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Online Games under WTO Law: Unresolved Classification Issues

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ABSTRACT

This paper explores the views of state and non-state actors on how to treat online games under WTO law. The author takes stock of the positions of WTO Members with a particular interest in the promotion of the online games industry on the one hand and in the protection and promotion of cultural diversity on the other. Moreover, the work examines the views expressed by a number of particularly well informed scholars. As a further contribution to the academic discourse, the author puts forward a view that considers the intrinsic characteristics of new-generation digital and online games. The thesis is that online games are complex products that do not seem to function as goods (anymore), but rather combine a piece of software with (audiovisual) content services.

KEY WORDS

WTO law; international media law; classification and sub-classification of digital products; online games; cultural diversity.

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ONLINE GAMES UNDER WTO LAW: UNRESOLVED CLASSIFICATION ISSUES

Thomas Steiner

1.	INTRODUCTION.....	2
2.	THE DIFFERENT ARCHITECTURES OF GATT AND GATS AND THE IMPLICATIONS FOR ONLINE GAMES.....	3
3.	ONLINE GAMES: CHILDREN OF THE DIGITAL NETWORKED ENVIRONMENT.....	4
4.	THE VIEWS OF STATE AND NON-STATE ACTORS.....	5
4.1.	WTO Members	5
4.1.1.	GATT-like Treatment for Entertainment Games: United States of America (US).....	6
4.1.2.	GATT Treatment for Digital Contents: Japan	6
4.1.3.	Digital Games as GATS Audiovisual Services: European Community (EC).....	6
4.1.4.	No (Clear) Definition of Software in GATT and GATS: Canada	7
4.2.	The View of the Industry	8
4.2.1.	Digital Games as Software: The Interactive Software Federation of Europe	8
4.2.2.	Free Trade for Software Products of Any Kind: Microsoft	8
4.3.	Views Expressed in the Academic Discourse	9
4.3.1.	In Search of Digital Products' Classification: Sacha Wunsch-Vincent	9
4.3.2.	Rebalancing GATT and GATS: Tania Voon	10
4.3.3.	Electronic Intangibles, Software, and the Fine Line between Goods and Services: Rohan Kariyawasam	12
5.	ONLINE GAMES AS A COMPLEX PRODUCTS COMBINING SOFTWARE AND CONTENT SERVICES	13
5.1.	Goods vs. Services — GATT vs. GATS.....	13
5.2.	GATS Classification of Online Games	15
6.	CONCLUSIONS	17

1. Introduction

Online games have become a major attraction. They hold an enormous and still growing economic potential. Today, sales for digital and online games already exceed the cinema box office sales in Europe and the European games industry is equivalent to half of the music market.¹ It is the fastest growing and most dynamic sector in the European content industry where it is growing more rapidly than it is in the US.² PricewaterhouseCoopers (PwC) project a turnover of 49 billion US\$ for the global digital games market in 2011, a compound annual increase of 9.1 per cent.³

At the same time, online games have become a target for regulators, in particular the European Community (EC) and some of its Member States. Governments have been assuming that certain types of games constitute a form of cultural expression and that promoting cultural diversity may be put forward as an essential rationale for regulating online games, similarly to the audiovisual media domain. We have looked at some of the policy measures put in place on the European level in a previous study.⁴ The main finding from this research, taking the viewpoint of EC media law, is that advertising in online games (AOG) is subject to the EC Audiovisual Media Services Directive (AVMS Directive).⁵ The single fact that the provider of an online game accepts the placement of brands or products renders that provider a “media service provider” within the meaning of the AVMS Directive.⁶ As a form of so-called “audiovisual commercial communication” (ACC), AOG is subject to the Directive’s rules on advertising.⁷

It is not surprising that pressure groups such as the Interactive Software Federation of Europe (ISFE) and software developers and publishers such as Microsoft or Electronic Arts lobbied extensively to urge the EC to exclude online games and AOG from the scope of the AVMS Directive. They refer to the enormous economic potential of the still young digital games industry and the possible negative consequences of new regulatory burdens.⁸ At the same time, the industry has approached regulators on the international level. In particular, industry officials consider that it is important to answer the question of how to classify online games within the framework of the law of the World Trade Or-

¹ See Screen Digest Ltd, CMS Hasche Sigle, Goldmedia GmbH, and Rightscom Ltd, *Content and Convergence: Implications for the Information Society. A Study for the European Commission (DG Information Society and Media)*, Final Report, October 2006, 38. See also European Commission, *Communication on the Protection of Consumers, in Particular Minors, in Respect of the Use of Video Games*, COM(2008) 207 final, 22 Apr. 2008, 2.

² See PricewaterhouseCoopers LLP (PwC), *Global Entertainment and Media Outlook 2007-2011: Global Overview* (New York: PwC, 2007), 38.

³ *Ibid.*

⁴ Thomas Steiner, ‘Advertising in Online Games and EC Audiovisual Media Regulation’, NCCR Trade Regulation Working Paper 2008/03, available at SSRN: <<http://ssrn.com/abstract=1101363>>, forthcoming in a separate volume (Andhra Pradesh: ICFAI University Press).

⁵ Directive 2007/65/EC of the European Parliament and of the Council of 11 Dec. 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).

⁶ See Steiner, above n. 4. See also Mira Burri-Nenova, ‘The New Audiovisual Media Services Directive: Television Without Frontiers, Television Without Cultural Diversity’ (2007) 44 *Common Market Law Review* 1689, 1705; and Chris Marsden, Jonathan Cave, Edward Nason, Andrew Parkinson, Colin Blackman and Jason Rutter, *Assessing Indirect Impacts of the EC Proposals for Video Regulation*. Report Prepared for the United Kingdom Office of Communications, RAND Europe, 2006, 25.

⁷ See Steiner, *ibid.*

⁸ See e.g. the ISFE’s submission. 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-9811-77F02C48ED25/0/ELSPApart2.doc>> (all websites as last accessed on 1 Dec. 2008).

ganization (WTO). They consider that WTO law could limit new regulatory burdens, put in place in particular by the EC and its Member States.

It is this unresolved issue of how to classify online games in WTO law, which stands in the centre of the research endeavour of this paper. In 1998, WTO Members established the Work Programme on Electronic Commerce. Since then, the Members have started to examine in a non-negotiation and in a non-binding form how existing rules regulating international trade in goods and services should be applied in the context of cross-border electronic trade.⁹ Because of their important implications for the degree of trade liberalisation for a given product, classification issues, including the classification of (entertainment) software, are of paramount concern in the Work Programme.

