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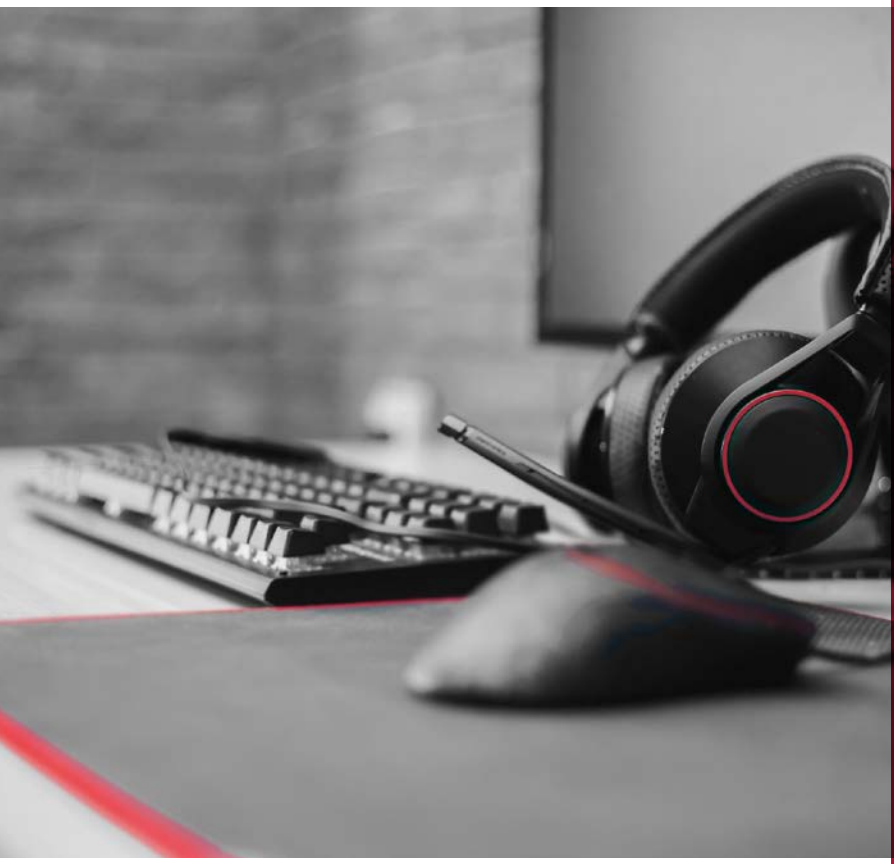

ONLINE GAMES IN RUSSIA: LEGAL ISSUES

CONTENTS

The online gaming market in Russia demonstrated growth of 9% in 2021, reaching RUB 177.4 billion (approximately EUR 2.9 billion)[1].

However, the situation changed dramatically after February 2022. According to experts, the regional share of Russia in the structure of consumer spending on mobile games has contracted from 50% to 10% since then. This decline is primarily attributable to the suspension of payment processing by Google and Apple, as well as the refusal of some services, such as Steam, to accept payment made using Russian bank cards.

In light of these developments, the state authorities have taken steps to assist the video games sector.

In May 2022, a meeting was held behind closed doors between representatives of the Executive Office of the Russian President and Russian video game developers. They discussed the possibility of redirecting the industry towards the Chinese market in a bid to reverse current negative video game development trends[2].

With these challenges in mind, in this overview we will describe the most pressing legal issues arising in the online gaming sector in Russia.

1. Background information on online games in Russia

Under Russian law, online games are computer programs. Accordingly, online games (including the right of protection or right of commercialisation) are regulated on the basis of the Civil Code of the Russian Federation ("**RF Civil Code**", "**Civil Code**").

No special regulator (state authority) is responsible for online games in Russia. At the same time, the Federal Service for Supervision of Communications, Information Technology and Mass Media (Roskomnadzor), which monitors the distribution of information of potential harm to children, may also within known limits exercise control over online games, as they are played more often by children, in other words individuals under the age of 18 according to Russian legislation. In addition, Roskomnadzor is authorised to block websites, which also makes this an important agency for the online games industry.

[1] https://www.rbc.ru/newspaper/2021/03/30/6061a30e9a79471323188935.

[2] https://www.kommersant.ru/doc/5357544?ysclid=l6np4fzq3a580340240.

2. EULA

The relations of players and the companies that are the first to offer different online games (more often than not the actual developers of online games) tend to be regulated by an end-user licence agreement (EULA). Each user must agree with the provisions of these agreements as a matter of course before starting to play a specific online game. Consequently, these relations are by their very actual nature contractual: as a rule, the player is granted the right to use the video game (constituting a computer program) within certain limitations.

In most cases such agreements constitute contracts of adhesion, in other words contracts whose terms and conditions are determined in advance in a standard form where the counterparty (the player) has no choice but to agree with them, accepting all provisions as a whole contained in such agreements.

Furthermore, if this involves a foreign developer, it is often the case that such agreements are merely a technical translation into Russian of an agreement that is subject to foreign law and used by the foreign developer in other countries. This fact triggers numerous risks related first and foremost to the so-called norms of direct applicability of Russian law (Article 1192 of the RF Civil Code). Russian courts will in any case apply the indicated norms of Russian law to the agreement even if it is subject to foreign law. Accordingly, developers should take this factor into account when wording the provisions of agreements with Russian players.

In the following we will consider the main groups of norms of direct applicability of Russian law that concern the relations between online game players and their developers most.

3. Legislation on the protection of consumer rights

Russian legislation on the protection of consumer rights (like similar laws in other countries) provides consumers with favourable terms and conditions for participation in civil commerce, establishing numerous guarantees and expanding permissible ways of protecting consumer rights in their mutual relations with entrepreneurs.

