

Copyrightability of Video Games

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Abstract: The video games industry started around the 1970's. By 1981 itself, a single game 'Pac-Man' had generated revenue amounting to \$150 million from sale in over a year, the revenue generated by arcade owners was estimated to be around \$1 billion. 'Scramble' was another game of the eighteenth century, whose revenue totalled around \$20 million. It was only in 1981 that Atari, a famous video game producer started an advertising campaign that it "registers the audiovisual works associated with its games and that it "considers its games proprietary" and that it will "vigorously [enforce] these copyrights.¹ A video game is usually defined as an electronic or computerized game played by manipulating images on a video display or television screen.¹ Video games fall into two domains of copyright law: that of computer programs (software) and databases as well as that of audiovisual or cinematographic works.² There may be a number of ingredients in video games to which copyright protection can be attributed. On one hand there could be the visual elements that appear on the screen whilst the game is being played providing it a distinct and unique look.

Keywords: Video Games, copyright form.

I. INTRODUCTION

This feature of the new age video games is what gives them a cutting edge over their old counterparts it reflects the amount of creativity that goes into the creation of the work and thus deserves protection. For example, the copyright owner of the popular game 'Pac-Man' brought out a new game which on one hand involved visual elements such as the 'gobbler' and the 'ghost monsters' and on the other hand also consisted of an altogether new form, pattern and method of gameplay. But, from the other point of view, according to the established principles of copyright law, it would appear that video games cannot get protection under copyright law as it does not protect 'ideas', 'methods of operation' and 'utilitarian' aspects of works.³ It is herein that the merger doctrine becomes very important as it is necessary to create a distinction between the idea and its expression, and this idea-expression can be utilized by the plaintiff to prove infringement in cases of copying.

To prove a claim of video game copyright infringement in a court of law, the plaintiff must show ownership of a valid copyright and an unauthorized copying or usage of the copyright. Moreover, the "plaintiff must show the fact-finder side-by-side versions of the allegedly infringing game and the copyrighted game."⁴ It was in the famous ATARI case that the Court compared the details of the audiovisual display of the two works, finding that a number of similarities in PAC-MAN and K.C. Munchkin were the deciding factors in Atari's favour on the question

of substantial similarity. The "total concept and feel" of Atari's game was taken into consideration by the Court. Another important issue relates to the concept of "mods". Modding is the process of altering, adding to, or deleting video game code to change the way that a particular game is played.⁵ But the problem with modding is that they are treated as derivative works and hence violative of copyright holder's rights unless consent is given and this grey area wherein the protection that can be accorded to such mods is unclear needs interpretation and clarification by courts.

In light of the above discussion, this present project work aims to understand the present stand on protection granted to video games and in doing so the copyrightability of video games, opinion of the judiciary in various jurisdictions, the issue relating to game mods as well the remedies available in case of infringement will be analysed

II. VIDEO GAMES: HOW CAN THEY BE COPYRIGHTED?

.. There has recently been a lot of discussion concerning the emergence of multimedia products as new technology products and the potential problems they present as regards their legal protection. Although there is a general consensus that multimedia products come within the ambit of copyright⁶, multimedia products present a unique characteristic. They are hybrid products and their classification into one or another category of copyright works is not easy. They combine computer technology, which brings them very close to software, they include a

¹ European Commission, Study on the Economy of Culture in Europe, October 2006

² F. William Groshide et al, *Intellectual Property Protection for Video Games: A View of the European Union*, 9 J. INT'L COM. L. & TECH. 1, 9(2014)

³ The distinction between "ideas" and "expressions of ideas" is found in § 102(b) of the Copyright Act, which declares: "[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work." 17 U.S.C. § 102(b) (1976 & Supp. V 1981)

⁴ Brian Casillas, *Attack Of The Clones: Copyright Protection For Video Game Developers*, 33 LOY. L.A. ENT. L. REV. 137, 146(2012-2013)

⁵ Ryan Wallace, *Modding: Amateur Authorship and How the Video Game Industry Is Actually Getting It Right*, BYU L. REV. 219, 220(2014)

⁶ Pierre Sirinelli, *Report on Multimedia and New Technologies*, France, Ministbre de la Culture et de la Francophonie, Paris 1994

collection of data, which brings them very close to databases and they produce a visual result, which brings them very close to films.⁷

Throughout the world's copyright laws there are no specific provisions for the protection of multimedia products. This is essentially so for one main reason. At the time of the drafting of those laws, no-one could foresee their emergence or predict their success on the market. Another explanation for the lack of immediate action in the area despite the extreme growth of multimedia products is the fact that their rather sudden development has caused bewilderment to legislators, copyright practitioners and academicians. In fact, this has already been done by necessity as regards video games, which were arguably the first forms of multimedia works to appear on the market.⁸

What are Multimedia/Audiovisual Works?

The term "multimedia products" has been used increasingly in the last few years with different meanings. However, a common characteristic in all those meanings is the fact that they all involve the combination of more than one different expression, e.g., sound, image, text, etc.

The mere inclusion of different kinds of expressions does not allow a work to qualify as a multimedia work. On top of that, these expressions have to be integrated. If that is not the case then we only have a juxtaposition of materials which perhaps adds nothing or at least does not add a lot to the fact that these materials are different in nature. Multimedia works are interactive in nature. They allow their users to interact with the information they carry, not simply by giving simple instructions to the machine or by choosing a limited number of available pathways, but also by manipulating and interfering with the materials contained in them and that to such an extent that they can morph and blur them.

Therefore, multimedia works should for the purposes of this article be defined as follows: *works which combine on a single medium more than one different kind of expressions in an integrated digital format, and which allow their users, with the aid of a software tool, to manipulate the contents of the work with a substantial degree of interactivity.*

Video Games as Multimedia/Audiovisual Works

Video games possess the general/basic characteristics of a multimedia work. Images and sound are the most frequently combined expressions, though text can also be included, usually in the form of commands, pathways or score results. All these elements make up the visual effect (sights and sounds) of the video game. The visual element is an audiovisual expression as long as images and sound or images alone or images as the main element are projected onto a screen.⁹

Video games are also interactive. In fact, interactivity is a core element of these games. Interactivity in video games allows the user to participate in and control the progress of the game. The user has the choice of selecting between the various options available. These will in their turn give rise to one of the predestined scenarios or predefined sequences of images. A certain number of scenarios are available in each video game and the choices of the player activate a particular scenario corresponding to each of these choices. Although the user selects these scenarios, he cannot intervene and change their content. In this sense his role is functional rather than creative.¹⁰

The similarities between video games and other multimedia products have prompted many commentators to think that what applies to video games should necessarily apply to other multimedia works as well.¹¹ Multimedia works in general can be afforded the same legal protection as video games if the differences they present are not substantial enough to justify a differential legal treatment.

