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THE GAME ON : STUDY OF INDIAN INTELLECTUAL PROPERTY LAWS VIS-A-VIS GAMING INDUSTRY

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Abstract

The rapid advancement in technology has significantly impacted the gaming industry, with India's gaming sector estimated to be worth \$1.8 billion and growing at a rate of 38%. Digital/video games, which involve innovations and inventions integral to intellectual property (IP), are eligible for protection under intellectual property laws. However, cases of infringement have become more prevalent, indicating that IP protections may be insufficient and leading to a decline in innovation.

Various forms of intellectual property rights, such as patents, copyrights, and trademarks, can protect different aspects of video games, but they are bound by doctrinal limitations that allow for the design and adaptation of existing games and improvements on them. This article extensively studies the role of intellectual property laws in promoting innovation in the online gaming industry and proposes legal reforms to strengthen the current legal system.

The authors analyze the position of gaming under existing laws in India and suggest remedies for existing loopholes. Through a thorough analysis, the authors propose legal reforms to address the inadequacies in the current laws and strengthen the protection of IP in the gaming industry. This paper highlights the importance of intellectual property rights in the gaming industry, analyzes the existing legal framework in India, and proposes legal reforms to ensure robust protection of IP in this dynamic and innovative sector.

Keywords

Intellectual property rights, Video Games, Authorship, Copyrights, ownerships, Copyright infringement.

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INTRODUCTION

As someone once rightly said, we are merely in the first minute of the first day of the internet revolution. As we move towards the second minute, the shift from physical to virtual gaming patterns among humans has become increasingly evident. In this digital age, characterized by rapid advancements in graphic generation technology, it is nearly impossible to remain immune to the allure of video games. Children of all age groups have embraced video games as one of their top choices, and the market is flooded with games targeting various age demographics.

What is interesting is that video games are no longer limited to just the young minds. According to available statistics, approximately 28 percent of game players in the world are below 18 years of age, while 32 percent are 36 years or older.² Video games have become a popular form of entertainment not only among teenagers, but also among adults. This emergence of video games as a widespread phenomenon has led to a greater need for the development of intellectual property (IP) protection for the rights of game developers and other key stakeholders.

The Indian Copyright Act of 1957 was established in alignment with various international conventions and the TRIPS Agreement. Copyright encompasses a set of exclusive rights that are granted to the original creator or author of various works, including artistic, dramatic, literary, computer software and computer programs, musical and cinematographic works, and sound recordings. These rights empower the author or creator to sell or reproduce their copyrightable work, as well as commercially exploit it through licensing, adaptation, translation, and assignment of the work.³

Just like other forms of creative and artistic expression, video games are eligible for protection under Indian copyright law.⁴ However, the current application of copyright law to video games may offer limited protection against copying, allowing competitors to mimic or "clone" the fundamental mechanics, design, and even story elements of a game in order to release a competing product. In video games, ideas and expression are intricately intertwined, making it challenging for courts and legislation to establish clear doctrinal lines and strike a balance between protecting

² STATISTA, <https://www.statista.com/topics/1680/gaming/#topicOverview>, (last visited Jul 21, 2023)

³ Indian Copyright Act, 1957, § 14

⁴ Primary elements of a video game that may be protected under different categories of "works" as per section 14 of the Copyright Act, 1957.

original creations from wholesale copying, while also fostering further innovation in the gaming industry.

In Part I, we will provide an overview of the gaming industry in India, highlighting its growth and significance in recent years.

In Part II, we will delve into the complexities of defining video games under copyright law, including the challenges in determining what can be copyrighted in a video game, as well as the difficulty in separating ideas from expression.

In Part III, we will discuss the composition of a video game and the various types of copyrightable content involved, including artistic, musical, and literary elements. We will also explore the key stakeholders who hold interests in video games, such as developers, publishers, and players.

In Part IV, we will examine the current IP law legislation in India and identify potential loopholes or gaps in the protection of video games under copyright law.

Finally, in Part V, we will provide suggestions for better protection of video games under Indian copyright law, including potential reforms or improvements that could enhance the legal framework for video game creators and stakeholders.

Through these five parts, we aim to provide a comprehensive analysis of the legal landscape surrounding video game copyright in India and propose recommendations for strengthening the protection of video games in the country.

