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Advertising in Online Games and EC Audiovisual Media Regulation

Thomas Steiner*

ABSTRACT

Advertising in Online Games (AOG) has received much attention in recent reports on the future of advertising. Consulting firms, market research institutes, leading e-marketing magazines, influential bloggers, and mass media assess and comment on the potential of these new models of advertising. The present article looks at AOG from the viewpoint of European audiovisual media law and policy. It suggests a typology of both online games and AOG. Based on that typology, the author introduces AOG as an object of regulation; evaluates motives, technical justifications and objectives in favour of regulating AOG; and analyses critically the new EC Audiovisual Media Services Directive as a prospective regulatory tool to accomplish these objectives.

KEY WORDS

Advertising; online games; digital culture; online worlds; new technologies; audiovisual media regulation; AVMS Directive.

* Thomas Steiner is a Doctoral Fellow within the NCCR Individual Project "eDiversity: The Legal Protection of Cultural Diversity in a Digital Networked Environment" and a member of i-call (International Communications and Art Law Lucerne) research centre at the University of Lucerne. Contact at thomas.steiner@unilu.ch.

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ADVERTISING IN ONLINE GAMES AND EC AUDIOVISUAL MEDIA REGULATION

1.	THE OBJECT OF REGULATION	3
1.1.	A Typology of Online Games	3
1.2.	A Typology of Advertising in Online Games (AOG)	5
1.3.	AOG as a Source of Revenue	10
1.4.	AOG and the Gamers	11
2.	THE GOALS OF AOG REGULATION	11
2.1.	Economic Goals of AOG Regulation	13
2.2.	Non-Economic Goals of AOG Regulation	15
3.	REGULATORY TOOLS FOR AOG—THE AVMS DIRECTIVE	21
3.1.	Online Games and the Scope of the AVMS Directive	21
3.2.	AOG and the Scope of the AVMS Directive	31
3.3.	AOG as Audiovisual Commercial Communication (ACC)	32
4.	THE AVMS DIRECTIVE AND THE GOALS OF AOG	34
4.1.	General Rules Applicable to All ACC	35
4.2.	Special Rules for Product Placement and Sponsorship in AOG	35
4.3.	ACC and the Goals of AOG Regulation	37
5.	CONCLUSION	40

Advertising in Online Games (AOG) has received much attention in recent reports on the future of advertising. Consulting firms, market research institutes, leading e-marketing magazines, influential bloggers, and mass media assess and comment on the potential of these new models of advertising. IBM Global Business Services predict “[t]he end of advertising as we know it”.¹ eMarketer has announced “the next level” of in-game advertising.² The influential bloggers of Future Lab were awestruck when they spotted a new AOG featuring *DaimlerChrysler*, *Nokia*, *Puma*, or a campaign for *Daftpunk’s Alive 2007* CD in online games.³ In addition, *The Economist* considers that the insertion of advertisements into video games holds “much promise”.⁴ Meanwhile, online advertising giant Google announces with much fanfare the acquisition of the AOG company Adscape Media⁵ and the internet advertising giant DoubleClick.⁶ Finally, online worlds such as

¹ S. J. Berman, B. Battino, L. Shipnuck and A. Neus, *The end of advertising as we know it* (Somers, NY: IBM Global Business Services, 2007), 1.

² ‘Let the Games Begin Advertising!’, *eMarketer Newsletter*, 7 Apr. 2007.

³ See the Future Lab Business and Games Blog at <<http://www.businessandgames.com>>. See also Ilya Vedrashko’s Advertising Lab Blog at <<http://adverlab.blogspot.com>>; all websites referred to in this article were last accessed on 1 Jan. 2008.

⁴ ‘Got game’, *The Economist*, 7 Jun. 2007.

⁵ B. Stolar, ‘Let the passion continue! We’re acquiring Adscape’, *The Official Google Blog*, available at <<http://googleblog.blogspot.com/2007/03/let-passion-continue-were-acquiring.html>>, posted on 16 Mar. 2007; J. Blau, ‘Google Buys In-Game Ad Firm’, *PC World Online*, 19 Mar. 2007.

⁶ ‘Google to acquire DoubleClick’, Google Press Release, 13 Apr. 2007; L. Story and M. Helft, ‘Google Buys DoubleClick for \$3.1 Billion’, *New York Times*, 14 Apr. 2007.

the Massively Multiplayer Online Games (MMOG) *World of Warcraft*,⁷ *Lineage*,⁸ and *EverQuest*⁹ praise their growing numbers of subscribers and increasing business potential.

Yet analysts vary in their predictions, and not all of them are as enthusiastic as the above-mentioned statements might suggest. For example, a chief scientist and consultant at Accenture asks whether virtual worlds actually mean “real business”,¹⁰ questions the “dubious economics” of MMOG,¹¹ and advises businesses not to be “trapped in a closed world”.¹²

The present article is not an attempt at another market analysis of AOG or even a broad study on the future of advertising. Instead, it aims to look at AOG from the perspective of European audiovisual media law and policy. So far, AOG has more or less followed the principle of “anything goes”.¹³ But extended regulation of the audiovisual media—particularly by the European Communities (EC) and their Member States—might soon put an end to that freedom, imposing substantial regulatory burdens upon marketers;¹⁴ namely with the entry into force of the new Audiovisual Media Services Directive (AVMS Directive)¹⁵ of the EC.¹⁶

The AVMS Directive, like its forerunner, the Television without Frontiers Directive (TVWF Directive),¹⁷ will contain rules on advertising. In the context of AOG, we will need to consider the following questions. Are online games “audiovisual media services” within the meaning of the AVMS Directive? Does the new Directive apply to AOG? Is AOG subject to the Directive’s rules on advertising? Will Member States have to regulate AOG when bringing their domestic laws into conformity with the AVMS Directive? If yes, the principle of “anything goes” could indeed be a thing of the past soon and marketers will need to find ways to comply with the rules imposed by these and other regulatory initiatives. Is the industry ready for this challenge? What role will private regimes, the industry’s self-regulation initiatives play?¹⁸ Should the advertising, gaming, and interac-

⁷ ‘World of Warcraft Surpasses 9 Million Subscribers Worldwide’, Blizzard Entertainment Press Release, 24 Jul. 2007.

⁸ ‘Original Lineage Game Grows Even Larger with Episode 5’, NCsoft Press Release, 29 Mar. 2007.

⁹ ‘Sony Online Entertainment Simultaneously Launches Expansions for Two of Its Massively Multiplayer Online Role-Playing Games EverQuest and EverQuest II’, SOE Press Release, 13 Nov. 2007.

¹⁰ K. S. Swaminathan, ‘Virtual worlds, real business?’, *Outlook*, 2007/3.

¹¹ *Ibid.*, 3.

¹² *Ibid.*, 5. Similarly, *The Economist* compared MMOG and virtual worlds to “walled gardens” when addressing this lock-in problem. The article suggests that a solution might be available. See ‘Online gaming’s Netscape moment?’, *The Economist*, 7 Jun. 2007. See also E. Naone, ‘Moving Freely between Virtual Worlds’, *Technology Review*, 29 Oct. 2007.

¹³ See P. Gillin, *The New Influences: A Marketer’s Guide to the New Social Media* (Sanger, CA: Quill Driver Books, 2007), 31, referring to the—so far—unregulated placing of advertising (or commercial communication in general) on video-platforms such as YouTube. See also A. Kerr, *The Business and Culture of Digital Games* (London et al.; SAGE Publications, 2006), 1. Furthermore, see E. Horlings, C. Marsden, C. van Oranje and M. Botterman, ‘Contribution to Impact Assessment of the Revision of the Television without Frontiers Directive’, Report Prepared for DG Information Society and Media of the European Commission, RAND Europe, TR-334-EC DG, 1 Nov. 2005, v. and 78.

¹⁴ It would not be the first time the EC acted as the forerunner and chief regulator, this time setting the standards for online games regulation. See ‘Brussels rules OK’, *The Economist*, 20 Sept. 2007.

¹⁵ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, OJ 2007, L332/27 (hereinafter AVMS Directive).

¹⁶ See M. Burri-Nenova, ‘The New Audiovisual Media Services Directive: Television Without Frontiers, Television Without Cultural Diversity’ (2007) 44 *CMLRev.* 1689, 1705.

¹⁷ Council Directive 89/552/EEC of 3 Oct. 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (Television without Frontiers Directive), OJ 1989, L298/23 (hereinafter TVWF Directive).

¹⁸ See e.g. the PEGI (The Pan-European Game Information) Online Safety Code (POSC), a code of conduct for the European interactive software industry, available at <<http://www.pegionline.eu/en/index/id/media/pdf/197.pdf>>. See also C. Marsden, J. Cave, E. Nason, A. Parkinson, C. Blackman and J. Rutter, ‘Assessing Indirect Impacts of the EC

tive software industry extend its codes of conduct in order to substitute or complement national or regional regulation? What might such self- and/or co-regulation look like?

We do not attempt answer all of these questions here. Instead, we want to establish the legal facts based on which we will be able to discuss some of the questions. Our first step is to list and structure online games and the many different ways in which marketers can advertise in these games; i.e. we ask *what* is there to be regulated (Section 1)? The second step is to ask *why* regulate? Is there a need for regulating AOG? We look at some of the reasons put forward in European media law and policy in favour of regulation. We evaluate the motives, technical justifications, and objectives for regulating¹⁹ and propose a number of economic and non-economic (societal and cultural) goals for AOG regulation (Section 2). In seeking a suitable set of tools that could contribute to accomplishing *some* of these regulatory goals, we will, in our third and fourth steps, evaluate the scope and analyse critically the prospects of one particular sector-specific policy instrument, the new EC AVMS Directive (Sections 3 and 4).

1. The Object of Regulation

There are both various types of online games and various forms of AOG. With regard to the different types of online games, IBM Global Business Services recently published a comprehensive classification. In the film industry, films are commonly divided into genres, such as action and adventure, drama, romance, horror, and comedy;²⁰ online games could be similarly classified into genres, such as first-person shooters, puzzle games, casual games, party games, role-playing games, racing games, and simulations.²¹ However, IBM's classification follows a different model. Its typology tells us how a game is played and whether it involves more than one player.²² For the purpose of this paper—and in particular with regard to the task of assessing the object of regulation—this is the type of classification we have chosen to build upon when developing our own typology. We suggest that such a typology could help to identify online games and AOG as a prospective object of regulation, evaluate the reasons that have been put forward in favour of regulation, and to analyse critically the potential of the AVMS Directive as a prospective regulatory tool to produce the desired behaviour or results in accordance with the reasons in favour of regulating.

1.1. A Typology of Online Games

Online games are any computer-based games played over the Internet; they can be played on any platform allowing at least some sort of network connectivity including PCs, game consoles and mobile phones.²³ Based on IBM's classification we develop a

Proposals for Video Regulation', Report Prepared for the United Kingdom Office of Communications, RAND Europe, 2006, 115–16.

¹⁹ On the difference between motives and technical justifications for regulating, see R. Baldwin and M. Cave, *Understanding Regulation: Theory, Strategy and Practice* (Oxford: OUP, 1999), 9.

²⁰ G. Dolbier, 'Massively multiplayer online games, Part 1: A performance-based approach to sizing infrastructure', *IBM developerWorks*, 10 Apr. 2007.

²¹ *Ibid.*

²² *Ibid.*

²³ OECD, 'Digital Broadband Content: The Online Computer and Video Game Industry', DSTI/ICCP/IE(2004)13/FINAL, 12 May 2005, 9. On mobile phones as an emerging new platform for (online) games—ranging from simple embedded games to more sophisticated downloadable and multiplayer games—see OECD, 'Digital Broadband Content: Mobile Content. New Content for New Platforms', DSTI/ICCP/IE(2004)14/FINAL, 3 May 2005, 38–46.

matrix of six different types of games to define online games as a prospective object of regulation.

1.1.1. Single-Player Games

Single-player games have long been the most common and may still be the best-known type of electronic games.²⁴ This type of games would most probably spring to mind when we think about a gamer sitting in front of a video-game console or a PC, competing only with the computer. We would also picture this as an offline rather than an online activity. However, this distinction between offline and online is becoming increasingly blurred and obsolete as new-generation game consoles requiring network connection—such as Microsoft's Xbox 360 or Sony's PlayStation 3—enter the online entertainment market.²⁵ Nearly all PC and console games will become at least in part online;²⁶ and as far as such games contain some sort of network connectivity, we will classify them as online games.

1.1.2. Multi-User Domain Games (MUD)

Multi-user domain games (MUD) are multiplayer role-playing games, which offer a generally text-based adventure to a number of players who are logged to a central server.²⁷ These games are older than the PC and date back to the time of serial consoles and minicomputers.²⁸ An early example of a MUD is MUD₁, created by Roy Trubshaw and Richard Bartle in 1979 at the University of Essex.²⁹ In MUD₁, users could communicate with others via their avatars by simple text commands.³⁰ MUD₁ and other early MUD were not simple chat rooms where users socialised. Instead, the goal of the game was primarily for a player to find his or her way through the textual environment, kill opponents and gather treasures to score points and to move up to the next level.³¹

1.1.3. Multiplayer Online Games (MOG)

Multiplayer online games (MOG) are played in teams connecting from a few dozens up to some hundreds or a thousand players. They typically include virtual tournaments using online versions of games such as poker or chess.³² We can also think of any sports challenge—real tournaments—played as online tournaments. A recent example is the *2008 Ski Challenge*, which both the Austrian and the Swiss public service broadcasters offer on their websites. Users can log in, virtually hit the steep slopes of the *Hahnenkamm* in Kitzbühl (Austria) or the *Lauberhorn* in Wengen (Switzerland) and qualify for the final

²⁴ Dolbier, above n. 20.

²⁵ Marsden et al., above n. 18, 117–18. See OECD, *Information Technology Outlook 2006* (Paris: OECD Publishing, 2006), 187–88.

²⁶ OECD, *ibid.*, 187.

²⁷ Dolbier, above n. 20.

²⁸ *Ibid.*

²⁹ F. G. Lastowka and D. Hunter, 'Virtual Worlds: A Primer', in J. M. Balkin and B. S. Noveck (eds.), *The State of Play: Law, Games, and Virtual Worlds* (New York: New York University Press, 2006), 19. See also E. Castronova, *Synthetic Worlds: The Business and Culture of Online Games* (Chicago: The University of Chicago Press), 290.

³⁰ Lastowka and Hunter, *ibid.* See V. Mayer-Schönberger and J. Crowley, 'Napster's Second Life?: The Regulatory Challenges of Virtual Worlds' (2006) 100 *Nw. U. L. Rev.* 1775, 1783; see also S. Kline, N. Dyer-Witford and G. de Peuter, *Digital Play: The Interaction of Technology, Culture, and Marketing* (Montreal et al.: McGill-Queen's University Press, 2003), 160.

³¹ Lastowka and Hunter, *ibid.* See Mayer-Schönberger and Crowley, *ibid.*

³² Dolbier, above n. 20. Popular MOG poker websites are <www.pokerstars.com> and <www.fulltiltpoker.com>. See 'A big deal', *The Economist*, 19 Dec. 2007.

round, competing online against many players—nationally and internationally.³³ Additional examples of MOG can be found on the website of bwin, a Germany-based company offering online sports betting and poker, casino, and a variety of other online games.³⁴

1.1.4. Massively Multiplayer Online Games (MMOG)

Massively Multiplayer Online Games (MMOG) engage millions of players around the world. Wikipedia lists more than 200 MMOG, about 100 of which are Massively Multiplayer Online Role-Playing Games (MMORPG)³⁵ such as *World of Warcraft*, *EVE Online*, *Lineage II*, or *Everquest*. This type of online game requires a highly complex infrastructure, reproduced and organised within data centres reaching around the world.³⁶ The sophisticated software of MMOG allows gamers to develop an identity in a computer-generated three-dimensional “virtual” reality, an online world. The players project this identity into the online world through the eyes of a kind of digital persona, an avatar. Avatars interact with other avatars and find their way through the online world, a computer-generated reality.³⁷ Probably as significant as the defining features of the game itself, MMOG commonly require significant investment and a monthly subscription fee.³⁸

1.1.5. Persistent (Online) Worlds

Persistent (online) worlds keep running whether or not any player is online, logged in and using it. All MMOG feature at least one persistent world.³⁹ Conversely, not all persistent online worlds are also MMOG. Linden Lab’s *Second Life* is “an excellent example of a persistent world that is not considered an MMOG.”⁴⁰

1.1.6. Massively Social Games (MSG)

Massively social games (MSG) are a subcategory of MMOG in which players engage in social networks that connect global communities. Players, i.e. their avatars, have “virtual 3-D chats” and exchange messages.⁴¹

1.2. A Typology of Advertising in Online Games (AOG)

Not only are there a great variety of online games, there are also many ways to advertise in them. All of the AOG models defined below are commercial in nature; and while some of the models have long existed in times of (offline) video gaming, other models newly emerge with the rise of online games and the complex possibilities of digital technology and network connectivity. The Interactive Advertising Bureau (IAB) in its 2007 Game Advertising Platform Report distinguishes nine different advertising formats used in the context of AOG: Advergames, static in-game, dynamic in-game, product

³³ See <<http://skichallenge.orf.at/sc08/>> (ORF, Austria) and <<http://www.sf.tv/sfsport/index.php?catid= sportski-challenge>> (SF, Switzerland).