There is no international consensus on how to classify entertainment software such as digital and online games under WTO law. And, in view of the current deadlock in the Doha Development trade negotiations, this is not going to change any time soon. WTO Members do not agree on either a GATT¹⁰ or a GATS¹¹ classification. Moreover, even if Members could agree on applying the GATS, sub-classification issues remain unresolved. As we will see below, possible GATS sub-classifications range from no available category to the classification under computer and related services to value-added telecom, entertainment, or audiovisual services.

We divide this paper into four parts. First, we seek to answer the question of why we should be concerned with classification issues when looking at online games as presumably a form of cultural expression. Secondly, we explore some of the intrinsic characteristics of new-generation digital and online games that make an unambiguous classification difficult. Thirdly, we explore the views of a number of state and non-state actors on how to classify online games within a WTO framework. Fourthly and finally, as a further contribution to the academic discourse, we put forward a view that considers the intrinsic characteristics of new-generation digital and online games. The thesis is that online games are complex products that do not seem to function as goods, but rather combine a piece of software with (audiovisual) content services.

2. The Different Architectures of GATT and GATS and the Implications for Online Games

The reason why we should be concerned with the question of how to classify online games under WTO law has much to do with the different architectures of the GATT and the GATS on the one hand and the significant implications of the sub-classification within the GATS itself on the other. WTO law treats products quite differently, depending on whether they are classified as goods or services. If classified as goods, products are subject to the demanding GATT (in connection with the Information Technology Agreement¹²). If classified as services, products are subject to the GATS.

This has important implications for the treatment of cultural products under WTO law, namely with regard to the audiovisual domain, as the architectures of GATT and GATS differ significantly and the degree of trade liberalisation is generally higher under GATT than under GATS. Special treatment for audiovisual products under GATT is only

⁹ See WTO, Ministerial Declaration on Global Electronic Commerce, adopted 20 May 1998, WT/MIN (98)/DEC/2.

¹⁰ General Agreement on Tariffs and Trade 1994, incorporating GATT 1947 (hereinafter GATT).

¹¹ General Agreement on Trade in Services, Annex 1(B) Marrakesh Agreement Establishing the World Trade Organization (hereinafter GATS).

¹² Information and Technology Agreement (ITA) generally referred to as the 'Ministerial Declaration on Trade in Information Technology Products', WT/MIN(96)/13, 13 Dec. 1996, entered into force and effect 1 Jan. 2000, available at <http://www.wto.org/english/docs_e/legal_e/itadec_e.pdf>.

possible in exceptional and limited circumstances listed in Article IV GATT. By contrast, the GATS imposes fewer general disciplines and owing to the positive list approach for market access and national treatment commitments and the possibility to list certain categories of services as an Article II GATS most-favoured-nation (MFN) exemption, WTO Members may largely refrain from making any commitments in the cultural — specifically the audiovisual — sector, at all.¹³ Members have the choice to include only certain sectors of the GATS Services Sectoral Classification List (so-called W/120)¹⁴ in their schedules of market access and national treatment commitments. Moreover, they are free to include sub-activities of a certain sector and to omit others.¹⁵

By making no commitments at all in the audiovisual services domain, the EC and many other WTO Members have so far successfully upheld possibly trade restrictive domestic regulations such as the Television without Frontiers (TVWF) Directive,¹⁶ the forerunner of the AVMS Directive.¹⁷ The TVWF Directive, like the new AVMS Directive, implements cultural policy measures such as minimum standards for various advertising formats and the promotion of the domestic industry (European works) that in some cases discriminate between EC Member States and other WTO Members or make access to the EC internal market more difficult for non-EC Members.

If online games were classified as goods subject to the GATT, measures under the AVMS Directive affecting trade in online games may be in discord with existing WTO law. Conversely, if classified as services within the meaning of the GATS and sub-classified as audiovisual services, the regulation of online games under the AVMS Directive could be largely upheld under WTO law even if it amounted to trade restrictions. This implies that it is not only important to clarify whether online games are goods subject to the GATT or services subject to GATS disciplines: it is equally important to clarify — if classified as services subject to the GATS — whether online games are indeed audiovisual services, the sub-category considered most relevant in the cultural domain.

3. Online Games: Children of the Digital Networked Environment

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 connection; namely, PCs, game consoles and portable devices.¹⁸ This definition covers various types of games. Possibilities include rather simple browser-based mini or casual games, which are played on PCs or smartphones, as well as complex multiplayer online network games (MOG) played predominantly on new-generation game consoles requiring a network connection: Microsoft's Xbox 360, Sony's PlayStation 3 (PS3) and Nintendo's Wii. Popular digital

¹³ See Tania Voon, 'A New Approach to Audiovisual Products in the WTO: Rebalancing GATT and GATS' (2007) 14 *UCLA Entertainment Law Review* 1, 5.

¹⁴ WTO, Multilateral Trade Negotiations. The Uruguay Round Group of Negotiations on Services, Services Sectoral Classification List, Note by the Secretariat, MTN.GNS/W/120, 10 Jul. 1991.

¹⁵ Sacha Wunsch-Vincent, *The WTO, the Internet and Trade in Digital Products* (Oxford and Portland, Oregon: Hart Publishing, 2006), 29.

¹⁶ 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).

¹⁷ See William J. Drake and Kalypso Nicolaidis, 'Global Electronic Commerce and GATS: The Millennium Round and Beyond' in Pierre Sauvé and Robert M. Stern (eds.), *GATS 2000: New Directions in Services Trade Liberalization* (Washington, DC: Brookings Institution Press, 2000), 408. See also Christoph Beat Graber, 'Audiovisual Media and the Law of the WTO' in Christoph Beat Graber, Michael Girsberger and Mira Nenova (eds.), *Free Trade versus Cultural Diversity* (Schulthess: Zurich, 2004), 30–33.

¹⁸ See OECD, 'Digital Broadband Content: The Online Computer and Video Game Industry', DSTI/ICCP/IE(2004)13/FINAL, 12 May 2005, 9.

games that enable MOG modes are *Burnout Paradise* by Electronic Arts (EA), Rockstar Games' *Grand Theft Auto IV*, Activision's *Call of Duty 4: Modern Warfare*, Ubisoft's *Rainbow Six: Vegas 2*, and the EA Sports games *NHL 09* and *FIFA 09*.¹⁹ In addition, the definition includes digital games played in complex game environments such as the massively multiplayer online role-playing game (MMORPG) *World of Warcraft*.