OVERVIEW OF THE INDIAN VIDEO GAME INDUSTRY

The Indian gaming industry has experienced significant growth in recent years, with an estimated market value of USD 1.5 billion in 2021, projected to reach USD 3.8 billion by 2025, according to KPMG India.⁵ This growth can be attributed to factors such as the increasing penetration of smartphones and the internet, the rise of E-sports, and the mainstream appeal of gaming. The COVID-19 pandemic has also accelerated the industry's growth as more people turned to gaming for indoor entertainment during lockdowns.⁶ With smartphones and reliable internet becoming

⁵ IBEF, <https://www.ibef.org/blogs/india-s-nascent-gaming-industry-on-the-rise>, (last visited Jul 18, 2023)

⁶ Anupriya Chatterjee, *Connect, compete, earn: How Covid lockdowns set Indian gaming industry on path to \$2 bn by 2023*, THE PRINT, (Jul. 20, 2023)

more accessible, gaming has become widespread in India. Esports has gained a massive following, and gaming has become a mainstream form of entertainment for people of all ages. The pandemic has further fuelled demand for video games, consoles, and accessories.⁷ The Indian gaming industry is expected to continue its upward trajectory, establishing itself as a significant economic and cultural force in the global gaming landscape.

The mobile gaming segment stands out as the primary driver of revenue in the Indian gaming industry, contributing over 85% of the total earnings.⁸ Popular games such as PUBG, Free Fire, and Call of Duty have played a pivotal role in propelling the growth of the mobile gaming industry in India. The affordability of smartphones combined with high-speed internet accessibility has made gaming easily accessible to a wider audience across the country.

Furthermore, the Indian government's Digital India initiative has played a significant role in promoting the development of the gaming industry. This initiative aims to promote digital literacy, improve internet infrastructure, and enhance the overall digital ecosystem in India.⁹ These efforts have helped create a conducive environment for the gaming industry to thrive, with increasing numbers of gamers and game developers in the country.

Apart from mobile gaming, the world of gaming in India is expanding rapidly with PC gaming and console gaming gaining momentum. While currently contributing a smaller portion to total revenue, the growth of gaming cafes and the surge in esports tournaments are expected to propel these segments in the future. With the Indian esports industry estimated to be worth USD 75-100 million and projected to grow at a staggering 36% CAGR, it has garnered significant investment from domestic and international players alike, including big names like Paytm, Nazara Technologies, Tencent, and PUBG Corporation. Supported by the Indian government and fuelled by a pool of talented game developers, India is becoming a hotspot for gaming companies looking to establish their presence in Asia.¹⁰

⁷ NCN NEWS NETWORK, <https://www.ncnonline.net/pandemic-augments-and-takes-gaming-industry-to-the-next-level/>, (last visited Jul 15, 2023)

⁸ WORLD ECONOMIC FORUM, <https://www.weforum.org/agenda/2021/02/why-india-s-gaming-industry-is-on-the-rise/> (last visited may 5, 2023)

⁹ INTERNATIONAL TELECOMMUNICATION UNION, *Digital India Skills Insights 2021*, https://academy.itu.int/sites/default/files/media2/file/21-00668_Digital-Skill-Insight-210831_CSD%20Edits%206_Accessible-HD.pdf, (last visited Jul 18, 2023)

¹⁰ Sudhir Chowdhary, *India is all set to become a gaming hotspot*, FINANCIAL EXPRESS, (Jul. 15, 2023) <https://www.financialexpress.com/life/technology-india-is-all-set-to-become-a-gaming-hotspot-2957966/>

COPYRIGHT DOCTRINE AND VIDEO GAMES

In India, the realm of video games and copyright law is a complex and ever-evolving landscape. Video games are not just mere entertainment, but also intricate creations composed of computer code, audio-visual representations, and interactive elements that engage users in a unique way. However, determining the appropriate scope of copyright protection for video games poses a challenge due to the multifaceted nature of these digital wonders.

One of the key hurdles in copyright protection for video games is the lack of comprehensive case law on video game clones.¹¹ The few existing decisions tend to focus on the game mechanics and rules, often providing minimal copyright protection and favouring game developers. Courts in India have also drawn a line between the idea and expression in video games, applying limiting doctrines like merger and scenes à faire to determine which elements are protectable under copyright law.¹²

This dynamic landscape establishes the current status quo for copyright doctrine as it applies to video games in India, but there is a growing need for a more optimized and refined approach. With the booming Indian gaming industry, it is crucial for the legal system to adapt and provide clear guidelines for copyright protection in this field. As video games continue to captivate audiences with their immersive experiences and cutting-edge technology, it is imperative for copyright law to keep pace with the rapidly evolving gaming landscape.

