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On the Overall Protection of Video Game Copyright

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Abstract

With the expansion of game industry, the improvement of legislation, and the development of judicial practice, the overall protection of video game copyright is becoming gradually necessary. The overall protection of video game copyright is not only determined by the features of video game, but also required by industry development and judicial practice concerning copyright. After discussing the necessity and feasibility of the overall protection of video game copyright, this paper come to the conclusion that overall protection is more suitable for Video Games.

Keywords

Overall Protection; Split Protection; Video Gams.

1. Necessity of the Overall Protection of Video Game Copyright

According to the report[1] published by the World Intellectual Property Organization (WIPO) at its official website on September 2022, quite a number of countries have started the overall protection of video game. On September 19, 2013, Court of Justice of the European Union decided in the judgment on the Nintendo case[2] that video game consists of computer programs, narrative elements, images, and sound elements, which should be protected by the copyright law as a whole.

1.1. The Protection of Video Game as a Whole is Determined by its Features

Video game mainly consists of two components, namely computer programs and the audio-visual elements presented through the operation of computer programs, including music, videos, animations, and images. The nature of video game is a computer program, which is presented by audio-visual elements. Computer program and audio-visual elements are integrated with each other through the operation of computer program.

1.1.1. Computer Program Cannot Involve All Elements of Video Game That Enjoy Copyright

According to the Regulations on the Protection of Computer Software in China, “computer program refers to the coded instructional sequences - or those symbolic instructional sequences or numeric language sequences which can be automatically converted into coded instructional sequences - which are for the purpose of obtaining a certain result and which are operated on information processing equipment such as computers”[3]. Some scholars believe that, since the “computer program” stipulated by the Copyright Law must be coded instructional sequences[4] that can be run by computers and command computers to fulfill a certain task, the coded data called by “coded instructional sequences” cannot constitute computer program. The writer agrees with that opinion. According to the explanations of some countries and international organizations in relevant legislation[5], “computer program” is defined by terms such as “can be run by computers”, “used by computers”, and “for the purpose of fulfilling the function of computers”. In other words, the “computer program” of video game only contains the instructional sequences that can be run by computers, excluding the coded data called by those instructional sequences. Music, images, and animation effects that represent the coded data cannot constitute “computer program”, or be protected as a part of

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"computer program" of video game. Therefore, if video game is simply understood as a computer program, the elements represented in audio-visual form during the running of game cannot be included. However, those elements are created by right holders through innovation and thus should enjoy copyright protection. In addition, in terms of creation process, video game is different from general computer program, as it requires script design at the first place and then makes overall arrangements on elements involving fine arts, music, and animation based on script. Some video games even involve plot arrangement and the setting of game rules. As early as January 20, 1982, in the Stern Electronics, Inc. V. Kaufamn case decided in the United States, it has been pointed out that the originality of video game lies in its audio-visual expression, and that computer program is merely a tool that shows such audio-visual expression[6]. Some domestic scholars also hold the opinion that "game designers can be deemed as a film director and game programming is equal to film directing, although they adopt different techniques."[7] The creation of video game cannot be seen as being entirely equivalent to the creation of film, neither can the audio-visual expression of video game be deemed as being equal to that of film. But to some extent, video game is similar to film. If video game is classified into computer software as a scientific work, its artistic elements would be missed.

1.1.2. Audio-Visual Elements are Not All Elements of Video Game that Enjoy Copyright

Similarly, although plots, images, and music might best reflect the originality of video game, those audio-visual elements cannot involve all the elements of video game that enjoy copyright. At the early creation stage of video game, the game images and sounds cannot meet the requirements of copyright law for originality, but it cannot be denied that computer program can enjoy copyright protection as a scientific work. In the Stern Electronics. Inc. V. Kaufamn case, the judge has also made it clear that the underlying computer program is independent from audio-visual works, so it can be protected [8]. Therefore, by merely regarding video game as film-alike work or audio-visual work, the computer program cannot be included. From another perspective, the most distinct feature between video game and film is interactivity, which is decided by the operability of compute program. It can be said that the audio-visual expression of video game is supported by computer program through underlying technology rather than shown by traditional ways such as filming, so the audio-visual elements presented by video game can bring completely different feelings to audiences compared with books or films. As a result, when inspecting the features of video game, we should inspect both audio-visual elements and computer program.

