

VIDEO GAMES AND INTELLECTUAL PROPERTY LAW

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Centre for Commercial Law Studies

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Shaping the future
of commercial law

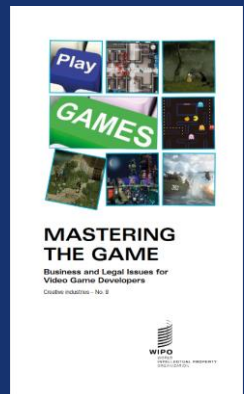


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**MORE
THAN JUST A
GAME**



Complex IP Products/Services

Complex Contractual Matrix

Complex Regulatory Framework

= Complex Issues (Overlaps, Gaps & Mismatches)

- Protectability
- Freedoms
- Regulation
- Use
- Abuse

+ Transactional/Supranational reach with consequences on the entire legal and regulatory frameworks & profound impact on culture and society

- Copyright
 - Patent
 - Trade marks
 - Design
 - Personality rights
 - Unfair competition
 - Trade secrets
- Creative use of third parties IP
 - EULAS*
 - Competition law

COPYRIGHT

- Legal nature
 - Cloning
 - Interoperability
 - Exhaustion (digital distribution, geo-blocking, account transfer, and key-selling)
- Interactivity Issues (Copyright+ TPM + EULA & ToS):
 - Hacks, bots & private servers
 - Emulators & ROMs
 - Modding & Add-ons
 - In-worlds user creations
 - Third-parties liabilities
 - Machinima production
 - Let's Play & Live streaming
 - Perception & Chilling effect
- AI (Enhanced Creativity, Enhanced Experience, AI-Created worlds)
- Bestseller clauses & IP clauses in employment contracts
- Preservation

- TPM & Mod-Chips

THE LEGAL NATURE OF VIDEO GAMES

- Unitary approach
 - audiovisual works
 - computer programs
 - something else?

- Distributive approach

For an overview: Andy Ramos et Al., The Legal Status of Video Games: Comparative Analysis in National Approaches, WIPO 2013 [partially outdated]

VIDEO GAME CONTENT

3D Models and Environments

Music, Sound & Voice Acting

In-Game and Concept Art

Story and Dialogue

Characters

Graphics

AUTHORS

Graphical Artists

Designers

Animators

Musicians & Composers

Writers

Visual Artists

GAME ENGINE

Creative Suite

Software Modules and Tools

Renderer

Physics Simulation

Artificial Intelligence

Music and Sound Management
and Sound Generation

UK

“The kind of copyright works originally relied upon were:

i) Artistic works being the bitmap graphics and the frames generated and displayed to the user;

ii) Literary works, being Mr Jones' [Nova's designer] design notes and the program which he wrote to implement the game;

iii) A dramatic work embodied in the game itself;

iv) Film copyright.”

(Nova Productions Ltd v Mazooma Games Ltd; Nova Productions Ltd v Bell Fruit Games Ltd [2007] EWCA (iv 219)

IELR 3.2: Copyright protection of video games in the post-Brexit world - article + video

US

“Courts in this Circuit and others have long held that elements of computer programs may be protected by copyright law. This includes both the code for the program as well as the graphical elements for programs such as video games.”

[[Tetris Holding, LLC v. Xio Interactive, Inc.,
863 F.Supp.2d 394 (D.N.J. 2012)]]

EU

“Videogames [...] constitute complex matter comprising not only a computer program but also graphic and sound elements, which, although encrypted in computer language, have a unique creative value which cannot be reduced to that encryption. In so far as the parts of a videogame, in this case, the graphic and sound elements, are part of its originality, they are protected, together with the entire work, by copyright in the context of the system established by Directive 2001/29”

(C-355/12 Nintendo)

C-5/08 Infopaq

C-310/17 Levola at [42] precise and objective form of expression

C-683/17 Cofemel:

1. Original
2. Expressed in a manner which makes it identifiable with sufficient precision and objectivity, even though that expression is not necessarily in permanent form

RELEVANCE

- Author?
 - Different authors depending on the type of work
 - same type of work you may have different authors depending on the jurisdiction, e.g. for audiovisual works
 - “The principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States shall be free to designate other co-authors”. (Art. 2(1) Term Directive)
- Term?
 - Different duration depending on the type of work. E.g. for audiovisual works:
 - “The term of protection of cinematographic or audiovisual works shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work”. (Art. 2(2) Copyright Duration Directive)
- Ownership of work created by employees?
 - (Possibly) different rules depending on the type of works. E.g. for software
 - “Where a computer program is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the program so created, unless otherwise provided by contract”. (Art. 2(3) Computer Program Directive)
- Exhaustion? (C-128/11 UsedSoft) v (C-263/18 Tom Kabinet)
- TPM - (C-355/12Nintendo)

GAME PLAY/MECHANICS?

