

Game clones and copyright infringement

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Propositions

1. A video game is a system that provides experiences to its players through interactivity. The interactivity provided by a video game does not mean the players can bring something to the game that does not initially exist in the game. Inside a video game, the four inter-related elements: mechanics, story, aesthetics, and technology, make video game software and its screen display both interdependent and relatively independent.
2. The concept of “game clone” refers to the phenomenon that the four inter-related elements: mechanics, story, aesthetics, and technology, of a game clone are similar or identical to those of an earlier game.
3. Although there are indeed some differences between US judicial practice and judicial practice in the courts of Japan and China, when looking at the issue of copyrightability and of finding copying of protectable expressions together, we get the impression that judicial practices in the US, Japan, and China all have a similar effect: they all provide a detailed analysis of what can be protected in a video game and provide a scope of protection for specific contents.
4. In the judicial practices of the US, Japan, and China, how to find copying of protectable expressions between disputed video game screen displays is problematic. That problem is reflected in the divergence of opinion on the scope of protection for a video game screen display and on whether a comparison should be made by relying on an ordinary person’s instincts or perception.
5. Courts can follow the three-step theory to find copying of protectable expressions between disputed video game screen displays: the first step is to abstract a video game screen display into four levels: the problem statement of a game, the nature of the fictional world created by the game, the manner of the display, and the elements of the display. The second step is to filter out the ideas and unprotectable expressions from each level and the third step is to make a comparison by following the sliding-scale approach assisted by expert opinions.
6. In the world of copyright law, weighing the balance of interests among right holders, users or follow-on creators, and the larger public will be an eternal problem. This problem will become more complicated when new technologies, new business models, and new kinds of works emerge.
7. Subjectivity is inevitable for the determination of any legal issue regarding copyright which is built on an intangible concept of works, but it is still necessary to restrict the subjectivity to a tolerable degree for the sake of the public interest or common good.
8. Copyright protection should build on human rationality and empirical evidence, rather than faith-based demonstration.