1.2. The Inherent Demand of Substantive Similarity Identification in the Determination of Copyright Infringement

In judicial practice, the standard that combines "contact and substantive similarity" is adopted to determine copyright infringement. When deciding whether there is substantive similarity between two works, in spite of their types, the court would not split factors before comparison. For example, a film would not be split into music work, literary work, and work of art for comparison. Meanwhile, the perception and experience of related audiences also constitute one factor that determines copyright infringement [9]. However, in terms of video game, when playing it, players perceive the integrity that combines a series of factors such as music, images, characters, plots, rules, and interfaces. Therefore, in the judgment on substantive similarity, correct conclusions can only be reached by regarding video game as integrity and viewing from the perspective of player (namely general observer). That is why there is a slim chance that every factor constitutes substantive similarity in split protection. Those factors are split from the integrity.

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1.3. The Overall Protection of Video Game Copyright is Prompted by Industry Development

In recent years, the video game industry has achieved significant progress in China. According to the 2021 China Gaming Industry Report jointly released by the Game Publishing Committee of China Audio-Video and Digital Publishing Association (GPC) and China Game Industry Research Institute on August 19, 2022, "the actual sales revenue of game market in China reached 296.513 billion yuan in 2021, increased by 17.826 billion yuan from the previous year, with a year-on-year growth of 6.40%." Meanwhile, "game users in China reached 666 million in 2021, increased by 0.22% year on year." "The scale of users grows by tens of millions per year."[10] The report has also pointed out that, with the intensifying competition in China's game industry, product market witnesses an obvious Matthew effect. Leading enterprises have prominent advantages in user scale and market share, while small and medium game enterprises are faced with severe competition pressure, especially constrained by development capitals and promotion channels, thus being caught in further squeezed development space [11].

In the face of severe competition pressure and a market environment where operation cost is rising, most of enterprises have chosen "free-riding", namely imitating existing games that deliver great benefits through a different form. The cost of developing a new game is higher than the compensation for copyright infringement. The case of Hearthstone is an example [12]. Hearthstone is the most profitable game created by Blizzard, which generated $173 million in the nine-month open beta test in 2014. According to the data of Superdata, in 2017, Hearthstone ranked the 8th on the online PC game revenue list with $ 217 million, even excluding the data on mobile terminals [13]. Due to the model of factor split protection, among five factors including "Hearthstone logo", "game interface", "card face design", "game text description", and "video and animation effects", the court decided that only the "animation for card store and opening extension pack" of "video and animation effects" can be protected in accordance with copyright law, and that the game created by the defendant infringed the right of reproduction of the plaintiff, as the defendant reproduced the "animation for card store and opening extension pack" created by the plaintiff. Other accusations of plaintiff were all dismissed. In the end, the defendant was ordered to compensate the plaintiff for economic loss of 50,000 yuan.

Thus, it can be seen that, since the factor split protection cannot provide comprehensive protection for video game copyright, the compensation for copyright infringement is far lower than the cost of developing a new game, or even than the profits generated by the "free-riding" game during its operation. Due to low cost of breaking the law, a large number of enterprises are reluctant to invest in the development of new game, but turn to copy the existing successful games in the market to seek profits. Consequently, the market is filled with games of similar qualities, presenting low innovation ability.

1.4. The Overall Protection of Video Game Copyright is Urgently Needed by Practice

On the one hand, in terms of judicial practice, split protection forces judges to handle a great number of infringement comparisons with different factors, and hear cases involving trademark right and unfair competition. It has been mentioned in the previous part. Factor split protection is only a makeshift in judicial practice. In the future, instead of splitting game factors, many cases will identify the overall dynamic picture of game as audio-visual work or film-alike work. Even so, some games that only have still images cannot be included and protected. Some scholars think that factor split protection presents obvious transitional feature [14]. In addition, video game is not only presented by "continuous dynamic pictures". There are also text-based MUD games[15] and sound-centered games. The approach that only includes continuous

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dynamic pictures into copyright protection cannot meet the requirements of complicated judicial practice concerning video game.

