

Team: 109

**GAMES INDUSTRY LAW SUMMIT:
LEGAL CHALLENGE 2019**

Alex Karsky & Allan Chen

VS

Omnia Ltd.

Submission of the Claimants

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LIST OF REFERENCES

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(English) Unfair Contract Terms Act of 1977

(German) Copyright Act of 1965

(Obliland's) Law on Copyright and Designs dated January 1, 1980

(Polish) Copyright Act of 4 February 1994

(Terryland's) Civil Law Code dated May 15, 1993

Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market COM/2016/0593 final - 2016/0280 (COD)

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)

PRIMARY AUTHORITIES (CASE LAW):

Judgement of the Federal Court of Justice of Germany (Bundesgerichtshof) GRUR 2012, 496 – *Das Boot (The Boat)*

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TABLE OF ABBREVIATIONS

Book	The novel titled “Dust on Our Hands” written by Alex Karsky
First Game	The MUD video game developed by Omnia Ltd. and published in 1990 titled “Cosmic Dust”
Second Game	The MMO video game developed by Omnia Ltd. and published in 2010 titled “Cosmic Dust 2”
Omnia	Omnia Ltd. incorporated under the laws of Obliland under No. 571938364819, with its seat in Seatown, Obliland
License Agreement	The License Agreement dated September 21, 1984 concluded between Alex Karsky and Omnia Ltd.
Obliland IP Law	(Obliland’s) Law on Copyright and Designs dated January 1, 1980
Terryland IP Law	(Terryland’s) Civil Law Code dated May 15, 1993
Regulation	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)
Directive Proposal	Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market

[Disclaimer] For the ease of reference, in-text remark made to the Regulation shall be regarded as a reference to the respective conflict of laws rules existing in both Obliland and Terryland, upon the fact that these provisions are analogous in both countries and were based in the cited Regulation, exhibit 4 *in fine*.

STATEMENT OF FACTS

1. The present case is between two citizens of Terryland acting as claimants and a company seated in Obliland. The first claimant is Alex Karsky, a writer and author the Book written in the 1980s. The second claimant is Allan Chen, a computer programmer, privately a friend of Alex Karsky. The respondent is Omnia, a company involved in the development of computer games, which employed Allan Chen until 1995.
2. In 1987, Allan Chen – employed at that time at Omnia – presented to Omnia’s CEO a plan to produce a video game based on Alex Karsky’s Book. The plan was accepted and soon Omnia concluded with Alex Karsky a License Agreement for the use of Book’s story to produce a video game. Development of the game was headed by Allan Chen, who also chose which characters, locations and plot elements were implemented in the game and how. The First Game was released in 1990. Allan Chen worked for Omnia for five more years and left in 1995.
3. The First Game was a text-based MUD (*Multi-User Dungeon*) game where players could explore the virtual world in real-time and interact between them and various NPCs (*non-playable characters*) via text commands.
4. In 2005, Omnia started works on a sequel to the First Game. The Second Game was eventually released in 2010 and was a big step forward in game design and development – it was no longer a text-based game but rather an MMO (*massively multiplayer online game*) with full graphic and visual improvements. Despite this change, it was still based on all threads and characters incorporated in the first game from the Alex Karsky’s Book.
5. In the following 8 years after the release of the Second Game, Omnia made profits of 800.000.000 USD net from its sales. Despite such substantial profits and even though the sequel heavily relied on the Book by Alex Karsky and its adaptation by Allan Chen, neither of them received any additional remuneration from Omnia.
6. In 2018, Alex Karsky and Allan Chen requested Omnia to pay additional remuneration for such extra use of their works. To date, Omnia did not comply with this request.

SUMMARY OF THE MAIN ARGUMENTS

7. Alex Karsky and Allan Chen claim additional remuneration for the extra use of their works by Omnia. Their claims are based on their native legislation, which is of non-derogable nature and, from the perspective of public policy, constitute an overriding mandatory provision. Thus, Claimants can invoke provisions of Terryland IP Law despite the general choice of Obliland IP Law provided in their respective contracts.
8. Alex Karsky's claim relies on Article 1173 Terryland IP Law which provides for additional remuneration for the author of the granted right if the initial remuneration turns out to be disproportionately low to benefits gained by exploiter of that right. Two independent legal grounds let Alex Karsky resort to this provision of Terryland IP Law in the present case, even though Obliland IP Law was chosen to govern the License Agreement concluded between Alex Karsky and Omnia.
9. First legal ground is Article 3(3) Regulation. It provides for an application of non-derogable provisions from the law of the country in which majority of elements relevant to the case are located even if the parties had initially agreed for the law of another country. In the present case, the majority of elements are located in Terryland – Alex Karsky wrote the Book in Terryland and it was first published in Terryland; both Alex Karsky and Allan Chen commenced initial negotiations regarding potential conclusion of the license agreement in Terryland; the final License Agreement was effectively concluded in Terryland and both Claimants are citizens of Terryland.
10. Alternatively, Alex Karsky submits that Article 9(1) Regulation justifies his resort to Terryland IP Law. The said article establishes that provisions regarded as crucial for safeguarding public interest override the law otherwise applicable. In the present case, Article 1173 Terryland IP Law should override any contrary provisions of Obliland IP Law as crucial for safeguarding authors against exploiters of their rights, which often have stronger position in negotiations and far better business acumen.
11. Once the resort to Article 1173 Terryland IP Law is established, Alex Karsky submits that its prerequisites are met. The total remuneration he had received from Omnia amounted to USD 10.000, which is less than 0.0013% compared to USD 800.000.000 net that Omnia

