CASE FILE #31: THE ARCADE AND THE APP

LEARNING AIMS

- Understand the rich audio and video dimensions of computer games today – what this enables, and why that might matter in copyright law
- Evaluate approaches to games as copyright-protected works

KEY QUESTIONS

The following key questions should be discussed to address the learning aims:

- How can a game be used to create a 'new' work?
- Is it useful to think of games as an art form?

Students will be expected to use Case File information to analyse ideas, to give opinions, and to justify opinions. Other questions posed within the Case File can be used to generate further discussion.

HOW CAN A GAME BE USED TO CREATE A 'NEW' WORK?

- See **TEXT BOX #3**
- Students are asked here to think about the 'machinima' (ma-shin-a-ma) phenomenon.

  It's very common for games to have functions allowing the player to 'build' something – customising a character, putting together a structure, or a broader set of actions, gestures, movements. Even where this isn't possible, game footage can often be exported and then edited in other ways (such as inserting a different soundtrack or combining game footage with other material). (Your students may have examples of their own to discuss).

  As an end product, Machinima can look quite like a film clip, but may have been created with nothing other than a computer game and a lot of time … no camera, no studio, no film school.

- This is a good example of a new or emerging form of creativity – and one not necessarily expected by those who develop the original game!

  A point to consider though is that, as with many exciting methods for creative production today, there is the risk that it rubs up against the rights of others, or at least seems legally 'risky'.

  A major hurdle for those interested in machinima is whether they are infringing the exclusive rights of the original game developer. As noted in **TEXT BOX #3** and the further resources, some (though not all) will take a more generous approach – perhaps recognising that machinima does not compete commercially with the game itself, and might even serve to promote the game to a wider audience.

IS IT USEFUL TO THINK OF GAMES AS AN ART FORM?

- See **TEXT BOX #2 and #4**
- **There is no right or wrong answer** to this question, **it is a matter of opinion**.
- The idea of protecting software under copyright law is somewhat unusual; the 'creative' dimension in writing software code is less obvious. But it is now well established that software is protected. This was achieved, as set out in **TEXT BOX #2**, by amending copyright law to state that a program is a type of literary work.
- Game development today can be a highly creative activity. A modern game can include hours of original or licensed music, innumerable works of visual art, a complex 'plot', and much more.

  Many successful games are made by large teams, where computer programmers are working alongside graphic designers, sound engineers, scriptwriters, animators, voice artists, and others. In that respect, the making of a game may look more like the production of a film than the preparation of new word processing software.
- The law defines the authors of a film as the producer and the director. This makes it relatively easy to understand who owns what rights in the film.

  But we don't have the same clearly defined rules on authorship for games. For this reason, there is lots of potential for complexity when trying to work out who owns what rights in relation to a game. For example, a game can involve multiple creators who all may or may not own some of the rights in the game, depending on what type of contract they have signed, whether they are working on a freelance basis, and so on.

  Do the students think that games production should be treated in the same way as film production? That is, should there be an equivalent of a producer and a director?

SUGGESTED ACTIVITIES

Consider introducing the students to a machinima video – there are some links below. Contrast this (and indeed modern high-definition console gaming) with a 'simpler' game (a classic e.g. Pac-Man or an app-based game from the present day volunteered by a student).

Ask the students to discuss points and similarity and difference between the two.

Two obvious points to make are as follows: (a) that games have always involved some measure of music and visual art, but (b) the processing power of today's hardware is such that the look and feel of a game is now very close to film and television (not least because film and TV increasingly use similar techniques e.g. computer-generated imagery).

CASE FILE #31: FROM ARCADES TO APPS

1. INTRODUCTION

In *The Unreliable Narrator*, our characters find themselves wandering through the history of a very 20th century art form – the (video – or computer) game. In this Case File #31 we consider the implications of intellectual property protection for the gaming sector, including the different aspects of copyright that may be present in a game.

2. WHAT IS SOFTWARE?

Computer games contain a rich set of potential subjects for intellectual property protection. Even the most elementary game will require the presence of some sort of instructions to the computer hardware. This 'software', written in a programming language, can be represented in letters and numbers and printed on paper, though some software would require thousands if not millions of pages and make little sense to those not skilled in the language. Computer hardware has improved over the last few decades, though; today's games can incorporate a significant amount of photo, video, and audio material, and even games that seem 'simple' (like an app played while waiting for a bus) can involve a complex set of instructions.

Although it was initially unclear how to treat software in the world of copyright, it became clear that classifying it as a type of literary work was the preferred approach. Software itself has been protected in copyright law for some time. When the UK revised its copyright law in 1988, it included 'a computer program' within the definition of literary work (s 3(1)(b)), confirming and clarifying a change to copyright law first made in 1985. In 1991, the EU (or the European Economic Community, as it then was) adopted a Software Directive, and in 1994, the new international agreement on world trade in services included new provisions on copyright law; both instruments also classified computer programs as a type of literary work.

