SAZ Points No. 5

Intellectual Property Rights Regarding Games

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Preface

This is the fifth title of the new SAZ Points ("SAZ-Zeichen"). This series of publications is a collaborative project of members of the Game Designers Association (Spiele-Autoren-Zunft e.V., SAZ) for the members of the organization. Most titles of this series are exclusively for members, with the intention of informing our members as comprehensively as possible about the basics of the development process of games and everything connected with it, and, in doing so, upgrading members' qualifications.

Given the relevance of the subject and its significance beyond our membership, this special edition is public. This legal opinion serves to defend the legitimate interests of game designers as originators.

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Games and Copyright Protection

In 2013, there were discussions in various areas and media with some dubious statements on the question of the copyrightability of games. The attitude of the German publishers "Fachgruppe Spiel" (today: Spieleverlage e.V.), which fundamentally questioned the copyright status of game authors, was astonishing[1]. However, this was and is in contrast to the publishers' practice of recognizing authorship in their contracts with game authors.

The debate is repeatedly characterised by misunderstandings of specialist gaming and legal terms and insufficient examination of the relevant judgements. Two points can be clarified first:

The argument that games are not mentioned in the German copyright act and therefore cannot be protected is obviously unfounded. The law is open to all types of work. In particular, the enumeration in Section 2 I UrhG is not final; there is a variety of protected works, which cannot be categorised under the expressly listed types of work (Nordemann in Fromm/Nordemann 10th ed. 2008, section 2 recital 11).

The question of whether the name of a game can be protected by copyright is equally fruitless because the concept of work of title protection law and copyright law has various criteria (Ströbele/Hacker, Markengesetz [trademark law], 10th ed. 2012, section 5 recital 87).

I. The Game as a Work

Personal intellectual creations of literature, science and art are protected under copyright law pursuant to Sections 1, 2 I and II UrhG. In principle, this also includes games (Schricker GRUR Int. 2008, 200, 203).

[1] The reason for this was discussions between the SAZ and the "Fachgruppe Spiel" about possible agreements on minimum standards in contracts based on § 36 UrhG.

It should be indisputable that copyright protection of (graphic) art regularly intervenes for individual materials of a finished end product, such as the game board graphics, the images on the box and the playing cards with corresponding illustrations (Section 2 I no. 4 UrhG). However, the deciding question is whether the intellectual content of the rules of the game themselves, i.e. the possible courses of action and game processes defined by the rules, is protected independently of the graphics and theme. Game designers normally only develop the rules of the game, defining the game process and courses of action which are presented to the publishers in the written rules of the game (frequently erroneously called the instructions) and with preliminary material as a prototype.

II. The 'Game Idea' Myth: a Definition

The most common argument brought forward against copyright protection for the intellectual content of games (the game processes, hereinafter referred to as 'games') alleges that 'ideas' have no protection, and therefore the 'game idea' behind a game cannot be protected either. It holds that ideas are free.

It is correct that abstract ideas, which have not (yet) materialised into a concrete work have no protection (Nordemann in Fromm/ Nordemann, 10th ed. 2008, section 2 recital 106). However, this applies in principle to all forms of work, not just games. For example, if someone wants to think up a business game and only has the idea that supply and demand should somehow define the price, naturally that person cannot claim any protection for these intellectual games. Even once the game is finished and features detailed rules on how the supply of quantities of goods and demand are determined and lead to a price, the abstract 'idea' behind this will remain free from copyright protection.

The first requirement for copyright protection, substantiation, is usually met by board games, because the games presented to a publisher have a written rulebook or the rules are communicated orally during a presentation interview. Substantiation on a specific game process has therefore taken place; the abstract idea stage has been passed.

Current case law also confirms that abstract ideas for game principles cannot be protected, unlike substantially developed games (see higher regional court of Cologne GRUR-RR 2013, 1, 7 – learning games; regional court of Leipzig decision dated 04 March 2009; ref. 5 O 905/09).

III. Game Rules as Personal Intellectual Creations

The crux of verifying whether copyright protection can be applied is the question of whether the creation is a 'personal' intellectual creation. Only then would a 'work' exist in the sense of the German copyright act (Section 2 II UrhG).