made on sale of the Second Game. Hence, there is a grave disproportion between respective benefits and his claim for additional remuneration is justified.

12. If the Tribunal finds otherwise, Alex Karsky requests that it finds Omnia's breach of the License Agreement for the use of his Book. Omnia breached the said agreement by reflecting the Book's universe in the Second Game despite the fact that the License Agreement limited the use of the Book only for the First Game.
13. Finally, similarly to Alex Karsky, also Allan Chen resorts to Article 1173 Terryland IP Law to claim additional remuneration. Alike Alex Karsky, Allan Chen submits that he is allowed to do so because the said provision is important for the public interest as safeguarding authors, and thus overrides any contrary provisions according to Article 9(1) Regulation. His claim, too, conforms to conditions for additional pay set forth in Article 1173 Terryland IP Law. Allan Chen left Omnia in 1995 and Omnia started to work on the Second Game in 2005 by using Alex Karsky's Book and Allan Chen's adaptations of it. Hence, his earnings at Omnia could not have taken account of the future profits enabled by sales of the Second Game, which proves that his remuneration for the contribution to the success of the Second Game was disproportionately low as compared to the profits obtained by Omnia.

LEGAL PLEADINGS

A. OMNIA SHOULD PAY ADDITIONAL APPROPRIATE REMUNERATION TO ALEX KARSKY ON THE GROUNDS THAT ORIGINALLY PAID REMUNERATION FOR HIS BOOK UNDER THE LICENSE AGREEMENT WAS DISPROPORTIONATELY LOW COMPARED TO OMNIA’S REVENUES

14. Alex Karsky and Omnia have agreed that the License Agreement, and any dispute arising out of it, shall be governed by Obliland IP Law.¹ Obliland IP Law does not provide authors with a possibility of adjusting their initial remuneration when it is disproportionately low compared to the benefits received by the party exploiting licensed right.
15. Alex Karsky does not contest that the parties² have used their autonomy and upon applicable to the present dispute conflict of law rules³ – art. 3(1) Regulation – expressly decided that their obligations shall be governed by Obliland IP Law.
16. However, Alex Karsky submits that art. 3(3) Regulation is applicable to the present case and remains a basis for supplementation of the Obliland IP Law – to the extent specified in the cited provision – by provisions of Terryland IP Law, which cannot be derogated from by the parties’ agreement (I). These provisions include Article 1173 Terryland IP Law which establishes a right of the author to demand additional appropriate remuneration from the exploiter of that right. Alex Karsky has met all prerequisites of this non-derogable provision of Terryland IP Law, and thus is entitled for the remuneration adjustment (II).

¹ Clause 14 License Agreement, exhibit 2.

² The word “parties” shall be understood as a reference to both Licensor and Licensee of the License Agreement.

³ For the ease of reference, in-text reference made to the “Regulation” shall be regarded as a reference to the respective conflict of laws rules existing in both Obliland and Terryland, upon the fact that these provisions are analogous in both countries and were based in both cited Regulations, exhibit 4 *in fine*.

I. ARTICLE 3(3) OF THE REGULATION SUPPLEMENTS GOVERNING LAW

17. Article 3(3) Regulation is the basis of supplementation of the general law governing the License Agreement in accordance with the valid choice of law clause:

“where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.”

18. The article cited above cannot be applied on a discretionary basis. Its application cannot violate parties freedom to choose the governing law that best fits their needs and legal certainty resulting from that decision.⁴ However, the supremacy of their contractual freedom does not amount to an absolute and unrestricted discretion.⁵ Article 3(3) Regulation safeguards evasion of the mandatory provisions of the country where all elements relevant to the situation are located, whose law has not been chosen. In considering its application, certain prerequisites must be met.
19. Therefore, Alex Karsky submits that **(i)** all other elements of the case relevant to parties situation point to the country of Terryland, and thus **(ii)** Article 1173 Terryland IP Law is of non-derogable nature and shall directly supplement the governing law chosen by the parties’.

(i) All relevant elements of the situation are located in Terryland

20. Before considering which provisions of certain law cannot be derogated from by an agreement, one must establish sufficiently strong factual connection between and all other elements relevant to a particular situation and a country whose law has been contracted out of.