³⁴ See <<https://www.bwin.com>>.

³⁵ See ‘List of Massively Multiplayer Online Games’, *Wikipedia*, available at <http://en.wikipedia.org/wiki/List_of_MMORPGs>, and ‘List of MMORPGs’, *Wikipedia*, available at <http://en.wikipedia.org/wiki/List_of_MMORPGs>.

³⁶ Dolbier, above n. 20.

³⁷ Mayer-Schönberger and Crowley, above n. 30.

³⁸ On the business model of MMOG and MMORPG, see OECD, 12 May 2005, above n. 23, 25–29. See also Castronova, above n. 29, 126–44 on the business model of MMORPG, in particular.

³⁹ Dolbier, above n. 20; Castronova, above n. 29, 80–81.

⁴⁰ Dolbier, *ibid.*

⁴¹ *Ibid.*

placement, sponsorship, inter-level ads, game skinning, pre-game, and post-game.⁴² We build upon the IAB's typology for AOG and try to establish the legal facts needed to evaluate reasons (economic and non-economic goals) put forward in favour of regulating, to assess the scope of the AVMS Directive, and to estimate what the AVMS Directive could contribute to accomplishing the regulatory goals as defined in this article.

1.2.1. Advergimes

Advergimes are games specifically designed for advertising. These games are a marketing-communication *sui generis*, normally assigned by the marketing department of a company or organisation to promote its own brand or product.⁴³ Whereas in most other types of AOG brands and products are placed in and around the game, advergimes are specifically designed for the sole purpose of marketing a single brand or product.⁴⁴ The brand or product is "the protagonist"⁴⁵ the central character or feature of the game.⁴⁶ Analysts expect that global expenditures on advergaming will grow significantly, as consumer demand for online entertainment continues to rise. Marketers are trying to catch up with an audience that is shifting from offline to online entertainment.⁴⁷ Advergimes are very engaging and appeal to both advertisers and gamers alike. As many advergimes have become popular, marketers are suggesting that gamers are obviously quite happy to accept advertising in return for free entertainment.⁴⁸ Companies or organisations usually offer their games directly via their websites.⁴⁹ Yet players are not bound to the PC to play advergimes. Other platforms such as game-consoles like Microsoft's Xbox⁵⁰ and even mobile phones⁵¹ feature advergimes, too.

Advergimes can be created using almost any of the above mentioned types of online games. Early examples of advergimes, such as *The Ford Simulator* of 1987 (a DOS game)⁵² or the console advergaming pioneer *The Coca-Cola Kid*, created in 1994 for the Sega Game Gear, were designed as single-player games.⁵³ Due to their relatively low production and development costs, single-player games continue to be the popular model for advergimes. Nonetheless, even these types of advergimes are very complex and their development and production is highly professional.

A recent example from the car industry is the *Volkswagen Golf GT Sport* advergime.⁵⁴ Volkswagen (VW) launched the game on its website in August 2007 concomitant with the release of the Universal Pictures film *The Bourne Ultimatum*. The film featured VW's Golf

⁴² Interactive Advertising Bureau (IAB), 'Game Advertising Platform Status Report: Let the Games Begin', Oct. 2007, 6; 'And now, a game from our sponsor', *The Economist*, 9 Jun. 2005.

⁴³ IAB, *ibid.*

⁴⁴ T. Winkler and K. Buckner, 'Receptiveness of Gamers to Embedded Brand Messages in Advergimes: Attitudes towards Product Placement' (2006) 7 *Journal of Interactive Advertising* 37, 37.

⁴⁵ 'And now, a game from our sponsor', *The Economist*, above n. 42.

⁴⁶ *Ibid.*

⁴⁷ A. Schaefer and M. Goodman, 'The Persuaders: Brand Advertising Is the Next Big Online Thing', Yankee Group Research, Jul. 2007, 1; P. Lee, *Moore's Law and electronic games* (London: Deloitte, 2004), 11.

⁴⁸ 'And now, a game from our sponsor', *The Economist*, above n. 42.

⁴⁹ Winkler and Buckner, above n. 44, 38.

⁵⁰ See I. Vedrashko, 'Advertising in Computer Games', Thesis (M.A.), Submitted to the Department of Comparative Media Studies in partial fulfilment of the requirements for the degree of Master of Science in Comparative Media Studies at the Massachusetts Institute of Technology, Sept. 2006, available at <http://gamesbrandsplay.com/files/vedrashko_advertising_in_games.pdf>, 48–50. See also B. Sinclair, 'XBLA gets its first advergime', GameSpot, available at <<http://www.gamespot.com/xbox360/driving/yaris/news.html?sid=6180594>>, posted on 8 Oct. 2007.

⁵¹ See 'The next big thing', *The Economist*, 4 Oct. 2007.

⁵² The game is available for download at <<http://www.dosgamesarchive.com/download/game/186>>.

⁵³ See Vedrashko, above n. 50, 48–50.

⁵⁴ The game is available for download at <http://www.volkswagen.com/vwcms_publish/vwcms/master_public/virtualmaster/en2/promosites/golf_gt_sport/golf_gt_sport.html?action=no>.

GT Sport as a product placement; the game on VW's website features the film's plot. Both the product placement in the film and the advergame were part of one car launching campaign. Other recent advergames also feature multiplayer online games (MOG) and persistent worlds. Another example from the car industry is BMW's *eDrive Challenge 2007*, a MOG popular in The Netherlands.⁵⁵ The game features the BMW 120d. It enables the player to compete against others, trying to improve his or her score, climbing the high score-list. Additional fun is provided in a feature that enables the player to create an individual circuit of his or her choice. Finally, the car industry has long discovered the promises of persistent worlds. An example is *Mokitown*, a persistent online world sponsored by DaimlerChrysler.⁵⁶

While the car industry is seen as one of the pioneers in offering advergames,⁵⁷ it is far from being the only industry to use this type of marketing communication for product launches and brand promotion. With firms such as *20th Century Fox*, *Nokia*, *GAP*, *FedEx*, and *American Express*, the leading advergame developer Fuel Industries Inc., lists companies from many other industries as its customers.⁵⁸ Moreover, governments and political parties have discovered the marketing potential of advergames. Since February 2007, the US Army with its *Virtual Army Experience*, a game that simulates a combat mission, has sought to recruit young people to join the Army. The simulation is an advanced version of the Army's successful *America's Army* video-game series. The multiplayer game drills the gamer through basic training and combat. At the same time, the Army's marketing tool gathers personal information about each player and uses it to customise the training programme during the simulations.⁵⁹ A recent example from politics is the advergame, which the Swiss right-wing Swiss People's Party (SVP) in the run up the October 2007 Parliamentary elections provided on its website. The game enables players to kick *black* sheep out of the country, while protecting *white* sheep from "evil" immigrants.⁶⁰

1.2.2. Product Placement

Product placement refers to the insertion of a brand or product in an entertainment medium such as television, film, or an online game.⁶¹ This type of marketing tool has a long and successful history, pioneered in the 1970s both in television and Hollywood films⁶² and became common practice for marketing in videogames in the 1990s.⁶³ The opportunities for product placement in games range from merely placing a logo on a "virtual" billboard to integrating the product into the online game's plot.⁶⁴ Alongside

⁵⁵ The game is available for download at <<http://www.bmwdrivechallenge.nl>>. Another example for an advergame using the MOD model is the US Army's *Virtual Army Experience*. See J. Voight, 'Army Recruiters On a New Mission', *Adweek*, 26 Nov. 2007.

⁵⁶ B. Book, "'These bodies are FREE, so get one NOW!': Advertising and Branding in Social Virtual Worlds', SSRN Paper, Apr. 2004, available at <<http://ssrn.com/abstract=536422>>, 25–26.

⁵⁷ Jürgen Kleeberger discovered that "nearly all car companies are doing a part of their marketing through games". See J. Kleeberger, 'Online-Gaming as Marketing and Sales Catalyst', Thesis (MBA), Submitted to the MCI Institute of the University of St. Gallen (HSG), 6 Dec. 2002, available at <http://www.gamasutra.com/education/theses/20030721/Kleeberger_thesis.pdf>, 55

⁵⁸ See Fuel Industries' case studies, available at <<http://www.fuelindustries.com/casestudies>>.

⁵⁹ Voight, above n. 55. See also S. Waterman, 'Military sets sights on virtual world', *Washington Times*, 23 Nov. 2007, and 'And now, a game from our sponsor', *The Economist*, above n. 42.

⁶⁰ See 'Swiss Right-wingers' Game: Kick Black Sheep Out', *GamePolitics.com*, available at <<http://gamepolitics.com/2007/10/18/swiss-right-wingers-game-kick-black-sheep-out>>, posted on 18 Oct. 2007. See also 'A noisy herd', *The Economist*, 11 Oct. 2007.

⁶¹ Winkler and Buckner, above n. 44, 38.

⁶² See K. Segrave, *Product Placement in Hollywood Films: A History* (Jefferson, NC and London: McFarland & Company Inc., Publishers, 2004).

⁶³ Vedrashko, above n. 50, 51.

⁶⁴ *Ibid.*, 50. See also Kline et al., above n. 30, 235–36.

IAB's typology for AOG, we can distinguish static and dynamic product placement. Both models may occur in any of the above-described types of online games played on any gaming platform.

Static in-game placement, also referred to as "Hard-Coded" advertising, includes the insertion of advertising elements into the game that cannot be changed.⁶⁵ This type of in-game advertising includes, *inter alia*, the posting of (real world analogue) billboards, e.g. alongside the racing track of a formula-one game, or banner advertisements in the virtual arenas of Electronic Arts' (EA) sports games. Other forms of static in-game placement include the opportunity to customise a racing car; game characters may use a *Nokia* mobile phone to call other game characters;⁶⁶ and players may upgrade their *Second Life* avatar with a new pair of *Armani Jeans*⁶⁷ or choose to play the next game on *FIFA 2008* using *Nike's Aerow II* football.⁶⁸

Dynamic in-game placement uses the same concepts as static in-game advertising; the difference being that dynamic in-game product placement allows the insertion of *dynamic* advertising elements within a game. By contrast to static in-game placement, the elements used in dynamic placement can be altered, adapted, and individually targeted depending on location, day of week and time of day.⁶⁹ With dynamic in-game advertising, marketers can react to changing trends and seasons for fashion goods such as mobile phones or clothes, keep in-game billboards updated, for example in order to promote the release of the newest films, and even change the music in games.⁷⁰ At the same time, dynamic in-game advertising allows companies to address more narrowly defined demographic groups.⁷¹ They use the internet-protocol (IP) address of the gamers' PC or game console and deliver advertising matched to their location.⁷² It is possible to promote a band's concert tour in a particular geographical region, place a radio advertisement in French playing from the radios of virtual cars driven by gamers in Paris, or to place an advertising message on particular days or times of the day only.⁷³ Taking dynamic AOG product placement one step further, marketers can—at least theoretically—profile gamers and target advertisements to each player individually, using the player's behaviour within the online game to create player profiles and then to target the player with advertisements that match this profile.⁷⁴ The arrival of this type of player profile targeting is only a question of time. With Adscape Media, Google recently acquired an AOG company that has the expertise in this type of targeting. Google now holds the patent entitled "Using information from user-video game interactions to target advertisements, such as advertisements to be served in video games for example".⁷⁵ In addition, Google is likely

⁶⁵ IAB, above n. 42, 6.

⁶⁶ M. Richtel, 'Product Placements Go Interactive in Video Games', *New York Times*, 17 Sept. 2002.

⁶⁷ See 'Giorgio Armani to open virtual store on Second Life', *Fashion United*, 3 Aug. 2007.

⁶⁸ See A. Stanescu, 'FIFA 08', *Softpedia Gaming Reviews*, 2 Nov. 2007. See also S. Schiesel, 'A Global Vision From the New Man at EA Sports', *New York Times*, 5 Sept. 2007; Kline et al., above n. 30, 235–36; and Vedrashko, above n. 50, 50–54.

⁶⁹ IAB, above n. 42, 6.

⁷⁰ 'Got game', *The Economist*, above n. 4. See also P. Göttlich, 'Online Games from the Standpoint of Media and Copyright Law', *IRIS plus*, 2007–10, 8.

⁷¹ IAB, above n. 42, 6.

⁷² Ibid. See L. Lessig, *Code: Version 2.0* (New York: Basic Books, 2006), 58–59.

⁷³ 'Got game', *The Economist*, above n. 4.

⁷⁴ B. Johnson, 'Advertisers get young gamers in their sights', *The Guardian*, 19 May 2006.

⁷⁵ USPTO Patent Application No. 20070072676, 'Using information from user-video game interactions to target advertisements, such as advertisements to be served in video games for example', assigned to Google Inc., invented by Shumeet Baluja, filed 29 Sept. 2005, and published 29 Mar. 2007. The abstract of the patent reads as follows. "Information about a person's interests and gaming behavior may be determined by monitoring their online gaming activities (and perhaps making inferences from such activities). Such information may be used to improve ad targeting. For

to expand its AdSense application to in-game advertising soon—even though Vinton G. Cerf, Google’s “Chief Internet Evangelist” in a recent interview with *Das Magazin* asserted, “As far as I know, we have no such plans.”⁷⁶

1.2.3. Sponsorship

Media law and economics generally distinguish sponsorship from advertising. Whereas advertising aims at promoting a specific product or service, the purpose of sponsorship is to promote the image or brand of a person, company, or organisation.⁷⁷ Usually, the person, company or organisation finances directly or indirectly a programme (i.e. a television show or a film); yet the financier is not involved in the planning, filming, production or broadcasting of the programme.⁷⁸

Thus, online game sponsorship refers to a situation in which a person, company or organisation finances an online game either directly or indirectly, for example, by sponsorship of a tournament, zone (level), or session of game play, in order to promote its image or brand. However, by contrast to the advergaming type of AOG, in online game sponsorship the financier by definition is not involved in the planning, development, design or production of the game.⁷⁹

Sponsorship may be used as marketing communication in any online game played on any gaming platform and often involves at least some kind of product placement, too. In some cases, it may even be difficult to draw the line between sponsorship and an advergaming. This depends on whether the corporate logos only *accompany* the game (product placement) or whether the marketing message is “the centre of the game”⁸⁰ (advergaming). There is no clear line between the two. It is unclear, for instance, if the Austrian and Swiss public service broadcasters’ *2008 Ski Challenge* qualifies as an advergaming, a sponsored MOG, or a MOG featuring the placement of many products, such as various ski resorts, banner ads alongside the slope, logos on the ski-suits, and—most importantly for the broadcasters—the live broadcasting of the “real” race.⁸¹

1.2.4. Pre-Game, Inter-Level, and Post-Game Advertising

Advergaming, product placement and sponsorship are the prevalent types of AOG. Besides these three major types of AOG, IAB mentions other types, but these refer more to advertising *around* than *in* online games. Pre-game advertising is the presentation of digital video or display advertisements before the game is played, as the game is loading. Similarly, inter-level advertising involves the display of advertising messages after the completion of a game play level as the next level is loading. Post-game advertising messages are displayed after the completion of the game.⁸²

Pre-game, inter-level, and post-game advertising may occur in the context of any of the above-described type of online games played on any gaming platform. The offline

example, such information may [be] used to target ads to be rendered in a video game being played by the person.” See D. Radd, ‘Google vs. Gaming’, *BusinessWeek*, 8 Jun. 2007.

