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***PROTECTION OF VIDEO GAMES UNDER INDIAN AND THE UNITED STATES OF AMERICA'S COPYRIGHT LAW***

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**Abstract**

*Video games raise various legal questions and challenges for the IPR system, mainly due to the complexity and segmentation of the game and there is some particular problem with a particular video like trademark registration, and copyrighted content directly such as sound effects. The current area of the legal protection of video games is very complex. Though Art. 2 of the Berne Convention protects video games under copyright protection. Video game is also subject to protection under the national law of the member states, protection of video games is required in the world of technology and creativity. The modern game contains audiovisual few features software that interacts with a different part of the video game. The present study employs the doctrinal method of research and is limited to the protection of video games under the Indian Copyright protection and the United State of America Copyright Protection.*

**Keywords:** *Video game, Indian Copyright, US Copyright*

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## 1.0 Prologue

The video game industry has reached a critical juncture in its efforts to prevent piracy; as publishers and developers adopt more stringent copyright enforcement technologies, consumers are becoming more vocal about the restrictions these technologies place on their use. Furthermore, there is a growing body of evidence to suggest that the heavy-handed right management technologies used in video games today may be counter-productive as they provide little incentive for consumers to purchase legitimate copies of games. If an effective method of regulating consumer behavior is to be found, the motivations of pirates must be examined.

This research could, however, have implications throughout the creative industries as a whole, as copyright protection technologies not only have a dramatic effect on consumer rights but seek to expand the modern scope of copyright law beyond its traditional limits. It is therefore essential that the areas in which such technologies transcend these limits be identified and challenged if the balance of the law is not skewed too far in favor of copyright holders.<sup>1</sup> The video game industry is a serious business. For instance, in 2009 video game sales overtook even the Hollywood film industry in terms of gross profits.<sup>2</sup>

The purpose of this paper is to shed some light on the advantages and shortcomings of current copy-protection methods employed in video games, how those methods challenge traditional copyright norms, and to put forward several observations as to how the industry may seek to evolve in the future.

The biggest challenge facing the video game industry today is that of piracy.<sup>3</sup> The perceived failure of copyright law has resulted in a swift and decisive technological response from the industry. Several developers have argued that used game sales are harming the industry as they do not generate any revenue for creators.<sup>4</sup> The problem of enforcing compute program copyrights against non-identical copying.<sup>5</sup> Although copyright protection through registration

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<sup>1</sup> Calum Darroch, *Problems and Progress in the Protection of Videogames: A Legal and Sociological Perspective*, 1 MANCHESTER REV. L. 136, 14

<sup>2</sup> *Id.* at 15

<sup>3</sup> *Id.* at 25

<sup>4</sup> *Id.* at 27

<sup>5</sup> Theodore J. & Grabowski Jr., *Copyright Protection for Video Game Programs and Audiovisual Displays; and - Substantial Similarity and the Scope of Audiovisual Copyrights for Video Games*, 3 LOY. L.A. ENT. L.J. 139, 15 (1983)

as a literary work is available for computer programs. Software copyright has some serious drawbacks.<sup>6</sup> One drawback is that only the particular expression of the program is protected by the copyright. That is, only the specific pattern and sequence of specific program instructions are protected. Just as there is more than one way to add two numbers to get, for example, the number 10 (5+5), 2+8, 6+4, 9+1, etc, there is countless way to write a computer program to accomplish any given task.<sup>7</sup>

Video games have brought challenges to intellectual property laws. The main problem video games put in copyright is that they are interoperable processes. The interactive nature of video games makes players more like writers and undermines the authority of the game creator. Video game players both create and perform creative experiences during their play.<sup>8</sup>

Video games only get copyright infringement until they match non-binding content. So the traditional copyright law may be those game developers are not enough defenders as writers.<sup>9</sup> Video game infringement has been a problem since the introduction of the first video game that may have been copied and resold- or even shared, as was the case in the early years of personal computers.<sup>10</sup> Although video games primarily enjoy copyright protection, they can also enjoy legal protection under industrial property laws, namely by virtue of registered patents, utility (useful) models, and trademarks. Important is also the legal protection that can be enjoyed if certain data and information fall under the trade secret category under the effective protection of competition Act.<sup>11</sup>

The video game is considered a complex work enjoying copyright protection and incorporating elements – each of which could be the standalone object of copyright law, including computer programs and audio-visual works. For this reason, when a video game is to be developed, subsequently distributed, and used, existing copyrights established during the creation of another video game over its components should be taken into account.

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<sup>6</sup> JOE LINHOFF, *VIDEO GAMES AND REVERSE ENGINEERING: BEFORE AND AFTER THE DIGITAL MILLENNIUM COPYRIGHT ACT*, 31, 2 (2004)

<sup>7</sup> *Id.* at 6

<sup>8</sup> Greg Lastowka, *Copyright Law and Video Games: A Brief History of an Interactive Medium*, 32, 3 (2013)

<sup>9</sup> *Id.* at 5

<sup>10</sup> Maxim V. Tsotsorin, *Piracy and Video Games: Is There a Light at the End of the Tunnel?*, SSRN ELECTRONIC JOURNAL, 5 (2012), <http://www.ssrn.com/abstract=2334057> (last visited Mar 25, 2022)

<sup>11</sup> Hristina R Georgieva, *Legal protection of videogames*, 9, 13

Video games are a significant economic and cultural force today. An entirely separate industry has developed out of watching other people play video games. In 2014, Amazon edged out Google to purchase Twitch for \$970 million.<sup>12</sup> Twitch, in turn, aided the rise of the new phenomenon of competitive gaming or “eSports,” in which video game players compete against each other, in front of massive arena crowds and even larger online audiences, for millions of dollars in prize money.

