

A Problem Old as Pong: Video Game Cloning and the Proper Bounds of Video Game Copyrights

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From the earliest days of video games, unscrupulous copycats ripped off the games of others, and the courts struggled to define the boundaries of copyright law as pertains to video games. As technology advances, small independent games are on the rise again, but so are copycats. Courts have had about 30 years to apply the body of copyright law to the medium of video games. However, recent litigation, especially Tetris Holding, LLC v. Xio Interactive, Inc., has sought to jettison some important aspects of copyright law as applied to gameplay mechanics. This article analyzes the history of the idea/expression dichotomy as applied to video games and suggests ways that future courts can better draw the boundaries of copyright protection.

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Introduction

The issue of cloning has plagued video games from the very beginning. In the early 1980s, video games were simple endeavors, usually made by lone individuals or a small handful of people.¹ However, because creating video games required very few people, creating counterfeits and knock-offs also needed very little in the way of manpower. Two more factors made the market ripe for such “cloned” games. First, technological limitations meant that video games were not very sophisticated. Even without copying a game’s underlying code, a knowledgeable programmer could largely recreate the graphics and game mechanics of a pre-existing game. For example, Pong was programmed by a single employee at Atari based on a description of the game Tennis on the Magnavox Odyssey.² Pong itself later spawned a rash of similar games.³

Second, the contours of copyright law as applied to computer programs were far from defined, as courts struggled to apply square legal principles to round technologies. One Circuit Court judge remarked, “Applying copyright law to computer programs is like assembling a jigsaw puzzle whose pieces do not quite fit.”⁴ Ultimately, however, the courts set out some important threshold matters, matters such as that videogames fulfill the fixation requirement needed for copyright; and the audiovisual display of video games qualify for copyright protection, regardless of the underlying computer code.⁵

¹ For example, Space Invaders was created entirely by one man, Toshihiro Nishikado. A total of three people worked on Atari’s 1979 hit Asteroids.

² Matt Barton & Bill Loguidice, The History Of *Pong*: Avoid Missing Game to Start Industry, GAMASUTRA, (Jan. 9, 2009), http://www.gamasutra.com/view/feature/132293/the_history_of_pong_avoid_missing_.php?print=1

³ *Id.* Ultimately, Magnavox prevailed in a lawsuit for patent infringement (rather than copyright infringement) against Atari over the copying involved in Pong.

⁴ *Lotus Dev. Corp. v. Borland Int'l*, 49 F.3d 807, 820 (1st Cir. 1995). Note that this case was from 1995, over a decade after many of the initial cloned-game cases were decided.

⁵ *See e.g. Atari, Inc. v. Amusement World, Inc.*, 547 F. Supp. 222, 226 (D. Md. 1981); *Midway Mfg. Co. v. Dirkschneider*, 543 F. Supp. 466, 479-80 (D. Neb. 1981).

Over time, video games became more complex and harder to copy.⁶ However, advances in technology have had two noteworthy effects on the video game market.⁷ First, advances in computer programs have once again allowed a small team without many resources to create games.⁸ Second, the rise of digital technology has made for easy distribution. Games do not necessarily need to be imprinted onto physical media such as cartridges or disks. Rather, game developers can store games on a computer server where interested parties can download them onto computers or other gaming devices. Services such as Steam, Xbox Live Arcade, and the Nintendo eShop sell games using precisely this method. Moreover, in some cases, no sale is necessary at all; anyone with a personal website can upload a game for the world to freely access.

However, such easy copying has also caused rip-off artists once again to rear their heads in large numbers. I have previously written about the growing problem of what I call “cyber-plagiarism”: thieves completely copying the works of others and selling them via digital distribution in major online retailers.⁹ These plagiarists tend to take independently-developed games that are not well known, copy them wholesale, and sell them in digital media stores like Apple’s App Store.

⁶ Space Invaders has 8 kilobytes of ROM and 8 Kb of Ram. Alessandro Scotti, *Space Invaders - Hardware map*, <http://www.ascotti.org/programming/side/hardware.htm>. Conversely, Call of Duty 2’s minimum system requirements specify 256 MB of RAM and 4.0 GB of uncompressed harddrive space. Call of Duty 2 Minimum System Requirements, available at <http://callofduty.filefront.com/info/cod2requirements>.

⁷ Of course, these are not the *only* two effects, but the ones which are pertinent to the discussion at hand.

⁸ For example, smash indie hit Cave Story was programmed by Daisuke “Pixel” Amaya in his free time, albeit over the course of a few years.

⁹ See Sam Castree, III, *Cyber-Plagiarism for Sale!: The Growing Problem of Blatant Copyright Infringement in Online Digital Media Stores*; Texas Review of Entertainment & Sports Law, 14 Tex. Rev. Ent. & Sports L. 25 (2012) (hereinafter Castree, *Cyber-Plagiarism*).

This, in turn, is a problem for Apple and its ilk, who may be liable for the copyright infringement of cyber-plagiarists under a theory of vicarious liability.¹⁰ Although I am aware of no case that has yet raised the issue, I have argued that digital media stores like the App Store are likely to fall outside the safe harbors of the Digital Millennium Copyright Act. These stores typically review works before ultimately selling them, which likely provides adequate knowledge of the infringing content.¹¹ Second, stores typically use a profit-sharing model, which gives them a “direct financial benefit” in sales of the infringing works.¹² Finally, although how fast an “expeditious removal of infringing material” must be is not well defined at present, stores often are not quick about removing plagiarized games.¹³

Digital media stores cannot be vicariously liable, however, unless the work sold in the App Store itself actually infringes. With many instances of cyber-plagiarism, the infringement is painfully obvious, as the original games are about 100% ripped off, with no effort whatsoever made to hide the cloning. On the other hand, there are many games in which infringement is not as obvious, and still others in which similarities exist without crossing the line into illegality. Courts must grapple anew with the question of which aspects of video games are protectable under copyright laws, and which are not. These boundaries are of the utmost importance for video game development and production: If drawn too narrowly, copied games will proliferate and legitimate authors will lose out on the remuneration and recognition that are rightfully theirs; if drawn too widely, legitimate innovation will be stifled.

One of these long-standing boundaries of copyright law is that games – or rather, methods and rules for playing games – are not copyrightable, “since they consist of abstract rules

¹⁰ A store operator is vicariously liable if it has (1) a direct financial interest in the infringing activity, and (2) the right and ability to control it. *See e.g.* Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 262 (9th Cir. 1996).

¹¹ *See* 17 U.S.C. § 512(c)(1)(A); Castree, *Cyber-Plagiarism* at 29-31.

¹² *See* 17 U.S.C. § 512(c)(1)(B); Castree, *Cyber-Plagiarism* at 31-33.