⁷⁶ R. Czerwinski, ‘Das Evangelium nach Google’, *Das Magazin*, 15 Dec. 2007, 16 (translated by the author).

⁷⁷ G. Siegert, W. Wirth, J. Matthes, K. Pühringer, P. Rademacher, C. Schmer and B. von Rimscha, *Die Zukunft der Fernsehwerbung* (Berne et al.: Haupt Publishing, 2007), 20. See M. L. Kiefer, *Medienökonomik* (Munich and Vienna: Oldenbourg Publishing, 2001), 323.

⁷⁸ Siegert et al., *ibid.*

⁷⁹ IAB, above n. 42, 6 holds a slightly different view, attributing to the sponsor “a 100% share of voice”. We find this wording rather misleading. It does not distinguish clearly enough between sponsorship and the advergaming type of AOG.

⁸⁰ Kline et al., above n. 30, 235.

⁸¹ See above Section 1.1.3.

⁸² IAB, above n. 42, 4–6.

equivalent of the three models is the traditional 30-second television-advertising spot inserted before the programme, during “natural” breaks, or after a programme.

1.3. AOG as a Source of Revenue

Advertising as a source of revenue is a key element of the business model for most media industries. To put it simply, casting aside the complex influences and interdependencies along the entire value chain of content production, packaging, and distribution, media service providers need advertisers to make media content production pay—advertisers need media service providers to attract potential consumers. This basic assessment also applies to the online gaming-industry.⁸³

There is already a history of almost 20 years of advertising in electronic games—particularly product placement.⁸⁴ At the same time, the electronic games industry is still a young one. Underpinned by technological developments, the industry is growing rapidly.⁸⁵ Technological advances bring greater complexity and higher development costs to the electronic games industry. These advances include, *inter alia*, more powerful processors, an incredible growth in the storage capacity of hard discs, high-speed broadband connectivity, wireless data services, and new standards in mobile data transmission technology. Moore’s Law has proven valid for the electronic games industry.⁸⁶

The financial advisors of Deloitte suggest that due to the relentless pace of technological advance, the costs of planning, developing, designing and producing electronic games will grow significantly, forcing the industry to find new sources of revenue.⁸⁷ PricewaterhouseCoopers (PwC) in their Global Entertainment and Media Outlook of 2007 predicted that the global electronic (video) game market would expand from \$32 billion in 2006 to \$49 billion in 2011—a compound annual increase of 9.1 per cent.⁸⁸ PwC also project that the global market for online advertising would expand at an annual rate of 18.3 from \$ 32 billion in 2006 to \$73 billion in 2011.⁸⁹ We can safely assume that expenditure on AOG will grow at a similar rate.

A 2007 eMarketer Report on Video Game Advertising predicts that the global market for advertising in electronic games will reach nearly \$2 billion by 2011, growing at a compound annual rate of nearly 23 percent.⁹⁰ Technological advances are among the main drivers of this growth. Product placement in games will become “more appealing”⁹¹ when better screen resolution make in-game advertising “seamless”.⁹² Always-on broadband internet connections, IP address localisation, and gamer profiling will create new

⁸³ OECD, above n. 25, 187. See also Marsden et al., above n. 18, 99–111; and OECD, 12 May 2005, above n. 23, 17–24, on the structure and value chains of the electronic (video) game industry, and at 25–31 on business models and cost structures.

⁸⁴ See above Section 1.2.2. See also Kline et al., above n. 30, 235–36, Vedrashko, above n. 50, 50–58, and Kleeberger, above n. 57, 56–59.

⁸⁵ OECD, above n. 25, 185.

⁸⁶ See Lee, above n. 47. Gordon Moore of Intel in 1965 predicted an immense pace of technological advance, presuming that the transistor density on a single integrated circuit microchip doubles approximately every eighteen months. This became known as Moore’s law. On technological advances and their implications on the environment for audiovisual media regulation, see M. Burri-Nenova, ‘The Changing Environment of Audiovisual Media’ (2007) 12 *medialex* 171. See also Burri-Nenova, above n. 16, esp. at 1690.

⁸⁷ Lee, above n. 47, 11.

⁸⁸ PricewaterhouseCoopers LLP (PwC), *Global entertainment and media outlook 2007-2011: Global overview* (New York: PwC, 2007), 38.

⁸⁹ *Ibid.*

⁹⁰ ‘Let the Games Begin Advertising!’, *eMarketer Newsletter*, above n. 2. See also ‘In-Game Ad Placements Get Flexible’, *eMarketer Newsletter*, 7 Sept. 2007.

⁹¹ Lee, above n. 47, 11.

⁹² *Ibid.*

opportunities for advertisers to target their advertising message more effectively, reaching a highly involved audience—eyeballs they had lost offline.⁹³

1.4. AOG and the Gamers

What are the consequences of these developments for the consumer, user, and gamer? Will the amusing parody on AOG, with corporate logos all around and in the game, which was posted on YouTube in September 2007, soon prove true? As a note of caution, virtual worlds research pioneer Edward Castronova in 2005 in the *Harvard Business Review* stated that doing business in “synthetic worlds” may “offer the chance to be part of a dream—or kill it.”⁹⁴ And in his book *Synthetic Worlds* Castronova warns that advertising in online worlds “must be handled with great care as it may destroy the reason why people come to the world in the first place.”⁹⁵

Online Worlds are fantasy worlds.⁹⁶ Done badly, AOG can destroy the imagination and the diverse cultural expressions, values and meanings in online worlds.⁹⁷ In an online game meant to be set in the 1940s, “Inspector Malone”, to use one of Castronova’s examples, “can quaff a Coke, so long as it’s in a 1940s-style Coke bottle”.⁹⁸ By contrast, in *Azeroth*, the fantasy scenery of *World of Warcraft*, no gamer wants to see a Wal-Mart supermarket⁹⁹ or even a dragon tearing apart and swallowing a Toyota pickup truck. (The latter is a real example. However, the Toyota did not really appear in the game. Rather, the advertising agency in a kind of reverse engineering style used the *World of Warcraft* game play as the setting for a Toyota Tacoma video advertising spot posted on YouTube.)¹⁰⁰

Some gamers are deeply concerned about this type of commoditisation of online worlds. They feel “that advertising has led to social ills in the real world, and that virtual participants are entitled to a fresh start without commercial culture’s deleterious effects.”¹⁰¹ In some instances, advertisers even—virtually—collide with inhabitants of online worlds. In *Second Life*, gamers formed an in-world terrorist group, the “Second Life Liberation Army”, to take action to force the advertisers out of the game.¹⁰²

2. The Goals of AOG Regulation

Having introduced online games and AOG as an object of regulation, the second step is to evaluate regulatory goals and objectives. *Why* regulate? Media services such as online games have both an *economic* and a *cultural* nature¹⁰³ and may involve a variety of

⁹³ Ibid; ‘Got game’, *The Economist*, above n. 4; Associated Press, ‘Ad Targeting Improves on Websites’, *New York Times*, 3 Dec. 2007.

⁹⁴ E. Castronova, ‘Real Products in Imaginary Worlds’, *Harvard Business Review*, May 2005, available at <<http://ssrn.com/abstract=759924>>.

⁹⁵ Castronova, above n. 29, 130.

⁹⁶ Ibid.

⁹⁷ See Castronova, above n. 94.

⁹⁸ Ibid.

⁹⁹ See Castronova, above n. 29, 130.

¹⁰⁰ The advertisement is available for download at <http://www.saatchikevin.com/sisomo/TV_Ads_Viral_Video/Toyota_Tacoma_World_of_Warcraft>. See also the agency’s commentary on the intrusive impact of the advertisement on *YouTube*, gaming websites, blogs and social networks such as *Facebook* at <http://www.saatchikevin.com/sisomo/Toyota_Tacoma_World_of_Warcraft_Insider_Commentary>.

¹⁰¹ M. Bartholomew, ‘Advertising in the Garden of Eden’ (2007) 55 *Buff. L. Rev.* 737, 738.

¹⁰² Ibid; ‘“Second Life Liberation Army” Targets Brands’, *MarketingVOX*, 7 Dec. 2006.

¹⁰³ Preliminary remarks to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, as adopted 20 Oct. 2005, and entered into force 8 Mar. 2007 (hereinafter CCD). See C. B. Graber, ‘The New

potentially conflicting interests. On the international, regional and domestic level, policy-makers have identified the dual nature of media services and adopted both economic and non-economic (societal and cultural) policy measures. Various reasons—motives and technical justifications—have been put forward in favour of regulating audiovisual media. We do not attempt to offer an exhaustive list of these motives and justifications here. Instead, we concentrate on the goals and objectives put forward within the framework of the AVMS Directive. In the light of the rapidly changing environment for the electronic games industry, such a choice may seem somewhat arbitrary. Indeed, the various, and at times conflicting interests of businesses, consumers, and the society, which are at stake in cultural policy-making, make the task of goal evaluation very complex. Yet in the search for a valuable toolbox for regulating, we need to reduce some of this complexity.

The present work takes a legal perspective. It seeks to analyse the perspectives of one particular piece of legislation, the AVMS Directive. Thus, we need to narrow the area of interest down to some core legal questions i.e.—to use a concept from sociology of law and legal theory¹⁰⁴—to what the *law* can and probably will react to. The AVMS Directive is a piece of legislation that makes parts of the media and entertainment industry subject to regulation that were traditional not an object of EC audiovisual media law and policy. This concerns in particular new on-demand modes of providing media services that enable the “user” to choose and *pull* content from a given catalogue of programmes rather than a traditional linear mode of *pushing* the content to a viewer. The present article suggests that online game services are provided on demand and that online gamers are “users” rather than viewers of media services. We find it valuable to consider the reasons put forward in favour of including such new modes of providing and consuming media services into the European framework for audiovisual media regulation. These could be reasons in favour of regulating online games and advertising placed in and around such games.

The AVMS Directive does not include a provision stating the object and purpose of the legislative act. In the absence of such a provision, a good way to identify the underlying rationales—goals and objectives—of the AVMS Directive is to scrutinise its Recitals. Recitals provide a means of interpretation and as such reflect on the overall system, rationales, goals and objectives of regulating. The justifications brought forward in the Recitals to the AVMS Directive, especially Recitals 1–8, have as their underlying rationale the dual nature of media products as having both an economic and a cultural significance. The policy goals and objectives¹⁰⁵ can be summarised as follows.

From an *economic* perspective, the Directive seeks to ensure the proper functioning of the European media and entertainment market. It seeks to provide for legal certainty and to create optimal conditions for a competitive market for European audiovisual media services. The AVMS Directive, at least in the rhetoric of its Recitals, considers the economic significance of the European audiovisual media and entertainment industry as an

UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?’ (2006) 9 *J Int Economic Law* 553, 553; and C. E. Baker, *Media, Markets, and Democracy* (Cambridge, UK: Cambridge University Press, 2002), 7–19.

¹⁰⁴ Sociology of law and legal theory suggest that the law operates as an autonomous social system within the macro-system of the society as a whole. As a social system, the law fulfils a specific function in society and offers a “performance” (“*Leistung*”) to other social systems. In this regard, what matters is that the law as a social system produces and offers the guarantee that one can rely on certain “expectations as expectations” (“*Erwartungserwartung*”). The theory, building upon sociological systems theory, proposes that the law can only operate in terms of a binary code that makes the basic distinction between legal and illegal. The law cannot and will not answer any question that cannot be decided in terms of this basic code. For example, it cannot react to economic problems such as the decision on whether it is reasonable to pay or not to pay. This type of decision is a task assigned to the economy as a social system. The law “talks” law and the economy “talks” economics. See in more detail: N. Luhmann, *Law as a Social System* (Oxford: OUP, 2004); the work was first published in 1993 as *Das Recht der Gesellschaft* and translated by K. A. Ziegert.

¹⁰⁵ Underlying rationales, as put forward in Recitals 1–8 AVMS Directive.

important part of the internal market, as offering substantial employment opportunities and contributing to consumer welfare and overall economic growth. With a minimum degree of harmonisation achieved by setting minimum standards, the Directive intends to work towards completing the *internal market* for audiovisual media services and prevent the distortion of competition in the internal market. Market integration and the promotion of competition in the market place are seen as important means to promote the European media services industry and to maximise both consumer welfare and overall *economic welfare*.

From a *cultural* perspective, the AVMS Directive in the Recitals emphasises the importance of promoting and protecting cultural diversity and the growing importance of audiovisual media services for societies—in particular for the freedom of information, opinion and expression. Finally, from a cultural as much a *societal* perspective, the Directive stresses that safeguards need to be put in place for the protection of the consumers of audiovisual media services.

In the following, we build upon the goals and objectives identified as the underlying rationales of the AVMS Directive. However, we do so not in a way of constraint, taking a narrow focus, but rather introduce the goals and objectives into a bigger picture. Where practicable and appropriate, we take into account other EC law and policy instruments and examine the EC policy goals and objectives in the light of international media law and policy—in particular in a human rights context.

As regards the structure of goal evaluation, we maintain the basic distinction between economic and non-economic (societal and cultural) goals and objectives for regulating, but at the same time, we are aware that such a distinction is often somewhat theoretical.¹⁰⁶ Indeed, the economy is an intrinsic part of the society, too;¹⁰⁷ and one cannot always distinguish cultural from economic motives and goals. Yet in the light of the complexity inherent in regulation studies, we suggest maintaining for the purposes of this paper this somewhat theoretical distinction between economic and non-economic regulatory objectives.

2.1. Economic Goals of AOG Regulation

2.1.1. Economic Welfare

From the perspective of economic regulation, we are primarily interested in the proper functioning of the AOG market. We consider a market to function properly if that market is able to allocate resources efficiently and if market players refrain from inequitable business practices.¹⁰⁸ Recital 6 AVMS Directive recognises that emerging markets for on-demand audiovisual media services offer significant employment opportunities and stimulate consumer welfare and overall economic welfare. As seen above,¹⁰⁹ the same optimistic outlook is valid for the markets for online game services and AOG.

Economic theory describes economic welfare in terms economic efficiency.¹¹⁰ To put it simply, casting aside the differences and complex interdependencies between allocative, productive and dynamic efficiency, economic efficiency in general refers to a market

¹⁰⁶ M. Burri Nenova, *EC Electronic Communications and Competition Law* (London: Cameron May, 2007), 69.

¹⁰⁷ Similarly, sociological systems theory describes the economy as one of many social sub-systems, as an essential part of the macro social system of the society as a whole. See generally N. Luhmann, *Die Wirtschaft der Gesellschaft* (Frankfurt am Main: Suhrkamp, 1994).

¹⁰⁸ See e.g. R. A. Posner, 'Theories of Economic Regulation' (1974) 5 *Bell J. of Econ.* 335, 335.

¹⁰⁹ Above Section 1.3.

¹¹⁰ A. I. Ogus, *Regulation: Legal Form and Economic Theory* (Oxford and Portland, Oregon: Hart Publishing, 2004), 29; Burri Nenova, above n. 106, 46–47;

situation in which all goods and services are “produced and consumed at their respective socially optimal levels”.¹¹¹ Failures in the structure of the online game and AOG markets may hamper economic efficiency and the maximisation of consumer welfare (consumer surplus) as well as overall *economic welfare* (consumer and producer surplus).¹¹² Moreover, disparities in the laws, regulation and administrative measures in EC Member States concerning on-demand media services, and potentially also AOG, may distort competition in the internal market.¹¹³ From the viewpoint of economic regulation, such “market failures” are important rationales for regulating.¹¹⁴ Following the “public interest” theory of economic regulation, it is a legitimate economic goal for regulating AOG to respond to the public interest in the correction of inefficient market practices and to promote consumer welfare and the maximisation of overall economic welfare.¹¹⁵

2.1.2. *The Internal Market*

Recital 2 AVMS Directive recalls that differences in laws, regulation and administrative measures of the EC Member States concerning the provision of (on-demand) audiovisual media services contain disparities. Some of these disparities may impede the free movement of media services within the EC and work against the aim of completing the internal market. The goal of completing the internal market is one of the driving forces and principle purposes of the EC.¹¹⁶ Article 2 of the Treaty establishing the European Community (EC Treaty)¹¹⁷ expressly states that the establishment of the Common Market is one of the principle tasks and purposes of the EC.¹¹⁸ Article 3(1)(c) EC Treaty specifies that the tasks set out in Article 2 shall include activities of the EC to establish “an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, *services* and capital”.¹¹⁹

As we will see below in Section 3, AOG includes the provision of services as defined in Articles 49 and 50 EC Treaty.¹²⁰ Left unregulated on the EC level, the structure of the AOG market and the business practices in that market may impede attainment of the goal of completing the internal market. National initiatives in the regulation of audiovisual media and existing and evolving regimes for the self-regulation of industry could gradually lead to a highly fragmented regulatory framework for AOG. Such fragmentation could hinder market integration and the freedom to provide AOG and media services.

