

Writing Assignment – Draft Paper

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Approved topic:

3. *Games such as Magic the Gathering or Settlers of Catan owe their success in part to novel ideas embedded in them, ideas frequently copied by later games. Are such ideas protectable under current I.P. law? Should they be?*

Should IP law protect the game industry from copycats?

Summary

This paper will discuss the possibility of current IP Law to protect the rules and implementation of a game, its character and their interaction, as well the visual, literary, and software elements of that game. Also, if such protection is desirable in order to promote the development of the game industry.

1 Introduction

The future of the gaming industry might be redefined by the result of two recent cases, involving the digital version of the game *Magic: The Gathering*, and the western themed card game “*Bang!*”. In these cases, law suits have been brought against alleged copycat games, relying on causes of action including copyright, trade dress and patent infringement. Both law suits raise important and interesting questions, such as: (i) Is it possible to protect the rules and implementation of a game? (ii) What about the characters, their interaction, plots and dialogues? (iii) What other elements of a game can be protected?

Discussions about those issues are quite relevant, since the mobile gaming industry is experiencing an invasion of clones or copycat games. While cloning has a long and varied history, it has become more prevalent with the explosion of social media and mobile games. For example, popular games such as “Minecraft” and “Flappy Bird” were followed by a great number of copycats, which took a free ride on their success.

As game development times decrease and their useful lifetime diminishes, cloning has become a very lucrative business. The game pool is full, and copying methods are increasingly easier and cheaper. The influx of copycat games in the mobile space raises some other issues, worth discussing. Are copycat games merely off-brand digital replicas or are they pure and shameless theft?

Historically, protection for video games has been obtained through intellectual property law like Copyright Law and Patent Law. The first may extend to the expressive, non-functional elements of a game, such as audiovisual display and the underlying source code, but not the ideas behind the game itself, while the latter extends to the functional aspects of games, such as gameplay mechanics.

Notwithstanding these protections, the limitations of Intellectual Property to deter cloning are a sore spot for the industry. Law suits can be expensive, lengthy, and uncertain. The protection afforded by Copyrights in video games is still a gray area. While a game itself may not be copyrightable, all of its constituent elements are. On the other hand, patents can take years to obtain and the process may be very expensive. In addition, the costs of being a victim of cloning has increased as developers invest more and more in marketing their games, only to see knockoffs emerge after a game reaches popularity and become lucrative.

However, some might argue that cloning actually propels the industry (economically speaking), creating whole genres, instigating creativeness and consequently benefiting the entire industry.

2 A quick look at Wizards of the Coast LLC v. Cryptozoic Entertainment LLC

On May of 2014, *Wizards of the Coast* (WotC), a Hasbro subsidiary responsible for publishing successful tabletop games such as “Dungeons & Dragons” and “Magic: the Gathering”, filed a law suit in the U.S District Court for the Western District of Washington against *Cryptozoic Entertainment* and its related company *Hex Entertainment*, the developers of a digital trading card game called “Hex: Shards of Fate”. *Wizards of the Coast* alleges that the game “Hex” is a copycat of “Magic: the Gathering”, specifically its online version, therefore infringing a number of aspects of *Wizard*’s intellectual property, including copyright, patent, and trade dress.

The game “Hex: Shard of Fate” was subject of a very successful Kickstarter funding campaign, which rose over US \$2.000.000, 00. Its Kickstarter page markets the game as a fusion between “Massively Multiplayer Online Games” like World of Warcraft (for which a trading card game called “Hearthstone” was previously published by Cryptozoic) and “Trading Card Games”. To a layman, one card game featuring medieval fantasy clichés like dragons, warriors and mages is much the same as any other. But from a legal perspective, that might not be the case.

2.1 The Copyright claim

Copyright protection subsists, in accordance with Section 102 of the Copyright Act of 1976, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. It includes categories such as literary works, musical works, including any accompanying words, dramatic works, including any accompanying music, pantomimes and choreographic works, pictorial, graphic, and sculptural works, motion pictures and other audiovisual works, sound recordings, and architectural works.

