



Sean Kane



When It Comes to Games, The Practical Limit to United States Copyright Protection May Only Be Skin Deep

Sean F. Kane is co-Chair of the Interactive Entertainment Group at Frankfurt Kurnit. He has worked at the forefront of the interactive entertainment industry for the past decade and has represented clients on transactional matters involving various business segments, such as console and PC video games, virtual worlds, eSports, online gaming, social gaming, mobile and tablet gaming, virtual currency and mobile apps. Mr. Kane regularly advises clients on licensing, co-branding, consulting, advertising, content monetizing, publishing and distribution transactions. Mr. Kane is a frequent speaker and writer on video game issues and has been quoted widely by the media.

Contacts

Frankfurt Kurnit

New York,
United States

Tel: 212.705.4845

Fax: 347.438.2146

SKane@fkks.com

Copyright claims based on alleged similarities between video games (“clones”) are as old as the industry itself. While video games, like other creative works, may receive some level of protection, not all elements of a game are protectable. Abstract ideas, including game mechanics and rules, as well as functional and scenes a faire elements, are not entitled to copyright protection under current United States law. Only expressive elements are protectable. For courts, this distinction can sometimes be only skin deep, and whether or not a clone faces liability frequently turns on whether the second developer takes the time to create a new visual design for a game.

This article briefly reviews the US law behind game cloning and copyright law, and highlights the importance that visual design and aesthetics play in whether allegations of cloning translate into actual liability.

I Rules for publishing game in Iran

The scope of copyright protection enjoyed by video games is narrower than many realize. As the Copyright Office has explained in stark terms: “[c]opyright does not protect the idea for a game, its name or title, or the method or methods for playing it. . . . Once a game has been made public, nothing in the copyright law prevents others from developing another game based on similar principles.” This is the much-discussed “idea-expression dichotomy,” and while it is an easy principle to state, it is much harder to consistently apply in practice.

Applying this theory to games, Courts have held a wide array of game features are entitled to little or no copyright protection, including:

- Instructions, including dialogue boxes, tool tips, game instructions and arrow indicators.
- Game Rules and Mechanics, including all of the “rules and procedures, including the winning procedures” that operate and animate gameplay.
- Game Board Design, such as the use of a six-by-six grid in a “match-three” puzzle game.
- Scoring or Point Systems, which track player performance, as well as the method of using points or coins to reward players and allow the purchase of power-ups.

Courts have also been unwilling to find copyright protection in common game tropes, so-called “scenes a faire” elements, which define certain types of genres. For example, when the owners of the iconic Dawn of the Dead film sued Capcom over its game, Dead Rising, a California federal court concluded that the movie and game setting – a suburban mall – and both work’s portrayal of characters using improvised weapons to fight zombies were unprotectable, generic elements of a zombie survival horror story. Other examples include basic martial arts moves in fighting games, or the stock fantasy trappings of “sword and sorcery” epic adventure, including wizards, elves and dwarves.

So what game elements can be protected by copyright? Often, courts focus on the most obvious creative aspects of a game — its visual appearance, and the unique aspects of a game’s characters. The visual design of a game, particularly where the game is abstract or fanciful, is protected. The design of even simple games, like Tetris, are eligible for protection: “the style, design, shape and movement of [Tetris] pieces are expression.” Similarly, other courts have held that the unique, progressive matching hierarchy in Triple Town, and the colorful design of Breakout are creative choices that enjoy copyright protection.

Characters are eligible for protection when they are uniquely recognizable, either because they are genuinely novel (like Pacman) or because a work takes stock characters and elevates them above the tropes of the genre to become icons, such as Chun Li, Ken and Lt. Guile from Street Fighter. And, once a character reaches that status, creative aspects of that character’s personality or appearance, like Lt. Guile’s unique “sonic boom” attack, are also entitled to protection.

| A Tale of Two Clones

Two relatively recent cases reinforce the difference between copying unprotectable ideas and rules, and copying protected expression: Tetris Holdings, LLC v. Xio Interactive, Inc., 863 F.Supp.2d 394, 410 (D.N.J. 2012), and DaVinci Editrice S.R.L. v. Ziko Games, LLC, 183 F. Supp. 3d. 820 (S.D. Tex. 2016). While both cases involve arguably the wholesale appropriation of a preexisting game’s rules, the former also took the visual aesthetic and was likely infringing, whereas the latter re-skinned the game’s rules with a new theme and escaped liability.

Tetris Holdings, LLC v. Xio Interactive, Inc.

