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German Attorney General: Video game with Swastika does not violate the law; constitutes art

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On April 30, 2018, the Attorney General Stuttgart decided that a video game which was reported to his office for an alleged violation of the German criminal law on prohibited Nazi symbols falls under the statutory exemption of art. The initiated criminal investigation was discontinued. This short article explains the decision and provides a quick overview about the legal situation in Germany as regards "problematic" symbols in video games and corresponding recent developments.

Disclaimer: Note that despite a publication of mine is cited in the Attorney General Stuttgart's decision, I was not involved in any of the proceedings described below.

I. What happened?

Before the German election in September 2017, a video game called *Bundesfighter II Turbo* was released. The title loosely translates to *Federal Fighter II Turbo* - in reference to the well-known SNES classic *Street Fighter II Turbo*. The game is designed as classic tournament fighter and features graphics and gameplay typical for the early 90s. The player can select the prime candidates of the different major German political parties (e.g. Angela Merkel for the *Christ Democrats*, Martin Schulz for the *Social Democrats*). One selectable character is Alexander Gauland from the right wing party *Alternative für Deutschland* (*Alternative for Germany – AFD*) which gathered a significant number of followers since the European refugee crisis began. Like with every tou

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fighter is able to perform certain special moves. One of Alexander Gau transforms the character into a flying Swastika which flies towards his



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Shortly after the game was released it became known that it was reported to the Public Prosecutor's Office Berlin for including unconstitutional symbols and was prohibited under German criminal law. If a crime is reported to the Public Prosecutor's Office, it will commence investigations. Consequently proceedings were opened. The proceedings were opened caused significant public attention in Germany when this was reported on December 2017.^[1] However, until today no further information on the proceedings were available. Before the decision is explained, some background information

II. Nazi symbols in video Games under German law

1. Applicable law

Showing of Nazi symbols is prohibited by Sec. 86a German Criminal Code

("StGB"): Using symbols of unconstitutional organisations. A semi-official translation^[2] of the law reads as follows:

(1) Whosoever

1. domestically distributes or publicly uses, in a meeting or in written materials (section 11(3)) disseminated by him, symbols of one of the parties or organisations indicated in section 86(1) Nos 1, 2 and 4; or

2. produces, stocks, imports or exports objects which depict or contain such symbols for distribution or use in Germany or abroad in a manner indicated in No 1,

shall be liable to imprisonment not exceeding three years or a fine.

(2) Symbols within the meaning of subsection (1) above shall be in particular flags, insignia, uniforms and their parts, slogans and forms of greeting. Symbols which are so similar as to be mistaken for those named in the 1st sentence shall be equivalent to them.

However, an exemption applies under the following circumstances (emphasize added):

*Subsection (1) above shall not apply if the propaganda materials or the act is meant to serve civil education, to avert unconstitutional movements, **to promote art or science, research or teaching, the reporting about current or historical events or similar purposes.***

2. The infamous Wolfenstein 3D court decision

In summer 1994 a person distributed the video game classic *Wolfenstein 3D* via an old telephone based mail box system (Thule Network). In *Wolfenstein 3D* the player has to fight Nazis and ultimately even kills Adolf Hitler. As *Wolfenstein 3D* takes place during the time of the Third Reich, the game shows a great number of Nazi symbols. In 1994, the

... was distributed the game was prohibited by the Local District Court Frankfurt/Main

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 person who distributed the game was convicted by the Local District Court Frankfurt/Main for violating Sec. 86a StGB. The defendant appealed the decision and the case was



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Supreme Court being the only higher court). On March 18, 1998 the High District Court Frankfurt confirmed the decision of the first level court. Amongst others, the decision was based on the following reasons (loosely translated):

“The purpose of Sec. 86a StGB demands that unconstitutional symbols are not shown in computer games. It is irrelevant that the prohibited insignias and symbols in Wolfenstein 3D are located in rooms which belong to the enemy. If such a use of prohibited symbols in computer games would be allowed it would hardly be possible to prevent an increasing use of such symbols in public which would contravene the purpose of Sec. 86a StGB. In particular for children and adolescents, computer games are an attractive and increasingly used form of play. If they would be lawfully confronted with symbols of national socialist organizations in video games, this could lead to them growing up with these symbols and insignias and thereby becoming used to them, which again could make them more vulnerable for ideological manipulation by national socialist ideas.”

3. Consequences

As known by most video game developers and publishers, the practical consequences of the 1998 *Wolfenstein 3D* decision were significant. In particular video games which are set during the time of the Third Reich or WWII often include Nazi symbols to create a realistic and atmospheric environment, similar to movies which are set in this time period. However, due to the *Wolfenstein 3D* decision until today no such video game is able to obtain an age-rating by the German age rating board (“USK”). Moreover, to avoid criminal prosecution, the video gaming industry saw itself forced to “clean” all video games with Nazi symbols for their German release by removing each single symbol in a costly and time-consuming post-production process. Other companies decided right from the start of the development not to include critical symbols and to go for a globally edited version to spare the costs for later changes required for the German market. Because Nazi symbols in movies are generally tolerated in Germany, this led to almost ridiculous situations where, for instance, the movie *Indiana Jones* was shown without edits during morning hours while the corresponding and identically titled cartoonish video game only showed black holes instead of Swastikas.