As a literary work pursuant to Section 2 I no. 1 UrhG, the written or orally presented rules of the game are normally protected by copyright, preventing word-for-word reproduction with no modifications at all. However, in the case of literary works, not only the outer form, i.e. the word choice, grammatical or rhetorical work, but also the intellectual content is protected if it represents a personal intellectual creation. This requires that the content demonstrates a level of individuality and does not simply repeat well-known ideas. For novels, we speak of the underlying 'fable' (for protection in this regard, sees Erdmann WRP 2002, 1329, 1334).

If a person tells the 'Harry Potter' stories in his/her own words but whilst retaining all individual plot lines, that person is in breach of the novel's copyright. If a person writes down the Hansel and Gretel fairy tale with his/her own embellishment, that person cannot prevent anyone from using the well-known version of Hansel and Gretel, rather he/she can only forbid use of his/her new version of the story.

In the case of Harry Potter, the protection therefore also covers the content of the story because it is new and individual; in the new version of Hansel and Gretel, the protection only covers the outer form (the exact word choice).

A lack of individuality can result from the material already being well known. It can also be caused by the creation being so banal that everyone would have thought of it because, for example, there are no alternatives worthy of serious consideration. For example, let us take the case of instruction manuals for kitchen appliances whose content is predetermined – the buttons and components of the appliance dictate the steps of use to be followed, which need then only be described by the author of the instruction manual.

Therefore, the creative freedom of the author is definitive. In every case it must be checked whether mere instructions of a mathematical or technical nature have been written with no other design alternatives, or whether something new has been created based on a creative artistic fantasy (relative to some extent in this respect: regional court of Mannheim 29 February 2008 – ref. 7 O 240/07).

IV. Threshold of Originality: Creative Freedom as a Criterion

Even with games, there are more or less banal creations, which may fail to demonstrate sufficient individuality, for example, games in which pairs of hidden cards are tracked down (MEMORY®). If an outer form is chosen that differs from others, there will be no violation of rights (example from Hertin GRUR 1997, 799, 809).

Most games created by designers, however, are based on the development of different courses of action available to the player, who decides between them. The course of the game changes, depending on the decisions of the players. The game designer must ensure that the game functions after every conceivable decision, i.e. every decision leads to the game's defined objective. The game may not hit a dead end.

In principle, numerous alternatives are conceivable to every optional course of action for a player in a game and its impact on the process of the game. From these alternatives, the designer must select the one he/she personally considers the best in terms of fun. The designer's selection, based on his/her own personal

experience, makes the game, as defined in the rules, a personal intellectual creation (higher regional court of Munich ZUM 1995, 48, 50 – logistics game; to Section 2 I no. 7 UrhG – learning games: LÜK boxes as academic depictions).

For example, the design possibilities for dice games are huge, although certain elements are known (Oechsler GRUR 2009, 1101, 1106). How many dice are used? Do all dice rolls count or only the highest? Can players re-roll? If yes, with how many dice and how often? Any number of different consequences can follow, for example does everyone get points when a specific number is rolled? If yes, does the number of points increase based on the dice roll or does the player's position relative to his/her opponents determine the points?

The designer must decide between all of these alternatives for defining the player's options and their impact on the game processes (and much, much more), and in doing so the designer shapes the game through his/her personality (Oechsler GRUR 2009, 1101, 1106, insofar as irrelevant see regional court of Mannheim 29 February 2008 – ref. 7 O 240/07, where the literary intellectual content, i.e. the 'fable', is openly equated with the theme of the game and not with the intellectual content of the rules).

In contrast, the well-known and banal principle of 'roll and move your piece forward by the number of spaces rolled' is of course not protected by copyright.

Therefore, just as in the case of a fable for a novel or a poem, game processes developed by designers, as thought content of the rules of the game, are protected under copyright law as personal intellectual creations, provided they demonstrate sufficient individuality (Henkenborg, Der Schutz von Spielen [the protection of games], 1995, p. 134; Hertin GRUR 1997, 799, 808; Schricker GRUR Int. 2008, 200, 203). Just as with other types of work, individuality can also be based on the original compilation of known elements (higher regional court of Cologne, GRUR-RR 2013, 1, 8 – learning games).

