforts prove to create bad laws, then we might catch ourselves with a huge competitive disadvantage and end up creating a lot of damage to different sectors.

Going back to more classical issues of copyright law, we know that video games are a complex subject matter. These are traditional issues of copyright law that have been discussed for years. However, we should take it to a modern setting - for instance, consumers get access to their games through gaming platforms such as Steam. From a copyright perspective it might be relevant to ponder what kind of an act it is. Is the online access of a video game an act of distribution, i.e. sale, or an act of communication to the public? From a copyright perspective there are direct consequences whether the act is categorized as a sale or as a license. A sale of a copy is exhausted once the product has been lawfully

distributed. But there is no exhaustion of communication to the public right. There are additional difficulties from a copyright perspective since the EU copyright law struggles with the categorization of the video games, i.e. are they software or audiovisual works? The EU copyright law has two different legal instruments, the « InfoSoc » Directive for general copyright protected subject matter and the Software Directive which is a *lex specialis* in relation to the InfoSoc Directive. This has ramifications for consumers and defines what the consumers can and cannot do from a copyright law perspective, because of the existence or non-existence of exhaustion of copyright. The Tom Kabinet ruling (C-263/18) from the CJEU concerning e-books, which are closest to video games of all the copyright cases, touched upon the issues of sale or license and secondary markets (i.e. the issue of digital exhaustion). The Nintendo case established that video games are complex subject matter. From the Court's case law, a conclusion can be made, that in order to establish in which category a work belongs to, we need to look at the whole work and think about what the main feature of the work is. So, for instance concerning e-books, the Court noted that the software of the e-book, is only incidental in relation to the whole book. Applying this to modern video games, are video games purchased because of the fantastic elements of the software? Or, is there more to it? The Nintendo ruling already pointed out that there is more to it. However, it should be also noted that software development is a huge part of modern video games, and on the basis of that, there are interesting cases from the national courts in France and Germany dissecting the video games.

**Alina Trapova** continued by presenting a question to Andrea Rizzi, on whether the video games on Steam are purchased (sale) or subscribed (licence) and according to Andrea Rizzi, video games are subscribed through Steam. Carmelo Fontana continued by drawing a parallel to the music industry where consumers do not really want to buy the songs for ownership anymore, but are rather paying a standard fee in order to gain access to the musical works. We are moving towards a development where consumption of everything

will be based on subscription.

**Alina Trapova** agreed that the subscription model is definitely a trend we are heading towards. Alina Trapova has co-authored to an article, where the authors actually unpacked the video games from the perspective of sale vs. license dichotomy and from the perspective of goods vs. services dichotomy. It is important to recognize the difference between sale and license, concerning the contract between game developers and game consumers (players), and separate that discussion from the goods vs. services discussion. These concepts overlap but there are some differences between them. As a player, you are getting access to all the services the game developer provides, but that is something different from the sale vs. license discussion. There is an appeal case from a Paris Court, concerning the question whether the Steam accounts of the players are subject to exhaustion or not. The Paris court did not go down our way and the game industry was upset about the ruling. It is important to note that in these types of cases IP questions do not appear in a vacuum but are closely related to consumer law. Consumer law might also have something to say about expansive end-user license agreements ('EULAs').

**Andrea Rizzi** added that these questions remain central because the exhaustion debate directly affects the possibility of having secondary markets for video games. This is also a possibility that the right holders have for long tried to prevent : since we have entered a situation where games are offered as a service or as a platform, the transfer of ownership in the digital environment comes with complexity.

### **3: WHAT ARE THE SENSITIVE ISSUES CONCERNING THE RELATIONSHIP WITH THE THIRD PARTIES, CREATORS, COMPETITORS, AND WHAT IS THE IMPACT ON THE INDUSTRY AND IP LAW ?**

**Andrea Rizzi** reminded us that the sophistication of video games has increased significantly and reached a state of the art that is not always recognized. The reproduction of real life persons or icons in video games is an expressive medium to provide realism. However, it creates a tension between the expressive right of the developer, using the material

protected by IP rights (trademark, copyright) and the right holder of those rights. In order to be lawfully distributed, a video game has to be lawful and avoid infringing existing third parties' copyrights. Otherwise it could be subject to an injunction and its distribution could be blocked.

The territorial nature of IP rights, on the one hand, and the need of a global market for the video game distribution, on the other hand, represent a challenge for the lawyers and the game developers. Particularly this is an issue concerning image rights, since there is a lack of harmonisation of image rights at an international level. This issue can be problematic, especially when the game developers want to include a famous person/celebrity in their video game, for historical settings for instance. **Andrea Rizzi** emphasized that the inclusion of an image of a celebrity can add to the realistic setting of a video game and therefore enables the developer to achieve a creative effort. It is also often used as a narrative tool. It is therefore complicated to ensure a balance between the freedom of expression of the developer and the celebrities' right to control their image. Carmelo Fontana also added that in terms of clearing the third party image rights, the development we see in the gaming industry has some resemblance to the movie industry and online streaming platforms (such as Netflix, Amazon & YouTube).