In the console games market, retail sale is still a valid model. Likewise, PC versions of MOG are sold through retail outlets. Even the more complex PC-based MMORPG such as *EverQuest* or *World of Warcraft* require the purchase of a software client from the retailer.²⁰ Other modes of supply used in the PC and the console markets include paid download, free download combined with a monthly subscription fee, and free-to-play download combined with micro-transaction and advertising-based revenue models.²¹

It is important to keep in mind the great variety of business models for online games when we explore the views of state and non-state actors in the next section of this paper. However we will not distinguish sharply between different types of online games. Some actors refer to "digital games", "video games", "entertainment games", "entertainment software", or "recreational software" – whether played online or not. Some more generally advocate classification as "digital content", "digital products", or "electronic intangibles". As explained below, for stocktaking purposes, we will consider them all. In this way, we will be able to gather sufficient views showing the dividing lines leading to the outcome that no international consensus is reached in these classification issues.

At the same time, we should note that we are in the midst of a transition from traditional offline digital gaming to online gaming. Sony's PS3, Microsoft's Xbox 360 and Nintendo's Wii game consoles enable the multiplayer online network mode of gameplay. The multiplayer online network mode has become a must for any new market entry, not only for PC games, but also for console games. And, even if digital games are still partly played offline in the single-player mode, it seems that eventually all digital games whether played on a PC, portable device or game console, will at least partly be played online.²²

Many of the views of state and non-state actors taken stock of and explored in this paper were expressed before new-generation consoles entered the online entertainment market. The PS3, for example, entered the market only in 2007. We should keep this in mind as a caveat and we will come back to new developments and the specific characteristics of (new-generation) online games below (Section 5) when we continue the classification debate with a view that considers online games as a complex product that combines software with (audiovisual) content services.

4. The Views of State and Non-State Actors

4.1. WTO Members

We start our stocktaking exercise with the views expressed by state actors, focusing on the US, Japan, the EC, and Canada. These WTO Members represent particular groups of Members. One group, explored in this paper uses the example of the US and Japan,

¹⁹ See Amazon's Games Bestsellers List at <<http://www.amazon.com/>>, <<http://www.amazon.co.uk/>>, <<http://www.amazon.de/>>, and <<http://www.amazon.fr/>>.

²⁰ See Edward Castronova, *Exodus to the Virtual World* (New York: Palgrave Macmillan, 2007), 46–48. See also OECD, *Information Technology Outlook 2006* (Paris: OECD Publishing, 2006), 24.

²¹ See e.g. OECD, above n. 18, 25–31.

²² Castronova, above n. 20, 46–48.

which have a strong interest in the promotion of the digital and online games industry.²³ Another group, explored using the example of the EC and Canada, includes WTO Members who have traditionally been and continue to be concerned about cultural diversity.²⁴

4.1.1. *GATT-like Treatment for Entertainment Games: United States of America (US)*

The US seeks to ensure that current WTO obligations apply to electronically delivered goods and services and that electronically delivered products receive treatment no less favourable than that accorded to like products delivered in physical form.²⁵ In the case of software, the US accepts that there is no clear-cut line between qualification as either goods or services. Yet the US suggests that a mere difference in delivery (online, electronically) of software (including entertainment software) does not change the “functional characteristics” of software, and it finds that trade rules or commitments should not determine the optimal business model for delivering software.²⁶

The US seeks a shift in focus away from the question of how to classify electronically delivered products, including (entertainment) software, to the question of how to *treat* them for trade purposes. It suggests that irrespective of their classification as goods or services, WTO Members should ensure the most liberal trade treatment possible for electronically delivered products.²⁷ To provide for such a trade-liberalising outcome, the US suggests *GATT-like* treatment for electronically delivered products as the GATT has a broader reach.²⁸

4.1.2. *GATT Treatment for Digital Contents: Japan*

Japan suggests that all “digital contents” transmitted electronically receive GATT treatment and that GATT principles, namely MFN, national treatment, and the general elimination of quantitative restrictions, fully apply to such contents.²⁹ In particular, Japan urges WTO Members to continue their practice of not levying duties on electronic transmissions of digital content.³⁰

Japan distinguishes between the act of electronically supplying digital content and the digital content itself. While Japan agrees that GATS principles should apply to the act of supplying digital content by electronic means, it says that it is unclear which principles, i.e. GATS or GATT disciplines, should apply to the digital content itself. Japan lists software as an example requiring further consideration. It would prefer that such considerations lead to the application of GATT principles, namely MFN, national treatment, and the general elimination of quantitative restrictions, to any digital contents.³¹

4.1.3. *Digital Games as GATS Audiovisual Services: European Community (EC)*

²³ This group includes in particular the WTO Members the US, Japan and South Korea.

²⁴ This group traditionally includes e.g. the WTO Members the EC, France, and Canada.

²⁵ US, Bipartisan Trade Promotion Authority Act of 2002 (hereinafter Trade Act of 2002), 19 U.S.C. § 3802 (b)(9)(B)(i)(2002).

²⁶ WTO, Work Programme on Electronic Commerce, Submission by the United States, WT/GC/W/493/Rev.1, 8 Jul. 2003, para. 7.

²⁷ *Ibid.* See also Trade Act of 2002, 19 U.S.C. § 3802 (b)(9)(B)(ii)(2002).

²⁸ WTO, Work Programme on Electronic Commerce, Submission by the United States, WT/GC/16, GC/C/2, S/C/7, IP/C/16, WT/COMTD/17, 12 Feb. 1999, 5.

²⁹ WTO, Communication from Japan to the Work Programme on Electronic Commerce, WT/GC/W/253, 19 Jul. 1999, para. 3.

³⁰ *Ibid.*, para. 4.

³¹ *Ibid.*, para. 10.

The EC distinguishes between content-related software and business software.³² Their position is that all services connected to content-related (entertainment) software are covered by the GATS. They recognise that when software is delivered physically the GATT applies to the import of the physical carrier medium, i.e. only to the CD-ROM or DVD on which the software is stored, but not the entertainment software's code or content itself. The EC says that GATT schedules had never covered any digitised content or information delivered by digital technology through an electronic telecommunications network.³³ In its view, it would be misleading to talk of the remit of a "digitised good" in the case of electronically delivered software. Whereas the CD-ROM or DVD on which software is stored could be seen as a good and thus subject to the GATT, the provision of the corresponding service remains subject to the GATS and should not "artificially" be turned into a good subject to the GATT.³⁴

With regard to GATS sub-classification of content-related (entertainment) software, the EC's view is that such content must not be considered as telecommunication and computer services, but that any content (except for business software) should be classified in the GATS audiovisual services sub-category.³⁵ They say that the nature of the multimedia material in question when talking about digital and online games is essentially audiovisual material and that services such as the publication, production and transmission of entertainment software have to be included in audiovisual services.³⁶

