Intellectual Property in Video Games

- Rananjay Talwar

A comment on the intellectual property law system in the video game industry

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"That's really one of the things I love about video games. It's a whole new world every time you start".

- Jennifer Hale

Introduction

Intellectual Property ["IP"] is a vital element of video game development contracts, employment agreements, distribution, advertising and every license in the game industry. People are persuaded, even eager to buy video games, because they are really buying a larger interactive entertainment experience beyond the physical goods.

This experience is legally enjoyed by consumers through a limited license to the IP. The game code, manual text, box art, title, game art, music, story, game world, middleware and graphics are all IP. Game development budgets for many large titles already exceed movie budgets in terms of years in production and total expenditure. Protecting that ever-growing capital investment is becoming increasingly important.

IP is an emotionally charged issue in the software community generally and the game development community in particular. Many people are in favour of **open-source** initiatives and are against software patents, patents in general, or even intellectual property in general. These points of view are clearly influential and hotly debated at the highest public policy and legislative levels throughout the world.

However, everyone agrees that there is room for improvement in the IP system and that the system is evolving. In addition, the current system is complex. Given the complexity of IP laws

at the international level, this comment focuses on US law by way of example and insight into the regulation of the video game industry. Where possible, European and other country perspectives are provided.

It should be stressed that, due to the cross-cutting nature of video games, a number of questions and challenges exist, especially in terms of IP. A general division of IP in the video game industry can be illustrated here -

Copyright	**Trade Secret**	**Trademark**	**Patent**
Music	Customer Mailing lists	Company Name	Inventive game play or game design elements
Code	Pricing Information	Company Logo	Technical innovations such as elements in software, networking or database design
Story	Publisher's contacts	Game Title	Hardware technical innovations
Characters	Middleware contacts	Game Subtitle	
Art	Developer's contacts	Identifiable 'catch phrases' associated with the game or company	
Box Design	In-house development tools		
Website Design	Deal terms		

Copyright

Article 2 of the **Berne Convention** provides a solid basis for eligibility for protection of video games by copyright, that they are in fact '*complex works of authorship, potentially composed of multiple copyrighted works.*'

Copyright is arguably the most important IP protection for most game companies. Generally speaking, copyright protects the fixed expression of ideas, and easily qualifies as the best tool for protecting game property because of its ease of use, power, and versatility.

In the US, eight categories of works are eligible for copyright protection. These are listed in the statute 17 USC 102(a). They are:

literary works;

musical works including any accompanying words;

dramatic works including any accompanying music;

pantomimes and choreographic works;

pictorial, graphic and sculptural works;

motion pictures and other audio-visual works;

sound recordings;

and architectural works.

With regard to architectural works, generally they do not pose a problem if included in a video game, as they are considered public works. However, in particular cases such as depiction as their central elements in the game, or their destruction, can be contested. Sony faced such an issue when it used the interior of the Manchester Cathedral for in game combat.[1]

Interactive entertainment is protected either as an 'other audio-visual work' or as a 'literary work.' As far as video games are concerned, copyright covers stories, characters, music,

[1]*Controversy over the use of Manchester Cathedral in Resistance: Fall of Man*, Wikipedia (Oct. 16, 2008), en.wikipedia.org/wiki/Controversy_over_the_use_of_Manchester_Cathedral_in_Resistance:_Fall_of_Man.

graphics, in certain instances imagined environments and geographic locations such as Middle Earth, Pandora from *Borderlands*, Mos Eisley from the *Star Wars* universe, Azeroth from *Warcraft*, and the post-apocalyptic world and cities in *Fallout*, and even the software source code itself.

The length of copyright is another element that makes it attractive for game developers. Copyright is long, not immortal like trademark, but long enough to outlive creators. At different times, copyright has varied in length, and the history of copyright contains enough different lengths for such protection to warrant further consideration.

The game *Breakout* is an interesting example, because that game was the subject of a series of cases surrounding the minimal level of creativity necessary for copyright. Atari tried at least twice to register the game for copyright, but registration was initially rejected because of the simplicity of the artistic display in the game.