### **4: IN THE LIGHT OF THE RECENT MICROSOFT'S ACTIVISION BLIZZARD ACQUISITION, SHOULD WE FEAR THAT PORTABILITY OR COMPATIBILITY PROBLEMS WILL ARISE BETWEEN THE GAMES AND PLATFORMS ? ALSO, DO YOU THINK IT WILL GIVE MORE POWER TO THE CLOUD GAMING SYSTEM?**

**Alina Trapova** firstly specified that the US antitrust authorities will have a final say concerning the acquisition. With regard to cloud gaming, this will bring the same-old topics from the copyright perspective: distri-

bution right vs. right of communication to the public : « it is just an old wine in a new bottle, perhaps » ! Litigation will also likely arise concerning this dilemma.

**Andrea Rizzi** considered that cloud gaming is clearly the future. However, the key question is whether the technology or the infrastructure is ready to support it. We move towards this direction, like it is the case for mobile games, due to the massive increase in video game players.

Regarding the risk of a compatibility issue, **Andrea Rizzi** highlights that there is still no market definition applicable to the video game industry. Actually, during the significant merger business combination between Vivendi Games and Activision in 2008, the European Commission did not even state a clear definition of what a relevant market should be, in order to better assess the deal. According to **Andrea Rizzi**, it says a lot about the characteristic lack of attention/ sophistication by the authorities towards the video game industry.

The antitrust legal framework is still under-developed as it has been applied to the video games industry, it will surely be an area vastly evolving in future years and the proposed acquisition of Activision Blizzard by Microsoft of recent announcement will be the first opportunity for the European Commission and other antitrust Authorities to look at market definition(s) and other antitrust concepts in today's context. From an antitrust perspective, the e-sports industry, where a video game's title is administered by one publisher owning the exclusive rights to the title being played competitively, very often in the absence of any specific State-regulation, raise delicate antitrust issues also.

## 5: CAN USERS' CREATIONS (IN MINECRAFT FOR INSTANCE) BE PROTECTED AS IP ? HOW TO DEAL WITH THE TERMS & CONDITIONS OF THE VIDEO GAME PLATFORMS?

**Alina Trapova** raised the question of whether the user's creations protectable with IP rights actually stand in opposition to game company rights. So, who will benefit from IP protection, the Minecraft player or the publisher (Mojang Studios)?

This question appears in many different perspectives, especially through the appli-

cation of artificial Intelligence and machine learning systems. In fact, several countries already have a provision in copyright Law that grant protection for computer generated work (UK and Ireland).

**Alina Trapova** explained that it would really depend on the level of freedom and creative choices that the player enjoys. Expressing as a user your own intellectual creative choices would be the crucial element to grant copyright protection.

It is therefore very difficult to reach the conclusion that players will automatically received a copyright claim on their creations, because the video game comes through the design of the programmer. Indeed, **Alina Trapova** says that it is important not to forget that the user operates with a creative constraint : « You can't go beyond the digital world delimited by the initial developers, so you may not be able to fully express yourself »

**Andrea Rizzi** pointed out that when he started as an in-house counsel for Activision Blizzard in 2008, there was almost an obsession for the publishers and the developers to actually own any piece of user generated content. This was probably driven by the fear of potential copyright claims. As of today we are seeing, a more relaxed approach whereby often the ownership of user generated content is left with the user and is not acquired. This is seen also as a fairer way to engage with the community, who may add value, especially in the imaginary world, which is constantly updated and novel. This is a shift in the way users and contributors are perceived in this new environment.

**Carmelo Fontana** added that from a his practical view, this is also consistent with the online platforms and social media services T&C's, which establish that social media platforms do not really want to wholly acquire the rights of the user-generated content from the user. A license is technically sufficient to operate the services and the platforms are not interested in whether the user can make re-distributions or transfer the content to another service. In fact, the concept of portability

is getting more and more recognised in the online environment.

**6: CONSIDERING THE CURRENT CRYPTO TREND AND ASSIGNING NFTS TO GAMES - WHAT ARE YOUR THOUGHTS ON THE USE OF A NFT TECHNOLOGY TO ACTUALLY ASSIGN AN IP RIGHT (WHICH IS MOSTLY WHAT HAPPENS WHEN SOMEONE ACQUIRES A SKIN/WEAPON IN SUCH KIND OF GAMES)?**

**Alina Trapova** noted that the Non Fungible Tokens (NFTs) are already having an impact on how businesses operate and many actors in the market are adjusting to them. It is true that NFTs constitute a sort of certificate of ownership of a digital good. They have the characteristics of being limited and exclusive in quantity. So, for example Fortnite skins are being offered as NFTs. Ownership of an NFT, however, should not be confused with the ownership of IP rights. It is also worth remembering that games are a complex subject matter that cannot be solely categorized as software or as audiovisual content. So we will see what the future brings us but we have to be careful about the very basics of law: the ownership of an NFT does not equal to owning an IP right. **Andrea Rizzi** added agreeingly that NFTs probably have nothing to do with the ownership of IP, at least at this point in time.

As a conclusive remark, **Manuel Desantes Real** referred to a comment made by a Participant to the current Encounter that he found perfectly summarising the debate: the discussion in the 18th Digital Encounter only proved that the video games have always challenged the limits of IP law and will continue to do so.

**Eetu Huhta and Adele Serio**

Fide and TIPSA (Transatlantic Intellectual Property Academy) join forces to organize a serial of digital encounters to try and find out if Intellectual Property is equipped to face the ongoing changes that our world is experiencing.

All online encounters are opened to any interested person and speakers have been selected among the most relevant IP scholars and professionals all over the world.

The Global Digital Encounters form integral part of the solidarity projects run by both organizations to support the international, European and national plans to overcome the sanitary and financial consequences of the COVID-19