In accordance with RF Law No. 2300-1 dated 7 February 1992 "On the Protection of Consumer Rights" (the "**Consumer Protection Law**"), a consumer is deemed to be an individual ordering, acquiring or using goods (work, services) solely for personal, family, domestic and other needs unrelated to entrepreneurial activity.

The extent to which the norms of the Consumer Protection Law apply to relations between the player and developer of an online game must be considered.

It is clear that each online game player is an individual, and that the overwhelming majority of players participate in the games for their own, personal interests and do not link such play to entrepreneurship.

The Consumer Protection Law applies to relations regarding the sale and purchase of goods, the performance of work or the provision of services. At the same time, an agreement to be concluded between an online game developer and player is by its very nature a licence agreement under which the player is granted the right to use a computer program (in other words, the online game). At the same time, it is worth noting that in certain instances courts determine such agreements as mixed contracts that combine indicia of a licence agreement and a paid services contract[3].

Consequently, if one proceeds from the premise that an agreement to be concluded with a player is (albeit partly) a paid services contract, the provisions of the Consumer Protection Law may be applied to this agreement. It can also be assumed that a court may apply the Consumer Protection Law to such relations by virtue of analogy of the law (Article 6 of the RF Civil Code).

It is worth noting here that Russian courts, when considering whether the Consumer Protection Law applies to the legal relations between a player and an online game developer, do not examine the aforementioned problem issue. Above all, the courts consider another issue – is the Consumer Protection Law applicable if the corresponding agreement between the player and online game developer is gratuitous?

The courts have responded in the negative to this question[4]. If under the agreement the game (the possibility of playing a game) is provided for a consideration, then the courts are inclined to apply the Consumer Protection Law to the legal relations of the parties. For example, in the Judgment of the Presidium of Moscow City Court on case No. 44g-259/18 dated 18 September 2018, the court proceeded on the premise that the Consumer Protection Law applied to relations between Russian players and the developer of the popular online game World of Tanks.

In another case, the Presidium of the Moscow City Court stated that "non-application of the norms of the Consumer Protection Law to govern legal relations connected with the acquisition of content (audio-visual works, music, images, computer software, and other intellectual property) by Russian consumers from non-resident vendors, including

[3] See case No. A40-91072/2014, https://kad.arbitr.ru/Card/277fdd53-f30b-4de4-a282-732bc448297e.

[4] See the Appellate Ruling of Moscow City Court dated 8 November 2013 on case No. 11-36731, the Ruling of Moscow City Court dated 8 December 2010 on case No. 33-38081.

remotely over the Internet, degrades consumer rights compared with the rules established by the laws or other legal acts of the Russian Federation in the area of consumer rights protection, since it deprives them of the opportunity to protect their lawful interests in the courts of the Russian Federation"[5].

Previously, the Presidium of Moscow City Court had adopted a different position: the Consumer Protection Law may be applied to relations involving a consumer only in instances when civil legislation does not contain any other special norms. For example, corresponding norms of the RF Civil Code must be applied primarily to an insurance contract involving a consumer, but the norms of the Consumer Protection Law will only be applied secondarily[6].

In view of the above, the Presidium of Moscow City Court concluded that claims filed by individuals related to the organisation of a game may not be protected, as games (games of chance) are governed by civil legislation (Chapter 58 of the RF Civil Code)[7].

Consequently, one can acknowledge the ambiguity of the applicability of the norms of the Consumer Protection Law to agreements concluded between online game developers and their players. In our opinion, it is highly likely that the trend regarding the need to apply the Consumer Protection Law to the relations between a player and an online game developer will gain traction.

It is therefore important to take into account of the following: consumer rights and guarantees established in the Consumer Protection Law may not be changed to the detriment of the consumer even under an agreement of the parties. For example, disputes arising from agreements with a consumer may in any case be subject to the jurisdiction of a court at the place of residence of the consumer (even if there is an arbitration clause in the agreement). The sizes of penalties and procedure for paying penalties for late performance by the counterparty of a consumer of its obligation are also stipulated peremptorily by the indicated law (incidentally in certain instances the size of such penalties may be reduced by a court).

Consequently, online game developers should take account of the provisions of the Consumer Protection Law when developing draft end user licence agreements with players from Russia. Otherwise, some of the provisions of such agreements could be invalidated, with corresponding norms of the Consumer Protection Law applied in their place.

[5] Judgment of the Moscow City Court dated 21 August 2018 in case No. 44g-257/2018.

[6] Clause 2 of Judgment No. 17 of the Plenum of the RF Supreme Court dated 28 June 2012 "On Consideration by Courts of Civil Cases on Disputes on the Protection of Consumer Rights."

[7] Judgment of the Presidium of the Moscow City Court dated 24 May 2013 on case No. 44g-45.

In connection with this fact, we recommend that online game developers in any case check their standard agreements (EULA, ToU, GTC) for compliance with the Consumer Protection Law.

4. Legislation on age restrictions

At present there is no special legislation in Russia on age ratings for video games. In addition, Russia is not a member of any of the well-known international and/or national organisations in this sector (for example, IARC, PEGI, USK, ESRB, etc.).

However, Russia has a general law that regulates the protection of children from information that could harm them – Federal Law No. 436-FZ dated 29 December 2010 "On the Protection of Children from Information that is Harmful to Their Health and Development" ("**Law on the Protection of Children from Harmful Information**"). In accordance with this law, any information product placed in the public domain must include a disclaimer that notifies all potential addresses of the age restriction established for this information product. At the same time, based on understanding of the indicated law, information products include computer programs (in other words, online games).

The requirements of the Law on the Protection of Children from Harmful Information merely involves the correct labelling of information products. The indicated requirements are addressed to the owner of the information product or its distributor who can conclude an agreement on the allocation of risks arising from failure to comply with corresponding requirements of the Law on the Protection of Children from Harmful Information[8].

