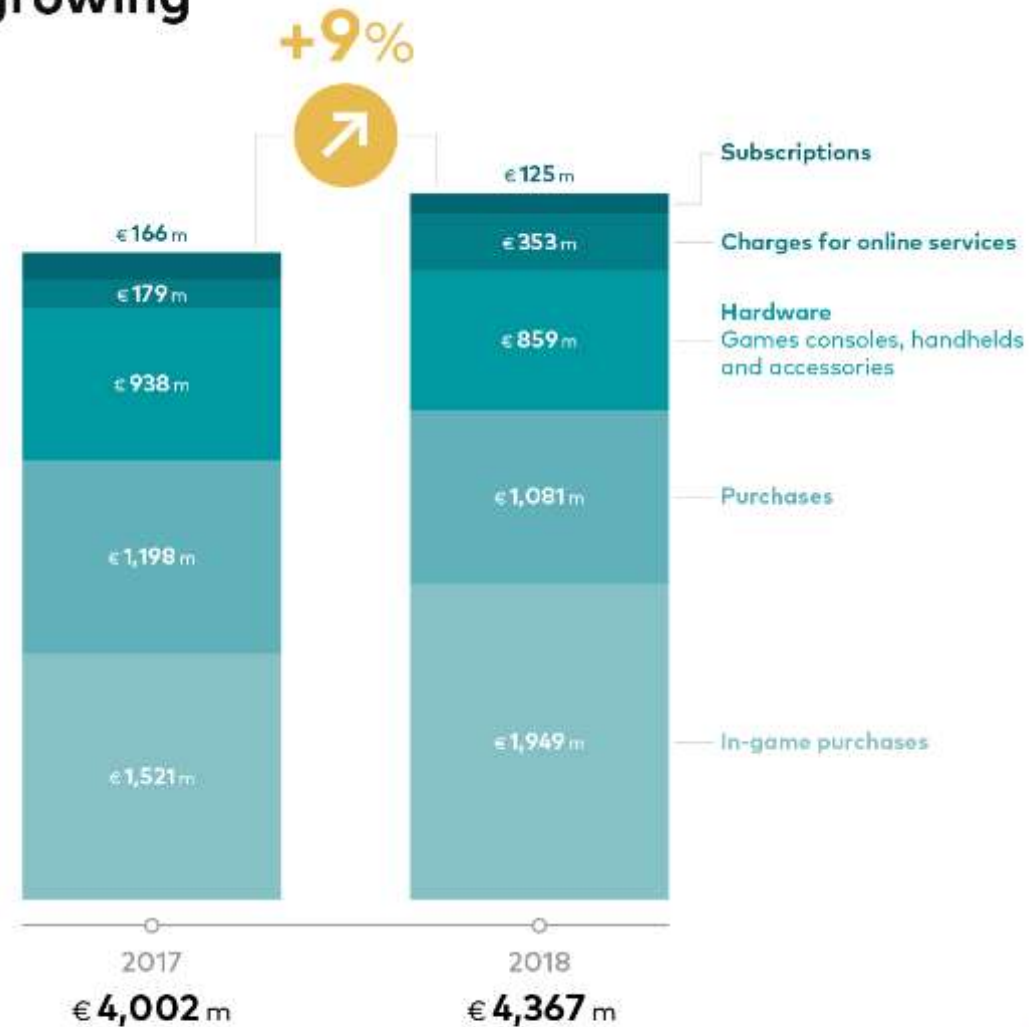




# Legal Update Germany 2018/2019

# The German market for computer and video games is growing



# Scope

Protection of  
Minors

Cases IP

Miscellaneous

- No loot boxes
- No GDPR
- No EU Copyright Directive

# Rating USK News: NS-Symbols

## Problem-free

- edutainment
- serious games
  - USK mark for Through the Darkest of Times (USK 12),
- Assassination 1942 (USK 12)

## It's a possibility:

- story-strong single-player games
- Clear opposition to the NS ideology

## Difficult:

- Story-free multiplayer games
- any" uncommented page break
- Equivalence of the warring parties
  - "Post Scriptum" no USK rating



# Wolfenstein II: The new Colossus" (US version) not banned

The Nintendo Switch game "Wolfenstein II: The new Colossus" (US version) was not indexed. The game uses a large number of anti-constitutional symbols. In the course of the plot, the players also encounter the character Adolf Hitler, who is drawn as a sick, confused and old man. In contrast to the procedural version of the game, a version adapted for the German market and marked by the USK contains strongly alienated references to the Third Reich.