¹¹¹ R. Frank and B. Bernake, *Principles of Economics* (Boston et al.: McGraw-Hill/Irwin, 2001), 87.

¹¹² On consumer and producer surplus see *ibid.*, 169–73.

¹¹³ Recital 2 AVMS Directive.

¹¹⁴ Baldwin and Cave, above n. 19, 9.

¹¹⁵ Posner, above n. 108, 335. See Burri Nenova, above n. 106, 46–49.

¹¹⁶ J. Steiner, L. Woods and C. Twigg-Flesner, *Textbook on EC Law* (8th edn., Oxford: OUP, 2003), 187. See also Burri Nenova, *ibid.*, 50.

¹¹⁷ Treaty establishing the European Community, consolidated version, OJ 2002, C325/33 (hereinafter EC Treaty).

¹¹⁸ Art. 2 EC Treaty reads: “The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Arts 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States” (emphasis added).

¹¹⁹ Art. 3(1)(c) EC Treaty (emphasis added).

¹²⁰ Below Section 3.1.3.

2.2. Non-Economic Goals of AOG Regulation

2.2.1. Privacy

As mentioned above, the AVMS Directive in its Recitals puts forward both economic and non-economic goals and objectives in favour of regulating. Non-economic goals include, from a societal perspective, the protection of consumers of audiovisual media services. Consumer protection is a notion that covers a broad range of policies. A list of consumer concerns affecting media services and online game services in particular could seldom be exhaustive. For the purpose of the present article, we focus on one objective inherent in consumer protection that is of great importance and the cause of considerable concern in the field of online gaming; namely the goal of protecting online gamers' privacy.¹²¹

Dynamic product placement in online games, as described above (Section 1.2.2), uses information about the gamer to target advertisements more narrowly to the right audience, using the internet protocol (IP) address of the gamer, or even to profile the gamers' behaviour in game play. Each online gamer is assigned a virtual address, an IP address. IP addresses refer to a logical place in the network and not to a specific geographical location. Nevertheless, given the IP address it is possible to collect the data necessary to find out where someone is. The commercial interest in this kind of knowledge is obvious.¹²²

Applied to AOG, marketers can precisely target the advertising message to the online gamers living in the relevant geographical area e.g. of a specific pizza delivery service that advertises. AOG marketers will not only know *where*, but also *who* the gamer is i.e. the gamer's consumer preferences, how much time he or she spends online playing games, what other internet services he or she is interested in etc.¹²³ In addition, as mentioned above, it is likely that marketers will soon be able to profile gamers according to their behaviour in game play. This will enable AOG brokers to target brands and products even more closely to specific gamers.

This all sounds a bit like a far-off vision of the future, a science fiction novel maybe. We recall William Gibson's groundbreaking "cyberspace" novel the *Neuromancer*, where luxury brand names such as *Gucci* "dominate the popular consciousness";¹²⁴ and Stephen Spielberg's film adaptation of Philip K. Dick's *Minority Report*, where interactive advertisements for *Guinness*, *Lexus*, or *American Express* individually target prospective

¹²¹ Another important field of policy that is inherent in the notion of consumer protection and of particular importance for online gaming and AOG is the protection of children and young people. This issue has been discussed elsewhere. See e.g. V. Mallinckrodt and D. Mizerski, 'The Effects of Playing an Advergame on Young Children's Perceptions, Preferences, and Requests' (2007) 36 *Journal of Advertising* 87; Göttlich, above n. 70, 9–10; and K. W. Saunders, 'Regulating Youth Access to Violent Video Games: Three Responses to First Amendment Concerns' (2003) 2003 *L. Rev. M.S.U.-D.C.L.* 51. See also M. Sahlfeld, 'Content Regulation in Online Worlds', NCCR Trade Working Paper, forthcoming 2008, draft on file with the author.

¹²² Lessig, above n. 72, 58.

¹²³ For a description of this kind of mechanism see e.g. USPTO Patent Application No. 20040059708, 'Methods and apparatus for serving relevant advertisements', assigned to Google Inc., invented by J. A. Dean et al., filed 6 Dec. 2002, and published 24 Mar. 2004. The abstract of the patent reads as follows. "The relevance of advertisements to a user's interests is improved. In one implementation, the content of a web page is analyzed to determine a list of one or more topics associated with that web page. An advertisement is considered to be relevant to that web page if it is associated with keywords belonging to the list of one or more topics. One or more of these relevant advertisements may be provided for rendering in conjunction with the web page or related web pages." See also USPTO Patent Application No. 20070072676, above n. 75.

¹²⁴ Bartholomew, above n. 101, 739. See W. Gibson, *Neuromancer* (London: Voyager, 1995), 170.

consumers like a relentless stalker, using a scan technology.¹²⁵ But while we may leave Dick, Gibson and Spielberg's visions of the future for the fiction section of our bookshops and DVD shelves, some of the technology available to AOG marketers today, combined with the prospects of Moore's Law as applied above to the gaming industry, do sound a note of caution.

Lawrence Lessig in *Code (Version 2.0)* provides such a note of caution. He recalls that advances in digital technology and the Internet in particular made it necessary for us to "sacrifice" some of the control we have over "our" data; that technological advances have made it feasible to monitor our online behaviour cheaply and continuously; and that we give others the ability to break through our public space.¹²⁶ Lessig also reminds us that marketers can *monitor* our behaviour in online games and *search* for information about *where* and—to some extent—*who* we are and *what* we enjoy, buy, and play. Everywhere we go and whatever we do on the Internet is recorded and can be searched via our IP addresses.¹²⁷ On the Internet, we allow a cookie to be placed everywhere we go; and "the fact that the machine carrying that cookie went there is recorded—as well as all the data associated with that cookie."¹²⁸ Google and other advertising brokers "know" us from our mouse clicks; and the more closely advertisers and businesses work together the nearer the amount of data that can be monitored and searched gets to becoming infinite.¹²⁹

The right to respect for privacy is a human right. The International Covenant on Civil and Political Rights (CCPR)¹³⁰ guarantees the right to respect for privacy in Article 17(1)¹³¹ and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)¹³² provides for the right to respect for private life in Article 8(1).¹³³ In its General Comment No. 16 on Article 17 CCPR, the Human Rights Committee (the Committee) stipulated that States have to regulate by law the gathering and holding of personal information on computers, data banks or other devices. State Parties ought to take effective measures to ensure that information about a person's private life will not fall into the hands of persons who are not legally authorised to receive, process and use that information, and that the information is never used for purposes incompatible with the CCPR.¹³⁴

It follows that States Parties have an obligation to take "effective measures" to protect the right to respect for privacy from interferences—be it "by public authorities or private individuals or bodies".¹³⁵ The Committee suggests that states regulate the collection of personal information on computers by *law*.¹³⁶ Ultimately, however, it is up to the States

¹²⁵ Bartholomew, *ibid.* See P. K. Dick, 'Minority Report', in P. K. Dick, *Minority Report: The Collected Short Stories of Philip K. Dick* (London: Orion/Gollancz, 2000, first published 1987), as adapted by Stephen Spielberg for Cruise/Wagner Productions (Twentieth Century Fox and DreamWorks Pictures, 2002).

¹²⁶ Lessig, above n. 72, 200. For applications of this kind of technology, see USPTO Patent Application No. 20070072676, above n. 75 and USPTO Patent Application No. 20040059708, above n. 123.

¹²⁷ Lessig, *ibid.*, 202–03.

¹²⁸ *Ibid.*, 203.

¹²⁹ *Ibid.*

¹³⁰ International Covenant on Civil and Political Rights, concluded 16 Dec. 1966, entered into force 23 Mar. 1976, 999 U.N.T.S. 171 (hereinafter CCPR).

¹³¹ Art. 17(1) CCPR reads: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation".

¹³² European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, concluded 4 Nov. 1950, and entered into force 3 Sept. 1953 (hereinafter ECHR).

¹³³ Art. 8(1) ECHR reads as follows. "Everyone has the right to respect for his private and family life, his home and his correspondence".

¹³⁴ Human Rights Committee, CCPR General Comment No. 16, The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17), 8 Apr. 1988, para. 10.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

Parties what kind of regulation they find appropriate and wish to put in place. The online gamer would prefer to play the game without Big Brother watching him or her; and we may argue that it is up to the gamers to protect their data when playing online. This call for self-protection is legitimate, but the means of control available to the individual user are limited. In the end, if AOG remains unregulated, Big Brother may not be blind. Therefore, we conclude that the protection of the right to respect for privacy is a legitimate goal and objective of AOG regulation.

It should be noted however that there is already a substantial body of EC law and policy dedicated to the protection of the right to privacy. In particular this is covered by Directive 95/46/EC of the European Parliament and the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Data Protection Directive, DPD).¹³⁷ The AVMS Directive as a sector-specific policy instrument could either choose to specify the rules set out in DPD, by including similar rules on data protection as applied to advertising, or it could find the regulation in DPD sufficient and refer in the AVMS Directive to the DPD's importance for online audiovisual media services.

2.2.2. *The Protection and Promotion of Cultural Diversity*

The protection and promotion of cultural diversity is recognised as an important and legitimate policy objective—nationally, regionally, and internationally. Media products have both an economic and a cultural nature and must not be treated as exclusively having commercial value.¹³⁸ On the international level, the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CCD) identifies the dual nature of media products and recognises the protection and promotion of cultural diversity as a legitimate goal of regulation.¹³⁹ On the regional level, both the Council of Europe (CoE) and the EC have adopted policies that identify the cultural nature of media products.¹⁴⁰ In Recital 3, the AVMS Directive refers to the fact that media products have both an economic and a cultural nature. The Recital stresses the growing importance of media products for societies and democracy—in particular for the freedom of information, opinion and expression. In addition, the AVMS Directive in Recital 5 makes explicit reference to the CCD and seeks to respect the principles of that Convention.

The CCD does not offer a direct definition of “culture”. Instead, it approaches the notion of culture indirectly and describes “cultural diversity” as referring to “the manifold ways in which the cultures of groups and societies find expression”.¹⁴¹ In choosing this approach, the Convention fails to provide a substantial definition of “culture”. Yet at the same time, with such an indirect and rather pragmatic approach, referring merely to certain aspects, namely to the way culture finds *expression*, the Convention conveniently avoids the ambiguity inherent in a broad, standard definition of “culture”.¹⁴²

¹³⁷ Directive 95/46/EC of the European Parliament and the Council of 24 Oct. 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995, L281/31 (hereinafter Data Protection Directive, DPD).

¹³⁸ Preliminary remarks CCD. See Graber, above n. 103, 553; and C. B. Graber, ‘Substantive Rights and Obligations under the UNESCO Convention on Cultural Diversity’, in P. van den Bossche and H. Schneider (eds.), *Protection of Cultural Diversity from an International and European Perspective* (forthcoming 2008), draft on file with the author. See also Recital 3 AVMS Directive.

¹³⁹ *Ibid.*

¹⁴⁰ See the various contributions to R. Craufurd Smith (ed.), *Culture and European Union Law* (Oxford: OUP, 2004). See also C. B. Graber, ‘Audiovisual Media and the Law of the WTO’, in C. B. Graber, M. Girsberger and M. Nenova (eds.), *Free Trade versus Cultural Diversity: WTO Negotiations in the Field of Audiovisual Services* (Zurich et al.: Schulthess Publishing, 2004), 27–28.

¹⁴¹ Art 4 CCD. See Graber, above n. 103, 558, and Graber, above n. 138.

¹⁴² Graber, *ibid.*

Similarly, the CoE and the EC refrain from clearly defining “culture”. Instead, the underlying rationale of both CoE and EC cultural policy measures and especially audiovisual media regulation lies in the protection and promotion of the fundamental rights to the freedom of information and *expression*. However, while the CoE adopted its European Convention on Transfrontier Television (CTT)¹⁴³ in the light of the freedom of information and expression (Article 10 ECHR), the EC’s AVMS Directive and its forerunner, the TVWF Directive, are primarily measures aimed at completing the internal market.¹⁴⁴ Nonetheless—next to the goal of completing the internal market as a main driver for reform—the AVMS Directive was drafted in the light of the freedoms of information and expression, too. Recital 3 AVMS Directive reads as follows. “Audiovisual media services are as much cultural services as they are economic services. Their growing importance for societies, democracy—in particular by ensuring *freedom of information*, diversity of opinion and media pluralism—education and culture justifies the application of specific rules to these services.”¹⁴⁵

For the purpose of the present article,¹⁴⁶ we find it appropriate to build upon the pragmatic approach that has been chosen for cultural policy measures both on the international and on the European level—defining “culture” indirectly via the various ways in which cultural activities, values, meanings, opinions etc. find *expression*. Playing an online game is a way in which culture finds *expression*—digital culture.¹⁴⁷ Referring to the expression of culture in game play, Edward Castronova in his much-acclaimed book *Synthetic Worlds* stated that online game worlds include the *expression* of a diversity of symbols, rituals, values and meanings. Real world *rituals*, find their way into the online worlds; and (fashion) clothing and equipment may have a similar *symbolic* meaning in-game as they have outside the game environment.¹⁴⁸ Moreover, some are excited about the cultural potential inherent in game play. In the rhetoric of such excitement, online games promise to transform play into a highly interactive group experience, empowering the players to take command of the media content, changing the very culture of media from a centralised to a decentralised one—with a highly democratising effect.¹⁴⁹

The democratising effect of the Internet, social networks, online games, and other online worlds is a much-contested issue in academic writing. Some scholars such as Yochai Benkler praise “the wealth of networks” and predict that novel ways of media consumption in a digitally networked environment will fundamentally change the way we do business in media markets and other parts of the information economy, eventually enhancing individual liberty and political freedom.¹⁵⁰ Benkler believes that in a digitally networked environment, the so-called “networked information economy” empowers people to be “better able to do things for and by themselves”; and that in the networked information economy people are “less susceptible to manipulation by others than they were in the mass-media culture.”¹⁵¹

¹⁴³ European Convention on Transfrontier Television (CETS No. 132), adopted 5 May 1989, as amended by the Protocol (ETS No. 171), entered into force 1 May 1993.

¹⁴⁴ Burri-Nenova, above n. 16, 1698.

¹⁴⁵ Recital 3 AVMS Directive.

¹⁴⁶ On the difficult task of defining “culture” for the purpose of law and policy-making, see C. B. Graber, *Handel und Kultur im Audiovisionsrecht der WTO. Völkerrechtliche, ökonomische und kulturpolitische Grundlagen einer globalen Medienordnung* (Berne: Stämpfli Publishers, 2003), 11–14. See also Graber, above n. 138.

¹⁴⁷ Kline et al., above n. 30, 11–17. See Castronova, above n. 29, 123; and Kerr, above n. 13, 1 and 44–47.

¹⁴⁸ Castronova, *ibid.*

¹⁴⁹ Kline et al., above n. 30, 14–17, summarising the views of what they call the “digital futurists”.

¹⁵⁰ Y. Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven, CT: Yale University Press, 2006).

¹⁵¹ *Ibid.*, 130.

