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Statement on the “Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market”, (COM(2016) 593 final, 14.9.2016) from the perspective of the preservation of computer- and video games as part of the digital cultural heritage

of the European Federation of Game Archives, Museums and Preservation Projects (EFGAMP) - efgamp.eu

I. Introduction

EFGAMP is a non-profit organisation, which comprises the main institutions active in the field of digital preservation, with a particular focus on the video and computer games sector. Its aim is to ensure that the European legal framework is compatible with the needs of digital preservation and it also aims to promote accessibility to gaming heritage by establishing and implementing description standards and connecting existing collections.

The members of EFGAMP are aware that the European Commission has reforming European Copyright law on its agenda. We also understand that digital uses in general and aspects of the preservation of the digital cultural heritage in particular are one of the main focuses of the reforms. We also acknowledge that the “Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market” from 14 September, 2016 (hereinafter: “DSM Draft Directive”) contains regulations that would facilitate the work of – among others – digital heritage institutions that preserve computer- and videogames (in short: games).

However, there is still room to improve the proposal in order to properly address certain specific challenges relating to – among other things – games archives and museums. In fact the preservation of games faces particular challenges that should be, at least for clarification and to establish legal certainty in this field, explicitly mentioned in further versions of the DSM Draft Directive.

II. Games: A specific cultural good

Games have started to become broadly perceived as cultural assets. For example, the German parliament stated in 2007: *“Computer Games [...] have continuously had a cultural impact over the last years. They have become an important economic, technological, cultural and social phenomenon in Germany.[...] Computer games transport social images and contain culturally relevant topics. Due to that they have become an important part of the cultural landscape of our country and are formative for our society”*.

Another example comes from Bruno Racine (President of the National Library of France) who states in 2012: *“I acknowledge the importance of computer games as a creative industry, as well as the role that heritage institutions play in their long-term preservation and making them accessible to the broader public and for future*

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research. This is why I, as Chair of the Europeana Foundation, request that computer games be taken into consideration by the European Statements, Recommendations and Directives concerning the preservation and the accessibility of cultural assets.“

In spite of this acceptance, the legal situation still does not take computer games sufficiently into account. Only some national Libraries like the ones in France, Denmark or Sweden are collecting games based on their specific deposit laws, but even they don't have a solid legal basis for fulfilling their mission to make games accessible and preserve them for future generations.

Games are in many ways different from other cultural works. They are 100% born-digital, interactive and they are highly dependent on the technical environment for which they were designed. Unless emulated or converted into different/open file formats they can only function, and therefore only be used, on specific platforms and/or operating systems. Converting, formatting and emulating generally require reproductions of and technical alterations to the code. More particularly, original, physical copies (e.g. cartridges, disks, or tapes) of video games sometimes only run on specific hardware (e.g. a certain console).

Archiving and copying games is complicated further, since they are often not disseminated as full working copies or not in the form of tangible copies at all. The distribution models for games vary enormously and there are numerous marketing and business models around. Some distribution models make the preservation of games by cultural heritage institutions particularly difficult because of legal and technical challenges. This is particularly true for online and browser games, server-based or cloud games, streamed games etc. The different marketing approaches are in many cases supported by technical protection measures (TPM) of various kinds. They increase the legal and technical challenges, posed by converting, emulating and other preservation methods, even more.

Furthermore games are considered to be special subject matter under copyright law. Games are hybrid works, i.e. they consist of software, audio-visual elements and sometimes additional subject matter like databases. Even now it is not clear whether their protection and use is governed by the general copyright rules (in Directive 2001/29 and its corresponding national implementations in particular), the rules about computer programs (in Directive 2009/24) or both. This makes legal assessments tricky, especially those about use under exceptions (like archiving) or when the game is – as is often the case – protected by TPM. Even though the EUCJ seemed to have decided in 2014 that Directive 2001/29 is, in general, applicable to the protection and use of games¹, national courts still apply

¹ EUCJ, C-355/12, 23 January 2014, recital 23, see

http://curia.europa.eu/juris/document/document_print.jsf?jsessionid=9ea7d0f130d6467f388fa1d244f3a7caa76142c9fa96.e34KaxiLc3eQc40LaxqMbN4Pax0Te0?doclang=EN&text=&pageIndex=0&docid=146686&cid=110874.



both general and software copyrights². These legal uncertainties threaten the preservation of games significantly. Acquiring the necessary rights to preserve games which are twenty years old, or even older, and then make them accessible to users of archives and museums is almost impossible. In some cases statutory exceptions allow games archiving but in most cases it is illegal.

The bottom line is that games are a special subject for copyright regulation that was mostly neglected in former copyright reforms. This situation must change, given the importance of games as one of the oldest forms of digital cultural content.

Art. 5 of the DSM Draft Directive is a step in the right direction but it falls short in some regards. Therefore, we have made some proposals, which are set out below, for consideration in the upcoming political process.

III. Requirements of cultural heritage preservation in general and games preservation in particular

The preservation of cultural artefacts requires several measures/steps that affect – in terms of copyright law – different exploitation rights. All of these steps must be considered when reforming copyright laws, otherwise new exceptions will turn out to be ineffective.

