

Copyright Issues in Digital Society: Sports Video Games

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Abstract

This article addresses application of copyright protection to sports video games, discusses relevant important issues, and is aimed at disclosing intellectual property approaches applicable to the various elements of that entertainment and sports technology. The main focus is put on issues such as copyrightable subject matter in sports, proprietary rights in sports video games, national approaches to copyright laws, complex issues of vesting copyright, and relationships between creators and users of video games. Particular attention is paid to protecting the athletes moves that appear in video games and elaboration of the copyright issues in Ukraine. It is suggested that categorized copyright protection is an adequate and flexible approach to sports video games as an independent and significant genre containing various copyrightable objects.

Keywords

Copyright, video games, digital society, intellectual property, e-sports, streaming video games.

1. Introduction

The video game market has been developing for over sixty years and according to various statistics its size is valued at more than USD 150 billion. There is a lot of evidence for its further growth. The video game industry has already eclipsed the music and film industries [1]. Even the COVID-19 pandemic did not slow down this dynamic; on the contrary, pandemic has accelerated it, as has the growth in the number of gamers around the world [2].

Legal issues cannot ignore such a thriving digital industry. Discussions about intellectual property in video games are not uncommon and have taken place since the advent of video games [3]. In most cases that digital systems are covered by copyright law, patent law, trademark law, and competition law [3], the right of publicity, the freedom of speech, expression, and creativity [4], and the right to privacy. But it is copyright law that penetrates the most the video game production industry [5; 6]. Modern developments contain many creative and expressive elements [7] that are covered by copyright, which creates a

large number of questions on law enforcement. Creating and using video games is an intellectual property challenge [8]. Therefore, these questions are interesting for science.

Video games can be grouped into several different genres (massively multiplayer online role-playing games, action adventure, first-person shooter, sports, rhythm, driving, strategies, puzzle, board and card games, gambling, etc.) [9] and may have distinctive goals (entertainment games, serious games or educational games, applied games, and social games) [3]. Different games have a large number of game elements, game rules standards and special expression in gameplay, and therefore they may have different legal protection [10].

Among the described genres, sports video games are of interest in several ways. First, sports video games market represents one of the highest selling types of video game in the industry [11]. And given such success, it is prone to spread copying, cloning, imitation, re-engineering of other developers' ideas [12]. Second, in 2019, the celebration of Intellectual Property Day was held under the slogan "Reach for Gold" where World Intellectual Property Organization emphasized

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the value of copyright among other intellectual property in the world of sport business, although it is not the only feature of the sport [13]. Sports video games are complex and complicated, which comprises different copyrightable objects [10]. Comparative analysis of sports and sports video games is interesting for science.

Copyright in sports is still causing debate among the scientific community, and the digitalization of sports has begun to generate even more debate.

This article addresses application of copyright protection to sports video games, discusses relevant important issues, and is aimed at disclosing intellectual property approaches applicable to the various elements of that entertainment and sports technology.

2. Copyrightable Subject Matter in Sports

In 2019, during the celebration of Intellectual Property Day, the copyright was only covered as a matter of broadcasting sports events. The portrayal of the sports performance through a picture or media coverage has good prospects for attracting intellectual property in different jurisdictions [14]. But there are also other copyrightable objects.

Sometimes courts had taken the position that sports performances meet the threshold for copyrightable subject matter [1]. A sports event per se cannot be considered as copyright [15]. Sports are divided between the following different groups, into which sports might fall, and these categories are arranged in order from the least to the most possibly copyrightable ones [16]: 1) sports events; 2) scripted sports plays; 3) routine-oriented competitive sports; and 4) routine-oriented non-competitive sports. Although this classification is not a panacea for obtaining copyright – for example, in the recent decision of the Spanish Supreme Court from October 18, 2020 regarding the claim of a professional bullfighter to obtain copyright protection, court sentenced that the bullfighter cannot register his choreography as an object of intellectual property since it cannot be expressed objectively [17]. The question of whether bullfight is a sport, perhaps, a debatable one, but the most important thing in this case is that in relation to expressive bullfight, the court referred to the decision of The Court of Justice of the European Union from October 4, 2011 with reference to Football Association

Premier League, which states that competitions limited by the rules of the game leave no room for creative freedom in the sense of copyright.