Video games as Computer Programs

Video games can qualify as various types of works. Predominantly, however, they qualify as computer programs and audiovisual works.¹² In the early video game cases, certain national courts expressed a strong preference for video games to qualify as computer programs.¹³ This preference was essentially based on two grounds. First, it was based on the finding that the screen outputs of the video games were not original enough to qualify as audiovisual works since the images and their sequences were essentially generated by the computer program contained in the video game. Secondly, it was based on the fact that the essential characteristic of films, i.e., a predefined or uninterrupted sequence of moving images, was not met by reason of the intervention of the players and their interaction with the video game.¹⁴

III. JUDICIAL OPINIONS IN VARIOUS JURISDICTIONS

Judicial Opinion in the U.S.A.

There have been a number of cases which are in favour of extending copyright protection to video games. Although the initial judicial decisions were concerning board games but they should also be discussed as it would help us to get a clear image of how the judiciary initially dealt with the copyrightability of 'games'. The origin of this proposition can be traced back to a case decided in 1930 i.e. *Affiliated Enterprises, Inc. v. Gruber*¹⁵. The "game" concerned here was a very simple promotional device used to attract patrons to movie theatres and other establishments by offering prizes selected on the basis of names and numbers drawn out of a receptacle. This was the first case which dealt with

⁷ Irini A. Stamatoudi, *Are Sophisticated Multimedia Works Comparable to Video Games?*, 48 J. Copyright Soc'y U.S.A. 467 (2000-2001)

⁸ *Ibid.*

⁹ Irini A. Stamatoudi, *Are Sophisticated Multimedia Works Comparable to Video Games?*, 48 J. Copyright Soc'y U.S.A. 467 (2000-2001)

¹⁰ *Ibid.*

¹¹ Bernard Edelman, *L'oeuvre multimedia, un essai de qualification*, [1995] 15 RECUEIL DALLOZ SIREY 109, 112

¹² *Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 853 (2d Cir. 1982)

¹³ Andre R. Bertrand, *Le Droit D'auteur Et Les Droits Voisins*, 508 (1991) cf. Irini A. Stamatoudi, *Are Sophisticated Multimedia Works Comparable to Video Games?*, 48 J. Copyright Soc'y U.S.A. 467 (2000-2001)

¹⁴ Irini A. Stamatoudi, *Are Sophisticated Multimedia Works Comparable to Video Games?*, 48 J. Copyright Soc'y U.S.A. 467 (2000-2001)

¹⁵ 86 F.2d 958 (1st Cir. 1936)

copyright aspect in games but the Court did not go into the merits of the case as it was of the opinion that the plaintiff had failed properly to plead copyright infringement.

In another case, *Chamberlin v. Uris Sales Corp.*¹⁶, the plaintiff claimed copyright in a game called "Acy-Ducy" and unsuccessfully attempted to enjoin the sale of the defendant's similar game. The proof showed that the game, with some variations, is the old Maskee game of India, taught to plaintiff by his grandmother, when he was eight years of age. The plaintiff alleged that he had added a few new twists to the old game, but these few twists did not persuade the court that he deserved credit for an original work of authorship. Furthermore, the court doubted whether the similarity of the defendant's rules and board to the plaintiff's proved that the defendant had copied the plaintiff's game, because each party's rules and board applied to a well known game played by many for many years. Thus, the court's holding could be explained on either of two grounds sufficient in themselves-that the game was not an original work of authorship or that copying had not been proven-without reaching the question whether copyright can extend to a game under circumstances when these other elements of infringement are proven.

The principle that copyright does not protect games has embedded itself in the law, subject to one major exception-graphic and pictorial aspects of games (such as the visual designs of game boards and playing cards) are said to be copyrightable, as long as their copyright does not create a monopoly on the "method of play."¹⁷

A case exemplifying the method-of-play/nonessential graphics distinction is that of *Durham Industries, Inc. v. Tomy Corp.*¹⁸ The case involved counterclaims by Tomy that Durham's game "Mickey Mouse Peanut Putter" infringed Tomy's copyright in a game called "Pass the Nuts." The court found that Pass the Nuts and Mickey Mouse Peanut Putter were "mechanically identical and structurally similar," each involving the use of push-buttons to move an object from starting point to goal. However, the court described Durham's artwork for each game as "totally different" from Tomy's. Tomy's Pass the Nuts was designed to make it appear as if a bear, a rabbit, a monkey and a squirrel are attempting to throw an acorn from the ground up to the top of a tree. By contrast, Durham's Mickey Mouse Peanut Putter "features Mickey Mouse, Minnie Mouse, Donald Duck and Pluto engaged in a game of golf." Tomy argued that its copyrights protected the "sculpture" of each game, but the court rejected this argument, holding that Tomy had failed to identify any "sculptural" features which were not also utilitarian.

The *Gruber*, *Chamberlin*, *Durham* cases were part of the phase when copyright was not considered suitable for video games. But, by the end of 1982 with the case of *Stern Electronics, Inc. v. Kaufman*¹⁹, we could at least see a ray of hope for the change in scenario. There was always an argument whether in case of video games "the original work of authorship is the computer program" which directs

play of the game, and not the game itself. Thus, they argued that computer program is the one which should be eligible for copyright protection. But, the Courts were always of some other opinion. The Second Circuit in the aforementioned case held that the "visual and aural features of the audiovisual display are plainly original variations sufficient to render the display copyrightable even though the underlying written program has an independent existence and is itself eligible for copyright." This case, though it dealt with audiovisual displays (and not with video games specifically) was an important move forward.

Another argument is regarding that the audiovisual displays in video games lack the requirement of "fixation" because the sequence of sounds and images varies each time the game is played, depending upon the player's actions. In *Atari, Inc. v. Amusement World, Inc.*²⁰ the district court found the fixation requirement satisfied by the game's printed circuit board, since the 'work', the audiovisual presentation, can be communicated from the printed circuit board with the aid of the video game's display screen. The court also summarily rejected a closely related challenge to video game copyrightability. The defendants argued that a "video tape of one game sequence" is not a "complete copy" of the work for purposes of the deposit requirements of the Copyright Act. In rejecting this argument, the court reasoned that the videotape is "alternative identifying material" which is an appropriate deposit, "given the bulkiness and cost of the actual video game."