However there is no intrinsic protection for “games”, except to the extent the game is comprised of individual copyrightable elements, for example, the game’s artwork, the plot or dialogue, the background music, or in the specific case of a video game, the source code for the game software. The mechanics and rules of a game, however, are not entitled to copyright protection – *Tetris Holding LLC v. Xio Interactive, INC* (United States District Court, D. New Jersey. 2012 Copr.L.Dec. P 30,267, 103 U.S.P.Q.2d 1959).

In *Tetris*, Desiree Golden, a recent college graduate, and founder of a company called *Xio* decided to create a multiplayer puzzle game for the iPhone called "*Mino*" and admittedly used Tetris as inspiration. Indeed, Golden was more than inspired by Tetris as it readily admits that its game was copied from Tetris and was intended to be its version of Tetris. Regarding the copyrightable elements of Tetris, the court held:

“[In] addition to the design and movement of the playing pieces as discussed above (including the use of bright colors, the individually delineated squares within the pieces, and the downward, lateral, and rotating movement), I find the following elements are also protected expression and further support a finding of infringement: the dimensions of the playing field, the display of "garbage" lines, the appearance of "ghost" or shadow pieces,

the display of the next piece to fall, the change in color of the pieces when they lock with the accumulated pieces, and the appearance of squares automatically filling in the game board when the game is over. *None of these elements are part of the idea (or the rules or the functionality) of Tetris, but rather are means of expressing those ideas.* I note that standing alone, these discrete elements might not amount to a finding of infringement, but here in the context of the two games having such overwhelming similarity, these copied elements do support such a finding. *It is the wholesale copying of the Tetris look that the Court finds troubling more than the individual similarities each considered in isolation”.*

Wizards claim also includes alleged infringement of “*play sequence and flow*”, which is not an ordinarily recognized copyrightable work. The computer code that makes up the game software would be copyright, but there is no suggestion in WotC’s claim that Cryptozoic or Hex have copied any of the computer code, only the game elements themselves.

This potentially opens the door for copycats to imitate a successful game, without technically infringing copyright. Such practice can be quite successful (remember “Minecraft” and “Flappy Bird”?). Unlike a film, a book, or a drawing, the rules or mechanics of a videogame will often be the key distinguishing feature or innovation that makes the game successful.

However, game rules are merely ideas, and cannot be copyrighted themselves. Once again, in *Tetris* the court held that “[user] manipulation of pieces composed of square blocks of differing geometric shapes, to fit pieces falling from top of game board with accumulated pieces at the bottom, were general, abstract ideas underlying computer-based video game and could not be protected by copyright”.

Does that mean an imitator merely needs to change the aesthetic coating of the game to avoid infringement while keeping the rules or mechanics identical? The answer would be affirmative if copyright was the only option to protect a game. However that is not the case, which leads us to the next topic.

2.2 The Patent claim

Wizards also allege patent infringement, specifically US Patent No. RE 37.957 (a re-issue of the earlier US Patent 5.662.332), which claims in essence the method of a “trading card game”. The patent refers to the game involving “game components” rather than “cards”, so it does not appear to be limited to the physical manifestation of the game and could include implementations using digital objects. This is important because WotC brought law suit against Hex regarding the electronic version of *Magic* and it’s allegedly copycat *Shards of Fate*.

It is true that the patent was filed with a priority date of 22 June 1994 – which means its 20 year life span has already come to an end. Even if *Wizards* succeeds in its patent infringement argument, it could not obtain an injunction to prevent *Cryptozoic* and *Hex* from launching their game. Its only remedy would be damages or an account of profits made during the period between the first infringement and 22 June 2014. But other issues arise: Is the patent for a method of trading card game a valid one? What about other video games “rules and mechanics”?