Others are sceptical about this “cult of the amateur” and the democratising effect of the Internet. In Andrew Keen’s opinion, “Today’s Internet is killing our culture and assaulting our economy”.¹⁵² He doubts that the Internet will have the democratising effect others predict. With regard to novel modes of advertising, he thinks, “When advertising and public relations are disguised as news, the line between fact and fiction becomes blurred.”¹⁵³ Instead of more community, knowledge, or culture, social networks and online worlds delivered “more dubious content”.¹⁵⁴

At the same time, there is a broad consent in academic writing that the right to express ones (digital) culture in online game play has a constitutional significance and requires protection and promotion. Similar to the approach taken in European and international cultural policy-making and audiovisual media regulation in particular, such writing commonly refers to the fundamental “right to play”, the freedom of expression, and—as far as the US perspective is concerned—the freedom of speech and the First Amendment doctrine.¹⁵⁵ In addition, it is worth noting that many European countries financially support the development, production, and distribution of content relevant to the games industry. Such funding ranges from financial contributions to local industry events, local and regional forums and fact-finding missions to support programmes aimed at raising the competitiveness of local firms and direct funds for content production. There are also EC-funded support programmes, for example MEDIA Plus, that promote the development, production, and distribution of European content.¹⁵⁶ Those support programmes demonstrate the recognition that online games, like other media services, have both an *economic* and a *cultural* nature and must not be treated as exclusively having commercial value.¹⁵⁷

We mentioned the key role of advertising as a source of revenue in the business model for most media industries and our presumption that the AOG market would expand significantly in the next five or so years and that the role of AOG in the business model of the online game industry would expand to a similar extent.¹⁵⁸ At this point however, we cannot say with any certainty how this growing significance of AOG will affect game play. There is too little empirical evidence on how AOG affects the gamer and alters both game play and the diversity of cultural values, meanings, and views expressed in the game.¹⁵⁹ Yet from a theoretical point of view, academic writing on advertising in traditional mass-media markets can give us some idea of how AOG and the interlinked commoditisation of online spaces may affect game play.

Media economists such as C. Edwin Baker suggest that once advertisers become a media’s “dominant paymaster”, they will influence the media service provider to provide

¹⁵² A. Keen, *The Cult of the Amateur: How Today’s Internet is Killing Our Culture and Assaulting Our Economy* (London and Boston: Nicholas Brealey Publishing, 2007).

¹⁵³ *Ibid.*, 17.

¹⁵⁴ *Ibid.* See also K. R. Fitzpatrick, ‘The Legal challenge of Integrated Marketing Communication (ICM)’ (2005) 34 *Journal of Advertising* 93.

¹⁵⁵ See J. M. Balkin, ‘Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds’ (2004) 90 *Va. L. Rev.* 2043; and J. M. Balkin, ‘Law and Liberty in Virtual Worlds’, in Balkin and Noveck (eds.), above n. 29, 88–90. See also E. Castronova, ‘The Right to Play’, in Balkin and Noveck (eds.), *ibid.*

¹⁵⁶ OECD, 12 May 2005, above n. 23, 53.

¹⁵⁷ See Graber, above n. 103, 553, and Baker, above n. 103, 7–19. See also preliminary remarks CCD.

¹⁵⁸ Above Section 1.3.

¹⁵⁹ Some work has been done on measuring player perceptions of AOG from a marketing research point of view. Yet these studies do not reflect on the impact on content and cultural diversity, but rather on efficiency, effectiveness and consumer response. See Z. Glass, ‘The Effectiveness of Product Placement in Video Games’ (2007) 8 *Journal of Interactive Advertising*; A. Acar, ‘Testing the Effects of Incidental Advertising Exposure in Online Gaming Environments’ (2007) 8 *Journal of Interactive Advertising*; M. Lee and R. J. Faber, ‘Effects of Product Placement in On-Line Games on Brand Memory’ (2007) 36 *Journal of Advertising* 75; and Winkler and Buckner, above n. 44.

to the audiences the kind of editorial content advertisers want them to receive. In addition, Baker claims, advertisers pressure media to avoid content that criticises the advertisers' products or political agenda and content that could turn customers against the advertiser. Moreover, to attract advertisers and to generate sufficient advertising revenue media tend to include content that puts the reader, viewer, or user into a mood that makes him or her receptive to advertisements. Consequently, Baker explains, media will not have sufficient incentive "to give audiences the informational and cultural content that the audiences want."¹⁶⁰

Media products generate significant positive externalities. Economic theory says that externalities occur "when the costs or benefits of an activity accrue to people other than those directly involved in the activity."¹⁶¹ Positive externalities, more specifically, imply an external *benefit*; i.e. "a benefit received by people other than those who pursue the activity."¹⁶² The empowering interactivity of online games and the cultural values, rituals, (symbolic) meanings and views expressed in game play constitute positive externalities, benefits not only the gamers, but also others enjoy. Cultural rituals and symbols not only find their way from the offline into the online spaces—gamers also take them back to the offline world. Because of these positive feedback-loops, what gamers experience online has an impact on their offline culture and social relations. Hence, even people who are not involved in the gaming activity may derive—through positive feedback-loops—a benefit from the online game as a media service and a cultural product.¹⁶³

Economic theory explains that externalities lead to inefficient behaviour and distort the effective allocation of resources. The effect of positive externalities, more specifically, is that activities generating them tend to be pursued too little.¹⁶⁴ It is very complex and costly to develop most of the above-listed online games. Game development and production depend heavily on research and development, and game programming and design require highly skilled personnel.¹⁶⁵ It is estimated that, because of these high research, development and production costs, only about three percent of all electronic (digital) games actually make a profit. The industry's response—similar to that of Hollywood or the record companies—is to focus on a small number of hits. Hits have to make sufficient profits to cover all the costs of the development and production of a large number of products that fail to make a profit. In an effort to bring in some predictability to the game development and production process, game designers—like those responsible for the Hollywood blockbusters or the hit records—tend to favour games that fall into particular standard categories.¹⁶⁶ Consequently, there might insufficient incentive for the market to design, produce and distribute online games that feature local content, linguistic diversity, educational value, a diversity of game play scenarios and storytelling—games that promise to deliver the aspired to feedback-loops referred to above.

¹⁶⁰ Baker, above n. 103, 25. Similarly, Jürgen Habermas, a sociologist and philosopher, pointed out that the commoditisation of the media—i.e. their increasing demand for capital and private investment in the form, *inter alia*, of advertising—constitutes an "Einfallstor", a gate through which privileged private interests invaded the media and the public sphere. See J. Habermas, *The Structural Transformation of the Public Sphere* (Cambridge, MA: Polity Press, 1992), 185. The work was originally published in 1962 as *Strukturwandel der Öffentlichkeit* and translated into English by T. Burger.

¹⁶¹ Frank and Bernake, above n. 111, 274 and 281.

¹⁶² *Ibid.*, 274. See C. E. Baker 'An Economic Critique of Free Trade in Media Products' (2000) 78 *N.C. L. Rev.* 1357, 1392.

¹⁶³ See Castronova, above n. 29, 123. See also Kline et al., above n. 30, 11–17.

¹⁶⁴ Frank and Bernake, above n. 111, 274–79 and 281. See Baker, above n. 162, 1377.

¹⁶⁵ OECD, above n. 25, 186.

¹⁶⁶ Kerr, above n. 13, 45.

To alter inefficient behaviour resulting from externalities, economic theory suggests that laws and regulation be put in place.¹⁶⁷ Following this line of reasoning, we suggest that the protection and promotion of cultural diversity is a legitimate goal and objective for regulating online games and AOG.

3. Regulatory Tools for AOG—the AVMS Directive

Having addressed *what* needs regulating (the *object* of regulation) and some of the motives and justifications *why* AOG needs regulating (economic and non-economic *goals* of regulation), we turn to the regulatory tools available to accomplish these regulatory goals. The question is *how* to regulate AOG i.e. *what regulatory tools* should be applied (rules on advertising, competition law and policy, intellectual property law, and/or human rights frameworks)? *What type of regulatory models* should be proposed (regulation, self-regulation, and/or co-regulation)? And—facing the challenge of multi-layered governance—at *which level* (national, regional, and/or global) should regulatory tools be put in place? For the purpose of this paper, we focus our scrutiny on one level, one regulatory tool, and one type of regulatory model, a sector-specific tool for advertising regulation on the regional level of the EC—the new Audiovisual Media Services Directive (AVMS Directive).¹⁶⁸

Digital technologies and ubiquitous network connectivity have significantly changed the environment for audiovisual media regulation. New patterns of business and consumer behaviour are transforming the media landscape along the entire value chain of content production, packaging, and distribution.¹⁶⁹ These developments were among the main driving forces in the process of revising the old TVWF Directive and drafting the new AVMS Directive. The European Commission was of the opinion that given the important economic and cultural impact of audiovisual media services, audiovisual media regulation should incorporate *all* content services, “irrespective of the technology that delivers them.”¹⁷⁰ In this Section, we intend to assess the scope of the AVMS Directive and answer the question whether the AVMS Directive is applicable to online games (Section 3.1) and AOG (Section 3.2).

3.1. Online Games and the Scope of the AVMS Directive

3.1.1. Audiovisual Media Services

The scope of the AVMS Directive includes all “audiovisual media services”. The AVMS Directive in Article 1(a) defines the notion in two alternative ways. For the purpose of the AVMS Directive, audiovisual media service means:

- “a service as defined by Articles 49 and 50 of the [EC] Treaty which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of Article 2(a) of Directive 2002/21/EC. Such an audio-

¹⁶⁷ Frank and Bernake, above n. 111, 279–81. See also Baker, above n. 162, 1393.

¹⁶⁸ The author will examine the prospects of alternative self-regulation as a means of regulating AOG in a future NCCR Trade Working Paper, forthcoming 2008.

¹⁶⁹ See Burri-Nenova, above n. 86, and Burri-Nenova, above n. 16, 1699.

¹⁷⁰ Burri-Nenova, above n. 16, 1702. See P. Valcke and D. Stevens, ‘Graduated regulation of “regulatable” content and the European Audiovisual Media Services Directive One small step for the industry and one giant leap for the legislator?’ (2007) 24 *Telematics and Informatics* 285, 285–86 and 295. See also Recitals 3, 6, 8, and 12 AVMS Directive.

visual media service is either a television broadcast as defined in point (e) of this Article or an on-demand audiovisual media service as defined in point (g) of this Article; and/or

- audiovisual commercial communication".¹⁷¹

The definition in Article 1(a) contains a number of notions, which we need to interpret. Some of the notions are defined in other parts of Article 1 or in other sources of primary or secondary EC law. In addition, Recitals 16 to 26 AVMS Directive provide for means of interpretation.

3.1.2. *The Blanket Exemption in Recital 18*

Before we analyse the scope of the AVMS Directive in more depth, we shall consider one of these Recitals provided as a means of interpretation. On reading the Recitals, we note that Recital 18 AVMS Directive seeks to provide a blanket exemption for "on-line games".¹⁷² The Recital explains that for the purpose of the AVMS Directive, the notion of an audiovisual media service should include "mass media in their function to inform, entertain and educate the general public" and audiovisual commercial communication. At the same time, the Recital seeks to *exclude* from the definition of audiovisual media services "any form of private correspondence, such as e-mails sent to a limited number of recipients" and "all services whose principal purpose is not the provision of programmes, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose." The Recital lists a number of examples for such services, whose principal purpose is not the provision of programmes, and which would be excluded from the scope of the Directive. The list includes, *inter alia*, "websites that contain audiovisual elements only in an ancillary manner" and "on-line games".¹⁷³

To conclude at this point that online games (and AOG) fall outside the scope of the AVMS Directive would be wrong for several reasons. Firstly, Recitals are not part of the enforceable text of the Directive; they are merely a means of interpretation.¹⁷⁴ Secondly, the exemption of online games as sought in Recital 18 AVMS Directive is not sufficiently clear; it would be difficult to apply the exemption even if it were part of the enforceable legal text.¹⁷⁵ Online games as defined above are not a homogenous object of regulation. There are various types of online games; and it is not clear from Recital 18 which definition of online games is the underlying rationale of the exemption sought in the Recital.

The Recital is obviously a response to the lobbying intervention of the Interactive Software Federation of Europe (ISFE) and other associations and market players in the interactive software industry—e.g. Microsoft. In a submission to the EC in June 2006, the ISFE urged the European Parliament and the Council to exempt online games from the application of the AVMS Directive and proposed to amend Recital 18 [ex 14] as a means to achieve such an exemption. ISFE sought to extend the list of exemptions, in what in the earlier draft was Recital 14, to: websites containing "audiovisual elements only in an ancillary manner, such as [...] participation in interactive software-based *online game play*."¹⁷⁶

¹⁷¹ Art. 1(a) AVMS Directive.

¹⁷² Recital 18 AVMS Directive. See Göttlich, above n. 70, 6.

¹⁷³ Recital 18 AVMS Directive.

¹⁷⁴ Göttlich, above n. 70, 6.

¹⁷⁵ *Ibid.*

¹⁷⁶ Interactive Software Federation of Europe (ISFE), 'Online Games do not belong in the Audiovisual Media Services ("AMS") Directive', Jun. 2006, available at <<http://www.culture.gov.uk/NR/rdonlyres/F414028A-3D5A-4D5C->

To interpret the proposal, we have to consider the underlying rationales of what ISFE name “online game play”. In its submission, ISFE specifies artificial intelligence (AI) and unscripted plot as “two integral and defining features of online games”.¹⁷⁷ It stated that in reality, online gaming has nothing to do with video on demand or broadcasting. ISFE emphasises that films and television shows—as opposed to online games—would not feature *artificial intelligence* (‘AI’) or an *unscripted plot*, two characteristics ISFE considers to be defining for online games.¹⁷⁸ According to ISFE, AI is a technology that allows the user to create and develop a specific identity and makes the game an individual experience.¹⁷⁹ This identity, ISFE asserts, is expressed in each player’s *avatar*, the character that represents the player inside the MMOG. The industry association also claims that as avatars interact, they—as “users”—create the plot of the game; and that it follows from the avatars’ individuality and freedom to interact that the plot of the game is *unscripted*, i.e. that it can differ every time a game is played. Following this line of reasoning, ISFE stated that online games (in general) were about user created content (UCC) and that the “general public” is not provided with but creates the content itself.¹⁸⁰ Therefore, ISFE claims, it is “impossible to affix editorial responsibility to one particular natural or legal person”, since participants are “constantly reorganizing and creating content in the form of ever-changing identities, ad lib chat, etc.”¹⁸¹

When discussing ISFE’s submission, we also mentioned interactivity among players’ digital persona, i.e. their avatars, when establishing online games as an object of regulation. By contrast, however, to what ISFE suggested, we assert that this is not a feature attributed to online games in general, but rather specifically to MMOG and MMORPG in particular.¹⁸² Hence, we suggest interpreting ISFE’s definition of “online games” narrowly, to include only MMOG and MMORPG. In addition, even if MMOG and MMORPG *do* feature UCC to some extent, such games will—at the same time—have content created by the game’s designers or by in-game broadcasters i.e. in-game TV shows, advergaming-type entertainment, and product placement that we may easily link to the responsibility of particular natural persons or legal entities.¹⁸³ It follows that despite the exemption sought in Recital 18 we need to examine the scope of the AVMS Directive—in order to evaluate whether the Directive could contribute to accomplishing the above-mentioned economic and non-economic goals of AOG regulation.

3.1.3. A Service as defined in Articles 49 and 50 EC Treaty

In order to qualify as an audiovisual service within the meaning of the AVMS Directive, an online game needs to be a *service* within the meaning of the EC Treaty. The term “service” as defined in Articles 49 and 50 EC Treaty is a genuine term in EC law and may not be specified by reference, for example, to an economic definition.¹⁸⁴ Article 50(1) EC Treaty defines the term mainly in a negative way, i.e. in delineation to the other funda-

9811-77F02C48ED25/0/ELSPAp2.doc>, Annex I at 5 (emphasis added). On the role of industry associations such as ISFE, see OECD, 12 May 2005, above n. 23, 54.

¹⁷⁷ ISFE, *ibid.*, 1.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*, in footnote *.

¹⁸⁰ *Ibid.*, 1.

¹⁸¹ *Ibid.*

¹⁸² See above Section 1.1.4.