1. **“Preservation”**: games preservation requires more than just copying. Due to their dependence on the platform for which they were created, games have to be converted/adapted to be able to run on other platforms (emulation). Their “restoration” concerns all aspects: software, audio-visuals (graphics, video, music, sound effects) as well as the interfaces and integration ports.
2. **Displaying and making a playable version accessible** to users of the institutions (e.g. the general audience, academic researchers, etc.). Games are an inherently interactive medium. Making them accessible therefore, by definition, means offering them as an interactive (i.e. playable) experience.

IV. Specific requirements for any amendments

² See e.g. the decision of the German Federal Court of Justice (BGH), 6.10.2014, case no. I ZR 25/15, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=d214ba509e4cca92a8ce87e9206382d9&nr=77132&pos=0&anz=1> [in German].

1. *Acknowledge games as part of the cultural heritage and mention them explicitly, as a subject in its own right, in the recitals of the Directive*

Given the neglect of games in former copyright reforms (e.g. the Audiovisual Directive, the Orphan Works Directive) and their importance as a cultural good and as valuable research and teaching material, they should explicitly be mentioned in the European copyright *acquis communautaire*. The acknowledgement could be realised by a simple reference in a separate recital or in existing recitals 5 and/or 20.

2. *Apply rules that are needed for the preservation of games to both the InfoSoc Directive (2001/29) and the Software Directive (2009/24)*

To preserve a game, all of its components (the software and the audio-visual components in particular) have to be copied. Since national courts still apply both the software and the general copyright rules to the use of software (see above), any new exception which is supposed to enable or facilitate the preservation of games must apply to both regimes. The proposal for Art. 5 in the DSM Draft Directive satisfies this need since it requires amendments to both directives.

3. *Open Art. 5 up to “born-digitals” by referring to the purpose instead of the ownership*

Computer and video games are born-digitals by definition. The days of their distribution on physical media like DVD or Blu-ray Disc are numbered. Like many other types of media, games are increasingly published in intangible form, e.g. as online downloads or through streaming.

Hence, many of the items that need to be archived are not and never were “owned” by the archives in physical form or licensed from the rights holder. In cases such as these they will not be considered as being “permanently in the collection of a cultural heritage institution” and the exception of Art. 5 will not be applicable or its applicability will, at the very least, be debatable. Therefore, the exception should only refer to the purpose (cultural preservation) rather than to the physical or intangible form of the reproduced copy (an “original”) or to the way in which the institution received or was provided with this copy.

4. *Make Art. 5 “contract-proof”*

Digital media products like games are almost exclusively marketed under contractual provisions like standard terms of service or licence agreements. Any exception that does not declare opposing contractual rules null and void will be regularly overruled by standard provisions. Since the terms of these standard contracts are exclusively controlled by the licensor, the balance of interests established by the exception will be in jeopardy. Hence, Art. 5 – as well as Art. 4 – should contain a paragraph like Art. 3.2: “Any contractual provision contrary to the exception provided for in paragraph 1 shall be unenforceable”.



5. *Apply Art. 4 explicitly to cultural uses by and in cultural institutions*

Cultural institutions are often involved in teaching or science but these are not their only or even their main focus. Therefore it is debatable whether and to what extent Art. 4 could be applied to use by cultural institutions like museums or archives or their users and visitors. Extending Art. 4 to cultural institutions would serve an urgent necessity, not only in enabling the preservation but also the use of archived copies of cultural heritage artefacts.

Preservation is not an end in itself. Investing billions in preservation would be useless and therefore unreasonable if the preserved material could not be used, e.g. displayed or otherwise made accessible to the visitors of museums or archives. Using archived material in a way that corresponds with usual social habits in a digital world would, among other things, require making it available remotely. Art. 4 acknowledges this necessity by enabling use for teaching purposes via secure networks. Cultural institutions must also be allowed to provide remote access – at least for certain (cultural) purposes and to certain user groups – to their material. Otherwise, sooner or later, they will become obsolete because they will not be able to satisfy society's expectations.

About EFGAMP e.V.

EFGAMP is a non-profit organisation according to German law. The aims of EFGAMP are to facilitate the preservation of interactive entertainment and information media and content, to facilitate public access to such media and content, to gather and circulate knowledge concerning the preservation of such media and content, to coordinate international activities with the aim of preserving such media and content, to support collaborations of international private and public organisations active in this field, to facilitate the exchange of knowledge and experience, to contact governmental and political institutions with the aim of improving the political, legal and economical frameworks and public relations concerning the preservation of such media and content.

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The objectives of EFGAMP:

- Promote the availability of digital interactive heritage
- Gather and circulate knowledge about digital preservation
- Strengthen the European information society
- Represent members and partners of EFGAMP at a European and global level



- Network with other digital preservation communities worldwide
- Lobby to promote digital preservation and the accessibility of the digital interactive entertainment heritage.

The members of EFGAMP:

- VIGAMUS – The Video Game Museum of Rome (Italy)
- Computerspielemuseum (Germany)
- Royal Danish Library (Denmark)
- MO5.COM (France)
- The Software Preservation Society (United Kingdom) / Kryoflux P&S Ltd (United Kingdom)
- Subotron (Austria)
- National Library of Sweden (Sweden)
- RetroCollect LLP (UK)
- Institute for Sound and Vision (Netherlands)

For more information please visit www.efgamp.eu