Team: 108

GAMES INDUSTRY LAW SUMMIT:

LEGAL CHALLENGE 2019

ALEX KARSKY

and

ALLAN CHEN

(CLAIMANTS)

V.

OMNIA LTD.

(RESPONDENT)

SUBMISSION OF THE RESPONDENT

TABLE OF CONTENTS

LIST OF REFERENCES

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SUMMARY OF THE MAIN ARGUMENTS

1. Contrary to Claimants' submission, the law of Terryland is not applicable to the case at hand as the requirements of Article 3(3) Rome I are not met, namely not all relevant elements of the situation, other than the choice of law, point to Terryland. Furthermore, Article 1173 of the Civil Law Code of Terryland is not an overriding mandatory provision within the meaning of Article 9(1) Rome I as it does not safeguard public interests of the country and protects only particular economic interests.
2. Even if the Court finds otherwise, Article 1173 Civil Code Law of Terryland cannot be applied as it would constitute a violation of the rule of law, namely the principle of non-retroactivity. The License Agreement between the parties was concluded in 1984 whereas the Civil Law Code of Terryland was introduced in 1993 and Article 1173 was only recently enacted.
3. Should the Court find otherwise, it is submitted that Alex Karsky's works were not exploited by Omnia as the plot of "Cosmic Dust 2" is completely new and it has virtually no connection with creative elements from Alex Karsky's book.
4. If the Court finds otherwise, Claimants manifestly failed to demonstrate that Respondent's profits from "Cosmic Dust 2" were derived from the exploitation of Alex Karsky's works. In any case, his contribution to the success of "Cosmic Dust 2" was at best minimal. Finally, his claim is restricted to Respondent's exploitation returns in Terryland which only reinforces the conclusion that there was no disproportionality under Article 1173 Civil Law Code. Alex Karsky's contribution is already covered by the flat fee paid by Respondent.
5. With regards to Allan Chen's claim, Respondent sustains that Article 1173 CLC shall not be applicable to the case at hand. However, Respondent agrees with the Claimants that Obliland's law is to be applied with respect to Allan Chen's employment contract.
6. In case the Court finds that Article 1173 CLC may be applied, Respondent submits that none of the prerequisites of this provisions are met. Namely Allan Chen is not an author of "Cosmic Dust"; Omnia did not exploit Allan Chen's works as all elements inspired by "Cosmic Dust" which are present in the "Cosmic Dust 2" are not copyrightable; and finally that Allan Chen's remuneration was not disproportionately low compared to his contribution to "Cosmic Dust 2".

7. Omnia claims that it is not in breach of the License Agreement due to two factors. First, no Alex Karsky's works were exploited in "Cosmic Dust 2" by Omnia. Alternatively, the development of "Cosmic Dust 2" falls within the scope of the *further use* provision under Article 2.1(b) of the License Agreement.

LEGAL PLEADINGS

A. OMNIA SHALL NOT PAY ADDITIONAL APPROPRIATE REMUNERATION TO ALEX KARSKY IN RESPECT OF "COSMIC DUST 2" ON THE GROUNDS THAT THE ORIGINALLY PAID REMUNERATION WAS DISPROPORTIONATELY LOW COMPARED TO OMNIA'S REVENUES FROM THE PRODUCT

1. The law of Terryland is inapplicable to the dispute at hand

1. Contrary to the submission of the Claimants ("**Claimants' Memorial**"), it is impossible to apply the Civil Law Code of Terryland ("**CLC**") to this case as the requirements of Article 3(3) Rome I[1] are not satisfied (**1.1**) and Article 1173 CLC is not an overriding mandatory provision within the meaning of Article 9(1) Rome I (**1.2**).

1.1. The requirements of Article 3(3) Rome I are not met

2. Two preliminary remarks need to be made.

3. First, it must be stressed that Claimants misinform this Court by stating that for Article 3(3) Rome I to apply, a majority of elements relevant to the situation must be connected to the country other than the country whose law has been chosen.[2] In fact, Article 3(3) Rome I requires that all elements are connected to other country.