On the other hand, in terms of copyright utilization and transfer, when judicial practice involves the copyright license and transfer of video game, the game is considered as a whole rather than split factors. The more detailed the factor splitting is, the higher the cost will be for copyright holders. For work users, the consideration and transaction cost they must pay will also increase. The overall protection of video game can effectively reduce the negotiation costs and transaction fees between right holders and work users. So, it is a more economic and efficient approach.

2. Feasibility of the Overall Protection of Video Game Copyright

The overall protection of video game copyright is not only necessary but also feasible in practice. The protection of film copyright has witnessed the transformation from being unprotected, to split protection, and to overall protection, which can render important reference to the overall protection of video game copyright. Meanwhile, the Copyright Law of the People's Republic of China has finished its third amendment. According to the Article 3 of the current edition of the Copyright Law of the People's Republic of China, the Item 9 "other works as provided in laws and administrative regulations" has been amended to "other intellectual achievements that meet the characteristics of works". Due to this amendment, the type of works will no longer be stipulated based on a closed legislative mode by the Copyright Law of the People's Republic of China. Therefore, even if video game is not included by the first 8 items of the Article 3 of the Copyright Law of the People's Republic of China, the current edition of the Copyright Law of the People's Republic of China can still make it possible for video game to receive overall protection.

2.1. Reference of Overall Protection of Films

When new technologies are posing challenges to copyright law, it is inevitable to make constant exploration and adjustment. Over the past 100 years, the protection of film copyright has undergone a process from being unprotected, to being protected along with other types of works, and being protected as an independent object. Meanwhile, the film industry has also developed into its current large scale. It can be said that the film industry and the law system related to film copyright protection have witnessed mutual promotion and common development. On the one hand, after the appearance of film, with the development of film production technology, there have been increasing demands for the protection of film copyright. On the other hand, the copyright law system has also played an important role in adjusting film production technology and ensuring the sound development of film industry. Since the film industry continues its expansion and involves more stakeholders, now there are higher requirements for the copyright law. Today, the protection of film copyright enjoys a relatively complete and sound law system.

2.1.1. Process of Receiving Copyright Protection of Films

On December 28, 1895, the Lumière Brothers of France played their short documentaries including La Sortie de l'Usine Lumière à Lyon and L'Arrivée d'un train en gare de La Ciotat at the basement of Le Grand Café Capucines in Paris through projection. They used a facility named "film camera" to play the films. Later, December 28 is marked as the birth of film, and the Lumière Brothers are called as "Fathers of Modern Film"[16]. After that, this new form of entertainment came into vogue, and film, as an emerging industry, has built a huge empire. However, related copyright system did not catch up with the thriving film industry. In fact, there were still disputes over the accessibility of film to copyright protection. At the very beginning, film was considered as a mechanical invention, and the Lumière Brothers only applied patent for their film camera. In the following days, with the development of film production technology,

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film has involved more and more complicated factors, resulting in many right infringement problems in practice, which mainly consist two types: (a) the arbitrary copy and cut of the already-produced films; and (b) the use of existing works such as novels, fine arts and music pieces in the production of films. The protection of film copyright has thus attracted people's attention. At that time, many countries in Europe and the United States stipulated the types of works based on closed legislation in their copyright laws. Consequently, film could not be classified as any type of works to receive protection. To solve this problem, in juridical practice, the majority of countries included film into certain type of works to protect it. Since film production technology was already mature back then and many countries agreed that photography works could be considered as the object of copyright protection in legislation and judicial precedents, a large number of countries considered film as "a group of moving photos" to protect it [17]. But "a group of moving photos" were protected as photography works, for some countries that rendered weak protection and limited rights to photos, such as Germany, film did not receive enough protection. Furthermore, for countries where registration formality was required, such as the United States, the right holder of film had to copy the cinefilm on sensitive papers one by one, to complete the registration of "photography works" [18].