Mobile gaming- is defined as gaming that takes place on smartphones and tablets. Smartphones and tablets that run on Apple iOS and Google Android software function as video game platforms. Mobile gaming is arguable “the largest and fastest-growing area of interactive entertainment within the video games industry.

Video games are copyrightable as computer code, as audio-visual representations of that code on a screen, and for the interactions and expression that computer code enables with its users. Video games present a unique challenge for courts in determining the appropriate scope and contours of copyright protection. Most video game copyright disputes are on the “substantial similarity” between the copyrighted and alleged infringing works. Because direct evidence of copying is often unavailable, copying may be inferred where the defendant has had access to the copyrighted work.

We stand on the shoulders of scientists, artists, a craftsmen who preceded us. We borrow and develop what they did. It is a the heart of what we know as progress.... borrowing and developing have always been acceptable.<sup>13</sup> Videogames are the product of human genius. IP law ensures protection for inventors and creators of video games. Video games attracted the attention of world technology which is lead to creativity in the video game industry. The IP in IP-intensive strikes develops a proactive strategy, which is essential to the success of developers and entrepreneurs. The applicable IPR regimes relevant are copyright, trade secret, and trademark, patent. The present study discusses the copyright protection of video games. Copyright protects of ideas including source code, character, choreography, building, conceptual arts, design, sound truck, sound effect, scripts, dialogue and running software. The copyright does not extend protection to the idea in the video game. Hence, The IP regime the videogame industry from the first vision of the game to a player’s generated content.

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<sup>12</sup> *Id.* at 15

<sup>13</sup> LADDIE, COPYRIGHT LAW: PERSPECTIVE FROM A NEIGHBOURING ISLAND 6–7 (1998)

## 2.0 Genesis of Video Games

Video games are a multi-faceted creative activity- featuring a wide range of art forms such as music, text, episodes, video graphics, and characters involving human interaction. Video games are not created as simple but are a combination of distinct elements that have each copyright ( i.e the characters in a particular video game, its song, settings, audio and video components, etc.).<sup>14</sup>

There are multiple genres in video fielded including action games role- playing games, simulation games, strategy games, music games, party games, sports games. Video games share a common element such the as computer that runs the game.

The object of this study is not the history of the gamester game. However, it is important to address that the early stages of the development of video refer to the 1961 work of *Spacewar*,<sup>15</sup> created by MIT student Steven Russel, as the first video game. The space war game was designed those two players to shoot a bullet at one another from very basic spacecraft this work led to the inspiration of many successful video games.<sup>16</sup>

## 3.0 Idea and expression dichotomy

The essential tenet of copyright law is that an idea is not protected by copyright, but the expression of an idea is protectable. Art 9 (2)<sup>17</sup> of TRIPS states that expression is protectable under copyright and not ideas, procedures methods of operation, or mathematical concepts.

Art. 2 of WCT, 1996<sup>18</sup> uses the same principle as the TRIPS agreement. The Indian copyright Act, 1957 does not have a similar provision in the protection, however, the Indian court has held that there is no copyright in an idea(s) the copyright in India protects the expression of India.

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<sup>14</sup> MR. ANDY RAMOS ET AL., THE LEGAL STATUS OF VIDEO GAMES: COMPARATIVE ANALYSIS IN NATIONAL APPROACHES 8 (2013)

<sup>15</sup> CREATORS OF FIRST VIDEO GAME “SPACEWARS!” GATHER FOR FIRST TIME EVER - VARIETY, <https://variety.com/2018/gaming/features/spacewars-history-talk-smithsonian-1203067907/> (last visited Mar 1, 2022)

<sup>16</sup> COMPUTER’S SCREEN INSPIRED FIRST VIDEO GAME, “SPACE WAR” ALL THINGS CONSIDERED, <https://www.npr.org/templates/story/story.php?storyId=197713661> (last visited Mar 1, 2022)

<sup>17</sup> TRIPS - ARTICLE 9, <http://www.cptech.org/ip/texts/trips/9.html> (last visited Feb 18, 2022)

<sup>18</sup> WIPO LEX, <https://wipolex.wipo.int/en/text/295166> (last visited Feb 18, 2022)

In the case of *Bharat Matrimony Com. P. Ltd. v. People Interactive (I) Pvt Ltd*,<sup>19</sup> The Madras High Court held that copyright protection applies to the expression of an idea, but not to an idea, technique, process, system, or method of operation.

Similarly, in the case of *Zee Telefilms Ltd v. Sundial Communication Pvt Ltd*,<sup>20</sup> the Bombay High Court has held that the law does not recognize a property right in abstract idea under the the-copyright Act to be considered protectable the merger rule of ideas and expression in Games

*In the Delhi High court, in the Mettel Inc. v. Jayant Aggarwalla*, the plaintiff alleged that copyright in their word board game marketed as “CRABBLES” it was claimed that the defendant produced a web-based game similar to that of the plaintiff, using the red pink, blue and blue titles use of identical pattern of arrangement of color title use of a star pattern on the central square. The court applied the doctrine of merger to that Hatt there was no copyright in the game as they were ideas of playing a game expressed in the work.

#### **4.0 A single video game but many works of Copyright**

Indian Copyright law has dealt with the issue of several creative contributions contained in a single work before and found that a single product can contain several works protected by copyright. The Copyright Act enumerates several categories of protectable works, including literary works, musical works, pictorial, graphic, and sculptural works, motion pictures and other audiovisual works; and sound recording.<sup>21</sup> Video game software that is the computer code that makes a video game function is protectable intellectual property because “ a computer program can be the subject of a copyright as a literary text. Video games are the result of the marriage of familiar audio-visual technology a TV screen and speakers with the nail-sized miracle of microelectronics – the silicon chip.”<sup>22</sup>

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<sup>19</sup> 2009(41) PTC709(Mad.).