4.1.4. No (Clear) Definition of Software in GATT and GATS: Canada

Canada finds that neither the Harmonised System (HS)³⁷ nor the W/120 satisfactorily recognises the existence of software as neither scheme gives a clear definition thereof. While the HS only provides a classification for the physical carrier medium on which software is stored ("recorded media", HS 85.24), the W/120 defines software only in the context of its description of computer and related services.³⁸ Canada would find it necessary to review the HS nomenclature in the event that WTO Members in the future were to agree to classify software as goods.³⁹

Moreover, Canada seeks a distinction between the act of providing the software and the software content itself. Canada is convinced that the act of providing the software content represents a service. Yet it points out that digitised data exchanged electronically often have a physical equivalent, e.g. as books or disks, and that there is no international consensus on how to apply WTO rules to "electronic deliverables that can have a physical equivalent."⁴⁰

³² See EC, 'Questionnaire on Services in the Recreational Software Sector', available at <http://ec.europa.eu/avpolicy/docs/ext/multilateral/gats/conrs_en.htm>.

³³ WTO, Working Programme on Electronic Commerce, Submission by the European Communities WT/GC/W/497, 9 May 2003, para. 7.

³⁴ *Ibid.*, para. 12.

³⁵ Wunsch-Vincent, above n. 15, 36.

³⁶ EC, above n. 32.

³⁷ Harmonised Commodity Description and Coding System, established and administered by the World Customs Organization (hereinafter HS).

³⁸ WTO, Communication from Canada to the Work Programme on Electronic Commerce, JOB(02)38, 8 May 2002, paras. 12-13.

³⁹ *Ibid.*, para. 14.

⁴⁰ *Ibid.*, para. 10.

4.2. The View of the Industry

We continue our stocktaking exercise with the view of the Interactive Software Federation of Europe (ISFE), a particularly influential industry pressure group in Europe, and with Microsoft's view on how to classify electronically delivered software.

4.2.1. *Digital Games as Software: The Interactive Software Federation of Europe*

The Interactive Software Federation of Europe (ISFE) sees digital games as software.⁴¹ It seeks a maximum level of liberalisation for the entertainment software sector and finds that digital and online games, whether distributed physically or electronically, are "commercial goods" subject to the GATT and not services subject to the GATS. Moreover, the ISFE not only thinks it wrong to classify entertainment games as services, it also considers it "erroneous" that digital games fall within the sphere of culture similarly to films and television programmes.⁴² The ISFE argues that if WTO Members agreed all the same on a GATS treatment for digital games, it would be wrong to sub-classify them as audiovisual services.⁴³

4.2.2. *Free Trade for Software Products of Any Kind: Microsoft*

Microsoft supports trade rules that seek non-discriminatory treatment and full market access for electronically delivered software.⁴⁴ Its position is that all existing international trade commitments under GATT, GATS and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) should also apply to electronic commerce. Microsoft finds that software has "long been treated as a good subject to GATT" and that this approach produced "very significant benefits [...] which resulted in the elimination of duties on most software products."⁴⁵

Microsoft recognises that it is the carrier medium on which the software is stored or recorded which most WTO Members treat as a good and that "major trading nations" regard the content of the carrier medium, i.e. the information itself, as non-dutiable. At the same time, Microsoft urges WTO Members to "refrain from reclassifying electronically delivered software as a service."⁴⁶ Microsoft argues firstly, "a good does not become a service simply because it is being delivered in a different way. Software has always been treated as a good, and this should not change simply because electronic delivery systems are now widely in use."⁴⁷ Secondly, it says that "reclassifying electronically delivered software as a service would result in application of the GATS rather than the GATT [...]. Applying GATS to electronically delivered software would weaken applicable trade disciplines, allowing Members to resurrect barriers eliminated under the GATT [...]"⁴⁸

⁴¹ Personal communication with Patrice Chazerand at the ISFE's.

⁴² ISFE, Letter to the European Commission, Directorate-General for Competition, State Aid Registry of 5 Jan. 2007 referring to 'State aid case No. C 47/2006 – Tax Credit for the Creation of Videogames (Notice published in OJEU, No. C297/19 of December 7, 2006)', available at <http://www.isfe.eu/index.php?PHPSESSID=p26brlt2f907coepfieqpb3q92&oidit=T001:d5c0b8882/EUPolicyHandbook/InternationalTrade.pdf>.

⁴³ EC, above n. 32.

⁴⁴ Microsoft, 'International Trade', available at <<http://download.microsoft.com/download/9/b/3/9b3b38df-0a36-43ad-adab-6a9d5c0b8882/EUPolicyHandbook/InternationalTrade.pdf>>.

⁴⁵ Microsoft, 'WTO and Electronic Commerce: issues for World Trade', Microsoft White Paper, 8 Sept. 1999, available at <<http://www.microsoft.com/issues/essays/1999/11-15wto-b.msp>>.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

4.3. Views Expressed in the Academic Discourse

To supplement the views expressed by some WTO Members and industry officials, we take stock of the views of a number of particularly well informed scholars on the unresolved classification issues discussed in this paper.

4.3.1. *In Search of Digital Products' Classification: Sacha Wunsch-Vincent*

Sacha Wunsch-Vincent explains that neither the GATT nor the GATS classification systems offer “an unambiguous way to classify digital products”, including (entertainment) software. With regard to the difficulties of classifying software under the GATT, he says that software has no physical attributes and that there is no classification for software under the HS, which only lists certain carrier media on which software is recorded and not the software’s content itself.⁴⁹ He explains that the physical *carrier medium* on which software is recorded is classified under HS heading 85.24 as packaged sets of CD-ROMs with computer software recorded on it.⁵⁰ In addition, Wunsch-Vincent highlights HS heading 95.0410, which refers to “video games of a kind used with a television receiver”.⁵¹

Assuming that WTO Members agreed that GATS rules and commitments apply to digitally delivered content products, Wunsch-Vincent addresses unresolved sub-classification issues within the GATS. In response to the question of how to classify (online) entertainment games, Wunsch-Vincent says that there is no single and specific GATS sub-category available under the current GATS regime. Rather, such “new” entertainment products combine software, audiovisual and telecommunication services.⁵² He explains that classification possibilities for entertainment games “range from no fitting classification entry over computer and related services, over value-added telecom to entertainment or audiovisual services.”⁵³ Wunsch-Vincent does not argue in favour of one or the other sub-category. Instead, he points out the advantages, disadvantages and foremost the uncertainties involved in the sub-classification within any of the categories mentioned.

