

Legal Regime of Avatars Created in the Framework of Video Games: Some Reflections in the Light of French and Other Legal Systems

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In the leisure industry, one fact is obvious: video games are becoming more and more widespread, both in Europe and in other parts of the world. It should be acknowledged that video game creators show constant imagination in order to develop new forms of ever more attractive games.

In particular, a growing interest is developing today around a new generation of games called *Massively Multiplayer On line Games* (MMOG). Being more and more complex, these games constitute in themselves a real legal challenge.

Their particularity lies in the fact that these games create a persistent virtual universe, perpetually evolving in an autonomous manner, independently of the actions taken by each player.³ The permanence of the

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3 Dossier du Forum des droits de l'Internet: Les jeux en réseau massivement multi-joueurs: Du virtuel au réel, p 4.

MMOG games is guaranteed by the game server which sometimes regroups hundreds of thousands of players connected simultaneously who interact by instant messaging or actions. This permanence implies an evolution of the game even when certain players are temporarily or completely disconnected from the game.

New technical possibilities offered by MMOGs raise a multitude of questions on the legal aspects, in particular the question of whether legal solutions which are applicable in the real world are transposable to the virtual and gaming worlds made up by the MMOGs. This problem is particularly pertinent concerning the virtual personalities and objects (called avatars) created by players in the framework of MMOGs. The legal regime of these virtual avatars is the subject of this discussion.

What are the rules applicable to these avatars concerning intellectual property? Should one attribute to the avatar the status of a work in the sense of the Intellectual Property regulations?

These questions relating to the legal regime of avatars are pertinent from two points of view.

On the one hand, we are witnessing the emergence of real commerce of virtual objects created by the intermediary of video games, and on the other hand the players, within the framework of the game, can lose their avatars, either because they have been stolen by an other player or because they have been removed from the game programme by the central server.

It is therefore legitimate to question whether the player, in such a case, can claim any rights or at least some form of protection of his avatar.

In examining these questions that we shall analyse the legal regime applicable in France to avatars created in the framework of video games.

Application of copyright in video games

The French (and more basically European) rules specific to copyright apply incontestably to video games as intellectual works. The principles of copyright apply not only to the video game itself which is recognised as a work susceptible of protection, but also to elements making up this type of game, notably the personalities which are created therein.

Video games, susceptible of protection by copyright

Both legal authorship and case law agree today to grant to the video game the quality of an intellectual work. As such, video games benefit from the protection conferred by Article L. 111-1 of the French Intellectual Property Code to any literary or any artistic work presenting an original character. The

solution is certain since the Court of Cassation delivered its judgments known as *Atari* and *Williams Electronics*,⁴ which ended the arduous controversies on the protection of video games by copyright. From this recognition of the video game as a work which is susceptible of protection by copyright, the inevitable question arises, which is less evident, to know who should be considered as the author of a video game.

The discussions and doctrinal controversies concerning the qualification of a video game as a collective work or a work of collaboration continue.⁵ Case law also has not succeeded in resolving the question and decisions have already been rendered in both directions.⁶ However, the stake of the argument is not small: it concerns notably how to determine who may enjoy the patrimonial rights attached to the video game. According to us, this question should receive a reply taking into account the particular circumstances of each case.

Fictional characters susceptible of protection by copyright

Legal authorship is today unanimous on the fact that a fictional character can be granted protection by copyright. It is the case, for example, of animated or cartoon characters, and *a fortiori* characters of video games presenting an original character. Although it is not abundant, case law also confirms protection of fictional characters by copyright.⁷ Thus, the Court of Cassation approved a decision of the judges on the merits, confirming that the character of a novel was an original work even if he was only constituted by a summary description.⁸ More recently, the Court of Appeal of Paris in another decision strengthened this position and decided that a fictional character may be qualified as an intellectual work when 'by his characteristic elements' he

4 Cass ass plén, 7 March 1986, *Atari et William Electronic: RIDA* Jul. 1986, p 134, note A. Lucas; see also JCP éd E 1986, 1, 15791, chron D Informatique by M Vivant and A Lucas, No 5.