Scientists note that scripted sports, adversarial and routine-oriented sports, don't deserve copyright protection [16; 18], while choreographies of routine-oriented/aesthetic sports [19] as well as sports celebration moves [19; 20] are copyrightable subject matter. It follows from studies and judicial practice that establishing the existence of copyright requires a number of procedures, including an identification of moves compliance to the strict rules, the number of moves performed in choreography, the presence of competition, the ability to move in a different way or simpler, peculiarity of moves, compliance of moves with the public morality, etc.

A video game, like a sports game, does not necessarily lead to a copyrighted work, which is determined by the level of originality of the work and the dichotomy of functionality and expressiveness, but the scope of the copyrightable subject matter in sports video games is much larger.

3. Proprietary Rights in Sports Video Games

Video games include different technological aspects. In these IT products, in general copyright covers the following objects [7; 10]:

- Musical compositions.
- Sound recordings.
- Voices.
- Imported sound effects.
- Internal sound effects.
- Photographic images.
- Digitally captured moving images.
- Animations.
- Texts.
- Storylines.
- Characters.
- Primary game engine or engines.
- Ancillary codes.
- Plug-ins.
- Comments.

In sports video games, the storyline and characters as copyrightable objects raise controversial issues. While, in some cases, copyright holders of various management games (e.g. Fantasy Football) can claim such rights, copyright holders of realistic simulations of sports

are unlikely to get copyright protection for their storyline. By analogy with the legal issues in sports discussed in the second paragraph, rules, placement of athletes on the field, etc., are not copyrightable subject matter even in the digital space.

In addition, the list above lacks choreography, pantomime or parody that an athlete can display, for example, during a score celebration that is a recognizable attribute of a real athlete. Such animation elements are widely used in sports video games to enhance their believability and entertainment. In this case, the digital version of such movements can be considered, for example, as derivative work. But as the lawsuits against Epic Games [21] show, not every set of moves can be qualified as copyright, which means that it is necessary to take into account all the most common and relevant requirements for obtaining the rights of this intellectual property – the fixation requirement, the human authorship requirement, copyrightable subject matter, and the originality requirement.

4. National Approaches to Copyright Laws

Each of the EU member states, as well as the USA, Canada, China, Ukraine and other countries have their own national copyright laws, which are based on the framework of international laws and agreements such as the Berne Convention (1886), the TRIPS Agreement (1994), and the WIPO Copyright Treaty (1996). National approaches to video games can be divided into the following areas:

- Video games are classified as functional software with a graphical interface.
- Separate or categorized protection of each creative element according to its specifics is provided.
- Video games are classified as audiovisual works.
- Video games are not classified and not clearly defined in the legislation.

The first approach is used in countries such as Canada, China, Israel, Russian Federation, Spain, and other countries; separate or categorized protection for creative elements is provided in Brazil, Denmark, Germany, Japan, USA, and other countries; video games are regarded as audiovisual works in Kenya and the Republic of Korea [22].

In Ukraine, video games are not mentioned in the legislation (in the Civil Code of Ukraine, in the Law of Ukraine “On Copyright and Related Rights”, and in the Law of Ukraine “On the Distribution of Copies of Audiovisual Works, Phonograms, Videograms, Computer Programs, and Databases”) despite the fact that the Supreme Court back in 2006 pointed out the need to describe a video game as an object of copyright law in the Law of Ukraine “On Copyright and Related Rights” and in the Law of Ukraine “On the Distribution of Copies of Audiovisual Works, Phonograms, Videograms, Computer Programs, and Databases”. It means that the laws mention copyrightable objects such as computer programs, databases, audiovisual works, etc., which, probably, could be applied to video games, but do not directly mention video games (and, of course, do not distinguish their genres). In Ukrainian legal proceedings, there is a lack of theory and practice applicable to that digital system, but some comments [23] indicate that in Ukraine it is more likely that the approach of separate protection of each creative element of video game according to its specifics is applied.

The more legislators and courts will recognize the legal versatility of IT, the easier it will be for the creators to assess in advance the potential legal risks and opportunities and create original works, the more interesting the game will be for gamers, and the easier it will be to build a thriving national sector of the economy.

5. Complex Issues of Vesting Copyright

Both e-sports and streaming sports video games are modern trends. At first glance, the use of neighboring rights is appropriate in these activities, but research and practice indicate the need for a more detailed analysis of the approaches to these issues.