- Originality
- Idea/Expression Dichotomy

“Almost all expressive elements of a game are related in some way to the rules and functions of game play”

[Tetris Holding, LLC v. Xio Interactive, Inc., 863 F.Supp.2d 394 (D.N.J. 2012)]

creating a video game - cloning





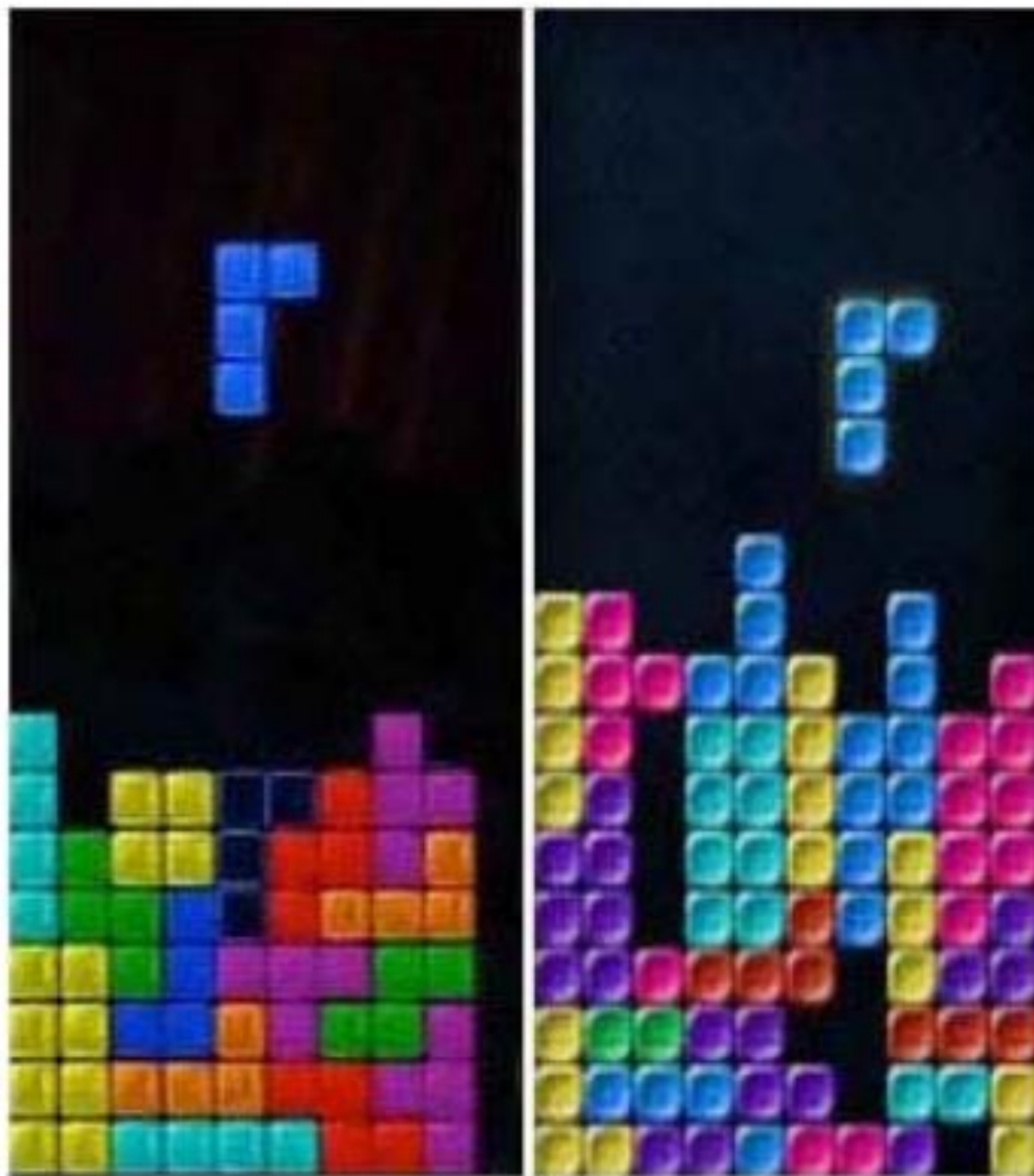
OXOXO = 111111 OXOXO

K.C. Munchkin!