The U.S. Patent & Trademark Office has issued over 15.000 patents with the word “game” in the title. In addition, the Manual of Patent Classification includes two classes, (273 and 463), entitled “Amusement Devices: Games.” Before the *Bilski* decision, the

Patent Office frequently rejected patent claims that did not recite a “machine or transformation,” which at first blush would seemingly exclude many games from patent eligibility under 35 U.S.C. §101 – *Bilski v. Kappos* (Supreme Court of the United States - June 28, 2010 - 561 U.S. 593 - 130 S.Ct. 3218 - 177 L.Ed.2d 792)

However, cases such as *Bilski* do not directly address patent protection for games. Thus, based on the general prohibition against patenting “abstract ideas” laid down in those cases and pre-existing law dealing with games, there are some general guidelines for obtaining patent protection for games. First, there is the issue of what cannot be patented, in other words, the rules of games alone.

Patent Office policy holds that “games defined as a set of rules” are not eligible for patent protection (Section 2106 of the Manual of Patent Examining Procedure). Thus, a method claim that defines nothing more than the “rules of a game” without requiring anything tangible will likely be deemed unpatentable. Therefore, the rules alone are not to obtain patent protection, even if they are sufficiently novel and non-obvious. So, what can be patented then?

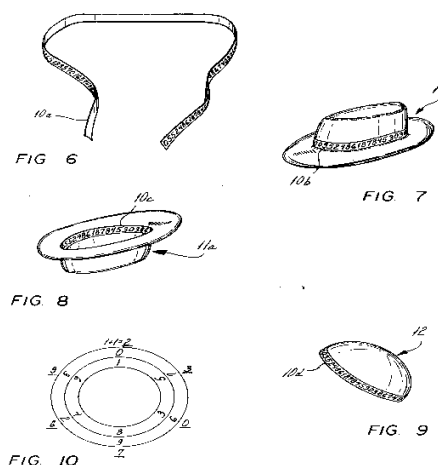
Unlike the rules of a game, the physical components used to play the game may provide a basis for obtaining patent protection. For example, the game pieces or cards, the game board, or any other physical components used to play the game may constitute an “article of manufacture,” which under the patent statute is something that can potentially be patented. In addition, many games might include an electronic component that would constitute an “article of manufacture.” As long as the claims of the patent application include one or more of these physical components, the game may be patent eligible.

However, being “patent eligible” simply means that the subject matter of the invention *can be patented*. The game must still be novel and non-obvious. If the board or

game pieces or cards have a unique physical structure, then the game may also pass these requirements for patent protection. However, the situation may be different if the only difference between the prior art and the new game is the printing on the game board or card.

Patent Office policy is that printed matter by itself is not patent eligible and that “[w]here the only difference between a prior art product and a claimed product is printed matter that is *not functionally related to the product*, the content of the printed matter will not distinguish the claimed product from the prior art (Manual of Patent Examining Procedure Sections 2106(I) and 2112.01)”.

The Patent Office policy is based, at least in part, on the case *In re Gulack*, 703 F.2d 1381 (Fed. Cir. 1983). In that case, court discussed the patentability of an “educational and recreational mathematical device comprising a ring or set of concentric rings or a band made endless or adapted to have ends” with several digits imprinted at regularly spaced intervals.



The particular digits were defined by an algorithm in the applicant's patent claims. The band or rings were sufficient to overcome the "patent eligibility" or "statutory subject matter" hurdle. However, the prior art included bands with printed information.

The Board of Patent Appeals and Interferences determined that the only difference between the prior art and the claimed rings was the printed matter and that the printed matter had no functional relationship to the band. The Federal Circuit Court of Appeals disagreed, stating that "*the critical question is whether there exists any new and unobvious functional relationship between the printed matter and the substrate.*" (Id. at 1386).