5 On this point, see A Cheron, *Essai sur la qualification juridique d'un jeu vidéo*: www.afjv.com/juridique/051026_statut_juridique_jeux_video.htm.

6 Case-law rendered in the sense of a qualification of video games as collaborative works, v CA Paris, 2 April 2004, SA CRYO *Interactive Entertainment c/ Revillard*; case-law in the sense of a qualification of video games as collective works, v CA Versailles, 18 November 1999, *Jean-Marc c/ Havas Interactive Europe*.

7 A et H-J Lucas, *Traité de la propriété littéraire et artistique*, Paris, Litec, 1994, p 126; A Bertrand, *Le droit d'auteur et les droits voisins*, Paris, Masson, 1991, p 553 sq; A Strowel, *La protection des personnages par le droit d'auteur et le droit des marques*, in *Droit d'auteur et bande dessinée*, actes du colloque organisé par le centre belge de la bande dessinée, Bruxelles, Bruylant, 1997, p 37 sq H Leben, *Petit digest des droits d'auteur appliqués au jeu vidéo, ou comment Mortal Kombat est devenu une œuvre de l'esprit*: www.afjv.com/juridique/050609_droits_auteurs_jeux_video.htm.

8 Cass/1st civ, 5 May 1993, No 91-13664.

constitutes an original work in the sense of the French Intellectual Property Code (IPC).⁹ The originality of a character is appreciated according to the same criteria as any other intellectual work. In fact, ‘the choice of opting for a particular expression, transcribed in a written form in the combination of the aforementioned characteristics gives the character the personality of the author... this certain creative process grants to the character its own original aspect’.¹⁰

Likewise, the attitude of characters and their expressions should be taken into consideration in the appreciation of the imprint of the personality of the author and the originality of the characters.¹¹ Finally, very recently the Court of Cassation recognised the originality and the application of copyright to the character *Kid Lucky*, representing Lucky Luke junior.¹²

Therefore, and in conclusion, if it is original, the character shall be protected as such, that is to say independently of the work in which it evolves.¹³

These principles also apply to virtual original objects created within the framework of video games. By virtue of the principle dictated by articles 6bis of the Berne Convention for the protection of literary and artistic

9 CA Paris, 8 Sept 2004, SA Publicis Conseil et Luc Besson c/SA Gaumont et SA SFR. Translation of Art L122-1 of the IPC « The provisions of the present code protect the rights of authors on intellectual works whatever may be the genre, the form of expression, the merits or the destination ». See also the Berne convention for the protection of literary and artistic works of 9 September 1886 that states in Art 2.1 and 2.6:

‘1) The expression “literary and artistic works” shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

(...)

(6) The works mentioned in this Article shall enjoy protection in all countries of the Union. This protection shall operate for the benefit of the author and his successors in title.’

10 CA Paris, 18 November 2005: *Juris-Data*, No 289587.

11 CA Paris, 30 April 2002 : *Juris-Data*, No 187896, see also, TGI Paris, 28 May 2004; *Juris-Data*, No 249103.

12 Cass 1st civ, 21 November 2006: *RLDI* 2006/22, No 683, obs J-B. Auroux.

13 C Caron, *Droit d’auteur et droits voisins*, Litec, 2006, No 151, p 114.

works of 9 September 1886¹⁴ and L.113-1¹⁵ of the IPC, the player, who in the framework of a video game, creates an avatar or an object presenting an original character, should be granted a copyright on the work that he has conceived. The solution, however, is not so evident. In fact, the creators of the video games are granted in parallel a copyright on their game as a whole, which could allow them to claim copyright on the avatars created in the framework of the game which they have created. A real conflict of rights ensues: those of the video game creators on the one hand and those of the players on the other hand. Therefore, the essential question which arises concerning copyrights relating to avatars is 'that of the sharing of intellectual property between those who supply the framework of interaction and those who build within it'.¹⁶

The double protection of video games by copyright: title holders of rights on the avatar

The plurality of potential authors of avatars created within a video game

According to copyright rules, it would be legitimate to consider that the player, who uses his imagination to create an avatar imprinted with his personality, is granted a copyright on this avatar in the sense of the IPC.