Atari had to fight a series of cases over the application rejection from 1989 to 1992, eventually winning the fight.[2] This series of cases is important, not only to game IP, but to copyright in general. Those cases stand for the proposition that courts or the Register of Copyright will not judge the creativity or artistic quality in copyright. Any original fixed work in a tangible medium is protected.

Copyright is also the main claim for games accused of cloning. In recent years, many cases of cloning have been filed. One example from 2012 was over cloning *Triple Town* with *Yeti Town*.[3] This resulted in a settlement where *Yeti Town* was handed over to Spry Fox.

Still, this is not a new phenomenon in the game industry. In the early 1980s Atari was involved in litigation over its *Pac-Man* IP against a Phillips game titled *K.C. Munchkin*. The length of protection is intimately tied to potential revenue generation. Game developers can use copyright to protect their ideas, build new games, and sell related products for a century.

Copyright in a property can literally be developed and exploited over generations. *Mickey Mouse*, *Star Wars*, and *Superman* are excellent examples of this. These IP examples have existed

[2] *Atari Games Corp. v. Oman*, Wikipedia (Dec. 6, 2013), en.wikipedia.org/wiki/Atari_Games_Corp._v._Oman.

[3] *Spry Fox, LLC v. Lolapps, Inc.*, Wikipedia (Mar. 9, 2021), en.wikipedia.org/wiki/Spry_Fox,_LLC_v._Lolapps,_Inc..

for decades and have been exploited across multiple media, including games. This also lends to the idea of Derivative works.

Derivative Work

A derivative work is a new work derived from an existing copyrighted work. In the world of video games, *Doom* the movie was a derivative work created from *Doom* the game. The same concept works in reverse as well. *Shrek* was first a film and then a derivative work was created, turning the copyrighted material in the film into a game.

The Lord of The Rings is an illustrative example here. Starting in 2001, Electronic Arts (EA) had developed games including the first *Battle for Middle Earth* game based on a license from the Peter Jackson films. This meant that the games from EA could only produce game content, or a derivative work, that came from the Jackson films.

In 2005, while creating the *Battle for Middle Earth* sequel and other *Rings* games, EA acquired a license to produce a game based on the entire world of fiction as described in the Tolkien books. This license to make derivative works based on the books opened up a great deal of new territory for creativity. Here EA was licensing a subset of material from one derivative work and later went on to acquire a license in the entire base of material.

Public Domain

Historical events are not subject to copyright, but the stories created out of them are. An example is World War II, a fertile area for game development in recent years. No one can copyright the specific events of that or any time period. *Battlefield 1942*, *Call of Duty*, and *Medal of Honor* can both use tanks, weapons and uniforms that are historically accurate. Furthermore, they are not infringing each other's copyright because the games are merely representing historical facts.

Having said that no infringement exists, this question came into some dispute in 2012. Electronic Arts sued Textron (makers of Bell Helicopters) seeking a declaratory judgment on this issue. The

case was settled out of court. In May of 2013, EA publicly announced that it would no longer license any weaponry for use in its games.

The *Scènes à faire* doctrine is similar to public domain property. This doctrine recognizes that some expressions of ideas are so often used that they cannot be copyrighted by themselves. Examples of this would be the generic elements of a fantasy story such as wizards or dragons. These races and their general stereotypes are not copyrighted, but specific instances of these races, such as *Gandalf,* that are established characters, would be.

Trade Secret

Trade secrets are company business secrets. A legal definition comes from the US Uniform Trade Secrets Act, which defines a Trade Secret as -

'Trade secret means information, including a formula, pattern, compilation, program device, method, technique, or process, that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy".

Any idea can be a trade secret as long as it is an idea that confers some business advantage and can be kept secret. Trade secret rights can extend to virtually any concrete information that grants a business advantage, such as formulae, data compilations, devices, process, and customer lists. Even though with modern chemical analytic methods, discovering the composition of any food product borders on trivial, the most well-known example of a trade secret is the formula for Coca-Cola.

Two advantages of trade secrets are that they have no registration cost and can be protected quickly. Trade secrets last as long as the owner of the information prevents it from becoming common knowledge. This, like trademark, is potentially immortal.

