

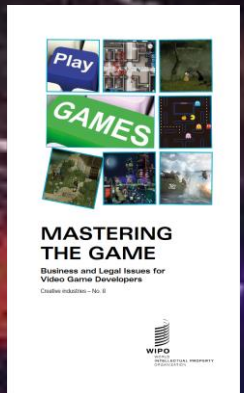
VIDEO GAMES AND COPYRIGHT LAW

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**MORE
THAN JUST A
GAME**







CYBERPUNK

2-0-7-7



VS



Woodturning

WoodShop

THE CRUX OF THE PROBLEM

Young, global, fast-paced, born-digital, highly innovative, highly creative, and very successful industry

- \$175.8 Billion in 2021 (newzoo 2020)
- 2.7 Billion people plays videogames (newzoo 2020)
- 51% of the EU Population (aged 6-64) play video games (IFSE 2020)

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

VIDEO GAMES AND INTELLECTUAL PROPERTY

- Copyright
- Patent
- Trade marks
- Design
- Unfair competition
- Trade secrets
- Creative use of third parties IP

COPYRIGHT

- Legal nature
 - Cloning
 - 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-game user creations
 - Third-parties liabilities
 - Machinima production
 - Let's Play & Live streaming
 - Perception & Chilling effect
- AI (Enhanced Creativity, Enhanced Experience, AI-Created Games)
- Video game preservation
 - TPM & Mod-Chips
 - Bestseller clauses & IP clauses in employment contracts

THE LEGAL NATURE OF VIDEO GAMES

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

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Andy Ramos et All, The Legal Status of Video Games: Comparative Analysis in National Approaches, WIPO 2013 [partially outdated]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

Music and Sound Generation

“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 Civ 219)

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

“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-355/12 Nintendo)

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”

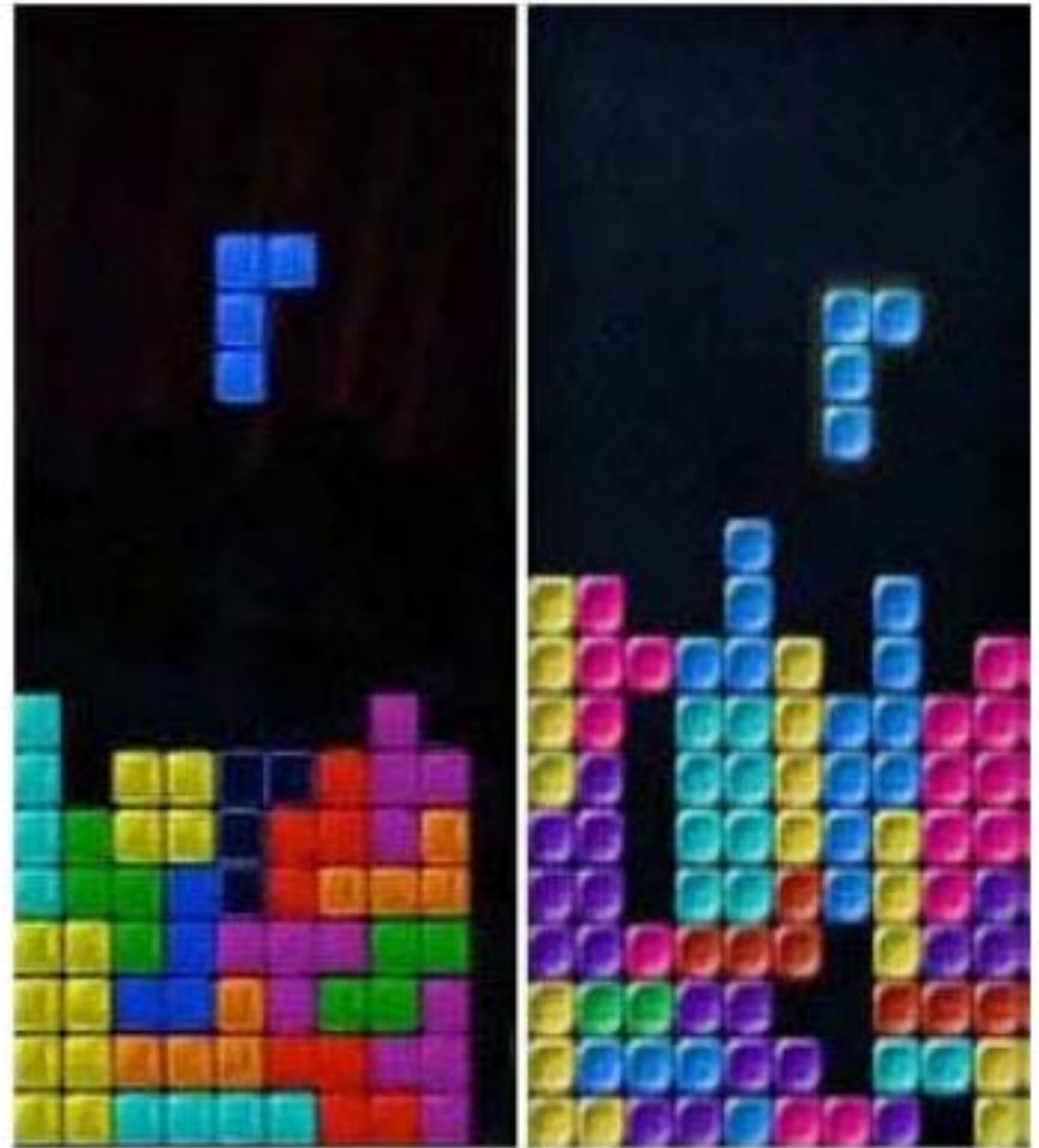
[Tetris Holding, LLC v. Xio Interactive, Inc., 863 F.Supp.2d 394 (D.N.J. 2012)]