⁴ F. Ferrari, *Rome I Regulation, Pocket Commentary*, Sellier European Law Publishers 2015, p. 76.

⁵ J. Rinze, *The Scope of Party Autonomy Under the 1980 Rome Convention on the Law Applicable to Contractual Obligations*, J. Bus. L. (1994) 412, 413.

21. Article 3(3) Regulation requires to prove that all other elements relevant to the situation were located in a different country than the one whose law has been chosen. These elements shall be assessed at the time of the choice of law, which in the present case was 21 September 1984 – the effective date of the License Agreement.
22. Alex Karsky submits that following elements are closely connected to Terryland: the subject matter of the license, the Book, has been written and initially published in Terryland; Alex Karsky and Allan Chen – as an employee of Omnia – started initial negotiations regarding potential license agreement in Talestown, Terryland; the License Agreement has been signed and concluded in Terryland, and; Alex Karsky is a citizen of Terryland.
23. Thus, having established that all other elements relevant to the case are located in Terryland, focus should be placed on the assessment whether Article 1173 Terryland IP Law providing additional remuneration for authors can be considered as non-derogable under the Regulation.

(ii) The provision on the additional remuneration cannot be derogated from by the License Agreement

24. Second part of Article 3(3) Regulation requires the existence of certain provisions of non-derogable nature in the national legislation on which the party wishes to rely. Alex Karsky submits that Article 1173 Terryland IP Law possess this characteristic and its application cannot be omitted by the choice of law. Cited article provides the following:

“Authors and performers are entitled to request additional, appropriate remuneration from the party with whom they entered into a contract for the exploitation of the rights when the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues and benefits derived from the exploitation of the works or performances”.

25. This provision creates the so-called “best-seller clause”. Best-seller clauses are adopted in order to ensure that authors receive fair remuneration for uses of their creations and guarantee the right to participate in the financial success gained upon their

exploitation. Such guarantees are especially relevant for authors if their creations are used in fields of exploitations that were yet unknown at the time of conclusion of e.g. license agreements and yield high profits for the other party which gains disproportionate economic advantage in comparison to the payment agreed.

26. Best-seller clauses provide protection to whole social group of authors in every field of their creativity – e.g. in musical, literary or artistic works. This protection will eventually apply to an individual author who could rely on it and claim additional remuneration, if initially agreed remuneration turns out to be disproportionately low compared to the benefits received upon exploitation of that right.
27. International legal doctrine widely considers the legal character of the best-seller provisions enshrined in domestic law of various countries as *ius cogens* norms.⁶ Such norms protect the social and economic rights of certain groups of people, in this case authors, which cannot be deprived of protection provided in such provisions. These norms are non-derogable provisions to which Article 3(3) Regulation refers.
28. Furthermore, the *ius cogens* character of the provisions granting authors an additional remuneration is widely recognized in the national legislation of various countries.⁷ For example, Germany has adopted provisions of mandatory nature protecting author's right of participation in unexpected profits arising from exploitation of licensed IP right.⁸ German legislator expressly stated that these rules are of non-derogable nature in § 32b of German Copyright Act – authors are thus protected irrespective of the choice of law, even if they enter into license agreement with foreign entity.⁹ It is not, however, necessary to adopt an *expressis verbis* statement in its own legislation that certain provisions are of such nature. Instead, the court, on a case-by-case basis, shall assess legal character of such provisions with special attention.¹⁰ Moreover, right to participate in unexpected

⁶ See for example D. Flisak, *Copyright and related law. Commentary*, Lex 2015, see also Y. Nishitani, *Contracts Concerning Intellectual Property Rights*, p. 81 [in:] F. Ferrari, S. Leible, *Rome I Regulation, The Law Applicable to Contractual Obligations in Europe*, Sellier European Law Publishers, 2009.

⁷ The best-seller clause and other clauses indicating that the former shall be treated as a mandatory provision is provided in, *inter alia*, the copyright laws of Germany, Czech Republic and Poland.

⁸ Paragraph 32 and 32a of the German Copyright Act 1965.

⁹ K. M. Gutsche, *New copyright contract legislation in Germany: rules on equitable remuneration provide "just rewards" to authors and performers*, *European Intellectual Property Review* 2003, p. 371.

