Intellectual property rights in the computer games industry

Simon Sellars and Paul Bicknell Sipara

global.practicallaw.com/2-598-3565

Computer games have been around since the late 1940s. Probably the earliest was a Cathode-Ray Tube Amusement Device that had a game built in where the aim was to guide a missile towards airplanes in an effort to shoot them down (Allen B Du Mont Laboratories, Inc had a patent for it (US Patent number 2455992)).

Since then the games industry has had a rapid but steady increase and reports are predicting that the industry will be worth around US$100 billion by 2018 (see DFC Intelligence report covered at www.gamesindustry.biz/articles/2014-06-25-game-software-market-to-hit-us9100-billion-by-2018-dfc).

Protection of intellectual property rights (IPRs) in this growing global industry includes:

- Copyright protection of aspects of computer games including software/coding, artwork/images, music/sounds, films, text, gameplay.
- Trade mark protection of characters and designs, among others.
- Enforcement strategy for businesses and bringing actions against infringements.

Other aspects of the games industry must also be considered, such as age classification.

GAME DEVELOPMENT AND INTELLECTUAL PROPERTY RIGHTS

Historically, games were released in the US market first, although this is changing and worldwide launches are more common. For larger development companies, there is usually a team of project managers managing the game through to completion, launch and post launch. The post launch period is now increasingly important as additional content is continually made available, whether as bug fixes or premium paid-for expansion of the original game.

A wide range of IPRs are applicable to computer games to varying degrees; copyright is the most important.

Copyright

Ideas or concepts are not protected by copyright, unless they are expressed in a form recognised by the Copyright, Designs and Patents Act 1988 (CDPA). Unexpressed ideas or concepts may be protected as confidential information.

There is no system of registration of copyright under the CDPA. Contrast this with, for example, the US, which operates a system of registration (see http://copyright.gov). For international games, local laws should be checked to ensure adequate and appropriate protection is obtained.

Copyright is a property right that can subsist within original literary, dramatic, musical or artistic works; sound recordings, films or broadcasts; and the typographical arrangement of published editions (Section 1 CDPA).

For a work to be protected by copyright it must also be original (that is, the author created the work through his own skill or labour without copying it). Generally, this test has a low threshold. There are other qualifying criteria including the author and country in which the work was created (see Part IX, CDPA).

Copyright in games generally covers:

- **Software/coding.** The definition of a literary work under the CDPA includes a computer program, including the preparatory design material for a computer program (Sections 1(1) and 3(1), CDPA).
- **Artwork/images.** The definition of an artistic work includes graphic works that include drawings, and so the game’s images and artwork, as well as those on the game’s case, can be protected as artistic works (specifically graphic works (see Sections 4(1)(a) and 4(2), CDPA). See also below, Gameplay.
- **Music/sounds.** A musical work is a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music (Section 3(1), CDPA). A sound recording means sounds, from which the sounds may be reproduced, or a recording of the whole or any part of a literary, dramatic or musical work from which sounds reproducing the work or part may be produced, regardless of the medium on which the recording is made or the method by which the sounds are reproduced or produced (Section 5A, CDPA).
- **Films.** Most games include short video or film extracts as the game progresses through the game that could fall within the definition of films under Sections 5A and 5B of the CDPA, which is a recording on any medium from which a moving image can be produced by any means. See also below, Gameplay.
- **Text.** The text used in the game can be protected as a literary work under Section 1(1) of the CDPA.
- **Gameplay.** Gameplay (that is the images played onscreen as the gamer progresses through the game) appears at first glance to be difficult to categorise into the language of Section 1 of the CDPA. “Artistic work” may be relevant; it includes graphic works that include drawings. However, these works are static and non-moving, whereas gameplay is, by its nature, in motion. The Court of Appeal in Nova Productions Limited v Mazooma Games Limited [2007] EWCA Civ 219 considered this point, highlighting that the moving images are a series of frames (static) stored in the computer’s memory, and so each frame constitutes an artistic work under the CDPA.

