

Electronic Arts v Zynga

Real Dispute Over Virtual Worlds

by Jennifer Lloyd Kelly and Leslie A. Kramer | October 4, 2012

Electronic Arts Inc.'s ("EA") recent lawsuit against Zynga Inc. ("Zynga") filed in the Northern District of California on August 3, 2012 is the latest in a string of disputes where a video game owner has asserted that an alleged copycat game has crossed the line between lawful copying and copyright infringement. See N.D. Cal. Case No. 3:12-cv-04099. There, EA has accused Zynga of infringing its copyright in *The Sims Social*, which is EA's Facebook version of its highly successful PC and console-based game, *The Sims*. Both *The Sims* and *The Sims Social* are virtual world games in which the player simulates the daily activities of one or more virtual characters in a household located in the fictional town of SimCity. In the lawsuit, EA contends that Zynga's *The Ville*, released for the Facebook platform in June 2012, copies numerous protectable elements of *The Sims Social*. EA claims this includes, among other things, aspects of its character creation feature, the look and feel of the starter homes and choice of decorative elements, the characters' household activities and bodily needs, and the "unique visual manner and style" in which characters socialize with each other.

These disputes – pitting video game companies against one another – often are resolved quickly because of the uncertainty both sides face. Copyright law only protects the expression of ideas, not the ideas themselves. Thus, there is no protection under copyright for general concepts, plots, or genres, stock or standard elements of a work that are customary to the genre (known in copyright parlance as *scenes a faire*), or ideas that are said to be "merged" with their expression (meaning, there is only a very limited number of ways to express a particular idea). But what does this actually mean in the video game context? Generally, that a game's overall theme, features driven by that theme, rules, stock characters, and method of play are not protectable, whereas its layout, look and feel, storyline, dialogue, sounds, and underlying code are protectable. Still, determining whether the alleged similarities between two games relates to these generally accepted categories of protectable content, thereby giving rise to a claim for infringement, is not as easy as one might think.

There are a couple of reasons for this. First, copying of games has become so commonplace in today's game industry (insiders refer to the practice as "fast follow") that often it is hard to determine who originated the content at issue. A common—and surprisingly effective—defense is that the potential plaintiff itself copied the expression from some oth-

er game (or perhaps, a book or a film), and thus, has no basis to assert a claim over that content. In this scenario, whether the alleged similarities between the two games pertain to protectable expression becomes, frankly, irrelevant.

Second, with respect to today's most popular breed of video games—those built for mobile devices and social networking platforms—few companies to date have been willing to let a court decide where the line falls. Disputes over alleged copycat games frequently are resolved short of litigation; indeed, many get no further than an unanswered demand letter, particularly when the recipient of the letter unilaterally decides to make changes to the game. But even the disputes that have made it to court typically settle quickly, before any rulings on the merits of the copyright claim. *E.g.*, *Psycho Monkey v. Zynga*, N.D. Cal. Case No. 09-cv-00603 (*Mob Wars v. Mafia Wars*); *Psycho Monkey v. YouPlus*, N.D. Cal. Case No. 09-cv-00638 (*Mob Wars vs. Mobsters*); *Tetris v. Biosocia*, S.D.N.Y. Case No. 09-cv-02310 (*Tetris vs. Blockles*); *Zynga v. Vostu USA, Inc.*, N.D. Cal. Case No. 11-cv-02959 (multiple games); ; *Hasbro, Inc. v. RJ Softwares*, S.D.N.Y. Case No. 08-cv-6567 (*Scrabble vs. Scrabulous*)).

Despite this trend, the District of New Jersey recently ruled on summary judgment that a game developer, Xio Interactive, had crossed the line into copying of protectable video game content with its game, *Mino*, and infringed the plaintiff's copyright in the game *Tetris*. *Tetris Holding, LLC v. Xio Interactive, Inc.*, No. 09-6115, 2012 U.S. Dist. LEXIS 74463 (D.N.J. May 30, 2012). There, Xio admitted it had been inspired by *Tetris* in its effort to create its own version of *Tetris* for the iPhone, but contended that all it had copied was *Tetris*'s rules, function, and "expression essential to the gameplay," which Xio contended could not give rise to a copyright claim. The court agreed with Xio that certain elements of the game that had been copied were not protectable, including the general concepts of having game pieces fall from the top of the screen and allowing the player to rotate the pieces while they fall. But it rejected Xio's assertion that there were only a limited number of ways to express the ideas and rules embodied in *Tetris*, concluding that much of what Xio had copied was protectable expression. This included the design, movement, color, shape, and shading of the game pieces, the game's dimensions (20 units high by 10 units wide), the previewing of the next piece to fall, "ghost pieces" (allowing a player to see where the piece will fit if it is not moved), and "garbage" lines (a random row of blocks placed on the board by the game).

What guidance the *Tetris* case will provide for mobile and social game companies going forward, however, is hard to say. Its holding is limited by the court's conclusion that, because *Tetris* is a "wholly fanciful" game with "no grounding in the real world," there were no "standard, stock or common elements" that had to be disregarded in the infringement

analysis. This is consistent with prior decisions involving arcade or console-based games, wherein games that are fanciful (such as Pac-Man) generally have received greater protection against infringers than games based on sports or other real life activities (such as golf or martial arts), because such games do not consist almost entirely of unprotectable elements like common sports moves, stereotypical characters, and scoring systems. Compare *Midway v. Bandai*, 546 F. Supp. 125 (D.N.J. 1982) and *Atari Inc. v. North American*, 672 F. 2d 607 (7th Cir. 1982), *cert denied*, 459 U.S. 880 (1982); with *Incredible Techs. Inc. v. Virtual Techs. Inc.*, 400 F.3d 1007 (7th Cir. 2005); *Data East USA Inc. v. Epyx Inc.*, 862 F.2d 204 (9th Cir. 1988).

Will the *Electronic Arts v. Zynga* case buck the current trend among game companies to resolve their disputes quickly and privately? And if so, where will the court draw the line in the virtual world? Only time will tell. Stay tuned.