¹⁰ Y. Nishitani, *Contracts Concerning Intellectual Property Rights*, p. 84 [in:] F. Ferrari, S. Leible, *Rome I Regulation, The Law Applicable to Contractual Obligations in Europe*, Sellier European Law Publishers, 2009.

profits of the licensee has been added to the German law with aim to prevent the exploiter of copyright from circumventing provisions cited above by an arbitrary choice of foreign law under Regulation.¹¹ Likewise, Polish legislation provides authors with best-seller clause.¹² Its mandatory and non-derogable character has been confirmed by judiciary.¹³

29. Moreover, recent European Commission's Directive Proposal aims to unify national legislation of 28 members states of the EU by requiring them to, *inter alia*, implement measures aiming at strengthening position of the authors. One of these measures is provided in the Article 15 Directive Proposal, which establishes best-seller clause granting authors right² to claim additional remuneration. Such campaign started by the European authorities undoubtedly shows that the best-seller clauses shall be considered as crucial for the protection of author's interest on various fields of their creations. Its importance is certainly recognized within the European Union member states.

II. ALTERNATIVELY, ARTICLE 1173 TERRYLAND IP LAW SHALL BE REGARDED AS AN OVERRIDING MANDATORY PROVISION UNDER ARTICLE 9 REGULATION

30. Regulation expressly makes distinction between "provisions which cannot be derogated from by agreement", which Alex Karsky put forward above, and "overriding mandatory provisions".¹⁴ The latter is more restrictive and regards only those rules that are so important to the legal system of the state concerned that they are intended to be applied regardless of the law applicable to the contract.¹⁵
31. Therefore, if the Tribunal decides that Article 1173 Terryland IP Law cannot be treated as non-derogable provision under Article 3(3) Regulation, Alex Karsky alternatively submits that Article 1173 Terryland IP Law shall be considered as an overriding mandatory provision under Article 9 Regulation and thus applicable.

¹¹ *Ibidem*, p. 81.

¹² Article 44 of the Copyright Act of 4 February 1994.

¹³ Judgment of the Appellate Court in Poznań dated 12 August 2009, case no I ACa 502/09. See also D. Flisak, *Copyright and related law. Commentary*, Lex 2015.

¹⁴ Recital 37 Regulation.

¹⁵ J. Harris, *Mandatory Rules and Public Policy under the Rome I Regulation*, p. 293 [in:] F. Ferrari, S. Leible, *Rome I Regulation, The Law Applicable to Contractual Obligations in Europe*, Sellier European Law Publishers, 2009.

32. Article 9(1) Regulation defines overriding mandatory provisions as:

*“provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.”*¹⁶

33. Cited article leaves the door open for the legislator of particular country to define which mandatory provisions qualify as overriding under its public policy.¹⁷ National legislation of the country in question may state in precise terms that certain rules are mandatory, however, that is not a requirement.¹⁸

34. International doctrine distinguishes two categories of mandatory rules connected with state’s public policy. First group refers to mandatory rules in a sense that they protect vital interests of the state, such as competition law.¹⁹ However, A. Bonomi notes, *“one must not forget that the recourse to overriding mandatory provisions sometimes permits protections of individual interests in sectors of contract law”*²⁰ and further *“even though this rules certainly has indirect effect on competition, it is intended to protect, in the first instance, the individual interests of a category (often weak) of entrepreneurs.”*²¹

35. Alongside this view, the second category of public policy protection refers to those rules whose purpose is to equalize parties’ position in civil law relationship by providing protection to the weaker party of such relationship – consumers, employees or authors.²² This view is justified because the protection of collective interests of specific categories of individuals can exert fundamental importance for the social and economic organization

¹⁶ See also Case C-369/96 and C-376/96 *Arblade* [1999] ECR I-8453.

¹⁷ F. Ferrari, *Rome I Regulation, Pocket Commentary*, Sellier European Law Publishers 2015, p. 321, 322.

¹⁸ *Ibidem*, p. 326; see also, for example, s. 26 and 27(1) of the English Unfair Contract Terms Act of 1977.

¹⁹ P. Grzegorzczak, K. Weitz, *European civil procedural law and conflict of laws*, LexisNexis 2012, p. 394, 421.

²⁰ A. Bonomi, *Overriding mandatory provisions in the Rome I Regulation on the Law Applicable to Contracts*, Yearbook of Private International Law, vol. 10, 2008, p. 293.

²¹ *Ibidem*.

²² *Ibidem*, p. 291.

of the country, especially when it concerns the interests of public at large insofar as they enter into contracts.

36. Therefore, Alex Karsky submits that Article 1173 Terryland IP Law shall be treated as overriding mandatory provision under Article 9 Regulation and thus directly applicable, as it effectively protects the public policy of Terryland by promoting a truly creative culture through safeguarding the interests of authors.

III. PREREQUISITES OF ARTICLE 1173 TERRYLAND IP LAW ARE FULFILLED

37. Having established that Alex Karsky can base his claim upon Article 1173 Terryland IP Law, which is applicable under Article 3(3) and 9 Regulation, it should be assessed whether Alex Karsky fulfils prerequisites under that article and is eligible for the additional remuneration.

