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Kiran Sandford, Editor In Chief

Mishcon de Reya, London, UK

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Are Online Video Games in a Regulation Free Zone?

Phillip Carnell, CMS Cameron McKenna LLP, London, UK

In June 2007, the British Board of Film Classification (BBFC) took the relatively unusual step of refusing to grant a certificate for the video game *Manhunt 2*. Left with little choice, the publishers of the game, Take-Two Interactive Software (owner of Rockstar Games), decided to withdraw the game from sale in the UK while they decided whether or not to appeal the BBFC's decision. The game was also banned in other countries, including, amongst others, Ireland, Italy, Switzerland and Germany.

On the other side of the Atlantic, in the US and Canada, the game was also effectively banned when the Entertainment Software Rating Board (ESRB) awarded it an AO (Adults Only) rating, which is the highest possible rating. However, unlike the decision of the BBFC in the UK, the decision of the ESRB did not make it an offence to supply the game in the US and Canada. Instead, the decision meant that the majority of retailers in the US and Canada would simply refuse to stock the game.

Both the application of criminal law in the UK and the application of a voluntary code of practice in the US and Canada resulted in the release of the game effectively being regulated so that the game was banned.

One platform for which *Manhunt 2* was developed is the Nintendo Wii, which provides a download service for its users (only older generation games are offered for download at the moment). Similarly, Microsoft's Xbox Live service allows games and game demos to be downloaded onto Xbox consoles and has more than 7.1 million users. Valve Software, the creator of the *Half-Life 2* computer game, operates a download service called 'Steam' for PCs. A recent Valve press release (May 2007) reports that Steam has more than 13 million users, all of whom can purchase and download new games. It would therefore appear to be both technically possible and commercially feasible for Take-Two Interactive Software to offer *Manhunt 2* for download rather than to license the game for sale on disc.

This therefore begs the question: to what extent would the game have been regulated if, rather than being offered for sale on a physical data carrier, such as a DVD, the game had been offered for download instead?

BBFC powers

The BBFC's powers in respect of video games are found in the Video Recordings Act 1984 (the "Act"). The Act applies to all Video Works, the definition of which is very wide and includes "any series of visual images" which are produced electronically by the use of any "device capable of storing data electronically". Normally, video games are exempted from the provisions of the Act (and therefore the remit of the BBFC). However, they are not exempted if, to a significant extent, they depict: (a) human sexual activity; (b) gross violence towards humans or animals; (c) human genital organs or human excretory functions; or (d) techniques likely to be useful in, stimulate or encourage the commission of offences. If a video game is not exempted, it becomes subject to the classification regime contained in the Act as if it was a film.

There are a number of serious criminal offences in the Act. It is an offence to supply, offer to supply, or possess with an intention to supply, a not-exempted uncertified game. This carries a maximum penalty of an unlimited fine and imprisonment for up to two years. It is also an offence to supply a game to a person below the age specified in the classification awarded by the BBFC (e.g. U, PG, 12, 15, or 18). The maximum penalty for this is a £5,000 fine and imprisonment for up to six months.

The Act was created when access to high-speed Internet connections was limited and, therefore, at a time when it was not technically feasible to download video games of the type which required classification. As a result, the wording of the Act is not clear as to whether or not it applies to downloaded games and there are no court decisions on point. However, although the Act will apply to video games that are sold on the Internet (e.g. via an online retailer) and which are delivered on disc, the wording would appear not to apply to video games which are offered for download.

The definition of "supply" in the Act is very wide and includes any manner of supply. However, the definition of "video recording", to which the sections in the Act containing the offences all refer, is: any disc, magnetic tape "or any other device capable of storing data electronically". The Act therefore requires that a "device" be supplied, rather than just the video game. It is therefore unlikely that the Act applies to video games that are offered for download only.

There are other criminal laws in the UK which apply to the content of video games. For example, video games which incite hatred may be subject to the Public Order Act 1986, and games which contain obscene images may be subject to the Obscene Publications Acts 1959 and 1964. However, none of the other criminal laws requires that video games are classified or provide for a public body to review the video games and to regulate or to provide guidance on their content.