“The mere fact that National Socialism is placed in a playful or entertaining media context does not yet lead to its banalization in the sense of a socio-ethical classification. Nor does the dramaturgy result in any glorifying or trivializing evaluation of National Socialism, since the actors of the Nazi regime are all negatively connotated during the course of the game, thus creating an unmistakable image of the enemy. The players encounter the National Socialists exclusively from the perspective of the resistance. At no time is it possible to join the National Socialists, to support them, to represent or defend the National Socialists' ideology in dialogues or to harm the resistance. The manner in which the fictitious Hitler drawing is drawn is also to be regarded as unsuitable for exerting a fascination on children and young people who are susceptible to the discussion of the advantages of an authoritarian leader state over democracy because of its consistently repulsive and pathetic character.”

# Cases IP

- BGH (Federal Court of Justice) 31.01.2019 – I ZR 97/17 (the right to the title of a work cannot be transferred without the rights in the work)
- BGH , Urt. v. 23.1.2019 – 5 StR 479/18 (Keyselling)
- Equitabel Remuneration

[...] the plaintiff had not lost his rights to the title of the work by granting the producer the copyrights to the pieces of music recorded by him during the term of the contract. Copyright cannot be transferred; only rights of use to the work can be granted [...] It follows from the accessoriness of the work title right that titles of works are not transferred either, but can only be granted rights of use.

# Context: Titles of works

- **Section 5 (German Trademark Act)**  
**Commercial designations**

(1) Company signs and titles of works shall enjoy protection as commercial designations.

(2) [...].

(3) Titles of works are the names or special designations of printed publications, cinematic works, music works, stage works or other comparable works.