<sup>20</sup> 2003(27) PTC457 (Bom).

<sup>21</sup> VANCE FRANKLINE BROWN, THE INCOMPATIBILITY OF COPYRIGHT AND COMPUTER SOFTWARE: AN ECONOMIC EVALUATION AND A PROPOSALL FOR A MARKETPALCE SOLUTION", (1998)

<sup>22</sup> Theodore J. & Grabowski Jr., *Copyright Protection for Video Game Programs and Audio-visual Displays; and - Substantial Similarity and the Scope of Audio-visual Copyrights for Video Games*, 3 LOY. L.A. ENT. L.J. 139, 20 (1983).

## 5.0 ORIGINAL WORKS IN VIDEO GAMES

Video games. Like other works of creative and artistic expression, are eligible for protection under section .. Copyright protection applies to original works of authorship fixed in any tangible medium of expression. Copyright law will however protect the original, creative, and artistic expression produced.

## 6.0 COMPUTER PROGRAMS

In India, computer programs were included in literary work, 1994 TRIPS by virtue of Article 10(1) states computer preprograms whether source or code shall be protected as literary work<sup>23</sup>, under the Berne Convention (1971) WCT 1996<sup>24</sup> in Art. 4 states computer programs are protected as literary works within the meaning of Art. 2 of Berne Conventions.

Such protection applies to a computer program regardless of mode or mode of communication. TRIPS and WCT do not define the term Computer program whatever, a computer program is defined “*as a set of instructions expressed in words, code, arrangement or some other way including machine-readable device, capable of rendering a computer or performing a particular function*”.<sup>25</sup> *The computer program is divided into; 1) application programs) System software.*

Application programs such as WordStar and VisiCalc, interact directly with a human to serve his particular need. On the other hand, the software includes like Apple- DOS or PC DOS does not satisfy a particular user need but makes the computer hardware functional and enables it to run application programs.<sup>26</sup> Hence, the copyright principles in traditional contexts, protection should be offered only to the expression of computer programs

## 7.0 LITERARY WORK<sup>27</sup>

Literary work means it is a work reduced to writing or any other similar form. Computer

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<sup>23</sup> ARTICLE 10(1) OF TRIPS AGREEMENT

<sup>24</sup> SUMMARY OF THE WIPO COPYRIGHT TREATY (WCT) (1996),  
[https://www.wipo.int/treaties/en/ip/wct/summary\\_wct.html](https://www.wipo.int/treaties/en/ip/wct/summary_wct.html) (last visited Feb 18, 2022)

<sup>25</sup> *Section 2(ff)*,

<sup>26</sup> DICTIONARY OF COMPUTING p.355

<sup>27</sup> ARTICLE 2(1) OF BERNE CONVENTION

programs, tables<sup>28</sup>, and compilations<sup>29</sup>, computer databases are considered literary works.<sup>30</sup> Computer and computer programs are respectively defined in section 2(ffb). Broadly speaking literary works are divided into prior work or primary work and derivative or secondary work. The Berne Convention<sup>31</sup> gives a collective definition to literary work. Both give an inclusive definition to literary work without giving an expressed meaning to literary work. Besides the source and object code, other parts of video games may classify as literary works as well. Many games emphasize telling a story and do so through spoken dialogues or text appearing on the screen.

### **8.0 COPYRIGHT PROTECTION OF CHARACTERS**

Characters play a very important role in video games. Some games will feature newly created fictional characters, some might use previously existing works, for example, if a new iteration in a series of video games with reoccurring characters is developed. But characters in video games can also be non-fictional; for example, football players in FIFA 15 (EA Sports, 2014), are designed to be reproduced from their real counterparts as faithfully as possible.

### **9.0 ARTISTIC WORKS<sup>32</sup>**

The visual appearance of the characters however can be protected as an artistic work under section 2 (c) of the 1957 Act.

### **10.0 MUSICAL WORKS IN VIDEO GAMES**

Music in video games is of special importance as it is the part of the game which is most independent and therefore most likely to be exploited separately this is especially true if pre-existing works have been used in the soundtrack of a video game. But even if music is created specifically for video games, it can nonetheless be commercially exploitable. Musical works do not pose any particular issue within the context of a video game; they are protected under Section 2(p) 1957 Act.

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<sup>28</sup> Section 2(o)

<sup>29</sup> SECTION 2(O) OF THE 1957 ACT. ARTICLE 10(2) OF TRIPS

<sup>30</sup> at 2

<sup>31</sup> BERNE CONVENTION, AS REVISED - ARTICLE 2, <https://www.law.cornell.edu/treaties/berne/2.html> (last visited Feb 18, 2022)

<sup>32</sup> SECTION 14 (D) OF THE 1957 ACT.



If the relevant music contains lyrics, then they are protected as literary works under the same subsection. Therefore, music in video games enjoys the same protection as it does in any other context.

### **11.0 SOUND EFFECTS AS ORIGINAL WORKS**

Sound effects, however, regardless of how skillfully crafted, do not fall under the definition of a musical work. Protection of video games as databases protected as databases.

### **12.0 OTHER ORIGINAL WORKS IN VIDEO GAMES**

the creative parts of the video games discussed above give a formidable impression of the complexity of today's video games and the various types of copyrighted works embodied in them.