Firstly, Wunsch-Vincent considers the option that entertainment games may fall under the category *computer and related services*. These services are a sub-sector of the “business services” sector, a sector, which has a generally high commitment level and is therefore highly liberalised. Wunsch-Vincent notes that the EC, the US and most industrialised countries have committed fully to computer and related services and have listed no limitations on market access or national treatment. Moreover, no sector-specific MFN exemptions have been listed for computer and related services.⁵⁴ At the same time, it remains unclear whether business and entertainment software are equally covered by GATS commitments for computer and related services. Wunsch-Vincent explains that whereas business software seems less of a classification problem, sub-classification for (online) entertainment games remains a particularly delicate issue.⁵⁵ He says that at the time when existing commitments on the computer services level were scheduled, no link had been established between this sub-sector and content products such as (online) entertainment games. Moreover, the Wunsch-Vincent argues that growing convergence in the

⁴⁹ Sacha Wunsch-Vincent, *WTO, E-commerce and Information Technologies. From the Uruguay Round through the Doha Development Agenda. A Report to the UN ICT Task Force* (New York: United Nations ICT Task Force, 2005), 134.

⁵⁰ *Ibid.*

⁵¹ Wunsch-Vincent, above n. 15, 26 and 233.

⁵² *Ibid.*, 74.

⁵³ *Ibid.*, 71.

⁵⁴ *Ibid.*, 90–91.

⁵⁵ *Ibid.*, 71.

content sector, creating overlaps of computer, telecommunication and audiovisual services, further reduces the clarity of existing commitments under computer and related services. Wunsch-Vincent suggests that these unresolved issues need clarification before one can presume that digitally delivered content products such as entertainment games should be treated as computer and related services.⁵⁶

Secondly, Wunsch-Vincent assesses the option of sub-classifying digitally delivered content products as *value-added telecommunications services*. Thereby, he makes similar observations to those in the case of computer services. The level of GATS commitments in this sub-sector is quite far-reaching, albeit lower than for computer services. Wunsch-Vincent points out two subdivisions of value-added telecommunications services, which are of special interest in the case of electronically delivered content products, namely “on-line information and/or data processing” and “on-line information and database retrieval”. The US has full commitments in both of these subdivisions. The EC, however, has full commitments only for “on-line information and database retrieval”, and not for “on-line information and/or data processing”.⁵⁷

Thirdly, clearly being a “special case”, Wunsch-Vincent presents *audiovisual services* as an option for sub-classification within GATS. He explains that the audiovisual domain plays an essential role in the discussion on classifying digitally supplied content products. Wunsch-Vincent sums up the diverging positions among WTO Members on the treatment of audiovisual services in international trade, which are central to the unresolved questions on digital trade, including classification issues. Wunsch-Vincent points out the opposing positions notably of the US and the EC (supported by Australia and Canada) with regard to the treatment of cultural products (namely audiovisual services) in WTO law.⁵⁸ He mentions the particularly low level of commitments in the audiovisual services sub-category and argues that even if there were a greater level of commitments in that domain, it remains unclear which of those commitments would apply to digitally supplied content products. Wunsch-Vincent considers it important for WTO Members in current or future negotiations to agree on whether, and under which audiovisual sub-sectors, digitally delivered content products fall. Moreover, he argues that any liberalisation of audiovisual services can only be meaningful if it addresses the unresolved classification issues for digital products. He urges Members to commit fully to market access and national treatment obligations in the chosen or created GATS category and to eliminate all MFN exemptions.⁵⁹

Ultimately, Wunsch-Vincent addresses *entertainment services* as an option for the sub-classification of digital products. Entertainment services are a sub-sector of “recreational, cultural and sporting” services. GATS commitments for entertainment services are exceptionally low. Wunsch-Vincent explains that whereas the US has full commitments for market access and national treatment, the EC (except for some of its Member States) and most other WTO Members have abstained from making commitments for entertainment services. In addition to the relatively low level of commitments, Wunsch-Vincent explains, WTO Members do not agree on the scope of entertainment services and their relevance to digitally supplied content products.⁶⁰

4.3.2. Rebalancing GATT and GATS: Tania Voon

⁵⁶ Ibid., 90–91.

⁵⁷ Ibid., 91–92.

⁵⁸ Ibid., 92–95.

⁵⁹ Ibid., 96–98.

⁶⁰ Ibid., 98.

Tania Voon suggests “a new approach to audiovisual products in the WTO, taking a holistic view of GATT 1994 and GATS rather than seeing them as two separate and independent agreements”.⁶¹ She proposes recognising “digital cultural products” explicitly as services subject to the GATS and not as goods subject to the GATT. Yet Voon does not argue that all digitised content products should be classified as services. For digitised products delivered in a tangible form recognised in the HS, she recommends treatment as goods.⁶² Voon argues that CDs, DVDs, video and audio tapes (HS headings 37.06 and 85.24), whether ordered online and delivered in a physical form or purchased in a shop, are goods. By contrast, Voon notes that printing and publishing services and audiovisual services are rightly classified within GATS as communication services in the W/120 Group 2.D.⁶³

Voon furthermore points out that new technologies in the audiovisual domain allow for direct-to-consumer electronic delivery, creating overlaps with telecommunications services. A distinction between telecommunications services and audiovisual services therefore may be difficult to make in some cases.⁶⁴ Voon mentions and seems to agree with the WTO Secretariat’s suggestion⁶⁵ that, as a rule of thumb “[...] it has become accepted that commitments involving programming content are classified under audiovisual services, while those purely involving the transmission of information are classified under telecommunications.”⁶⁶ Voon adds two comments to the Secretariat’s suggestion. Firstly, she mentions that the US has disagreed with this suggestion⁶⁷ and secondly, she cites Sacha Wunsch-Vincent, explaining that “it can be argued that the GATS [...] merely covers services that ultimately ‘produce or record’ content (e.g. sound recording) or that serve to ‘deliver’ content (e.g. radio and television transmission services) but not necessarily the content itself”.⁶⁸ Voon concludes that in view of the convergence between the audiovisual and the telecommunications sectors, both the definition of telecommunications services and the distinction between audiovisual and telecommunications services need to be revisited.⁶⁹

Addressing the classification of digitally delivered content products specifically, Voon argues that treating digital products as goods when they are not delivered in a tangible form would be artificial – just as it would be artificial to treat digital products such as CDs as services if delivered in tangible form. She generally accepts the principle of technological neutrality, namely that in order to avoid trade distortions, international trade regulation should ideally treat a given product in the same way, regardless of the form it takes or the technology used to provide it. She thinks, however, that the WTO system already distinguishes clearly between goods and services and that the treatment of goods under the GATT has a long history and can easily be applied to trade in products crossing borders physically. Voon thinks that electronically transmitted cultural products fall more easily within the “new world of GATS”, a still young instrument

⁶¹ Voon, above n. 13, 4.