The Indian gaming industry is on the rise, and it is vital for the legal framework to keep up with the creative and technological advancements in the field of video games. With a clear understanding of the unique challenges and elements that make up video games, the copyright law can provide adequate protection to foster innovation and creativity in the gaming industry. As gamers and developers continue to push the boundaries of what is possible in the world of digital entertainment, it is essential for the legal system to ensure that their rights are safeguarded in accordance with the evolving nature of video games. The future of video game copyright law in India holds immense potential, and it is imperative for stakeholders to work together in shaping a

¹¹ Sayed Qudrat Hashimy, *Protection of Video Games under Indian and the United States of America Copyright Law*, Volume IV Issue II,

¹² Adarsh Ramanujan, Prateek Bhattacharya & Esheetaa Gupta, *Idea Expression Dichotomy in Copyright Law*

robust framework that fosters innovation and creativity while also protecting the interests of all parties involved.

COPYRIGHTABLE SUBJECT MATTER

In India, original works of authorship fixed in any tangible medium of expression are protected by the Copyright Act. This includes literary works, musical works, pictorial, graphic, and sculptural works, motion pictures, audio-visual works, and sound recordings, as well as video game software, which is considered a form of literary text.¹³ While video game players focus on the audio-visual experience and gameplay of the game, rather than the underlying code, developers who clone a video game can still be found to have infringed copyright if their software code closely mimics the audio-visual aspects and gameplay of the original game.

Fortunately, Indian courts have recognized that the display of images on a video game screen is separately copyrightable as an audio-visual work. Despite the interactive choices made by players during gameplay, courts have found that video games meet the "fixation" requirement under copyright law. This means that video games are considered fixed in a tangible medium of expression and are therefore eligible for copyright protection.¹⁴

In summary, video games are considered protectable intellectual property in India, and courts have recognized the various elements that make up a video game as separately copyrightable, including the audio-visual aspects, gameplay, and underlying software code.

IDEA-EXPRESSION DICHOTOMY IN VIDEO GAME

The concept of idea-expression dichotomy holds significant legal importance in the realm of video games in India. This principle, established in the landmark case of *Baker v. Seiden*¹⁵ and now enshrined in the Indian Copyright Act of 1957, refers to the separation of ideas from their expression in the form of code, graphics, and other game components. In India, the Copyright Act recognizes this dichotomy, providing protection for the expression of an idea in a video game, but

¹³ Definition of Work, as provided under § 2 clause y of The Copyright Act 1957.

¹⁴ Mr. Andy Ramos, Ms. Laura López, Mr. Anxo Rodríguez, Mr. Tim Meng & Mr. Stan Abrams, *The Legal Status of Video Games: Comparative Analysis in National Approaches*,

¹⁵ *Baker v. Selden*, 101 U.S. 99 (1879)

not for the idea itself.¹⁶ This means that while a video game idea itself cannot be copyrighted, the specific way in which the idea is expressed in the game can be protected.

For example, a game idea of a superhero fighting villains cannot be copyrighted, but the specific code, graphics, and other creative elements that make up the game can be protected. Similarly, the idea of a game allowing players to build and explore a virtual world, as seen in "Minecraft," cannot be protected by copyright, but the specific expression of that idea in the form of the game's code, graphics, and music is protected.

Court cases such as *R.G. Anand v. M/s. Delux Films and Ors.*¹⁷, *Eastern Book Company v. D.B. Modak*¹⁸, *Microfibres Inc. v. Girdhar & Co.*¹⁹, and *Super Cassettes Industries Ltd. v. Myspace Inc.*²⁰, have further clarified that copyright protection extends only to the expression of an idea and not to the idea itself. Courts must distinguish between elements of a game that are ideas and those that are expressions, which can be a complex task, especially for unfamiliar media. Mechanics of a game are generally considered ideas and are not subject to copyright protection, while elements like graphics, sounds, characters, and the "look and feel" of a game's interface may be protectable.

Art assets within a video game, such as graphics and soundtracks, can be protected under copyright law, though their protection may be limited if they are primarily functional in nature or fall under certain limiting doctrines. Courts may also consider the "look and feel" of a game, or the graphical user interface (GUI), when determining copyright infringement. However, there may be confusion over the term as it has been used to describe the overall gameplay sensation as well.

The idea-expression dichotomy is a crucial principle in determining copyright protection for video games in India. Courts must differentiate between ideas and expressions to determine which elements are entitled to such protection, which can be a challenging task, particularly in the case of unfamiliar media.