The Court held that the digits printed on the applicant's band were related to the band in two ways: (1) the band supports the digits, and (2) the digits formed an endless sequence, with each digit residing in a unique position with respect to every other digit in an endless loop. In contrast, the prior art band included data items that were "independent, bearing no direct relation to the other data entries" on the band and which were "not arranged in any particular sequence."

There is a difference between printed matter that is functionally related to the substrate and printed matter that is functionally related to the rules of the game. In the Federal Circuit's non-precedential decision in *In re Bryan*, 2009 U.S. App. LEXIS 6667 (Fed. Cir. 2009) the applicant sought to patent a game board and game having a touring band theme. The applicant's claims recited a board having a particular layout, a series of tokens, a supply of money, and a deck of cards called "Consequence" cards. The Patent Office found a piece of prior art that disclosed the same features except for the printed matter on the deck of cards. The applicant argued that the claim was patentable over the prior art because the *printed matter allowed the cards to be used in a certain way in playing the game*. However, the court rejected that argument, noting that "if we were to accept

[applicant's'] argument, it seems anyone could patent the structure of a pre-existing game simply by changing the game's theme without changing its structure."

There is a dearth of legal decisions dealing with attempts to patent games. In general, games that have some physical components are eligible for patent protection. In the case of video games, "patents are limited to functional aspects of the game, such as the hardware, or to processes that are independent of play, such as scoring". However, if the content of the game is what distinguishes it from earlier games, then it will be important to functionally link printed matter describing the content to the substrate on which it is printed in a way that distinguishes the prior art.

Of course, novel game pieces, other devices, board shapes, and possibly even color arrangements could also impart patentability. Yet, if the only difference between a new game and the prior art is the content of what is printed on the game board, and there is nothing special about the game board structure itself, obtaining patent protection may be difficult.

In the specific case of *Wizard v. Hex* the court will have to decide whether the functionality and structure of *Shards of Fate* are different from *Magic*, therefore not infringing. If this case proceeds to final judgment, it will be an important landmark for the future of the gaming industry. Will the possible patent protection of rules and implementation of a game be sufficient to keep clones from competing? Or will game developers have to rely on the copyright in the visual, literary, and software elements of their game? By changing those elements in order to avoid infringement while using the same idea will competitors increase and evolve the game industry? In that case, should game design be given some form of sui generis intellectual property protection in functional gameplay elements?

3 Some thoughts on *DaVinci Editrice S.R.L v. Ziko Games LLC*

Meanwhile, in the non-digital world, another “cloning” lawsuit is underway. In Texas, Italian company DaVinci Editrice S.R.L., the creator of the spaghetti-western themed card game “*Bang!*”, has commenced action against Ziko Games LLC and Yoka Games, the creators of a competing card game named “Legends of the Three Kingdoms” based on the Chinese historical period and the associated mythology - *DaVinci Editrice S.R.L v. Ziko Games LLC* (United States District Court, S.D. Texas, Houston Division - August 8, 2014 - Slip Copy - 111 U.S.P.Q.2d 1692)

DaVinci Editrice is alleging that “Legend of the Three Kingdoms” uses the same mechanical features of “*Bang!*” but changes the aesthetic (including artwork and instructions) to an Asian-themed alternative, including for example the hidden roles taken by each player (Sheriff, Deputy, Outlaw, and Renegade in *Bang!*; Monarch, Minister, Rebel, and Turncoat in “Legend of the Three Kingdoms”) and the associated objectives, and the character cards used by the players. DaVinci Editrice claims that in doing so, “Legend of the Three Kingdoms” infringes the copyrights in “*Bang!*” and is in breach of Texas’s unfair competition state law. DaVinci Editrice sought a preliminary injunction, while Ziko and Yoka sought summary dismissal.

The court released an initial opinion in which injunction was denied, on the basis that the artistic differences between the two games meant that a jury could reasonably find that they were not substantially similar (notwithstanding the duplication of some elements), which was insufficient to discharge the burden required to obtain preliminary injunctive relief. The court also rejected DaVinci Editrice’s claims under Texas state law, as it did not plead any conduct separate from the claims under US federal copyright law, and so its

unfair competition and unjust enrichment claims were explicitly pre-empted by the federal law.