Despite the industry’s efforts to remove all symbols from its games, accidents happened regularly which led to several video games being released in Germany that still included one or two symbols which were overlooked during the post-production process for reasons of human error. In all these cases the German editions were withdrawn and trashed before a new fully cleaned version was re-released, multiplying the localization costs (clean, trash, clean again). Additionally, many video game companies suffered from substantial secondary implications: To avoid criminal prosecution in Germany some companies decided to geo-block the original version of their games for the German territory. This practice caused several large-scale outcries by German gamers and significant reputational harm in many cases because German gamers who were not able to import the original version by digital download or to unlock an already bought (physical) import version were blaming the

industry. Companies like Sega even issued a statement stating that the German



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German legal scholars and practitioners, including myself, nowadays almost unanimously consider the *Wolfenstein 3D* decision with its general statements and implications to be false, outdated and in violation of the constitutional right to freedom of art. Early 2015, I published a legal article on the subject in the *Computer and Law* journal (*Computer und Recht*, 2/2015, p. 92 et seq.), mainly criticizing the decision for not even considering the statutory exemption of the promotion of art (see the wording of the exemption above). In June 2016, I repeated my concerns in an extensive interview published by the German video game magazine *Gamestar* ([Engl. version via Google website translation](#), 3 pages). While movies and games are not the same (one being interactive, the other purely passive) it nevertheless seems hard to justify why movies are generally getting a free pass but video games do not, in particular considering that the production processes of modern video games and movies are similar, with countless artistic and creative people being involved. Several German courts have already decided in relation to other matters that video games constitute a form of art. This includes in particular court decisions in relation to blacklisting decisions concerning video games, which are subject to an identical statutory art exemption (Sec. 18 (2) No. 2 Youth Protection Act) as it is provided in Sec. 86a StGB. In light of this, the fact that the art exemption was not even mentioned in the *Wolfenstein 3D* decision seems more than questionable.

Additionally, the legal framework applicable to video games has changed significantly since the *Wolfenstein 3D* decision in 1998. Back then, USK ratings were only recommendations of a private body without any legal standing. This was changed in 2003 with the enactment of the new Youth Protection Act. USK ratings now have the same legal standing as movie ratings issued by the FSK. In both cases, the relevant age-rating decision is taken over by the 16 German states by means of an official procedure and thereby obtains the rank of an administrative decision. Both organizations are perfectly capable of assessing any potential harm to minors or unconstitutional or unlawful content in video games or movies and reacting to it by refusing the relevant age-rating. Based on these arguments, I consider it very likely that a German court would nowadays decide against a general prohibition of critical symbols in video games for reasons of the statutory exemption of art. Such a decision could be reached by challenging an age-rating refusal decision of the USK (see below).

5. Public reaction and awareness

The main reason why video game companies are reluctant to challenge the general prohibition of critical symbols in video games is the risk of a potential public disaster. Who would like to be the company taking a stand and fighting for its right to have Nazi symbols in video games? No need to explain this any further. While such an outcry would surely not come from the German gamer base which typically despises any form of censorship – in fact German gamers and the German video gaming press would certainly appreciate and support any effort in this regard – such fear is not unjustified in terms of the remaining public which is not interested in video games. Aside from German gamers and people working in the industry, so far the prohibition of Nazi symbols in video games was not subject to greater

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The New Colossus. Being set in a dystopian world where the Third Reich has won the war, the game of course includes a large number of Nazi symbols. As usual, the German version was significantly altered. All prohibited symbols and references to the Third Reich were removed. This included renaming Hitler to “Heiler” (*Healer*), removing his mustache and having him being addressed as “My chancellor”.

The changes made to *Wolfenstein II: The New Colossus* were so significant that it ultimately sparked the interest of the German mainstream media. For several weeks the topic became subject to a so far unprecedented level of media coverage (see for an instance an Article by *Spiegel-Online* where I was asked for my opinion: [Engl. version via Google website translation](#)). However, the center of the public attention was not that the original version of the game provides hundreds of symbols which are prohibited in Germany but instead that due to the German prohibition and the extensive changes that were made to the German version of the game impression was given that Germany tries to cover up its historic responsibility and guilt by prohibiting and censoring art beyond necessary means. Especially one altered dialogue triggered significant public attention: In the original version Hitler speaks about the player’s character and makes a reference to the Jewish heritage of his (the character’s) mother. It is also revealed that his father betrayed his mother and handed her over to the Nazis and that she later died in a concentration camp. However, in the German version any reference to the Jewish heritage was removed for consistency purposes. Additionally, the mother dies through imprisonment and not in a concentration camp. The fact that a German video game version of all things removes all references to Jews and somehow trivializes historic events for reasons of a general prohibition of Nazi symbols was almost unanimously considered as tasteless and disproportionate by the German mainstream media. Overall, the general tone was that video games with serious stories should not be censored.