In Tetris, the developer of a game called Mino was alleged to have infringed Tetris by copying substantially all aspects of the famed puzzle game. In defending against Tetris's claim, Xio admitted to downloading a copy of Tetris and creating what amounted to a "clone" of the game, but claimed that it had taken steps to only copy the non-protectable elements of Tetris. These steps even included obtaining an opinion from legal counsel. Xio alleged it had not infringed Tetris because Mino only copied "rules, function and expression" which were "essential to the gameplay" but which did not constitute original protectable expression. In short, Xio relied on the argument that the rules of Tetris were inseparable from the expression, and so to the extent that the games looked alike, it was due to the fact they operated on the same rules.

The court rejected this argument out of hand, finding that Xio had done more than just incorporate Tetris' underlying rules. For the court, the fact that Xio had appropriated the visual design of Tetris was significant, and it spent significant time looking at the similarity of the look and feel of the two games, stating that "[t]here is such similarity between the visual expression of Tetris and Mino that it is akin to literal copying" regardless of the fact that Xio did not actually copy the underlying Tetris code. The court contrasted Mino with another Tetris-inspired game, Dr. Mario, to demonstrate how a developer can remix game concepts and ideas without appropriating protected visual elements. The court took pains to note that, in Mino, "the style of the pieces is nearly indistinguishable, both in their look and in the manner they move, rotate, fall, and behave. Similar bright colors are used in each program, the pieces are composed of individually delineated bricks, each brick is given an interior border to suggest texture, and shading and gradation of color are used in substantially similar ways to suggest light is being cast onto the pieces." The court described other problematic similarities between Tetris and Mino such as the game board dimensions, the manner in pieces are displayed, and the appearance of the completed game board. The Court found that the movements of the blocks in Tetris were not merely functional, but expressions associated with those elements.

DaVinci Editrice S.R.L. v. Ziko Games, LLC

DaVinci arose out of allegations that Ziko had cloned DaVinci's popular card game, Bang!, while only tweaking the game's aesthetic so that it took place in an ancient Chinese martial-arts setting instead of the Old West. The parties agreed that each game's rules were nearly identical, and much of the litigation focused on whether the allegedly unique characters in Bang! (the "Sheriff," "Deputy," "Outlaw" and "Renegade") were infringed by Ziko's versions ("Monarch," "Minister," "Rebel," and "Turncoat").

At the motion to dismiss stage, the court let DaVinci's claims survive, finding that the in-game characters' capabilities were part of their attributes and traits, and therefore could be protectable along with their names and visual design. Examining the "totality of the characters' attributes and traits," the court concluded a "reasonable factfinder" could conclude the games were similar, despite the fact that one was set in a Wild-West theme, whereas the other was set in ancient China.

Ultimately, however, Ziko prevailed at the summary judgment stage because it was able to show that the alleged infringement — the relationship among the various in-game characters — was a function of rules and not expressive narrative content. The court was swayed by the fact that Ziko's game had featured starkly different visual elements and character design, and different kinds of special powers (even if they did function identically within the rules of the game). Moreover, the court thought it significant that DaVinci's characters and special abilities were not connected to an overarching narrative, and had no set role or relationship in any play-through of the game. "Unlike a book or movie plot, the rules and procedures, including the winning conditions, that make up a card-game system of play do not themselves produce the artistic or literary content that is the hallmark of protectable expression . . . Instead, the game rules, procedures, and winning conditions create the environment for expression." Absent the appropriation of a defined character relationship, roughly analogous to a movie plot, the court was skeptical that there could be infringement.

In the end, the court found that the special abilities did not create expressive, protected character interaction, writing that "[t]he events in a Bang! game are not predetermined because the interactions between the roles have no underlying script or detail and are not fixed. Making certain roles aligned with and others opposed is part of the game's winning conditions, but these determine little about how players progress through the game." And, as a result, the court dismissed the case and granted judgment in favor of Ziko.

| Takeaway

Beyond highlighting the weight that courts give to visual elements and character design, these cases hold lessons for developers looking to ensure that their works are protected, and for others looking to capitalize on a genre growing in popularity. For the former, it's not enough to develop an innovative new set of rules for a game. If a game is to enjoy robust copyright protection, those rules must be connected with expressive, creative visual elements and strong developed characters that set the game apart from those that might follow-on. For second-mover developers, it is important not to cut corners and not take the time to create an independent visual aesthetic that sets a game apart from the earlier games that inspired it. Indeed, building on the court's comments in Tetris, it is better to take inspiration from games like Dr. Mario and combine new designs and new gameplay elements rather than lean entirely on a re-skin of what has come before.

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