4. Second, Claimants submit that Alex Karsky and Allan Chen negotiated the License Agreement in Terryland.[3] In fact, Allan Chen was merely an employee of Omnia[4] and there is no indication in the case that he was authorised to represent Omnia or conduct any negotiations on behalf of Omnia.

5. Moving to the main argument, Article 3(3) Rome I is inapplicable to the case at hand because it is impossible to say that "all the other elements relevant to the situation at the time of the choice" of law are connected with Terryland.

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[1] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I").
[2] Claimants' Memorial, ¶9.
[3] Claimants' Memorial, ¶22.
[4] The Case, ¶1.

6. Article 3(3) Rome I is designed to apply to *a purely domestic situation*.[5] It thus becomes relevant only in *very rare cases*.[6] If there are other elements, outside the choice of law, relevant to the situation at the time of concluding the contract, which are connected with other countries, the contract is not a domestic contract of concern only to one country so that Article 3(3) Rome I does not apply.

7. Claimants decided to support their argumentation on Article 3(3) Rome I by referring to Franco Ferrari's commentary, because in this very work it is stated that it is *plainly the case* [that Article 3(3) Rome I is inapplicable], *for example, when (...) the principal place of business or the place of central administration of one of the parties – leads to a foreign country.*[7]

8. The same view is also shared in the German[8] and English[9] case law. In *NM Rothschild Ltd v Equitable Life Assurance Society,*[10] it was held that the domicile of the other party to the contract was plainly a relevant element for the purposes of Article 3(3) Rome I. In *Caterpillar Financial Services Corp v SNC Passion* it was held that the nationality of the other party is *clearly a crucial point*.[11] In that case the fact that the other party was a Delaware Corporation was *the most significant element of the transaction which involve a connection with a jurisdiction other than France*[12] (claimants in *Passion* argued that all elements point to France).

9. Finally, Claimants themselves admit that their nationality is a relevant element.[13] Equally relevant is Respondent's nationality.

10. Respondent is a company domiciled in Obliland, where it develops its products.

11. The position therefore is clear. Article 3(3) Rome I has no application in this dispute.

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[5] F. Ragno in: F. Ferrari, *Rome I Regulation: Pocket Commentary*, 2015 [F. Ferrari], p. 110.
[6] D. Solomon, *The private international law of Contracts in Europe: advances and retreats*, (2008) 82 Tulane Law Review, pp. 1727-1728.
[7] F. Ferrari, pp. 111-112.
[8] BGH, NJW-RR 2005, 929, 931; BGH, NJW 1997, 1697, 1698.
[9] Emeraldian Limited Partnership vs Wellmix Shipping Limited [2010] EWHC 1411 (Comm), ¶174.
[10] [2002] EWHC 1021 (QB).
[11] [2004] EWHC 569, ¶29.
[12] Ibidem, ¶23.
[13] Claimants' Memorial, ¶22.

1.2. Article 1173 CLC is not an overriding mandatory provision under Article 9 Rome I

12. Contrary to Claimants' submission,[14] it is impossible to regard Article 1173 CLC as an overriding mandatory provision under Article 9 Rome I.

13. Definition in Article 9(1) Rome I introduces a *very restrictive approach* as to whether a given norm may be classified as an overriding mandatory provision.[15] It should be applied only in *exceptional circumstances*.[16]

14. Article 9(1) Rome I refers to norms deemed to be *crucial* for safeguarding of *public interests* as well as maintaining the *political social or economic organisation* of the state concerned. Therefore, the national courts should resist the temptation to attribute too easily the nature of overriding mandatory provisions.[17]

15. Claimants argue that rules whose purpose is to equalize parties' position in private law relationship by protecting the weaker party fall under Article 9 Rome I.[18]

16. This view cannot be accepted. Indeed, German Federal Supreme Court (BGH) concluded that the protective norms concerning certain categories of individuals, in particular the weaker party to a contract, do not fall under the notion of overriding mandatory provisions even though they also tend to promote, indirectly, the interests of the collectivity.[19]