However, certain video game creators also claim the title rights upon these avatars created within their game. This is why they do not hesitate to expropriate a character from a video game, to purely and simply delete an object from their game or even more, to sell it, without having to justify their actions to the concerned players.¹⁷

It is therefore legitimate to ask in the name of which rights or legal principles the video games creators claim to be authors, in the sense of the IPC of avatars created by the players.

In this respect, different theses are offered and confront each other in this matter.

14 Art 6 bis1 of the Berne Convention: 'Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.'

15 Art L 113-1 du CPI: The quality of author belongs, unless proved otherwise, to the person or persons under whose name the work is divulged.

16 M Fensollen, *L'économie réelle des univers persistants : vers une propriété virtuelle?*: www.gensollen.net/2007_gensollen_virtuel_court.pdf.

17 M Gensollen, *ibid.*

PLAYERS CANNOT BE GRANTED ANY RIGHTS ON THEIR AVATARS

A first theory, defended by the video games creators, consists in saying that the copyright on an avatar belongs to them, in their quality as owners of the pre-existing software. However, this theory is in itself incorrect in relation to the rules of copyright. In fact, the titleholder of rights on software is not automatically the titleholder of eventual rights on the creations which might interact with the former.

THE GRANTING OF COPYRIGHT TO THE PLAYER-CREATOR

Contrary to the preceding approach, the avatar created by a player in the framework of a videogame is considered as a work which is independent from the software through which it has been created. It results that the player who created an avatar may be granted a copyright to the avatar. In practice, it is obviously in relying on this theory that more and more players are claiming damages for the various attacks upon the copyright which they claim on their avatars.

In this respect, the recent case *Anshe Chung* is a good example. Anshe Chung is the name of an avatar created by a German called Ailin Graef, in the framework of the virtual universe *Second Life*. Anshe Chung granted an interview to CNET News.com in front of a virtual packed room, composed of a public of virtual avatars. Afterwards, the images of this interview were reproduced on the website YouTube.¹⁸ Arguing that Google, as owner of the site YouTube, had infringed the copyright which she held on her avatar, by diffusing images of the work without her authorisation, Ailin Graef managed to get Google to remove the disputed video from its site YouTube. In order to strengthen her claims, the player invoked the American law, the Digital Millennium Copyright Act (DMCA)¹⁹ of 1998 which had introduced a procedure allowing a copyright holder to require an internet service provider to remove from its site any content which infringed his rights.

On the question of paternity of avatars, A Cheron proposes a distinction between the different methods of creation of avatars. Indeed, creation of goods in a virtual universe can be done in two ways.²⁰ The first way of creating an object 'traditional crafting', consists in the gathering and merging of objects pre-existing in the concerned universe. In other words, the conceived object

18 D Terdiman, The legal Rights to your 'Second Life' Avatar: www.news.com/2102-1047_3-6147700.html.

19 *Digital Millenium Copyright Act*, public Law No 105-304, 112 Stat, 2860 (28 October 1998). This law implements two WIPO treaties; the copyright treaty and the performances and phonograms treaty.

20 A Cheron, L'application du droit dans l'univers virtuel persistant d'un jeu vidéo en ligne: www.cejem.com/article.php3?id_article=225.

already existed in the data of the central server before the player intervened. The intervention of the player simply therefore allows for the 'materialisation' of the object. According to the second way of creating an object called 'modern crafting', the player has a real modelling and creative tool for the avatar in three dimensions. This method offers the player enormous possibilities to model his avatar and to determine the shape, the size, the style or even the colour of the object which he wishes to create. This is, for example, the method which can be used in the famous virtual universe 'Second Life'.²¹

From a legal point of view, one must therefore distinguish between whether the relevant avatar has been created by means of traditional crafting or modern crafting. In the case of an avatar created from objects pre-existing in the database of the software, the concerned player will not be granted any intellectual property right on his avatar. On the contrary, if the avatar is created using the modern crafting method, the player may be a copyright titleholder, as long as the avatar thus created meets the condition of originality required by copyright. The approach proposed by A Cheron is interesting and is in line with the logic of copyright. In fact, it is important to remember that the criteria for protection granted by copyright is the original characteristic of the work in as much as an imprint of the personality of its author.