Unless and until the Act is amended, it would therefore appear that the publishers of Manhunt 2 would be able to offer the (unclassified) game for download in the UK without committing an offence.

The fact that video games offered for download appear to be unregulated has led to some games publishers selling video games on disc which have been classified by the BBFC, but offering special downloads for the game which later affect their content. The new game (with new content unlocked or added by the download) may not have been given the classification awarded by the BBFC or, in some situations, it may not have been classified at all. The best known example of this is the "hot-coffee" modification for the Grand Theft Auto: San Andreas game, for which a simple download revealed a sex-themed mini-game within the full game.

ESRB and PEGI

The ESRB in the US and Canada, and the Pan European Game Information (PEGI) in Europe, both operate voluntary schemes to which video game creators, publishers, and retailers are all encouraged to join. Both organisations have a code of practice which regulates the conduct of members and the ESRB also has binding terms and conditions which it states it can enforce against its members to ensure that the code of practice is complied with. Both classify games with an age and content rating system designed to inform parents and others about the content of video games before they are purchased.

Neither the ESRB or PEGI has the ability to ban a video game or criminalise its distribution. However, retailers which are members of the schemes, which will include the majority of large retailers, will enforce the content ratings given and may refuse to stock games which have not been given a rating. In the US and Canada, an Adults Only (AO) rating will effectively result in a video game being commercially unsuccessful because the majority of large retailers (such as Wal-Mart) will refuse to sell the game. European retailers appear happy to sell 18+ rated games, although the higher age rating may affect sales of the video game.

Both the ESRB and PEGI will provide a rating for any game submitted to it by one of its members, and a video game that is intended to be distributed online can be submitted for a rating. In July this year, PEGI announced a new rating for online games. Games publishers will be able to add a new "PEGI Online" logo to their promotional material for a game if they have signed up to PEGI's online safety code and framework contract. This includes an obligation to keep the website *"free from illegal and offensive content created by users and any undesirable links, as well as measures for the protection of young people and their privacy when engaging in online gameplay."* There is also an obligation only to include content in the online game which has received a rating from PEGI.

Many websites which offer games for download (e.g. Microsoft's MSN site) will only offer games which have received an ESRB and/or PEGI rating. Similarly, Microsoft, Nintendo and Sony, the three key players in the games console industry will not allow a video game to be downloaded over their proprietary download services unless it has received an ESRB or PEGI rating. A similar culture of industry self-enforcement is therefore developing in relation to online video games, particularly in relation to video games for games consoles; if the game is not rated, the large download sites may refuse to offer the game for download. However, this may only have a limited effect on video games released for a PC, because the games' publisher could easily offer the game for download on its own website.

Conclusion

In the UK at least, online games and video games offered for download do not appear to be subject to any legally enforceable regulation. The games will be subject to criminal laws which apply to all downloadable content, such as the laws relating to the distribution of obscene images, but there appears to be no requirement to submit downloadable ultra violent or games featuring sexual content for classification. Industry bodies operating the voluntary codes of practice may have the power to regulate and potentially prevent the

release of online games for games consoles, but it may be some time before that power spreads to affect the distribution of online games for PCs.

Phillip Carnell
CMS Cameron McKenna LLP

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Three-Dimensional Trademarks a Difficult Protection in the European Community

Sabine Lipovetsky, Kahn & Associates, Paris, France

Three-dimensional shapes are protectable as trademarks in the European Community. Section 4 of Regulation n°40/94/EC dated December 20, 1993 on the Community trademark expressly states that the shape of goods or of their packaging can be registered as community trademarks and designate goods and services.

However, the decisions of the European Community jurisdictions with regard to the validity of three-dimensional trademarks reveal the difficulties in obtaining the protection of shapes of goods or packaging as trademarks. Those difficulties have been once more demonstrated in the decision of the Court of First Instance of the European Communities dated May 23, 2007¹, with respect to the validity of a trademark which consisted of the shape of a detergent tablet, which was a white square with a colourful flower encrusted on the top.