Pac-Man

TETRIS HOLDING, LLC V.
XIO INTERACTIVE, INC.,
863 F.SUPP.2D 394
(D.N.J. 2012)



CLONING





SPRY FOX LLC v. LOLAPPS INC, No. 12-00147, 2012 WL 5290158 (W.D. WASH. SEPT. 18, 2012)

CLONING





VS



Woodturning

WoodShop

EXHAUSTION

- digital distribution
 - (C-128/11 UsedSoft) v (C-263/18 Tom Kabinet)
 - UFC-Que Choisir v Valve 2019
- account transfer/selling
 - vzbv v valve
- key-selling

USE OF 3° PARTIES IP



INTERACTIVITY

Copyright+ TPM + EULA & ToS =

- Hacks, bots & private servers
 - Emulators & ROMs
 - Modding & Add-ons
- Creative use of third-parties copyright (IP)
- In-game user creations (+third-parties liabilities)
 - Machinima production
 - Let's Play & Live streaming

Perception & Chilling effect

UGC

MORE ...

- AI (Enhanced Creativity, Enhanced Experience, AI-Created Games)
- Bestseller clauses & IP clauses in employment contracts
- Video game preservation

PATENT

- Video game patents
 - Hardware patents
 - Software patents
 - Protecting game mechanics
- Interoperability
- US v EU dichotomy
- Perception, awareness and understanding
- Costs and damages (one size doesn't fit all?)
- The Nemesis patent

• AI

THE MEDIUM SPLIT-SCREEN PATENT



PATENT IN A NUTSHELL

- Money, money, money issue
- High risk of invalidation
- High risk of trolling
- Chilling effect
- High risk of concentration of power and control beyond the scope of the patent
- UK and the EU far beyond the US (but it is probably a good thing)

TRADE MARKS

- Registrability
- Cloning
- Multimedia Marks
- Fictional Marks
- In-world use of TM
- In-world users' creations
- Gamers are different than average consumers, but the metaverse is not only for gamers



MULTIMEDIA MARKS

EUTM application number
017282203



FICTIONAL TRADE MARKS



IN-WORLD USES

- E.S.S. Entertainment 2000, Inc. v. Rock Star Videos, Inc., 547 F.3d 1095 (9th Cir. 2008)
- Minsky v. Linden Research, Inc., No. 1:08 cv 819 (N.D.N.Y. 2009)
- Leo Pellegrino v. Epic Games, Inc., No. 19-1806 (E.D. Pa. 2020) - just one out of many
- AM General v. Activision Blizzard, No. 17-cv-8644 (S.D.N.Y. 2020)




USE

- Google France [2010] RPC 19
- L'Oréal v eBay [2011] RPC 27
- Coty Germany v Amazon Services Europe [2020] ETMR 27
- (UK) - (Montres Breguet S.A. and others v Samsung Electronics Co. Ltd. and Samsung Electronics (UK) Limited [2022] EWHC 1127 (Ch)).

• Unconventional uses?

MANCHESTER UNITED V SEGA

The screenshot shows the Manchester United club profile page in Football Manager 2019. The page is titled 'MANCHESTER UNITED' and indicates they are '12th in English Premier Division'. The date is '24 JUN 2019 Mon 9:00'. The page is divided into several sections: 'CLUB DETAILS', 'COMPETITION', 'RIVALRIES', and 'DERBIES'. The 'CLUB DETAILS' section includes the club's crest, nation (England), region (UK & Ireland), reputation (5 stars), nickname (The Red Devils), year founded (1878), professional status (Professional), captain (Ashley Young), vice-captain (David De Gea), and squad personality (Highly Professional). The 'COMPETITION' section shows the division (English Premier Division) and media prediction (6th). The 'RIVALRIES' section lists fierce rivals (Liverpool, Man City, Leeds) and other rivals (Arsenal, Bolton, Chelsea). The 'DERBIES' section lists Manchester Derby, Roses Derby, and North-West Derby.

