

# **Games as cultural products: a legal assessment**

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## the culture debate in int. law (i)

- under the law of the World Trade Organization (WTO) law: **no specific 'culture' rules/treatment**
- **but:** the story is much longer and more contentious
- the **'cultural exception'** debate
- agreement to disagree as a way out: **no services sector excluded but flexibilities built-in**
- **the result: very few commitments for audiovisual services** (i.e. film, TV and radio programmes, sound and video recordings)

## the culture debate in int. law (ii)

- a new instrument on ‘culture’: **UNESCO Convention on the Diversity of Cultural Expressions (2005)**
- **all-catching definition of cultural expressions**
- digital games definitely fall under it
- **in any case:** it is national policymaking that decides upon special ‘cultural’ treatment
- **int. law may be putting constraints on this special treatment**

# the WTO

- comprehensive rules for trade in goods, services and intellectual property
- compulsory and efficient dispute settlement mechanism
- powerful principles prohibiting discrimination: most-favoured-nation and national treatment
- **MFN:** do not discriminate between countries
- **NT:** do not discriminate between national and foreign products and services
- discrimination forbidden only for **like** products and services

## WTO: classification matters

- WTO Agreements created in 1995
- **no single category** readily corresponds to digital games
- digital games themselves hardly a uniform category
- **products or services: GATT or GATS?**
- if services, then which category:  
**telecommunications, computer related, entertainment or audiovisual services?**
- **implications are huge as may limit state action**

## WTO: classification matters

- **the US and the software industry seek the most liberalising mode**
- electronically delivered products should receive the same treatment as physically traded ones
- **ISFE:** it is 'erroneous' to add games to the domain of culture
- **the EU:** anything related to content is a service
- computer-related vs. audiovisual services

## stakeholders' positions: **the US**

- while the US also supports its games industry, does so on different grounds
- **research and development tax breaks:** e.g. Electronic Arts can write off its software development costs
- **job creation arguments:** domestic production deduction
- **strong industry lobbying:** the new e-caucus project engaging 39 members of Congress to seek tax benefits

## stakeholders' positions: **the EU**

- culture as part of the discourse
- **the MEDIA programme: 10'000 to 100'000 EUR direct and non-repayable aid (fairly modest)**
- **exemption from the ban on state aid to promote culture (art. 107(3)(d) TFEU)**
- **the French tax rebate case (2007)**
- **digital games as cultural industry: implications for the allocation of competence between the EU and the Member States?**



## implications down the road

- **legal uncertainty at the international level regarding digital trade**
- **the trade vs. culture debate revitalised: the US-EU clash often prevents meaningful solutions**
- **distortion of incentives (?)**
- **corruption of cultural objectives (?)**

**thank you.**

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