The Court of First Instance of the European Communities considered that the shape of the detergent tablet could not be protected as a trademark, as it did not enable consumers to identify the commercial origin of the product. The main function of trademarks is indeed to identify the commercial origin of the products they refer to.

The Court of First Instance of the European Communities specified that the distinctiveness of three-dimensional trademarks must be appreciated with regard to the presumed expectation of an average consumer, normally informed and reasonably alert and aware. With respect to daily consumption goods, such as detergent tablets, the shape of such goods does not attract the attention of the average consumer as much as other trademarks. Indeed, the average consumer is not used to presuming the origin of goods from their shape or the shape of their packaging. Three-dimensional trademarks should be made of shapes which are very different from the standard shapes used in the relevant industrial branch, in order to be immediately analyzed by consumers as the indication of the origin of the goods.

This decision demonstrates that despite the provisions of the Community Trademark Regulation specifying that the distinctiveness criteria are the same for all types of trademarks, the examination of the validity of the three-dimensional trademarks by the judges of the Court of First Instance of the European Communities is more severe than for other figurative or verbal trademarks.

It appears that there is a real difficulty in registering and then securing the protection of a product shape as a three-dimensional trademark on the basis of distinctiveness. Such difficulty mainly concerns the protection of shapes as such (« naked » shapes). The combination of the shape with other elements such as words or designs increase the chance of having a three-dimensional trademark registered.

In view of the current European case law, there is a real advantage in filing first - or in parallel with a trademark filing - a Community design to protect the shape of a product or its packaging. The Community design may protect three-dimensional industrial design (including shape) and constitutes a good basis for the holder to defend its rights. The main conditions to protecting a shape are the originality and individual character of the design. A design is considered original when created independently by its author without copying or imitating a previous design. The criteria of the individual character is met when the general impression given to the user differs from the impression produced by any other previous product.

The right to a trademark will more easily be obtained later on as the effective use of the shape for a certain period of time may give it a distinctive nature.

The Community trademark protection has for advantage to be unlimited while the Community design protection may not exceed 25 years.

Interestingly trademark and design protection may coexist if the shape fulfils the requirements for each form of protection.

Sabine Lipovetsky

¹ Court of First Instance of the European Communities, May 23, 2007, Procter & Gamble, n° T-241/05

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Blogging: The End Of Free Advertising

Susan Barty, CMS Cameron McKenna LLP, London, UK

Given the popular appeal and increasing influence on consumer behaviour of blogs, consumer rating websites and social networking websites, it is not surprising that advertisers have posed as independent consumers or bloggers for marketing purposes. L'Oreal, Sony, Wal-Mart are just some of the big names that have been accused (rightly or wrongly) of using agencies and individuals to post blogs, comments or reviews as part of a planned advertising campaign, all without declaring any kind of interest or revealing their true identity. This is sneaky, perhaps, but in many cases it is not illegal.

Not for much longer, however, as covert commercial blogging, otherwise known as "flogging", will be soon be banned by Brussels. Under new laws which are supposed to come into force at the start of 2008 (the UK is taking its usual lackadaisical approach and is implementing the law in April 2008) should commercial advertisers pose as consumers, for example on fake blogs, without revealing their true identity, they will subject themselves to both criminal and civil liability. This will not only apply to flogging, it will also apply to fake testimonies on consumer rating websites such as TripAdvisor, book reviews on Amazon, and activities on social networking sites such as Facebook.

The new rules are being brought in as a result of the EU's Unfair Commercial Practices Directive. This is designed to do exactly what it says on the tin - not only will it impose a general ban on unfair practices but will also include two main categories of unfair commercial practice: misleading practices and aggressive practices. Whether a commercial practice is unfair will be assessed in light of the effect it has, or is likely to have, on the average consumer's decision to buy.

The Directive catches all commercial organisations, big or small. The upshot is that all companies (including small companies and sole traders) will not be able to pay individual bloggers or professional agencies to post false or misleading blogs or reviews online, nor will they be able to do it themselves.