¹⁸³ See Göttlich, above n. 70, 5. See also Vedralshko, above n. 50, 31, referring to MTV shows inside *Second Life*, for example. On different types UCC and on its economic and cultural characteristics, see OECD, ‘Participative Web: User-Created Content’, DSTI/ICCP/IE(2006)7/FINAL, 12 Apr. 2007.

¹⁸⁴ W. Kluth in C. Calliess and M. Ruffert (eds.), *Kommentar des Vertrages über die Europäische Union und des Vertrages zur Gründung der Europäischen Gemeinschaft – EUV/EGV* (2nd edn., Neuwied and Kriftel: Luchterhand, 2002), Art. 50 EGV, para. 5.

mental freedoms provided for in the Treaty. Services within the meaning of the EC Treaty have a subsidiary role and are only services as far as they do not come within the provisions relating to the freedom of movements for goods, capital and persons.¹⁸⁵ Moreover, Article 50(1) EC Treaty provides that services are “services” within the meaning of the Treaty only where they are “normally provided for remuneration”. At the same time, the EC Treaty does not specify in general, what kind of *activities* constitute services within the meaning of the Treaty if provided for remuneration. Instead, Article 50(1) gives examples, including activities of craftsmen and the professions and activities of an industrial and/or commercial nature.¹⁸⁶ The list of examples is non-exhaustive and has been expanded significantly in case law.¹⁸⁷

In the *Sacchi* Judgement, the European Court of Justice (ECJ) had the chance to address the nature of audiovisual media products, i.e. whether they constitute goods or services. With regard to the subsidiary role of services and to the distinction between the provision of services and trade in goods the ECJ held, “the transmission of television signals, including those in the nature of advertisements, comes, as such, within the rules of the Treaty relating to *services*.”¹⁸⁸ On the other hand, the ECJ held, “trade in material, sound recordings, films, apparatus and other products used for the diffusion of television signals are subject to the rules relating to freedom of movement for *goods*.”¹⁸⁹

In online gaming we can make a distinction similar to the one the ECJ made in *Sacchi* with regard to television broadcasting; a distinction between the trade in goods and the provision of services. Online gamers can play a game using a variety of platforms ranging from the PC to game consoles and mobile phones. These devices are tangible. They can be touched, carried and traded as such. Hence, by analogy to what the ECJ held in *Sacchi*, the trade in gaming platform devices, similar to the trade in material used to broadcast television signals, is governed by the rules relating to the freedom of movement for goods. Such devices are *goods* and not services within the meaning of Articles 49 and 50 EC Treaty.

By contrast, like a terrestrial network transmission of television signals, online media services such as online games are transmitted via a network, using digital broadband technology. Hence, if the Courts in *Sacchi* held that the *transmission* of television signals itself—including advertising—comes within the rules of the Treaty relating to services, then, the *transmission* of the broadband signals for online gaming also comes within the rules of the Treaty relating to *services*.

It follows that *providing* the online game as an intangible benefit to the user qualifies as the provision of a *service* within the meaning of the EC Treaty and therefore (see Article 1(a) AVMS Directive) within the meaning of the AVMS Directive. Provided, of course, the service provider receives remuneration in return for the service. As seen above when defining the object of regulation this is usually the case. The online games services provider will normally receive remuneration in return for the advertising space he or she offers; and gamers normally have to buy the software, pay a monthly subscription fee or otherwise remunerate the online games services provider.

3.1.4. Electronic Communications Networks

The AVMS Directive applies only to services transmitted through electronic communications networks. In Section 1.1, we established network connectivity as one of the

¹⁸⁵ Art. 50(1) EC Treaty.

¹⁸⁶ Ibid. See also C. Barnard, *The Substantive Law of the EU* (Oxford: OUP, 2004), 335.

¹⁸⁷ Barnard, *ibid.*, with reference to the relevant case law.

¹⁸⁸ Case 155/73 *Giuseppe Sacchi* [1974] ECR 409, para. 6 (emphasis added).

¹⁸⁹ Ibid., para. 7 (emphasis added).

defining features for all online games. Some sort of network connectivity is needed to provide online gaming services.¹⁹⁰ This will normally involve an *electronic communications network* within the meaning of Article 2(a) of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (Framework Directive).¹⁹¹ Article 2(a) of the Framework Directive defines the notion of electronic communications network as

“transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, *including Internet*) and *mobile terrestrial networks*, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed”.¹⁹²

Online games are played on a variety of platforms including PCs, (new generation) game consoles, and mobile phones. All of which include either internet connectivity or mobile networks. Irrespective of the information they convey, they are communications networks within the meaning of the Framework Directive and therefore also within the meaning of the AVMS Directive.

3.1.5. A Non-Linear/On-Demand Service

Unlike the television services, consumers and users download online gaming services on demand. Gamers themselves decide when and where they wish to play which game, game level, session or game play. The notion of audiovisual media services includes services irrespective of the mode of media consumption, “whether television broadcasting or on-demand”.¹⁹³ The AVMS Directive distinguishes between so-called linear and non-linear audiovisual media services. *Linear* (or television broadcast) *services* cover audiovisual media services “provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule”.¹⁹⁴ *Non-linear services* are audiovisual media services “provided for the viewing of programmes at the moment chosen by the user and at his/her individual request on the basis of a catalogue of programmes selected by the media service provider”.¹⁹⁵ We specify the conclusion made so far and put forth that offering an online game is not only a service within the meaning of the EC Treaty, but also a non-linear/on-demand media service; provided the remaining criteria defined in Article 1(a) AVMS Directive are satisfied as well.

3.1.6. Audiovisual

To qualify as a non-linear audiovisual media service, an online game needs to be “audiovisual” within the meaning of the AVMS Directive. For the purpose of the AVMS Directive, a media service is audiovisual if it provides “moving images with or without

¹⁹⁰ See above Section 1.1.

¹⁹¹ Directive 2002/21/EC of the European Parliament and of the Council of 7 Mar. 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ 2002, L108/33 (hereinafter Framework Directive).

¹⁹² Art. 2(a) Framework Directive (emphasis added).

¹⁹³ Recital 16 AVMS Directive.

¹⁹⁴ Art. 1(e) AVMS Directive.

¹⁹⁵ Art. 1(g) AVMS Directive.

sound”.¹⁹⁶ All of the above-described online games, single-player games, MOG, MMOG, persistent worlds and MSG contain “moving images with or without sound”. We exclude MUD from our listing, however. MUD, at least in their initial form, are based on simple text commands and do not include moving images. Consequently, all online games except MUD are audiovisual in nature.

3.1.7. *A Catalogue of Programmes*

To qualify as a non-linear/on-demand audiovisual media service, an online game needs to offer a “programme” that can be chosen from a “catalogue”. Article 1(b) AVMS Directive defines a programme as

“a set of moving images with or without sound constituting an individual item within a schedule or a *catalogue* established by a *media service provider* and whose form and content is comparable to the form and content of television broadcasting. Examples of programmes include feature-length films, sports events, situation comedies, documentaries, children's programmes and original drama”.¹⁹⁷

We have accepted that online games (except MUD) comprise a set of moving images. Whether online games are offered as “an individual item within [...] a catalogue” needs to be decided on a case-by-case basis, though. This is certainly the case if a gamer can individually choose to download a particular game, level of game play or session from a website—as for example www.bwin.com, where the user may choose to download a variety of online games from a given catalogue similar to the one of an on-demand film database.

To constitute a non-linear service, furthermore, the provider offering the online game as an individual item in a catalogue needs to be a media service provider within the meaning of the AVMS Directive, offering a service comparable in form and content “to the form and content of television broadcasting.”¹⁹⁸ We will come back to this requirement below in Section 3.1.9.

3.1.8. *Television-Like Programmes*

Recital 17 AVMS Directive addresses on-demand (non-linear) services and states that it is characteristic of on-demand services “that they compete for the same audience as television broadcasts, and the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive. In the light of this and in order to prevent disparities as regards free movement and competition, the notion of ‘programme’ should be interpreted in a dynamic way taking into account developments in television broadcasting.”

Iliya Vedrashko explains, “Games are like television and film”, and points at a surprising variety of similarities and overlaps between the two media services.¹⁹⁹ Vedrashko explains that most modern games feature carefully developed characters, complex settings and (film-like) plots. Many concepts of film theory, for example camera angles or

¹⁹⁶ Recital 20 AVMS Directive.

¹⁹⁷ Art. 1(b) AVMS Directive (emphasis added).

¹⁹⁸ Ibid.

¹⁹⁹ Vedrashko above n. 50, 31. With a similar argument comparing online games and film, see Göttlich, above n. 70, 4–5. See also ‘Gaming’s next episode?’, *The Economist*, 21 Sept. 2006, presuming that with the advent of “episodic” games video games increasingly become “like television programmes”.

the way a character is developed, also apply to game design. Moreover, Vedrashko emphasises that there are television shows *about* games and *in* games; games based on films (e.g. *Lord of the Ring*, *Matrix*, and *Star Wars*) and films based on games (e.g. [*Lara Croft*] *Tomb Raider*, *Doom*, and *Mortal Combat* and *Tron*). Vedrashko thus concludes that games are like film and television and even go beyond the stage of just being “like” but move along the same lines.²⁰⁰

We may well deduce from Vedrashko’s explanations and the analysis of those who share his conclusions²⁰¹ that online games are “television-like” within the meaning of the AVMS Directive “i.e. that they compete for the same audience as television broadcasts, and the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive.” Recital 17 as a means of interpretation supports such an assessment. The Recital encourages a “dynamic” interpretation of the notion of programme.²⁰² We conclude that online games are listed as individual items in a catalogue of television-like programmes.

3.1.9. Editorial Responsibility of a Media Services Provider

To qualify as non-linear audiovisual media services online games have to come under the editorial responsibility of a media service provider. A *media service provider* is “the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised.”²⁰³ That provider offers the media service under his or her *editorial responsibility* if he or she exercises “effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services.”²⁰⁴ We distinguish four sets of different content creators involved in online game design and content production: the game designers, in-game broadcasters, online gamers, and those who advertise (AOG marketers) or mediate advertising slots (AOG brokers) in online games. In the following Subsections, we evaluate the kind of content the aforementioned actors create and examine whether they have editorial responsibility and if they are media services providers.

A. The Game Designers

As mentioned previously it is very complex and costly to develop most online games. Online games design and production depend highly on research and development, and game programming and design require high skilled personnel.²⁰⁵ Subsequently, along the entire value chain of developing, creating, distributing and providing an online game service, at least one natural or legal person is responsible for the choice of the content of game play and the manner in which it is organised.²⁰⁶ Of course, game design differs from one type of online game to another. However, the basic observation that someone is in control and guides the process of game design holds true for all types of online games.

²⁰⁰ Vedrashko, *ibid.*, 31–32.

²⁰¹ On game-films-interdependencies see M. Kinder, ‘Narrative Equivocations between Movies and Games’, in D. Harries, *The New Media Book* (London: British Film Institute, 2002); and P. D. Marshall, ‘The New Intertextual Commodity’, in Harries, *ibid.*, 74–76.

²⁰² Recital 17 AVMSD.

²⁰³ Art. 1(d) AVMS Directive.

²⁰⁴ Art. 1(c) AVMS Directive. See also Valcke and Stevens, above n. 170, 296.

²⁰⁵ OECD, above n. 25, 186.

²⁰⁶ See Göttlich, above n. 70, 3–5, arguing in a similar way with regard to the attribution of authorship in online games.

We can make a crude distinction between the way MMOG, and MMORPG are designed and the way other online games are created, i.e. single-player games, MOG, and online versions of video games. According to Edward Castronova, the process of video game design typically proceeds as follows. A team of designers conceives an idea, sketches out a demo, and decides on game play scenarios, i.e. on what the player will do. At the same time, artists begin to develop game environments and characters. Both groups assign tasks to the programmers, who put the plans and ideas into programming language and “make it happen”. If and when the teams have built enough content, they make an alpha version of the software available for testing. In response to the alpha tests, game designers will change game play scenarios, environments, or programming, which are tested again. The process is repeated until the management is satisfied with the products. Only at that point is the game released to the publisher and “goes gold”.²⁰⁷

The process for MMOG and MMORPG comprises similar steps. They are more or less borrowed from traditional video game design practice.²⁰⁸ Yet the design is even more complex than say regular game design. Castronova explains that the apparent “beta test” in the market for MMOG and MMORPG has developed into a free-trial phase; i.e. once software is ready for testing, companies simply open their servers and make the game available for free download to anyone who asks. The idea is to gather a community of insiders enthusiastic to play the game, so when it “goes gold” and begins to charge a subscription fee, newcomers will already find an active community within that online world of MMOG or MMORPG. This business practice leads to game service providers being tempted to abandon the effort to test the game and instead to release and make available for download one update after another. In effect, *the testing phase of the product appears to go on for many months after the game is released*.²⁰⁹ All this leads Castronova to conclude that to produce an online game as an ongoing world experience delivered over the Internet is “simply much more complicated than procuring a piece of entertainment software for single sale.”²¹⁰

We learn from Castronova’s explanation that not only game design for simple online games but still more, game design for MMOG and MMORPG involves great expertise of natural and legal persons who stay involved long after the game has been released. They offer a persistent world experience and provide an ongoing media service for which they have largely editorial responsibility within the meaning of the AVMS Directive. These natural or legal persons offer the service in the capacity of a “media service provider” within the meaning of the AVMS Directive. Article 1(b) states that for the purpose of the AVMS Directive audiovisual media provider means “the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised”. As far as the person who creates and provides the content can be identified holds editorial and organizational responsibility and receives remuneration for the service in return, the elements of the scope of the AVMS Directive analysed in this Subsection apply to game designers.

B. *In-Game Broadcasters and Films*

We can distinguish a second set of content providers, namely those who are not directly involved in game design but create and offer content once the game goes live. Paul Göttlich distinguishes between the games themselves and “the integration of audiovisual

²⁰⁷ Castronova, above n. 29, 128.

²⁰⁸ See *ibid.*, 129.

²⁰⁹ *Ibid.*, 128–29.

²¹⁰ *Ibid.*, 129.

content into game worlds".²¹¹ Göttlich calls the phenomenon of integrated audiovisual content "in-game broadcasting" and refers to the possibility for avatars and other kinds of digital persona to watch films and television programmes within games.²¹² Similarly, Ilija Vedrashko claims that online (video) games and television broadcasting are alike; he refers to a MTV fashion show broadcast inside the persistent social online world *Second Life*, an in-game concert given by a U2-tribute band, or *Depeche Mode* performing inside *Sims Online* in Sims-language.²¹³ Such in-game content is provided under the editorial responsibility of natural persons or legal entities, too. As far as we can identify the person or legal entity who creates and provides the television- or film-like content, that person or legal entity is a media service provider within the meaning of the AVMS Directive if it holds editorial and organisational responsibility and receives remuneration in return for the service.

C. *The Online Gamers*

The third set of content creators are the online gamers themselves as they interact in everyday game play. Only this part of content production in online games features—to some extent—UCC the way ISFE defined it in the submission cited above.²¹⁴ We will not discuss here the extent to which online games content features UCC, AI technology, and/or unscripted plot. For the purposes of this article, it is sufficient to highlight that as far as UCC is not of economic in nature, i.e. it is not provided in return for remuneration, it will fall outside the scope of the AVMS Directive. Increasingly, however, gamers actually *do* business during game play; thus, even UCC in some instances generates revenue. In such instances, individual players could become media service providers, holding editorial responsibility within the meaning of the AVMS Directive.

But at the same time, we doubt that UCC amounts to a share of game play content as significantly high as industry officials, e.g. at ISFE, claim. After all, what a gamer can do in game play is strictly defined by the "code" of the game.²¹⁵ The persistent world *Second Life* is possibly the only online game actually featuring an "open code" where gamers can determine the plot as game play advances. By contrast, most other online worlds, e.g. the at present most popular MMORPG *World of Warcraft*, feature a "closed code" that limits the extent to which gamers can actually create content and determine the plot.²¹⁶ As the gamers navigate through *Azeroth*, the fantasy setting of *World of Warcraft*, the gamers' actions are limited to a selection between the alternatives put in place by the game designers.²¹⁷

D. *AOG Brokers and AOG Marketers*

The final set of content creators are companies and organisations who advertise in online games (AOG marketers) and those who *mediate* the "virtual" advertising slot

²¹¹ Göttlich, above n. 70, 5.

