

## **“The Emerging Need to Protect Video Games: The Rights of Developers and Key Stakeholders”**

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### **Abstract**

The video game industry is growing exponentially with the latest developments in technological sector. Thus, there emerges the need to protect the rights of developers and key stakeholders involved in developing a game. Copyright is a bundle of rights provided to protect the original work of the owner against infringement. A video game consists of different elements which may be categorized as audiovisual elements and software program, which can individually become subject for copyright protection. It depends upon the legislative framework of a country and jurisprudential theories and nature of jurisdiction to seek copyright protection for different elements of a video game. With evolution in gaming industry there increases the number of personnel involved in developing a game and their right to hold copyright which encumbers upon their contribution and originality of work. It is important to protect the interests of game developers and key stakeholders by providing legal protection to video games. This article aims to examine the implication of copyright law in regards to protection of video games in Indian perspective.

Keywords: Copyright, Video Games, Copyrightable Content, Key Stakeholders

### **Introduction**

The emerging importance of protecting Intellectual Property (in short IP) was recognized in *Berne Convention for the Protection of Literary and Artistic Works, 1886* (Berne Convention) which was administered by World Intellectual Property Organisation (WIPO). This was followed by the Universal Copyright Convention of 1951 and finally Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement of 1995.

The Indian Copyright Act of 1957 was enacted in conformity with most of the International Conventions and TRIPS Agreement. Copyright is a collection of exclusive rights available at the disposal of original creator or author of artistic, dramatic, literary, computer software and computer programmes, musical and cinematographic work, and sound recordings. The said right vested in author empowers the author or original creator to sell or reproduce the copyrightable work and exploit the same in the commercial terms via licensing, adaptation and translation and assignment of work.<sup>1</sup>

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<sup>1</sup> Section 14 of Indian Copyright Act, 1957

Protection of Copyright commences since the day of creation of work, here the creation means that the work should be expressed in a material form and is not at a stage of mere idea. An indispensable characteristic of copyright protection is that a work protected by copyright is protected from all unauthorized uses irrespective of the goods and services covered by each use. Usually no one can exploit or exercise economic rights, without the authorization of owner, in respect of a work which is substantially similar to the copyrighted work or which accommodate the crucial features of such a work.

Copyright at sometimes referred to as author's right which express that authors have certain specified rights in their work which can only be exercised by them are moral rights of the author. Other rights which allows author to grant license to third parties and prevent unauthorized uses of their work are referred to as economic rights.<sup>2</sup>

The Indian Copyright Act provides for both economic and moral rights of owner of the copyright. These rights have been recognized in TRIPS Agreement and Berne Convention. Economic rights are those rights which assist the owner to receive economic benefits out of his work. The economic rights empower the owner to commercially exploit his copyrightable work. Since fifteenth century these rights have been recognized in one shape or another.<sup>3</sup> Section 14 of the act states that it is exclusive right of the original owner or author to do or authorize to do any of the below mentioned acts in respect of the copyrightable work. This important right recognizes the right to reproduce, right to distribute and the right to communicate to the public. Apart from economic rights, the Indian Copyright Act also envisages moral right under section 57 which is based on Article 6bis of Berne Convention. Moral right is a right to prevent, preserve and nurture the author's creation. It was held in *Amarnath Sehgal v. U.O.I.*<sup>4</sup>, 'that moral rights of an author are soul of his work as it reflects his personality'. The moral rights are exceptions to the general rule that after an author has assigned the rights for a distributor or third party, the latter alone is qualified for sue in regard of any infringements as an author can claim his moral rights even after assignment of work.

### **Composition of Video Games**

The video game industry have grown exponentially since the evolution of art has taken place with scientific progress, where the creators are able to perfect their work of art using new technological tools and techniques. This advancement in the end made conceivable the

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<sup>2</sup> Alin Speriusi-Vlad, *Understanding Intellectual Property: About Moral Rights and Economic Effects*, SSRN ELECTRONIC JOURNAL 3–5 (2014).

<sup>3</sup> J.A.L. Sterling, *BACKGROUND AND BASIC PRINCIPLES*, in *WORLD COPYRIGHT LAW* 279 (3 ed. 2009).