The only limitation is the time the information can be kept 'secret.' The key is always to ensure that that information you wish to protect is valuable, confidential and *kept* confidential. Further afield, there is a general obligation on most countries under the international treaty called the **Trade-Related Aspects of Intellectual Property agreement** (TRIPS) to provide protection for '*undisclosed information*' (though the means of implementing the treaty vary widely). The rights given to a trade secret holder include the right to prevent others from using the trade secret unless the other party discovers the secret through legitimate research.

As an example, the mailing list data for subscribers of an MMO (Massively Multiplayer Online) is a type of trade secret. These people have subscribed to a company's MMO for years and have each paid literally hundreds of dollars to the publisher. If an employee steals the MMO contact list, this employee can now have easy access to people interested in playing an MMO and willing to pay for it in the long term. This information could be enormously valuable for a competitor.

Development tools could also be trade secrets. A development tool that may populate a 3D level intelligently with environmental objects by pulling these objects from a specified directory. This software was written in-house for one development project, but could easily be modified to work with other projects, saving programmers and level designers many hours of work by placing a 'skeleton' level down according to certain conditions. An employee leaving with the code for this design tool and taking it to a competitor, can said to be stealing a trade secret.

Details about licensing and publishing agreements can also be a trade secret. In fact, license agreement and other contract secrets are one of the most common trade secrets in the game industry. Often both parties do not want deal details leaked to the public. This class of secrets covers obvious clauses such as how much is paid and when. It also covers less obvious, but equally important information such as which employees are 'key employees' for fulfilling a development agreement.

Trademark

The Xbox, PlayStation, Apple, and Facebook logos are immediately recognizable and consumers have certain thoughts and feelings associated with those marks. That brand recognition and association with a particular company is the purpose of trademark.

Trademarks are arguably the second most important IP protection for game companies after copyright, since a good trademark can set a company and its games apart from others in the minds of consumers.

In the gaming world, the Xbox trademark was in use by another software company when Microsoft started marketing the Xbox. The competing company was a publicly traded company that should have been easy to find in a standard trademark search.[4] Another trademark case for Microsoft came in 2003 with the planned MMORPG *Mythica*. One of the most popular games in that market, *Dark Age of Camelot*, is made by Mythic Entertainment.

In response to the clear *Mythica*/Mythic conflict, Mythic initiated a case against Microsoft for trademark infringement. Microsoft cancelled the whole *Mythica* project after the dispute arose. Microsoft settled the suit with Mythic, agreeing not to use the term 'Mythica' and to drop its US applications to register 'Mythica' as a trademark. As part of the settlement, Microsoft also assigned Mythic the rights to international trademark applications and registrations for 'Mythica' as well as the associated domain names. [5]

Patents

Although extremely important for some hardware, software, development tools and other middleware companies, patents are not used as often in the game context. This may change as the industry matures, but for the time being patents are not often utilized throughout the majority of the game industry.

[4] (June 18, 2001), www.theregister.com/2001/06/18/microsoft_buys_xbox_name_off/.

[5] Todd Bishop, *Microsoft ends development of 'Mythica' game*, (Feb. 14, 2004), www.seattlepi.com/business/article/Microsoft-ends-development-of-Mythicagame-1137016.php.

Still, each year there are large patent litigations in games. This increase has caused a substantial burden for developers, which must often take on the cost of defending these cases if the publisher and developer are named in a patent infringement complaint. Patents do not usually protect games themselves because they do not usually meet the statutory criteria. Yet, there are a growing number of game-related patents, usually in the areas of hardware, digital distribution, networking, and inventive gameplay.

It is common for an early-stage game company to be cash-poor, but perhaps they have an invention or several patentable inventions that are potentially worth a great deal. This is particularly true with middleware companies. The company may fear its competition stealing the invention, but still wants to market the product and raise money.

Final remarks

Starting out as niche area of scientific research themselves, in a span of few decades, video games now serve as a base and empower research itself through their game play. The complexity of modern games and their ability to reflect true world concepts, including economic markets and social structures, makes them ripe for researchers working on the frontier of these fields to test out their models.

Creativity was always present, both in designing and playing a game. The challenge is to preserve it.