



1

Copyright – Overview

Copyright law determines the following:

- Subject matter
- Authorship
- Ownership
- Term of protection
- Economic rights
 - to copy the work
 - to issue copies of the work to the public
 - to rent or lend the work to the public
- to perform, show or play the work in public
- to communicate the work to the public
- to make an adaptation of the work or do any of the above in relation to adaptation
- Digital exhaustion
- Exceptions – fair dealing and fair use
- Moral rights

2

Video Games and Copyright

- Legal classification of video games
 - Video games are complex digital products – which elements and aspects can be protected individually, and can video games be protected as such?
- Digital exhaustion
 - Does digital exhaustion apply to complex digital products?
 - Sale of goods or provision of service?
- Copyright infringement
 - There are unique uses and practices with regards to video games that may give rise to copyright infringement
- Generative AI and copyright
 - Questions about the authorship and ownership of computer-generated works and potential infringing practice with regards to the training data

3

Legal Classification of Video Games

- Different jurisdictions have different approaches to protecting video games
- Unitary approach
 - Audiovisual works
 - Computer programs
 - Something else?
- Distributive approach

Andy Ramos, Laura López, Anxo Rodríguez, Tim Meng and Stan Abrams, The Legal Status of Video Games: Comparative Analysis in National Approaches (WIPO) (partially outdated)

4

Nova Productions Ltd v Mazooma Games Ltd [2006]



5

Legal Classification of Video Games – UK

- Claim that two arcade games infringed copyright in Nova's *Pocket Money* game
- No direct copying of source code – the claim was for copying the program by copying the outputs that appeared on the screen
- Nova also argued the defendants have copied the look and feel and mechanics of the game

IELR 3.2: Copyright protection of video games in the post-Brexit world, article + video

6

Legal Classification of Video Games – US

“Courts in this Circuit and others have long held that elements of computer programs may be protected by copyright law. This includes both the code for the program as well as the graphical elements for programs such as video games.”

[*Tetris Holding, LLC v. Xio Interactive, Inc.* 863 F.Supp.2d 394 (D.N.J. 2021)]

7

Legal Classification of Video Games – EU

“As is apparent from the order for reference, videogames, such as those at issue in the main proceedings, constitute complex matter comprising not only a computer program but also graphic and sound elements, which, although encrypted in computer language, have a unique creative value which cannot be reduced to that encryption. In so far as the parts of a videogame, in this case, the graphic and sound elements, are part of its originality, they are protected, together with the entire work, by copyright in the context of the system established by Directive 2001/29 (InfoSoc Directive).”

(C-355/12 *Nintendo*)

(C-5/08 *Infopaq*)

(C-310/17 *Levola* at [42] – precise and objective form of expression

(C-683/17 *Cofemel*)

1. Original
2. Expressed in a manner that makes it identifiable with sufficient precision and objectivity, even though that expression is not necessarily in permanent form

8

Relevance

- Author
 - Different authors may be identified depending on the type of work, e.g. audiovisual works may have a different author depending on the jurisdiction
 - “The principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States shall be free to designate other co-authors.” (Art 2(1) Term Directive)
- Term
 - Different length of protection depending on the type of work, e.g. for audiovisual works
 - “The term of protection of cinematographic or audiovisual works shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work.” (Art 2(2) Term Directive)

9

Relevance

- Ownership of work created by employees
 - Potentially different rules depending on the type of work, e.g. for software
 - “Where a computer program is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the program so created, unless otherwise provided by contract.” (Art 2(3) Computer Program Directive)
- Exhaustion
 - C-128/11 UsedSoft
 - C-263/18 Tom Kabinet
- TPMs
 - C-355/12 Nintendo

10

Digital Exhaustion

- Authors have an exclusive right to authorise or prohibit distribution of their works (and their copies) by sale or otherwise, for example by lending or even by distributing free copies
- Within the EU, this right is exhausted after the first authorised distribution of the work on the EU market
- Does the exhaustion principle apply to digital copies as well?
- CJEU has ruled that the InfoSoc and Software Directive are outside the remit of the exhaustion principle
- The InfoSoc Directive is the general rule (the exhaustion principle does not apply) and the Software Directive is the *lex specialis*