¹³ *See* 17 U.S.C. § 512(c)(1)(C); Castree, *Cyber-Plagiarism* at 33-34.

and play ideas.”¹⁴ The law prevents game makers from obtaining copyright protection on rules and game mechanics because, simply put, they are not the proper subject of copyright. This follows from the “idea/expression dichotomy,” which forbids anyone to copyright an idea.¹⁵

However, a few commentators have argued that the rules of video games are different in this regard. One has argued that not all rules are uncopyrightable ideas: because video games are “a new field and . . . their creation requires enormous effort and expense, [therefore,] original works of authorship are evident in the games' rules and methods of play.”¹⁶ Another, while acknowledging that copyright does not protect “the method or process for playing a game,” claimed that this “black letter rule is probably wrong.”¹⁷ While this is far from a majority view, a handful of courts have decided cases along these lines. One such case was *Atari, Inc. v. North American Philips Consumer Electronics Corp.* (involving the plaintiff’s Pac-Man and the defendant’s K.C. Munchkin), in which the Seventh Circuit held copyrightable the “role reversal” mechanic in which Pac-Man is temporarily empowered to chase and eat his pursuers.¹⁸ Another such case is *Tetris Holding, LLC v. Xio Interactive, Inc.*¹⁹, decided in 2012. Whereas the Pac-Man role-reversal holding was a minor point in the *Atari v. North American Philips* decision, the court in *Tetris Holding* seems to base its entire decision (at least implicitly) on the notion that game mechanics are copyrightable. While some game developers lauded the *Tetris Holding* decision as a victory in the fight against cloned games, the court’s analysis of copyright law cause for concern, more than anything.

¹⁴ *Midway Mfg. Co. v. Bandai-Am., Inc.*, 546 F. Supp. 125, 148 (D.N.J. 1982).

¹⁵ If an idea is protectable at all, it must be through patent law. See *infra* Section III.

¹⁶ Thomas M. S. Hemnes, *The Adaptation of Copyright Laws to Video Games*, 131 U. Pa. L. Rev. 171, 218 (1982) (internal footnote omitted).

¹⁷ William K. Ford, *Copy Game for High Score: The First Video Game Lawsuit*, 20 J. Intell. Prop. L. 1, 41, fn. 286 (2012) (referencing to the decision in *Tetris Holding, LLC v. Xio Interactive, Inc.* (see *infra* Section II(B)).

¹⁸ 672 F.2d 607, 618 (7th Cir. 1982).

¹⁹ 863 F. Supp. 2d 394, 396 (D.N.J. 2012).

In Part I of this Article, I describe the idea/expression dichotomy, including such specific applications as merger, functionality, and *scènes à faire*. In Part II, I discuss two recent cases of allegedly infringing video games and how those cases dealt with ideas vs. expression. Finally, in Part III, I offer suggestions both to courts and to game developers on how to properly navigate the idea/expression dichotomy as applied to video games.

I. Idea/Expression Dynamics

The idea/expression dichotomy is one of the foundational doctrines that underlies copyright law. This rule holds that ideas themselves are not the proper subject of copyright protection; only expressions of those ideas are copyrightable.²⁰ For example, one cannot copyright the idea of ‘a movie about an underdog sports team who ultimately makes it to the championship.’ However, expressions of that idea include *The Bad News Bears*, *The Mighty Ducks*, *Major League*, *BASEketball*, and hundreds of others; such films may receive (and have received) copyright protection. In the realm of video games, one could not copyright the idea of ‘a game about a hero who must slay an evil vampire to return peace to the land.’ However, that idea may find expression in games such as *Castlevania*, *Bram Stoker’s Dracula*, *The Twisted Tale of Spike McFang*, and *Buffy the Vampire Slayer*. A competitor is free to make its own vampire-slayer game but may not copy the specific elements of expression found in these or any other pre-existing games. Copyright infringement lies both when the later work copies the existing work outright and in total, as well as when the two games are merely “substantially similar.”²¹

However, not everything in a copyrighted work is itself protectable, and a later author may copy any unprotectable aspects of an earlier author’s work. Such aspects include any

²⁰ See 17 U.S.C. § 102.

²¹ See e.g. *Atari v. North American Philips*, 672 F.2d at 614.

material that has fallen out of copyright, and, more importantly for present purposes, the underlying ideas in another's work. Moreover, the idea/expression dichotomy has several discrete applications, including to the rules of a game, to functional aspects of a work, and to the concept of "*scènes à faire*."

A. Game Rules & Merger

As stated above, a long-standing rule of copyright is that games rules are not copyrightable. This rule developed in an era before computers, and the courts applied it to board games, card games, and the like. For example, in *Whist Club v. Foster*, the defendant created his own booklet restating the rules of auction bridge.²² In dismissing the case, the court held that the plaintiff could have no copyright "[i]n the conventional laws or rules of a game."²³ The Copyright Office has similarly stated, "Once a game has been made public, nothing in the copyright law prevents others from developing another game based on similar principles."²⁴

However, there are some slight caveats. A game board or playing cards, if sufficiently stylized, can merit protection as artistic works.²⁵ Secondly, a particular writer's specific formulation of the rules (as codified in a rule book or instructions) will be protected at least against exact copying.²⁶ Unless, of course, the rules implicate the "merger doctrine."

The merger doctrine of copyright law states that, when there is only one way or a small number of ways to express a particular concept, the expression "merges with the underlying idea"²⁷ and is therefore unprotectable. For example, *Morrissey v. Procter & Gamble Co.*

²² 42 F.2d 782 (S.D.N.Y. 1929). "Auction bridge" is a variant of the card game "bridge."

²³ *Id.*

²⁴ U.S. Copyright Office, *Copyright Registration of Games*, FL-108 (Dec. 2011), available at <http://www.copyright.gov/fls/fl108.html>.

²⁵ Trivial Pursuit, for example (*see Selchow & Righter Co. v. Goldex Corp.*, 612 F. Supp. 19, 21 (S.D. Fla. 1985)); *see also* 1-2 MELVILLE B. NIMMER AND DAVID NIMMER, *NIMMER ON COPYRIGHT*, § 2.18[H][3][a] (2009) (hereinafter *Nimmer on Copyright*).

²⁶ *See e.g. Chamberlin v. Uris Sales Corp.*, 150 F.2d 512, 513 (2d Cir. 1945).

²⁷ *Capcom U.S.A., Inc. v. Data East Corp.*, 1994 U.S. Dist. LEXIS 5306, at *26 (N.D. Cal. 1994).

involved the rules of a pair of sweepstakes contests.²⁸ Rule 1 for each contest required contestants to write their names and addresses on product box tops and mail them to the respective contest organizer.²⁹ Based on the rudimentary nature of the instructions, the court held that the rule was “so straightforward and simple that” the merger doctrine applied.³⁰ Moreover, merger is not limited solely to game rules; the doctrine applies any time that idea and expression become inseparable. For example, in *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, both plaintiff and defendant made jeweled pins shaped like bees. The court held that “[a] jeweled bee pin is therefore an ‘idea’ that defendants were free to copy,” because, essentially, the only way to make a realistic bee pin is to model it after an actual bee as found in nature.³¹

Some courts have said that, when the merger doctrine applies, copyright infringement will only lie for identical copying.³² Many others do not mention such a limitation, and including both *Morrissey v. Procter & Gamble Co.* and *Herbert Rosenthal Jewelry Corp. v. Kalpakian*.³³ The Nimmer copyright treatise rejects the idea explicitly, and rightly so.³⁴ As Professor Nimmer explains, “Particularly in the case of functional works, it may be necessary to embody near, or even word-for-word, identity.”³⁵ Sometimes, especially for simple or instructional concepts, there really is only one way to get the point across.