Until the revision of the Convention de Berne (Berlin Text) in 1908, film, for the first time, was classified as an object of copyright protection [19]. After that, countries started to stipulate film as an independent type of works in domestic laws [20]. The Copyright Law of the People's Republic of China implemented in June 1991 read "cinematographic, television and video-graphic works" in Article 3. In 2020, according to the amendment to the Copyright Law of the People's Republic of China, it was amended as "cinematographic works and works created by a process analogous to cinematography". Such amendment was made to meet the requirements of the Convention de Berne and the TRIPS Agreement. In 2021, after another amendment to the Copyright Law of the People's Republic of China, the item "cinematographic works and works created by a process analogous to cinematography" has been replaced by "audiovisual works", and the Article 17 specifically stipulates that audiovisual works include cinematographic works, television play works and other audiovisual works.

It has roughly taken 60 years for film to enjoy the legal status of copyright as an independent work, after being deprived of protection at the beginning and then being included into photographic works to seek protection. Through long and constant adjustment, the simple rules at the very start have finally developed into a complete legal system.

2.1.2. Reference Significance for Video Game

Through reviewing the process of film copyright protection, it can be easily told that film works share many similarities with video games: (a) Both are the collection of complex factors. Film is often regarded as a complex work made through cooperation. During the production of a film, elements such as plot, dialogue, music and art are assembled, so the final work requires the creation of different people. It is the same with video game, which also assembles various elements such as rules, gameplay, story, dialogue, music, static picture and dynamic picture. (b) Both experienced similar copyright protection at the early stage. Both of them have witnessed the transformation from being unprotected to being protected as other types of works. However, film work has obtained the status of independent object because its special nature made other types of works such as "photography work" fail to provide complete protection for it. Currently, video game is undergoing a similar problem in split protection. (c) The operation of both industries are characterized by complexity, precision and meticulous division of labor, which requires special copyright protection law. During the production and post-operation of film, various parties have to jointly play their roles, including directors, producers, actors and actresses, editors, photographers, distributors and projectionists. The film industry generates huge economic benefits, and "photography work" cannot fully cover such huge industry scale. Similarly, the launch of a video game also involves a lot of work such as planning, programming,

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and art and character design. The live game or competitive game even involves the interests of more complex stakeholders such as game publishers, broadcast platforms, and game players. In some countries, the market value of video game has exceeded the combined values of film and music industries [21]. In the face of such huge industry scale, it is not sure whether "audiovisual works" can continue covering video game and providing complete legal protection for it in the future. Considering the development of film copyright protection, when the range of "audiovisual works" cannot cover video game, it is necessary to enact laws that classify video game as an independent type of work.

2.2. Amendment to the Copyright Law of the People's Republic of China Makes it Possible for Overall Protection of Video Game

2.2.1. Legislative Changes

Compared with the 2010 Copyright Law, current Copyright Law of the People's Republic of China has three distinct changes in terms related to the composition and type of work:

First, with regard to the composition of works, "can be replicated in some tangible forms" has revised as "can be expressed in a certain form". In fact, before the amendment, some scholars had questioned the requirement of "can be replicated in some tangible forms" [22]. In recent years, there have appeared judicial precedents that focused on new works, such as the hair design copyright case of "10 representative attractions around the West Lake" [23]and the music fountain copyright case [24]. Discussions about "replicability" have attracted great attention. The amendment to the Copyright Law of the People's Republic of China has replaced "can be replicated in some tangible forms" with "can be expressed in a certain form", so the range of copyright protection has been appropriately expanded, related disputes may be reduced, and related laws will be stricter.

Second, "cinematographic works and works created by a process analogous to cinematography" has been replaced by "audiovisual works". At the same time, according to the Article 17 of the Copyright Law of People's Republic of China, audiovisual works include cinematographic work, television play works and other audiovisual works.

Third, with regard to the type of works, the Item 9 "other works as provided in laws and administrative regulations" has been revised as "other intellectual achievements conforming to the characteristics of the works". Although the 2010 Copyright Law of the People's Republic of China included the listing of "other works", it was restricted by "provided in laws and administrative regulations". Therefore, back then, the types of works were listed based on closed model, namely the listing must be clearly stipulated by the copyright law or other laws and regulations. Compared with that, the new amendment to the Copyright Law of the People's Republic of China has listed types of works based on open legislation. As long as the work meets the provisions of the Item 1 of Article 3 of the Copyright Law of the People's Republic of China and conforms to the characteristics of works, it can be protected under the copyright law.

