

Kluwer Copyright Blog

Overkills and Wipes: Aligning copyright with the video game industry's needs: Part 1

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This is a two-part post summarising the authors' findings from the report on [Copyright Infringement in the Video Game Industry](#), which was prepared by the authors for the World Intellectual Property Organization. It focusses on the state of the art of the video game industry and the role of IP, in particular copyright, throughout the lifecycle of video games as complex digital products. It has identified four specific case studies relevant for copyright infringement and enforcement strategies: (i) game cloning, (ii) cheating, (iii) emulators and ROM files, and (iv) livestreaming and Let's Play videos. This part looks at the state of the art of the video game industry and the first two case studies, while part 2 turns to emulators, ROM files, livestreaming and Let's Play videos.



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The industry

Over the last few decades, the video game industry has experienced unprecedented growth, becoming one of the most successful creative industries worldwide. Video games are complex digital creations designed to be interactive, immersive, capable of fostering players' creativity, and increasingly, capable of connecting players across the globe. These distinctive features have given rise to a number of uses and practices that pose unique challenges for video game companies when it comes to copyright enforcement strategies. These challenges are exacerbated by the global nature of the industry and the lack of harmonisation of copyright law, meaning that an enforcement strategy which has been successful in one jurisdiction may not necessarily achieve the same objectives elsewhere. Enforcement strategies will necessarily differ depending on factors such as the type and genre of the video game at issue, the business model employed, the nature of the

allegedly infringing activity and the jurisdiction in which it takes place. While copyright is the intellectual property right most commonly associated with video games — as it is with the products of most creative industries — rightholders should bear in mind that it is far from the only tool in their arsenal. They can also rely on a range of other intellectual property rights and, importantly, the terms of the end-user licence agreement (‘EULA’) governing players’ use of their video games. The latter can be particularly useful where the lawfulness or otherwise of a practice is unclear.

In addition, the interactive nature of video games and the commercial importance of an active and engaged player base means that, in deciding on an enforcement strategy, video game companies should be mindful of the need to cultivate and maintain a positive relationship with their player base. Aggressive enforcement against individual users is rarely the best approach, as this is likely to undermine the goodwill between the company and its players. In addition, not all potentially infringing uses and practices present a commercial threat; indeed, some arguably infringing activities may actually be beneficial to the rightholder. In deciding on an enforcement strategy, therefore, companies should be careful to distinguish between uses and practices that are directly detrimental to their revenue stream (such as game cloning), those that are detrimental to the player experience (such as cheating) and those that are, conversely, an intrinsic part of a thriving player community (such as video game livestreaming, Let’s Play videos, in-game user-generated content and modding).

The four case studies set out in this two-part post highlight the importance of differing strategies for addressing different uses and practices that have varying impacts on video game companies’ revenues and reputation.

Game cloning

Game cloning refers to a practice where a competitor seeks to capitalize on a video game’s success by replicating its combination of game mechanics – namely the rules and systems that govern and guide the player’s interactions with the game – without engaging in any direct copying of the game’s art, music, sounds or the underlying computer program that powers it (for examples, see [here](#) and [here](#)). This effectively allows the competitor to produce a game that ‘plays’ in the same way as the original but looks and sounds different from it. This issue has become especially significant within the mobile gaming sphere, as the relative simplicity of mobile games makes them much more susceptible to this kind of imitation.

Rightholders seeking to make claims of copyright infringement against producers of game clones have met with mixed results depending on the jurisdiction, with courts in the US (see [here](#) and [here](#)) — and recently China (see the seventh case discussed [here](#)) — being much more receptive to such claims compared to courts in the UK (see discussion [here](#)). This is because different jurisdictions treat game clones very differently, depending in part on how they classify video games as copyright subject matter and in part on where they draw the line between the taking of an unprotectable ‘idea’ and the copying of protected ‘expression’ where copying of game mechanics is concerned. Because of the costs and risks of legal action, some small, independent video game companies have shown a preference for non-legal solutions, including ‘naming and shaming’

perceived cloners.

Cheating

‘Cheating’ is an umbrella term for a range of practices that allow users to gain an unfair competitive advantage which negatively affects the experience of other players, particularly in the context of multi-player online games. These include the use of private servers (i.e., the unauthorised re-implementation of an online video game server), the use of bots (i.e., computer programs that play the game in the place of the player, often used to automate repetitive tasks) and the exploitation of bugs or oversights in the game’s design. Cheating creates frustration and resentment in the player base, leading to fewer players, less participation and decreased revenue. The majority of players who engage in cheating generally make use of cheat software created and supplied by third parties. Rightholders’ enforcement strategies, therefore, are directed not only at individual players, but at providers of cheat software.

Most companies incorporate prohibitions against the use, production and distribution of cheat software in their EULAs and Terms of Service. This provides a legal basis to terminate players’ access to their games in the event of a breach. Perhaps even more importantly, however, the EULA also enables companies to take action against the providers of cheat software. While it is possible, in principle, to bring a successful claim of copyright infringement without relying on the EULA against providers of cheat software, this requires rightholders to identify with a fairly high degree of specificity, which protected elements of the video game have been copied, as well as the precise nature of the allegedly infringing acts. This remains to be particularly problematic since the lack of consensus regarding the legal nature of video games and their constituent elements. Infringement of complex digital products constitutes of multiple infringing acts, which may be overlapping and mutually exclusive in their application. A well-drafted EULA, therefore, remains rightholders’ safest and most obvious route to success.

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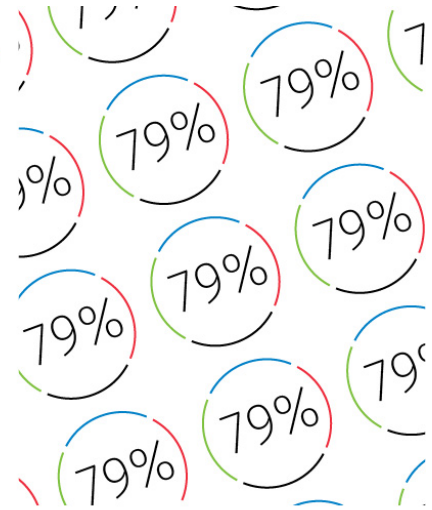
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