There have been numerous cases relating to video games in the U.S. in which infringement was found by the Court. One of such case was *Stern Electronics, Inc. v. Kaufman*²¹. The plaintiff, Stern, held an exclusive North and South American sublicense for the video game "Scramble". Scramble had been registered with the Copyright Office as an audiovisual work, using a videotape of the game to satisfy the deposit requirements of the Copyright Act. The defendant, Omni Video Games, Inc., marketed a competing video game called "Scramble 2". While comparing the two games, the Court observed:

"This court viewed a videotape of plaintiffs "Scramble" and defendant's "Scramble 2". The sequence of images and sounds that appears on the screen when the game has started - the "play mode" - is virtually identical in the two games. The sequence of images that appears on the screen when the game is not being played - the "attract mode" - is slightly different. The Omni game's attract mode uses different wording than Stern's and begins in a different phase. These differences in the attract mode certainly indicate that the games are not identical, but the two games are substantially similar."

Based on its finding of substantial similarity, the district court found a probability that Stern would succeed on the merits and entered an order granting Stern sweeping injunctive relief. The court preliminarily enjoined Omni "from infringing in any manner plaintiff's copyright in the audiovisual work entitled 'Scramble'."²² The court based its

¹⁶ 56 F. Supp. 987 (S.D.N.Y. 1944), *affd*, 150 F.2d 512 (2d Cir. 1945)

¹⁷ M. Nimmer, *Nimmer On Copyright*, § 2.18[H][3] (1982) cf. Thomas M. S. Hemnes, *The Adaptation of Copyright Law to Video Games*, 131 U. Pa. L. Rev. 171 (1982-1983)

¹⁸ 630 F.2d 905 (2d Cir. 1980)

¹⁹ 669 F.2d 852 (2d Cir. 1982)

²⁰ 547 F. Supp. 222 (D. Md. 1981)

²¹ 523 F. Supp. 635 (E.D.N.Y. 1981), *affd*, 669 F.2d 852 (2d Cir. 1982)

²² *Id.* at p. 641-42

holding that the games were substantially similar on its impression that the two games were similar in appearance. Another case in which infringement was found by the Court was that of *Atari, Inc. v. Armenia, Ltd.*²³ The plaintiff Atari charged that the defendant's video game "War of the Bugs" infringed Atari's copyright of its game "Centipedes". Concluding that the two games were substantially similar, the court acknowledged that the similarity between the two games did not extend to "the colour and shape of the objects and so on." The points of similarity the court found were in such aspects as how the "worms" "travel" and how the "shots" are "fired", elements that could easily be characterized as "methods of operation" for purposes of section 102(b) of the Copyright Act.²⁴

In another case, *Midway Mfg. Co. v. Dirkschneider*²⁵, the plaintiff alleged infringement by the defendants of three games at once: "Galaxian" (by the defendant's "Galactic Invaders" and "Kamikaze III"), "Pac-Man" (by "Mighty Mouth") and "Rally-X" (by "Rally-X"). The court found that "a comparison of the defendant's games and the plaintiff's games shows that the games are virtually identical." In support of this result, the court provided a convincing recitation of identical features, descending even to such particulars as the way the wings of Galaxian's and Galactic Invader's aliens "extended upward in a stationary position" as the aliens "swooped down on the defense ship". In the case of *Midway Manufacturing Co. v. Artic International, Inc.*²⁶, a different type of infringement was found by the Court. The defendant Artic allegedly marketed a speed-up kit for plaintiff Midway's video game "Galaxian." Artic moved for summary judgment on the ground that it had "not copied plaintiff's work or induced others to copy that work." Midway's theory was that playing Galaxian with the speed-up kit produced visual images "substantially similar to the visual images originally copyrighted", thus creating an unauthorized derivative work. The Court while denying the defendant's motion for summary judgment, the court said:

"As noted, the copyright law is designed to reward creative and artistic endeavours. It gives the author the exclusive right to distribute copies of that work and make derivative works from the original. If defendant's device is designed and used solely to modify plaintiff's visual image, then plainly defendant's device would only have value because of plaintiff's particular copyrighted audio visual work. Defendant, thus, by selling its device reaps the benefits of plaintiff's artistic endeavour. Such conduct would be violative of § 106(2) of the Copyright Act."

There was also some cases in which the Court did not find infringement between conflicting video games. In *Atari, Inc. v. Amusement World, Inc.*²⁷, Atari, the plaintiff, and in this case the owner of a video game called "Asteroids", sought to enjoin defendants from manufacturing or distributing any product in violation of plaintiff's copyright." In particular, Atari alleged that Amusement World's video game "Meteors" was substantially similar to, and therefore an infringement of, Atari's Asteroids. The

Court catalogued twenty-two "design features" which the games shared and nine respects in which the games differed. The similarities identified by the court ranged from those as general as the fact that both games presented an "overhead view of the battle field" to those as minute as the fact that "there is a two-tone beeping noise in the background throughout the game, and the tempo of the noise increases as the game progresses."

The court first rejected the defendant's contention that Atari's copyright claim was void in its entirety because it attempted to monopolize "the idea of a video game in which the player fights his way through asteroids and spaceships." The court observed that the mere fact that "there are a great number of similarities in expression" between Meteors and Asteroids does not imply infringement of one by the other. Instead, "it is necessary to determine whether the similar forms of expression are forms of expression that simply cannot be avoided in any version of the basic idea of a video game involving space rocks." The court held that "most of these similarities between the two games are inevitable, given the requirements of the idea of a game involving a spaceship combating space rocks and given the technical demands of the medium of a video game."

In *Atari Inc. v. North American Philips Consumer Electronics Corp.*²⁸, Atari and its co-plaintiff, Midway Manufacturing Co., alleged, among other things, that North American's game K.C. Munchkin infringed Atari's and Midway's rights in Pac-Man. The court found both Pac-Man and K.C. Munchkin to be "maze-chase" games - each game features on its video screen a maze or mazes. The player in each game controls a "central character" which moves through the maze, gobbling "dots" as it moves. The object of each game is to score points by causing the central character to gobble the dots while at the same time avoiding the goblins or munchers. Similar to the *Amusement World* case, the *North American Philips* court also catalogued and analyzed the area of dissimilarity. The court also identified differences from the point of view of play of the two games. Further, it was admitted that the defendant North American had initially attempted to obtain a license for Pac-Man from the plaintiff Midway and asked Mr. Averett to develop K.C. Munchkin only after Midway had rebuffed its licensing overtures. The court acknowledged that "copying proscribed by copyright law means more than tracing original [sic], line by line; to some extent it includes appropriation of artist's thought in creating his own form of expression." The Court while concluding held that

"But evidence in this record shows that "K.C. Munchkin" is not substantially similar to "Pac-Man". In fact, it has been established in the proceeding that [the] defendants created their game from a source they had utilized before "Pac-Man" came into existence; the maze defendants utilized is different, and the way their game is played is different from plaintiff's 'Pac-Man'."