2.2.2. Video Game Conforms to the Constitutive Requirement of Works

According to the Item 1 of Article 3 of the Copyright Law of the People's Republic of China, "for purposes of this Law, the term "works" means intellectual achievements in the fields of literature, art and science, which are original and can be expressed in a certain form." Scholars have further summarized the constitutive requirements of works [25], including: (a) they belong to the fields of literature, art and science; (b) they are original; (c) they can be expressed in a certain form [26]; and (d) they are intellectual achievements.

1) Video Game Can Belong to "Fields of Literary, Art and Science"

Due to the complexity of video game, it has the attributes of both scientific works and artistic works. The computer program used in video game shall be considered as scientific works and belong to the field of science. However, in terms of the expression form of video game, it

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possesses the function of expressing subjective emotions or reproducing objective things, which are the two basic functions of art. Furthermore, the audiovisual elements of video game such as pictures, music and animation also belong to the field of art. That being said, this paper believes that right holder adopts computer program as a method to express emotions or reproduce things, and that such method aims to present the art of video game although itself is a kind of scientific work in copyright law. Therefore, video game should belong to the field of art.

2) Being Original

First, the originality of video game cannot be denied because some video games are not original, just as the originality of photography work cannot be denied since some photos for the pure purpose of replication are not original. The legislation of China does not have a specific explanation for "originality" [27]. Some scholars have theoretically interpreted originality as "a work that is independently created by someone, not or basically not the replication, plagiarism or imitation of other works"[28]. Other scholars believe that "being original" means "the creation of a work is the result of some people's own selection, choice, arrangement, design and combination, neither replicated based on the existing forms nor deduced from existing programs or procedures (also known as techniques)" [29]. Some scholars put forward the concept of "originality" and even state outright that "the standards for originality are relatively complex"[30]. Even the Glossary of the Terms of the Law of Copyright and Neighbouring Rights released by the WIPO has not given a detailed and deepening explanation of "originality"[31]. Due to the lack of specific explanation in legislation and different opinions in academy, in juridical practice, the identification of "originality" basically depends on different cases, without unified standards. Generally speaking, the understanding of "originality" consists of two parts, namely "independent creation" and "intellectual result". First, it means "the independent creation of a certain person", emphasizing that the work must be created by someone independently, not by plagiarizing or imitating existing works. Second, it requires the work to be the result of someone's "intellectual creation", present "creativity" to some extent, and show the personal feature of someone based on his or her different selection and judgement[32].

If a video game is created by author, or independently made by game designer and other creators, rather than through plagiarism, such game will conform to the requirement of "independent creation" in originality. In the creation process of video game, the creator has to make choices in terms of rules, pictures and music, so as to reflect his or her personal feature in the final video game and meet the requirement of "intellectual result" in originality.

3) Video Game Can be Expressed in a Certain Form

Whether being stored through cassette and CD, or stored directly on the hard disk of computer through downloading, or even stored on the server through "cloud gaming", it is believed that a game has been copied on a carrier in a tangible form. In addition, when a game is running, its pictures can be replicated through screenshots, recordings and videos. The current Copyright Law of the People's Republic of China has revised the requirement of "replicated in a tangible form" to "can be expressed in a certain form", which exerts little influence on video game. Video game can be replicated in a tangible form, and "being replicated in a tangible form" itself belongs to "can be expressed in a certain form". Therefore, it arouses no further discussions or disputes over the fact that video game conforms to the requirement of "can be expressed in a certain form".