5.1. E-sports

Born in Asia and spread to Europe and Americas, e-sports has already eclipsed some of the biggest sporting events in the world [1]. It became difficult to ignore the commercial potential of e-sports, and in 2017, the International Sports Committee (IOC) began to consider “competitive e-sports” as a sporting event. In 2018, Lausanne hosted the first e-sports

forum organized in cooperation between the IOC and the Global Association of International Sports Federations.

E-sports is defined as “an area of sport activities in which people develop and train mental or physical abilities in the use of information and communication technologies” [24]. In addition, scientists note that escapism, acquiring knowledge about the games being played, novelty and e-sports athlete aggressiveness positively predict e-sports spectating frequency [25], i.e., even those aspects make e-sports popular and open up new market niches.

Taking into account the arguments from the previous paragraphs, e-sports is characterized by more ways of copyright protection than sports. Another difference between sports and e-sports is that copyright exists when an e-sports game is created, whereas it does not apply to sport as such [14]. There is a perception that the sports performance of e-sports can be considered as original expressions under copyright law, just like music, dance or theater [26]. At the same time, it is doubtful that “law may recognize intellectual property in a virtual eSport” [14] when it comes to scripted sport simulators. But certain opportunities still remain – since e-sports can protect the game format with copyright, and regulation of the rules of the game may be less important or even irrelevant [14]. At the same time, the widespread use of the image of an athlete as a leader of public opinion can place certain restrictions on the commercial aspects of copyright. This issue remains controversial.

Thus, copyright in e-sports generally primarily includes the corresponding rights of IT developers (or other copyright holders) to sound recordings, voices, sound effects, photographic images, moving images, animations and texts, and comments. In the second place, the rights of organizers and participants of a digital sports event to the same objects and to broadcasting as well as to possible new creative works appear. Otherwise, the relationship between e-sports players and organizers will probably develop similarly to well-known practices in real sports.

5.2. Streaming

Streaming video games is live broadcasting playing video games on the internet [27]. Research shows that in recent years, game developers have been aggressively using their

copyrights to gain a share of streamers income and to control the context in which their game is shown [27]. There is a perception that freedom of expression can and should be used in this context, as game streaming is already beneficial for IT developers (or other copyright holders) as it increases the demand for their game [27].

Today, in this type of relationship, the laws of countries justifiably give preference to the rights of copyright holders. According to all factors from the fair use checklist (the purpose and character of the use; the nature of the copyrighted work; the amount or substantiality of the portion used; and the effect of the use on the potential market or value of the work) the streamers' positions are weak.

5.3. User-Generated Content

The situation with user-generated content remains insufficiently clarified. Many video games encourage players to create and share so-called user-generated content, which can be a legal minefield for all parties [8].

Modern interactive online video games include tools for creating and developing new game elements such as characters, levels and other creative elements, in fact, they develop an entirely new category of creators whose legal status remains largely unclear [7]. Players must follow the rules of use of the game specified in the "end user license agreement" which in most cases leaves room for doubt, and IT developers should take into account various situations in order to prevent the distribution of illegal or inappropriate content on their platforms [8].

All games are interactive processes, and players perceive the game as a creative process, which undermines the copyright of the IT creator, while laws may not sufficiently protect both the copyrights of creative players and authors of video games [28].

The fact that only a specific expression of a computer program is copyrighted can be a disadvantage, because even similar visual effects by themselves sometimes cannot be proof of copying [3]. The copyright holder retains the rights to only one of the many ways of expression and its derivatives. Some confusion arises here, which includes concepts such as original work, fair use, derivative work, etc.

On the one hand, the resolution of this issue requires relevant courts decisions and explanations. Although tools for protecting the

copyright of players and authors of interactive games (or other copyright holders) are still developing, it is important to understand that here, as in most cases of streaming video games [28], the value of works is low. The same cannot be said for e-sports, where the financial prospects are much higher.

6. Relationships between Copyright Holders and Users of Video Games

6.1. Copyright Infringement

A thriving sector of the economy is bound to be faced with various types of law infringements. In addition, game developers are increasingly using a complex mixture of legal and illegal tools to regulate creative activities [1]. Among the most common infringements, the following should be noted [8; 10; 12]:

- One-for-one code copying.
- Imitation of game mechanics or remixure of multiple games' mechanics.
- Changing the graphics of an existing game (reskinning), while retaining the original expression and actual gameplay.
- Modifying other elements of an existing game, while preserving certain original elements.
- Hiding secret content (Easter eggs) in a video game by its developers which is taken from another copyrighted work.