### **13.0 VIDEO GAMES AS SOUND RECORDINGS AND FILMS**

While video games do not constitute a single original work as such, they may be protected as a recording if they fall under the definitions of films or sound recording with the meaning of section 14(e).

### **14.0 VIDEO GAMES AS FILMS**

The probably most important but also contentious question in classifying video games under copyright law is if video games are to be considered films.

### **15.0 VIDEO GAMES AS SOUND RECORDINGS**

The accompanying soundtrack of video games can also be protected as a sound recording by section 13(3)(b).

### **16.0 VIDEO GAMES AS MULTIMEDIA WORKS**

This vast variety of works found in video games ultimately raises the question of whether this is feasible at all. Some international courts have made this observation already and video games as single sui generis 'multimedia work'.

**17.0 MOTION PICTURES AND OTHER AUDIO-VISUAL WORKS**

The object code dilemma object code or machine language is the language that computers use to execute their most fundamental electronic functions.

**18.0 Copyrightable Subject Matter in Video Games**

Video games have evolved along with the development of Computer Science, and Technology. In the 1960s, video games only included graphics with basic forms; then the developers were able to incorporate rudimentary sound.

According to Lipson and Brain,<sup>33</sup> video game includes the following creative elements.

| <b>AUDIO ELEMENTS</b>   | <b>VIDEO ELEMENTS</b>   | <b>COMPUTER CODE<br/>(SOURCE CODE<br/>AND OBJECT<br/>CODE)</b>  | <b>OTHER SUBJECT<br/>MATTER ELIGIBLE<br/>FOR COPYRIGHT<br/>PROTECTION</b>  |
|---|---|---|--|
| <ul style="list-style-type: none"> <li>▪ Musical composition</li> <li>▪ Sound recording</li> <li>▪ Voice</li> <li>▪ Imported sound effects</li> <li>▪ Internal sound effects</li> </ul> | <ul style="list-style-type: none"> <li>▪ Photographic images (p. e. Giff, Tiff, Jpeg)</li> <li>▪ Digitally Captures Moving images (p.e. Mpeg)</li> <li>▪ Animation</li> <li>▪ Text</li> </ul> | <ul style="list-style-type: none"> <li>▪ Primary GamEngineeror Engines</li> <li>▪ Ancillary CodPluginsns (Third Party Subroutines)</li> <li>▪ Comments</li> </ul> | <ul style="list-style-type: none"> <li>▪ Video game scripts, and other literary works; well-developed</li> <li>▪ Characters;</li> <li>▪ Choreographies and pantomimes and maps and Architecture work.</li> </ul> |

<sup>33</sup> ASHLEY SAUNDERS LIPSON & , ROBERT D. BRAIN, VIDEOGAME LAW: CASES, STATUTES, FORMS, PROBLEMS & MATERIALS (Carolina Academia Press 2nd) (2019)

However these, elements are not protectable per se, unless they meet jurisdiction to and criteria for protection; in this regard, the United StateAmerica law protects only original works of authorship fixed in a tangible medium of expression.<sup>34</sup>

**19.0 Persons engaged in the development, marketing, and production of Video Games**

It is overwhelming that the distinct elements included in video games can deserve independent copyright protection. The number of people involved depends on the size of the project and the company involved and the kinds of platforms for which it was created and the video game involved competent professionals which may include among others, programmers, artists designers, graphic designers animators, sound editors, music composers, cinematographers, costume design, etc.

| A. PRODUCER   | B. GAME DESIGNERS  | C. OTHERS  |
|---|--|--|
| <p><i>games is like mutatis mutandis to that of a movie director. Producer supervises and ol over the creation of video games. They are others that come under this category like Director of Production.</i></p> | <ul style="list-style-type: none"> <li>• Games designers include</li> <li>• Lead designer</li> <li>• Level designer</li> <li>• Content designer</li> <li>• Game writer</li> <li>• System designer</li> <li>• Technical designer</li> <li>• User interface designer</li> <li>• Creative director</li> <li>• Writer</li> <li>• Scriptwriter</li> </ul> | <ul style="list-style-type: none"> <li><i>i. Artist, the creator of the visual art of the game</i></li> <li><i>ii. Programmer, who creates or adapts a video game</i></li> <li><i>iii. Audio Designer, who is creating sound effects and other related sound elements</i></li> <li><i>iv. Performers and actors about both voice and movement v. Producers of audiovisual and soundrecordings</i></li> </ul> |

<sup>34</sup> Section 102(a) of the U.S. Copyright Act.,

The question is whether the expert has a copy has protection? To secure copyright protection, create original work. In most of the cases, these authors have an employee and employer relationship with the developer company. If the work is not created within this relationship, the producer must ensure the proper transfer of rights to publish and market video games.

## **20.0 PROTECTION OF GAMEPLAY**

The gameplay, or how a player interacts with a game. It is the method in which the game proceeds based on the game's rules and the player's engagement. This contains the game's storyline, narrative, obstacles, and levels. This means that the game's objectivity and narrative cannot be copied by another game, protecting not only the game's applicability but also giving the game's authors the creative control to develop more games relying on the storyline of the previous game.

## **21.0 PROTECTION OF ARTWORK AND VISUAL DESIGN**

A game developer can get a copyright on the game's artwork and graphic design, but only to the degree that no one can recreate it exactly as it is. However, if the game is part of a genre that needs a few parts to be included in every game in that genre, such elements would only have copyright over their exact portrayal and not the entire element. For instance, a game with a military theme might have firearms and various types of artillery.

