Kluwer Copyright Blog

Germany: The Federal Supreme Court rules on World of Warcraft

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*Computer games are becoming more and more important, not only in everyday life but also in legal theory. The German Federal Supreme Court has now issued a decision on the online game World of Warcraft (*decision of 06.10.2016, I ZR 25/15 – World of Warcraft I). *In this decision, the Court addressed questions regarding the interaction between software copyright, copyright contract law and general contract law. The decision is to be interpreted against the background of the SAS decision of the Court of Justice of the European Union (*C-406/10 – SAS Institute Inc./World Programming Ltd), *as well as the Half Life decision of the Federal Supreme Court (Federal Supreme Court,* MMR 2010, 771 – Half Life 2) *and the series of decisions regarding so-called used software (the UsedSoft cases) (*C-128/11 – UsedSoft/Oracle; *Federal Supreme Court,* GRUR 2011, 418 – Used Soft*; Federal Supreme Court,* GRUR 2014, 264 – Used Soft II; *Federal Supreme Court,* GRUR 2015, 772 – Used Soft III). *Finally, Germany has a robust law with regard to general terms and conditions which has to be interwoven into this set of legal questions and which has a significant impact on the dogmas of copyright contract law.*

The issue in dispute addressed in this decision relates to typical online games, in addition to the game *Diablo* (one of the most well-known) and the computer game *World of Warcraft*. Such *games* now achieve more revenue than many a Hollywood film. As with all computer games, they comprise – in addition to the software controlling the game – what the Federal Supreme Court has termed game data, i.e. graphics, music and text, but also – as expressed by the Federal Supreme Court – "film sequences" and "models". These types of games are always operated with so-called EULAs (end user licence agreements). In the case in question, the EULA for the computer game *World of Warcraft* contains among other things the phrases that rights of use granted would be "revocable" and "not transferable" and also an express ban on pursuing a commercial purpose with the game. The EULA for the computer game *Diablo* also contained an express ban on the use of so-called *bots*. *Bots* are themselves computer programs; their purpose is to enable automation with which the player can further develop his game character simply and without time-consuming and – as the Federal Supreme Court puts it – "playfully charming" actions. They are widely distributed in online games. In the case at issue, the defendant operated bots of this kind.

The only issue in dispute was the unauthorised duplication of the computer games. The claims before the Federal Supreme Court only concerned copyright law. Claims of a contractual nature had in the meantime been referred to another court.

In accordance with the implementation of representative action and with regard to issues of the

abuse of legal rights due to various other pending proceedings, which are not of interest here, the Federal Supreme Court first addressed an important topic in practice, the definition of the writ of summons in disputes regarding computer programs and other technical subjects. The Federal Supreme Court emphasised that a writ of summons is only adequately defined within the meaning of § 253 of the German Code of Civil Procedure if it uses general terms to describe the action to be prohibited. Nevertheless, it is a prerequisite that the meaning of the terms used not be in doubt, with the result that the scope of the claim and decision is certain (I ZR 25/15, marginal number 29 – World of Warcraft I). This aspect of jurisprudence, which up to now has fundamentally applied to questions of competition law, can now also be used in copyright law, as designations such as the name of the software and (also in detail) a restriction "for commercial purposes" are adequately defined within the meaning of the case law of the Federal Supreme Court (I ZR 25/15, marginal number 30ff. – World of Warcraft I).