Consequently, if the distributor (owner) label the information product correctly in accordance with the requirements of the Law on the Protection of Children from Harmful Information, they are deemed to have duly performed their obligations in full under this law. In any case, the indicated persons are not liable for the subsequent consumption of the information product even by individuals from an age category that differs from the inserted labelling. Liability for the consumption by children of any information (including online games) and also for the rearing of children in general, is assumed by their parents.

[8] Recommendations on how to apply Federal Law No. 436-FZ dated 29 December 2010 On the Protection of Children from Information that is Harmful to their Health and Development" in respect of Printed Products (Books)" (approved by the Ministry of Telecommunications and Mass Communications of Russia on 22 January 2013, No. AV-P17-531).

The distributor (owner) of the information independently determines its age category, proceeding from the criteria established by the Law on the Protection of Children from Harmful Information. Furthermore, the age ratings by any foreign organisations (for example, IARC, PEGI, USK, ESRB, etc.) are not taken into account and have no legal significance for the Russian state authorities.

The Law on the Protection of Children from Harmful Information stipulates the following age categories: 0+, 6+, 12+, 16+, 18+. Compliance with different criteria stipulated in the law is required for the classification of information to each of the aforementioned categories. For example, the following contents of online games may influence the classification of such games with different age groups in accordance with the provisions of the law:

- scenes of violence (physical, psychological, sexual, etc.), suicide or harm to their lives or health;
- sickness or death of an individual (in particular, of minors);
- accidents or disasters, wars;
- justification of any illegal behaviour;
- sexual scenes (in particular, with the participation of minors or individuals of non-traditional sexual orientation);
- unethical actions or statements;
- repudiation of family values;
- consumption of drugs, alcohol or tobacco;
- foul language.

How such content of online games influences their age rating is determined first and foremost by how realistically the scenes with such content are presented, and also the extent to which they are portrayed in an attractive light to children (from the perspective of inciting children to take corresponding actions).

If the distributor (owner) of the information is not sure about the specific age category that should be allocated to the online game from the categories cited above, the distributor (owner) may apply to experts for assistance. These experts are individuals (experts) and legal entities (expert organisations) accredited by Roskomnadzor.

For example, in 2020 an expert review was made of the game "Counter-Strike: Global Offensive (CS:GO)", which established that it causes harm to the health and/or development of children pursuant to the Law on the Protection of Children from Harmful Information. In the expert's opinion, this product may be classified under the label "18+"[9].

If information is incorrectly labelled (or there is no such labelling in principle), there is a risk that the administrative liability stipulated by Clause 1 of Article 6.17 of the Code of the Russian Federation on Administrative Offences ("**RF Code on Administrative Offences**") may be imposed on the distributor (owner). This article imposes liability on legal entities in the form of an administrative fine of up to RUB 50,000 or an administrative suspension of activity for a period of up to 90 days.

5. Intra-group behaviour of players and the imperative norms of Russian legislation

As a rule, the terms of use of online games contain the rules of conduct of a player in a game, in particular if the game is a multiplayer game. Frequently, such rules are spelled out fairly simply and understandably: for example, players may be prohibited from using unethical, disparaging or defamatory language, posting personal information on third parties, threatening other players, using the game for commercial purposes, etc.

At the same time, even when the rules are so simple and understandable, situations often arise that require an appropriate legal assessment. By way of example, we describe here a bizarre incident that happened in one famous multiplayer online game.

One player created a character with the nickname Jesus. Then, leveraging the possibilities provided by the game, the player playing in the name of this character started performing various actions in the game: for example, publicly beating or even killing other characters, posting indecent or offensive messages in the general chat area, etc. As all these actions were committed as part of the game mechanics, all the other players could see that these actions had been committed by the character Jesus Christ. Many Christians playing this online game were offended by this development.

In Russia a federal law was adopted that aims in particular to protect the feelings of believers and combat abuse against their feelings and convictions[10].

[9] https://rkn.gov.ru/mass-communications/p679/p682/.

It is a crime for individuals to commit public actions expressing their wilful disregard for society and performed for the purpose of offending the religious feelings of believers (Article 148 of the Criminal Code of the Russian Federation ("**RF Criminal Code**")).

Accordingly, as a result of the aforementioned instance Russian players offended by this situation could file applications with the competent authorities (for example, with the prosecutor's office, the police, etc.) for the purpose of curtailing violation of Russian legislation and holding the culprit liable.

It is clear that only the player can be held liable in the long run, and not any online game developers. Nevertheless, such situations and scandals on holding a player liable could have a negative impact on the reputation of online game developers, and as a result their positions on a corresponding market.

Accordingly, we recommend that online developers prevent the possible creation of characters with nicknames that might potentially offend the feelings of believers, and also block the accounts of players who aggressively and systematically offend feelings of believers in general chats and other public online game spaces.

Online game developers should also factor in other mandatory norms of Russian legislation that may affect gameplay. For example, in accordance with Article 12 of the Family Code of the Russian Federation ("**RF Family Code**"), marriages require the mutual voluntary consent of the man and woman who are marrying and have reached the age of consent. Consequently, Russian legislation only permits the registration of marriages between members of the opposite sex, in other words, it does not permit same-sex marriages.

In connection with this fact, in 2013 a ban was introduced to Russian legislation on the promotion of non-traditional sexual relations activity among individuals who have not reached the age of 18. This prohibition is particularly relevant to online games, as they are played simultaneously by a large number of players, a considerable number of whom are minors.

For example, in accordance with Article 6.21 of the RF Code on Administrative Offences, such promotion may be expressed in the distribution of information aimed at the formation among minors of non-traditional sexual relations, [promotion of] the attractiveness of non-traditional sexual relations, [the presentation of] a distorted picture of the social equivalence of traditional and non-traditional sexual relations, or the imposition of information on non-traditional sexual relations that triggers interest in such relations.