The Court of Appeal was also invited to find that there was a further type of artistic work that went beyond the individual frames, protecting the in-time movement of the series of frames (in the particular case the in-time movement of the cue and power metre). It was argued that this involved additional labour and effort beyond the individual frames. This was rejected at paragraph 16: “[...]”Graphic work” is defined as including all the types of thing specified in s.4(2) which all have this in common, namely that they are static, non-moving. A series of drawings is a series of graphic works, not a single graphic work in itself. No-one would say that the copyright in a single drawing of Felix the Cat is infringed by a
drawing of Donald Duck. A series of cartoon frames showing Felix running over a cliff edge into space, looking down and only then falling would not be infringed by a similar set of frames depicting Donald doing the same thing. That is in effect what is alleged here.”

**Trade marks**

Any sign capable of being represented graphically is capable of distinguishing the goods and services of one undertaking from those of others is registrable provided that both:

- It is not descriptive or non-distinctive in respect of the goods and services in question.
- It has not been opposed by the owner of an earlier similar sign. A distinctive game name will make a game memorable and standout from others.

**The house mark approach**

There are many approaches to brand strategy. However, a common brand strategy in the games industry is the “house mark approach”. Typically, the name of the first version of the game will be the house mark. Then the house mark will be used in combination with a “supporting mark” each time a new version of the game is released. It was also popular to use the name of the first game followed by 2, 3, 4 and so on, as new versions of the game were published. Today however, that practice is becoming less frequent with brand owners opting to use a house mark in conjunction with another mark. For example Activision own:

- An EU community trade mark (CTM) for CALL OF DUTY registered for computer games and so on in class 9. This is one of their house marks for the Call of Duty franchise, first released in 2003.
- A CTM for CALL OF DUTY GHOSTS registered for computer games and so on in class 9, games and action figures and so on in class 28 and entertainment services and online gaming and so on in class 41. The GHOSTS element refers to the game in the franchise released on 5 November 2013.
- A CTM for CALL OF DUTY ADVANCED WARFARE registered for computer games and so on in class 9, games and action figures and so on in class 28 and entertainment services and online gaming and so on in class 41. The ADVANCED WARFARE element refers to the version of the game released on 3 November 2014.

The house mark approach has its advantages. The goodwill, success and recognition of the first version helps with future marketing and sales of subsequent versions, as gamers will generally be familiar with previous versions and so may be more inclined to purchase the new version based on their previous experience with the old version.

**Characters**

Characters are capable of intellectual property (IP) protection. The usual option is to register an EU Community design of the character. Registration of a community design offers a quick and effective option for protection. A Registered Community Design (RCD) can last for up to 25 years provided the design is renewed every five years. Registering a community design is a relatively quick exercise, as the Office for Harmonization in the Internal Market (OHIM) does not examine the design for validity against prior designs.

Another option is to register an image of the character as a trade mark. Unlike a RCD, a trade mark can last perpetually provided renewals are filed and paid on time every ten years. However, there may be an issue if the character as depicted in the trade mark registration is not used within a continuous five year period, which may leave the registration vulnerable to challenge for non-use.

**Designs**

Registered and unregistered designs (UK and EU) are available. In practice, the registration of designs in the industry seems to be fairly limited, with reliance on copyright, trade marks and passing off appearing to be more common.

There are, however, some examples of registered designs for game imagery, particularly imagery that is likely to stay onscreen throughout the game, such as user interfaces. For example, Electronic Arts Inc have registered designs for the toolbars that feature in the game THE SIMS.

**AGE CLASSIFICATION**

The Video Recordings Act 1984 (VRA) makes it an offence (subject to certain exemptions and defences, see below) to supply a game unless it has been submitted for age classification to an authority designated by the Secretary of State. In the UK, classification is undertaken by the Video Standards Council trading as the Games Rating Authority (GRA) (see www.videostandards.org.uk/GRAG). The GRA adopts the Pan-European Games Information age-rating system (PEGI). This system was created by the Interactive Software Federation of Europe (ISFE). Before obtaining a PEGI rating, publishers join ISFE and, as part of joining, agree to comply with the PEGI Code (see www.pegi.info/en/index/id/1185/media/pdf/372.pdf). ISFE own the collective marks that are applied to the game.

