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Knockoffs, the Nemesis of the Gaming World

by Jennifer Lloyd Kelly and Theis Finlev | April 6, 2011

On March 22, Amazon launched the Appstore, bringing video games to the fingertips of thousands of Android users who, like their iPhone and iPad-toting friends, can now purchase and play video games anywhere, anytime. Due to mobile device games' ease of access, highly addictive nature, and low price points, the market for such games has exploded in recent years. With many such games achieving almost cult-like status (think *Angry Birds*, which has achieved over 100 million downloads across all platforms), the emergence of knockoffs is practically inevitable.

In fact, we have already witnessed a number of copyright disputes between game developers and their alleged infringers, some of which have actually reached litigation. However, before attorneys rush to advise their mobile game developer clients to file suit, they should bear in mind the relatively limited copyright protection video games historically have received. While there is not yet a body of copyright law specific to mobile device games, the analytical framework established in video game cases dating back to the 1980s is certain to shape copyright claims involving mobile games.

Thirty years ago, at the dawn of video game litigation, a court found it necessary to explain that video games were "computers programmed to create on a television screen cartoons in which some of the action is controlled by the player." *Stern Electronics Inc. v. Kaufman*, 669 F.2d 852 (2d. Cir. 1982). Since then, while video games have become infinitely more complex, copyright infringement analysis as applied to them has remained rather simple—and the copyright protections afforded most games rather narrow.

Where a video game is based on a sport or other real-life activity, courts generally have been unwilling to find infringement unless the games are virtually identical. See *Incredible Techs. Inc. v. Virtual Techs. Inc.*, 400 F.3d 1007 (7th Cir. 2005) (no infringement between golf-themed games); *Data East USA Inc. v. Epyx Inc.*, 862 F.2d 204 (9th Cir. 1988) (*World Karate Championship* did not infringe *Karate Champ*). These holdings are rooted in the fundamental principle of copyright law that one can receive protection only for the expression of an idea, not the idea itself. Under this principle, certain elements of a work are free for the taking and, hence, cannot form the basis of an infringement claim. These elements include general plots, themes and genres; scenes-Ã-faire (common story elements); and purely functional aspects of the work.

In the context of sports or real-life-themed video games, courts have concluded that content such as scoring systems, stereotypical characters, or common sports moves fall within these unprotectable categories. See *Capcom U.S.A. Inc. v. Data East Corp*. 1994 WL 1751482 (N.D. Cal. 1994). Because those games often are comprised largely of such content, they historically have received little protection under the copyright laws. As the 7th U.S. Circuit Court of Appeals explained, "golf is not a game subject to totally fanciful presentation," because all golf games feature certain elements, such as sand traps and water hazards. *Incredible Techs. Inc. v. Virtual Techs. Inc*., 400 F.3d 1007 (7th Cir. 2005) (denying injunction where similarities between PGA Tour and Golden Tee were based on similarities inherent to the game of golf).

In contrast, games that are more fanciful or imaginative generally have received greater protection against infringers. For example, in *Midway v. Bandai*, 546 F.Supp. 125 (D.N.J. 1982), Midway sought a preliminary injunction to stop Bandai from distributing an alleged knockoff of Midway's *Galaxian*, an outer space game in which the player controls a rocket ship defending itself against a swarm of computer-controlled aliens who attempt to bomb and collide with the player's ship. The court granted the injunction, noting that it was not necessary for Bandai to copy Midway's particular expressions (such as the insectile shape of the aliens' heads) in developing Bandai's own version of an outer space game involving a ship attacked by aliens. But even then, the court was careful to note that Midway's copyright did not preclude the development of other outer space-themed video games based on the same, unprotected idea.

Similarly, in *Atari Inc. v. North American*, 672 F.2d 607 (7th Cir.), cert. denied, 459 U.S. 880 (1982), the court granted a preliminary injunction against a knockoff of *Pac-Man*, based on similarities between the relative size and shape of the protagonist's bodies, their V-shaped mouths, and their distinctive gobbling action. Yet the court observed that even a fanciful game like *Pac-Man* cannot receive protection for its stock elements, such as its maze, scoring table, tunnel exits, or use of dots to gauge a player's performance.

Indeed, regardless of a game's ilk (sports and real-life versus fanciful), courts generally have conducted their infringement analysis by disregarding, or "filtering out," all unprotectable elements of the games and then comparing any similarities that remain. For instance, in *Capcom U.S.A. Inc. v. Data East Corp.*, 1994 WL 1751482 (N.D. Cal. 1994), Capcom alleged infringement of its one-on-one street fighting game, *Street Fighter II*, by Data East's *Fighter's History*, claiming that seven of its characters and 27 of the characters' special moves were improperly copied. The court first determined that four of the seven characters were stereotypical characters and 22 of the special moves were based on basic martial arts disciplines and, as such, were unprotectable. After comparing just the remaining three

characters and five special moves, the court found that there was no substantial similarity between the games.

More recently, in *Capcom Co. Ltd. v. MKR Group Inc.*, 2008 WL 4661479 (N.D. Cal. Oct. 20, 2008) (albeit a movie/game comparison), the owner of the rights to the 1979 horror movie "*Dawn of the Dead*" alleged that Capcom's *Dead Rising* video game violated its copyrights because, among other things, both works involved humans battling zombies in a shopping mall during a massive zombie outbreak. Before comparing the works, the court first filtered out all unprotectable elements, and then concluded that the remaining claimed similarities necessarily flowed from the "unprotectable idea of zombies in a mall" — and thus, could not support a finding of infringement.

What these cases suggest is that, in any dispute involving the alleged copying of a mobile device game, the first and most important part of the analysis will be developing a good understanding of the game's particular genre and the elements of the game that are driven by that genre. Unless it can be shown that what has been copied goes beyond these stock elements and into the realm of the author's unique expression, it is likely to be game over for any such claim.