²⁸ 379 F.2d 675, 676 (1st Cir. 1967).

²⁹ *Id.* at 678.

³⁰ *Id.* at 679.

³¹ 446 F.2d 738, 739, 743 (1971).

³² See e.g. *Capcom v. Data East*, 1994 U.S. Dist. LEXIS 5306 at *26 (“the merger doctrine provides that only identical copying of the expression is barred”); *C. B. Fleet Co. v. Unico Holdings, Inc.*, 510 F. Supp. 2d 1078, 1082 (S.D. Fla. 2007) (“The merger defense does not apply in instances where the infringing work is virtually identical to the copyrighted work”).

³³ See also e.g. *Ets-Hokin v. Skyy Spirits*, 225 F.3d 1068, 1082 (9th Cir. Cal. 2000); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522 (6th Cir. 2004); *Oracle Am., Inc. v. Google Inc.*, 872 F. Supp. 2d 974, 976 (N.D. Cal. 2012) (“When there is only one way to express an idea or function, then everyone is free to do so and no one can monopolize that expression.”).

³⁴ 4-13 Nimmer on Copyright § 13.03[B][3]. (citing, e.g., *Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458 (5th Cir.), cert. denied, 498 U.S. 952 (1990); *National Nonwovens, Inc. v. Consumer Prods. Enters., Inc.*, 397 F. Supp. 2d 245, 257 (D. Mass. 2005)).

³⁵ 4-13 Nimmer on Copyright § 13.03[B][3].

B. Functionality

The law also denies copyright protection to the functional aspects of otherwise copyrightable works. In the days before computers, the rule applied to “useful articles,” i.e. to “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.”³⁶ For example, clothing, furniture, machinery, and lighting fixtures are all useful articles and therefore receive no copyright protection, no matter how aesthetically pleasing a given shirt or chair might be.³⁷

With the widespread use of computers, courts had to grapple with what aspects of a computer program were protectable under copyright. Many elements of computer programs “are dictated by the function to be performed, by considerations of efficiency, or by external factors such as compatibility requirements and industry demands.”³⁸ Ultimately, the rule emerged that functional aspects of these programs fell outside the bounds of copyright.³⁹

*Atari, Inc. v. Amusement World, Inc.*⁴⁰ dealt with *Asteroids* and *Meteors*, two games about spaceships shooting the eponymous rocks in outer space. In comparing the two games, the court listed many similarities that were “inevitable, . . . given the technical demands of the medium of a video game”:

The player must be able to rotate and move his craft. All the spaceships must be able to fire weapons which can destroy targets. The game must be easy at first and gradually get harder, so that bad players are not frustrated and good ones are challenged. Therefore, the rocks must move faster as the game progresses. In

³⁶ 17 U.S.C. § 101. See also 17 U.S.C. § 113. “Portray the appearance of an article” includes objects like miniature model airplanes, whose purpose is to look like the real airplane. Such things are copyrightable as sculptural works. See *Gay Toys, Inc. v. Buddy L Corp.*, 703 F.2d 970, 973 (6th Cir. 1983).

³⁷ U.S. Copyright Office, *Useful Articles*, FL-103 (Dec. 2011), available at <http://www.copyright.gov/fls/fl103.html>.

³⁸ *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1524 (9th Cir. 1992) (citing *Computer Assoc. Intl., Inc. v. Altai, Inc.*, 23 U.S.P.Q.2d (BNA) 1241, 1253–56 (2d Cir.1992)).

³⁹ See e.g. *Computer Associates Intl. v. Altai*, 982 F.2d 693, 705 (“[W]e conclude that those elements of a computer program that are necessarily incidental to its function are similarly unprotectable.”); *Sega v. Accolade*, 977 F.2d at 1524 (“The protection established by the Copyright Act for original works of authorship does not extend to the ideas underlying a work or to the functional or factual aspects of the work.”).

⁴⁰ 547 F. Supp. 222 (D. Md. 1981).

order for the game to look at all realistic, there must be more than one size of rock. Rocks cannot split into very many pieces, or else the screen would quickly become filled with rocks and the player would lose too quickly. All video games have characteristic sounds and symbols designed to increase the sensation of action. The player must be awarded points for destroying objects, based on the degree of difficulty involved.⁴¹

The court held that although the “defendants took [the] plaintiff’s idea . . . the copyright laws do not prohibit this”; therefore, after eliminating these unprotectable ideas, the court determined that what remained was “not substantially similar.”⁴²

C. *Scènes à faire*

One final application of the idea/expression dichotomy arises in the case of “*scènes à faire*.”⁴³ *Scènes à faire* are “incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic.”⁴⁴ In the world of literature and drama, some genres have had literally centuries to establish familiar scenes, stock characters, clichés, and the like. As authors write, other authors pick out those of their predecessors’ ideas that are good or useful or moving. Over time, these items become traditional aspects of a genre. Movies have had over a century to do the same, although many (but not all) such aspects were drawn from the books and plays that preceded the existence of film. Video games have had only about 30 years to establish themselves, but the medium already involves many *scènes à faire*, as courts have recognized. Some of these come by analogy to real-world scenarios or earlier forms of media – much as movies borrowed from the stage, games borrow from movies and other media. Other *scènes à faire* have developed within the unique aspects of video games.

⁴¹ *Id.* at 229.

⁴² *Id.* at 230.

⁴³ The term literally means “scenes to do,” but is often translated by courts as “scenes that must be done,” and the phrase does have connotations in line with the latter.

⁴⁴ *Atari, Inc. v. N. Am. Philips Consumer Electronics Corp.*, 672 F.2d 607, 616 (7th Cir. 1982) (internal quotations omitted).

1. *Scènes à Faire* Extrinsic to Video Games

Courts have often drawn from material extrinsic to video games to find *scènes à faire*.

First, courts have drawn from the real world. Take martial arts, for example. In *Data East USA, Inc. v. Epyx, Inc.*,⁴⁵ Data East, maker of the game *Karate Champ* sued over similarities found in *Epyx's World Karate Championship*. The lower court noted 15 similarities, including the use of forward somersaults, backward somersaults, back-foot sweeps, and low kicks; a 30-second countdown for each round; two fighters – one dressed in red and one in white; and a single referee who says things like “begin” and “stop.”⁴⁶ Looking at the list, the Ninth Circuit determined that these features “encompass the idea of karate”; any depiction of karate would necessarily include such elements because the martial art “is not susceptible of a wholly fanciful presentation.”⁴⁷ Ultimately, the court held that only the scoreboard and the background scenes were copyrightable, but that these elements were “quite dissimilar” between the two games.⁴⁸

Another example is golf. In *Incredible Technologies, Inc. v. Virtual Technologies, Inc.*, the maker of *Golden Tee* video golf sued the maker of *PGA Golf Tour*. Citing to *Data East v. Epyx*, the court stated that golf, like karate, “is not a game subject to totally ‘fanciful presentation’”; therefore, any realistic golf game necessarily requires several elements of real-life golf, including a golfer, golf clubs, golf courses, a wind meter, sand traps, and water hazards.⁴⁹ The mere existence of these features in the defendant’s game were irrelevant, because the differences in presentation were sufficient (at least enough to save the defendant from

⁴⁵ 862 F.2d 204 (9th Cir. 1988).