[10] Federal Law No. 136-FZ dated 29 June 2013 "On the Introduction of Amendments to Article 148 of the Criminal Code of the Russian Federation and Certain Legislative Acts of the Russian Federation for the Purpose of Combatting Abuse of Religious Convictions and the Feelings of Individuals."

Accordingly, if it is held that the contents of the online game promote non-traditional sexual relations in accordance with the cited definition, the developer of such an online game could be held administratively liable. For example, in the case of legal entities the mentioned Article stipulates liability in the form of an administrative fine in the amount of up to RUB 1 million, or administrative suspension of activity for a period of up 90 days.

Russia now has court practice regarding the imposition of administrative liability on persons who post information on the Internet (in particular, to social networks) that has been assessed as propaganda of non-traditional sexual relations among minors. As a rule, these cases are related to the posting of certain content within LGBT communities[11].

A number of cases in this category were related to plaintiff's statements that iOS software contains emojis that constitute propaganda of non-traditional sexual relations (an image of two female individuals with a child between them, an image of two male individuals with a child between them, etc.).

However, the courts have ruled that the emojis per se are neutral and cannot be equated to propaganda (active imposition) of anything, including non-traditional sexual relations among minors, and that the ban on propaganda of non-traditional sexual relations – as activity on the purposeful and uncontrolled dissemination of information – does not per se exclude conveying the corresponding information in a neutral context[12].

In the light of the above, we recommend that the developers of online games which present scenes of non-traditional sexual relations establish an age rating of 18+ for such games if they are sold in the Russian Federation.

6. In-game assets: legal framework

Most online games have developed an in-game economy with their own currency, auction houses, in-game product stores, etc. Usually, such in-game assets are earned and accumulated by players as they make progress through the game and assimilate its content. However, in certain games such assets can be acquired by players for real money. This fact also exacerbates what is already a fairly urgent matter regarding the legal nature of such in-game values and the respective legal framework.

[11] Judgment No. 58-AD21-7-K9 of the Supreme Court of Russia dated 13 May 2021; Judgment No. 16-2515/2021 of the Seventh Cassation Court of General Jurisdiction dated 17 June 2021.

[12] Cassational ruling of the Moscow City Court dated 27 May 2016 No. 4r-5326/2016; Appellate ruling of the Moscow City Court dated 18 December 2015 in case No. 33-41370/2015.

A dispute between Mail.RuGames and the tax inspectorate was a landmark case in this respect[13]. The court proceedings came about due to a decision of the tax inspectorate which had charged the company with over RUB 180 million in value-added tax (VAT) on the profits obtained by the company from the sale of in-game assets in online games.

The tax inspectorate proceeded on the premise that in this particular instance the company was providing paid services to players for the use of additional functionality in the game. As the profits obtained for the provision of the services (execution of paid service contracts) are subject to VAT, the tax inspectorate adopted the contested decision and accrued this tax in respect of the company.

Disagreeing with the position of the tax inspectorate, the company cited the fact that it had concluded licence agreements with each player for computer programs (here, online game), while the paid access to the additional functionality of the games merely represented a change to the terms and conditions of the licence agreement (expansion of its scope). In accordance with Sub-Clause 26, Clause 2 of Article 149 of the Tax Code of the Russian Federation (the "**RF Tax Code**"), profits obtained from the granting of the right to use computer programs under licence agreements are exempt from VAT.

However, the courts of all instances, including the RF Supreme Court, supported the tax inspectorate and concluded that the agreements regulating the mutual relations of players and the company constituted mixed contracts and contained provisions of both a licence agreement and also a paid service contract, which are not eligible for the aforementioned tax benefit.

Consequently, the Russian courts decreed that in-game values are the subject of performance (service) within the framework of a mixed contract (licence agreement and paid service contract) concluded between the developer of the online game and player, and not part of the actual online game as a computer program.

7. In-game competitions / lotteries, loot boxes

From a financial perspective all online games can be divided into paid games (pay to play, P2P) and free games (free to play, F2P). The former demand from their players monthly payments of game time (payment of the "subscription"), whereas in the latter as a rule no payments need to be paid to the developer. Therefore, it is entirely logical that the F2P game mechanics of online games propose more often than not that players

[13] http://kad.arbitr.ru/Card/277fdd53-f30b-4de4-a282-732bc448297e.

invest real money in the game (make a "donate") in order to obtain in-game advantages, upgrade or decorate their character, etc.

In certain online games the financial funds of players are attracted not only for the purpose of acquiring in-game values, but also for participation in a variety of competitions, lotteries, prizes and other events. One of the most popular varieties of such lotteries is that players acquire so-called loot boxes. There is a certain probability that players will discover in such boxes different in-game items – from the most useless to the most unique and valuable.

The chance (albeit minimal) to become the owner of unique and valuable prizes motivates a number of players to participate in such in-game lotteries (in particular, through the acquisition of loot boxes).

Russian legislation[14] defines a game of chance as a risk-based agreement on winnings, concluded by two or more participants of such an agreement between themselves and the organiser of the game of chance according to the rules established by the organiser of the game of chance. Furthermore, the term winnings here means money or other property, including property rights payable or to be transferred to the participant in the game of chance on the onset of the results of the game of chance, stipulated by the rules established by the organiser of this game.

As already noted above, in-game values are classified by courts as the subject of performance under a paid services contract that are taxable and accordingly have commercial value from a legal perspective. Moreover, in certain online games players may trade in the in-game values they have won in lotteries between themselves, using the in-game currency (which is also frequently acquired with real money).

As a result, one should conclude that intra-group values are covered by the aforementioned definition of winnings classified as "other property".

Consequently, in-game lotteries (including loot boxes) formally may be classified as games of chance from the perspective of Russian legislation.

Russian legislation[15] has established a blanket ban on the performance of activity relating to the organisation and holding of games of chance online. Websites containing corresponding information must be entered by the competent authorities in a special register. Access to such websites will then be blocked in the Russian Federation[16].