²¹² Ibid., 5–6.

²¹³ Vedrashko above n. 50, 31 and 35. Göttlich, above n. 70, 4–5 draws comparable parallels between online games and films. He contests the view that films, as a rule, constitute a closed system and suggest that online games be classified as film-like audiovisual or cinematographic works; provided the film is "rendered in a sufficiently creative and individual way".

²¹⁴ ISFE, above n. 176.

²¹⁵ Lessig, above n. 72, 5 develops the idea that "code is law" and establishes "code" as a regulator—a tool for regulation.

²¹⁶ On the concept of "open code" vs. "closed code", see *ibid.*, 139. Similarly, Balkin, 2004, above n. 155, distinguishes between the freedom of the game designer to determine the rules of the game ("freedom to design") and the gamers' freedom to use and play the game ("freedom to play").

²¹⁷ See Kline et al., above n. 30, 19.

(AOG brokers). The Google owned Adscape Media and other AOG brokers mediate “virtual” advertising slots to “real companies” (AOG marketers) such as *McDonald’s*, *Levi’s*, *Nike*, *Coca-Cola*, *20th Century Fox*, *Nokia*, or *FedEx*. They pay for the placement of “real world” brands in “virtual world” spaces.²¹⁸

The question is, whether AOG marketers and AOG brokers are audiovisual media services providers within the meaning of the AVMS Directive when they place advertising messages in and around online games. This is not an easy question to answer. Even if we bear in mind that AOG brokers like Google are continuously evolving from mere technology to huge media undertakings, AOG brokers and AOG marketers will usually not hold editorial responsibility for game play. That responsibility will typically stay with the natural person or legal entity offering the “virtual” advertising slot via the AOG broker to the AOG marketer.

3.1.10. *Inform, Entertain or Educate the General Public*

Finally, to qualify as a non-linear service within the meaning of the AVMS Directive, an online game needs to be offered, “in order to inform, entertain or educate, [...] the general public”.²¹⁹ The online game industry is part of the entertainment industry. Gamers consume, play, and use online games for amusement and entertainment. Playing games is like watching TV, going to the cinema, or listening to music. They are certainly here to entertain you!²²⁰ Moreover, some games also have an educational intention.²²¹ Even provision of information may be their purpose.

With regard to the notion of “general public” Recital 30 AVMS Directive explains that the Directive concerns services “offered to the general public in the European Union” and that “it should apply only to audiovisual media services that can be received directly or indirectly by the public in one or more Member States with standard consumer equipment.”²²²

We recall that all online games comprise at least some sort of network connectivity and that games can be downloaded from the website of the media service provider. Such websites can certainly be accessed from within the European Union and its Member States “with standard consumer equipment”. The requirements discussed in this Subsection are therefore fulfilled.

3.1.11. *Interim Conclusion*

Online games are—to a significant extent—subject to the AVMS Directive. The fact that the natural person or legal entity holding editorial responsibility accepts advertisements to be placed in and around online games makes that person or entity a media service provider within the meaning of the AVMS Directive.²²³ Exemptions from the general application of the Directive to online games may be possible for online games featuring a certain degree of UCC and for the generally text based MUG. All exemptions, however, need to be addressed on a case-by-case basis.

²¹⁸ See Book, above n. 56, 12–13. See also OECD, 12 May 2005, above n. 23, 28; Richtel, above n. 66; and Fuel Industries, above n. 58.

²¹⁹ Art. 1(a) AVMS Directive.

²²⁰ Vedrashko, above n. 50, 31–32. See OECD, 12 May 2005, above n. 23, 9.

²²¹ OECD, *ibid.*, 41.

²²² Recital 30 AVMS Directive.

²²³ See Marsden et al., above n. 18, 25, and Burri-Nenova, above n. 16, 1705 who come to the same conclusion.

3.2. AOG and the Scope of the AVMS Directive

We noted that AOG brokers and AOG marketers create game play content in the form of advertising messages. The editorial responsibility for that content, though, would typically not lie with the AOG broker or marketer but remain with the media services provider who offers the online game and accepts the placement of advertisements in the game.²²⁴ In this Section (3.2), we examine whether the AVMS Directive covers not only online games (as examined in Section 3.1) but, more specifically, also AOG.

3.2.1. Audiovisual Commercial Communication

Technically, and rather theoretically, there are two ways the AVMS Directive could include AOG—indirectly via the online gaming service or directly as an “audiovisual media service” *sui generis*. Article 1(a) Second Indent AVMS Directive offers a second alternative mode to determine the scope of the term “audiovisual media service”.²²⁵ If we interpreted the provision literally, we would assume that whatever qualifies as “audiovisual commercial communication” (ACC) would also qualify as an “audiovisual media service” and by itself—as an audiovisual media service *sui generis*—be subject to the Directive. Yet such an interpretation is contrary to the overall system, purpose, and—in particular—some of the Recitals of the Directive.

The definition of ACC set out in Article 1(h) AVMS Directive does not mention as a prerequisite that ACC *by themselves* be services within the meaning of the EC Treaty. ACC merely need to include “images with or without sound” in a programme and as such accompany an audiovisual media service other than ACC.²²⁶ At the same time, Recitals 16 and 18 AVMS Directive seek to limit the scope of the term “audiovisual media services” to services as defined by the EC Treaty²²⁷ and to exclude all services whose principle purpose is not the provision of programmes within the meaning of Article 1(b) AVMS Directive.²²⁸ In our view, in the light of the overall system and purpose of the Directive, the requirements sought in Recitals 16 and 18 to include services within the meaning of the EC Treaty and to limit the term to services whose principle purpose is the provision of programmes make perfect sense. It is indeed hard to imagine how editorial responsibility could be attributed to AOG brokers or even AOG marketers. On the contrary, the responsibility for the advertisement as an integral part of the media content will typically stay with the media service provider—in our case the provider of the online gaming service and not the AOG broker or marketer.²²⁹

We would have to determine on a case-by-case basis whether AOG itself comprises a service within the meaning of Articles 49 and 50 EC Treaty and to examine the complex relationship between the AOG broker, the AOG marketer, and the online games service provider.²³⁰ In any case, the responsibility for the content and form of such advertising (services) will typically stay with the media service provider who chooses to accept the insertion of advertisements in his or her audiovisual media service, i.e. the online gaming service.²³¹ The question of whether AOG, or more generally ACC, comprise audiovisual media services (*sui generis*) therefore remains rather theoretical. Article 1(a) Second In-

²²⁴ Marsden et al., *ibid.*, 25; Burri-Nenova, *ibid.* See also above Section 3.1.11.

²²⁵ See above Section 3.1.1.

²²⁶ Art. 1(h) AVMS Directive.

²²⁷ Recital 16 AVMS Directive. See above Section 3.1.3.

²²⁸ Recital 18 AVMS Directive. See above Section 3.1.7.

²²⁹ See above Section 3.1.9.

²³⁰ See above Section 3.1.3.

²³¹ See Marsden et al., above n. 18, 25; and Burri-Nenova, above n. 16, 1705. See also above Section 3.1.9.

dent AVMS Directive is somewhat misleading in this regard—if not to say a legislative failure.

3.2.2. AOG as a Part of the Online Game

For the purpose of further examination in this article, we will build upon the fact that online gaming services themselves are largely subject to the rules of the Directive.²³² If online games service providers accept the insertion of advertisements in and around the online gaming service, such advertisements (AOG) become *part of the online game* and will have to comply with the Directive's rules on advertising.²³³ In what follows therefore, we have to scrutinise whether AOG comprises ACC. For AOG is only subject to the rules on advertising set out in Articles 3e to 3g AVMS Directive if AOG is a form of ACC.

3.3. AOG as Audiovisual Commercial Communication (ACC)

3.3.1. Audiovisual Commercial Communication (ACC)

The regulation of advertising is a core element of the AVMS Directive. While the TVWF Directive spoke of advertising, however, the AVMS Directive introduces the notion of “audiovisual commercial communication”. The notion is taken from the e-Commerce Directive²³⁴ and is intended to include all rules related to advertising.²³⁵ Article 1(h) AVMS Directive defines audiovisual commercial communication (ACC) as

“images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, *inter alia*, television advertising, sponsorship, teleshopping and product placement”.²³⁶

Most AOG features “images with or without sound”. “Virtual” billboards, brand and product placement, whether dynamic or static, use *visual* means to attract gamers. Advergaming *are* games in themselves. Like all advertising, AOG has a promotional intent and includes marketing messages placed by natural persons or legal entities (both AOG brokers and marketers) “pursuing an economic activity”. AOG is commercial in nature. AOG marketers pay AOG brokers to mediate “virtual” advertising slots and the online games media service provider receives a payment in return if he or she accepts the placement of advertisements in and around online games.

Sponsorship and product placement are forms of advertising that we listed above when defining AOG as an object of regulation. Both forms of AOG *accompany* the game; and we recall that online games (in which AOG is placed) are *like* “programmes”. In what follows, we compare the different forms of AOG as defined in Section 1.2 to the forms of ACC included in the scope of Article 1(h) AVMS Directive and determine whether AOG comprises ACC and is therefore subject to the Directive's rules on ACC set out in Articles 3e to 3g AVMS Directive.

²³² See above Section 3.1.11.

²³³ See Marsden et al., above n. 18, 25; and Burri-Nenova, above n. 16, 1705. See also above Section 3.1.9.

²³⁴ See Art. 2(f) of the Directive 2000/31/EC of the European Parliament and the Council of 8 Jun. 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, OJ 2000, L178/1.

²³⁵ Burri-Nenova, above n. 16, 1711.

²³⁶ Art. 1(h) AVMS Directive.

3.3.2. *Product Placement*

Article 1(h) AVMS Directive mentions “product placement” as one possible form of commercial communication within the meaning of the AVMS Directive. The Directive defines product placement in Article 1(m) as comprising

“any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within a programme, in return for payment or for similar consideration”.²³⁷

We stated (above Section 1.2.2) that product placement for the purpose of AOG referred to the insertion of a brand or product in an entertainment medium such as television, film, or an online game. It also became clear that product placement in online games includes some form of payment in return for the placement of the advertising message. It follows that product placement for the purpose of AOG will also be product placement within the meaning of the AVMS Directive and constitutes a form of audiovisual commercial communication.

3.3.3. *Sponsorship*

Article 1(k) AVMS Directive defines “sponsorship” as encompassing

“any contribution made by a public or private undertaking or natural person not engaged in providing audiovisual media services or in the production of audio-visual works, to the financing of audiovisual media services or programmes with a view to promoting its name, its trade mark, its image, its activities or its products”.²³⁸

In the context of AOG as an object of regulation (above Section 1.2.3), we defined sponsorship of online games as referring to a situation in which a person, company or organisation finances directly or indirectly an online game, such as sponsorship of a tournament, zone (level), or session of game play, in order to promote its image or brand. We also stated that—by contrast to the advergaming type of AOG—the sponsor is not engaged in the planning, development, design or production of the game.

The definition of sponsorship for online games as a type of AOG is broadly consistent with the definition of sponsorship in Article 1(k) AVMS Directive. Sponsorship in online games includes a financial contribution of an undertaking or a natural person otherwise not involved in providing the online game service or in the production of such services. Moreover, the aim of the sponsorship for online games is to promote the image or trademark of the sponsor. Hence, sponsorship for online games as a type of AOG is subject to the rules on sponsorship included in the AVMS Directive and constitutes a form of audiovisual commercial communication.

In addition to our brief analysis of the definition of sponsorship in Article 1(k) AVMS Directive, it is worth noting that the definition includes one quite unusual and maybe conflicting element. We mentioned above (above Section 1.2.3) that, from the perspective of media economics, there is a fundamental difference between advertising in general and sponsorship. This difference lies in the fact that advertising, at least traditionally,

²³⁷ Art. 1(m) AVMS Directive.

²³⁸ Art. 1(k) AVMS Directive.

aims at promoting a service or product, while the aim of sponsorship is to promote the name or image of the sponsor. Now the definition set out in Article 1(k) AVMS Directive not only includes as an aim of the sponsorship the promotion of the name or image of the sponsor but also its *products* as such. By contrast, Article 1(d) TVWF Directive, the forerunner to the AVMS Directive, did not include the notion “product” as an intended goal of the promotion with sponsorship.²³⁹ It is beyond the scope of this paper to determine whether this amendment is an intentional extension of the subject matter of sponsorship or simply an inconsistency accidentally created by the legislator. It would certainly be interesting to examine the matter in more depth in a further study.

3.3.4. *Advergaming*

By contrast to product placement and sponsorship, the AVMS Directive does not mention advergaming. Nevertheless, advergaming need not necessarily be excluded from the definition of ACC. Article 1(h) AVMS Directive uses an open and flexible approach to defining ACC. It is open and flexible enough to include novel models of advertising, which will emerge in the changing digital environment for audiovisual media. This becomes clear from the wording (“*inter alia*”) in Article 1(h). The list of possible models of commercial communications in the last sentence of Article 1(h) AVMS Directive is non-exhaustive. After all, the main goal of including this broad notion of ACC, covering all forms of advertising in audiovisual media services, was to provide a set of rules as a minimum standard on the EC level that would “provide legal certainty across all Member States.”²⁴⁰

Nevertheless, the (general) definition of audiovisual commercial communications in the first part of Article 1(h) AVMS Directive requires that the communication be “*included in a programme*”.²⁴¹ If we interpret the notion of “included” in an audiovisual service in a way that the commercial communication needs to be embedded in *another* audiovisual service, advergaming would not come under the rules that the AVMS Directive provides for ACC; after all, advergaming itself *is* the service. At the same time, the issue is too complex to allow us to conclude here that advergaming would not constitute ACC. We recall that it may sometimes be difficult to distinguish advergaming from product placement in games and suggest that the issue be assessed on a case-by-case basis.

3.3.5. *Pre-Game, Inter-Level, and Post-Game*

Pre-game, inter-level, and post-game as types of AOG are comparable to the traditional 30-second television advertising spot. Like the 30-second spot, pre-game, inter-level, and post-game advertising is shown before the programme, i.e. the game or level of game play, during natural breaks, and/or after the end of the programme. As for most types of AOG, the general rules set out in Article 3e AVMS Directive will apply to pre-game, inter-level, and post-game advertising alike. We will come back to these rules below in Section 4.1.

4. The AVMS Directive and the Goals of AOG

It follows from the above analysis that AOG largely comprises ACC within the meaning of the AVMS Directive and that consequently the Directive’s rules on ACC are applicable to AOG. It remains to be seen what the Directive’s rules on ACC as applied to

²³⁹ Art. 1(e) TVWF Directive.

²⁴⁰ Burri-Nenova, above n. 16, 1711.

²⁴¹ Art. 1(h) AVMS Directive (emphasis added).

AOG can contribute to accomplishing the economic and non-economic goals put forward in favour of regulating.

4.1. General Rules Applicable to All ACC

Subject to the rules on ACC, *all* AOG (advergames—as far as they qualify as ACC—, product placement, sponsorship, pre-game and post-game) shall be readily recognisable as ACC and must not:

- (i) “use subliminal techniques;”²⁴²
- (ii) “prejudice respect for human dignity;”²⁴³
- (iii) “include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation;”²⁴⁴
- (iv) “encourage behaviour prejudicial to health or safety;”²⁴⁵
- (v) “encourage behaviour grossly prejudicial to the protection of the environment;”²⁴⁶
- (vi) promote cigarettes and other tobacco products;²⁴⁷
- (vii) target the promotion for alcoholic beverages specifically at minors and must not encourage immoderate consumption of such beverages;²⁴⁸
- (viii) in the Member State within whose jurisdiction the media service provider falls promote medicinal products and medical treatment available only on prescription;²⁴⁹
- (ix) “cause physical or moral detriment to minors. They must not directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity, directly encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, or unreasonably show minors in dangerous situations.”²⁵⁰

4.2. Special Rules for Product Placement and Sponsorship in AOG

4.2.1. Product Placement

The AVMS Directive provides for rules on product placement. In addition to the extended scope of the AVMS Directive as compared to the TVWF Directive, the inclusion of rules on product placement is another major amendment in the new regulatory framework. As stated above (Section 3.3.2), product placement in the context of AOG comprises product placement within the meaning of the AVMS Directive. As a general rule, Article 3g(1) AVMS Directive *prohibits* product placement.²⁵¹ By way of derogation

²⁴² Art. 3e(1)(b) AVMS Directive.