⁶² *Ibid.*, 17 and Tania Voon, *Cultural Products and the World Trade Organization* (Cambridge: Cambridge University Press, 2007), 223.

⁶³ *Ibid.* (2007), 71.

⁶⁴ *Ibid.*, 72.

⁶⁵ See *ibid.*, 72–73.

⁶⁶ WTO, Council for Trade in Services, Audiovisual Services: Background Note by the Secretariat, S/C/W/40, 15 Jun. 1998, para. 5.

⁶⁷ See WTO, Council for Trade in Services, Communication from the United States—Audiovisual Services, S/C/W/78, 8 Dec. 1998.

⁶⁸ Wunsch-Vincent, above n. 15, 50.

⁶⁹ Voon, above n. 62, 72.

about which Members are still learning and deciding how to formulate trade rules, adapting to the challenges of the digital world.

As an option for current and future negotiations, Voon suggests improving the treatment of digital cultural products as services under GATS. Under her proposal, any trade distortions resulting from distinguishing between electronically transmitted cultural products and digital products taking a tangible form should be minimised by rebalancing GATT and GATS. She argues that such a rebalancing process would simultaneously diminish the significance of the classification issue from a political perspective. Voon explains that because of their broad discretion in relation to audiovisual products under GATS, the EC argues that digital products are services subject to GATS disciplines, whereas the US favours a goods-classification for digital products given the stronger and more trade liberalising GATT.⁷⁰ Rather pragmatically therefore, Voon argues that bringing GATS and GATT disciplines more closely into alignment in connection with audiovisual products would also imply that the EC and the US would have “less to disagree about.”⁷¹

Voon’s far-reaching proposal is to subject all cultural products under GATS to the obligation of market access and national treatment. Moreover, she proposes that no trade restrictions in the form of market access limitations should be allowed on the ground that they are necessary to protect and promote culture. Instead, the absence of quantitative restrictions and the encouragement of a broad range of foreign and domestic voices should protect and promote culture. Ultimately, Voon says that although it may be justified in some cases to discriminate against foreign cultural products, national treatment should always be the starting point. With regard to existing MFN exemptions listed in relation to the audiovisual sector, Voon argues that WTO Members should reach an agreement that many of the MFN exemptions listed on 1 January 1995 in relation to the audiovisual sector have expired. MFN exemptions for cultural policy measures, however, could be maintained where they involve Members of an “agreement liberalizing trade in services” complying with Article V GATS.⁷²

Voon’s method essentially implies a shift from a positive list approach to a negative list approach for market access and national treatment obligations and declaring most MFN exemptions expired. She proposes a number of “escape routes” for cultural policy measures to make a negative list approach under GATS politically feasible. Escape routes include discriminatory subsidies, additional leeway for developing country Members, allowing them to impose or maintain certain trade restrictive safeguards for cultural products, and the recognition of screen quotas in a general GATS provision applicable to all Members similar to Article IV GATT.⁷³

4.3.3. *Electronic Intangibles, Software, and the Fine Line between Goods and Services:* *Rohan Kariyawasam*

Rohan Kariyawasam addresses unresolved classification issues referring to “electronic intangibles”. In his understanding, this notion includes “e-products” or “digital goods and services”, ranging from video on demand to MP3 to customised software in diverse sectors such as audiovisual, health and education. The common feature of “electronic intangibles”, Kariyawasam explains, is that such products are usually a digital

⁷⁰ Ibid., 223–24 and Voon, above n. 13, 17.

⁷¹ Voon, above n. 62, 224 and above n. 13, 18.

⁷² Voon, above n. 62, 226–27 and above n. 13, 17–20.

⁷³ Voon, above n. 62, 227–33 and above n. 13, 20–26.

combination of a binary code.⁷⁴ He focuses on electronic intangibles, passing “virtual borders” by way of telecommunications networks.

Elaborating on the difficult distinction between goods and services when classifying electronic intangibles, Kariyawasam makes interesting observations with regard to the example of software. He stresses that in the case of software, if characterised as a good, the HS may not be able to classify the electronically tradable digitised information. He points out that while the HS distinguishes between empty carrier media and carrier media with (software) content, the HS does not provide a classification for the content itself. The reason why the HS had no classification was that software is not a “physical entity”. Kariyawasam says that the HS includes goods on which software is stored, including diskettes, tapes, CDs and DVDs under “recorded media”. By contrast, Kariyawasam explains, software is treated solely as sound and video recordings. If classified as a service, Kariyawasam says that while the W/120, based on CPC 842, defines software in the context of its description of software implementation services, it does not describe software as a service in its own right. He concludes that neither packaged nor customised software appear to be covered by the existing GATS framework and that the current classification framework fails to adequately classify software as either a good or a service.⁷⁵

5. Online Games as a Complex Products Combining Software and Content Services

In this Section, our aim is to learn from the views taken stock of in the previous Sections. We seek to continue the academic discourse and argue that online games should be understood as complex products that combine software with content services in the digital networked environment.

5.1. Goods vs. Services – GATT vs. GATS

The three authors reviewed in this paper all base their argumentation in favour of GATT or GATS treatment essentially on the fact that only goods are subject to customs duties. That is to say, the fact that the HS provides for a tariff number for a product at issue may indicate the suitability of GATT rather than GATS classification. The HS is not legally binding for WTO Members, still most Members use the HS for customs classification, and it plays a vital role in WTO dispute settlement when a Member’s tariff schedule is disputed and needs interpretation.⁷⁶

It is apparently the established view in the academic discourse that the HS fails to unambiguously classify (entertainment) software even if at first sight there seem to be two options available to classify non-entertainment and entertainment software. The options seem to be HS Heading 85.24, incorporating “records, tapes and other recorded media for sound or other similarly recorded phenomena”, and Heading 9504.10, covering “video games of a kind used with a television receiver”. Wunsch-Vincent mentions both headings as possible options to classify the physical carrier medium on which software or entertainment software is stored. Similarly, Kariyawasam says that the HS includes goods on which software is stored, including diskettes, tapes, CDs and DVDs under “re-

⁷⁴ Rohan Kariyawasam, *International Economic Law and the Digital Divide* (Cheltenham, UK and Northampton, MA: Edward Elgar, 2007), 118 in footnote 1.

⁷⁵ *Ibid.*, 144–45.