COMPOSITION OF VIDEO GAME AND COPYRIGHTABLE CONTENT WITH KEY STAKEHOLDERS

¹⁶ Zachary Strebeck, *Idea vs. Expression – What is protected under copyright law?*, GAME DEVELOPER, (Jul. 15, 2023), <https://www.gamedeveloper.com/business/idea-vs-expression-what-is-protected-under-copyright-law->

¹⁷ *R.G. Anand v. Deluxe Films*, AIR 1978 SC 1614

¹⁸ *Eastern Book Company v. D.B. Modak*, 2008 (1) SCC 1

¹⁹ (2009) 40 PTC 519 Del

²⁰ *Myspace Inc. v. Super Cassettes Industries Ltd.*, SCC Online Del 6382 (2016)

The composition of a video game and copyrightable content involves several key stakeholders who play crucial roles in the development process. With the rapid advancements in technology, the video game industry in India has evolved from basic graphics in the 1960s to include audio and visual elements, as well as software programs that run the game engine.²¹

The audio/visual elements of a video game include sound recordings, background music, dialogues, sound effects, animations, images, character traits, and text, which are presented to the player on the screen. These elements may be subject to copyright protection depending on the jurisdiction, as they can be classified as original artistic work expressed in a tangible medium of expression.²²

The software program of a video game includes the primary game engine, design documents, manuals, code, and plug-ins that allow players to interact with the audio/visual elements. The programmer or engineer who writes the code holds a significant stake in the copyrightable subject matter of the game.

The development team, which includes artists, audio designers, level designers, scriptwriters, and content designers, among others, contributes to the creation of different elements that form the final product. Their contributions may also be subject to copyright protection depending on their originality and jurisdictional requirements.

The producer, who supervises and oversees the development team, plays a crucial role in arranging the funds required for the game's quality maintenance. The producer's role is similar to that of a movie director, and they may hold copyright interests in the video game.

The publisher, who acquires distribution rights or develops the game themselves, also holds a stake in the copyrightable content of the video game. Other stakeholders may also be involved in the development process, depending on the nature of the game.

The transfer of copyright rights may depend on contractual agreements among the stakeholders. If there is a contract of services, the employer may hold the copyright protection under their name.

²¹ Mayank Rautela, Video Game: An Audio Visual Protection or a Software Protection, SSRN ELECTRONIC JOURNAL (2016).

²² 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).

The producer is responsible for ensuring proper publication and marketing of the video game, including the transfer of copyright rights if required by the contract.²³

IP LAW LEGISLATION IN INDIA AND LOOPHOLES

In India, the definition of an author according to the Copyright Act of 1957 is the person who causes the creation of any literary, dramatic, musical, or artistic work that is computer-generated.²⁴

An artistic work is further defined as a painting, sculpture, drawing, engraving, photograph, work of architecture, or artistic craftsmanship, regardless of its artistic quality.²⁵ Additionally, literary works, which include computer programs, are also protected under copyright law, which means that the base codes of video games can be considered as either literary works or software programs.²⁶ The Copyright Amendment Act of 1994 also introduced rights for software programmers.²⁷

However, unlike cinematography, the regulation and censorship of video games in India are not clearly defined. The legal classification of video games is subject to changes in business practices and technicalities in each specific case, and it remains uncertain whether video games can be classified as cinematographic works due to a lack of precedent in this area. According to Section 2(f) of the Indian Copyright Act, a cinematographic film is defined as any work of visual recording that includes a sound recording and any work produced by any process analogous to cinematography, including video films.²⁸ Therefore, it is possible to interpret that video games may fall under the category of cinematographic films with careful interpretation of the terms "any process analogous to cinematography." However, due to the lack of precedent in this matter, it remains uncertain.

So far, the Indian judiciary has mainly dealt with the protection of technological measures and software interference in the context of video games. For example, in the case of *Mattel Inc. and Ors. v. Jayant Agarwalla*,²⁹ the court held that the plaintiff was not granted copyright protection

²³ Andy Ramos, *The Legal Status of Video Games: Comparative Analysis in National Approaches*, WIPO 44–48 (2013).

²⁴ Indian Copyright Act, 1957, § 2(d)

²⁵ Indian Copyright Act, 1957, § 2(c)

²⁶ Indian Copyright Act, 1957, § 2(o)

²⁷ Copyright (Amendment) Act, 1994, § 14(b)(ii)

²⁸ Indian Copyright Act, 1957, § 2(f)

²⁹ *Mattel Inc. and ors. v. Jayant Agarwalla*, 2008 (153) DLT 548

for the layout and rules of the game 'scrabble' due to the doctrine of merger and section 15(2) of the Indian Copyright Act, but the defendant was restricted from infringing on the plaintiff's registered trademark 'scrabble.' Another case, *Sony Computer Entertainment v. Harmeet Singh*³⁰, discussed the originality of work in video games, where the court passed an injunction order against the defendant for tampering with the technological software of Sony gaming consoles and offering them for sale.