Judicial Opinion in France

The Court of Appeal in Paris in two cases of alleged infringement and copying of two video games also came

²³ 2 COPYRIGHT L. REP. (CCH) 1 25,328 (N.D. Ill. Nov. 3, 1981)

²⁴ 17 U.S.C. § 102(b) (1976 & Supp. V 1981)

²⁵ 543 F. Supp. 466 (D. Neb. 1981)

²⁶ 2 COPYRIGHT L. REP. (CCH) 1 25,337 (N.D. Ill. June 2, 1981)

²⁷ 547 F. Supp. 222 (D. Md. 1981)

²⁸ 2 COPYRIGHT L. REP. (COH) 25,363 (N.D. Ill. Dec. 4, 1981)

across the issue of originality. It found that the similarities alone between the two video games did not suffice to make out a case of infringement since in fact they only revealed the common idea behind them. Any exclusivity granted to the idea would lead to an unjustifiable monopoly in non-protectable material.²⁹ In another case the Court found that "these facts in our times do not originate in a particularly original imagination or a very original intellectual effort."³⁰ In both cases, video games were not protected by copyright by reason of their lack of originality.

The French decisions on video games went perhaps one step further than those in the U.S. That was due to the fact that an idea in the U.S. was held to be whatever could not be expressed by a video game developer in another way, whilst in France the idea was whatever was not creative enough to qualify as original (or what was rather commonplace). The French decisions were criticised by a part of the literature as being too strict, perhaps in view of the danger that many video games will go onto the market unprotected and will become easy prey to potential trespassers or marketers in the same area.

Judicial Opinion in Germany

In *Pengo*³¹, the German Court of Appeal in Frankfurt ruled that although it is possible for video games to qualify as both computer programs and audiovisual works, not enough originality was found in the video game at issue to qualify as an audiovisual work. It was found to have been conceived by its developer in such a way as "to create a simple play activity which requires no more than attention and reflex actions." In fact, it was submitted that it is the software which creates, determines and operates the images that appear on the screen. Apart from that, there is not enough originality put in the audiovisual displays to turn them into a film. The fact that everything was computer-generated did not allow the German Courts to opt for the film qualification of the work.³²

In *Donkey Kong Junior*³³ the same Court denied protection to a video game as an audiovisual work because of its nature. The fact that players were allowed to interact with the video game, undertake different steps each time and achieve different things, necessarily led to different images. It was exactly this plurality of possible outcomes in terms of sequences of images that was thought by the Court to make it impossible for the game to qualify as a film. The absence of predefined sequences of images was found to be contradictory to the notion of a film.³⁴

IV. ANALYSIS OF THE 'NINTENDO' CASE

The issue in *Golden China TV Game Centre & others v Nintendo Co Ltd.*³⁵ was whether video games enjoy copyright protection as 'cinematograph films'.

Nintendo manufactured and distributed video games. It sought to interdict Golden China from dealing in some 40 video games which, so Nintendo argued, were copies, made in Taiwan, of games which it had created, developed, and manufactured. Its claim was based on the infringement of

its copyright under the Copyright Act 98 of 1978. It argued that a video game which had gone through the various stages of creation, design, and development was a cinematograph film within the definition of this term in the Act. The evidence showed that the games were stored in silicon micro-chips known as Read Only Memory chips (ROMs): the whole sequence of images making up the video film was stored in a CH-ROM silicon chip, while the sound track and the computer game program enabling the player to manipulate the game were stored in a P-ROM silicon chip. Nintendo succeeded in the trial Court.

Harms JA, delivering the judgment of the appeal court, described the operation of a video game: "A video game is, as its name implies, a game played on a video screen. An apparatus containing integrated circuits (usually two microchips) is connected to it. When the machine is in operation, a visual display appears on the screen. The display has the general appearance of an animated cartoon strip, save that the game player is able, up to a point, to control the game sequence with a control mechanism. In other words, the game sequence is not finitely fixed."

Harms JA then looked at the wording of the Copyright Act. Section 2(1) lists the categories of works eligible for copyright protection. One of them is 'cinematograph films'. The term itself is defined in section 1, which states that the term, means the fixation by any means whatsoever on film or any other material of a sequence of images capable, when used in conjunction with any mechanical, electronic or other device, of being seen as a moving picture and of reproduction and includes the sounds embodied in a soundtrack associated with the film, but shall not include a computer program.

The judge then examined certain key phrases in this definition:

- * first fixation;
- * a sequence of images; and
- * but shall not include a computer program.

First fixation

Harms JA noted that, generally, a work had to be fixed or reduced to some or other material form before it could be eligible for copyright. In this case, the parties conceded that the video games in issue had been fixed. If not fixed, they could not, of course, have been copied.

A sequence of images

Harms JA noted the obvious difference between a conventional cinematograph film and a video game: in a conventional film the sequence of images was fixed, whereas in a video game the sequence of images was, to an extent, variable and controlled by the player. Harms JA stressed that many of the visual images were repetitive and remained constant each time the game was played. He concluded that a video game's sequence of images complied with this requirement in the definition of a cinematograph film.

But shall not include a computer program

²⁹ Criminal Court of Nanterre, 29 June 1984, (1984) *Expertises*, No. 67, at 301

³⁰ Criminal Tribunal of Paris, 8 Dec. 1982, (1983) *Expertises*, No. 48, at 31

³¹ Judgment of the Court of Appeal in Frankfurt, 13 June 1983, [1983] GRUR 39 *Id.* at 756

³² *Id.* at 756

³³ Judgment of the Court of Appeals in Frankfurt, [1983] GRUR 757

³⁴ *Id.* at 758

³⁵ 1997 (1) SA 405 (A)

The parties, in this case, had agreed that the video games were not computer programs, although computer programs were used during their creation and although they might have been fixated by way of such programs. The appellate court concluded that video games qualified for copyright protection as a 'cinematograph film'. And as the judge noted, the remaining element of the definition of this term - that with the use of 'any mechanical, electronic or other device' the film must be 'capable of being seen as a moving picture' - was clearly present in the case of a video game

V. VIDEO GAMES: INFRINGEMENT AND REMEDIES

The young video game industry has suffered a variety of growing pains, such as litigation over harsh state and local government regulation of video game purveyors, parental fear that playing games may harm children, and public outcry against the propriety of marketing video games that contain sexually explicit or other objectionable subject matter. These problems, however, do not constitute as severe a threat to video game companies as does competition from video games that illegally infringe the copyrights of popular game models.³⁶ It was observed by the court in the case of *Stern Elec. Inc. v. Kaufman*³⁷, that these infringing games "pose a substantial threat to the health of the electronic video game industry". To prove a claim of video game copyright infringement in a court of law, the plaintiff must show ownership of a valid copyright and an unauthorized copying or usage of the copyright. Moreover, the "plaintiff must show the fact-finder side-by-side versions of the allegedly infringing game and the copyrighted game."³⁸

In simple terms, video game copyright infringement can occur when the defendants produce games that are virtually identical to previously created games and then challenge the validity of the copyrights on those games and this is commonly referred to as "knock-offs". In *Midway Mfg. Co. v. Dirkschneider*³⁹, the plaintiff alleged infringement by the defendants of three games at once: "Galaxian" (by the defendant's "Galactic Invaders" and "Kamikaze III"), "Pac-Man" (by "Mighty Mouth") and "Rally-X" (by "Rally-X"). The court found that "[a] comparison of the defendant's games and the plaintiff's games shows that the games are virtually identical." In such cases the court does not need to differentiate between idea and expression and the identical feature descending down to minor specific particulars is proof enough that such games are copies of the copyrighted works.