17. Furthermore, Claimants' argumentation[20] is contrary to the wording of Article 9 Rome I, which refers to interests regarded as crucial by a country for safeguarding its public interests. From that it follows that provisions that only balance the interests of the contractual parties cannot be qualified overriding mandatory provisions.[21]

18. The rules on copyright protection primarily aim at safeguarding the author's individual interests, so that they could hardly be characterized as overriding mandatory rules.[22] Absent

[14] Claimants' Memorial, ¶¶30-36.
[15] F. Ferrari, p. 326.
[16] Rome I, Recital 37.
[17] A. Bonomi, *Overriding mandatory provisions in the Rome I Regulation on the Law Application to Contracts,* Yearbook of Private International Law, vol. 10, 2008, p. 289.
[18] Claimants' Memorial, para. 35.
[19] BGH 13.12.2005 XI ZR 82/05, in: IPRax 2006, p. 272.
[20] Claimants' Memorial, ¶¶34-35.
[21] F. Ferrari, pp. 326-327.
[22] Y. Nishitani in: F. Ferrari, S. Leible, *Rome I Regulation : the law applicable to contractual obligations in Europe,* 2009, p. 82; T. Kono, *Intellectual Property and Private International Law,* 2012, p. 279.

legislator's clear intent, copyright laws should not be considered to fall within Article 9(1) Rome I. That is why the Dutch[23] and German[24] legislators expressed their clear intent.

19. Article 1173 CLC is clearly aimed at safeguarding the author's individual interests. There is no indication as to the legislator's intent to "entrench" this norm. Therefore, it may not be regarded as crucial for the public interest.

20. Finally, French case law suggests a greater intensity of public policy with respect to moral rights.[25] French approach demonstrates that with respect to economic rights there is a "relatively weak domestic policy that does not warrant imposition on foreign law contracts".[26]

21. Article 1173 CLC is intended to protect purely economic interests of the author. Contrary to Claimants' submission, it is therefore impossible to regard such provision as an overriding mandatory provision.

2. The claim regarding additional remuneration under Article 1173 CLC is barred due to the *lex retro non agit* principle

22. Claimants' demand to be paid additional sum of money pursuant to Article 1173 CLC is contrary to the principle of non-retroactivity.

23. Principle of non-retroactivity is widely recognised in any country governed by the rule of law.[27]

24. According to this principle, the law produces effects only after it is brought to the general knowledge of their recipients.

25. Given its importance, it is up to the legislator to establish, in express terms, derogations therefrom.

[23] Article 25h Dutch Copyright Act 2015.
[24] Section 32b German Copyright Act.
[25] Cour d'appel Paris ch., Apr.19, 1989, RIDA 1989,360.
[26] J.Ginsburg, p.184.
[27] e.g.Article 2 French Civil Code.

26. With respect to author-protective legislation, the new Dutch Copyright Act 2015 expressly states in Article III which provisions have retroactive effect: Article 25d ("bestseller clause") is not one of them.

27. In Germany, it is irrelevant when the contract was concluded for the bestseller clause to apply, provided it was concluded after January 1, 1966, which is when the German Copyright Act entered into force.[28]

28. Article 18(3) of the proposal of a directive on copyright in the Digital Single Market, which includes a bestseller clause in Article 15, should be read as meaning that contracts concluded prior to the effective date of the DSMD cannot be challenged.

29. Article 1173 CLC was introduced recently.[29] No exact date is indicated in the case. Nevertheless, not only is there no clear legislative intention as to its retroactive effect, the License Agreement was concluded 9 years before the CLC entered into force!

30. Therefore, Art. 1173 CLC is inapplicable to the case at hand as its application would be contrary to the rule of law.