However, it is evident that the two methods explained above do not give the same latitude to the player in order to mark the imprint of his personality on the avatar that he creates.

The practical corollaries

REAL COMMERCE OF VIRTUAL OBJECTS

In practice, the problems tackled above have important implications.

The value of an avatar in the framework of a video game has become such that a real commerce has developed in virtual objects of video games.²² This real 'merchandising' of virtual objects manifests itself in different ways. Online sales sites for example offer to players the opportunity to buy virtual objects with real money.²³ Certain sites also offer to change real money into virtual money, a primordial tool which is evolving in the virtual universe of video games. Some players even go so far as to arrange for themselves the services of a personal mentor, a sort of 'particular teacher', who is in charge of guiding them through the game in return for payment.

21 It should be specified here that the avatars in the game Second Life can also be created by means of traditional crafting.

22 *Dossier du Forum des droits de l'Internet, op cit*, p 4.

23 From a legal point of view, it should concern the transfer of intellectual property rights with all the resulting consequences, notably concerning the validity conditions of the transfer of copyright.

This phenomenon of growing commercialisation has important consequences on the intellectual property level and thus on the level of the relationship with the editor.

On this level, moreover, even if no judicial decision has been rendered concerning intellectual property rights on avatars, foreign case law has already had the opportunity to judge on the basis of liability law.

Among the best known is the case *Red Moon Online*, which was brought before the Chinese judicial system.²⁴ In this case, the dispute was between a player called Li Hongcheng and the videogame editing company 'Beijing Artic Ice Technology'. The dispute concerned the virtual objects which the player had acquired in the framework of the game *Hongyue* and which he had then 'lost' following a pirate attack of the database of the game, the purpose of which was to virtually give these objects to a third party avatar. Following the loss of his avatar, Li Hongcheng decided to approach the Chinese courts. The decision rendered on 18 December 2003 is interesting for the Chinese solution and the arguments developed by the parties. However, it does not pronounce on the questions relating to intellectual property rights related to the avatars of a video game.

Li Hongcheng built his case on the fact that he had spent time, money and energy in acquiring the objects concerned. For its part, the editing company of the game argued that the avatars were simply 'piles of data' only existing in the framework of the game and therefore not granting any rights to the player outside of this game.²⁵

Without resolving the question of the intellectual property of 'stolen' objects, the Chinese court recognised however the liability of the editing company of the games and consequently ordered it to return the objects to their original owner. The decision was based on the fact that the editing company of the game was liable for the security failures inherent in its computer programme. Although this Chinese decision concerns only indirectly the 'ownership' of virtual objects created in a videogame, it illustrates that the possibility of granting rights to players on their avatars is progressively being taken into consideration.

In the same sense, the online auction company eBay announced recently its intention to terminate the sale of virtual objects on its site on the grounds that eBay did not have any intellectual property rights on these virtual objects or at least an authorisation to distribute from those who were their real authors.²⁶