K.C. Munchkin!

Pac-Man

**TETRIS HOLDING, LLC
V. XIO INTERACTIVE,
INC., 853 F.SUPP.2D
394 (D.N.J. 2012)**





**SPRY FOX LLC v. LOLAPPS INC, No. 12-00147,
2012 WL 5250155 (W.D. WASH. SEPT. 15, 2012)**



VS



Woodturning

WoodShop

EXHAUSTION

- digital distribution,
 - (C-128/11 UsedSoft) v (C-263/18 Tom Kabinet)
 - UFC-Que Choisir v Valve 2019
 - IELR 3:2 - Trepova-Fava, Aren't we all exhausted already? EU copyright exhaustion and video game resales in the Games-as-a-Service era
- account transfer/selling
 - vzbv v valve
- key-selling
 - IELR 1:1 Lober-Klein-Groothuis, The long and winding road of digital distribution. Or: why the ECJ's UsedSoft decision is of no use to keysellers

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

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

MORE ...

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

7 PERSPECTIVES

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).

METAVVERSE

THANK YOU

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- GREENSPAN-DIMITA, *Mastering the Game*, 2nd edition, WIPO
- FESTINGER, *Video Game Law* 2nd edition, Lexis Nexis - A modern classic, but outdated
- SCELSI-DANNENBERG, *Computer Games and Immersive Entertainment*, 2nd edition, ABA
- BOYD-PYNE-KANE, *Video Game Law*, CRC Press
- NABEL-CHANG, *Video Game Law*, West Academic
- LIPSON-BRAIN, *Video Game Law*, 2nd edition, Carolina Academic Publishing
- VAN DREUNEN, *One Up*, Columbia Business School
- Lastowka's *Copyright Law and Video Games: A Brief History of an Interactive Medium*. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2321424
- Lee, YH. *Play again? Revisiting the case for copyright protection of gameplay in videogames*, *E.I.P.R.* 2012, 34(12), 865-874
- Burk, Dan L., *Copyright and Paratext in Computer Gaming*. *EMERGING ETHICAL ISSUES OF LIFE IN VIRTUAL WORLDS*, Charles Wankel, Sean Malleck, eds., Information Age Publishing, Forthcoming, UC Irvine School of Law Research Paper No. 2009-22, Available at SSRN: <https://ssrn.com/abstract=1407640>