38. Article 1173 Terryland IP Law imposes three prerequisites:

- (i) Whether Alex Karsky, as licensor, is an author of the novel and has the rights connected with his authorship;
- (ii) Whether Omnia, as licensee, exploits the rights granted under the License Agreement;
- (iii) Whether Alex Karsky's originally agreed remuneration is disproportionately low compared to Omnia's subsequent relevant revenues and benefits derived from the exploitation of that right.

(i) Alex Karsky is the author protected by copyright

39. Alex Karsky is an author of the Book. Legislation of both Obliland and Terryland contains the same regulation which recognizes the creator of specific work as its author.²³ Thus, regardless of substantive law applicable to this issue, Alex Karsky shall be duly regarded as an author of the Book and the protection granted under copyright provisions

²³ Article 1147 Terryland IP Law and Article 7 Obliland IP Law, exhibit 4.

of Obliland IP Law shall be supplemented by non-derogable provisions of Terryland IP Law.

40. The conclusion of the License Agreements and its wording is in itself sufficient proof that there is no dispute regarding Alex Karsky being an author of the Book.

(ii) Omnia exploited the right to use the Book

41. Alex Karsky and Omnia concluded License Agreement, upon which Omnia was allowed to use the Book. According to its Clause 2, Omnia had a right to reproduce the Book within the First Game and to use it in such other way as may be required for creation and further use of the First Game.

42. Upon that right Omnia has developed the First Game (published in 1990) and the Second Game (published in 2010). Regardless of the alleged by Alex Karsky violation of the License Agreement in developing the Second Game, Omnia has exploited the same right granted under the License Agreement by developing, publishing and selling two distinct games from which it received enormous financial profits and other benefits, such as multiple market awards and global recognition.

(iii) Alex Karsky's remuneration for the right granted to Omnia is disproportionately low compared to the revenues derived from Omnia's exploitation of that right

43. The Federal Court of Justice of Germany (*Bundesgerichtshof*) in the case of *Das Boot*²⁴ presented the method of assessing whether there is a disproportion between author's contractual remuneration and licensees' revenues. It stated that:

“The court first has to determine the author's contractual remuneration and the proceeds and benefits of the third party from the use of the work. Thereafter, one has to determine the remuneration which – in retrospect – would have been equitable considering third parties' revenues and benefits. Finally, one has

²⁴ Bundesgerichtshof GRUR 2012, 496 – *Das Boot* (*The Boat*).

to assess whether the contractual remuneration is conspicuously disproportionate in relation to such equitable compensation.”

44. Alex Karsky has received 10.000 USD from Omnia for rights granted under the License Agreement.²⁵ This amount was a sole and total remuneration that he received from the conclusion of the agreement in 1984 to this date.
45. To the contrary, the Respondent has generated two direct sources of income from the exploitation of the granted right. The first one concerned the sales of the First Game within ten year of its existence, from which Omnia has received 100.000 USD net²⁶ – which equalled to 1/10 of Alex Karsky’s remuneration.
46. Second source of Omnia’s income, whether exercised lawfully or unlawfully, came from the sales of the Second Game which amounted to 800.000.000 USD net.²⁷ Alex Karsky has not received any remuneration for the exploitation of his Book in the Second Game.
47. Therefore, the total remuneration of Alex Karsky compared to the combined profits of Omnia for exploitation of the rights granted under the License Agreement **is less than 0.0013%**. This difference undoubtedly constitutes grave disproportion in respective revenues at the first sight.

CONCLUSION OF THE FIRST CLAIM

48. Albeit the valid choice of law clause employed in the License Agreement, parties cannot disregard certain non-derogable provisions of domestic law which are closely connected to their situation. On this basis, article 1173 Terryland IP Law supplements parties choice of law and grants Alex Karsky ground for claiming additional fair share in the profits received upon exploitation of his rights by Omnia. This is necessary to balance the gap between parties.

²⁵ License Agreement, clause 4(1).

²⁶ Case, para. 4.

²⁷ Case, para. 7.

B. OMNIA BREACHED THE LICENSE AGREEMENT BY USING THE BOOK TO CREATE TWO GAMES INSTEAD OF ONE

49. License Agreement allows to use the Book only for “creation” of one game and for “further use” of such game (I). Nevertheless, Omnia not only developed the First Game, closely reflecting the Book’s universe, but also built the Second Game, sequel to the first one equally rooted in the Book. Any references to the Book in the Second Game, however, exceed the agreed use of the Book for “creation” of one game only (II) and cannot be justified as “further use” of the First Game (III).