24 Quote by S Gerrero, Vol virtuel... Condamnation réelle!: www.legal-biznext.com/droit/Vol-virtuel-Condamnation-reelle.

25 *Ibid.*

26 Declaration de Hani Durzi, Spokesperson of Ebay on the website Slashdot: www.games.slashdot.org.

AN IMPLICATION FROM CONTRACT LAW? USERS LICENSES

Video game creators try to implement safeguards against eventual claims of ownership exercised by the players against them or against other players. It is in this state of mind that the editors of games have been progressively led to establish game users' licences, consisting in implementing a lot of users' conditions governing notably the relations between players.²⁷ These users' conditions, accepted by the player, are an integral part of the contractual relation existing between the player and the editing company since the former has contracted for a subscription with the latter.²⁸ As an example, Article 8 of the users' conditions of the famous game World of Warcraft provides that 'Blizzard Entertainment does not recognise any ownership claim outside of the World of Warcraft, nor the sale, gift or exchange in the real world of anything whatsoever linked to World of Warcraft. In this sense, you do not have the authorisation to buy or sell virtual objects for "real" money, nor to exchange outside of the World of Warcraft. Please note that Blizzard Entertainment has the right to, and shall stop illegal sales'.²⁹ This clause should allow the editing company of the World of Warcraft game to take action in contract against any player involved in the commerce of objects resulting from the game.

In the case of a veritable creation of an avatar by a player, one can always doubt the efficiency of this type of clause in transferring the copyright of the creator-player to the editor. Indeed, for example in French law, a copyright transfer contract must notably specify the extent of the transferred rights as well as the place and the duration of exploitation of these rights.³⁰

Tort actions relating to avatars

The problem

Damage suffered by avatars or by players themselves in the framework of video games is more and more frequent. Actions in tort are likely to be brought before the courts and tribunals by players for damage they have suffered in the framework of the game in which they participate. This is notably the hypothesis of the case Li Hongcheng commented on above. Generally speaking, it may also concern cases in which a player loses virtual objects or

27 A Cheron, L'application du droit dans l'univers virtuel persistant d'un jeu vidéo en ligne: www.cejem.com/article.php3?id_article=225.

28 H Leben, *op cit*.

29 Conditions available on the homepage: www.wow-europe.com/fr/legal/termsofuse.html.

30 Art L 131-3 du CPI; s also on the conditions of copyright transfer: C Caron, *Droits d'auteur et droits voisins*, Paris, Litec, 2006, p 318 sq.

characters which he has created, whether this loss is due to the intervention of another player or even the intervention of the central server of the game. More astonishing is the possibility for the avatar of a player to be the victim of a 'virtual rape' perpetrated by the avatar of another player. This case occurred in 1993 when, in the framework of the video game *LambdaMOO*, an avatar called Mr Bungle raped another avatar. The player who was a victim of what he qualified as a crime attempted in vain to have the player responsible for the avatar Mr Bungle condemned to death.³¹

First of all, it is important to make the distinction here between the situations in which the avatar itself is the sole victim damaged, and those where the player has suffered a distinct personal damage. Evidently it is not the same rules which will apply to these very distinct situations.

In this respect, one should remember the fact that a video game of course remains governed by general conditions of use, which the player accepts before starting the game.

Thus, the creator of the game may always retain the right to delete an avatar from his game, because the latter has broken the rules of the game, for example, by raping another avatar, or making racist comments towards protagonists in the game. Concerning the case in which a player himself alleges a damage which he has personally suffered, logic implies that one should apply to this type of case the rules which are in force in matters of extra-contractual liability.

Application of the theory of 'accepted risk'?

It could be interesting to apply to the cases in which players suffer harm in the framework of an MMOG, the theory called 'accepted risk', currently applied in matters of sports liability.³² This doctrinal and case law theory tends to put 'a brake' on, to a certain degree, actions in liability instigated in sporting matters. It states that the victim of a damage suffered during a sporting activity had accepted the risk of suffering damage in advance.³³ One should specify here that the damage accepted by the sportsman is of course limited to the damage inherent to the activity in which he is participating. There is no question, for example, of covering damage resulting from a punch given by a golfer to another golfer, whereas this sort of damage is for example inherent in boxing and therefore covered by the theory of accepted risk.