11

UsedSoft v Oracle

- The CJEU confirmed that exhaustion can take place for digital distribution, but only for software (so far), and only if the following conditions are met: the permanent character of the 'licence', the appropriate remuneration of the rightsholder, and the reseller making their copies unusable for after the resale
- The Software Directive as *lex specialis* will apply only when it concerns computer programs **per se**

12

Nintendo v PC Box

- The court ruled *videogames*, such as those at issue in the main proceedings, *constitute complex matter comprising not only a computer program but also graphic and sound elements, which, although encrypted in computer language, have a unique creative value which cannot be reduced to that encryption* and fall under the remit of InfoSoc Directive
- The principle of exhaustion does *not* apply

13

Tom Kabinet

- The case concerns the Tom Kabinet website, a challenger to the publishing industry, who operates a marketplace for people to sell and buy second-hand e-books
- In order to sell used e-books, sellers can upload e-books onto the site by agreeing to delete their own personal copies from their hard drive and they are asked to verify that the e-books being uploaded were legally obtained
- The CJEU ruled that the supply to the public by downloading, for permanent use, of an e-book is not covered by the concept of 'distribution', but by that of 'communication to the public', and therefore cannot give rise to exhaustion

14

Capitol Records v ReDigi (US)

- Case regarding the reselling of digital goods like music and e-books
- The court ruled that the company's secondary market for digital music infringes on the copyrights controlled by record companies
- The case has been closely watched as a test of whether the first sale doctrine — the legal principle that someone who owns a copy of a copyrighted work, like a book or album, is free to resell it — can be applied to digital goods
- The judge ruled that ReDigi's system infringed on Capitol's reproduction rights because it transmitted an unauthorized copy of the file over the Internet

15

Sale of Goods or Provision of Service?

- Another important consideration is whether the interaction between the rightsholder and the end-user is a sale of goods or a provision of service
- If a customer pays for using a digital product, an e-book or a video game, for example, does this qualify as a sale or service?
- A crucial distinction in copyright law between the (exhaustible) distribution right and the (inexhaustible) right of making available
- Will the concept of cloud gaming upset this distinction even further?

IELR 3.2 Trepova-Fava, Aren't we all exhausted already? EU copyright exhaustion and video games resales in the Games-as-Service era

Longan, Dimita, Michels, and Millard, Cloud Gaming Demystified: An Introduction to the Legal Implications of Cloud-Based Video Games, Queen Mary Law Research Paper No. 369/2021 (SSRN)

16

Copyright in Choreography



17

Copyright in tattoos reproduced in video games

- Are tattoos capable of copyright protection?
- Do you need a license to reproduce it in a video game?
- *Solid Oak Sketches, LL v. 2K Games, Inc. and Take-Two Interactive Software, Inc., (2020)*
- *Alexander v. Take-Two Interactive Software, Inc., (2020)*



18

Copyright Infringement

- Creation of a video game
 - Incorporation of third-party intellectual property
 - Cloning
- Distribution of and access to a video game
 - Emulators and ROMs
 - Key selling
 - Account transfer and second-hand video games
- Alteration of the video game
 - Modding
 - In-game user creations
- Interfering with the integrity of the video game
- Re-purposing the video game
 - UGC
 - Livestreaming and E-sports

Key issues:

- Cloning
- Modding and in-game user creation
- Key selling and account transfer
- Interfering with the integrity of the video game

19

Cloning

- **Cloning** refers to the practice of creating a game which replicates the game experience of the original game, usually by a competitor
- Not a new problem, but becoming more common / large scale
- Elements that are being copied:
 - Look and feel
 - Game mechanics
 - Characters
 - Graphics and visuals