# Keyselling: BGH 5 StR 479/18

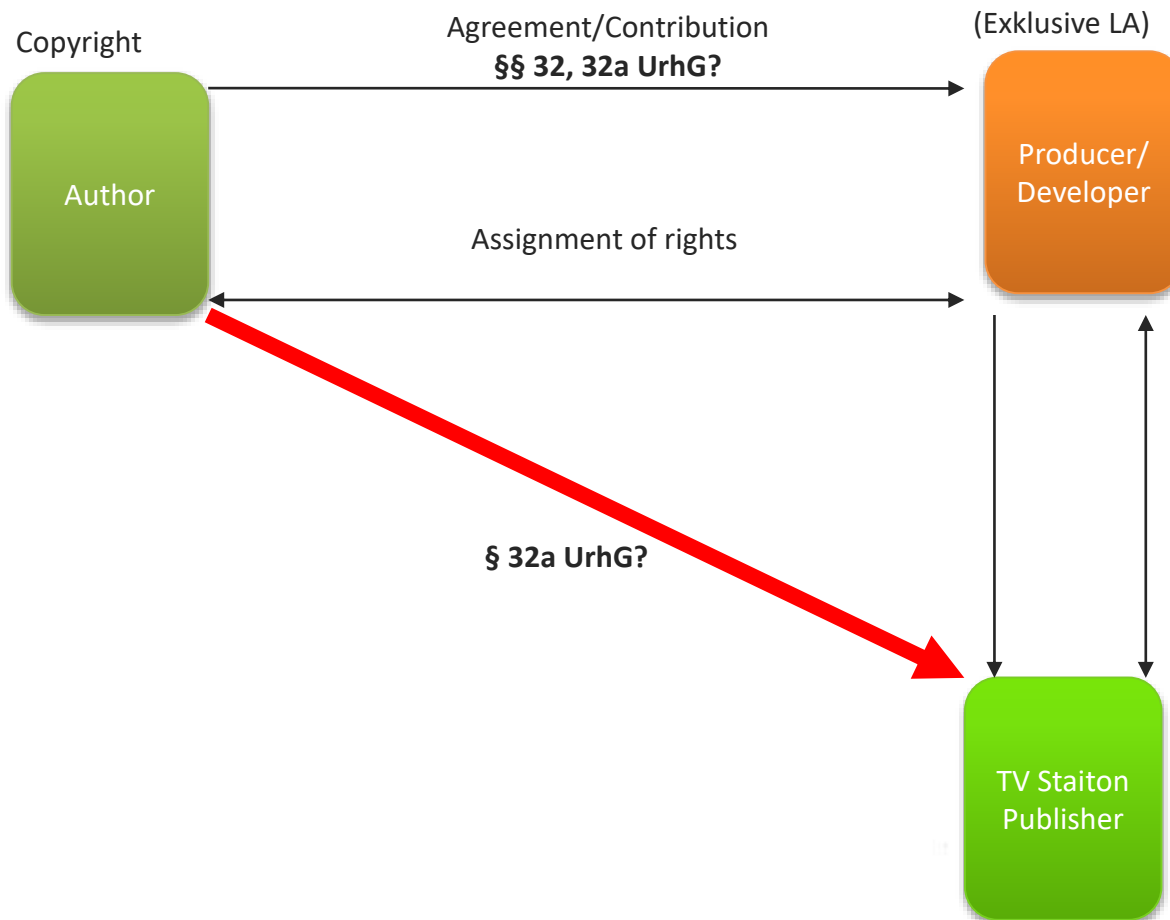
- Anyone who transmits product keys and links for downloading software computer programs to others (here: purchasers) without the consent of the right holder and other authorization shall disseminate these within the meaning of § 69 c No. 3 UrhG and shall thus be “guilty” pursuant to Sec. 106 I UrhG (German Copyright Act).
- In particular, the authorization to use the computer program is not derived from the sent product key due to the lack of the author's consent; this key is rather - comparable to a vehicle key - only a technical means to use the acquired computer program permanently...
- However, if the use of the acquired computer programs was prohibited by law, the customers are damaged to the extent of the full purchase price. From an economic point of view, the merely factual enabling of unlawful use - as in cases of the sale of stolen goods in which no bona fide acquisition is possible - is not equivalent to the payment of the purchase price”
- The low risk identified in the present case of being sued for injunctive relief by the beneficial owner and the corresponding idea of the owner are therefore irrelevant.



# Copyright: Equitable Renumeration

- The plaintiff is the chief cameraman of the film production "Das Boot", which was produced in 1980/1981 as one of the most successful German feature film of all time. The defendants are public broadcasters. The parties are in dispute about participation claims according to § 32a UrhG Abs. 2 for the exploitation of the film by the defendants as licensees. *OLG Stuttgart v. 26.09.2018 - 4 U 2/18.*

# Kontext:



# Background

- **Section 32a**  
**Author's further participation**
- (1) Where the author has granted a right of use to another party on conditions which, taking into account the author's entire relationship with the other party, result in the agreed remuneration being conspicuously disproportionate to the proceeds and benefits derived from the use of the work, the other party shall be obliged, at the author's request, to consent to a modification of the agreement which grants the author further equitable participation appropriate to the circumstances. It shall be irrelevant whether the parties to the agreement had foreseen or could have foreseen the amount of the proceeds or benefits obtained.
- (2) If the other party has transferred the right of use or granted further rights of use and if the conspicuous disproportion results from proceeds or benefits enjoyed by a third party, the latter shall be directly liable to the author in accordance with subsection (1), taking into account the contractual relationships within the licensing chain. The other party shall then not be liable.
- (3) There can be no advance waiver of the rights pursuant to subsections (1) and (2). An expected benefit shall not be subject to compulsory execution; any disposition regarding the expected benefit shall be ineffective. The author may, however, grant an unremunerated non-exclusive right of use for every person.
- (4) The author shall not have a right pursuant to subsection (1) if the remuneration has been determined in accordance with a joint remuneration agreement (section 36) or in a collective agreement and explicitly provides for further equitable participation in cases under subsection (1). Section 32 (2a) shall apply mutatis mutandis.

