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Videogames and their clones – How copyright law might address the problem

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ABSTRACT

As is the case for other creative works, developers of videogames should be able to rely upon copyright law for protection of their intellectual property. However, although videogames are frequently cloned by rival videogame developers, copyright law appears ill-equipped to cope with the practice. Cloners avoid copying the game components that are clearly protected by copyright: the frames, sounds, or computer code; instead, they copy the way in which the videogame plays ("the gameplay") which courts have found to be outside the scope of copyright protection. Some scholars have argued that the cloners would be more vulnerable to effective legal challenge if videogames were protected as a new category of works in copyright law. In this article, however, I draw upon videogame theory from the digital humanities, and link this to the concept of copyright harmonisation, which has been propounded as likely to guide future decisions of the Court of Justice of the European Union, to explain why the suggestion that videogames should comprise a new category of copyright works is not practicable. Instead, I argue that a videogame as an entity should be protected by copyright, as should any other creative work, provided it meets the criteria of "an original intellectual creation".

1. Introduction

Although videogames have become one of the most lucrative computer-based industries in the world,[1] internationally their legal protections remain complex and inconsistent.[2] Presently, copyright law provides the most important legal protection for the videogame and is the focus of many disputes. However, copyright law in its current form appears ill equipped to cope with the increasingly prevalent practice of cloning. Cloners are careful to avoid direct copying of copyright-protected frames, sounds, or computer code in a videogame; instead, they copy the way in which the videogame plays ("the gameplay"). Internationally, the courts struggle in cases of alleged copyright infringement to separate the gameplay, which the courts consider to encapsulate the unprotectable "idea" of a videogame, from the protectable "expression of the idea", which the courts tend to view as comprising the different categories of copyright works that make up the game.[3]This struggle provides an opportunity for the cloner. The successful cloner produces a game that is strikingly similar to the original videogame, but is careful not to copy any of the elements of the original that are clearly protected by copyright.

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[1] See David M Ewalt "Americans Will Spend $20.5 Billion On Videogames In 2013" Forbes, 19 December 2013 at http://www.forbes.com/sites/davidewalt/2013/12/19/americans-will-spend-20-5-billion-on-video-games-in-2013/.

[2] The videogame was conceived of in the 1960s by Ralph H. Baer, who died in December 2014 after a long career as a developer and inventor of consoles and videogames. Yet the problem of providing adequate legal protections for the videogame is ongoing.

[3] *Nichols v Universal Pictures* (1930) 45 F (2d) 119.

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> The nature of copying which these developers are charged with is more subtle: they seek to replicate . . . the *gameplay* of their competitors' most popular titles. Using different computer programs and, crucially, sufficiently different graphics and sounds. Gameplay is, in short, the combination of game mechanics, rules, goals, obstacles, rewards and penalties used in a particular videogame, which is made manifest through the audiovisual displays generated when the player interacts with the game.[4]

The cloner also takes advantage of the fact that videogames are not protected as a separate category of works in copyright law. Conversely, other creative outputs such as films, which are usually protected as a separate category, are not subject to cloning. A rival company can produce a film about the idea of a bank robbery for example, and may even use similar filming techniques to those used in an earlier film about a bank robbery, but the end result must be clearly distinguishable from the earlier film or it will likely be found to be an infringement of copyright.[5] As the Judge stated in the Australian case of *Sega Enterprises Ltd v Galaxy Electronics Pty Ltd*:[6]

> It would be strange indeed if Parliament intended the definition of 'copy' to be construed so narrowly that a representation of an animated film, which looked just like the film, would not constitute an infringement, simply because it was produced by the computer technology involved in the present case.

In contrast, many cloned videogames are almost indistinguishable from the earlier original game, yet nevertheless escape a finding that there has been infringement of copyright.[7]

A feature of copyright law in many countries[8] is that copyright protects only works that fall within defined categories in their copyright legislation.[9] It is clear that each of the separate components of a videogame "fits" within a category of the works which copyright law sets out to protect and will therefore be protected by a separate copyright (provided that component meets the relevant originality threshold for the jurisdiction). Thus, the graphics and individual frames of the videogame are categorised as artistic works in copyright law, the sound effects are categorised as sound recordings, and computer code is categorised and protected as a literary work.