⁴⁶ *Id.* at 209.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Incredible Technologies, Inc. v. Virtual Technologies, Inc.*, 400 F.3d 1007, 1015 (7th Cir. 2005).

preliminary injunction⁵⁰), even though the court determined that “it is pretty clear here that [the defendant] set out to copy the Golden Tee game.”⁵¹

Courts also draw *scènes à faire* from existing literary genres and stories. For example, in *Bissoon-Dath v. Sony Computer Entm't Am., Inc.*, the plaintiffs sued over alleged similarities between several versions of their screenplays set in ancient Greece and the hit video game *God of War*.⁵² These similarities included the use of Greek gods like Zeus, Ares, and Athena⁵³; antagonism between Athena and Ares, and between Athens and Sparta⁵⁴; and locations like Athens, Sparta, Mount Olympus, and the Underworld.⁵⁵ The court held that all of these elements are “generic and clichéd for stories involving ancient Greece and Greek gods.”⁵⁶

A similar result occurred regarding the zombie horror genre in *Capcom Co. v. MKR Group, Inc.*, in which video game developer Capcom sought a declaratory judgment that its game *Dead Rising* did not infringe on George Romero’s film *Dawn of the Dead*.⁵⁷ Among the similarities alleged by declaratory defendant MRK are a bi-level shopping mall as the works’ setting, the fact that said malls have a gun shop, the creative use of items to kill zombies, and a parody of rampant consumerism.⁵⁸ The court held that “the few similarities MKR has alleged are driven by the wholly unprotectable concept of humans battling zombies in a mall during a zombie outbreak.”⁵⁹

⁵⁰ “[T]he differences in the presentation are sufficient to make [Plaintiff]’s chances of success on the merits unlikely.” *Id.* at 1015.

⁵¹ *Id.* at 1011.

⁵² 694 F. Supp. 2d 1071 (N.D. Cal. 2010) *aff’d sub nom. Dath v. Sony Computer Entm’t Am., Inc.*, 653 F.3d 898 (9th Cir. 2011).

⁵³ *Id.* at 1088.

⁵⁴ *Id.* at 1082.

⁵⁵ *Id.* at 1086.

⁵⁶ *Id.*

⁵⁷ 2008 U.S. Dist. LEXIS 83836 (N.D. Cal. 2008).

⁵⁸ *Id.* at *18.

⁵⁹ *Id.* at *21. Some might say that this description is getting overly specific, bordering on expression rather than idea. I would argue that the shopping mall is quite possibly a *scène à faire* of zombie horror at this point.

2. *Scènes à Faire* Intrinsic to Video Games

Even from the early days of video games, courts have identified genres, as well as the standard features found therein. One such genre was the “maze chase,” identified as such in *Atari v. North American Philips*.⁶⁰ Among the essential of the genre, the court first listed the maze itself (of course), as well as a “scoring table” (i.e. the numerical display showing the player’s score) and the dots to be collected by the player.⁶¹

The court in *Capcom U.S.A., Inc. v. Data East Corp.*⁶² identified several *scènes à faire* in the fighting game genre. The court quickly disregarded several of the similarities between the games *Street Fighter II* and *Fighter’s History* that amounted to common martial arts moves, including a Thai kickboxer’s knee bash, a boxer’s dashing punch, and a wrestler’s backwards throw and body leap.⁶³ The court then noted that features such as character selection, a color-changing vitality bar across the top of the screen, and a winner designation icon⁶⁴ were common among fighting games, including *Mortal Kombat* and *Samurai Shodown*.⁶⁵ Ultimately, the court held that Capcom “failed to raise serious questions concerning the merits of its copyright claim,” despite the fact that “Data East set out to copy *Street Fighter II*'s success and that Data East developers spent hours studying the game to see how this goal might be accomplished.”⁶⁶

In *Capcom v. MKR*, the court notes the existence of the survival horror genre, and seems to accept Capcom’s description that survival horror games “are typically dark, violent, and supernatural. The player's goal is to ‘survive’ long enough to escape from an isolated location

⁶⁰ 672 F.2d 607, passim (7th Cir. 1982). As stated above, the case involved the games *Pac-Man* and *K.C. Munchkin*. *Id.* at 617.

⁶¹ *Id.* at 617.

⁶² 1994 U.S. Dist. LEXIS 5306, at *7 (N.D. Cal. 1994).

⁶³ *Id.* at *33. Such “adherence . . . to basic martial arts disciplines precludes wholly fanciful expression.” *Id.* at *34.

⁶⁴ *Street Fighter* uses a two-finger peace sign/V-for-victory for winner designation; *Fighter’s History* uses a thumbs up.

⁶⁵ *Id.* at *23-*24.

⁶⁶ *Id.* at *43, *12.

overrun with monsters such as zombies. There is often a ‘safe haven’ where the characters can rest, eat, regain strength, and remain safe from attack.”⁶⁷

II. Recent Cases

Two recent cases, both brought by large companies, have already paved the way to push the boundaries of video game copyright protection. Those cases are *Electronic Arts Inc. v. Zynga Inc.*⁶⁸ and *Tetris Holding, LLC v. Xio Interactive, Inc.*⁶⁹ Ultimately, the first case settled before trial. However, the claims asserted by the parties are nonetheless important in analyzing how game developers (and their legal teams) treat allegedly cloned games. The second case was decided on the merits and is even more important because it stands as precedent for future judges to follow. However, in many ways, *Tetris Holding* is a severe and unfortunate break with prior case law, the ramifications of which are yet unknown.⁷⁰

A. Electronic Arts v. Zynga

Electronic Arts (“EA”) owns the rights to the very popular “The Sims” franchise. In August 2011, EA released The Sims Social on Facebook, and the game quickly rose to become Facebook’s second-most popular game for a time.⁷¹ In The Sims Social, like all Sims games, players “create and customize their own virtual persons, known as ‘Sims’” and direct them in their everyday lives in a virtual world, including activities such as “build[ing] a home . . . eating, resting, [and] interacting with other Sims.”⁷²

⁶⁷ 2008 U.S. Dist. LEXIS 83836 *4, fn. 1 (N.D. Cal. 2008).

⁶⁸ No. 12-04099 (N.D. Cal., filed Aug. 2012).

⁶⁹ 863 F. Supp. 2d 394 (D.N.J. 2012).

⁷⁰ Shepardizing the case shows that it has already been cited twice, once positively and once merely cited in passing. Fortunately, both times, the case was used only for some of its unobjectionable parts.

⁷¹ Complaint for Copyright Infringement at 3, *EA v. Zynga* (N.D. Cal., filed Aug. 2012) (No. 12-04099) [hereinafter EA Complaint].

⁷² *Id.* at 2.