<sup>4</sup> *Amarnath Sehgal v. UOI*, 2005 (30) PTC 253

production of new works of authorship, for example, cinematographic works, databases, computer programs and, all the more as of late, video games.<sup>5</sup>

The video games in this century contain highly potent audio-visual elements and software programs, through which the user can interact with the game. Video games are an amalgamation of different individual elements containing numerous forms of art work may be created by different authors including but not limited to dialogues, characters, maps, and story that includes software programmes which helps in human interaction with such elements on some specific hardware such as personal computer, console or Smartphone. Therefore, video games are not creation of a sole work of art but are of complex cross-cutting nature and mix match of audiovisual and software elements. These different elements of a video game can be copyrighted individually if they are original or creative in nature.

However, now it is well established that video games consist of various forms of elements and, hence, the debate of original idea or expression has been switched to a debate of legal nature of video games, which shall further be discussed.

### **Copyrightable Content and Key Stakeholders in a Video Game**

With the development of technological science, the video game industry has evolved greatly. In 1960s, video games only consisted of graphics that too of basic form. Shortly thereafter, the developers were able to include sound tracks, following with addition of story and different character and further more. To understand the copyrightable content that goes into the creation of a video game which can be classified as original and unpublished work, it is important to examine the various technical and creative elements present in a video game.<sup>6</sup> On the face an interactive video game consist of number of elements which further can be divided into three main categories which are audio elements, visual elements and software program.

- i. *Audio/visual Elements:* These elements form a major part of any video game as it is the end content which is presented to the player on his screen. These elements includes sound recordings, background music, dialogues, imported/internal sound effects, animations, photographic images (for example – a cover photo of a game), digitally captures moving images, attire/personality traits of character, characters, text.
- ii. *Software program:* These elements basically run the game through an engine which permits the player to interact with the audiovisual elements of the game, it include

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<sup>5</sup> Mayank Rautela, *Video Game: An Audio Visual Protection or a Software Protection*, SSRN ELECTRONIC JOURNAL (2016).

<sup>6</sup> Mac Sihigh, *The game's the thing: properties, priorities and perceptions in the video games industries*, RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY IN MEDIA AND ENTERTAINMENT 2–4 (2017).

basic primary engine, design documents – basic rules of the games; manuals, code, plug-ins.

Prima facie these elements are not protected but are subject to criteria of jurisdictional protection according to the legislation depending upon the degree of protection provided under the copyright law of the country as some countries only provide protection to original work expressed in tangible medium of expression.<sup>7</sup>

The artwork (sketches, architectural work, maps, etc.) in a game attracts copyright protection as they can be classified as original artistic work of an author which has been expressed. Also, the codes on which the whole games runs which involves the graphic designs can be copyrighted as it is expressed in writing and seek copyright protection as that of literary work of all features. Same as the digitally capture moving images may also attract copyright protection as dramatic work and so could the plot.

The number of people involved in developing a video game has grown significantly as more and more elements were added. A video game can be developed by a single game developer or an entire organization depending upon the size of the project. The key stakeholders who hold interest in the copyrightable subject matter of a video game are as follows:

- i. *Programmer or Engineer*: the software programmer who writes the code on which the game run.
- ii. *Development Team*: this team consists of the entire major element creator which helps in developing the different elements of a game from which a final product can be ascertained. It includes all the artists, audio designer, level designer, technical designer, script writers, content designer and test analyzer etc.
- iii. *Producer*: The role of a producer is no less than that of a movie director. He supervises and oversees the functions of development team and arranges funds required and maintenance of quality.
- iv. *Publisher*: A company who has acquired distribution rights to make public copy of video game or has itself developed or for which it has procured a development team.<sup>8</sup>

The abovementioned list of stakeholders is not exhaustive, as there can be other number of members involved in developing of a game depending upon its nature. Now, their right to hold copyright depends upon the requirements of jurisdiction and their contribution and originality in the work. It is the producer who has to ensure the transfer of rights if there is no contract of services for proper publication and marketing of the video game. If there contract of service exists then the employer will hold the copyright protection under his name.

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<sup>7</sup> Andy Ramos, *The Legal Status of Video Games: Comparative Analysis in National Approaches*, WIPO 44–48 (2013).

<sup>8</sup> *Ibid.* 9-10.