20

Cloning

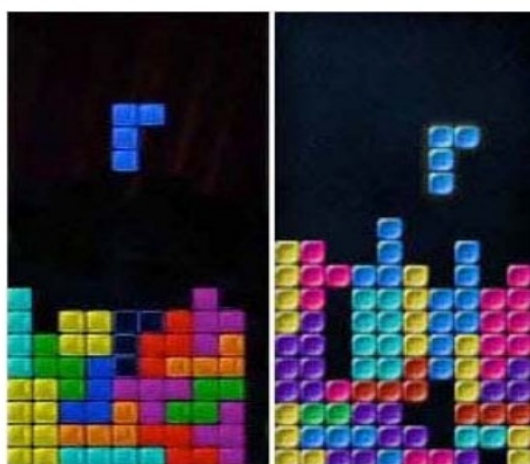
- Copying can be:
 - Literal
 - Literal copying of abstract features
 - Non-literal copying
- Video game copying / cloning usually involves **non-literal copying**, which is the most difficult to prove / succeed with a claim
- Jurisdiction-specific

21

Tetris Holding, LLC v. Xio Interactive, Inc., 863 F.Supp.2d 394 (D.N.J. 2012)

- The Court stated:

“there is such similarity between the visual expression of Tetris and Mino that it is akin to literal copying”.



22



Spry Fox LLC v. LOLApps Inc, No. 12-00147, 2012 WL 5290158 (W.D. Wash. Sept. 18, 2012)

23

Alternative Avenues

- Patent law
- Trademark law
 - Multimedia trademarks
- Design law
- Unfair competition and passing off
- Takedown requests
- 'Naming and shaming'

24

Altering a Video Game

- Modding
- From recolored versions to existing outfits and hairstyles for The Sims 4 to complete overhauls (see images for comparison)
- These alterations – ‘mods’ – are distributed online free of charge



25

Modding – Creation

- Creating a mod
 - Introducing new content, feature, or element to the original video game without copying it (add-on, plug-in); but more often
 - The new elements may imitate the structure and organization of existing code, or incorporate features of the existing art
- Copyright implications
 - Copying (of the work as a whole or of a substantial part or similar equivalents) implicate the reproduction right in the original video game and/or its constituent works, as well as adaptation or derivative works rights

26

Modding – Use

- Using a mod
 - The player must have the original video game which it modifies already installed on their gaming device
 - The mod alters the content, when interaction with the original video game
 - It does not operate as stand-alone pieces of software
- Copyright implications
 - Mere use of a mod may constitute copyright infringement, particularly where the EULA expressly prohibits players from modifying it
 - *Take-Two Interactive Software v. James* (UK)

27

Modding – Making available

- Making a mod available online
- Copyright implications
 - The making available of mods online potentially implicates the distribution, making available to the public and/or communication to the public rights in the original video game
 - Where a mod contains infringing material, the operator of the website on which it is hosted may also incur liability, except where the “safe harbor” rules for Internet service providers apply

28

Integrity of a Video Game

- Private servers
- Cheating in online video games via the use of hacks, bots, or the provision of unauthorized private servers
- It impacts the integrity of the game and users' experience
- Copyright implications
 - Infringing the reproduction right and the communication to the public right
 - It may also amount to a circumvention of TPMs and a breach of EULAs
 - *MDY v Blizzard* (US)
 - *Riot Games, Inc v Stefan Delgado Argote et al.* (US)
 - *Epic Games, Inc v Joseph Sperry* (US)
 - *Blizzard against Bossland* (Germany, UK)

29

Key points

- Copyright considerations underline creating and using video games as well as the tools needed to develop them
- Other IPRs complement the protection available to a whole range of assets present in video games, and any other associated products and services, both physical and digital, altogether creating a complex matrix of IPRs
- Interactivity and creativity hinges on the questions of
 - legal nature,
 - scope of protection,
 - what qualifies as infringement,
 - are there any valid exceptions?
- Multi-layered enforcement strategies are required (litigation is not always the best option)

30

Thank you!