Although it is well accepted that infringing games copy the work of the copyright holders without their authorization and thus are against the interests of the rights holders of the game but sometimes to prove that such infringing games are in fact infringing becomes a herculean task because there is no direct evidence of copying. In such a scenario where there is no direct evidence courts have to essentially

rely on the "substantial similarity test". And this relates to other category of infringement faced by copyright holders. Determining whether two works are substantially similar is notoriously difficult, and courts employ a variety of tests to handle the difficulty. The common goal of all these tests is to determine when improper copying of expression occurs in the absence of literal copying, which serves to guard against the ability of an infringer to avoid liability simply by making his or her work only technically different from a copyrighted work, for example by paraphrasing an entire book. Perhaps the most fundamental difficulty encountered in a substantial similarity analysis is how to determine, when no literal copying of a work exists, how much of the similarity between two works is merely that of the abstract ideas of the works, which are not protectable and thus cannot be infringed, and how much is the similarity of the expressions of those ideas. Even if courts were perfectly able to draw the line between idea and expression, the fact that non literal copying is actionable leads logically to the conclusion that somewhere under the literal, fixed work exists an intangible yet copyrightable expression susceptible of infringement-one may call it the "heart" of the work.⁴⁰

Courts must undertake two types of analysis to ascertain whether works are substantially similar. First, courts must define the scope of a plaintiff's copyright to determine what a defendant may or may not copy. Central to this determination is the idea-expression principle, which states that copyright laws protect only expressions of ideas, not the abstract ideas underlying a copyrighted work. Second, courts must compare the defendant's work with the plaintiff's protectable expression to decide whether they are substantially similar.⁴¹

To grab an understanding of the issue at hand, it would be important to keep in mind that the protection granted to video games does not relate to the idea behind the game but the expression i.e. audio visual aspects etc., which is also famously known as the "total concept and feel" of the game. Hence, what needs to be analysed by the courts is whether the copying is such that the whole feel of the game seems to have been stolen or copied by the infringers.

Thus what becomes very important in such cases of infringement is the doctrine of idea-expression dichotomy also referred to as the merger doctrine. The merger doctrine may be significant in rulings concerning copyright infringement because "in some instances, there may come a point when the author's expression becomes indistinguishable from the idea he seeks to convey, such that the two merge." The doctrine prevents a copyright holder from suing for copyright infringement when the copyright holder would have a monopoly over "an idea when there are only a limited number of ways of expressing the idea."⁴² Thus, the right holder needs to show that the copying by the defendant relates to his expression and not merely the idea and the courts while applying this principle

³⁶ Steven G Mcknight, *Substantial Similarity Between Video Games: An Old Copyright Problem in a New Medium*, 36 VAND. L. REV. 1277, 1277(1983)

³⁷ 523 F. Supp. 635, 638 (E.D.N.Y. 1981)

³⁸ Brian Casillas, *Attack Of The Clones: Copyright Protection For Video Game Developers*, 33 LOY. L.A. ENT. L. REV. 137, 146(2012-2013)

³⁹ 543 F. Supp. 466 (D. Neb. 1981)

⁴⁰ Kevin M Hales, *A Trivial Pursuit: Scrabbling for A Board Game Copyright Rationale*, 22 SETON HALL J. SPORTS & ENT. L. 241, 257(2012)

⁴¹ Supra note 37 at 1280

⁴² Supra note 39 at 147

consider factors like the intent of the defendant who copies the work, and the conduct of the defendant in appropriating the work.

Another important concept that can work to negate the claim of the plaintiff is *Scenes a faire*, it refers to incidents, characters, or settings that, as a practical matter, are indispensable, or at least standard, in treatments of a certain topic. If scenes a faire constitute the only similarity between two works, courts will find no actionable similarity because scenes a faire are not copyrightable.⁴³ Thus to prove a claim of infringement the copying must be more than mere scenes a faire.

The decision of court in the case of *Stern Electronics, Inc. v. Kaufman*⁴⁴ can be considered to be one of the earliest decisions favouring and protecting the right holders of video games against infringement. The plaintiff, Stern, held an exclusive North and South American sublicense for the video game "Scramble". Like other video games, Scramble had been registered with the Copyright Office as an audiovisual work, using a videotape of the game to satisfy the deposit requirements of the Copyright Act. One of the defendants, Omni Video Games, Inc., marketed a competing video game called "Scramble 2". Based on its finding of substantial similarity, the district court found a probability that Stern would succeed on the merits and entered an order granting Stern sweeping injunctive relief. The court preliminarily enjoined Omni "from infringing in any manner plaintiff's copyright in the audiovisual work entitled 'Scramble.'", The court also impounded "all of [the] defendant's 'Scramble 2' video games or any other copies of plaintiff's 'Scramble' audiovisual work that infringe plaintiff's copyright and are under defendant's control." Finally, the court found that the defendants had infringed Stern's trademark rights in the mark "Scramble" and enjoined the defendants from further use of that mark.⁴⁵ But in the present case, the court failed completely to address the question whether the similarity it saw between "Scramble" and "Scramble 2" was the necessary consequence of their being based on the same idea, employing the same method of play. The court based its holding that the games were substantially similar on its impression that the two games were similar in appearance rather than on an analysis of the difficult problem of applying the idea/expression distinction in the video game setting.⁴⁶

Then came the famous Atari cases wherein the courts came up with explanations and observation that clarified the law a little on the concept of substantial similarity and the method of analysing substantial similarity that was not addressed in its preceding cases and also considered the doctrine of idea-expression while doing so. The first case is, *Atari, Inc. v. Amusement World, Inc.*⁴⁷, wherein Atari sought to enjoin an alleged infringement of its video game "Asteroids" by Amusement World, Inc.'s game entitled "Meteors". The federal district court judge examined the two games and found twenty-two similarities and nine

differences. After holding that Atari owned a valid copyright that covered its Asteroids game, the court considered the idea-expression issue. In determining the scope of the plaintiff's copyright, however, the court held that most similarities between the two games were "inevitable". The court stated that similarities which are inextricably associated with the idea of a video game are not protectable because protecting them would give the plaintiff a monopoly over the idea, and ruled in favour of the defendant. After discounting the unavoidable similarities between the games and applying the "ordinary observer" test, the court found that an ordinary player who compared Asteroids and Meteors would conclude that the games were different. Although the court candidly admitted that Amusement World copied Atari's idea, it held that the two expressions of the idea were not substantially similar. The court reasoned that the overall feel of the way the two games played was different.⁴⁸