# Other

- Dead Island
  - Access providers of all kinds can now only be subject to blocking claims pursuant to Section 7 IV TMG. Specifically, the BGH decided that the access provider used could be subject to blocking claims both for its WLAN access and for its wired Internet access
- Bots LG Hamburg:
  - The parties dispute the admissibility of so-called "bots" for the online computer games "Diablo III" and "WoW". According to § 4 No. 4 UWG, those who deliberately obstruct competitors act unfairly.

# Consent to „privacy policy“

KG, 27.12.2018 – 23 U 196/13

- The defendant operated the Internet sales platform "Apple Online Store" until 2012. Its website contained a "privacy policy" in addition to general terms and conditions. Consent of the customers to the transmission of further information was “given” by pre-set check marks.
  - *Data protection guidelines" are also contractual terms as defined in § 305 I 1 German Civil Code(= Unfair Business Terms Regulation) if they are understood as such by the consumer.*
  - *Data processing for internal purposes, product improvements or advertising cannot be based on Art. 6 I 1 lit. b DSGVO without being necessary for the fulfilment of the contract. Unilateral information does not replace necessary consents within the meaning of Art. 6 I 1 lit. a DSGVO.*
  - *Clauses which create the incorrect impression of a data processing authorization without (actually required) consent violate § 307 I 1, II No. 1 BGB.*



# OPINION OF ADVOCATE GENERAL SZPUNAR

delivered on 21 March 2019(1) Case C-673/17


In order to participate in a lottery organized by Planet49, an internet user was confronted with two checkboxes which had to be clicked or unclicked before he could hit the 'participation button'. One of the checkboxes required the user to accept being contacted by a range of firms for promotional offers, another checkbox required the user to consent to cookies being installed on his computer. These are, in a nutshell, the facts of the present order for reference from the Bundesgerichtshof (Federal Court of Justice, Germany)

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About this tool 

05.05.2019

(1) There is no valid consent within the meaning of Articles [...] with regard to the processing of personal data and on the free movement of such data in a situation [...] is permitted by way of a pre-ticked checkbox which the user must deselect to refuse his consent and where consent is given not separately but at the same time as confirmation in the participation in an online lottery.

(2) [...]

(3) For the purposes of the application of Articles [...], it makes no difference whether the information stored or accessed constitutes personal data.

(4) The clear and comprehensive information a service provider has to give to a user, under Article 5(3) of Directive 2002/58, includes the duration of the operation of the cookies and the question of whether third parties are given access to the cookies or not.





# Legislation and administrative decisions

## Administrative decisions

- Esports & Visa
- Withholding Tax for Buy Out but not (anymore) for Google Adds
- **Cliffhanger!** Facebook and Antitrust Law (no data transfer to game provider)

# E-Sports: Changes to the Visum Manual. Whats New?

- In order to participate in an e-Sports tournament, a participant from a third country (not EU) must apply for a residence permit that explicitly allows them to work. Previously, the Federal Employment Agency had to approve such residence permits, which very much slows down the process.
- The new simplified procedure for short-stay entries includes exemption from otherwise required approval by the Federal Employment Agency. However, this classification does not yet apply to entries for participation in a longer-term gaming operation.



# Visa handbook in the 68th edition of the Federal Foreign Office

- “3. performances of a sporting nature (§ 22 No. 1 BeschV (Employment Ordinance))
  - *Pursuant to § 22 No. 1 BeschV, residence permits for performances of a sporting nature (this includes in particular participation in competitions, but also, for example, completion of a trial training course) do not require the approval of the BA [i.e. Employment Agency] if the duration of the activity does not exceed 90 days within a period of twelve months.*
  - *The granting of a residence permit for professional sportsmen and sportswomen in accordance with § 22 No. 4 BeschV shall not be considered for employment in "e-sports". Against the background of the changing concept of sport and the corresponding agreement in the coalition agreement, however, e-sports events (e.g. "Riot Games") can now be subsumed under § 22 (1) no. 1 of the Ordinance as "events of a sporting nature" in distinction to international sports events in accordance with § 23 of the Ordinance.”*