III. The prosecutor’s decision

As it was revealed today by the Association for Germany’s Video and Computer Gamers (“VDVC”)[3], one of their members notified the game *Bundesfighter* to Public Prosecutor’s Office Berlin to initiate proceedings in order to ultimately reach a first positive decision by an official body on video games with NS symbols in Germany. Such a decision would need to consider all developments and legal opinions since the *Wolfenstein 3D* decision was issued in 1998. Well, the plan worked:

1. Decision by the Public Prosecutor’s Office Stuttgart

As it was communicated today and can be drawn from the official documents that were released together with the VDVC’s news on its website, the Public Prosecutor’s Office Berlin forwarded the case to the competent Public Prosecutor’s Office Stuttgart. The latter already decided on December 13, 2017 to discontinue the proceedings for reasons that the notified game does not violate Sec. 86a StGB. The decision first summarizes all facts concerning the notified game (production, graphic style, gameplay, developer etc.). Afterwards, reasons are provided why the game does not violate Sec. 86a StGB. According to the District Attorney Stuttgart the game falls under the exemption of § 86a StGB and



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exaggerated depiction of the featured politician's characteristics. A satirical TV broadcast with similar content would also not constitute a criminal offense. The simple fact that the satirical content is presented in another form (i.e. a video game) would not justify another decision.

2. Complaint against the decision of the Public Prosecutor's Office Stuttgart

In order to reach a higher level decision, a complaint against the decision of the Public Prosecutor's Office Stuttgart to discontinue proceedings was lodged. Such complaint extensively refers to the *Wolfenstein 3D* decision and the fact that the art exemption was not even considered by the court and therefore does not apply to video games. Additionally, the complaint is backed up with the ongoing practice of the USK not to rate games which include Nazi symbols.

3. Decision by the Attorney General's Office Stuttgart

On April 30, 2018 the Attorney General decided over the complaint and rejected it, confirming that *Bundesfighter II* does not violate Sec. 86a StGB. To support his decision, the Attorney General mainly cites the legal article which was published by me in the Computer and Law Journal back in 2015 (see above already) and extensively draws arguments from it. Loosely translated:

"Your objection according to which the art exemption would not be applicable is incorrect. According to the legal literature, the decision of the High District Court Frankfurt from 1998 is outdated (see Schwiddessen, CR 2015, p. 92 et seq., 97 with additional references). While there was no age-rating procedure for video games at the time of the decision, [such a procedure] and thereby an effective control mechanisms was introduced with the enactment of the Youth Protection Act in the year 2003 [...]. Additionally, administrative courts regularly assess in relation to disputes over blacklisting decisions whether the game falls under the exemption of art as provided in Art. 18 (3) No. 2 Youth Protection Act, which is identical to the exemption provided in Sec. 86a StGB."

4. Implications

It is unlikely that the decision of the Attorney General's Office Stuttgart will change the practice of the USK not to age-rate games which include critical symbols. The age-rating process behind the USK belongs to the executive. Decisions by prosecutors also belong to the executive and not to the legislative. The *Wolfenstein 3D* decision, however, is obviously a legislative decision by a relatively high court. Thus, it is unlikely that the USK will consider itself bound by the Attorney General's Decision as the latter only constitutes a decision by another executive body.

However, the Attorney General's Decision also clearly shows that the exemption of art applies to video games and that there is no general prohibition of Swastikas etc. in video

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needed because the relevant game is only distributed online, video game companies can assess their game in light of the exemption of art to consider an unedited release in Germany.

Lastly, the decision of the Attorney General’s Office Stuttgart certainly provides another very solid argument in case the practice of the USK not to age-rate video games which include critical symbols would be challenged in court. The latter can be accomplished by simply applying for an age-rating of an older game which includes “prohibited” symbols and by challenging the USK’s subsequent age-rating refusal decision.

[1] <http://www.gamona.de/games/aktuelles,landeskriminalamt-ermittelt-gegen-satire-pruegler-bundes:news.html>

[2] https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0877

[3] English version: <https://vdvc.de/blog/2018/05/08/public-prosecutor-will-not-prosecute-bundesfighter-ii-turbo-for-using-nazi-symbolism/>

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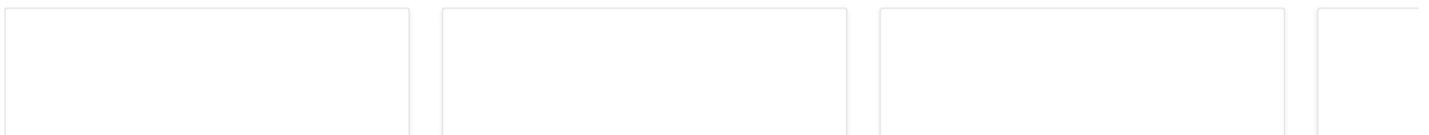


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