3. Even if the Court finds Terryland law to be applicable, Claimants' demand under Article 1173 CLC is unwarranted

31. If the Court finds Terryland law to be applicable, Article 1173 CLC requirements were not met as Respondent did not exploit Alex Karsky's works in Cosmic Dust 2 (**3.1**). Alternatively, if the Court finds otherwise, Alex Karsky failed to demonstrate that Respondent's revenues and benefits were derived from the exploitation of his works (**3.2**). Should the Court find otherwise, it is submitted that Alex Karsky's contribution was in any case insignificant for the success of "Cosmic Dust 2" (**3.3**). Furthermore, his claim is limited to Respondent's exploitation returns in Terryland which only reinforces the conclusion that there is no disproportionality under Article 1173 CLC (**3.4**).

3.1. Respondent did not exploit Alex Karsky's works in "Cosmic Dust 2"

[28] Stechova, p.140
[29] The Case, ¶9

32. There was no exploitation of Alex Karsky's works in "Cosmic Dust 2". Claimants merely assert that the works were exploited without a single argument or example to support it.[30]

33. One of the conditions for Article 1173 CLC to apply is that the party to a contract has exploited the works of an author. No such exploitation occurred in the production of "Cosmic Dust 2".

34. Indeed, the names of some of the characters that exist in the book appear in "Cosmic Dust 2". It needs to be stressed, however, that the name "Ava Martin" and others are not protected by copyright as literary works.[31] The plot of "Cosmic Dust 2", however, is completely new, it has virtually no connection with the book.

35. First, the game universe was developed by the players themselves in "Cosmic Dust".[32] That is the nature of the MUD genre. For example, in the book Ava Martin is a scientist who found a powerful weapon and decided to share it with the known universe.[33] In contrast, in the MUD game, she was a leader of a small group of rebels, but with time she gained such a massive support from players that made her character a very influential figure, almost a religious symbol.[34] It should also be mentioned that other characters from the book like Lance Wang, Roger "Jolly Roger" Stoff or AI 4400 were only an inspiration for the class characters such as hackers, pirates and robots,[35] which is not protected by copyright.

36. Second, the plot of "Cosmic Dust 2" picks up exactly where it left off in "Cosmic Dust", as developed by its dedicated fans[36] and game creators, not by Alex Karsky.

37. In conclusion, no work protected by Alex Karsky's copyright was exploited in "Cosmic Dust 2". Article 1173 CLC finds no application here.

3.2. Alex Karsky failed to demonstrate that Respondent's revenues and benefits were derived from the exploitation of his works

[30] Claimants' Memorial,¶¶41-42.
[31] Exxon Corp. v. Exxon Insurance [1982]RPC 69
[32] Exhibit 3.
[33] Exhibit 1, p.3.
[34] Exhibit 3.
[35] Exhibit 1, p.4.
[36] Exhibit 3.

38. Even if Alex Karsky's works were exploited, the Claimants failed to discharge the burden of proof incumbent on them with respect to Article 1173 CLC.

39. Article 1173 Terryland law refers to disproportionality between contractual remuneration of an author and the revenues derived from the exploitation of the works by the other party.

40. Claimants argue that i) Alex Karsky is the author of the "Dust on our Hands", ii) Respondent exploited his rights and iii) Respondent generated a significant profit from its product.[37]

41. Respondent does not dispute Alex Karsky's authorship of "Dust on our Hands". There is, however, an unwarranted logical leap in Claimants' argument in saying that because Respondent exploited Alex Karsky's works and generated revenues from its product, it follows that the entire profit was derived from the said exploitation. This is not necessarily the case. The game generated such profits because of its exceptional quality[38], not because some of its plot revolves around characters inspired by Alex Karsky's book. In fact, it is far more likely that it is not the exploitation of Alex Karsky's work that built the success of the product. This realisation is obvious once one thinks about what aspects of Alex Karsky's work were exploited, as described in Exhibit 1.

42. The events take place in the near future characterised by antagonisms between powerful corporations in the universe inhabited by robots, hackers, pirates and merchants. This in itself does not guarantee success just like a mere adaption of Tolkien's beloved story did not prevent the (commercial) failure of games like The Lord of the Rings (1994).

43. It is the quality of the game as developed by its creators that is the (primary) source of the benefits, not the fact that the story involves hackers and robots, dwarves and elves, Aragorns or Ava Martins.