It is a offence to the offence of supplying an unclassified game if the game is an “exempted work”. A game is an exempted work if it is any of the following:

- Taken as a whole, is designed to inform, educate or instruct.
- Taken as a whole, is concerned with sport, religion or music.
- Satisfies one or more of the conditions in Section 2A of the VRA such as: the game does not include depictions of violence, misuse of drugs, and swearing.

However, such games may qualify for the PEGI OK rating, which means that there is nothing in the game that would lead to a higher rating than a 3+ PEGI rating.

The PEGI system has classifications for ages 3+, 4+, 6+, 7+, 12+, 16+ and 18+. In addition, the back of a game cover (case) often features a number of descriptors that is a series of images designed to explain the particular age rating on the game. The descriptors cover: bad language, discrimination, drugs, fear, gambling, sex, violence and online gameplay (see www.pegi.info/en/index/id/33).

**INDUSTRY SPECIFIC IPR ISSUES**

**Recognition systems vs modification chips**

Games consoles often contain hardware-based recognition systems that prevent the illegal use of unauthorised copies of computer games or games that are region locked to be played in a different territory. Games that do not have a particular code will not be launched on those consoles. A modification chip (or modchip) circumvents these recognition systems, so gamers can play illegal games copies or legitimate games purchased from outside the console’s geographical region.

**Nintendo Co Ltd and others v PC Box Srl and another**

PC Box sold modchips designed to circumvent Nintendo’s DS and Wii’s recognition systems. Nintendo began proceedings in Tribunale di Milano where an issue arose as to whether Nintendo’s recognition system exceeded the parameters of Article 6 of Directive 2001/29/EC on copyright and related rights in the information society (Copyright Directive) when read in conjunction with Recital 48 of the Copyright Directive (for the UK law see: CDPA, Part VII, sections 296, 296ZA-296ZFA).

The Copyright Directive requires that all EU member states provide adequate protection against “circumvention of any effective technological measures” (Article 6(1)) and seeks to prevent the manufacture, import, distribution, sale, rental, advertisement for rental or sale, or possession for commercial purposes devices that (Article 6(2)):

- Have the purpose of circumventing.

global.practicallaw.com/ip-mjj
• Have a limited commercial use other than for circumventing.
• Are primarily designed to circumvent.

The Court of Justice of the European Union (CJEU) was asked:
• Whether “effective technical measures” covered measures equipping portable video games equipment or consoles with protection, as well as equipping the housing systems for such games.
• What is the criteria for assessing the scope of legal protection against circumventing technological measures?

The answer to the first question was yes. The words “effective technical measures” did cover measures equipping portable video games equipment or consoles with protection, as well as equipping the housing systems for such games, as the purpose of the Copyright Directive was to give rights holders a high degree of protection. Therefore, a broad interpretation should be given to effective technical measures.

The answer to the second question was that it is for national courts to determine whether alternative measures (or measures that were not installed in games consoles) could be adopted that caused less interference with activities of third parties (such as PC Box), while providing comparable protection for rights holders. The CJEU recommended taking into account:
• The costs of technological measures.
• Technological and practical steps of implementing those measures.
• A comparison of the effectiveness of the different types of technological measures as regards the protection of the rights holder’s rights. However, that effectiveness need not be absolute.
• The purpose of the modchip.

Let’s play
“Let’s play” is the term used to describe footage of a person playing a game. People may typically do this for review purposes. That footage is then uploaded to, for example, YouTube in the hope that the video receives a high number of views generating an income for the account owner. Many game reviewers, professional gamers and gamer teams do this.

Let’s play has also progressed into live streaming. For example, in August 2014 Amazon purchased the website Twitch.tv, which allows users to broadcast themselves playing games.