Zynga is the maker of many Facebook games, including the popular Farmville and Mafia Wars. In June 2012, Zynga released a Facebook game called The Ville, its own take on what EA calls the “social game” genre of video games.⁷³ The problem was, The Ville was “shockingly similar” to The Sims Social.⁷⁴

And The Ville was not the first time that someone had sued Zynga over an allegedly cloned game. In 2009, developer Psycho Monkey sued Zynga over Mafia Wars, claiming that it was merely a clone of Psycho Monkey’s game Mob Wars.⁷⁵ Also in 2009, developer Crowdstar sued, alleging that its game Happy Aquarium became Zynga’s FishVille.⁷⁶ In 2011, developer SocialApps sued, claiming that FarmVille infringed its game myFarm.⁷⁷ As EA alleged in its complaint, this practice of cloning games “was prevalent in [Zynga’s] earliest days.”⁷⁸

In its complaint, EA alleged that Zynga copied many of The Sims Social’s “distinctive” and “unique audio-visual elements.”⁷⁹ For the most part, EA did a good job of respecting the idea/expression dichotomy in making out these claims. EA identifies several stock elements of “social games,” and then carefully followed up its discussion of these features with the specific expression within The Sims Social. For example, EA states that the ability of a player “to customize his or her character’s appearance . . . is common in social games.” EA then points to specific aspects of expression in The Sims’s character creator. Within character creation, both

⁷³ See e.g. *id.* at 64.

⁷⁴ *Id.* at 6 (quoting Tricia Duryee, *Zynga Taking On EA’s Sims Social With Its Next Game, The Ville*, ALL THINGS D (June 26, 2012) <http://allthingsd.com/20120626/zynga-taking-on-eas-sims-social-with-its-next-game-called-the-ville>).

⁷⁵ EA Complaint, at 35-36.

⁷⁶ *Id.* at 41.

⁷⁷ *Id.* at 40.

⁷⁸ *Id.* at 34. For a history of this practice on Zynga’s part, see Joe Osborne, *Zynga’s copycattin’ around, and it’s not the first time*, GAMES.COM (Jan. 26, 2012) <http://blog.games.com/2012/01/26/zynga-copycat-history>.

⁷⁹ At the outset, I need to say that I offer no opinion as to the ultimate merits of EA’s copyright claims, had it gone to trial. I only assert that EA has properly pled certain issues such that they may be properly submitted to a jury, rather than dismissed, e.g., for failure to state a claim upon which relief can be granted.

games use the exact same eight RGB (red-green-blue color) values for skin tones.⁸⁰ EA also claimed that Zynga copied character personality types, only choosing close synonyms; for example, Athlete became Jock, and Villain become Scoundrel.⁸¹ Moreover, these character types perform similar gestures and animations when a player selects them.⁸²

EA also points to “the unique visual manner and style in which characters in The Sims Social socialize with one another.”⁸³ Such aspects in the two games include similar notifications in changes to characters’ relationship status, similar “snuggle/cuddle” animations, and a similar style of speech and thought balloons.⁸⁴ Of course, none of these aspects would be independently copyrightable. EA could not monopolize sinister-looking gestures, the use of a certain number or color for skin tones, or cuddling on a couch, even if no other video game had ever included them before. However, in showing the substantial similarity required for copyright infringement, every drop in the bucket adds up. And there is no problem with trying to add these things up. Many reviews certainly did.⁸⁵

However, EA also attempts to claim protection for certain uncopyrightable game mechanics. In both games, a player can “invite over” other characters through that game’s leaderboard so that the invited character will appear in the player’s house to socialize; however, “EA . . . alleges that The Sims Social was unique in its use of this invitation vehicle for character

⁸⁰ EA Complaint at 75. “RGB values range from 0 to 255, resulting in more than 16 million different color combinations.” Of course, not all of these will be suitable as human skin tones.

⁸¹ *Id.* at 67.

⁸² *Id.* at 70-73.

⁸³ *Id.* at 96.

⁸⁴ *Id.* at 97-98.

⁸⁵ See e.g. Nadia Oxford, *If you want to live online, The Ville is there for you... but so is The Sims Social*, GAMEZEBO (July 3, 2012) <http://www.gamezebo.com/games/ville/review> (“the moments wherein Zynga *does* rip-off EA/Maxis wholesale are as obvious (and unattractive) as a centipede with sixty-one legs. It’s hard to play The Ville without feeling some wholesale *deja vu*.”); Pete Davison, *The Ville review*, INSIDE SOCIAL GAMES (June 28, 2012) <http://www.insidesocialgames.com/2012/06/28/the-ville-review> (“Let’s get one thing out of the way: The Ville is *very* similar to EA’s The Sims Social.”); see also EA Complaint fn. 29-33 and accompanying text.

interaction and engagement.”⁸⁶ EA does not allege that The Ville copies the look of The Sims’s leaderboard. Neither does EA allege any similarity in some animation or sound effect connected with an invited character’s appearance. Unfortunately for EA, hundreds of games with online components have leaderboards to show how the various players measure up to one another. The mere idea of a leaderboard is not copyrightable. Moreover, a multiplayer online “social game” necessarily needs a way for players to connect and interact with each other. This is not only inherent in the idea of a “social game,” but seems to be dictated to the external demands of the players (especially considering that players play the game via the social media site Facebook).⁸⁷ To that end, the use of the leaderboard is a functional tool that facilitates inter-player connection. EA simply cannot take these two wholly uncopyrightable ideas, as ideas, and put them together in a way that makes them copyrightable. Doing so would prohibit any other game maker from allowing players to connect in a similar manner.

The Sims Social also has a home value metric that increases as a player purchases new items and expands his home.⁸⁸ EA complains that Zynga “copies the manner in which the home value metric aggregates home value.”⁸⁹ EA has lost this argument by well over a century. In *Baker v. Selden*, decided in 1880, the plaintiff wrote a book describing his new, simplified method of accounting book-keeping.⁹⁰ The defendant wrote his own book describing a similar method.⁹¹ In deciding the case in favor of the defendant, the Supreme Court stressed the “clear

⁸⁶ EA Complaint 96.

⁸⁷ Moreover, inviting over other players is a very common aspect of “social games.” For example, every version of Nintendo’s Animal Crossing series allows players to visit one another’s towns (even for versions that do not support an Internet connection). Animal Crossing was released on the Nintendo GameCube in 2002, a decade before The Sims Social.

⁸⁸ *Id.* at 88.

⁸⁹ *Id.* at 89. EA also complains the Zynga copies the manner in which home value is displayed, which is a valid topic for copyright infringement.

⁹⁰ 101 U.S. 99, 102 (U.S. 1880).

⁹¹ *Id.* at 100.

distinction between the book, as such, and the art which it is intended to illustrate.”⁹² The former is a copyrightable literary work; the latter is an uncopyrightable idea. EA was similarly trying to protect its method of home value calculation, and its claim must similarly fail.