These tendencies are taking place at the present stage of development of IT. Among a digital society, infringements are more widespread and more profitable for clone developers, but proportionately more detrimental to original developers [29].

6.2. Copyright Protection

Lawsuit cases regarding copyright in video games are widely reported in the scientific literature, but there is a lack of information regarding lawsuit cases which consider infringements in sports video games.

The main implications of most common lawsuits in video games are identifying significant similarities between works, balancing between freedom of speech, expression, creativity and copyright, testing genre standards (which are not protected by copyright), and publicly available noncopyrightable subject matter in a particular work.

Lawsuits involving sports video games, for example, have addressed issues such as the game's compliance with copyright vesting requirements and categorizing video game streams within the context of copyright law [30]. Most of the disputes between the creators of sports video games are about violations of other laws (public rights, false advertising, etc.). Although video games have already become part of the 21st century media landscape, their protection under copyright law still raises difficult doctrinal issues [28], some of which were described in the previous paragraphs.

Intellectual property law, especially copyright law, is an ever-expanding doctrine [27]. But such a complex copyright system means that courts have to conduct more detailed analysis, which in turn leads to higher costs for litigating parties [7].

The revenue that independent developers make is limited [29], but in the fast-growing mobile games market, such IT developers have weight. The mobile games market is full of small and medium-sized companies that use video games for commercial purposes without obtaining all the relevant copyright and related rights [7]. An illustrative example is the removal of Flappy Bird from the Apple App Store, after which sixty Flappy Bird clone applications were sent every day for approval in the App Store [29].

Although some countries are implementing projects to simplify the handling of copyright infringement claims, in general, the high costs of litigation processes are not always within the reach of SMEs. Legislation should distinguish legitimate inspiration and plagiarism [9] in order to serve all stakeholders. Although potential copyright infringement implies certain legal remedies, the following extralegal norms of fairness, which minimize the need for strong legal interventions, underlie content creation in the gaming context [1]:

- Norms of competitive integrity prevalent among video game players.
- Norms of wealth sharing arising out of communities of loyal consumers.
- Labor-based norms that allow gameplay streamers to claim ownership over their recorded stream.

Internal copyright management systems [31], which could include legal, educational, and specific aspects (such as IT applications in licenses distribution or in monetization of copyright assets, etc.), are useful to SMEs especially at the stage of development of

technological elements of digital systems that are essentially copyrightable subject matter. An effective legal instrument for the protection of intellectual property rights is Directive 2004/48/EC of the European Parliament and of the Council from April 29, 2004 on the enforcement of intellectual property rights, which provides effective means of presenting, obtaining and preserving evidence that is of prime importance in intellectual property lawsuits, which allows plaintiffs to claim the physical withdrawal of infringing goods and/or materials and tools used in the production and/or distribution of those goods and/or materials, an “ex parte injunction”, an interim measure for a judgment without the presence of the defendant [3]. The implementation of such rules could be adequate to the challenges of the Digital Era, and, possibly, standardize the processes of considering cases related to copyright protection and reduce the costs of litigants for conducting different tests.

7. Conclusions

Thus, as a result of the analysis, it was found that proprietary rights in sports video games are significantly different in objects from sports and slightly different from the general case of video games. Basically, this kind of entertainment and sports, like other genres of video games, contains a wide variety of copyrightable objects: mostly – primary game engine or engines (which can be considered, for example, as “literary work” or “computer program” in the language of the law), ancillary code (computer program or literary work), plug-ins (computer programs or literary works), musical compositions (musical works, including any accompanying words), sound recordings (sound recordings), images (graphic works), animations, sound-effects, and comments (motion pictures and other audiovisual works), texts (literary works), sport celebration moves (pantomimes and choreographic works), and neighboring rights for e-sports; and barely – storylines and characters.

Therefore, separate or categorized copyright protection is an adequate and flexible approach to sports video games for the digital society needs since “categorized protection is probably conducive to the innovation and iteration of the video game sector” [32]. This approach also may be applied in countries where video games are not directly indicated as copyrightable subject matter

and may be considered as a complex of other copyrights.

Jurisdictions of countries in whose legislation the video games are not defined as an object of copyright and where there are no relevant court cases run the risk of facing a chaos of unpredictable court decisions. At the same time, it is important to note that nowadays information on generalized approaches in court cases regarding sports video games is scarce, as well as on court cases regarding e-sports, streaming sports video games, and user-generated content. These questions are a prospect for further research.

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