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Legal Regulation of "Skinning" Games

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Abstract: The development of video games has formed a complex and diversified huge system. It is precisely because of the variety of modern video games and abundant layers, "skinning" games and other infringement problems are endless. What kind of electronic games are worth protecting, and which part of them need to be protected, is the problem of today's legislation and justice. Judicial practice is basically through the copyright law or anti-unfair competition law to regulate the infringement of electronic games, but both have different degrees of inadequacy. If the development of "skinning" games is allowed to continue, the excellent but small-scale and medium-sized game developers will be driven out of the game market, and the future of electronic games will not go too far. Therefore, it is essential to strengthen intellectual property protection and improve the level of innovation by setting up a special category of protection through the Copyright Law and leading the development of the video game industry by judicial means.

Keywords: "Skinning" Games; Copyright Law; Intellectual Property Protection; Anti-unfair Competition.

1. Introduction

The development of video games has formed a complex and diversified huge system. Early video game rules are mostly through the target of repeated strikes to obtain the ultimate victory. However, today's video games are not only about the rules of operation but also the rules about the storyline and worldview development; games with a high degree of freedom and openness can even encourage the players to figure out new rules of the game, which have not been disclosed to the public. Not to mention all the specialized rules that have been designed for different types of games. It is precisely because of the variety of modern video games and abundant layers, "skinning" games and other infringement problems are endless. What kind of electronic games are worth protecting, and which part of them need to be protected, is the problem of today's legislation and justice. Judicial practice is basically through the copyright law or anti-unfair competition law to regulate the infringement of electronic games, but both have different degrees of inadequacy.

2. Reasons Why Video Games are Difficult to Protect

2.1. Video Games are Interactive

Players experience different game procedures, plots, and stages, and receive feedback through various operations on video game terminals. This is what makes video games so enjoyable. While players experience the fun of video games through immersive operation, this interactive process and the way of obtaining pleasure are beyond the scope of copyright law. Thus, forming specific and clear protection scope and rules for video games is difficult due to their unique interactive feature, which falls outside the scope of traditional copyright law.

2.2. The High Level of Video Game Freedom.

In the early days of video games, players were given a very narrow range of playing options. For example, the first video game ever developed by William Higinbotham in 1958, "Tennis for Two"1, [1] The game uses a point of light as a tennis ball and a line as a net. The rules of this kind of game are very simple, and the freedom of the players is too small to be copyrighted. [2] However, for competitive games such as World of Warcraft, DOTA2, and League of Legends, there is a set of rules that belong to the game itself for basic operations. If players want to get a higher sense of achievement and better gaming skills, they need to study different strategies, and some players will also have a strong personal style to form their gaming skills. In addition, the rules of some video games tend to be open, and the game developers provide a broad platform with very few restrictions. As a result, so-called experience, strategies, and tricks, techniques are left to the players themselves to figure out and discover. Developing highly open video games requires significant investment in market research and brainstorming. The rules of such games are already highly original. Players' exploration and research of the game complement the developers' efforts as well. Players who are good at the game can even develop new gameplay, therefore, the protection of these game rules becomes impossible to solidify.

2.3. The Complexity of the Video Game Development Process

The development process of a video game is mainly divided into the following three stages: exploitation stage, production stage, and post- production stage. In the exploitation stage of the game, the game designer has to first make an overall structure of the whole game. They need to think about what kind of interactive mode the game adopts better. At the same time, they have to search for a lot of relevant materials and information and write the plot, worldview, and core content of the game. In the production stage, the game engine is mainly used to produce and fill in the game models, graphics mapping, animation, special effects, etc. based on the gameplay or rules conceived before. In the post-production stage, the game bugs are repaired and the software is optimized for the hardware platform on which the game runs. It can be seen that, in addition to the game code, that is, the game software and hardware development part that can be protected as computer software, the most basic part of game development, and also the most core part

that reflects the competitiveness of the game in today's gaming market, is the core rule-making and the framework of the game during the game exploitation stage. When the core rules of a game have been plagiarized, the game developer who committed the copying act can achieve the same game effect as the original game by simply modifying and replacing the game graphics, character model design, world view, and plot, as well as sound effects. Worse still, the developer may be able to take over the market share of the original game due to its superiority in certain aspects.