At this point it is probably worth pointing out that the directive is not just aimed at online activity and a number of commercial practices will be unfair in all circumstances. This Directive contains a "black list" of activities which must not be carried out. This list includes "falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer". In other words, companies will not be able to pretend to be someone else anymore, without clearly stating who they actually are.

But back to the web, and with sneaky marketing campaigns likely to be more effective than upfront marketing campaigns, what is stopping companies from simply risking it and

continuing existing practices?

Those that break the new rules risk both civil proceedings and criminal prosecution and when it comes to catching the guilty *in flagrante* (or possibly *in flog-rante*), the authorities will be allowed to make test purchases and enter premises without a warrant if necessary. But the crucial word here is “risk” - the government has already indicated that only serious infringements will be prosecuted, although it is probably best to assume that it will prod into action the Office of Fair Trading and Trading Standards, the chief enforcement agencies, should an illegal blog or product review gain a high profile in the press.

So, in six months (in the UK at least) the plug will be pulled on sneaky online marketers pretending to be members of the public. Of course, the new laws will not outlaw using these media, but advertisers will no longer be able to disguise themselves as a consumer and once it becomes clear that the blog or review is self-promotion some of its impact is likely to be lost. Whatever happens, the new laws are likely to leave advertising and marketing agencies scratching their heads as they think up new (legal) online marketing campaigns.

Susan Barty
Phillip Carnell
CMS Cameron McKenna LLP

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Corporate Securities Alert—eProxy Rules Are Now Effective for Large Accelerated Filers

Dan Winnike, Fenwick and West, LLP, Mountain View, California, US

This article outlines and explains amendments the Securities and Exchange Commission adopted in July 2007 regarding electronic availability of proxy materials. The new “eProxy rules” will enable shareholders to choose the means by which they access proxy materials. The potential ramifications of the Notice Only model versus the Full Set Delivery – from cost savings on printed materials to website hosting methods, reporting timelines, and compliance with California laws – are included in the implementation considerations and issues discussed.

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German Act on Data Retention in Force

Dr. Thomas Stögmüller, teclegal Habel Rechtsanwälte Partnerschaft, Munich, Germany

On 1 January 2008, in Germany the Act on Data Retention entered into force. This Act implements the EC-Data Retention Directive of 15 March 2006 and obliges telecommunications and Internet providers to retain traffic data for a period of six months. Such traffic data are for example the ID of the e-mail account of senders and receivers, the sender's IP address and the IP address assigned to each user for any Internet usage. During the legislation procedure it was discussed whether copyright owners should also have access to such traffic data in order to identify potential copyright infringers. Even though the new act does not grant such right, criminal prosecution authorities may have access to the retained traffic data in case a crime was committed by means of telecommunications. Therefore, copyright owners whose copyright might have been infringed by means of e-mail correspondence or via Internet can try to get information about the infringer through the criminal prosecution authorities which are authorized to access the retained traffic data.

Dr. Thomas Stögmüller
teclegal Habel Rechtsanwälte Partnerschaft

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Canada Announces Policy Framework for the Auction of Advanced Wireless Services (AWS) Radio Spectrum

Lorne Salzman, McCarthy Tétrault, Toronto, Canada

On November 28, 2007, Industry Minister Jim Prentice announced the policy framework for the auction in May 2008 of AWS spectrum in the 1.7/2.1 gigahertz (GHz) bands. A stated objective of the framework is to encourage new entry and foster more competition in the Canadian mobile wireless market.

The AWS auction design was hotly debated during much of 2007. On the one hand, potential new entrants sought spectrum set-asides and other measures to encourage new entry. On the other hand, the incumbent national mobile wireless operators and many other commentators argued that potential new entrants did not deserve any special treatment, and that all AWS spectrum should be auctioned to the highest bidder.