That doesn't mean that computer code will be a particularly good bedtime story, but it does mean, as with other literary works, the author of the work will have certain exclusive rights under copyright law. When dealing with software, these rights are about the copying of the code itself, such as making an unauthorised copy of a file or disk or incorporating the code into another game.

A game, however, will normally consist of other elements alongside the computer program itself. Images, sounds, and the like, may be protected (assuming they meet the normal criteria for originality and the like). On the other hand, as explored in Case File #32, certain features within a game (especially the 'mechanics' through which the player interacts with the system) may fall outside of copyright protection entirely. In any event, one of the tasks for a game developer (just like we saw in Case File #29) will be obtaining licenses for other works incorporated into their game (e.g., if they are not writing their own music, creating their own artwork, and so on). And, an unauthorised copy of a game may also be an unauthorised copy of, for instance, a theme tune contained within it.

3. GAMES AND BEYOND

As sometimes arises in the context of buyers exercising consumer rights or even tax breaks for developers, it can be quite difficult to work out when a game is 'finished,' or what is or is not the game as far as the developer's contribution is concerned. Games,

like software more generally, may need to be fixed ('patched') through an update, especially where a problem with the code is identified after it has been first released. Many games are now accompanied by downloadable content ('DLC'), unlocking features or adding a new level. Some games offer great opportunities for players to create new content using the software – customised characters, new gaming experiences, and more.

A particularly interesting issue has been the phenomenon of machinima, that is, the generation of new creative content using a game. Examples including making audiovisual material while playing a game and exporting it to be viewed elsewhere, or combining game footage with additional material (e.g. an additional soundtrack).

Hugh Hancock pioneered machinima, working in Scotland with creative and technical collaborators and, through the company he co-founded, Strange Company, produced a feature-length film, *Bloodspell*, in 2008. Strange Company's machinima.com website grew into a broader hub for game-related content, was taken over by its staff and eventually sold to Warner, recently relaunched as a 'premier provider of digital content at the intersection of gamer entertainment and culture'.

During his career, Hancock often spoke at conferences on law and technology about the challenges of intellectual property law for his work. In this 2015 video, he talks about the particular barriers faced by machinima creators as compared with, for instance, a filmmaker working with a camera on a street or in a studio. On another occasion, in 2013, he told stories about why it matters that the world's first copyright act, the 1710 Statute of Anne, didn't contemplate World of Warcraft.

Legal academic Greg Lastowka has written about machinima in chapter 9 of his 2010 book *Virtual Justice*, highlighting how some game developers encouraged or tolerated the creation of machinima, but did so against a backdrop of a copyright law ill-equipped to handle this novel situation.

4. FOR DISCUSSION: THE ART OF GAMES

If copyright is about creativity, how creative is game development? Opinions vary; one early court throws some judicial shade by describing arcade game players as 'fairly undiscriminating insofar as their concern about more subtle differences in artistic expression' and so not particularly engaged with artistic creativity on the part of the developer. More recently, the Court of Justice of the EU explained (in the *Nintendo v PC Box* case, which was about modifying computer hardware so as to allow for the playing of a wider range of games than those authorised by the manufacturer) that modern games 'constitute complex matter comprising not only a computer program but also graphic and sound elements, which, although encrypted in computer language, have a unique creative value which cannot be reduced to that encryption'.

Does it help to think of games as an art form? Does this affect how you think about copyright in the context of games?

5. USEFUL REFERENCES

WIPO, 'The Legal Status of Video Games: Comparative Analysis in National Approaches' (2013)

Atari v North American Philips 672 F 2d 607 (1982) (unfortunately, this case is not readily available online)

Nintendo v PC Box (2014) (CJEU) Case C-355/12 is available here: http://curia.europa.eu/juris/liste.jsf?num=C-355/12

G Lastowka, *Virtual justice: the new laws of virtual worlds* (Yale University Press 2010) https://archive.org/details/virtualjustice

D Mac Síthigh, 'The game's the thing: properties, priorities and perceptions in the video games industries' in M Richardson and S Ricketson (eds), *Research handbook on intellectual property in media and entertainment* (Edward Elgar 2017)

L Frølunde, 'Machinima as creative practice' (*Audiovisual Thinking* #7) https://www.audiovisualthinking.org/videos/issue-7-machinema/

H Hancock, 'A Virtual Filmmaking Primer' (24 January 2014) https://www.antipope.org/charlie/blog-static/2014/01/resource-post-virtual-filmmaki.html#more

Learn how to write your own game in this free FutureLearn course from the University of Reading