CLUB DETAILS		
	NATION England	NICKNAME The Red Devils
	REGION UK & Ireland	YEAR FOUNDED 1878
	REPUTATION ★★★★★	PROFESSIONAL STATUS Professional
		CAPTAIN Ashley Young
		VICE-CAPTAIN David De Gea
		SQUAD PERSONALITY Highly Professional

COMPETITION	
DIVISION	English Premier Division
MEDIA PREDICTION	6th

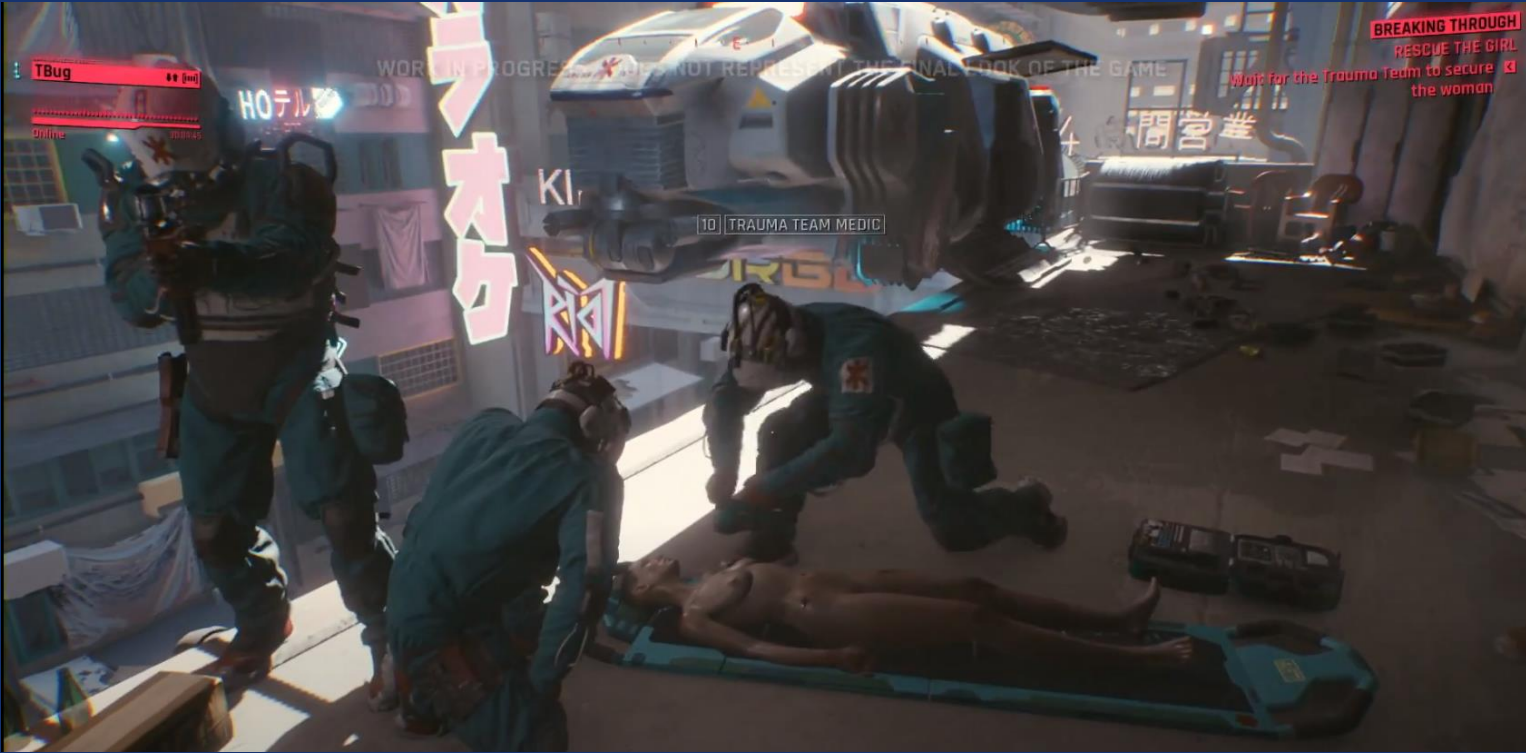
RIVALRIES	
FIERCE RIVALRY	Liverpool (Local), Man City (Local), Leeds (Historic)
OTHER RIVALRY	Arsenal (Competitive), Bolton (Local), Chelsea (Competitive)