3. Legislative and Judicial Dilemmas

3.1. The Dilemma of Applying for Protection from the Copyright Law

3.1.1. "Failure " of the Dichotomy Between Thought and Expression

The dichotomy between ideas and expressions refers to the fact that the Copyright Law protects only expressions and excludes ideas from the scope of protection. This principle has been recognized worldwide as one of the basic principles for clarifying the scope of protection under the Copyright Law. Some scholars have pointed out that the rules of a game are merely a set of restrictions and revelations of the game, which are used to specify what the players can and cannot do in the game. [2] The U.S. Copyright Office has also pointed out that the operating rules of a game are ideas and cannot be copyrighted. [2] It seems that "the rules of a video game belong to the idea" is already a fact, but with the emergence of the "skinning game", people gradually realize that the rules of the game, which contain a lot of ingenuity of the game developers and condense their wisdom, have become independent expressions, which should be protected by the Copyright Law.

However, the difficulty lies in the fact that the demarcation between ideas and expressions is hard to clarify. Electronic games are more complex and contain more elements, which makes the Copyright Law often encounter difficulties in protecting the copyright of electronic games. For example, in the case of Legend of the Crouching Dragon v. Legend of Hearthstone copyright, the Shanghai First Intermediate People's Court held that "the defendant copied the rules and gameplay of the plaintiff's game, and its behavior was improper, but it was not the object of the adjustment of the Copyright Law [5]."The rules and gameplay of the game were excluded from the protection of the copyright law. However, in the case of Heroes Love Three Kingdoms v. Dawu Generals, the Court of First Instance stated that "the specific presentation of the rules of gameplay constitutes the object of protection under the Copyright Law, and this principle has been recognized by the Court." [6] The court held that the rules of the game were the objects protected by the Copyright Law. It can be seen that disagreement among judges regarding whether game rules are protected by copyright law has led to inconsistent judgments in practice. [7]

3.1.2. “One Size Fits All” in Judicial Practice

In practice, judges usually do not consider the rules of video games as expressions but directly recognize all the contents related to them as ideas. The reason for this is that, in addition to the conservatism of China's judiciary, there is a lack of a clear definition of game works in the copyright law. Whether electronic games can become the object of copyright protection is a problem that has not been solved in the legislation [7]. Therefore, in judicial practice, judges, when faced with highly original game rules, tend to avoid mistakes and "judicial legislation" by classifying them as ideas. This results in the most important intellectual achievements of a game not being effectively protected.

But it is indeed biased to roughly divide game rules into ideas across the board. This will greatly dampen the enthusiasm of game developers for game innovation. As game development improves, game rules not only include basic operation steps and gameplay but also how to operate to maximize the benefits of implied tactics. For example, in the case of Bubble Tang v. QQ tang [8], the basic rule is to place bombs to destroy the enemy, and the players themselves need to avoid being affected by the flexible positioning, resulting in "self-detonation". The rules of the game also elaborated on the specific location and angle of the bomb placement, which has exceeded the scope of the basic operational steps, and can be called a specific expression. However, the Court refused to protect it as an idea.

3.1.3. Excessive Use of the Merger Doctrine and Necessary Scene Doctrine Defense

The merger principle means that when an idea can only be expressed in one or several effective ways, making the idea and the expression inextricably linked, the copyright law does not protect either the idea or the expression. The principle of the necessary scene means that certain scene descriptions that appear repeatedly when describing a creative theme or background of the times are not protected by copyright.

Plagiarists often use this principle and the merger doctrine to copy the core gameplay, claiming that the rules of the imitated game are common ideas/expressions. For example, the Ninth Circuit Court of the United States, in the case of the Karate game copyright infringement appeal (Data East USA v. Epyx, Inc.), held that similar fighting mechanisms, rules, manipulation methods, skills, etc. in the defendant's and plaintiff's games belonged to the ideas, and argued that karate's rules could only be expressed in such a limited way [9] ; or raised the necessary game scenarios against certain copied Scene principle defenses, to achieve the purpose of avoiding the suspicion of copyright infringement. For example, in the case of Bubble Tang v. QQ Tang [8] , the court held that the login interfaces of QQ Tang and Bubble Tang "both use a rectangular login window, and the window is located in the center of the lower part of the screen, which this court considers to be a common form of expression."