## **22.0 PROTECTION OF GAME CODES:**

We must first understand the role of software in gaming before dealing with game codes in the context of copyright protection. The first is Game Engines, which are basic frameworks that game creators use to develop games, and the second are readable software codes that allow games to be played on a variety of devices. The framework (the Gaming Engine) is either owned by the creators or licensed to them. Hence, if two gaming businesses employ the same Game Engine, some key components that overlap in the two games based on the software engines' coding will be rendered beyond the scope of copyright protection.

### 23.0 PLAYER LICENSES

A user license is a contract that instructs the user of the game's conditions of use as well as any rights related to the product. It specifies the user's constraints when playing the game. Game Publishers also provide various gaming services that operate as an internet platform for accessing multiple games. for instance, Steam by Valve and Origin by Electronic Arts are two of the most prominent gaming service providers.

### 24.0 Legal Controversy in Video Game

Generally, modern games are irrefutably composed of Audio components, visual elements, and software programs are the three primary areas of gaming material.

- a) **Audio Elements** - Audio elements are an important feature of every game. Sound recordings, background music, talks, animation noises, and so on are examples.
- b) **Visual elements** All of the items that are displayed on-screen are referred to as visual elements. Photographic photos, digitally acquired moving visuals, animated still/moving images, characters, text, and other elements are included.
- c) **Software programs** - These components are in charge of running the game. They contain things like scripts, basic design, and plugins, among other things.

The discussion is based on the classification of the work as a whole- whether it is a multimedia work, an audiovisual work, or, primarily a computer program.

Some scholars argue that video games are multimedia works that come under the category of the audiovisual works, accepting that these works are fundamentally a “*series of related images*”, following the most understandable definition of the audiovisual work provided by the legislature in the USA and India.

Practically speaking, video games are meant to be played and run using a computer program with (inter) active implications for users while audiovisual works are currently defined, implying mostly passive viewer participation.

In contrast, another author also remarks that it is not easy to put a video game in the category of audiovisual due to the following aspects;

- a) *One of the authors of these works (typically, scriptwriters, directors, r, and songwriters are not the same type of writer as those who are creating a particular game ( like actor and composer, artist, etc..)*
- b) *Copyright protection for video game producers and audiovisual works does not always meet the criteria.*
- c) *Audiovisual involves certain performance rights that are common in a video game*

Classification of the video game becomes legal controversial, none has explicitly definitive answers to the question of Video game classification. There are countries like Argentina, Canada, China, Israel, Italy the Russian Federation, Singapore, and Spain that constitute Video games to be predominantly computer programs to the specific nature of the works and dependencies on the software for the application.

In the Contrast, other countries like India, the A, Belgium, Brazil, Denmark, Egypt, France Germany, Japan, South Africa, and Sweden takes into account the complexity the video games considering that video game have distributive classification. Therefore, formal protection of a different aspect of the game should be obtained separately. It depends on the specific type of work (i.e. Whether it is for writing, drawing, audio and visual, etc.

Lastly, there are a small group of countries, including Kenya and the Republic of Korea consider audiovisual as the essential element of video games, and audiovisual elements must prevail and the software used in the game be protected.

Video games include traditional works of authorship (such as pictorial and literary works, sound, and images) and software, which in this sector is called a “*game engine*”. Hence a game engine is a technical instrument used both for the development of the video game and to drive the game on the console, *smartphone or computer*. Given the nature of the game engines, they are also commonly known as “*middleware*” in the video game industry, because they provide intermediary solutions so that game developers do not need to start a game from scratch but can use the tools and resources created by middleware providers.

## **25.0 India**

In India, there is no regulated video game classification or censorship. Since gaming law is not fully developed, the legal classification derives from business practice and is based on the

technicalities of each specific case. Furthermore, the Indian Copyright Act, 1957 ( hereinafter, the Indian Copyright Act) establishes, in the preliminary section the different definitions and interpretations according to which “*artistic work*<sup>35</sup>” means;

- a) *A painting, a sculpture, a drawing, an engraving, or a photograph whether or not any such work possesses artistic quality.*
- b) *A work of architecture and*
- c) *Any other work of artistic craftsmanship.*

It is unknown whether video games can be qualified as “*Cinematographic works*” under the *Indian Copyright Act*, as there is no jurisdiction in this regard.

Section 2 of the Act, establishes that “*Cinematograph film*” means any work of visual recording on any medium produced through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual recording and ‘cinematograph’ shall be construed as including any work produced by any process analogous to cinematography including video films.”

As above, it is understood that any “process analogous to cinematography” could lead to the conclusion that video games can fall within this definition, but without relevant precedents, still it is uncertain. Following the above discussion, the legal definition of an author is (d) (vi) about any literary, dramatic, musical or artistic work which is computer-generated, the person who causes the work to be created.”<sup>36</sup>

Furthermore, the law explicitly stipulates that literary work included computer programs in *computer programs, tables and compilation, and computer databases included in literary work.*”<sup>37</sup> In the video, the game source can be protected as software or literary works.<sup>38</sup>

## 26.0 Key Stakeholders

The video game development is provided by the game developer, maybe individual or large. Major stakeholders who participated in the value chain and development process include:

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<sup>35</sup> Chapter I, Section 2(c) of the Indian Copyright Act, 1957,