⁷⁶ See e.g. WTO, Appellate Body Report, *European Communities—Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, 27 Sept. 2005, and WTO, Appellate Body Report, *European Communities – Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 Jun. 1998.

corded media". Both authors point out that one needs to distinguish the *physical carrier medium* (e.g. a CD-ROM or DVD) from the software code or *content* itself and that the HS only lists certain carrier media on which software is stored, but not the software's code or content itself.

We do not need to elaborate further on which of the two options offer the "most specific description", a criterion that is considered a general rule of interpretation,⁷⁷ as both refer to the physical entity on which the game is stored but not the digital games' software code or content itself. Indeed, the HS does not seem to offer a way to classify software and digital and online games' content independently from the physical carrier medium on which that content is stored.⁷⁸

As seen above, there is a great variety of existing and emerging distribution and business models for digital and online games. We purchase the initial software client for PC or console games on a DVD or blue-ray disc (for PS3 games) from the retailer, order it at Amazon, or download it from PlayStation Store (a service similar to the iTunes music-on-demand service). The DVD or blue-ray disc, a "physical entity" purchased at the retailer or ordered at Amazon would be classified under either HS Heading 85.24 or 9504.10 and be covered by the GATT. Moreover, we suggest that the console itself should be classified under Heading 9504.10 and subsequently be covered by the GATT.

By contrast, the HS does not seem to offer a classification for the software code, i.e. the games' content itself. One could argue in line with the reasoning of the US that (entertainment) software is always bound to a physical carrier medium and should not be treated as an independent product. Yet we think that a non-separation and accordingly a GATT classification for the content of digital and online games would be counterintuitive. This becomes obvious in view of recent developments in the digital and online games markets.

As mentioned above, we are in the midst of a transformation from traditional offline digital gaming to online gaming. The initial software client we purchase from the retailer, order at Amazon, or download from PlayStation Store is no longer a final product. New-generation consoles such as Sony's PS3, Microsoft's Xbox 360 and Nintendo's Wii enable the multiplayer online network mode of gameplay, an essential mode of play for new-generation digital games. Even if digital games are still sometimes played offline in the single-player mode, it seems that all digital games will at least partly be played online. Online games, whether played on the PC or on consoles via the PlayStation Network (PSN), Xbox LIVE or the Wii Online network, function over time. Players connect their console to the corresponding network and meet online to compete individually or in teams against other teams worldwide. Moreover, to maintain our online status, we will have to accept the need to download new versions of the games' software code/content. It has to adapt over time in order to be capable of connecting to other players online.

These games simply do not function as goods (any more). Rather, we should understand digital and online games as complex products. Whereas the accompanying DVD or blue-ray disc seems to be subject to the GATT, we suggest that the GATS would be more suitable to govern the games' contents and all associated services. Such a separation does not run counter to applicable WTO law. Indeed, the WTO Appellate Body has ruled on

⁷⁷ World Customs Organization, General Rules for the Interpretation of the Harmonised System, available at <http://www.wcoomd.org/files/1.%20Public%20files/PDFandDocuments/Harmonized%20System/general_rules_interpret_HS.pdf>, para. 3(a).

⁷⁸ For a similar argument, see Christoph Beat Graber, 'State Aid for Digital Games and Cultural Diversity: A Critical Reflection in the Light und EU and WTO Law' forthcoming in Christoph Beat Graber and Mira Burri-Nenova (eds.), *Governance of Digital Game Environments and Cultural Diversity* (Cheltenham, UK: Edward Elgar).

several occasions that whereas certain aspects of a product may be subject to the GATT, others may be subject to the GATS.⁷⁹

5.2. GATS Classification of Online Games

In this Section, we assume that WTO Members agree that the contents of online games are services subject to the GATS. Admittedly, such an agreement is — in view of the current deadlock in the Doha Development trade negotiation round — not likely to come about any time soon. Yet even if an agreement is reached that the GATS rather than the GATT applies to trade in digital and online games, sub-classification for online games within the GATS sub-sectors would still have to be decided.

As mentioned above, the answer to this question has important implications for the treatment of online games as presumably a form of cultural expression. The EC and many other WTO Members have no commitments at all in the audiovisual services domain. Thereby, they have successfully upheld regulations on domestic audiovisual media (services) that are possibly trade-restrictive; and cultural diversity motives have been and continue to be the predominant rationale for regulating in the audiovisual domain.

We have argued elsewhere, when taking the viewpoint of EC media regulation, that online games' content is of an audiovisual nature.⁸⁰ And we have mentioned above that as so-called ACC, advertising services in online games are "audiovisual media services" subject to the EC's AVMS Directive. Finding an answer to the question of whether such regulation of online games environments is in harmony or discord with existing WTO agreements presupposes an answer to the question whether online games similar to traditional media services such as film and television can be sub-classified in the GATS audiovisual services category.

As seen from Wunsch-Vincent's explorations, GATS sub-classification possibilities for entertainment games range from no available category to their classification under computer and related services to value-added telecom, entertainment, or audiovisual services. The views of state actors reveal that no international consensus exists, nor is in sight given the current negotiation deadlock. Whereas the US suggests GATT-like treatment for entertainment games and seeks, in general, the most liberal treatment for electronically delivered content products, the EC and some of its Member States seek to classify digital games' contents as GATS audiovisual services.

When looking at the continued role of regulation of online games as audiovisual media services in EC law, we should have a closer look at what WTO law understands as audiovisual services. In EC law, a media service is of an audiovisual nature if it provides "moving images with or without sound"⁸¹ and online games as defined above all contain moving images with or without sound. Yet things are different in WTO law. What in EC law is an "audiovisual media service" is in WTO law not necessarily a GATS audiovisual service. For GATS purposes, the W/120 classifies audiovisual services as a sub-sector of communication services (W/120 Group 2.D). Sub-divisions of audiovisual services are

- (a) motion picture and videotape production and distribution services,
- (b) motion picture projection services,
- (c) radio and television services,
- (d) radio and television transmission services,
- (e) sound recording, and

⁷⁹ See *ibid.* for a similar argument with reference to the relevant case law.

⁸⁰ Steiner, above n. 4.

⁸¹ Recital 20 AVMS Directive.

(f) other.

These services generally have their associated listing under the provisional CPC, except for the non-specified W/120 audiovisual services sub-division “other”.