44. Therefore, it is unjustified for Claimants to compare the contractual remuneration with the entire revenues of Respondent.[39] Under Article 1173 CLC the profits that ought to be compared are those that were derived from the exploitation of the works. The burden of the

[37] Claimants' Memorial, ¶¶39-47.
[38] The Case, ¶7
[39] Claimants' Memorial ¶¶46-47.

proof lies upon Claimants and they manifestly failed to show that Respondent's revenues were generated by the exploitation of Alex Karsky's works.

3.3. Alex Karsky's contribution to the success of "Cosmic Dust 2" was insignificant

45. As demonstrated above, it is doubtful whether there was any creative contribution by Alex Karsky in the development of "Cosmic Dust 2" at all. However, even if Alex Karsky's works were exploited, his contribution was insignificant and had no impact or influence on the commercial success of "Cosmic Dust 2".

46. According the well-established German case law, no additional remuneration is available pursuant to the best-seller clause where the author's work was of "mere ancillary importance" to the overall product.[40]

47. It needs to be stressed that by 2018, around one thousand people were working on the game.[41]

48. It is inherent in the nature of successful MMOs that the game universe is constantly evolving even further to ensure the interest of players around the world. Creative contributions in the updates and patches uploaded as the universe develops are in the very nature of top MMOs and should not be understated.

49. Therefore, not only when the game was released was Alex Karsky's contribution minimal, it has become even more negligible by now.

4. Alex Karsky's claim under is limited to the exploitation revenues generated in Terryland

50. Even if we accept Alex Karsky's contribution was not ancillary to the success of "Cosmic Dust 2", his claim is only limited to the exploitation returns obtained in Terryland.

51. Claimants allege the infringement of national IP rights and seek protection of Terryland IP laws. According to the universally acknowledged *lex protectionis* principle, obligations arising out of infringements of IP rights are governed by the law of the country for which protection is claimed.

[40] I ZR 145/11 of 10 May 2012.
[41] The Case, ¶7

52. That is why under the established German case law and doctrine *where worldwide rights are granted by the author, the statutory claims to remuneration are restricted to exploitation returns within Germany and do not expand to worldwide income*.[42]

53. Such conclusion follows from the fact that the rights conferred under an IP right are limited to the territory of the state that grants or protects the right. Explicit statutory territorial limitations can be found especially in the countries of common law tradition.[43] Also in the civil law jurisdictions, territorial limitations on at least the economic rights are frequently assumed.[44]

54. International IP conventions require certain substantive minimum standards, yet tolerate differences between domestic laws. The right to choose the particular level of protection granted under the national IP law, as required by the international IP conventions, would be undermined if other states could override that choice through the extraterritorial application of their own IP laws.[45]

55. Therefore, in order to maintain the worldwide compromise enshrined in international IP conventions, only the exploitation returns within Terryland ought to be taken into account, that is, USD 25 million.[46]

56. Given that exploitation of Alex Karsky's works was at best insignificant and that around 1,000 people creatively contributed to the success of "Cosmic Dust 2", it only reinforces the conclusion that Alex Karsky's contribution is already covered by the flat fee paid by Respondent more than 30 years ago.

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[42] K. Stechova, *How to Best "Sell" the "Best-seller" Clause?,* doctoral thesis, 2017, p. 150; K. M. Gutsche, *New copyright contract legislation in Germany: rules on equitable remuneration provide "just rewards" to authors and perfomers*, European Intellectual Property Review 2003, p.371.
[43] e.g.section 36 Australia Copyright Act 1968; Article 5 Canada Copyright Act; section 1 Indian Copyright Act,1957; section 16(1) UK Copyright, Designs, and Patent Act 1988.
[44] S. Strömholm, *Upphovsrätt och internationell privaträtt*, Stockholm 2001. pp. 173-181.
[45] L. Lundstedt, *Territoriality in Intellectual Property Law*, Stockholm University 2016, p. 98.
[46] The Case, ¶7.