# TAX: Withholding Tax for Buy Out

- *“A tax deduction obligation pursuant to § 50a (1) EStG (withholding tax) also exists if the payment creditor [e.g. Author of a Game] with limited tax liability grants the payment debtor [e.g. Developer] a comprehensive right to use a copyrighted work in the sense of a "total buy out" against a one-time flat-rate payment”. (BFH (I. Senat), Urteil vom 24.10.2018 – BFH I R 69/16)*

# But ... no withholding tax for:

- remuneration received by foreign platform operators and Internet service providers for the placement or brokerage of electronic advertising on Internet
- This applies to fees for advertising for inquiries in online search engines, via intermediary platforms, for social media advertising, banner advertising and comparable other online advertising and regardless of the conditions under which the remuneration is due based on the specific contractual relationship (e.g. cost per click, cost per order or cost per mille, revenue share) (Binding Letter of the BMF)

# Trade Secret Act 26.04.2019

The qualification of information as a trade secret requires that the owner of the trade secrets applies *appropriate measures to ensure non-disclosure of trade secrets*, otherwise the trade secret is not protected.



# New Trade Secret Law

- EVERYTHING CAN BE A TRADE SECRET
  - Object of protection = Information
  - broad understanding
  - Ideas and knowledge
  - Software source code and algorithms
  - Manufacturing methods and prototypes of hardware
  - Customer and supplier lists
  - Company key figures (sales, costs and profits)
  - Business strategies and market analyses





# Next Year?



# Funding

- 50 Million Euro Games Funding reserved in the federal budget
- Details are in Progress
- formal notification expected end of 2019

# Protection of Minors?

- April 25<sup>th</sup>: Federal Family Minister Giffey wants to implement easily recognizable age recommendations for apps to protect children and young people from dangerous content. She told the newspaper "Bild am Sonntag" that there are currently different age ratings for the same games at different locations on the Internet. Parents, however, must be able to rely on the label. The obligation to label is to become part of a new law for the protection of minors in the media, which Giffey's ministry is currently working on. Above all, she wants to make providers more accountable.
- A first draft of the law is to be presented before the end of this year - with the aim of passing the law before the end of this legislative period.

- Draft Joint Guidelines of the State Media Authorities adopted by DLM and GK
- "When assessing the exploitation of inexperience of minors, is among other things to be judged on the overall assessment of the offer and the underlying business model."
- Advertising also directed at children pursuant to § 6 (4) JMStV,
- may be inadmissible, in particular, if
  - (1.) an advantage is granted for viewing advertising;
  - (2.) for linking profiles with another platform
  - is advertised.
- NB: The Joint Guidelines of the State Media Authorities for Ensuring the Protection of Minors (Jugendschutzrichtlinien - JuSchRiL) specify the legal requirements of the Interstate Treaty on the Protection of Minors in the Media.



# Next Years...

- Digital Content Directive
- Tangible Goods Directive
- The New Deal for Consumers will mean:
  - **Strengthening consumer rights online,**
  - **More transparency in online market places**
  - **More transparency on search results on online platforms –**
  - **New consumer rights for “free” digital services** –When paying for a digital service, consumers benefit from certain information rights and have 14 days to cancel their contract (withdrawal right). The New Deal for Consumers will now extend this right to ‘free’ digital services for which consumers provide their personal data, but do not pay with money. This typically would apply to cloud storage services, social media or email accounts.
  - **2. Giving consumers the tools to enforce their rights and get compensation**
  - **Representative action, the European way**
  - **Better protection against unfair commercial practices**
  - **Introducing effective penalties for violations of EU consumer law**
  - Under the proposal, national consumer authorities will have the power to impose effective, proportionate and dissuasive penalties in a coordinated manner. For widespread infringements that affect consumers in several EU Member States, the available **maximum fine will be 4 % of the trader's annual turnover** in each respective Member State. Member States are free to introduce higher maximum fines.
  - **4. Tackling dual quality of consumer products**
  - **5. Improved conditions for businesses**
  - The Commission's proposals will be discussed by the European Parliament and the Council.



# Thank You!

## Questions?

Dr. Claas Oehler

Ihde & Partner

Berlin, Germany

[www.ihde.de](http://www.ihde.de)

Claas.Oehler@ihde.de

plm 17/2015