Both games also have a “walls down” mode in which the walls of a player’s house disappear so that players can better see the interior.⁹³ In both games, the windows and doors remain visible and “free-floating.”⁹⁴ That houses have walls is a simple fact of life. However, given that one of the main purposes of both *The Sims Social* and *The Ville* is to obtain a valuable and well-laid-out house, players will necessarily need some way to fully observe their both own houses and the houses of other players. Gameplay thus necessitates the walls-down mechanic. Furthermore, EA’s complaint that *The Ville* “replicat[es] the unique and original look of the free-floating windows and doors”⁹⁵ must fail on merger grounds. There seems to be no other way to remove the walls from a player’s house than to, well, remove the walls. Assuming *arguendo* that such a thing is even copyrightable, the available choices seem to be either to keep the doors and windows where they are, or to remove them along with the walls. With such limited options, any protectable expression must merge into the idea of a walls-down mode.⁹⁶

B. Tetris Holding v. Xio Interactive

Tetris Holding, which owns the rights to the immensely popular puzzle game Tetris, sued Xio Interactive for copying Tetris to make a blatant clone called Mino.⁹⁷ Xio argued that it only

⁹² *Id.* at 102.

⁹³ EA Complaint at 85-86.

⁹⁴ *Id.* at 86.

⁹⁵ *Id.*

⁹⁶ Admittedly, there could be two other variations, of “keep the doors but not the windows” and “keep the windows but not the doors.” However, adding this paltry number of extremely trivial variations does not negate the merger doctrine to the walls-down feature.

⁹⁷ The court never states which version of Tetris Mino infringed, as there have been many different versions on many different video game systems. However, the court does include some images of Tetris, although I cannot identify the particular version at issue.

copied uncopyrightable game rules and functionality, rather than protectable expression.⁹⁸ However, the judge held that merely being related to a rule or function of a game does not necessarily make that aspect of the game uncopyrightable.⁹⁹ As the court pointed out, “Any game expression can always be defined as relating to a game rule.”¹⁰⁰ Such a wide holding would all but eliminate protection for all video games, and the judge rightly rejected the defendant’s contention, at least as such a broad, general matter.

In beginning its analysis, the court described the “general, abstract ideas underlying Tetris” in this way:

Tetris is a puzzle game where a user manipulates pieces composed of square blocks, each made into a different geometric shape, that fall from the top of the game board to the bottom where the pieces accumulate. The user is given a new piece after the current one reaches the bottom of the available game space. While a piece is falling, the user rotates it in order to fit it in with the accumulated pieces. The object of the puzzle is to fill all spaces along a horizontal line. If that is accomplished, the line is erased, points are earned, and more of the game board is available for play. But if the pieces accumulate and reach the top of the screen, then the game is over.¹⁰¹

The court then turned to elements of Tetris that it thought *were* copyrightable. To begin, we should look at the some things that the court (at least arguably) got right. These included “the design and movement of the playing pieces (including the use of bright colors)” and the game over animation in which “squares automatically fill[] in the game board.”¹⁰² Courts have repeatedly held that the style of movement of a video game character is protectable. For example, Pac-Man’s “distinctive gobbling action” and the “manner of movement” of his adversarial ghosts,¹⁰³ and Mario’s “march . . . along the girders” in Donkey Kong¹⁰⁴ have both

⁹⁸ Tetris Holding, LLC v. Xio Interactive, Inc., 863 F. Supp. 2d 394, 396 (D.N.J. 2012).

⁹⁹ *Id.* at 411.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 409. I will note that the judge’s description does seem to be a very fair summary of the game of Tetris, although much of it applies to a large number of puzzle games.

¹⁰² *Id.* at 412-413.

¹⁰³ Atari v. North American Philips, 672 F.2d 607, 618 (7th Cir. Ill. 1982).

received copyright protection (at least as drops in the infringement bucket). The colors of the various tetriminos,¹⁰⁵ although not identical in hue, are similar. The court’s images show green “S” pieces, purple “T” pieces, and blue “I” pieces in both games.¹⁰⁶ Again, Tetris Holdings cannot monopolize a blue 1X4 stick, but every drop counts. In fact, the court was careful to note that no one element standing alone would necessarily amount to copyright infringement, but taken as a whole, the two games were had an “overwhelming similarity.”¹⁰⁷ Indeed, looking at online gameplay footage, the games are practically indistinguishable.¹⁰⁸

However, the court also lists as protectable other, far more problematic, aspects of Tetris. These elements include “the dimensions of the playing field” (10 blocks by 20 blocks); “the display of ‘garbage’ lines”¹⁰⁹; the display of “shadow” or “ghost” pieces, which indicate where the current piece will land on the field; and “the display of the next piece to fall” (which the court later calls the “preview piece”) – i.e. which of the seven tetriminos will appear after the player finishes placing the current piece.¹¹⁰

The “playing field” is really akin to a game board. But this board is typically an unadorned blank space, hardly the kind of thing ripe for copyright protection. However, the

¹⁰⁴ Universal City Studios, Inc. v. Nintendo Co. Ltd., 615 F. Supp. 838, 859 (S.D.N.Y. 1985), aff’d 797 F.2d 70 (2d Cir. 1986), cert. denied, 479 U.S. 987 (1986).

¹⁰⁵ That is, the playing pieces.

¹⁰⁶ While the Tetris website indicates the color that each tetrimino is to have (<http://www.tetris.com/how-to-play-tetris/glossary.aspx>), the site’s free online version of Tetris (at www.freetetris.com) uses entirely different colors. Moreover, at least some versions of Tetris change the color palette used for the tetriminos as the game progresses. Under these circumstances, the color element is probably, at best, incredibly weak in helping to sustain copyright infringement.

¹⁰⁷ *Id.* at 413.

¹⁰⁸ For an example of Mino in action, see <http://www.youtube.com/watch?v=YNh8lBrhEM4>.

¹⁰⁹ While the opinion does not explain the term “garbage lines”, it likely refers to the sudden appearance of blocks at the bottom of the field during multiplayer mode when an opponent clears multiple lines of blocks at once. It could also refer to the presence of preexisting blocks on the field when the game begins (as seen in Type B mode on the NES version of Tetris), but both context and the footage from the video in the preceding footnote lead me to assume that the court meant the former.

¹¹⁰ *Tetris Holding*, 863 F. Supp. 2d at 413.

court claims that the real issue is the exact copying of the dimensions.¹¹¹ Here, Xio got itself into trouble when its expert admitted that the playing field could be designed “in an almost unlimited number of ways.”¹¹² Defendant’s expert was actually wrong on this point; there are really only a limited number of dimensions available for a Tetris board before gameplay becomes impossible or absurd. For example, the board must be at least four blocks on either side, or the pieces will not even fit (although realistically, 8X8 is probably the minimum size for a workable game). On the other hand, numbers cannot get too large without the game becoming impossibly long and losing any sense of tension or reason (e.g. 50X50, or even 100X100). Unfortunately for Xio, by listing the issue as an “undisputed fact,” Xio essentially waived any argument regarding utility or merger. Nevertheless, the judge was still wrong to list the field dimensions as protectable.

Bigger problems arise with shadow pieces, the preview pieces, and garbage lines. These aspects of the game are, without a doubt, functional. Both shadow pieces and preview pieces facilitate the playing of Tetris by helping the player to plan and to avoid simple mistakes. Both are ideas (e.g. the idea of showing where a piece will land). Moreover, any protectable expression must necessarily merge into the idea; there is simply no other way to show a player what piece will appear next, except by *showing the player which piece will appear next*.¹¹³ As for the appearance of garbage lines, it is just as much a rule (an idea) as capturing a pawn in chess. Nevertheless, the judge declares, *ispa dixit*,

¹¹¹ *Id.*

¹¹² *Id.* (quoting Pl. Stmt. Of Undisputed Fact, ¶ 53).