B. OMNIA SHALL NOT PAY ADDITIONAL REMUNERATION TO ALLAN CHEN IN RESPECT OF "COSMIC DUST 2" ON THE GROUNDS THAT THE REMUNERATION PAID TO HIM AS AN EMPLOYEE OF OMNIA WAS DISPROPORTIONATELY LOW COMPARED TO THE CONTRIBUTION THAT HE MADE TO "COSMIC DUST 2" AND TO OMNIA'S REVENUES FROM THE PRODUCT

1. Article 1173 CLC is not applicable to Allan Chen's claim

57. As it was already proven, Article 1173 CLC cannot be applied to the case at hand neither on the basis of Article 3(3) Rome I,[47] nor pursuant to Article 9 Rome I.[48] Thus, it had to be concluded that Allan Chen's claim regarding additional remuneration is groundless and Omnia is under no legal obligation to pay Claimant additional remuneration due to the "Cosmic Dust 2" market success.

58. However, in case this Court finds that Article 1173 CLC may be applicable to the case at hand, it shall be stated that Allan Chen cannot fulfil any prerequisites laid down in this provision.

2. Allan Chen's employment contract is governed by Obliland's law

59. Respondent concurs with Claimants' argument that Article 8 Rome I is to be applied to Allan Chen's employment contract. Moreover, Respondent also agrees that the test provided in Article 8 Rome I leads to a conclusion that the contract is to be governed by Obliland's laws.[49]

3. Even if Article 1173 CLC is applicable, Allan Chen does not meet any of its prerequisites

60. Having established that Obliland's law governs Allan Chen's employment contract and that its provisions shall be used to determine the authorship and scope of rights the parties are entitled to, it is possible to examine in detail why Article 1173 may not be applied to the case at hand.

3.1. <u>Allan Chen is not an author of "Cosmic Dust" pursuant to Article 20 LCD</u>

[47] See above:¶2-11.
[48] See above:¶12-21.
[49] Claimants' Memorial,¶¶78-79.

61. Obliland's LCD provides two central provisions regarding authorship of a work – Article 7 and Article 20. The latter is to be treated as *lex specialis* in relation to Article 7.

62. Such reasoning is also confirmed by English doctrine, which explicitly provides that in case of a … *under s. 11(2), the Act effectively overrides author's rights to be identified as the author in relation to anything done by or with the authority of the copyright owner.*[50] Similar approach is presented by the US jurisprudence and doctrine, which provides that the employer shall be an author and owner of all copyrights to works made by an employee in the course of his/her employment.[51]

63. Although Claimants correctly pointed out the similarity of Article 20 LCD to paragraph 11(2) of the UK's CDPA 1988,[52] it is apparent that their notion regarding distinction between authorship and copyrights in terms of employment relationship was not correct.[53]

64. Further, Allan Chen based his claim to authorship of "Cosmic Dust" upon one argument derived from Article 15 LCD. On grounds of this provision Claimants state that: *…Obliland IP Law considers the employer to be the owner but not the author of employee's work.*[54]

65. This notion is fundamentally wrong. First of all, economic rights invoked in Article 15 LCD are by no means identical to ownership of the work. Claimants evidently confused copyright law with ownership in the understanding of civil (contract) law.

66. More importantly, Article 15 LCD cannot be used as an indication of authorship. Goal of this provision is to provide protection for moral rights of an author independently of his/her economic rights.[55] However, pursuant to Article 20 LCD …*employer is the first owner of <u>any copyright</u> in the work*… It is clearly visible, that Article 20 LCD provides no limitation as to which part of copyright to work created by an employee is owned by employer, and

[50] D. Bainbridge, *Intellectual Property*, Pearson Education,2009, p.116.
[51] L. Martin, N. Wilson, The Palgrave Handbook of Creativity at Work,2018, p.407.
[52] Claimants' Memorial,¶82.
[53] *Ibidem.*
[54] *Ibidem.*
[55] Article 15 CLC is identical to Article 6*bis* of the Berne Convention for the protection of Literary and Artistic Works. See: *Guide to the Berne Convention for the protection of Literary and Artistic Works (Paris Act, 1971)*,WIPO,1978, Geneva, p.41-43.

rather grants employer the complete scope of both economic and moral copyrights to the employee's work.