[14] Clause 1 of Article 4 of Federal Law No. 244-FZ dated 29 December 2006 "On State Regulation of Activity regarding the Organisation and Holding of Games of Chance and on the Introduction of Amendments to Certain Legislative Acts of the Russian Federation."

[15] Part 3 of Article 5 of Federal Law No. 244-FZ dated 29 December 2006.

[16] On the basis of Sub-Clause d), Clause 1, Part 5 of Article 15.1 of Federal Law No. 149-FZ dated 27 July 2006 "On Information, Information Technologies and on the Protection of Information."

The indicated law permits, as an exception to the aforementioned general rule, the organisation of online games of chance if performed through specialist organisations – registration centres for transfers of interactive bids of bookmakers or pari-mutuel betting, through the acceptance of so-called interactive bids. This activity is subject to a large number of special rules and restrictions established both in law[17], and also in special subordinate legislation[18].

It would appear that no developers of online games disseminated in the Russian Federation and containing elements of games of chance comply with the requirements of Russian legislation on games of chance, accordingly there is a risk that such developers could be held liable.

In accordance with Part 1 of Article 14.1.1 of the RF Code on Administrative Offences, an administrative fine may be imposed on a legal entity for the illegal organisation of online games of chance in the amount of up to RUB 1.5 million.

It should also be borne in mind that Russian civil legislation (Article 1062 of the RF Civil Code) prevents the enforced (judicial) exercise of rights of claim related to the organisation of games and bets. This means that a player who won in an in-game lottery, but for some reason or other did not receive the prize, will not be able to file any claims in court against the game developer.

8. Computer bots: how do you tackle them?

In the overwhelming majority of online games, a key element in game mechanics as a whole and gameplay in particular is the opportunity for players to compete with each other in attaining specific in-game goals. In such competition consistent rules of the game established by developers for all players are crucial.

The use by players of bots – special computer programs that make it possible to obtain in-game resources or other values more rapidly than other players – represents a material threat to a fair playing field in the game, and as a result to the popularity of the game as a whole.

[17] Article 6 of Federal Law No. 244-FZ dated 29 December 2006.

[18] See, for example, Resolution No. 452 of the RF Government dated 8 May 2015 "On Additional Requirements on the Organisers of Games of Chance."

Russian legislation does not contain special norms regulating corresponding relations. Moreover, there is no judicial practice in this area as of yet. However, there have already been court cases dedicated to the fight of game developers against bots in foreign law and order (in particular, in the USA and in Germany)[19].

At the very least two competitive strategies exist in respect of bots: the fight against players using bots based on the provisions of the end user licence agreements concluded by developers with players (EULA), and the fight against bot producers and distributors.

Regarding the first strategy, thanks to the principle of freedom of contract enshrined in Article 421 of the RF Civil Code, everything is fairly simple – virtually every online game developer includes in the end user licence agreements with players provisions on the inadmissibility of using bots. As a result, any player violating these terms and conditions and using bots may be held liable by game developers in accordance with the provisions of the end user licence agreement (starting with an official warning up to the permanent blocking of the violator's account and the recovery of damages incurred by game developers).

The situation becomes complicated when dealing with the developer of a bot or the person selling bots. What exactly do seller or developer violate? Would it be possible to proceed on the premise that they infringe the exclusive copyright of the online game developer through their actions? In accordance with the provisions of Part 4 of the RF Civil Code, the use of a work (online game) by third parties without the consent of the rights holder (developer) is not permitted. In accordance with Sub-Clause 9, Clause 2 of Article 1270 of the RF Civil Code, the use of a work (online game) is recognised in particular to be its reworking, which in turn implies that third parties may not rework an online game without the consent of its developers.

Pursuant to judicial practice, the processing of computer program is understood to mean:

- use of the unique source code of the computer program being reworked;
- use of the principles for the functioning of certain parts (modules) of the computer program being reworked.

At the same time, by virtue of the express indication of the RF Civil Code (Sub-Clause 9, Clause 2 of Article 1270) adaptation does not constitute the reworking of computer program, in other words, the entry of amendments being performed solely for the functioning of the computer program on the specific hardware of the user or for the management of specific user programs.

[19] See, for example: OLG Hamburg, Judgment dated 6 November 2014 – 3 U 86/13; MDY Industries, LLC v. Blizzard Entertainment, Inc and Vivendi Games, Inc., 629 F.3d 928 (9th Cir. 2010).

If the infringers reverse engineer the online game during the creation of the bot and use its source code, then it would possible to claim an illegal reworking of the online game, in other words, infringement of the exclusive copyright of developers.

As for the online distribution of bots, protecting the rights of developers by blocking of corresponding websites, deletion of posts containing references to the downloading of bots, etc., come to the fore (for more detail, see Section 11 "Blocking of websites").

It is important to remember that instances of infringements of the exclusive rights of developers to trademarks, the display of characters from an online game, and also other intellectual property protected by Russian legislation may serve as the grounds for the deletion of such content from a website (in addition to the illegality of the creation of the bots located therein).

In addition, Directorate K of the Ministry of Internal Affairs of Russia (the department responsible for fighting cybercrime) has instigated a number of criminal cases in connection with the creation and distribution of harmful programs for foreign online games. According to available information, in one case for mercenary gain the perpetrator created a program for an online game and made it available to users for a fee. The program made it possible to automate the game process in order to gain advantages over other players[20]. In another case, Directorate K investigated cases of the sale of bots for the game World of Tanks. It was reported that the police made a test purchase of bots and determined them to be harmful[21].

In these instances, criminal cases were instigated based on evidence of crimes stipulated by Part 1 of Article 273 of the Criminal Code of the Russian Federation (the „**Criminal Code**"). Under this Article, the creation, distribution, or use of computer software or other computer information wilfully intended for the unauthorised destruction, blocking, modification, or copying of computer information or the neutralisation of tools for protecting computer information is subject to punishment in the form of custodial restraint for a period of up to four years, or compulsory labour for a period of up to four years, or imprisonment for the same period with a fine of up to RUB 200,000 or in the amount of the convicted offender's wages or other income for a period of up to 18 months.