**Indian Legislation – Copyright Act, 1957**

An author has been defined, under the Indian Copyright Act, 1957, *as in relation to any literary, dramatic, musical or artistic work which is computer-generated, the person who causes the work to be created.*<sup>9</sup> Artistic work has been defined as *a painting, a sculpture, a drawing, an engraving or a photograph, whether or not any such work possesses artistic quality; a work of architecture; and any other work of artistic craftsmanship.*<sup>10</sup> Further, it is also stated that a literary work also include computer program.<sup>11</sup> Therefore, it can be concluded that base codes of video games can seek copyright protection as literary work or software program. The Copyright Amendment Act of 1994 introduced rights of software programmers.<sup>12</sup>

Unlike cinematography, video games are not regulated through legal classification or censorship. Video games only derive their legal classification through changes in business practices that too based on technicalities in each specified case. It is unresolved whether video games can be classified under the category of cinematographic works as it is unprecedented along with absence of jurisprudence. Section 2(f) of Indian Copyright Act defines cinematographic film as *any work of visual recording and includes a sound recording accompanying such visual recording and cinematograph shall be construed as including any work produced by any process analogous to cinematography including video films.*<sup>13</sup> Thus, it is opined that with thorough interpretation it can be said that video games may be categorized as cinematographic films through interpretation of terms “*any process analogous to cinematography*”, yet it is uncertain as there is a lack of precedent in this subject matter.

The closest Indian judiciary has reached in this regard is protection of technological measures and software interference. The first ever case law dealt on this issue was ***Mattel Inc. and Ors. v. Jayant Agarwalla***<sup>14</sup>, where the plaintiffs are the owner of the trademark ‘scrabble’ in all countries except USA and Canada. One of the licensee of plaintiff released various game version for computer, playstation and mobile phones. The plaintiff contented that they hold copyright protection in India by virtue of International Copyright Order, 1991 in layout and rules of the games as it fall under the category of artistic work. It was argued by the defendant that they has similar online version of the game called ‘scrabulous’. Defendants used deceptive and confusing metatags which is infringement of copyright by use of same color border tiles and use of star pattern on the central square, which can be categorized as artistic work. It was held that no copyright protection was granted to plaintiff due to doctrine of merger and on account of section

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<sup>9</sup> Section 2(d) of Indian Copyright Act, 1957

<sup>10</sup> Section 2(c) of Indian Copyright Act, 1957

<sup>11</sup> Section 2(o) of Indian Copyright Act, 1957

<sup>12</sup> Section 14(b)(ii) of Copyright (Amendment) Act, 1994

<sup>13</sup> Section 2(f) of Indian Copyright Act, 1957

<sup>14</sup> *Mattel Inc. and ors. v. Jayant Agarwalla* 2008 (153) DLT 548

15(2) of Indian Copyright Act. The defendants were restricted from infringing plaintiff's registered trademark 'scrabble' and using 'scrabulous' or any other deceptive mark similar to 'scrabble'.

Another case before Delhi High Court namely *Sony Computer Entertainment v. Harmeet Singh*<sup>15</sup>, puts a wide discussion on originality of work, where the defendants were changing the internal software program of Sony playstation three and offering them for sale. It was the first case where the originality of the content of video game was discussed at length setting the jurisprudential clarity on this issue. The court passed an injunction order against the defendant on the issue of tampering with technological software of Sony gaming consoles.

As video game industry has become more revolutionary, new sets of problems are arising relating to online gaming players. It is yet unknown that video game fall within any category of work which can be copyrighted and judiciary is yet to address specific issues of interactive gaming. The recognition of legal status of contributors is significantly important to development in the gaming industry.

## **Conclusion**

Considering the technological advancements in video game industry, it is utterly important to stress that, many video games may sometimes share similar base code and developed on same line of software programs. Video games are created with an amalgamation of different elements which can be copyrighted individually. Owing to their complicated and cross-cutting nature, video games pertains numerous challenges in terms of copyright protection.

Due to the growing complexities, developing a video game can involve a number of individuals engaged in multiplex work of authorship. Consequently, whether these stakeholders hold any protection for their work depends upon the contribution and originality in the work and specific requirements of each jurisdiction.

In spite of the fact that current legislative framework does not provide for any protection to video game and its work from being infringed, an innovative set of intellectual property strategy in accordance with the provisions of Indian Copyright Act of 1957 can impeccably protects the interest of development team and other stakeholders involved. As the industry in itself is growing rapidly, a proportionate legal protection form infringement of video games would benefit the video game industry and concerned investors, developers and players.

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<sup>15</sup> Sony Computer Entertainment v. Harmeet Singh 2012(51) PTC

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