<sup>36</sup> Chapter I, Section 2(d) of the Indian Copyright Act, 1957,

<sup>37</sup> Chapter I, Section 2(o) of the Indian Copyright Act, 1957,

<sup>38</sup> Section 14 (b)(ii) Indian Copyright Act.,

| MANUFACTURER   | PUBLISHER  | DEVELOPMENT TEAM  |
|--|--|---|
| <p><i>Producer responsibilities include managing the development team budgeting and quality assurance.</i></p> | <p><i>A company that publishes video games that are self-produced has acquired development or distribution rights.</i></p> | <ul style="list-style-type: none"> <li><i>(i) Artist: who creates the video game art.</i></li> <li><i>(ii) Programmer: the software Engineer whowrites or develops a game codebase.</i></li> <li><i>(iii) Level Designer A person who createslevels, Challenges, or objectives for Videogames using a set of a specific program</i></li> <li><i>(iv) Sound Engineer Technical professionals who responsible for sound effectsand sound composer of the game’s musical score.</i></li> <li><i>(v) Inspector: A game tester analyses video games’ record software errors as part of quality assurance.</i></li> </ul> |

The Video game contains several parts that, when combined, constitute the final product: the game code, the characters, the dialogue, audio/music, the video, and the storyline. All these are individually copyrightable under the Indian Copyright Act.<sup>39</sup>

<sup>39</sup> SYMBIOSIS LAW SCHOOL, NOIDA & SCRIBOARD, NEW DELHI, STUDY ON “CREATING VIRTUAL WEALTH: IMPORTANCE OF INTELLECTUAL PROPERTY IN THE ANIMATION & GAMING INDUSTRY



## 27.0 Author and the Transfer of Rights

In Mobile or online gaming, the producers, typically have full rights and therefore share most of the revenue. The main content developer can qualify as an author, along with the team responsible for setting up the theme of the game. Author<sup>40</sup> about any literary, dramatic, musical, or artistic work that is computer-generated, as the person who causes the work to be created. Therefore, in the case of the video game, authorship will be vested in the producer or publisher (as the case may be) that causes the game to be created, even if that development includes creative contributions from employees or third-party contractors.

Chapter IV of the Indian Copyright establishes that in certain cases (employment by a proprietor of a newspaper, magazine, or similar periodical under a contract of employment or apprenticeship: photograph taken, or painting or portrait drawn, engraving or a cinematograph film) the person who arranged all the element to obtain the creation of such a work is the first of one of the copyrights in the work.

In the absence of a contract of employment, the original creators of a video game are entitled to authorship rights under the Indian Copyright Act. However, in the case of a game's development, the team who conceived basic India and transformed it into an entire game would qualify as author under the Act.<sup>41</sup>

The supreme court of India, in the case of *Silver Jubilee Tailoring House and others v. Chief inspector of shops and Establishment and the Another*, has held that the proper test to ascertain if such a relationship exists is whether or not the employer has the right to control the manner of execution of the work. Factors like the degree of control, opportunities for profit or loss, investment in facilities, permanency of relationship,s and, skills required in the claimed operation also play a significant role.<sup>42</sup>

According to section 18 of Indian copyright, “a copyright owner may assign the right in an existing work to any person, either wholly or partially, generally or subject to limitations and of the whole term of the copyright or any part thereof”.

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<sup>40</sup> Section 2(d)(vi), Indian Copyright Act.,

<sup>41</sup> Section 17 of Indian Copyright Act,

<sup>42</sup> AIR 37, 1974 Scr (1) 747.,

Similarly, section 19 of the Indian Copyright explicitly expresses that *“only written, singed assignments are valid, they must also include the identification of the work, the duration and the territorial scope of the assignment. In the absence of a period for territorial scope, the assignment shall be limited to a term of five years within the geographical area of India.*

Indian law has yet to address the specific legal issues of interactive online gaming. As the behavior of avatars becomes more realistic, sophisticated, and intelligent, the question regarding the legal status of contributions made by players may give rise to disputes. Providing players special privileges for their creations and contributions to the game may add a new dimension to the gaming world

### **28.0 Economic Compensation for Authors**

The gaming business in India's online sector reached US\$1.027 billion in 2020, an increase of 17.3 percent from US\$543 million in 2016.<sup>43</sup> Mobile games, video games, and internet games all showed a spike during the statewide shutdown, with applications like 'Ludo King' and 'Carrom Pool' seeing an increase in daily active users. It's also worth noting that when India's national lockdown began, the founder of Ludo King reported an increase in active users from 13 million to 50 million.<sup>44</sup> However, as video games become more popular, there is a rise in the number of people who play them.

Video games are protected by copyright laws in India since they fall under the category of "creative works." Different features or components of the game, in particular, will be regarded as copyrightable works. Because the software in India is protected by copyright, video games created from software may also be protected separately. The plot, characters, music, and sections of the code are all important features of a video game that are protected under several kinds of "works" as defined by section 14 of the Copyright Act, 1957 (the "Act"). Since Article 2 of the Berne Convention for the Protection of Literary and Artistic Works allows for the protection of copyright, video games can also be protected through copyright law.

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<sup>43</sup> India's online gaming industry has the potential to generate \$2 billion by 2023: EY-All India Gaming Federation report, BUSINESS INSIDER, <https://www.businessinsider.in/advertising/ad-tech/article/indias-online-gaming-industry-has-the-potential-to-generate-2-billion-by-2023-ey-all-india-gaming-federation-report/articleshow/85265749.cms> (last visited Apr 14, 2022).

<sup>44</sup> How Ludo King Became a COVID Quarantine Sensation in India | NDTV Gadgets 360, <https://gadgets360.com/games/features/ludo-king-creator-vikash-jaiswal-total-users-downloads-india-success-2232634> (last visited Apr 14, 2022).

Writer's compensation by the copyright owner is governed by an employment agreement and the law of the employer's organization and may include a bonus or other form of payment as agreed upon by the parties. Again, the video game engineer must be a sole proprietor or employee bound by a contract of employment. In India, royalties, in most cases, do not form part of the compensation paid to video game creators, although Section 19(3) of the Copyright Act of India states that granting of copyright to any work will also determine the amount paid, in any, to the author or his legal heirs.