After this procedural recital, the Federal Supreme Court next addressed the object of protection in the dispute, namely the computer game. It is at this point that we already start to see the unanswered questions that the decision generates. The Federal Supreme Court started its discussion regarding the object of protection by saying that it is talking about the "client software" for the online games "World of Warcraft" and "Diablo 3". It then goes on to state that this software consists of not only a computer program, but also of audio-visual game data. Even this formulation is imprecise as it is not the client software that consists of a computer program and game data, rather the computer game itself consists of the computer program controlling it and the game data that enables the game result. It is true that the Federal Supreme Court differentiates between the components of a computer game, i.e. the text and the music among other things, and argues that these components can be protected by copyright "or participate in the originality of the overall work and enjoy copyright protection together with the latter" (I ZR 25/15, marginal number 34 – *World of Warcraft I* with reference to *CJEU*, C-355/12, marginal note 23 – Nintendo / PC-Box and 9net and *Federal Supreme Court*, GRUR 2013, 1035, marginal note 20 – Videogame / Consoles I amongst others). Unfortunately, however, the Federal Supreme Court does not continue with this statement. Although it recognises that a computer game represents an overall whole unit consisting of several components relevant under copyright law, it does not address the question as to whether separate complete work protection applies to this overall whole unit or whether each of the parts enjoys individual protection. This would have been important to clarify the question as to whether the separate respective copyright standards apply for each of these components of the overall whole or whether – as supported by *Bullinger* and the authors – one must decide on certain issues under copyright law and one cannot cumulatively use all the feasible applicable copyright law standards (*Bullinger/Czychowski*, GRUR 2011, 19, 22-24). It is too simplistic for the Federal Supreme Court to refer in this respect to the CJEU's *Nintendo* decision; this had not recognised the importance of the question and is not immediately relevant in this case (I ZR 25/15, marginal number 34 – World of Warcraft I with reference to *CJEU*, C-355/12, marginal note 23 – Nintendo / PC-Box and 9net).

The fact that the Federal Supreme Court is not consistent in this respect is also evident from its arguments with respect to the intrusions into the rights of the computer game manufacturer. It identifies the latter as duplication rights and does not quote either § 16 or § 69c (1) of the UrhG [German Copyright Act], but instead talks about a "duplication of the client software" in accordance with §§ 69c (1), 15 (1), of the UrhG (I ZR 25/15, marginal number 36 – World of Warcraft I). It therefore cumulatively uses general rights of use under copyright law with the special duplication right for computer programs, without differentiating which right is to be applied to which component of the computer game.

The Federal Supreme Court quite rightly makes clear in this context that the mere display on the screen of works contained in the client software does not represent independent duplication, which is completely in line with existing case law up to this point and with overwhelming opinion in the literature (I ZR 25/15, marginal number 38 – World of Warcraft I).

A dogmatic but fully correct position is then taken by the Federal Supreme Court as to whether there is a justification for the manufacture of automation software and the use thereof, if not in the licence agreement (cf. under Clause 3 in this respect), then from § 69d (3) of the UrhG. It outlines the scope of § 69d (3) of the UrhG, which has only been the subject of a few decisions, and states that § 69d (3) of the UrhG only covers forms of program analysis that are not connected with an intrusion on the program code (I ZR 25/15, marginal number 57 – World of Warcraft I). This can be readily agreed with – in particular the Federal Supreme Court makes clear that invoking § 69d (3) of the UrhG does not require access to the source code and certainly does not grant this (I ZR 25/15, marginal number 61 – World of Warcraft I).

The Federal Supreme Court thus goes so far as permitting duplications via § 69d (3) of the UrhG that go far beyond the actual objective of § 69d (3) of the UrhG, namely to enable interoperability. The Federal Supreme Court compares the current case with the CJEU case *SAS Institute (*I ZR 25/15, marginal number 61 – World of Warcraft I). In this case, the CJEU determined that functionalities of computer programs cannot be part of protection under copyright law. The Federal Supreme Court applies this idea: not only is the development of alternative software permitted, but also the development of additional software. This goes a long way, but appears to be correct according to the provisions of the Software Directive. These can be clearly recognised in recitals 10 and 15, to the effect that it wants to promote the interoperability and interaction between independently created computer programs. Even though the Federal Supreme Court does not mention this, the argument must be accepted.

The Federal Supreme Court also takes from this decision that, in the current case, the manufacture of automation bots in accordance with § 69d (3) of the UrhG would actually be permissible even though commercial use had been banned under the licence agreement (as general terms and conditions, although not included) (I ZR 25/15, marginal number 63 – World of Warcraft I). It is clear at this point that the plaintiff has achieved a pyrrhic victory, as the Federal Supreme Court is basically of the opinion that the development of bots in accordance with § 69d (3) of the UrhG is permissible – a very broad view.

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