Then came the case of *Atari, Inc. v. Williams*⁴⁹, here Atari attempted to enjoin the defendant from marketing its home video game entitled "Jawbreaker", claiming that it infringed their "Pac-Man" game. At the time the defendant sought to market Jawbreaker, Atari had not yet perfected a home video version of Pac-Man. The court found that although both video games used the same idea, a similarity in ideas was not actionable. Specifically the court stated that the copyright laws did not protect the idea of "a player symbol being guided through a maze appearing to gobble up dots in its path while being chased through the maze by several opponents." The court also characterized Pac-Man's rules, strategy, and progress of play as unprotectible ideas.⁵⁰

In *Atari, Inc. v. North American Philips Consumer Electronics Corp.*⁵¹, Atari alleged that North American, by producing and marketing its video game entitled "K. C. Munchkin," infringed Atari's copyright on Pac-Man and sought injunctive relief in federal district court. The Seventh Circuit Court of Appeals held that even though most of the elements of the video game PAC-MAN were not protectable, there were specific copyrightable expressions within the game that were infringed by the "substantially similar" game, K.C. Munchkin. The court explained that although the "idea" of a maze-chase game is unprotectible, the audio and visual aspects of the game constitute the copyrightable expression of the game's "idea". The court, using Justice Hand's definition of the abstraction test, stated that the plaintiff's game, PACMAN, could be described accurately in reasonably "abstract terms, much in the same way as one would articulate the rules to such a game." Therefore, the defendant's use of indistinguishable video game characters infringed on the plaintiff's copyright. Specifically, the court found that plaintiffs famous PAC-MAN characters such as the "gobbler" and the "ghost monsters" distinguished PAC-MAN from all other games. Thus, copyright protection extends "to at least a limited extent the particular form in which [a game] is expressed (shapes, sizes, colors, sequences, arrangements, and

⁴³ Supra note 37 at 1288

⁴⁴ 523 F. Supp. 635 (E.D.N.Y. 1981)

⁴⁵ Thomas M S Hemnes, *The Adaptation of Copyright to Video Games*, 131 U. PA. L. REV. 171, 182(1982-1983)

⁴⁶ Id at 183

⁴⁷ 547 F. Supp. 222 (D. Md. 1981)

⁴⁸ Supra note 37 at 1299

⁴⁹ 1981-1983 Copyright L. Dec., 25,412, at 17,383 (E.D. Cal. Dec. 28, 1981)

⁵⁰ Supra note 37 at 1302

⁵¹ 1981-1983 Copyright L. Dec., 25,363, at 17,044 (N.D. Ind. Dec. 4, 1981)

sounds).” The court noted that video games appeal to a relatively indiscriminating audience, and a player entranced by a game’s play would overlook minor differences in detail. The Seventh Circuit in *North American Philips* recognized the utility of using the audience test to determine whether two video games are substantially similar when it stated that the stimulation of play, which is the “main attraction” of a video game, prevents consumers from focusing on minor artistic differences. Although the court realized that differences between two games might alter their visual impressions, it felt that these differences could not excuse the taking of a substantial part of the plaintiff’s work—the characters. Finally, the court observed that the history and promotion of the *K. C. Munchkin* game provided additional evidence of the similarity between the games and the intent of *North American* to disguise its intentional appropriation of Atari’s game. The Seventh Circuit, based on its “ocular comparison” of the two works, concluded that Atari would succeed in a copyright infringement suit against *North American* because *K. C. Munchkin* captured the total concept and feel of *Pac-man*.⁵²

In the case of *Tetris Holding v. Xio Interactive, Inc.*⁵³, the District Court of New Jersey rejected the clone developer’s standard defence—that it copied only non-expressive, functional elements of the original game—and instead concluded that the clone developer infringed the underlying, expressive elements of *Tetris*, as well as the game’s trade dress. After examining cases, the *Tetris Holding* court ultimately utilized the AFC test to determine if there was a substantial similarity between *Tetris* and *Mino* in violation of copyright law. First, the court concluded that the underlying mechanisms and rules of *Tetris* were not protectable. Specifically, the court noted that copyright protects neither the abstract elements of a game nor the “expressive elements that are inseparable from them”. As a result, the basic components of *Tetris* are void of any copyright protection. The court, however, determined that *Tetris Holding* is entitled to copyright protection for the way it chose to express those ideas—such as the way in which *Tetris Holding* designed *Tetris* pieces—particularly with respect to their expression in the look and feel of the game as represented by its audiovisual display. The court reached this conclusion by comparing *Tetris* and *Mino* “as they would appear to a layman’ [by] concentrating upon the gross features rather than an examination of minutiae.” In fact, the AFC test “does not involve” analytic dissection and expert testimony, but depends on whether the accused work has captured the “total concept and feel” of the copyrighted work.” Because the two games placed side by side look almost identical, the “common layman” approach would be satisfied where, “[w]ithout being told which is which, a common user would

not be able to decipher between the two games.” Of importance to the court was “[i]f one has to squint to find distinctions only at a granular level, then the works are likely to be substantially similar.” Moreover, after watching videos of the two games, the court found that the similarity between the visual expression of *Tetris* and *Mino* was “akin to literal copying.”⁵⁴

Thus the court employs various tests for determination of substantial similarity viz., by examining the “total concept and feel” of the works at issue, the consideration of “overall look and feel.” Many a times, tests employed by the courts overlap with various tests using similar formulations: most notable among these are the “ordinary observer” test, the “more discerning observer” test, the “intended audience” test & the “abstraction-filtration-comparison” test. The above discussion and the case law seem to be encouraging to the copyright holders of videogames as they try to differentiate the unprotectible idea from the protectible expression by employing the doctrines and principles of traditional copyright law to the new age games that helps the game developers who have spent labour, capital and time in developing the copyrighted games from being infringed