At present, producers of cinematographic works have all the rights, while contributors such as music composers do not receive benefits once a song or music has been added to the work. This is the case that follows the discretion of the Supreme Court in its landmark decision.

***Indian Performing Right Society Ltd. v. Eastern India Motion Pictures Association*** <sup>45</sup>

In the case of IPRS, the Copyright Board initially ruled that music composers and songwriters retained their copyrighted work in their music works. On appeal, the Supreme Court set aside the decision of the Board. If a songwriter or music artist has authorized a filmmaker to produce a cinematographic film that uses the author's intention, the writer may not in time demand copyright infringement. Finally, the latest Provisory amendment to the Indian Copyright Act is aimed at granting exclusive rights to music authors/producers and introducing moral rights to them as well.

The Bill proposed to replace Section 38A and 38B, with the substitution for section 38(3) ensuring that once the manufacturer has approved the installation of the cinematograph film (work), the manufacturer cannot object to enjoying the rights of the actor by the producer. However, the artist will be still entitled to the benefits of using these games commercially. Video game studios will usually be the authors and copyright owners of such creative works. India follows the English – Anglo – American system which allows a natural person to become Writer. The new copyright law (2012) must be interpreted by Indian courts to determine whether it will apply to video game providers.<sup>46</sup>

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<sup>45</sup> *Indian Performing Rights Society Ltd. v. Eastern India Motion Pictures Association (the IPRS Case) 1977 AIR 1443, 1977 SCR (3) 20,*

## 29.0 Protection of Video Games under The United State of America

Section 102 of the United States Copyright Act, 17 U.S.C. (hereinafter, called the US Copyright Act. Deals with the subject matter of copyright. It establishes that; Copyright protection subsists in original works of authorship fixed in any tangible medium of expression, from which can be perceived, reproduced, or otherwise communicated, categories;

- i. *Literary works*
- ii. *Musical works*
- iii. *Pictorial, graphic, and sculptural works*
- iv. *Motion pictures and other audiovisual works and*
- v. *Sound recordings.*

In the case of *Williams Electronics, Inc. v. Artic International, Inc.*, the court has held that, even if video games are not mentioned in this section, this type of work may comply with the requirements set out in the US Copyright Act, where it is the original, modified (either analog or digital) and may not be recognized and reproduced.<sup>47</sup>

## 30.0 Idea and expression

There is no clear distinction between video games and their defenses will vary depending on the particular game and its components. Video games can be regarded as computer programs and such are classified as writing tasks. In the early days of video game creation, its unusual design made the thin line between expression and Idea almost invisible.

The case of *Atari, Inc. v. Amusement World, Inc.*<sup>48</sup>, dealt with the similarity of Asteroids developed by Atari and Meteors created by the defendant. In this case, the court reaffirms the principle that ideas are not protected by copyright, but the only expression of option which protects video games as audio and visual works. Hence, a video game can be copyrighted as audio and visual works (and, by default as animations). Atri demanded the protection of his

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<sup>46</sup> at 47

<sup>47</sup> 685 F.2d 870 (3rd Cir.1982),

<sup>48</sup> 2547 F. Supp. 22 (D. Md. Nov. 27, 1981

video game by recording it as an audio and video service instead of recording, with a videocassette. The court included that the similarities do not involve copyright infringement, since the similarities were merely the plaintiff's views, which would not be copyrighted.

The Circuit court in the *Apple Computer, Inc. v. Franklin Computer Corp.*<sup>49</sup> has found that the court faced a problem in determining the scope of protection, as the object code of a computer is a form of expression not understandable by humans. Hence, the appeal court in the USA has held that the computer program whether it is source code or object code is copyrightable as literary work.

The third Circuit court has held in the case of *Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc.*<sup>50</sup> that the copyright protection of computer programs may extend beyond the program literal code to their structure, sequence, and Organisation.” The Whelan court broadly interpreted the expression in the copyright protection to the overall organization of the computer program opened doors for the protection of the “look and feel, or the software’s audiovisual display.

Another Landmark case was *Atari, Inc. v. North American Philips Consumer Electronics Corp.*<sup>51</sup> The plaintiff sued the U.S. branch of the Dutch Company for copyright infringement by creating a video game (called KC Munchkin) that closely resembles the Pac-Man.

The court found that there were many differences between the two parts of the game, but it was held that was sufficient for the major parts to be removed, concluding that although the play is not protected by copyright, this type of work is protected under the terms of fair use.

### **31.0 U.S. Copyright Office**

The U.S. Copyright Office states that single registration can be done on a computer program with its Screen displays. Registration will extend to any copyrighted screens produced by the system regardless of whether screen identifiers are included. Because computer programs are written work services, registration like a workbook is usually appropriate. Registration will extend to any copyright screens produced by the system, regardless of whether screen identifiers are included. However, if the imagery or explicit identity is large, registration as

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<sup>49</sup> 714 F.2 1240 (3rd Cir. 1983).

<sup>50</sup> *Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc.* 797 F. 2d 1222 (3rd Cir. 1986),.

<sup>51</sup> 672 F.2d 607, 617 (7<sup>th</sup> Cir. 1982).

visual work can be done. Similarly, if the recording of animation or audio and visual data is advanced, registration like a motion picture/audio function can be performed.

The Copyright Office has found that registrations are often sufficient to protect computer screen displays, including video games. Video games have a complex legal component in the United States. Also, other ways to protect certain features of video games are copyright (in-game features) and trademarks (eg game tile and character names).