¹¹³ I suppose that another option exists, in using words to explain what piece will come next, such as “square” or “T-piece.” However, the merger doctrine applies even if a single, awkward alternative exists (rendered largely superfluous since most tetriminos tend to be referred to by single letters, anyway). Moreover, the next piece window, which displays the preview, may be uncopyrightable because it lacks sufficient *originality*. A small blank space with the word “Next” is probably not sufficiently creative to merit copyright protection. *Cf. Sem-Torq, Inc. v. K Mart Corp.*, 936 F.2d 851 (6th Cir. 1991) (“For Sale” sign not copyrightable). It is also worth noting that Mino’s next piece window does not even use the word “Next,” so one must wonder what “look and feel” the court found so similar.

I am not persuaded that these features constitute either the ideas or rules of Tetris or are necessitated by game play. Moreover, even if these were rules, it is Xio's copying the same look and feel of these features that lead me to find it has infringed Tetris Holding's copyright.¹¹⁴

The court then adds that “Xio was free to design other ways to alter game play, making it more or less difficult, using its own original expression to express these features.”¹¹⁵ However, the judge is contradicting herself. The only original expression that alters gameplay is the game’s underlying computer code, which the court admits is not copied.¹¹⁶ Otherwise, gameplay is based on the rules and game mechanics that underlie a game. The court earlier stated that the “abstract ideas underlying Tetris . . . cannot be protected by copyright nor can expressive elements that are inseparable from them.”¹¹⁷ Elsewhere, the court explains how “Nintendo obtained a patent in the *game mechanics*” of its game Dr. Mario.¹¹⁸ The court seems to understand that patents, not copyrights, protect game mechanics. However, the court instead uses this fact to claim that, because Nintendo described Dr. Mario as a variation on Tetris, Xio should have just created an entirely different game, too. The court seems to completely misunderstand the idea/expression dichotomy and the public domain, even though it manages to spell out the pieces correctly. It is unfortunate that Dr. Mario is not a psychiatrist, because the court’s dissociation is troubling.

However, even if shadow pieces, the “next piece” window, and garbage blocks were copyrightable, they are *scènes à faire* of the puzzle game genre. In its opinion, the court states that “the *scènes à faire* doctrine has little weight in instances such as this because there are no expressive elements ‘standard, stock, or common’ to a unique puzzle game that is divorced from

¹¹⁴*Tetris Holding v. Xio Interactive*, 863 F. Supp. 2d at 413.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 410 (“Xio did not copy the source code and exact images from Tetris”).

¹¹⁷ *Id.* at 409.

¹¹⁸ *Id.* at 412 (emphasis added).

any real world representation.”¹¹⁹ The court sought to wholly distinguish Tetris from video games like Karate Champ and Golden Tee golf by focusing on Tetris’s lack of real-world analogies.¹²⁰ Of course, the *scènes à faire* doctrine is not so limited. Neither zombies nor Olympian gods have “real world representation,” but neither the Northern District of California nor the Ninth Circuit had any problem applying *scènes à faire* to those situations.

Tetris falls into the genre of puzzle games. It is probably the prototypical example of the genre, but Tetris now stands as merely one of many. Shadow pieces, preview pieces, and garbage lines are all very common features in puzzle games. Games like Dr. Mario, Panel de Pon,¹²¹ Pac-Attack, and Bust-A-Move feature garbage lines or garbage blocks in multi-player matches. Dr. Mario, Kirby Star Stacker, Bust-A-Move, and Super Puzzle Fighter II Turbo (a.k.a. Puzzle Fighter) show preview pieces. Dr. Mario Online Rx¹²² and Bust-A-Move have shadow pieces. Just as Capcom could not protect Street Fighter’s vitality bars, Tetris Holding cannot protect such standard devices as these from use in other puzzle games.

III. Going Forward

A. Courts

The foregoing discussion shows how much the court in *Tetris Holding* got wrong, but what can courts do to get it right? First, the *Tetris Holding* court stated that Xio included shadow pieces, preview pieces, and garbage lines “in order to enhance game play.”¹²³ This is key language, even if the court apparently did not think so. Any mechanic that enhances gameplay,

¹¹⁹ *Id.* at 408.

¹²⁰ *See id.* at 407-08.

¹²¹ Released in the U.S. by Nintendo as both Tetris Attack and Pokémon Puzzle League.

¹²² A version of Dr. Mario that is downloadable on Nintendo’s Wii console.

¹²³ *Id.* at 413.

anything that makes gameplay “more or less difficult”¹²⁴ necessarily cannot be copyrightable. This is practically the definition of a “utilitarian” or “functional” aspect of a video game’s program. Therefore, courts ought to take “enhances gameplay” as a good metric for determining whether some part of a game is functional.

Of course, one could argue that aesthetic features can “enhance gameplay” just as much as functional game mechanics. Pleasant artwork, beautifully-rendered graphics, and appropriate music can all doubtlessly “enhance” one’s gaming experience, under certain definitions of the word. Likewise, poor choices in graphics and color selection have the possibility to make a game more difficult than it needs to be.¹²⁵ However, these aspects of a game are purely aesthetic. Game mechanics, on the other hand, are not. Even if a shadow piece has some artistic merit, it primarily enhances gameplay by allowing a player to see where his piece will land, and thus better avoid careless mistakes. A preview piece enhances gameplay in that it allows a player to better strategize, which makes the game easier to play. The use of garbage blocks reduces the space left on the playing field and may ruin some strategic decisions, and thus makes the game harder to play.¹²⁶

Relatedly, courts should always keep in mind the distinctions between patents and copyrights. Patents are the proper form of intellectual property to cover ideas.¹²⁷ In terms of protection, patents offer much stronger protection than copyrights. Whereas copyright law only forbids copying (and thus allows for independent creation), patents allow the patent holder to

¹²⁴ *Id.*

¹²⁵ For example, a programmer could accidentally make a piece of background scenery appear to be a ledge on which a player can stand. This will render a game needlessly difficult, as players inadvertently fall to their doom trying to jump onto a non-existent platform. Castlevania on the NES is guilty of this in Stage 10 (i.e. the first portion of the fourth level).

¹²⁶ And while some may say that forcing garbage blocks on an opponent is a beautiful thing, it is decidedly *not* the kind of beauty that pertains to copyright.

¹²⁷ See *Incredible Technologies, Inc. v. Virtual Technologies, Inc.*, 400 F.3d 1007, 1012 (7th Cir. 2005) (“The exclusion of functional features from copyright protection grows out of the tension between copyright and patent laws. Functional features are generally within the domain of the patent laws.”).

prevent others from making, using, offering for sale, selling, or importing the invention.¹²⁸ However, the requirements for receiving a patent are much more rigorous¹²⁹, and a patent only lasts for 20 years.¹³⁰ Conversely, a copyright will last for a minimum of 70 years.¹³¹ Judges should be mindful that “a copyright must not be treated as equivalent to a patent lest long continuing private monopolies be conferred over areas of gainful activity without first satisfying the substantive and procedural prerequisites to the grant of such privileges.”¹³² Thus, a court should consider whether a developer should be able to monopolize the game element in question for 70 years or more. Considering the repercussions of such a decision should also steer courts in the right direction.