VI. GAME MODS: ISSUES & LEGAL STANDPOINTS

.. Modding is the process of altering, adding to, or deleting video game code to change the way that a particular game is played.⁵⁵ The issue with modding is that it appears to be a derivative work and as is common knowledge the copyright holder has an exclusive right to prepare a derivative work and therefore if game mods are in fact derivative works then such an action without the authorization of copyright holder would be illegal. The dominant test for determining whether the alleged infringer’s product constitutes a derivative work is the “substantial similarity” test. Under this test, the infringing derivative work must incorporate a portion of the copyrighted work in some form, and be substantially similar to the copyrighted work⁵⁶. The case of *Midway Manufacturing Co. v. Artic International, Inc.*⁵⁷, throws light on this concept of game mods as derivative works, in this case the court held that the speeded-up version was a derivative work. The *Midway* court added an equitable/economic analysis to the determination of what is a derivative work. The pivotal factor in the determination was the potential for economic benefit to the arcade licensee⁵⁸. In this case, the Seventh Circuit affirmed a district court’s injunction prohibiting the infringement by *Artic* of *Midway*’s copyrighted *PacMan* and *Galaxian* video games. *Midway* is the manufacturer of the video games, *Pac-Man* and *Galaxian*. Inside each video game machine are printed circuit boards which store the images and sounds

⁵² Supra note 41 at 157

⁵³ 863 F. Supp. 2d 394 (D.N.J. 2012)

⁵⁴ Supra note 37 at 159

⁵⁵ Ryan Wallace, *Modding: Amateur Authorship and How the Video Game Industry Is Actually Getting It Right*, *BYU L. REV.* 219, 220 (2014)

⁵⁶ Carol S. Curme, Case Notes : Derivative Works of Video Game Displays: *Lewis Galoob Toys, Inc. v. Nintendo of Am. Inc.*, 61 U. Cin. L. Rev. 999, 1010(1992-1993)

⁵⁷ 704 F.2d 1009 (7th Cir.), cert. denied, - U.S. -, 103 S. Ct. 176 (1983)

⁵⁸ Christopher A. Kesler, *Galoob v Nintendo: Derivative works, Fair use & Section 117 in the Realm of Computer Program Enhancements*, 22 *Golden Gate U.L. Rev.* 489, 494(1992)

produced by the machine when the games are played. The circuit boards also serve to control the rate of speed at which the games are played. Artic sold printed circuit boards used inside video game machines. One of the circuit boards sold by Artic, when inserted into a Galaxian game machine, accelerated the rate of speed at which Galaxian was played. Artic also sold a circuit board that stored a set of images and sounds nearly indistinguishable from Midway's Pac-Man, so that when Artic's circuit board was inserted into a machine and played, the video game looked and sounded like Pac-Man. Midway filed suit against Artic in federal district court for copyright infringement of its Galaxian and Pac-Man video games. The district court denied Artic's motion for summary judgment and granted Midway's motion for a preliminary injunction. In appeal, the court considered whether the playing of video games involved creative effort of the player, rather than that of the game inventor. The Midway court recognized that the particular order of images that appears on the screen of a video game machine when it is played is not identical to the set of images stored in the machine's circuit boards. This presented another difficulty in classifying video games as audiovisual works. However, a video game player does not have the ability to create any sequence he desires out of the images stored in the circuit boards of the machine. The court ruled that "[p]laying a video game is more like changing channels on a television than it is like writing a novel or painting a picture." The player is confined to choosing only those sequences made available by the game. Therefore, it was the inventor, not the player, who the court considered to be the creative actor behind the playing of the game. The most significant issue decided by the court was whether circuit boards that speed up the rate of play of Midway's video games constituted an infringement of Midway's copyrights. Artic argued that there was no copyright infringement because speeding the play of a video game was akin to playing a phonograph record of 33 RPM at 45 or 78 RPM, which would probably not be a copyright infringement. The court rejected the analogy. There is an enormous demand for speeded term as any set of images shown as some kind of unit, the court has broadened the shield of protection for video games. Furthermore, the Midway court broadened the scope of protection afforded the video game copyright holders to devices that alter the play of video game machines. After determining that a speeded-up video game is not the same product as the original game, the court ruled that circuit boards that accelerate the rate of a game and result in increased marketability are derivative works of the original copyrighted works. The unauthorized selling of such a device constitutes copyright infringement.⁵⁹

Another important case that related to mods is the case of *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*⁶⁰, wherein the court refused to classify the Game Genie as a derivative work because it did not create an independent work as it was the original game itself that created audio visual representation and not the mod, it also took into consideration the market test meaning thereby that if the game mod had no adverse effect on the commercial benefits

of the copyright holder then it can be considered to be fair use and in the present case found that the mod was not infringing Nintendo's copyright because of the non-commercial use of the displays, and Nintendo's failure to prove present or potential market harm.

VII. INDEPENDENT ANALYSIS

Video games consist of two main components. The first one would be the audiovisual work which is displayed on the screen to which the player communicates according to the movement of the characters and sounds of the game. The second one would be computer programs, which operates the game and thereby produces results. According to me, if both these components independently fulfil all the requirements for copyrightability, they should be granted protection for both of them in a video game. Also, if one component of the video game is found to be eligible for copyright protection, then the video game should be granted protection only to that extent. A consequence of this would be that third parties would only be entitled to copy the unprotected portion of the video game, and not the unprotected one.

An understanding of the concept of video games would suggest that both the above components deserve protection in their own sphere. Firstly, the visual images created on the screen while playing a video game is the result of the variations of the player's action according to which the images appear on the screen, thus fulfilling the element of originality. Also, the visual images (combined with the sounds) display an array of different components of the games, which might be new and original, relating to the concept of the game. It should be noted that the concept of the game is also copyrightable. On the other hand, computer programs, which in a way are designed to display a set of images when a certain movement is made by the player, would also be entitled to copyright protection as it is the core component which makes the functioning of the game possible the visual images are produced the concerned program.

A brief reading of the judicial decisions would suggest that the legal opinion concerning the copyrightability of video games has undergone a lot of development. Firstly, as regards the first element of copyright i.e. originality, the Court in the *Gruber* case had decided that games can contain the element of originality so as to constitute copyright. It was as early as in the *Durham* case in 1980 that the question of copyrightability of video games was dealt by the U.S. Court. This case is of relevance because the Court (though the Court could not arrive at the decision that there was infringement), for the first time considered the artistic aspect in video games. Just after two years, the Court in the case of *Stern Electronics, Inc. v. Kaufman* again found that the copyright subsists in the 'visual and aural' display of video games but further went on to state that the computer programs are also eligible for copyright protection. This was the first time that the Court recognised the copyrightability of computer programs in reference to video games.

⁵⁹ Jay B Lake, *Copyright Protection Of Video Games: Pac-Man And Galaxian Granted Extended Play*, 5 LOY. L.A. ENT. L.J. 143, 143(1985)

⁶⁰ 964 F.2d 965 (9th Cir. 1992)

Secondly, 'Fixation' an essential for copyright to subsist in a work has posed problems for the judiciary. The Court in the *Atari* case adopted a rather simplistic approach when it stated that the 'fixation' requirement in video games is satisfied by the 'board' as it is the main instrument through which the work (under consideration for copyright protection) can be transmitted to the user through a display screen. There were numerous judgments which further recognised the copyrightability in video games on the basis of 'artistic' element involved in its creation.