Potentially, a Let’s play video is a communication to the public of a protected work within the scope of Sections 16(d) and 20(1) of the CDPA. However, commercially, owners of the IPRs in the game being played often send out copies to YouTubers to review and upload their gameplay to YouTube as part of their marketing campaign. Those videos could be watched by many hundreds of thousands of people, some of which may be considering purchasing the game, and the YouTube video may be the deciding factor.

Characters and look-a-likes
Care should be taken with characters that feature in games. The legal systems of some countries lean towards favouring rights holders. There has been a lot of litigation in the US based on unauthorised use of celebrities’ images and likenesses, for example:
• No Doubt (the band) filed proceedings in California for the use of their imagery and likeness in the game Band Hero. It was reported that this case settled for an undisclosed amount.
• Lindsey Lohan sued developers of Grand Theft Auto. Vaccusing them of using her likeness for the character Lacey Jonas. Lacey Jonas appears on the front cover of the game and bears a strong similarity to Lindsey Lohan. Lacey Jonas plays a minor role in the game hiding from paparazzi, among other things. The action was filed in New York.
• Manuel Noriega (former Panamanian dictator) sued Activision over use of his image and likeness in the game Call of Duty: Black Ops 2. It was alleged that the game portrayed Manuel Noriega as responsible for a number of fictional crimes. The action was filed in Los Angeles.
• Ellen Page was reported to have been disappointed that her image and likeness was used for the character Ellie in the game The Last of Us. After this, the Ellie character was altered.

ENFORCEMENT
An appropriate enforcement strategy should be employed to prevent copying of a game.

Registrations
The first stage for businesses is to complete appropriate IP registrations in relevant jurisdictions throughout the world in copyright, trade mark or design infringement (where applicable). Generally, registered rights are easier to enforce than unregistered rights, and most enforcement campaigns lean towards asserting registered rights supplemented by unregistered rights. However, in the context of computer games, while registered rights are still important and should be obtained were possible (budget permitting), copyright is often key.

Copyright and design right infringement
For copyright and design right infringement, the claimant must show for each that:
• Copyright or design right subsists within the item.
• The claimant owns that right.
• A substantial part of the copyright work has been copied. In the case of design right, that the design is the same or substantially the same as the claimant’s.
• That the defendant copied the work or design.

If the defendant to an action for copyright infringement can establish that he did not know or had no reason to believe that copyright subsists within the work, the claimant is not entitled to damages, including exemplary damage (Section 97T(1), CDPA).

However, it is general practice to include an IP notice on the back of the game cover containing the relevant IPRs. It is also usual to include a statement on permitted use (or home use) describing the manner and extent that the games publisher permits the game to be used. An IP notice is also sometimes included at the beginning of the game as it loads on screen.

Registered design rights
Owners of registered designs can enforce their rights against those selling games that contain designs that do not give informed users a different overall impression to the design owner’s design. Unlike copyright and design right infringement, there is no requirement for the claimant to show copying.

Trade mark infringement and passing off
Trade mark infringement and passing off proceedings tend to be rare in the games industry, with the battle lines being drawn in the context of copyright infringement. However, it is common to include a trade mark notice on the back of the game case in an effort to warn others considering using identical or similar marks. Passing off is also relevant in the context of character and celebrity merchandising, and so is trade mark infringement (see box Recent cases, Ate My Heart Inc v Mind Candy Ltd).

The use of HMRC, UK borders agency and trading standards
EU-wide border policies made seizure of infringing goods relatively straight forward through member states national offices. Trading standards officers have the power to inspect and seize goods as part of their objective to enforce the laws and regulations on
quantity, quality, safety and fair trading governing goods and services available to consumers.

2015 AND BEYOND

The video game industry in 2015 is at an interesting junction. Complex games on a par with those on home consoles barely five to ten years ago can now be played on devices carried around in most people's pockets. The spectrum of gamers' ages continually expands as developers target new and untapped markets. Business models and user expectations are constantly shifting, as "freemium" games (provided free initially, but that make money using in-game advertising or by micro-payments for access to additional game content) increase in popularity.