As the video game industry in India continues to grow, new issues are arising, particularly in the realm of online gaming players. The categorization of video games under copyright law remains unclear, and the judiciary is yet to address specific issues related to interactive gaming. The recognition of legal status for contributors in the gaming industry is crucial for its development in India.

LOOPHOLES IN THE PRESENT LEGAL SYSTEM

The legal landscape governing video games in India remains uncertain, with various loopholes present in the current legal system. One key issue is the ambiguity in categorizing video games under existing copyright law. While the Indian Copyright Act recognizes literary, dramatic, musical, and artistic works, video games are not explicitly mentioned, leaving developers and players unsure of their legal rights and responsibilities. The closest available classification is cinematographic works, but this lacks clarity.

Another challenge is the absence of a dedicated regulatory body for the video game industry in India. While the Ministry of Information and Broadcasting and the Central Board of Film Certification provide some oversight, there is no specific legislation or agency for video games. This results in a lack of a clear framework for licensing, certification, and classification, leading to confusion and inconsistency.

Furthermore, copyright enforcement is often lax in India, and pursuing infringement cases can be time-consuming and costly, particularly for smaller developers. As a result, copyright infringement is rampant in the Indian video game industry, posing challenges for protecting intellectual property.

³⁰ *Sony Computer Entertainment v. Harmeet Singh*, 2012(51) PTC

Lastly, there is a lack of awareness and understanding of the video game industry within the Indian legal system. This can lead to judgments that do not accurately consider the unique aspects of the video game industry or its legal complexities. For instance, in the *Mattel Inc. and Ors. v. Jayant Agarwalla* case³¹ The court did not recognize copyright protection for the layout and rules of the game Scrabble, which has significant implications for the owner's intellectual property rights.

Overall, the current legal framework surrounding video games in India suffers from loopholes that need to be addressed. Clarity in the legal status of video games, establishment of a dedicated regulatory body, stronger copyright enforcement, and increased awareness within the legal system are critical steps to foster the growth of the video game industry in India.

CONCLUSION

The legal system will inevitably play a crucial role in establishing rules for the video game industry. With significant technological advancements in video game development, resulting in games with similar base codes and software programs, protecting video games from copyright infringement has become challenging. This is further complicated by the fact that video games are composed of various copyrighted elements and involve multiple individuals contributing to different aspects of the game's creation, each with varying levels of copyright protection based on their originality and contribution.

To address these challenges and provide better protection for video game copyrights, innovative intellectual property strategies that comply with the Indian Copyright Act of 1957 can be implemented. Here are some suggestions:

Clarification of legal categorization: Amending the Indian Copyright Act to include a specific legal category for video games would provide clarity and prevent confusion in legal interpretation.

Strengthening of penalties for infringement: Increasing the penalties for copyright infringement would act as a deterrent and discourage theft of intellectual property, reducing piracy and safeguarding the interests of video game developers.

³¹ *Mattel Inc. and ors. v. Jayant Agarwalla*, 2008 (153) DLT 548

Implementation of Digital Rights Management (DRM): The use of DRM can secure video game content and prevent unauthorized reproduction and distribution, adding an extra layer of protection, especially in the online gaming industry.

Encouragement of self-regulation: The video game industry should be encouraged to develop and implement self-regulation mechanisms to ensure compliance with copyright laws, fostering a culture of respect for intellectual property and promoting industry growth.

The absence of legislative protection for video games in India poses a serious threat to the gaming industry, both domestically and internationally. It is imperative for the government to examine, discuss, agree upon, and implement laws that protect the rights of developers and the gaming industry as a whole. Protecting various aspects of video games, including game names, derivative rights, and data privacy of players, requires a flexible and accommodating legal framework that addresses past, present, and future concerns related to piracy, fraud during gaming transactions, infringement, and technological advancements in the gaming sector.

In conclusion, emphasizing the importance of intellectual property protection for the gaming industry is vital. Owners and creators hold rights to every aspect of a game, including merchandising characters from the game. Therefore, it is crucial to establish a comprehensive legal framework that addresses the evolving landscape of the video game industry and protects the interests of all stakeholders, including developers, players, and investors.