It has been argued in the academic discourse that the current sub-divisions for audiovisual services as defined in the W/120 for GATS purposes may be confusing, as they do not sufficiently distinguish between the services (contents) themselves and the networks and technologies used to supply them.⁸² Moreover, some argue that there is growing ambiguity about the very notion of audiovisual services. They say that in the light of new technologies, digitisation, and convergence in telecommunications and audiovisual services, the existing sub-divisions may be too vague or too narrow and do not take into account the great variety of newly emerging electronic media.⁸³

The ambiguity in the current W/120 system for audiovisual services stems not least from the fact that it somewhat confusingly combines notions that define *what* (information/content) is being conceived and notions that refer to *how* information/content is conceived. Paul Nihoul insightfully explains that “audiovisual” is not the same as “broadcasting”. While the former refers to the content, i.e. a combination of sound (“audio”) and images (“visual”), the latter merely refers to one of many possible transmission technologies (“broadcasting”).⁸⁴ We can see from this explanation, which refers to the literal meaning of “audio-visual”, that ultimately, the notion of “audiovisual services” appears to be much more flexible than the W/120 typology might presume. The notion of “audiovisual” is not linked to any specific form of technology. Rather, it is open to new technological developments. We think that the W/120 audiovisual services group is flexible enough to incorporate newly emerging media services such as online games services. We should note that Patrick A. Messerlin *et al.* say that the audiovisual services sub-division “other” offers precisely the flexibility required for listing *multimedia content* and new electronic media emerging in the event of new technological developments.⁸⁵

We understand the notion “multimedia” as referring to content products that combine a variety of different, predominantly digital, media formats and modes of (cultural) expression. This includes text, images, sound (audio), images, moving images (video), dance, performing arts and visuals (e.g. laser shows). Similarly, the media scientists and sociologists Paschal Preston and Aphra Kerr define “multimedia” as involving “the combination and development of different media forms on one or more channels.”⁸⁶ We argue that online games are a perfect example of multimedia products as they often combine media formats such as film, audio, video, sounds, visuals, and performing arts.

The production and product development process for online games reveals how games’ content creators combine elements from text, images, audio, and video in a complex multimedia product. This process involves a team of designers who conceive an idea, sketch out a demo and decide on gameplay scenarios. Artists develop game environ-

⁸² See Damien Geradin and David Luff (eds.), *The WTO and Global Convergence in Telecommunications and Audio-Visual Services* (Cambridge: Cambridge University Press, 2004), 15. In the same volume, see also the P. L. G. Nihoul, ‘Audio-Visual and Telecommunications Services: A Review of Definitions under WTO Law’.

⁸³ See Patrick A. Messerlin, Stephen E. Siwek and Emmanuel Cocq, *The Audiovisual Services Sector in the GATS Negotiations* (Washington, DC: The AEI Press and Paris: GEM, 2004), 2. See also Geradin and Luff, *ibid.* and Nihoul, *ibid.*

⁸⁴ Nihoul, *ibid.*, 380.

⁸⁵ See Messerlin, Siwek and Cocq, above n. 83, 2–3.

⁸⁶ Pascal Preston and Aphra Kerr, ‘Digital Media, Nation-States and Local Cultures: The Case of Multimedia “content” production’ (2001) 23 *Media Culture & Society* 109, 111 and personal communication with Aphra Kerr. The authors note that whereas today, “multimedia products are generally defined in relation to their digital nature”, the term is historically contingent and very much a term of the 1990s that has “an important pre-digital history”.

ments and characters. Both groups assign tasks to the programmers, who transform the plans and ideas into programming language.⁸⁷

Gamers use instant-text-messaging in *World of Warcraft* or chat via their headsets during online multiplayer network team battles in *Call of Duty: World at War* to communicate and cooperate with their guild. The players becomes an undercover agent in *Need for Speed: Undercover* just like an actor in a Hollywood action film. James Bond seeks a *Quantum of Solace* not only in cinemas but also in the digital game environments on consoles and PCs. Star Wars, Indiana Jones, the Simpson's, Batman and Spider-Man appear in films as well as digital games. And players can re-experience episodes from the television series *Lost* in the virtual environment of their game console. Games such as *Lost* and *Call of Duty: World at War* are episodic. As *The Economist* has explained, the more digital games become episodic, the more they become *television-like* programmes.⁸⁸

Based on the above, it can be established that online games combine a variety of different media formats and modes of (cultural) expression in one channel. Online games are a vivid example of multimedia products. The multimedia material in question is the essential character of digital and online games services. We find that as multimedia products, online games should be classified in the GATS sub-category "other" audiovisual services.

6. Conclusions

The state of play for online games under WTO law is uncertain. Many important classification issues are unresolved. In view of the current deadlock in the Doha development trade negotiations, this is not going to change any time soon. There is no consensus on whether online games are goods subject to the GATT or services subject to the GATS. If treated under GATS, possibilities for sub-classification range from no available category to the classification under computer and related services to value-added telecom, entertainment, or audiovisual services.

Continuing the goods versus services debate, we accept the dominant view in the academic discourse that the games' contents must be distinguished from the physical carrier medium on which the initial software client is stored. We argue that the fact that the HS provides for a tariff number for a product at issue may indicate GATT rather than GATS classification. And as only the physical carrier medium on which the initial games software client is stored, but not the games' content itself, has a tariff number in the HS, we agree that the HS fails to unambiguously classify online games. Our view is that new-generation digital games, which are essentially played using a broadband Internet connection, are complex products that indeed do not seem to function as goods (any more).

Assuming that WTO Members agree upon GATS classification, we argue that online games are a vivid example of a multimedia product and that the multimedia material in question is the essential character of online games. Ultimately, we find that the sub-category "other" audiovisual services is the appropriate GATS sub-classification for online games. This has important implications for the treatment of online games as presumably cultural products. In view of the low level of commitments in the audiovisual domain and if the EC and other WTO Members continue to make no commitments in the GATS audiovisual services sub-sector, it may be established that existing obligations of the WTO agreements do not seem to prevent governments from regulating online games.

⁸⁷ Personal communication with Mathieu Caramella (Ubisoft, Bucharest). See Edward Castronova, *Synthetic Worlds: The Business and Culture of Online Games* (Chicago: The University of Chicago Press, 2005), 128.

⁸⁸ 'Gaming's next episode', *The Economist*, 21 Sept. 2006.

And possibly trade-restrictive cultural policy measures in the domestic regulation of online games would not be in discord with applicable WTO law.

Yet with a view to fairly balancing the principles of trade liberalisation and cultural diversity in the field of online games, we suggest that governments voluntarily abide by a necessity test for cultural policy measures in domestic regulations. That is to say, governments should effectively aim the cultural policy measure at issue, e.g. rules related to advertising in online games, at protecting and promoting cultural diversity, and the measure should be necessary for that purpose.⁸⁹ With regard to the question of necessity, the availability of alternative, less trade-restrictive measures such as alternative self- and co-regulation instruments would have to be considered.

⁸⁹ For a similar argument, see Graber, above n. 78.