The German Federal Court of Justice (BGH) decided along these lines in the often-cited 'lottery' judgement (BGH GRUR 1962, 51, 52). Not only the literal embodiment of a written game rule is protected, but also its intellectual content, i.e. the process contained therein (regional court of Leipzig, decision dated 04 March 2009; ref. 5 O 905/09). In this concrete case, the BGH concluded that the defendant had not copied the game rules word for word. It therefore depends on the content of the game rule. The court then checked whether the intellectual content taken from the plaintiff's game rule had the necessary threshold of originality. Due to the negligible deviations from well-known games, the BGH denied this in the concrete case. However, it would be a mistake to infer from this that games themselves cannot demonstrate the necessary threshold of originality, or only do so in exceptional cases. The BGH expressly points out that the requirements are no higher than for other works (verbatim: 'no greater requirements are to be placed on the necessary extent of the intellectual work for the awarding of copyright protection').

V. Protection for Individual Parts?

Taken individually, individual parts of a work can be protected by copyright if in each case they demonstrate the necessary individuality and threshold of originality. Certainly, no independent protection exists for individual game mechanics or fully abstract ideas such as the use of game pieces to trigger certain actions (worker placement) or thematic elements such as colonising an island, founding a kingdom or drawing additional cards. Here, the necessary individuality could be lacking.

On the other hand, use of the essential core of one game in a new game can represent a breach of copyright, even if a few individual rules are changed, omitted or re-added. As with all other works, it must then be decided, assessing the individual elements, whether it is a derivative work[2] or a breach of copyright (Sections 23 and 24

[2] As a derivative of an existing work, it is always permissible to create a new work that uses the original work as a template but which is altered so greatly overall that the old work fully fades away and is no longer definitively identifiable in the new work. In the case of a game, the

UrhG). The same applies in the case of expansions to existing games, which are to be assessed in the same way as a continuation of a novel and update of the fable of the original (BGH GRUR 1999, 984, 987 – Lara's daughter).

VI. Games as a Work like any Other

As described above, copyright protection for the work of game designers is based on the same criteria as other types of work. If the threshold of originality set out by law is met, the rules and processes of games are protected by copyright. Games developed by designers are normally the result of a long selection process shaped by the personal experiences and thoughts of the designer, in which the best option is selected from a number of alternative rules. Therefore, designers' games are always to be considered protected under copyright law. Only in exceptional cases may there have been no or only an exceptionally small amount of design leeway or choice, causing the overall game to be considered banal.

Almost all publishers expressly recognise the copyrights of the designers in their agreements and on their websites and want to oblige the designers to examine their games for any violations of copyrights belonging to existing games. In this light, the opposing stance of the umbrella organisation of the publishers, 'Fachgruppe Spiel', a member of the German toy industry association Deutscher Verband der Spielwarenindustrie e.V., is surprising. This organisation questions whether game designers are creators in the sense of the German copyright act and therefore denies the SAZ its right to representation under Section 36 UrhG. Consequentially, copyright law for games is called into question in general.

VII. Game Designers as Creators

We conclude that, on closer examination, game designers are creators in the sense of the German copyright act. Therefore, they

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copyrighted work is found in the developed game processes in such a way that a purely literal reformulation, a new image or a new theme could never suffice in order to infer a 'derivative work'.

can establish an association pursuant to Section 36 UrhG. As the only organisation of its type in Germany, the SAZ meets the requirements as a representative association because it has the majority of German game designers as members. This is also shown by a representative examination of the proportion of games published by members of the SAZ through individual publishers. The association has also now complied with the statutory requirements set out by Section 36 UrhG in order to represent its members with respect to users.

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The following titles of SAZ Points are published until now, exclusively and free of charge for members of the Game Designer Association (SAZ):

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Game Designers: From the Idea to the Completed Work

36 pages, published 2010

SAZ Points No. 2

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SAZ Points No. 3:

Theoretical and Practical Principles for Game Instructions

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Collaboration and Contracts with Publishers

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