However, there is no international consistency regarding the copyright protection of the entire videogame as an entity.[10] The United States courts have ruled that a videogame falls into the category of audiovisual works (which includes films) in the Copyright Act 1976 (US). The courts of England and Wales have described a videogame as an audiovisual work (which is not a separate category of works in the Copyright, Designs and Patents Act 1988 (UK) – hence the game as an entity is not protected) or a computer program (which is a literary work), but do not agree that it is a film. The Australian courts have described a videogame as a film, but not as an audiovisual work. Most recently, the Court of Justice of the European Union (CJEU) in *Nintendo Co Ltd v PC Box Srl* (*PC Box*) opined that videogames "have a unique creative value" which cannot be reduced to computer language,[11] thereby clarifying that the scope of copyright protection available to videogames in the EU extends to the Information Society Directive as well as the Software Directive.[12] Furthermore, as Eleonora Rosati has argued, the CJEU appears to be moving inexorably towards the position that the concept of separate categories of works with different thresholds of protection in copyright law has no place in EU law; rather, copyright should protect any work that is its author's own intellectual creation.[13]

Clearly, any legal solution that will protect videogame developers from the cloners requires that a careful balance be kept in mind; it is fundamental that legal protection must not be expanded to create a monopoly over the idea of a game but, conversely, the games developer must be confident that their investment in research and development is suitably protected. Some scholars argue, therefore, that the videogame deserves to be protected as a new category of works in copyright law.[14] This solution, they contend, will protect the gameplay. In addition, such protection would circumvent the current tendencies of courts to focus their decisions in cases of alleged infringement upon whether there had been direct copying of individual elements of a videogame that fall neatly into recognised categories of copyright works: the graphics, the

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[4] Yin Harn Lee "Play again? Revisiting the case for copyright protection of gameplay in videogames" (2012) 34(12) European Intellectual Property Review, 865 at 866.

[5] In *Norowzian v Arks Ltd (No 2)* [2000] EMLR 62 (AC) the UK Court of Appeal found no infringement of copyright. "At most it could be said that there was a striking similarity of techniques employed by the film makers but the subject matter of each film was different."

[6] Per Burchett J in *Sega Enterprises Ltd v Galaxy Electronics Pty Ltd* [1996] FCA 1740 at [16].

[7] For examples see Eric Adler "Clones Wars: Videogame Litigation Illustrated" Patent & Technology Law at https://medium.com/patents-technology-law/clones-wars-video-game-litigation-illustrated-36682abb4d68.

[8] See, for example, the Copyright Act 1994 (NZ), the Copyright Act 1968 (Cth), the Copyright Designs and Patents Act 1988 (UK) and the Copyright Act 1976 (US). For convincing argument that European Union copyright legislation is tending to adopt a less divisive approach: see Eleonora Rosati "Closed subject-matter systems are incompatible with UE copyright" (2014) 12 *GRUR Int* 1112–1118, discussed post.

[9] Broadly, these categories are literary, artistic, dramatic and musical works, sound recordings, films, communication works, and typographical editions of published works. Some jurisdictions including the United States describe films as audiovisual works.

[10] See for example WIPO "Videogames" at http://www.wipo.int/copyright/en/activities/video_games.html.

[11] *Nintendo Co Ltd v PC Box Srl* CJEU, Case C-355/12, 23 January 2014, para 23.

[12] Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society ("the Information Society Directive") and Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs ("the Software Directive").

[13] See Eleonora Rosati "Closed subject-matter systems are incompatible with UE copyright" (2014) 12 *GRUR Int* 1112–1118.

[14] See Yin Harn Lee "Play again? Revisiting the case for copyright protection of gameplay in videogames" (2012) 34(12) European Intellectual Property Review, 865 and Tanya Aplin "Not in Our Galaxy" [1999] European Intellectual Property Review 633.