### **32.0 Authors and Rights Holders**

There is uncertainty about how to protect video games (i.e. such as computer programs, audio, and visual work which affects the number of copyright holders who may be privileged in a particular video game.

Generally, all parties involved in the development and marketing of video game (e.g. writers, online forums, and stores) claims copyright protection. However, publishers and producers own the intellectual property rights of the video game although it depends upon the contract plans between them and the authors or business developing the game. Intellectual property rights in the video game are not automatically transferred simply because the person or organization (whether employee or contractor is paid for the efforts.

Although many publishers or producers insist on owning all IPR in the video game, as new platforms for the distribution and exploitation of such games are introduced and many smaller studios are involved in the industry, new contract programs in which authors can participate, in the value chain allow them to maintain some ingenuity property right.

In this sense, the author may be any person who contributes to the original design in the video game, or to the employer or other person to whom the work has been primed, such as the work for hire, etc. Unlike the European countries, companies may qualify as writers where that employer- employee relationship or other employment-related relationship exists. That leads to the conclusion that most employees will never be considered writers, because if they are hired to do a particular job, ownership will always be reserved for the employer, in terms of section 201(b) of U.S. copyright law.

The US copyright law is limited to visual arts that are defined in Section 101 of the U.S. Copyright Act excluding –motion pictures or other audio and video work or any other work for hire.

Contribution ownership can only be transferred in writing. In the case of people involved in online gaming who create new sets, characters, or levels with the tools provided by the video game manufacturer, unless a person transfers his or her right in writing ownership rests with that provider. The license may be in writing or described in a code of conduct. The extent of the written license is determined by the contract agreement. In the absence of a written agreement, the license is likely to mean, for instance, voluntary provision of content without written limits; in such a case, the player will be providing a specified license right for its intended purpose (e.g. use of the game).

However, under the U.S. copyright it is insisted to obtain copyright in that contribution by a written document, such as the End User License Agreement, which is a standard for this category.

### **33.0 Transfer of Rights**

Under the US copyright, a video game can be owned by two groups of people; these may be individuals or groups. When the work is done by two or more people, there may be two situations either Work that contains collective rights or a collaborative project which is a project prepared by two or more authors for contribution grouped into spare or dependent components of the organization as a whole.

The main difference between them is that the author of the collaborative work is the sole copyright owner of the content created by him, while the authors of the collaborative work share copyright throughout the work.<sup>52</sup> According to section 201<sup>53</sup> copyright in a particular work may be transferred in whole or in part to a function or license. Except for one type legally defined – work for employment,

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<sup>52</sup> Section 101 and 201 of the U.S. Copyright Act.

<sup>53</sup> Section 201 d. of the U.S. Copyright Act

created by the employee, the transferor rights (as opposed to a license) are possible by a written and duly signed agreement. In this reference, by employment; work generated for the employee according to his or her employment amount (regardless of whether there is a written agreement relating to the employment) or a special order or authorized work that falls into one of the nine categories;<sup>54</sup>

- 1- *contribution to a collective work*
- 2- *part of a motion picture or other audio and visual work*
- 3- *translation*
- 4- *a supplementary work*
- 5- *compilation*
- 6- *instructional text*
- 7- *test*
- 8- *test answer*
- 9- *atlas, provided that the parties may expressly agree in the written agreement that the work is regarded as work for the employer*

Certain definitions of classes may be important, but those definitions are not detailed here, without realizing that a video game may be suitable as an audio and visual work. If the employee qualifies as a contract employee, the employer, or the organization employed by the creator or with who he or she is contracted and not the individual who created the work.

In cases where the business contracted with the seller to create the delivery. Generally, the seller is an independent contractor and not an employee.

The goods delivered by the seller will not be eligible for an employee-prepared service. In such cases, the official employment law applies only if the employee enters one of the nine classes and the parties enter into a written agreement. Although the software is unclear, in the list of rules, certain software and video game components may be defined as audio and visual work. However, some software may not be eligible for any of the legal categories.

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<sup>54</sup> Section of 204 of the U.S. Copyright Act



Regarding About financial compensation of video game authors and participants, the U.S. Copyright Act does not define clearly what kind of payment they should receive.

Finally, in the U.S. legal system, video games are not automatically regarded as audio regarded work auburn analysis should be made of each case to determine what are the dominant features of this type of the author's work. In any case, computer code has always been the basis of video games, therefore, this would mean that the split distribution would apply to video games. However, many disputes over video games involve copyright (not copyright in computer code or other related inventions).

### **34.0 Conclusion**

Throughout this study, the study tried to analyze many different approaches that India and the US have taken legal protection of video games, the creators involved, and the transfer of copyright laws. The study found that most sites tend to protect the creative works as software, this is because probably the only thing that is common in all video games is their basic computer program.

However, when considering the latest technological advances, it is important to emphasize that, in most cases, different videogames will share the same source code or game engine when developed using the same software (middleware). This feature needs to be taken into account when analyzing the official version of video games.

The study is of the view that video games are complex, and composed of multi-copyrighted works (eg text, image, sound, characters, and software) that deserve independent legal protection. While general practices consider software to be an existing part of video games. The study also believes that the distinguishing feature of one video game is not only the basic software but also the various audio and text features created for each video game. That may include the performance of actors and artists.

Some video games which redesigned for social networks or mobile phones, such as popular card games do not stand out from the crowd and they will need to seek copyright protection through the software. At the international level, although the TRIPS agreement and the WIPO copyright Agreement, WCT include software references and audio and visual creation, international agreements provide little direct guidance on the protection of video games. Given the complexity and economic value of video games, the international community considers an opportunity to discuss and analyze the video game protections.

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