67. Allan Chen was performing all his work obligations relating to "Cosmic Dust" while remaining under employment contract with Omnia.[56] Thus, in such a case interpretation based on fundamental legal conflict rules and UK doctrine[57] shall be applicable accordingly, rendering that Allan Chen may not be regarded as an author or owner of any copyrights vested in "Cosmic Dust".

68. Thus, the first and essential prerequisite of Article 1173 CLC is not met as Allan Chen is not an author of "Cosmic Dusts" and consequently Mr. Chen shall not be entitled to any additional remuneration.

3.2. Omnia did not exploit Allan Chen's works

69. Respondent fully denies Claimants' demand stating that Omnia used his work and entirely reproduced it in "Cosmic Dust 2".[58]

70. Omnia could not have exploited any works of Allan Chen as none of the elements used by Omnia during the creation of the "Cosmic Dust 2" did not constitute a work.

71. It is a universal principle of copyright law that work to be granted copyright protection has to be original[59] and individual.[60]

72. In the case at hand, the only elements which were used by Omnia during the creation of the "Cosmic Dust II" were purely generic such as character classes and the mere concept of the world[61] – none of which shall satisfy the test of being original and individual. Concept of a character class is almost always intertwined with the genre and setting of a particular game. It is obvious that a game set in middle-ages would be based on character classes of knights, nobles etc. and a game which main plot focuses on galactic wars would include robots, space

[56] Clarifications, A7 in connection with The Case, ¶5.
[57] See above:¶62.
[58] Claimants' Memorial,¶86.
[59] CCH Canadian Ltd v Law Society of Upper Canada, [2004]1 SCR 339.
[60] X. gegen Y. AG, decision of the Swiss Federal Supreme Court of September 5, 2003;BGE 130 III 168.
[61] Exhibit 3,¶¶3-4.

pirates etc. Thus, concept of a class or the idea of the game setting may not be copyrightable and therefore cannot be exploited.

73. Identical rule may be applied to all names of characters, corporations or places. They do not fulfil the threshold of originality and individuality, hence they also should not be protected by copyright.

74. Moreover, Claimants themselves admitted that *no facts of the case indicate that the Second Game* [Cosmic Dust 2] *was necessary to use the First Game* [Cosmic Dust], *or vice versa*[62], further reinforcing Respondent's stance that no exploitation of Allan Chen's works occurred.

75. To summarize, none of the elements used by Omnia to create "Cosmic Dust 2" fulfilled the threshold of being protected by copyright, thus even if Allan Chen was found to be an author of "Cosmic Dust", Omnia still did not exploit any of his works, which renders his claim for additional remuneration groundless.

3.3. Allan Chen's remuneration for the creation of "Cosmic Dust" was not disproportionately low

76. In case this Court finds that Allan Chen was an author of "Cosmic Dust" and that his works were exploited by Omnia, Respondent submits that Allan Chen's remuneration was not disproportionately low to Omnia's revenue.[63]

77. Pursuant to Article 1173 CLC assessment of disproportionally low remuneration is subject to *the benefits derived from exploitation of the works*.

78. In the case at hand, Allan Chen did not partake in the creation of the "Cosmic Dust 2" and as Claimants admitted "Cosmic Dust" was not necessary to create "Cosmic Dust 2",[64] thus Allan Chen's overall contribution to the "Cosmic Dust 2" was marginal.

[62] Claimants' Memorial,¶69.
[63] See also:¶¶38-44.
[64] Claimants' Memorial,¶69.

79. Furthermore, by 2018 around 1.000 people were working on "Cosmic Dust 2"[65] and it was ultimately their effort and creativity that gained Omnia such revenue and not the general concept, character classes, or names which were responsible for the game's success.