[20] https://38.xn--b1aew.xn--p1ai/news/item/19123302/.

[21] https://t.me/bazabazon/8050.

9. Marketplace

The marketplace is an e-commerce platform on which different third parties offer products or services for sale, but the actual transactions are processed by the marketplace operator.

Here eBay is the best known example of a marketplace.

When it comes to online games, the marketplace operates as follows: developers post their game content on the marketplace where any player can acquire it online. In this case some of the income, as a rule the smaller share, goes to the operator of the platform and the larger share goes to the developer.

As a result, developers gain a large audience for the sale of their content, receive feedback and requests on developments, while the marketplace operator receives its commission, usually around 20 – 30%.

Popular marketplaces for trading in games and different associated content include such platforms as Steam, Origin, Microsoft Store, XBOX Marketplace, Unreal Engine Marketplace.

The functioning of the marketplace gives rise to numerous legal issues related to the protection of the rights and interests of its participants. Let's take a look at the main ones.

As the goal of a marketplace's functioning is to make profit on the sale of paid content, such content posted on the platform often attracts the interest of infringers – online pirates.

After obtaining content illegally, the pirates distribute it on their websites dedicated to online games in groups in social networks, posting links for downloading the content or a respective torrent file.

In this situation the developer is entitled to file claims against the owner of the website, domain administrator or hosting provider for the deletion or accordingly blocking of the resource where the copyright is being infringed (for more details, see Section 11 "Blocking of websites").

However, this raises the question as to who is authorised to file such a claim against the indicated individuals. In the marketplace model the rights holder remains the content developer, and if a large amount of content is distributed illegally, in some cases the interests of hundreds of rights holders-developers are affected.

In this situation, a claim for the blocking of the website may be filed on behalf of the rights holder – developer of the content. However, in a number of cases this can be complicated.

Accordingly, it is often the case that the marketplace operator acts as the applicant in a claim on the infringement of intellectual rights. In this case, the operator should be duly authorised by the developer.

For this purpose we recommend including in corresponding agreements (licence, distribution agreements) between the marketplace operator and content developers the authority of the operator to represent the interests of the developer regarding the protection of the intellectual rights of the latter in respect of the content posted on the marketplace. At the same time, we recommend describing in detail all the actions that the operator is authorised to take (the filing and signing of a claim, etc.).

10. Streaming and recording of the gameplay of online games

Online game tournaments or the gameplay of certain players can attract a vast audience ready to watch them in a live real time broadcast or watch recordings. Such live broadcasts are usually made through streaming, in other words, the transmission of a picture displayed on the player's monitor to an unlimited number of third parties through different web services, where YouTube and Twitch are the most popular.

Here the issue of the legitimacy of the streaming arises.

Pursuant to the RF Civil Code, a computer program (video game) includes audio-visual images (picture from the monitor) generated by such a computer program. This is the visual display (picture with the player's monitor) and is used by the player (broadcast to an unlimited number of third parties or recorded) during streaming or the recording of gameplay.

Consequently, under Russian law the streaming of a game or the recording of its gameplay represents a way to use the game.

Accordingly, admissibility of the streaming of the game or the recording of its gameplay will be directly contingent on the terms of the specific licence agreement governing the use of this game by the player. Furthermore, one should bear in mind the provision of Clause 1 of Article 1235 of the RF Civil Code which stipulates that the right to use intellectual property that is not expressly indicated in the licence agreement is deemed

not to have been provided to the licensee. In other words, if the game user agreement does not include any provisions on the streaming of the game or the recording of its gameplay, the player may not perform such actions without a special separate permission of the developer of this game.

However, the difficulties for streamers do not end here. If a court does not recognise the streaming or the recording of the gameplay of a video game as use based on the legal meaning of the word, the actual video game is not the sole intellectual property that is being used by the streamer. For example, if the gameplay of the video game includes audio compositions (for example, background music) or video inserts (so-called "cinematics"), the indicated gameplay elements constitute an independent work, the streaming or recording of which may without a doubt be considered use that is not permitted by default without the consent of their rights holders. Moreover, many streamers love playing online games with the music of their favourite groups and performers, whose use in streaming or the recording of gameplay also requires the individual consent of the rights holder of corresponding tracks.

In actual fact, it is specifically the rights holders of music (both in-game, and also third party, external) and not video game developers that most often block the streaming channels or gameplay recordings uploaded by users to various online services, where the music of such rights holders is being used illegally.

In the fight against streamers-infringers, rights holders are helped significantly by online services used to stream or post the gameplay recordings.

For example, in accordance with YouTube's Terms of Service[22] (**the** "**Terms**"), each user of the service confirms that the content being uploaded by this user does not contain third-party intellectual property. If a violation of the Terms is discovered, YouTube reserves the right to decide whether to delete the video entirely or individual fragments of the video.

YouTube has also developed a new system ContentID, which makes it possible to automatically scan in real time use of intellectual property in clips uploaded on YouTube or during the streaming of a rights holder who is registered in this system and has submitted information on the intellectual property that they own. If content registered in the system of the rights holder is discovered in a clip or streaming uploaded on YouTube, the system automatically performs the action that it is instructed to take by the rights holder (for example, it blocks this video or monetises it in favour of the rights holder).

At the same time, it should be acknowledged here that the streaming of video games and publication of clips with their gameplay increases significantly the popularity of

[22] https://m.youtube.com/static?template=terms.

such video games in the Internet community, as it presents their best form of advertising (furthermore, it is absolutely free for developers). Accordingly, a number of video game developers implement a policy that enables all players to stream without restriction or upload online gameplay recordings of the video games created by such developers. For example, such a policy is adhered to by such major companies in the game industry as Valve and Ubisoft[23].