DERBIES	
	Manchester Derby (vs Man City)
	Roses Derby (vs Leeds)
	North-West Derby (vs Liverpool)

Manchester United to be renamed Manchester UFC from Football Manager 22 onwards after trademark dispute

CYBERPUNK 2077





> clothes > t-shirts

Trauma Team Platinum T-shirt | DESIGNED BY CD PROJEKT RED

★★★★★ [1 REVIEW](#)

The pinnacle of corporate paramilitary medical insurance, Trauma Team members will go to hell and back for you... That is, if you have Platinum Membership. With this Trauma Team T-shirt, you'll always have them close to your heart (and other vital organs).

Mikołaj is 185 cm tall. He is wearing M size men's t-shirt.

STYLE	MATERIAL	THICKNESS
MEDIUM FIT	100% COTTON PREMIUM	170 G

SIZE: S M L XL XXL XXXL [Table of sizes](#)

\$23.00
IN STOCK

\$3.95
ESTIMATED SHIPPING

[ADD TO CART](#)

[ADD TO WISHLIST](#)

entertainment > figurines

Trauma Team Elite Response Unit Figure | DESIGNED BY CD PROJEKT RED

In Night City, a life of luxury needs protection of the highest caliber. Always on call, Trauma Team are the mobilized life savers of the biggest spenders and VIPs in town. And they're worth every Eddie. This 15-inch, hand-painted figure shows them in action, fully equipped and ready to pull another Platinum member out of harm's way and into the oh-so-sweet embrace of safety.

Due to the complex and hand-painted nature of the item, each figure may feature minor differences in appearance. Limited edition. Planned shipping date: Q2 2021.

MATERIAL	SIZE
POLYSTONE	15 INCHES

\$350.00
PRE ORDER

\$13.39
ESTIMATED SHIPPING

[ADD TO CART](#)

[ADD TO WISHLIST](#)

DESIGN

- Icons, GUIs and in-game items
- Fundamental but virtually unexplored/untested

HONOURABLE MENTIONS

- Unfair Competition
 - Lack of harmonisation
- Competition Law / Anti-Trust
- Trade Secrets
- Personality Rights
 - Lack of harmonisation

- EULAs & ToS
 - Questionable enforceability of some IP clauses

MULTI/CROSS IP ISSUES

- Cloning
 - Copyright, Patent, Trade Mark, Design, Unfair Competition, etc
- Virtual Property/Exhaustion
 - Tencent v. DD373(.com)
- In-game use of third parties IPRs (+CH)
 - Copyright (e.g. Easter eggs, dance moves)
 - Trade marks (e.g. Hyperrealism)
 - Personality rights / publicity rights / image rights (e.g. Cameos)
 - Cultural Heritage Laws
- Esports
- Streaming

1. Games as a Destination

- Exponential growth of the Metaverse, IP licensing, and virtual world building (Minecraft, Roblox, Animal Crossing, and Fortnite) will make video games the place to be and be seen.

2. Games as an Experience

- Virtual reality, haptics, wearables, and new deep immersive technologies will be ready to bring it all together.

3. Games as a Service

- Cloud computing, cloud platforms, advance mobile devices, along with broadband and 5G deployment, will set the stage for players to engage whenever (any time), wherever (any place), and however (any device).

4. Games as a Social Network

- Multiplayer functionality, competitive tournaments, and esports, will continue to make the gaming world one big family.

5. Games Get Real(istic)

- Advances in computer processing power, speed, storage, and graphics—powered by AI

6. Games for Change

- The video game industry will continue to harness its global reach to engage players in societal causes such as climate change (#playingfortheplanet), pandemic response (#playaparttogether), and mental health (#safeinourworld)

7. Retro Games

- Nostalgia will continue to fuel the industry's link to the past and help bridge generations to come (grandparents playing with grandkids).



THANK YOU

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