4) Video Game Belongs to Intellectual Achievements

Some scholars have explained "intellectual achievements" by comparing existing things in nature. For example, it goes beyond doubt that the Goddess Peak on the Three Gorges of the Yangtze River is a piece of art work made by nature. It cannot be considered as a work by copyright law as it is not sculptured or created by people[33]. The work mentioned by the

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copyright law must be an intellectual achievement. In other words, it must be the result of people's intellectual creation and the expression of people's inner emotions or thoughts. With regard to the production of video game, it embodies people's intellectual creation from the design of play rules, interface and style, to the processing of images, sounds and music, and to the writing of programs. Therefore, video game belongs to intellectual achievements.

2.2.3. Possible Types of Video Games

Judging from the current Copyright Law of the People's Republic of China, video games as a whole do not belong to the types of works listed in the first 8 items of Article 3. However, based on the above analysis, video games can belong to the "fields of literature, art and science", have originality, can be expressed in a certain form, and are intellectual achievements. Therefore, it is mostly possible that video games can be classified into the Item 9 of Article 3 of the current Copyright Law of the People's Republic of China: other intellectual achievements conforming to the characteristics of the works. Although the provision of "other intellectual achievements conforming to the characteristics of the works" has realized the transformation from "a statutory type of works" to "an open type of works" in China, such type of works still does not have specific provisions, and the type of works can only be identified by court in individual cases. Different courts might have different judgements, thus creating great uncertainty to the classification of video games.

3. Conclusion

To sum up, the protection of video copyright is based on the premise that video game is regarded as a whole. Currently, the extensively applied split protection in judicial practice can only be regarded as a makeshift. With the rapid expansion of video game industry, the meaningful exploration of video game copyright protection in legal system will help resolve disputes in practice and meet the urgent requirement put forward by technological development. To respond to this urgent demand, the first step is to realize the overall protection of video game copyright through legislation and judicial practice.

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[6] "Someone first conceived what the audiovisual display would look like and sound like. Originality occurred at that point. Then the program was written." Stern Electronics, Inc. V. Kaufman, United States Court of Appeals, Second Circuit. January 20, 1982 669 F.2d 852, 213 U.S.P.Q. 443.

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[23] Civil Judgment of Hangzhou Intermediate People's Court, Zhejiang Province, (2011) Zhe Hang Zhi Zhong Zi No. 54.

[24] Civil Judgment of Beijing Intellectual Property Court, (2017) Beijing 73 Min Zhong No. 1404.

[25] See Wang Bing et al.: Basic Course of Intellectual Property Rights, Tsinghua University Press, 2016, pp. 31-32; Edited by Wu Handong: Intellectual Property Law, Peking University Press, 2014, pp. 50-51; Edited by Liu Chuntian: Intellectual Property Law, Higher Education Press, 2015, pp. 55-57.

[26] Since the 2010 Copyright Law of the People's Republic of China used the phrase "can be replicated in some tangible forms", textbooks before the implementation of the current Copyright Law of the People's Republic of China enacted in June 2021 also used the phrase "can be replicated in tangible forms" rather than "can be expressed in a certain form.

[27] Coincidentally, the "Definition" of Article 101 of the 1976 American Copyright Act and the legislative explanations of Congress missed the interpretation of the term "original work", namely "originality".

[28] Edited by Wu Handong: Intellectual Property Law (Fourth Edition), Peking University Press, 2014, P50.

[29] Edited by Liu Chuntian: Intellectual Property Law (Second Edition), Higher Education Press, 2003, P45.

[30] Written by Wang Qian: Course of Intellectual Property Law (Fifth Edition), China Renmin University Press, 2016, P25.

[31] The WIPO defines "originality" as: Originality in relation to a work means that it is the author's own creation and is not copied totally or essentially from another work. Edited by the WIPO, translated by Liu Bolin: Glossary of the Terms of the Law of Copyright and Neighbouring Rights, Peking University Press, 2007, P171.

[32] Mr. Zheng Chengsi once argued: "If a work really presents judgment and selection, it is difficult to deny the originality of the work, namely, it is difficult to deny its eligibility for copyright protection." Zheng Chengsi: Copying, Originality and Copyright Protection, Chinese Journal of Law, March 1996, Vol. 18, No. 2 (Total No. 103).

[33] See Wang Qian: Intellectual Property Law Course (Fourth Edition), China Renmin University Press, March 2014, P25.