11. Blocking of websites

The overwhelming majority of infringements of the rights of online game developers (and in principle any other rights holders) are currently committed online on different websites. If such an infringement is discovered, the rights holder is usually interested, in addition to the receipt of compensation, in the deletion from the website of the content that infringes their rights, or in the total blocking of such a website.

At present different ways can be used to block websites. However, they can be arbitrarily split into two major groups: extra-judicial and judicial.

11.1 EXTRA-JUDICIAL BLOCKING OF WEBSITES

At present the extra-judicial procedure for blocking a website implies the sending of a corresponding claim not to the website owner or its administrator, but instead to the information intermediary responsible for the functioning of the website. If the information intermediary is notified of an infringement of third party rights performed using the website, but does not take respective measures, it will not be able to avoid liability if the interested party files a claim in court. It is namely in connection with this fact that information intermediaries try not to allow disputes to escalate into conflicts and frequently satisfy the claims of the interested party pursuant to the pre-court dispute resolution procedure by blocking a corresponding website.

Pursuant to the law, information intermediaries include:

- parties engaged in the online transmission of materials (for example, a communications operator);

- parties allowing the posting of material or information required for its receipt online (for example, hosting providers, YouTube);

[23] https://support.ubi.com/ru-RU/faqs/18579/Ubisoft-YouTube-и-авторское-право/; https://www.cybersport.ru/dota-2/news/valve-razreshila-neofitsialnye-strimy-dlya-svoikh-turnirov.

- parties providing access to materials online (for example, search engines)[24].

Information intermediaries also include news aggregators[25], video hosting services[26], search engines[27], social networks[28], torrent trackers[29], contextual advertising services, such as Google AdWords, Yandex.Direct[30], domain name registrars[31], etc.

In practice, interaction between the rights holder and hosting provider looks as follows. The rights holder sends a claim to the hosting provider in which it notifies the latter of instances of infringement of the rights of the rights holder on the hosted website and demands that the website is blocked, or all contested content is deleted (the appropriate claim depends on the situation).

The hosting provider contacts the website owner or the domain administrator, proposing him to delete the contested content/the entire website independently. If these persons ignore the request of the hosting provider, the latter performs the indicated actions independently, as the actual website as a body of content is always located on the server of the hosting provider of this website. The rights holder thereby secures the desired result through its hosting provider without taking court action or applying to any state authority.

11.2 JUDICIAL BLOCKING OF WEBSITES

If the attempts at pre-court resolution of the dispute fail to yield any result, the rights holder may apply to a court.

Moscow City Court will always be the competent court in such cases.

Even before the filing of a statement of claim on the main subject matter of the dispute, the rights holder may file a motion with the indicated court for the application of preliminary interim measures aimed at the immediate interim protection of copyright. If this motion is satisfied, Roskomnadzor and other parties will be required to terminate

[24] Minutes No. 10 of the meeting of the working group of the Expert Advisory Board of the Intellectual Property Court dated 22 April 2015.

[25] Judgment No. S01-491/2017 of the Intellectual Property Court dated 6 July 2017 on case No. A40-216998/2016.

[26] Judgment No. S01-524/2015 of the Intellectual Property Court dated 22 June 2015 on case No. A40-66554/2014.

[27] Judgment No. S01-729/2014 of the Intellectual Property Court dated 16 March 2015 on case No. A40-118714/2013.

[28] Decision of Moscow City Court dated 17 May 2017 on case No. 3-92/2017.

[29] Judgment of the Intellectual Property Court dated 16 March 2015 on case No. A40-118714/2013.

[30] Judgment of the Intellectual Property Court dated 12 September 2014 on case No. A40-145068/20136.

[31] Decision of the Commercial Court of the City of Moscow dated 11 December 2017 on case No. A40-132026/17-91-1150.

the creation of the technical conditions that allow the posting of such illegal content,[32] in other words, to send a corresponding notice to the hosting provider, which will notify the website owner, and if there is no reaction from the latter, the telecommunications operator.

As a fairly high percentage of motions for the application of preliminary interim measures are dismissed, this motion must be prepared carefully. In any case, the following must be taken into account:

- the applicant must prove its status of rights holder;
- screenshots of the website confirming the posting of the contested copyrighted material must be attached;
- information on the hosting provider of the website must be indicated. This is easy to determine by using the Whois service;[33]
- the data received from the Whois service should make it possible to establish the mailing address of the party responsible for the infringement of the exclusive rights.

If the motion of the rights holder for the application of preliminary interim measures is satisfied, the court will establish a deadline (no more than 15 days) during which the rights holder must submit a statement of claim to the hosting provider on the main subject matter of the dispute for a ban on the creation of technical conditions that lead to the infringement of the claimant's rights.

If the statement of claim is not filed by the established deadline, the preliminary interim measures will be revoked by the court.

If the statement of claim is filed on time, the indicated preliminary interim measures will be transformed into interim relief and will retain force until the end of the consideration of the case.

[32] Clause 53 of the "Overview of Court Practices on Cases Involving Resolution of Disputes on Protecting Intellectual".

[33] For example, see Ruling No. 2i-0109/2018 of the Moscow City Court dated 25 January 2018.

12. Development of online games in Russia

When entering the Russian market, foreign companies sometimes consider the possibility of bringing Russian developers onto their team. In so doing, the following aspects of how Russian law regulates such relations should be taken into consideration.

12.1 WORKS FOR HIRE

Article 1295 of the Civil Code enshrines the definition of a work for hire, which means a work (including computer software) created within the scope of the job duties established for an employee (the author). Under the general rule of Clause 2 of Article 1295 of the Civil Code, the employer holds exclusive rights to such works for hire, unless the employment agreement or independent contractor agreement with the author establishes otherwise.