31 J Dibell, *A rape in Cyberspace*, *Village Voice*, vol. XXXVIII, No 51, 1993.

32 A Cheron, *op. cit.*

33 Cass 2e civ, 10 April 1991: Bull, II, No 121, p 65; Le risque sportif et son assurance, www.jurisques.com/esport.doc.

In the case between the CPAM (primary medical insurance organisation) of Nantes and Olympique de Marseille the theory of accepted risk was applied for the first time. In this case, the CPAM filed an action against Olympique de Marseille (OM) for damage caused by one of the players of OM to a player of FC Nantes during a football match.³⁴ The court considered that the fault attributed to the player of OM could not engage the latter's civil liability, on the grounds that the engagement of civil liability in sporting matters must be appreciated in the particular framework of a sporting activity and of the acceptance of risks inherent in this type of activity.

The analogy of this case with the case where damage is caused to a player by the intermediary of an avatar is striking. From this point of view, it would therefore be conceivable to apply this theory to cases in which a player suffers damage in the framework of the virtual world of a video game. One could in this respect consider that by subscribing to a video game and by creating an avatar in the framework of this game, the player knows the risks inherent in this activity, and accepts the possible harmful consequences.

However, certain limits should be applied to the application of the theory of the acceptance of risks.

First of all, this theory does not allow one to do away with the notion of fault, whether it be contractual (relationship player-editor) or extra-contractual (relation players among themselves). On the contrary, this theory influences in reality the definition itself of extra-contractual fault. If the contractual fault can easily be defined (a failure of a contractual obligation) it is not the same for extra-contractual fault. The appreciation of the latter shall always be subject to the standard of the concerned activity and thus to the notion of accepted risk.

Furthermore, case law makes a selective application of this theory and subordinates it to a series of conditions. Thus, the application of this theory supposes that the danger or the risk in question is real, that it is known by the sportsman in all its components before he takes part in the activity in question and that the risk is consciously accepted.³⁵

Finally, it should be specified again that this theory only applies in principle in matters of extra-contractual liability, 'the accepted risk resulting from a unilateral undertaking of the victim, without exchange of consents'.³⁶ That said, the rules of the game (which may be contractual), like sporting rules, have an incidence on the notion of extra-contractual fault.³⁷

34 TGI Nantes 4e ch, 26 April 2001, *CPAM de Nantes c/ Blondeau, OM*.

35 F Bolot, L'activité sportive; une source de responsabilités: www.univ-littoral.fr/rech/even_scie/afrops/c4-1.rtf.

36 Definition on the web: www.anena.org/jurisque/thesaurus/texte/accept.htm.

37 In summary, the rape of an avatar in a video game for children is in our opinion always wrong, but may not be so even in certain games which, without being violent and/or pornographic games for adults, are intended to reproduce all aspects of human behavior existing in the real world.

This precision is important since it signifies that the theory of accepted risk cannot be applied in contractual relations existing between the player and the editing company of games. However, these relations, as we have seen above, are largely framed by the users' conditions accepted by the player during the conclusion of his subscription. These users' conditions can obviously include exoneration clauses or limitation of liability clauses in favour of the creators of video games.

Conclusion

The legal regime of an avatar created within a videogame raises different questions, to which it is possible to respond by applying principles existing in copyright law or by proceeding by analogy with another branches of law.

Concerning the question of intellectual property rights relating to an avatar of a video game, the principles which are specific to copyright quite simply destroy the theory according to which the creator of a video game would automatically be the titleholder of the copyright on the avatars created by the players.

Furthermore, if intellectual property rights are granted to players themselves on their avatars, a realistic solution adapted to the logic of copyright would mean that it was necessary to differentiate between avatars created through the technique of 'traditional crafting' and those created by 'modern crafting'. One should however remember that to be protected, an avatar created by means of 'modern crafting' must be 'original' in the sense of copyright.

Concerning the question of court actions instigated by players for damages which they have suffered themselves, or of which their avatar is a victim, two types of rules apply here, in a concomitant manner.

On the one hand, beyond the rules of liability, the general conditions of use of the game will apply in the relation between the editor and the players who contravene them.

On the other hand, the general rules of tort law will also apply between players. However, these rules will be developed or handled, as is done in sports law, by the theory called 'accepted risk'.