New iterations of games hardware continue the cat and mouse game of people trying to find ways to do things with the technology that are outside of the manufacturer's original intentions, and the rules and regulations that govern the works associated with computer games struggle to keep up.

The low barrier to entry for new games developers brought around by the rise of the "app store" has reignited the debate on the extent of legal protection that can be afforded to game clones that copy game ideas and concepts, but not the aspects traditionally protected by copyright such as the soundtrack and artwork.

The now-mature games industry is a fairly self-correcting one, and represents a major cornerstone of the entertainment industry in general. Developers are increasingly aware of the need to protect their investment. While the existing legal framework may not be perfect, improved accessibility to information, resources, finance, and enforcement capabilities (in the UK especially, with the introduction of the small claims track at the IP Enterprise Court) has resulted in a dynamic and competitive marketplace, which shows no real sign of slowing down its impressive growth.

RECENT CASES

Nova Productions Limited v Mazooma Games Limited

This was an appeal to the Court of Appeal on alleged infringement of copyright by two games (Jackpot Pool and Trick Shot). It was alleged that these games copied a number of outputs in the claimant's game (Pocket Money).

Held: no copyright infringement. The outputs that were found to have been inspired from the claimant's game, which also appeared on screen of the defendant's games, were too general to amount to a substantial part of it. Creating a program that merely emulated another's program without copying the source code or graphics would not constitute copyright infringement.

Ate My Heart Inc v Mind Candy Ltd

In the Moshi Monsters game there is a character called Lady Goo Goo (a baby with blond hair that sings wearing large sun glasses). The claimants particularly objected to the defendant's Internet release of a song called the Moshi Dance sung by Lady Goo Goo that was alleged to resemble Lady Gaga's song Bad Romance. Following a large number of views on Youtube of the defendants, they planned to release the song on iTunes.

Held: interim injunction granted. The court found that:

- It was a strong argument that consumers would be confused between Lady Gaga and Lady Goo Goo:
  - considering the comments left by people on Youtube;
  - Goo Goo and Gaga were noises made by babies;
  - Lady Gaga had a reputation in music;
  - Lady Gaga's fans are referred to as little monsters; and
- The defendant's song on Youtube appeared when Gaga and Monsters were entered as a search

- Lady Goo Goo gave rise to a link with the trade mark LADY GAGA, which had a reputation. It was relevant to the issue of injury and dilution that consumers might believe that Lady Gaga had approved the defendant's song, which might lead to tarnishment or unfair advantage being taken of LADY GAGA.

- The defendant would have suffered substantial damage if prevented from releasing the song and the claimant's brand would suffer damage that would be difficult to quantify. However, the balance of convenience was in favour of preventing the defendant's song from being released.
**Practical Law Contributor profiles**

<table>
<thead>
<tr>
<th>Simon Sellars, Senior Associate</th>
<th>Paul Bicknell, Junior Associate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sipara</td>
<td>Sipara</td>
</tr>
<tr>
<td>T +44 844 225 3570</td>
<td>T +44 844 225 3570</td>
</tr>
<tr>
<td>E <a href="mailto:ssellars@sipara.com">ssellars@sipara.com</a></td>
<td>F +44 186 559 3580</td>
</tr>
<tr>
<td>W <a href="http://www.sipara.com">www.sipara.com</a></td>
<td>E <a href="mailto:pbicknell@sipara.com">pbicknell@sipara.com</a></td>
</tr>
<tr>
<td></td>
<td>W <a href="http://www.sipara.com">www.sipara.com</a></td>
</tr>
</tbody>
</table>

**Professional qualifications.** England and Wales, Solicitor

**Areas of practice.** Intellectual property.

**Professional qualifications.** Solicitor, England and Wales

**Areas of practice.** Intellectual property.