3.2. The Dilemma of Applying the Protection from the Anti-Unfair Competition Law

In practice, there are also a few cases where the anti-unfair competition law has been applied to protect the infringement of the rights of video games. The infringed tend to advocate that the tortfeasor constitutes a copy of a well-known commodity trademark or commodity decoration, or constitutes false advertising; as well as advocating the use of the general provisions of the anti-unfair competition law to regulate. Small and medium-sized game developers, with low visibility and insufficient evidence chain, face hardships due to large differences between games and traditional commodities when violated [11]. Thus, there are situations in which the game works cannot be recognized as well-known commodities, cannot be recognized as false advertising, and there are difficulties in applying the general provisions when they are being protected by the above three methods.

3.2.1. The Dilemma of Recognizing as Well-Known Goods

For the background, plot, rules, elements, sound effects and other parts of a game to be considered well-known goods, the person who has been tortured would need to prove the time, territory, target, and sales of those parts, as well as the duration, extent, geographic scope of any publicity, and the record of protection as well-known goods. [12] However, in the digital age, video games, with the support of Internet platforms, may have "territorial" requirements that span both domestic and foreign countries. The Copyright Law is also characterized by territorial protection, and once a work is online in a country or region that is not subject to the Berne Convention or the Trips Agreement, it will be more difficult to determine the "territorial" protection requirement. In terms of the "degree" requirement, if the "skinning" work has a heat response but the original work has no spark, it is difficult to protect the original work. Moreover, this degree of influence is difficult to define in the Internet era, and it is difficult to define whether it is a good or bad "influence" and the scale of the "influence". Due to the information cocoon and different audiences, a game may have exploded in the gaming community, but those who don't know the game, may not even realize its existence. It is difficult to define "a certain level". In addition to this, well-known products have a high demand for duration. However, the problem is that in the digital age, the cost and time required to make a copy of a game are greatly reduced. It is difficult to achieve a sufficiently long period of "relevant public exposure" to be recognized as a well-known good. Does this mean that if we want to give video games more comprehensive protection, we need to lower the standard of "relevant public exposure time"? As a result, it is very hard to recognize and protect an original game even though it is already well-known in practice.

3.2.2. The Dilemma of Identifying False Advertising

False advertising means that the operator makes false or misleading advertisements about its goods or services, and the consumer is deceived or misled, or creates a likelihood of deception or misrepresentation. [17] However, in the case of "skinning" games, tortfeasors usually use real scenes from the "skinning game to promote their game, focusing on the game's graphics, scene layout, sound effects, and character design, which are all part of the real game setup and are not related to false advertising. For example, in CrossFire v. All Guns, although the court found that the defendant was suspected of using the plaintiff's popularity for publicity purposes, all of its publicity of the game content was true, and therefore there was no false publicity. [18]

3.2.3. The Dilemmas of Applying the General Provisions

Determining the actual harm suffered as a result of competitive behavior is difficult. For example, some “skinning” games avoid market share loss by changing the online platform, thereby avoiding the so-called actual damage caused by competitive behavior. Therefore, it is difficult for the originator to prove that his interests have been infringed by the other party in terms of loss of economic benefits. Some scholars have also argued that the damages suffered by the person who has been tortured may be intangible. The "skinning" game produced by the tortfeasors may confuse the audience between the original game and the "skinning" game, resulting in a decline in the goodwill of the original game. For large and powerful investors, it may not be difficult to find relevant evidence and form a complete chain of evidence. However, in practice, it is mostly the small and medium-sized game developers who have difficulty in defending their rights and interests, as they cannot prove their case, and the credo of "the law protects the weak" does not seem to be applicable here.

4. The Need to Regulate "Skinning" Games by Statutory Class Protection of Works

Since there are differences in the current judicial practice as to whether the video game can be protected as an object of the Copyright Law, the legislation will be classified as a specific type of work, and the Copyright Law will formally give protection to its special category, which may have a better effect on circumventing the chaos of the "skinning" game.