²⁴³ Art. 3e(1)(c)(i) AVMS Directive.

²⁴⁴ Art. 3e(1)(c)(ii) AVMS Directive.

²⁴⁵ Art. 3e(1)(c)(iii) AVMS Directive.

²⁴⁶ Art. 3e(1)(c)(iv) AVMS Directive.

²⁴⁷ Art. 3e(1)(d) AVMS Directive.

²⁴⁸ Art. 3e(1)(e) AVMS Directive.

²⁴⁹ Art. 3e(1)(f) AVMS Directive.

²⁵⁰ Art. 3e(1)(g) AVMS Directive.

²⁵¹ Art. 3g(1) AVMS Directive.

from this prohibition, unless a Member State in its national audiovisual media legislation decides otherwise, Article 3g(2) AVMS Directive *allows* product placement:

- (i) “in cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes— except for children’s programmes,”²⁵² or
- (ii) “where there is no payment but only the provision of certain goods or services free of charge, such as production props and prizes, with a view to their inclusion in a programme.”²⁵³

4.2.2. Sponsorship

As stated above (Section 3.3.3), sponsorship of online games comprises sponsorship within the meaning of the AVMS Directive. Sponsorship of audiovisual media services or programmes is allowed under the following conditions:

- (i) “their content and, in the case of television broadcasting, their scheduling shall in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider;”²⁵⁴
- (ii) “they shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services;”²⁵⁵
- (iii) “viewers shall be clearly informed of the existence of a sponsorship agreement. Sponsored programmes shall be clearly identified as such by the name, logo and/or any other symbol of the sponsor such as a reference to its product(s) or service(s) or a distinctive sign thereof in a appropriate way for programmes at the beginning, during and/or the end of the programmes.”²⁵⁶

At the same time, by way of derogation from the general permission:

- (i) “Audiovisual media services and programmes shall not be sponsored by undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products.”²⁵⁷
- (ii) “The sponsorship of audiovisual media services and programmes by undertakings whose activities include the manufacture or sale of medicinal products and medical treatment may promote the name or the image of the undertaking, but shall not promote specific medicinal products or medical treatments available only on prescription in the Member State within whose jurisdiction the media service provider falls.”²⁵⁸

²⁵² Art. 3g(2) 1st Indent AVMS Directive.

²⁵³ Art. 3g(2) 2nd Indent AVMS Directive.

²⁵⁴ Art. 3f(1)(a) AVMS Directive.

²⁵⁵ Art. 3f(1)(b) AVMS Directive.

²⁵⁶ Art. 3f(1)(c) AVMS Directive.

²⁵⁷ Art. 3f(2) AVMS Directive.

²⁵⁸ Art. 3f(3) AVMS Directive.

- (iii) “News and current affairs programmes shall not be sponsored. Member States may choose to prohibit the showing of a sponsorship logo during children's programmes, documentaries and religious programmes.”²⁵⁹

4.3. ACC and the Goals of AOG Regulation

In Section 2, we set out a number of economic and non-economic goals for AOG regulation. In this Section (4.3), we analyse critically what the AVMS Directive as a tool available for AOG regulation could contribute to accomplishing the goals listed in Section 2.

4.3.1. Economic Goals

A. Economic Welfare

We introduced as a legitimate economic goal of regulating AOG the correction of inefficient and inequitable market practices in order to maximise both consumer welfare and overall economic welfare (above Section 2.1.1). The AVMS Directive in Recital 6 identifies the market potential of on-demand audiovisual media services. The Directive considers that these markets offer significant employment opportunities and stimulate consumer welfare and overall economic growth. At the same time, an analysis of the Directive's scope shows that online games are largely on-demand media services within the meaning of the AVMS Directive and that the Directive's rules on ACC are applicable to AOG. Hence, the question is how the AVMS Directive—as a tool available for regulating advertising placed in and around online game services (AOG)—could contribute to accomplishing the goal of maximising economic welfare.

The AVMS Directive seeks to set minimal standards for ACC and herewith to bring about a minimum level of harmonisation to the disparate laws, regulation and administrative measures applicable to advertising in each Member State. Such harmonisation should enhance legal certainty for media services providers and make available a playing field for European companies offering media services—including those offering online gaming and AOG services. However, while such rhetoric and declarations of intent as put forward in the Recitals are all very well, the question is whether the real policy instruments put in place by the EC will bring about the behaviour and results they seek. There is reason to doubt this and to be dubious as to the prospects of the AVMS Directive as a toolbox to correct inefficient and inequitable market practices and to promote economic welfare.

The rules set out in the AVMS Directive will not have direct effect. As a directive in the sense of Article 249 EC Treaty, the AVMS Directive only binds the Member States “as to the result to be achieved”.²⁶⁰ It requires further implementation to take effect, and as to the form and method of implementation, Member States are allowed a certain degree of discretion.²⁶¹ Even more, since the AVMS Directive only provides for minimum standards, Member States when implementing the rules on ACC, for example, may choose to go beyond the minimum standards and increase the regulatory burdens for marketers who advertise in online game services falling under that Member State's jurisdiction. Consequently, harmonisation may not be achieved and the desired playing field for European companies offering online game services could instead become a rather uneven one. Greater regulatory burdens are likely to lead to higher market entry costs for both online

²⁵⁹ Art. 3f(4) AVMS Directive.

²⁶⁰ Article 249 EC Treaty.

²⁶¹ *Ibid.* See Steiner, Woods and Twigg-Flesner, above n. 116, 54.

game service providers and AOG brokers and marketers. Hence, the Directive has the potential to work against the aim of competition as a means to promote consumer welfare and economic growth. Further research will be necessary to find out whether EC competition law and policy could provide for a more powerful and suitable regulatory tool than the AVMS Directive for working towards creating and maintaining an efficient and equitable market for online game services and AOG and to promote consumer welfare and overall economic welfare.

B. *The Internal Market*

We have noted (above Section 2.1.2) the concern that if left unregulated on the regional level, the structure of the AOG market and the business practices in that market may be detrimental to the goal to completing the internal market. National initiatives in online games and AOG regulation and existing and evolving industry self-regulation regimes may gradually lead to a highly fragmented regulatory framework for AOG. This fragmentation may hinder further market integration and the freedom to provide and receive media services.²⁶² The AVMS Directive, at least in the rhetoric of its Recitals, seeks to guarantee a functioning internal market.²⁶³ It provides for a minimum level of harmonisation and coordination by setting minimum standards for the regulation of ACC and AOG in the individual Member States. The minimum standards should offer a playing field for more coherent national rules—a more coherent framework for AOG regulation.

Again, we are doubtful that the AVMS Directive can fulfil its promises. In fact, the same criticisms as mentioned above with regard to the goal of promoting economic welfare apply to the aim of completing the internal market. Namely, that the AVMS Directive has no direct effect and that the degree of harmonisation it seeks to bring about will be very low. Consequently, disparities will remain as to the rules applicable to online games and AOG within the internal market; and the regulatory framework for these markets will remain fragmented rather than becoming more coherent.

4.3.2. *Non-Economic Goals*

A. *Privacy*

We explained above (Section 2.2.1) that dynamic product placement in online games may raise concerns regarding the protection of private data and stated that the protection of such data is a legitimate societal (non-economic) goal of AOG regulation. The AVMS Directive seeks to protect consumers. However, it does so only indirectly. Namely, in that it provides in Article 2a(4) that Member States for reasons of public policy, including *inter alia* consumer protection, may derogate from some of the rules set out in the Directive. Moreover, concerning AOG in particular, the obligation to enhance transparency with regard to ACC could work towards creating a better awareness as to which data are collected and how the player is targeted. Ultimately, it is our opinion that at least the AVMS Directive itself fails to fulfil its promise of providing adequate protection for consumers of audiovisual media services. It remains to be seen how much further Member States are willing to take the issue of consumer protection.

It should also be noted that there are other EC legislative instruments available, which provide for the protection of privacy and are applicable to AOG; namely the DPD.²⁶⁴ Data collected by AOG brokers as described above encompass “personal data”

²⁶² *Ibid.*

²⁶³ Burri-Nenova, above n. 16, 1704.

²⁶⁴ See above Section 2.2.1.

within the meaning of the DPD and fall within the scope of that Directive.²⁶⁵ The data contain information about a person's economic, cultural or social identity that can at least indirectly be identified and linked to an IP address or another link assigned to the online gamer, e.g. a link to the account data.²⁶⁶ The DPD requires that AOG brokers and others collecting data within the meaning of the Directive specify the purpose for which they collect the data;²⁶⁷ and that such data be accurate, adequate, relevant and not excessive in relation to the purpose for which they are collected.²⁶⁸ Moreover, the processing of such data is only legitimate if it occurs in accordance with the criteria set out in the DPD.²⁶⁹

B. *The Protection and Promotion of Cultural Diversity*

Playing an online game is a way of expressing one's culture. Online games include cultural rituals, symbols, values and meanings that have positive externalities. Positive externalities have the effect that activities generating positive externalities tend to be pursued too little. The online game market may fail to design, produce and distribute online games other than those falling into a particular standard category similar to Hollywood blockbusters or hit records. The business behaviour and the potential influence on game content of those who are involved in AOG and contribute to the financing of online games may further increase such effects. Meanwhile, economic theory suggests that to alter inefficient behaviour resulting from externalities, laws and regulation be put in place. Following this line of reasoning, we introduced as an important cultural (non-economic) goal for regulating AOG the protection and promotion of cultural diversity (above Section 2.2.2).

The AVMS Directive, at least in the rhetoric of its Recitals, identifies the cultural nature of media products and recognises the growing importance of audiovisual media services for societies, democracy, and the freedom of information and expression.²⁷⁰ The rules on ACC are drafted in the light of the freedoms of information and expression and should take into account the cultural aspects of audiovisual media services. ACC have to be readily recognisable as such and must not use subliminal techniques.²⁷¹ These rules imply that the online games service provider and the AOG broker provide information about and make transparent any product placement or sponsorship agreement. The measure enhancing transparency and the separation of commercial and non-commercial communication should contribute to the freedom of information, expression and opinion. In the ideal case, the player is given the opportunity to freely enjoy the online game as a cultural artefact. Depending on the mode and form of implementation of those transparency requirements, the AVMS Directive may indeed provide for *some* safeguards for cultural diversity. At the same time, transparency is not new to the industry. In fact, most market players in the AOG industry are committed to these ideals, but it is one thing to

²⁶⁵ According to Art. 3(1) DPD, the Directive applies "to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form a filing system. Art. 2(h) DPD defines "personal data" as "any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity".

²⁶⁶ Göttlich, above n. 70, 9.

²⁶⁷ Art. 6(1)(b) DPD.

²⁶⁸ Art. 6(1)(c) DPD.

²⁶⁹ In particular, the rules provided in Arts 7 and 8 DPD. For further assessment of AOG and data protection see Göttlich, above n. 70, 9.

²⁷⁰ Recital 3 AVMS Directive. See also Recital 4 AVMS Directive, referring to Art. 151(4) EC Treaty containing an obligation to consider cultural aspects when taking actions under other provisions of the EC Treaty.

²⁷¹ Art. 3e(1)(a) and (b) AVMS Directive. See also Art. 3f(1)(c) AVMS Directive, requiring the audiovisual media service provider to inform users about the existence of any sponsorship agreement.

put in place rules on transparency or to be committed to fair business practices, and another thing to control those practices and to enforce the rules.

At the same time, we predict that the rules on ACC, despite their potential for enhancing transparency, will not be able to avoid what we put forward as the main reason for concern when looking at the interdependencies of advertising and media content. We doubt that the rules on ACC as provided for in the AVMS Directive could avoid that some online games that are attractive from a cultural viewpoint may not be attractive to advertisers e.g. because they do not fit into a standard category or because they offer too little space for AOG. Again, such business practices could increase the tendency of game developers and producers to concentrate on specific standard categories of online games similar to Hollywood's blockbusters or the record industry's hits. The market may fail to produce online games that feature a diversity of game play scenarios and storytelling with the potential to generate positive externalities.

While the rules on ACC as provided for in the AVMS Directive can contribute little or nothing to the protection and promotion of cultural diversity, the Directive *does* provide for *some* more safeguards for the diversity of cultural expressions in online games and other on-demand audiovisual media services. At least it does so if we assume that the provision promoting European works in on-demand audiovisual media services catalogues is aimed not only at promoting the economic but also the cultural aspects of on-demand services such as online games. Article 3i(1) AVMS Directive requires that Member States with regard to on-demand audiovisual media services promote, where practicable and appropriate, the production of and access to European works. According to that Article, such promotion could include e.g. a requirement for media service providers under a Member States jurisdiction to contribute financially to the production and rights acquisition of European works. Furthermore, on the distribution level, Member States may require such media service providers to guarantee in their catalogue of programmes offered on demand a certain share or prominence of European works.²⁷²

Despite the good intentions in that provision and the corresponding rhetoric in the Recitals to the AVMS Directive, we are rather sceptical about the prospects of that provision promoting European works in on-demand audiovisual media services—including online games. A higher share or prominence of European works within a catalogue of online games does not necessarily mean that there will be a higher level of diversity of cultural rituals, symbols, values and meanings *expressed* in game play.²⁷³ The definition of what constitutes a "European work" does not identify the originality or quality of the media service; neither does a "European work" refer to a media service that necessarily features national and European themes.²⁷⁴ While the fact that an online game is a European work may make it more likely that a gamer in Luxembourg will enjoy local game content, that player will not necessarily find a greater diversity of game play scenarios, storytelling, and independent productions—online games other than the top selling hits.

5. Conclusion

There are various types of online games as well as a wide range of possible ways in which marketers can advertise in and around such games. Advertising is increasingly becoming a key source of revenue for the developers and providers of online games. Meanwhile, some gamers are concerned about the increase of advertising placed in and around online games and the interlinked commoditisation of such games. At the same

²⁷² Art. 3i(1) AVMS Directive.

²⁷³ See Burri-Nenova, above n. 16, 1710.

²⁷⁴ See Art. 1(n) AVMS Directive. See also Graber, above n. 146, 253–54.

time, online games as an on-demand audiovisual media service are largely subject to the AVMS Directive. The fact that the natural person or legal entity holding editorial responsibility accepts the placement of advertisements in and around online games makes that person or entity a media service provider within the meaning of the AVMS Directive and as a form of ACC, advertising in and around online game services is subject to the Directive's rules on advertising.

The rhetoric of the Recitals to the AVMS Directive puts forward a number of economic and non-economic goals and objectives in favour of regulating audiovisual media services, including on-demand services. Such goals and objectives include the promotion of economic welfare in a competitive and equitable European market for on-demand media services, the completion of the internal market and the free movement of media services in that market—consumer protection and the protection and promotion of cultural diversity.

At the same time, an analysis of the prospective impacts of the actual rules put in place to cover on-demand services, including online games, reveals a wide gap to the promises offered by the rhetoric of the Recitals. We doubt that the Directive could contribute to accomplishing the goal of an integrated internal market for on-demand services such as online games, in which competition is not distorted and that works towards the goals of consumer welfare and overall economic welfare. We also doubt that the rules on ACC as applicable to AOG could sufficiently protect the consumers' right to respect for privacy. Moreover, as regards cultural diversity, there is a wide gap between the rhetoric putting forward cultural diversity as a reason for regulating and the actual instruments put in place.²⁷⁵

Finally, we suggest that further research is needed to find a suitable toolbox for use in working towards the legitimate goals and objectives introduced in this article as reasons in favour of regulating online games and AOG. In particular, we suggest examining the prospects of competition law and policy and alternative industry self-regulation instruments.

²⁷⁵ On this gap between what the AVMS Directive promises with regard to cultural diversity and the real instruments put in place, see Burri-Nenova, above n. 16, 1716–20 and 1723.