Consequently, for the presumption of the employer's exclusive rights to a particular computer program to apply, it is essential that such program be deemed a work for hire.

It has been noted in court practice that in order to determine whether a work created by an employee under a specific assignment by the employer is a work for hire, it is essential to investigate whether this assignment lay within the scope of the employee's job duties. If this assignment from the employer did not lie within the scope of the employee's job duties, then the work created cannot be considered a work for hire, and the employee retains exclusive rights to the work. The employer may only use it on the basis of a separate agreement with the employee, and provided compensation is paid.

The fact that the author used the employer's materials to create a work does not by itself serve as grounds to conclude that the work created is a work for hire.

When there is a dispute between the author and the employer as to whether a specific work created by the author is a work for hire, it should be taken into consideration that the content of the employee's job duties and the fact of the creation of a work of art, literature, or science within the scope of these duties must be proven by the employer[34].

Thus, the employer must take care in advance to correctly arrange its relations with employees who will be working on developing software (games). In addition to the

[34] Clause 104, Judgment No. 10 of the Plenary Session of the Supreme Court of Russia dated 23 April 2019 "On the Appplication of Part Four of the Civil Code of the Russian Federation".

employment agreement, which must indicate the specific job duties of the employee (development of computer software), it is recommended that the employer draw up a job description and in it indicate in detail what the labour function consists of, for example computer software (game) developer. In a disputed situation, the employer will also have to prove that it gave the employee an order to develop a game. Such orders may be drawn up in the form of letters of assignment, memoranda, etc. After completion of the assignment – development of computer software – it is recommended that the transfer of the software from the employee to the employer be documented.

12.2 CUSTOM WORK CONTRACT

If an individual is not an employee, but must be engaged as a developer, then a custom work contract is concluded with the individual.

Pursuant to Clause 1 of Article 1288 of the Civil Code, in a custom work contract one party (the author) undertakes, by order of the other party (the client), to create a work as stipulated in the contract in a physical medium or in another form.

In contrast to a work for hire, exclusive rights to the computer program does not automatically belong to the client: this question must be settled in the contract with the author. This contract may stipulate that the client is granted exclusive rights to the work that the author is to create, or it may grant the client the right to use this work within the boundaries established by the contract, i.e. a license. The first variant, where the client is granted exclusive rights, is naturally more advantageous to the client.

The Civil Code grants certain advantages to the author as part of the regulation of custom work contracts.

Among other things, where necessary and when there are valid reasons to do so, the author is given an additional grace period to complete the work, equal to one-fourth of the term established by the contract for performance, unless a longer grace period is stipulated by agreement of the parties. If the work to be created by the author is to be used as part of a complex object, this rule applies unless the contract stipulates otherwise.

If the grace period expires and the author has still not completed the program, the client may unilaterally repudiate the contract.

The client also has the right to repudiate the custom work contract immediately on the expiration of the term established by the contract for its performance, if the contract has not been performed by this time and it clearly follows from the contract's terms and conditions that in the event of a missed deadline for performance the client will lose interest in the contract.

It should also be taken into consideration that the author's liability under the agreement on transferring exclusive rights to the work and under the licensing agreement is limited to the amount of real damages caused to the other party, unless the agreement foresees a lesser liability for the author.

12.3 SOFTWARE DEVELOPMENT AGREEMENT

If the client's counterparty is not the author of the work, then the provisions of Article 1296 of the Civil Code apply to relations.

Pursuant to Clause 1 of Article 1296 of the Civil Code, exclusive rights to a computer program created under an agreement, the subject of which is the creation of this work, belong to the client, unless the agreement between the contractor and the client stipulates otherwise.

It should be taken into account that as a general rule the contractor has the right to use such a work for its own needs on the terms of an unpaid simple (non-exclusive) license for the entire duration of the term of exclusive rights. If the client does not want this provision to apply, it can be amended in the agreement itself.

Contacts

Falk Tischendorf
Rechtsanwalt | Partner
Head of CIS
ADVANT Beiten
Falk.Tischendorf@advant-beiten.com

Ilya Titov
Lawyer | LL.M. | Associate
ADVANT Beiten
Ilya.Titov@advant-beiten.com

ADVANT Beiten in Russia
Turchaninov Per. 6/2
119034 Moscow
T: +7 495 2329635
www.advant-beiten.com

Our Offices

BEIJING
Suite 3130 | 31st floor
South Office Tower
Beijing Kerry Centre
1 Guang Hua Road
Chao Yang District
100020 Beijing, China
beijing@advant-beiten.com
T: +86 10 85298110

BERLIN
Luetzowplatz 10
10785 Berlin
Germany
berlin@advant-beiten.com
T: +49 30 26471-0

BRUSSELS
Avenue Louise 489
1050 Brussels
Belgium
brussels@advant-beiten.com
T: +32 2 6390000

DUSSELDORF
Cecilienallee 7
40474 Dusseldorf
PO Box 30 02 64
40402 Dusseldorf
Germany
dusseldorf@advant-beiten.com
T: +49 211 518989-0

FRANKFURT
Mainzer Landstrasse 36
60325 Frankfurt/Main
Germany
frankfurt@advant-beiten.com
T: +49 69 756095-0

FREIBURG
Heinrich-von-Stephan-Strasse 25
79100 Freiburg im Breisgau
Germany
freiburg@advant-beiten.com
T: +49 761 150984-0

HAMBURG
Neuer Wall 72
20354 Hamburg
Germany
hamburg@advant-beiten.com
T: +49 40 688745-0

MOSCOW
Turchaninov Per. 6/2
119034 Moscow
Russia
moscow@advant-beiten.com
T: +7 495 2329635

MUNICH
Ganghoferstrasse 33
80339 Munich
PO Box 20 03 35
80003 Munich
Germany
munich@advant-beiten.com
T: +49 89 35065-0

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