80. Therefore, Allan Chen's remuneration was not disproportionately low compared to the benefits derived from the exploitation of his (supposed) works, and he shall not be entitled to additional remuneration pursuant to Article 1173 CLC.

[65] The Case,¶7.

C. OMNIA SHALL NOT BE CONSIDERED TO BE IN BREACH OF THE LICENSE AGREEMENT WITH ALEX KARSKY

1. Omnia cannot be in breach of License Agreement as it did not exploit any of Alex Karsky's works

81. As demonstrated above,[66] no works owned by Alex Karsky were exploited by Respondent in the course of the development of "Cosmic Dust 2." The plot of the game is entirely new,[67] only the names of some of the characters are used, but their names are not protected by copyright.

82. Claimants submitted that the fact that some of characters from Dust on our Hands served as prototypes for such class characters as robot, hacker, hacker's friend, merchant, constitutes a violation of Alex Karsky's copyright.[68] This statement is far from the truth.

83. Elements similar to those present in "Dust on Our Hands" which were included in the "Cosmic Dust 2" cannot be protected by copyright, thus they may not violate Alex Karsky's rights under the License Agreement.

84. The same objections apply to Claimants' argument that the conflict between corporations should be protected by copyright.[69]

85. Applying such reasoning leads to absurd conclusions such as that no authors currently would be able to refer to antagonism between dwarves and elves in their works as it would violate copyrights of plethora of writers, filmmakers and computer game developers.

86. Furthermore, Respondent based its arguments on the untrue facts by stating that "Cosmic Dust 2" is *equally rooted in the Book*[70] or that Respondent used the book to create Cosmic Dust 2 *as much as it did*[71] in "Cosmic Dust" and finally that the characters in "Cosmic Dust 2" are the same as those in the book.[72]

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[66] See above:¶¶75-81
[67] Exibit 3, John Rees' statement,¶2.
[68] Claimants' Memorial,¶59.
[69] Claimants' Memorial,¶60.
[70] Claimants' Memorial,¶49.
[71] Claimants' Memorial ¶66.
[72] Claimants' Memorial,¶62.

87. However, the characters were changed and developed by the community of "Cosmic Dust" players[73] and Omnia. Inadvertently, Claimants admited so themselves by quoting Respondent's CEO.[74]

2. Pursuant to Article 2.1(b) of the License Agreement Omnia was entitled to develop "Cosmic Dust 2"

88. In case the Court finds that Omnia exploited Alex Karsky's works in "Cosmic Dust 2", Respondent submits that it was allowed to do so by virtue of Article 2.1(b) License Agreement.

89. Article 2.1(b) License Agreement states that Respondent is allowed to use the book in any way if it is required for further use of Cosmic Dust. It goes without saying that *further use* would allow Omnia to add graphic enhancements, or develop the plot to ensure the interest of the players around the world. Morevoer, changes and modifications are inherent to the online games nature and any author in Alex Karsky's position would have reasonably foreseen such developments at the time of contracting.

90. Having that in mind, development of "Cosmic Dust 2" shall be regarded as falling within the scope of the *further use* of "Cosmic Dust". Thus Omnia is not in breach of the License Agreement.

[73] Exhibit 3, John Rees' statement,¶1.
[74] Claimants' Memorial,¶63.

REQUEST FOR FINDINGS

For the foregoing reasons, Respondent respectfully request the Court to fully dismiss Claimants claims and to adjudge and declare that:

A. Omnia shall not pay additional appropriate remuneration to Alex Karsky in respect of "Cosmic Dust 2" on the grounds that the originally paid remuneration was disproportionately low compared to Omnia's revenues from the product;

B. Omnia shall not pay additional appropriate remuneration to Allan Chen in respect of "Cosmic Dust 2" on the grounds that the remuneration paid to him as an employee of Omnia was disproportionately low compared to the contribution that he made to "Cosmic Dust 2" and to Omnia's revenues from the product;

C. Omnia shall not be considered to be in breach of the license agreement with Alex Karsky, because the license did not permit Omnia to develop and exploit "Cosmic Dust 2".