However, the court held that the character cards used in “*Bang!*” and the roles defining interaction between the players were creative expressions that were eligible for copyright protection, and noted that in role-playing games such as these, the artwork has less of an impact on the “*total concept and feel*” of the finished product than does the other creative methods a designer uses to shape the experience of the players through their individual decisions and interactions. As a result, DaVinci Editrice had presented a claim on which relief was possible, given the *similarity of gameplay mechanics* between the two games.

Although only a first step in the litigation, this decision potentially strengthens the position of game designers such as WotC, as the more *functional elements of gameplay could be considered creative expression eligible for copyright protection* independently of the art, music, story, or other copyrightable elements of the game that may not themselves be infringed by an imitator.

4 Are copycat games real villains for the game industry?

Some might argue that cloning is beneficial to game industry and especially for consumers. Generally, this is not a popular opinion. But these “clones” may be considered the building blocks of entire game genres, such as “real time strategy” games and “first person shooting” games, and many others.

It is important not to forget that most games are a kind of a “remix”, especially nowadays. “Remixes” and *memes* drive our popular culture. There is probably no better recent example than the extreme success of Minecraft and its spawns, like “Terraria” - 2D Minecraft combined with *Castlevania*; “Ace of Spades” - Minecraft mashed-up with Team Fortress 2; “StarForge” - remixes Minecraft with sci-fi shooting reminiscent of Halo.

It is also true that for every smart evolution of Minecraft’s basic premise there are plenty of shameless copies, that do nothing more than tag along on Minecraft’s success without actually adding anything to the “sandbox building” genre. But even some of these clones end up innovating.

As I told before, none of this is new to followers of video games, or even the pop culture in general. For example, three years after the release of groundbreaking shooter “Doom”, virtually every subsequent shooter was referred to as a “Doom clone,” regardless of how much it actually borrowed from it. Of course, most shooters of that era did copy heavily from Doom – the label was usually well-earned. But as the genre continued to grow and become more diverse, the term “first person shooter” rapidly increased in usage. Now no one thinks of games like “Halo”, “Call of Duty” or “Killzone” as “Doom clones”. The genre evolved. That might not be the case if the creators of “Doom” decided to patent the rules or mechanics of “first person shooting”.

Another issue is when an already-big company “borrows” from the little guy. A lot of Zynga's critics contend that the company's entire multi-billion dollar social gaming empire is built on a business model of waiting for a small company to come up with an idea that works and then co-opting and improving it. Should this matter? Does it mean that the original game was not ready to be introduced to the market? In this case is there a “first mover” advantage, considering Zynga’s marketing power?

On the other hand, considering the increasing investments on social media games, not to say the whole game industry, shouldn't the underlying ideas regarding game mechanics and rules (the truly innovative element of that game) be protected by Intellectual Property Law, in order to promote innovation and development of the industry?

It is safe to say that not all clones and copies are created equal. Some push genres forward, while others are created by greedy opportunists. But both always take a "free ride" on its predecessor success, and it always will. Is that a good or bad thing for the game industry?

5 Alternatives to Intellectual Property Monopoly

Considering that the game industry is better without Intellectual Property Law, what options do developers who invest a lot of money on their game projects have, in order to prevent cloning?

One alternative is the option and reinforcement of Nondisclosure Agreement (NDA). Before sharing source code, demos, or ideas with potential partners, developers may consider executing an NDA that specifically prohibits cloning or the use of any derivation of the IP shown to the other party. Contracts negotiations are not limited to some strictures of Intellectual property Law.

Another alternative is code scrambling. Oftentimes cloners simply reverse engineer a popular game in order to copy it. One way to avoid this is to obfuscate the source and machine code of the game so avoid reverse engineering.

Conclusion

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