4.1. Avoiding Jurisdictional Dilemmas Resulting from the Hybridization of Bundles of Rights

It has been a common practice in judicial practice to seek protection for the infringed portion of a video game as one or more of the categories of works under the Copyright Law. However, this leads to a problem: the types of works that have been granted statutory protection may not exactly cover the infringed portion of the video game, and this portion has not been regulated by the law involves a situation of "no law can be relied upon", which needs to be considered by the judge in applying his or her discretion. For example, in the Taiji Panda case [13], the court held that the overall running screen of the Taiji Panda game constituted a filmography as stipulated in Article 3(6) of the Copyright Law. Secondly, the specific presentation of the gameplay rules in the game's overall screen constituted the object of protection under the Copyright Law. It can be said that the Court has disguised ly extended the scope of protection of audiovisual works or electronic works (from the game screen to the gameplay and game rules). If electronic games were specialized as a special category of works and given specific protection, such phenomena would be eliminated and the problem of excessive judicial legislation and discretion would be avoided.

4.2. Reducing the Burden of Proof on Small and Medium Game Developers

Small and medium-sized game developers have always been the "hardest hit" by "skinning" games. On the one hand, as a new force and small-scale organizational structure, they are freer and more creative and energetic, and have considerable potential in terms of originality of works; on the other hand, the small-scale team form also leads to the fact that small and medium-sized game developers do not have sufficient ability to provide a complete and powerful chain of evidence to protect their rights and interests when their rights and interests are infringed upon, and their right to speak is too weak to be seen. [15] The legislative protection of the Copyright Law with electronic games as a special category can at least reduce the burden of small and medium- sized game developers in terms of the burden of proof so that they do not have to fall into the predicament that they may not be able to rely on the Copyright Law while seeking the Anti-Unfair Competition Law and failing to meet the standards of the provisions. It will clear the obstacles for small and medium-sized game developers to defend their rights and better promote innovation.

5. The Advice of Legislation and Judiciary in the Protection of Video Games

5.1. From the Application of Copyright Law

The most important thing is that we need to give the protected video game a clear definition, to make it become a specialized category of work in the Copyright Law. So that people could distinguish the board between protected games and unprotected games. According to Shanghai Pudong New Area People's Court (2017) Shanghai 0115 Minchu 77945 Civil Judgment, the judge held that the presentation of a video game could be separated into 5 layers, the first layer is the direction of the game category. For example, the game, in this case, is a role-playing game at its core; the second layer is the design of the basic gameplay based on its category, like a shooting game that scored by hitting the target or killing specific models; the third layer is the design of the core gameplay, which aimed at the arrangement and production of the distribution of resources, for example, a guiding map to lead the gamers to accomplish the combat goal or the planning of the numerical system of game characters and props; the fourth layer is about the way the game resources are linked, which need the game developer to consistently adjust and make a change; and the final layer is the refinement of the overall appearance of the game, i.e., insertion of art and sound elements. Therefore, it can refer to the practice of the Pudong Court and solidify this method of stratifying games at the legislative level. Make it a layered method of judging whether the rules of the game have protective value. Not only can it become a way to determine whether the game is worth protecting, but it can also detect if a skinning game has plagiarized an original game by changing or replacing a certain layer of content.

5.2. From the Application of Anti-Unfair Law

The Anti-Unfair Law has always been used as an underpinning provision to protect in cases of copyright infringement. Combined with the dilemma of video games cannot be protected as well-known goods, legislation might consider appropriately lowering the standard of "relevant public exposure time", expanding the possibility of video games being protected as well-known goods. Apart from that, in the "Tencent v 360Guard Case" [14] concluded in 2014, the Supreme People's Court included legitimate business models in the protection of Article 2 of the Anti-Unfair Competition Law, and some scholars believe that this marks a new stage in the application of the general provisions of the Anti-Unfair Competition Law [16]. This model can also be used analogously for video game protection, where the core gameplay of a video game is protected as a business model.

6. Conclusion

Video games are on the rise, and the emergence of the "skinning" game phenomenon means that the development of video games has entered a new stage, moving towards complexity, diversification, and innovation. But at the same time, it also means that the risk of homogenization and rigidity is greatly enhanced. If the development of "skinning" games is allowed to continue, the excellent but small-scale and medium-sized game developers will be driven out of the game market, and the future of electronic games will not go too far. Therefore, it is essential to strengthen intellectual property protection and improve the level of innovation by setting up a special category of protection through the Copyright Law and leading the development of the video game industry by judicial means.

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