Moreover, the *Tetris Holding* court seems to have entered the case *a priori* assuming that Tetris, as an audiovisual work, is copyrightable. At one point, the court stated that “Xio argues the change in color [of a piece after it lands on the playing field] is a ‘function’ because it helps the user to see what pieces are in play and what pieces are locked. But, like Defendant's arguments as to the elements already discussed, this defines function too broadly and potentially engulfs all of Tetris's expression.”¹³³ The court’s assumption of copyrightability is understandable, since it likely saw Xio as a rip-off artist attempting to exploit the system in the same vein as many of the defendants in the early video game cases. However, given the simplistic nature of Tetris, it is at least possible that functionality and the other idea/expression dynamics *do* engulf the whole of the game.

¹²⁸ 35 U.S.C. § 154(a)(1).

¹²⁹ A process eligible for a patent must be useful, novel, and non-obvious to a person of ordinary skill in the relevant art. 35 U.S.C. §§ 101-103.

¹³⁰ 35 U.S.C. § 154(a)(2).

¹³¹ Corporate works-for-hire last the shorter of 95 years from the work’s first publication or 120 years from the work’s creation. 17 U.S.C. § 302(c). Works with human authors last 70 years from the death of the author. 17 U.S.C. § 302(a).

¹³² *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 741 (9th Cir. Cal. 1971).

¹³³ *Tetris Holding, LLC v. Xio Interactive, Inc.*, 863 F. Supp. 2d 394, 414 (D.N.J. 2012).

It will admittedly be a very rare occurrence that a video game raises such an issue of “engulfment.” Even most early video games had some minimal level of protectable artistic expression. For example, Pac-Man has the ghosts and the eponymous protagonist himself;¹³⁴ Space Invaders has enemy aliens and the player-controlled space ship. On the other hand, the entirety of Tetris consists of seven simple, monochrome geometric shapes under the influence of gravity. None of these is independently copyrightable,¹³⁵ and the collection of them as a whole may not be, either. Although few games will have this issue, courts must not dismiss the possibility out of hand.

Finally, courts should always be aware of the *scènes à faire* that appear in various video game genres. Indeed, courts have generally done well in recognizing *scènes à faire*, and should not hesitate to allow parties to address the issue. *Scènes à faire* are especially important if courts *do* decide (improperly) to allow copyrights on game mechanics, as many gameplay elements have become indispensable to various genres, or even to video games at large.

B. Game Developers

Thusfar, the discussion has dealt with judges and lawyers, but the actual issues involved will most directly impact game developers themselves. So, what should developers do to avoid problems like these? First, game developers should not try to seek copyright protection for game mechanics in their games. This may at first seem counter-intuitive: wouldn’t developers want to maximize protection for their games? As I have argued above, such attempts should rightly fail, and so the efforts would be a waste of time and legal fees. But even if courts become willing to allow copyrights on game mechanics, the ensuing legal landscape will not be hospitable to developers. All other game developers would similarly attempt to copyright game mechanics,

¹³⁴ See *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607, 617 (1982).

¹³⁵ Cf. *Oddzon Products, Inc. v. Oman*, 1989 U.S. Dist. LEXIS 17077 (D.D.C. 1989); aff’d, 924 F.2d 346 (D.C. Cir. 1991) (basic shape, without “additional creative work” is not copyrightable).

resulting in extended monopolies over many gameplay ideas owned piecemeal by a large and disparate number of developers (or by a mere handful of large corporations, which may be worse). A start-up game company, or even a well-established one, will not want to negotiate a license from EA for the right to allow players to connect via a leaderboard. EA surely would not want to negotiate a license from Namco-Bandai for Pac-Man-like “role-reversal.” No one will want to secure potentially dozens of different licenses just for the right to design a single game, even with entirely original music and art assets.

So how, then, should game developers properly protect their games from unscrupulous copycats? Patents offer one solution. For example, as noted above, Nintendo received a patent for the game mechanics of Dr. Mario.¹³⁶ Any truly novel gameplay may be eligible for patent protection. However, given the technical rigors and high financial costs involved, patents will probably be outside the means of many game developers, especially small start-up companies.

Trademarks offer another solution. In fact, Tetris Holding alleged a count for trade dress infringement along with its copyright complaint.¹³⁷ Trademarks serve to protect the consuming public against confusion as to the source of goods and services. A developer may be able to secure trademark protection for game names, the trade dress appurtenant to the game (such as “brightly-colored Tetriminos, which are formed by four equally-sized, delineated blocks”¹³⁸), and even a company name. Unlike patents, trademarks do not strictly require registration, and the costs involved with trademark registration are less than those of patents (although the costs may still put registration outside the reach of some small game developers). However, the

¹³⁶ U.S. Patent No. 5,265,888 (filed Feb. 19, 1993); *see also* Tetris Holding, LLC v. Xio Interactive, Inc., 863 F. Supp. 2d 394, 412 (D.N.J. 2012).

¹³⁷ *See Tetris Holding v. Xio*, 863 F. Supp. 2d at 415 *et seq.* While it is beyond the scope of this article to analyze the merits of the Tetris trademark claim, Tetris Holding may indeed have been successful in calling Xio’s blatant cloning unfair competition.

¹³⁸ *Id.* at 415.

claimed trademark must actually identify the developer in question, in the mind of the public, as the source of the game. Moreover, like copyright law, trademark law does not protect functional features.¹³⁹ But proper branding is definitely an issue that no developer should ignore.

Finally, there are ways within copyright law to offer at least some protection against more egregious instances of cloning. Recall that game boards and game pieces may be copyrightable if sufficiently stylized. The same will hold true for even simple puzzle games. For example, Nintendo's Pokémon Puzzle League involves moving and lining up colored tiles. While basic colored squares may not be copyrightable, Pokémon Puzzle League's tiles contain stylized images, including flames, leaves, coins, and pokéballs. Developers also may use additional trimmings outside of the core game. For example, Pokémon Puzzle League has stylized backgrounds and images of Pokémon characters in and around the actual playing field. Capcom's Puzzle Fighter includes animated characters from the Street Fighter and Darkstalkers series. Of course, such stylization will not prevent a copycat from replicating the gameplay, but it will certainly prevent wholesale copying, as well as some level of variation thereof. Combined with the copyright for the game's underlying computer code, developers can obtain at least a decent amount of protection even for simplistic games.

Conclusion

The renewed problem copycats in video games is cause for concern. However, in attempting to stamp out copyright infringement, courts must be careful to respect the boundaries of copyright law, especially as contained in the idea/expression dichotomy. The ideas underlying every game are in the public domain, free for all to use in their own works. In their

¹³⁹ See *Traffix Devices v. Mktg. Displays*, 532 U.S. 23, 29 (U.S. 2001).

zeal to punish plagiarists, courts must ensure that they do not go too far in protecting copyrights and thus stifle legitimate innovation.