It is interesting to note that the French courts adopted a much more stricter approach than the U.S. Court. The U.S. Courts recognised that an 'idea' on which the game develops is entitled to copyright protection, which truly appears to be the correct view. Surprisingly, the French Court went in the other direction, to hold that an idea would not be entitled to copyright protection in case of video games. The German Courts, though on the face of it appears that they have adopted a liberal approach, but this is not the case. Although they have recognised that video games could be protected as computer programs as well as audiovisual works, their judgments don't seem to display this. They have been primarily of the view that it the film created is a computer generated sequence of images by the 'program' (combined with the actions of the user) which guides the audiovisual work, and therefore lacks originality. Among the three jurisdictions analysed in this research project, I am of the view that U.S. Courts have adopted the correct and the most logical approach when deciding cases on copyrightability of video games, for the simple reason that they have expressly acknowledged that the 'audiovisual element' as well as the 'computer program' shall be eligible for copyright protection, and the same have been granted a lot of times. It should be noted that there have been no judicial pronouncements regarding the copyrightability of video games in India.

According to data compiled by the NPD Group, a global market research company, and released by the Entertainment Software Association, the computer and video games industry sold 273 million units in 2009 leading to an astounding \$ 10.5 billion in revenue. By 2015, analysts predict the global video game industry will reach \$91 billion. Video game industry also referred to as interactive entertainment is considered to be the more profitable than other modes in entertainment industry such as music and movies. The video game industry has come a long way from its predecessors i.e. arcade games to the modern and sophisticated games that can be played on your computer and smartphones. This growth of video game industry has also lead to an unavoidable consequence that being, litigation, the long list of cases related to video games are evidence that the developers of these games are very fierce in asserting their proprietary rights in such games and are more than ready to approach courts if and when there is an infringement of their copyrighted works. But it is not as easy as it sounds, there are a number things that are unclear on the subject and that poses a problem. The codified law does not specifically relate to the contents and that puts the courts in a position to guide the way.

Having dealt with the aspect of protection accorded to such video games viz., copyright, an important point of discussion is their infringement by third parties. This infringement occurs when a third party or a competitor

wanting to make money copies the contents of a game that belongs to someone else i.e. they copy the essential aspects of a copyrighted game and these are the aspects that make it eligible for grant of protection. This copying occurs generally in two forms, the first case is one where the third party just makes an identical copy or a literal copy, such copies are very easy to identify as there are no or not much differences in the copy and the original and as such the end result is like a fools copy. An example could be like copying some text to the extent that not even punctuations are changed and even copying the mistakes in that text, such copying is done without putting much brain into it and that's why can be easily caught. It's the next sort of copying that is difficult to identify and even having done so it has to be determined that whether such copying is of the mere idea or the expression of such idea. It's a basic principle of copyright law that ideas cannot be protected, it's their expression that can be protected, this idea-expression dichotomy serves a very important purpose in cases related to infringement of copyrighted games. When a suit is filed for infringement of a video game what needs to be determined is the scope of protection that such a game deserves and while doing so, the game's unprotectible ideas and the protectible expressions of those ideas have to be well separated. Such copying of ideas is not illegal because protection cannot be granted to mere ideas as they belong in the public domain and grant of such protection may lead to perpetual monopolies that cannot be allowed. Another important doctrine that plays an important role is "Scenes a faire", they are such incidents, characters or settings that cannot be separated from a certain thing, thus such things that come under scenes a faire cannot be granted protection and if the copying only relates to such characters then there is no infringement. Now coming to the protectible aspects of video games these are the expression of the idea and are implemented majorly as audio visual aspects of the game. In the famous case of *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, the Seventh Circuit used the phrase "total concept and feel" of the game to describe the protectible aspects of the game.

Thus in a suit for infringement what needs to be proved is that the subject matter of the game in issue deserves protection and that as such there is a copying of those protectible aspects. In cases where there is no direct copying, courts majorly apply the test of "substantial similarity" to decide whether there is infringement or not. While deciding cases the courts examines whether the similarity between the infringing game and the original game is merely of idea or something more than that i.e. substantial similarity. For correct implementation of the aforementioned test the courts employ a couple of tests alongwith it to ensure that there is no room for error. The "ordinary observer" test, the "more discerning observer" test, the "intended audience" test & the "abstraction-filtration-comparison" test are some of these tests that are employed by courts and it is not necessary that all of them be used in one case, they can employed interchangeably. There are a number of cases wherein the courts have used various techniques to answer the question as to whether there is infringement or not. The first case that dealt with video games and infringement was the case of *Stern Electronics, Inc. v. Kaufman*, although in the present case the court gave a finding of infringement in favour of

plaintiff but it didn't address the issue of idea-expression dichotomy and that whether the similarity it found in the two games was one of idea or the expression. The next trail of cases were all brought by Atari and are famously called as the Atari cases, herein the court shed light on the "substantial similarity" test employed and also gave insights for manner of its implementation. Although Atari lost the first two cases viz., *Atari Inc. v. Amusement World* and *Atari Inc. v. Williams*, but in both the cases the court explained in detail the distinction between protectible and unprotectible aspects of the game and also applied the "ordinary observer" test for determination of infringement. The third case of the series i.e. *Atari Inc. v. North American Philips Consumer Electronics Corp.*, the court brought in the idea of "total feel and concept" of the game and how the same is protectible, and gave a finding of infringement in favour of Atari.

Game mods work by adding, altering or deleting code of the game and are purchased by the players as they offer something more or better than the base game. Such mods are not always made with the authorization of the right holders and this is where the problem arises. In case the right holders do not agree with the mod they bring a suit for infringement as it is considered that a mod is essentially a derivative work and only the right holder has the exclusive right to authorize such derivative work. This was held in the case of *Midway Manufacturing Co. v. Artic International, Inc.*, and the defendant was held liable for infringement. In another case *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*, another important observation was made by the court in regard to mods that if there is no commercial harm to the right holder then the use can be considered to be fair use and thus not infringing. To conclude, it would be correct to say that video games are copyrightable (in the form of audiovisual works and computer programs). The major jurisdictions of the world agree to this standpoint. Further, in order to protect the copyright from being infringed, the Courts have developed a number of techniques to counter this problem. It is expected that the judiciary should be more active and efficient in dealing with such cases as by the time the Courts take note of any such instance of infringement, much of the damage has already been done. Also, substantive provisions should be brought into force in order to make the position of law on video games clearer. If all these things are taken

care of, it would make the life for gamers as well as game developers a lot more relaxed.

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ⁱ Atari advertisement appearing in the November 1981 issue of Creative Computing, Nov. 1981, at p. 99.