I. THE LICENSE AGREEMENT ALLOWED OMNIA TO USE THE BOOK FOR CREATION AND FURTHER USE OF ONLY FIRST GAME

50. The allowed use of the Book was agreed by Omnia and Alex Karsky in the License Agreement. License Agreement provides that Alex Karsky (referred to as Licensor) granted to Omnia (referred to as Licensee) an exclusive right to use the Book (referred to as Work) for creation of a product, for further use of this product and to reproduce it within this product.²⁸
51. Cited provision makes use of the Book largely dependent on the term “Product”. The “Product” is defined in clause I of the License Agreement as “*the computer game to be created by Omnia or upon its instructions*”. The definition clearly relies on a singular noun “game”. This shows that the Book could only be used for creation and further use of one game.
52. This is reinforced by recital of background motives behind the License Agreement. Section B specifies that the consenting will of the parties was to enable sale of game. Here, too, reference to the term Product defined as one game is made:

The Licensee wishes to receive, and the Licensor is willing to grant to the Licensee license ... to sell the Product within which the Work has been reproduced.

²⁸ License Agreement, clause 2(1).

53. Hence, the License Agreement is clearly worded to limit the use of the Book to one game only.
54. It is a standard and well-established business practice within the gaming industry for the parties to agree to rights to produce sequels or other derivative works such as DLC's or expansion packs, separately from the right to use the intellectual property content in the initial game.²⁹ Express provisions of this kind are used in the industry due to the fact that the very nature of digital entertainment makes it difficult to predict whether a game will prove commercial success and will allow to establish a long-running franchise. Omnia failed to secure such provision in the License Agreement.

II. OMNIA USED THE BOOK FOR CREATION OF THE FIRST GAME AND THE SECOND GAME

55. Omnia created two games, both of which draw largely from the Book.
56. The Book plots vision of the future dominated by conflict between four stakeholders: a central government of the Earth, rebels and two tech companies, transport supplier and AI supplier. The plot is located on various planets, including Las Vega. The main character of the Book is scientist Ava Martin.
57. Omnia released the First Game in 1990.³⁰ Before its release, Allan Chen produced for Omnia table summarising transpositions from the Book to the First Game, which all were further implemented.³¹
58. The table shows that Omnia borrowed from the Book its main character Ava Martin, the location at Las Vega, three stakeholders, i.e. Earth Government, rebels and transport giant Gigaparsec Industries, and gave them the exact same names.³² The fourth

²⁹ World Intellectual Property Organization, *Mastering the Game, Business and Legal Issues for Video Game Developers*, Creative industries – Booklet No. 8, 2014, p. 41, 42.

³⁰ Case, para. 4.

³¹ Exhibit 1.

³² *Ibidem*, p. 2-3.

stakeholder from the Book, AI supplier Terra Cognita also has its counterpart in the First Game – tech company Plus Ultra that provides AI assistance.³³

59. Apart from the above, five more roles from the Book served as prototypes for roles in the First Game, including a robot, space pirate, hacker, hacker’s friend and bionic implant seller.
60. Finally, the First Game also shared the concept of the underlying conflict between four stakeholders, with rebels and tech giants challenging the Earth government.³⁴
61. In conclusion, the First Game’s plot closely reflects that of the Book, which evidences that the Book was used to create the First Game. Hence, the allowed use of the Book limited by the License Agreement to creation of only one game, was already exploited for creation of the First Game.
62. Omnia, however, did not stop there and went on to create the Second Game. The Second Game was released in 2010.³⁵ Omnia advertised the Second Game as continuation of the plot set out in the First Game with the same characters.³⁶
63. The advertisement of the Second Game quoted Omnia’s General Director saying that new plot of the Second Game “*will pick up exactly where we left off in the original game*” and that all elements of the First Game were kept in the Second Game:

“Rest assured that in Cosmic Dust 2 we have kept all other wonderful developments of the game universe which You, our loyal players, have helped us to achieve”

64. Secondly, to convince potential players that the Second Game was continuation of the First Game, Omnia’s General Director mentioned Ava Martin and Earth Government as parts of the universe maintained in the Second Game.³⁷

³³ Exhibit 1, p. 2.

³⁴ Ibidem, p. 1.

³⁵ Case, para. 7.

³⁶ Exhibit 3.

³⁷ Ibidem.

65. Thirdly, the advertisement referred to the stakeholders present in the First Game, including tech companies and rebels, as well as made the conflict between them centre axis to its own plot.³⁸
66. In conclusion, the Second Game incorporated main character of the Book, all four stakeholders and the competition between them. Hence, Omnia used the Book to create the Second Game as much as it did in the case of the First Game. Use of the Book for both games, however, exceeded the allowed use limited by the License Agreement to one game only.

III. CREATION OF THE SECOND GAME GOES BEYOND “FURTHER USE” OF THE FIRST GAME

67. The License Agreement allows to use the Book as much as is required not only for “creation” but also for “further use” of a game. Omnia however cannot justify its use of the Book for the Second Game as necessary for “further use” of the First Game. The Second Game was a separate new game, and not just additional, rather technical updates, that might improve the First Game.
68. The Second Game was entirely new type of game that fundamentally differed from the First Game. The First Game was a multi-user dungeon game (“MUD”).³⁹ MUDs were popular in the 1990s and used text as the only mean of representing a virtual world. Such characteristic limited players’ activity to reading and typing commands. In turn, the Second Game was a massively multiplayer online game (“MMO”).⁴⁰ MMOs largely replaced MUDs in 2000s and remain highly popular to date. Contrary to text-based MUDs, MMOs use graphics to represent game’s universe and players. This graphical feature of the Second Game was firmly emphasised by Omnia that advertised its “*stunning visuals*”.⁴¹

³⁸ Exhibit 3.