Minister Prentice has now settled that debate. Citing the goal of encouraging greater competition and further innovation, as well as lowering prices, improving service and providing more choices for consumers, the Minister has decided to set aside 40 megahertz (MHz) of bandwidth for new entrants while leaving 65 MHz available for all contenders to bid for. His decision follows a public consultation on how best to conduct the auction process for the available spectrum.

Under the policy framework, 90 MHz of AWS spectrum will be auctioned in six paired frequency blocks (three of 20 MHz bandwidth; three of 10 MHz), mirroring the block assignments in the US. Three of the blocks will be reserved for new entrants (one of 20 MHz; two of 10 MHz), while the other three will be open to all bidders. Blocks will be auctioned by geographic service area. Depending on the frequency block, the country will be divided into either 14 or 59 service areas for bidding and licensing purposes. In addition to the AWS spectrum, the upcoming auction will encompass two other spectrum blocks: One, a 10 MHz paired block at 1.9 GHz, is a potentially valuable block located in the band occupied by Personal Communications Services (PCS) licensees. The other is an unpaired 5 MHz block at 1670 MHz.

The policy framework also calls for:

- Mandatory digital roaming service for cellular, PCS and AWS licensees outside of their licensed territory for at least 10 years. (Roaming is the ability of a customer of one service provider to access the wireless service of another service provider.)
- Mandatory roaming service for new entrants inside their licensed territory for five years, with a possible extension in limited circumstances.
- Mandatory sharing of antenna towers and sites (with exceptions based on technical limits or national security concerns), and the prohibition of most exclusive site arrangements. The new rules will apply to virtually all tower operators, including broadcasters.
- Roaming and tower/site sharing arrangements are intended to be commercially negotiated by the parties involved. Impasses will be settled by binding commercial arbitration.

The auction announcement does not propose any changes to the Canadian ownership and control rules applicable to mobile wireless service providers. Although the continued appropriateness of these rules is being considered by the Competition Policy Review Panel recently appointed by the federal government, the panel's report will not be issued until after the auction is completed. Accordingly, auction participants intending to involve non-Canadians investors will need to take these complex rules into account as part of their auction preparation.

Details of the auction rules, and a more comprehensive timetable of events and deadlines, will be published in the next few weeks. Applications from bidders will be due in March 2008. The auction will begin on May 27, 2008.

For further information, see the Industry Canada website at http://strategis.ic.gc.ca/epic/site/smt-gst.nsf/en/h_sf01714e.html.

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German Federal Supreme Court Decides Liability of Web Forum Operators for Outside Contributions

Markus Häuser, CMS Hasche Sigle, Munich, Germany

As soon as operators of internet forums become aware of defamatory content in contributions posted in such forums, the injured party may demand that such content be blocked or removed. The 6th Senate for Civil Matters of the German Federal Supreme Court (BGH) has now decided by judgment of 27 March 2007 that this responsibility of the operator of an internet forum for contributions posted in the forum continues even if the injured party is aware of the identity of the author of the defamatory statements.

By this judgment the BGH reversed a judgment on appeal of the Higher Regional Court (OLG) of Düsseldorf, which had partly annulled the liability of operators of opinion forums as “disquietors” (“Störer”). The court had decided that the operator, was no longer to be held jointly liable once it had made known details of the user whose remarks potentially infringed the rights of a third party. Anyone who felt his rights had been infringed could, in such a case, ask the infringer to refrain from making the remarks.

By its judgment the BGH made clear that the injured party, irrespective of his claims against the author of the contribution objected to, has a claim for discontinuance against the forum operator from the time the forum operator obtains knowledge of the defamatory remarks. According to the BGH, this claim for discontinuance is also not precluded by the fact that the contribution was posted in an opinion forum.

The decision of the BGH would not seem surprising. It confirms once more the invariable practice of the courts and is in line with current law. Although under the new German Telemedia Act (see Section 8 paragraph 2 TMA) providers of telemedia services are under no obligation to monitor information transmitted or stored by them or to search for circumstances suggesting illegal activity, they do have to remove or block access to such content without delay as soon as this has come to their knowledge (Section 7 para. 2 TMA).

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