³⁹ Case, para. 4.

⁴⁰ Case, para. 6.

⁴¹ Exhibit 3.

69. Furthermore, no facts of the case indicate that the Second Game was necessary to use the First Game, or vice versa. To the contrary, Omnia’s CEO suggested that those who never played the First Game could still enjoy the Second Game:

*“Whether a long-time fan or completely new to the story, we are sure everyone will enjoy ... Cosmic Dust 2”*⁴²

70. In light of the above, the Second Game gave a whole new level of player’s experience. It replaced text-based universe with graphic-based universe – an upgrade parallel to that from a book to a movie. Given this substantial change, the Second Game cannot be viewed as mere technical update enabling “further use” of the First Game. It must be viewed as a product entirely separate to the First Game. In consequence, Omnia cannot argue that it used the Book to create the Second Game because it was required for the further use of the First Game.

CONCLUSION OF THE SECOND CLAIM

71. The License Agreement clearly allowed Omnia to use the Book to create only one game. Nevertheless, Omnia used the Book to create both the First Game and the Second Game, which equally reproduced the universe and characters presented in the Book. Moreover, reproduction of the Book in the Second Game cannot be justified as required for “further use” of the First Game, allowed in the License Agreement, because the Second Game was an entirely new and separate game of a new type.

C. OMNIA SHOULD REMUNERATE ALLAN CHEN PROPORTIONATELY TO THE BENEFITS IT MADE ON HIS WORK DELIVERED AS OMNIA’S EMPLOYEE

72. Omnia employed Allan Chen as “*Cosmic Dust Video Game Product Director*” until 1995. Throughout his employment, Allan Chen largely contributed to the First Game. He outlined entire plot, characters and locations of the First Game based on the Book⁴³ and, after his propositions were all approved, headed development process of the First

⁴² Exhibit 3.

⁴³ Exhibit 1.

Game.⁴⁴ The universe of the First Game was therefore primarily a product of Allan Chen's adaptation of the Book.

73. After Allan Chen left Omnia, Omnia used all elements of his adaptation to produce the Second Game. The Second Game gave Omnia net profits above 800.000.000 USD net between 2010 and 2018. Nevertheless, despite these enormous profits, Omnia has never offered any extra pay to Allan Chen. This is unfair. Allan Chen should be paid for further use of his adaptation incorporated in the Second Game that let Omnia make substantial earnings.
74. Allan Chen has statutory right for additional remuneration upon Terryland IP Law, which he can exercise even if Obliland IP Law governed his employment bond with Omnia (I) and even if Omnia acquired rights to his adaptation as work-for-hire (II). Moreover, his claim for additional remuneration meets all prerequisites established in Terryland IP Law (III).

I. TERRYLAND IP LAW GOVERNS ALLAN CHEN'S CLAIM FOR ADDITIONAL REMUNERATION

75. Irrespective of whether Obliland's or Terryland's legislation governs relation between Omnia and Allan Chen, he can benefit from the right to additional remuneration established in Article 1173 Terryland IP Law.
76. As was established in the paras. 30-36 above, the abovementioned provision is an overriding provision in the light of the Regulation, which makes its application required in spite of other laws being applicable.

II. ALLAN CHEN'S CLAIM FOR ADDITIONAL REMUNERATION IS ALLOWED EVEN IF OMNIA OWNS HIS WORK

⁴⁴ Case, para. 4.

77. Omnia alleges to have acquired Allan Chen’s adaptation of the Book as work-for-hire.⁴⁵ This however is irrelevant for exercise of his right for extra payment. This right is granted to the author of the work, and not to its owner. Neither is this right in any way dependent on who owns the work. In the present case, Allan Chen is the author, and hence has the right to request additional remuneration.
78. The issue of work-for-hire raised by Omnia is an employment matter. Employment matters between Omnia, seated in Obliland, and Allan Chen, citizen of Terryland, are subject to the law implied by the collision rules contained in the Regulation. The conflict of laws potentially applicable to employment matters, such as the authorship of employee’s work, is governed by Article 8 Regulation.⁴⁶ This provision is considered to enlists three successive steps to establish the applicable law. In the first place, it is the law chosen by parties.⁴⁷ Secondly, if such choice is lacking, it is the law of the country where the work is habitually carried out.⁴⁸ Thirdly, if this, too, is unknown, it is the law of the country where employer is situated.⁴⁹
79. In the present case, the first two links cannot be determined. It is unknown whether the parties consented to any choice of law or where Allan Chen habitually carried out his work. Thus, the last resort rule of the employer’s country indicates that Obliland IP Law applies to employment matters between Allan Chen and Omnia.
80. Accordingly, Article 20 Obliland IP Law provides that employer owns copyrights to employee’s work:

“Where a literary, dramatic, musical or artistic work is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to any agreement to the contrary.”

⁴⁵ Case, para. 10.

⁴⁶ J.J. Fawcett, P. Torremans, *Intellectual Property and Private International Law*, Oxford University Press 2nd edn., p. 722, para 13.90.

⁴⁷ Article 8(1) Regulation.

⁴⁸ Article 8(2) Regulation.

⁴⁹ Article 8(3) Regulation.

81. However, Obliland IP Law also provides that author is “*the creator of the work*”,⁵⁰ who can claim authorship irrespective of who owns copyrights to the work:

*Independently of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work ...*⁵¹

82. The above provisions show that Obliland IP Law considers the employer to be the owner, but not the author of employee’s work. The same regulation adopted in the United Kingdom is considered to introduce a split between authorship and ownership rather than transfer both to the employer.⁵²
83. In light of the above, Allan Chen remains the author of the adaptation he created, even if he does not own it. Since the right for additional remuneration is attached to the author, Allan Chen is entitled to exercise this right.

III. ALLAN CHEN’S CLAIM FOR ADDITIONAL REMUNERATION IS JUSTIFIED IN THE LIGHT OF TERRYLAND IP LAW

84. Allan Chen’s claim for additional remuneration is justified.
85. Article 1173 Terryland IP Law provides that the right to extra payment can be exercised if the exploiter of a given right made earnings disproportionately high in comparison to the author. English High Court,⁵³ relying on a similar provision that allows the employee inventor to seek compensation if the patent on his invention turns out to be of outstanding benefit to the employer, held recently that employees whose patent enabled profits of ca. 80.000.000 USD should receive an additional remuneration in the amount – in the discussed case – equal to 3% of patent-based profits of employer.⁵⁴

⁵⁰ Article 7 Obliland IP Law.

⁵¹ Article 15 Obliland IP Law.

⁵² L. Bently, B. Sherman, D. Gangjee, P. Johnson, *Intellectual Property Law*, Oxford University Press 5th edn., p. 133.

⁵³ English High Court, *James Duncan Kelly and Kwok Wai Chiu v GE Healthcare Limited* [2009] EWHC 181 (Pat).

⁵⁴ The court found benefits from the patent equal to 50.000.000 GBP. At the time of the award 1 GBP was valued at ca. 1.6 USD.

86. This is the situation in present case. Firstly, Allan Chen is the author of adaptation of the Book's universe. Secondly, Omnia used his work – it had incorporated his proposed adaptation to the First Game and entirely reproduced it in the Second Game. Thirdly, Omnia made net profit of more than 800.000.000 USD net on the Second Game between 2010 and 2018. In turn, Allan Chen has not received any payment whatsoever after 1995. Therefore his remuneration for the use of his work in the Second Game is merely non-existent, whereas earnings of his employer approach one billion USD and are ten times higher than in the abovementioned case where extra pay for the employee was allowed. This leaves earnings of Omnia and Allan Chen in stark contrast and justifies his claim for additional remuneration.

CONCLUSION OF THE THIRD CLAIM

87. Similarly to Alex Karsky, Allan Chen is equally allowed to invoke author's right for extra payment established in Article 1173 Terryland IP Law. Such resort to his native legislation is justified in the light of Article 9 Regulation, since the said provision of Terryland IP Law safeguards public interest and overrides any laws otherwise applicable. Furthermore, Allan Chen's claim fulfils all conditions for additional remuneration under Article 1173 Terryland IP Law, and is justified due to grave disproportion between his earnings and those made by Omnia from the Second Game.

REQUEST FOR FINDINGS

In light of all submissions, the Claimants respectfully request the Tribunal to find that:

- A) Omnia shall pay additional appropriate remuneration to Alex Karsky, in the amount not less than 80.000.000 USD net, which amounts to ca. 10% of the revenue generated by Omnia from the sales of the Second Game, on the grounds that the originally paid remuneration was disproportionately low compared to Omnia's revenues from the product;

- B) If the Tribunal decides that no additional remuneration shall be paid to Alex Karsky, Omnia shall be considered to be in breach of the License Agreement with Alex Karsky, because the License Agreement did not permit Omnia to develop and exploit the Second Game;

- C) Omnia shall pay additional appropriate remuneration to Allan Chen, in the amount to be decided as appropriate by the Tribunal with regard to the revenue generated by Omnia from the sales of the Second Game, 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 the Second Game and to Omnia's revenues from the product.

Respectfully submitted on 20 February 2019.

On behalf of the Claimants,
Counsels of the team 109