CASE FILE #32: THE (UN)POPULAR CLONE

LEARNING AIMS

- Understand copying (as in developer B allegedly copying the work of developer A) in the context of games
- Discuss how the law ought to be enforced

KEY QUESTIONS

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

- How can one game be said to be a copy of another?
- Who should be responsible for dealing with 'cloned' games?

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 ONE GAME BE SAID TO BE A COPY OF ANOTHER?

- See **TEXT BOX #2 and #3**
- Some of the biggest copyright cases concerning computer games have been disputes between game developers. In the materials, we see disputes between the famous original game of *Tetris* and a deliberately similar, more recent game; we also meet the *Nova* case, where two developers of arcade games went up against each other in a set of lengthy court cases in England.
- These cases aren't hugely surprising. A 'similar' game can draw upon the market for a particular type of game – and a player, having completed or at least got the most out of the first game, could be interested in a different approach. And some gamers (perhaps including your students) will have clear preferences as to genre – 'I like action games but not puzzle games', for instance.
- The creators of the 'earlier' game will argue that the 'later' game is drawing upon their work – even if (as is typical) there is no direct copying of the computer code itself. They will argue that the way that gameplay is represented (through on-screen displays, the rules of the game, particular types of image) is original to them and that the 'later' game developer needed their authorisation to make what is, in legal terms, an infringing copy.
- But the 'later' creators will point to the very general nature of some of the alleged similarities, arguing that what is said to be copied was never protected by copyright law in the first place. They will worry that if they need permission to make their game, it will be too easy for the 'earlier' creators to corner the market and simply say no (or demand an unreasonable price) – even though what the 'earlier' creators did in the first place may be limited in terms of originality.
- The law tries to strike a balance between these positions. While warning (as in *Nova*) that copyright law can go too far, there is the possibility of showing, in suitable

cases, that despite the lack of evidence of copying of code, a later game is an infringing copy of the earlier game. Courts will look in detail at, for instance, how much has been 'taken' from the earlier game and how much of that material was itself original.

WHO SHOULD BE RESPONSIBLE FOR DEALING WITH 'CLONED' GAMES?

- See **TEXT BOX #4**
- **There is no right or wrong answer** to this question, **it is a matter of opinion**. There is no specific legal duty in place.
- This text box prompts students to think about enforcement.

  'Cloning' of games is seen as a particularly extreme example of the phenomenon discussed in this case file (though note that it can be tempting for a developer to shout cloning, as it's not a legal term but it a very negative one).

  In its proper sense, we are talking about a new game that is developed quickly and with little originality to exploit the interest in a particular game. This is often seen in app stores and the like – taking advantage of a sudden wave of players searching for a game and perhaps going to the 'cloned' version if it comes up earlier in search results or is cheaper.
- In general, copyright law is up to the owner to enforce. In theory, where cloning arises, the original developer can go to court seeking to prevent the cloner from publishing the game, and/or seeking an appropriate legal remedy for the harm caused.
- In practice, this can be of limited value. Cloned versions can pop up quickly and gather substantial revenue. The nature of legal processes, especially across national borders, can be too cumbersome to satisfy the original developer. Players, too, can be led astray by poor quality clones (especially where combined with, for instance, the gathering of personal data).
- One possible way to enforce the law is to make the app store take on a greater role.

  Many games are now sold through these stores, so it seems an obvious place to screen out the worst of clones – and to do so quickly and cheaply. And a cloned game that can't be downloaded by players isn't really doing much harm.

  But this approach can be challenged on the grounds that it gives power to the store operator (such as Apple, for iPhone games) and that the operator may not be in as good of a position as a judge to decide whether copyright law has been infringed or not. (This is not just an issue for games clones – increasingly, the responsibility for enforcing copyright law seems to be shifting to platforms like YouTube or Facebook, for better or for worse).

SUGGESTED ACTIVITIES

As an activity, ask students to come up with their own 'clone' of a popular game, and debate whether this would be lawful or unlawful. Use this to explore the consequences of overprotection (no scope for new games) vs underprotection (unfair competition with no real creativity).

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1. INTRODUCTION

Sherlock and John see a number of images and animations that may look familiar to a gamer, during *The Unreliable Narrator*. For example, what are those skulls falling in intriguing patterns? In this Case File #32, we consider a famous dispute about a game similar to one of the world's most played games – *Tetris* – and think about the consequences of under- and over-protection in copyright law.

2. TETRIS

When Sherlock and John meet Mr. Hush and Agnes, something like *Tetris* plays out around them, although instead of the 'tetromino' familiar to anyone who had a Game Boy in the 1990s we see skulls instead. But what is the legal status of a game that 'looks' or 'feels' like *Tetris*? This issue came before the US courts in 2012, where the *Tetris* rightsholders succeeded in persuading a judge that a new game, *Mino*, infringed their rights. (We also learn from reading the case that the makers of *Mino* happily admitted that they had set out to do something that was *Tetris*-like, having taken legal advice that it would be possible to do so without infringing copyright law). The judge pointed out that *Tetris* was a 'purely fanciful' game (not an existing game, like golf, which was being represented on screen in a way that players would already visualise), and that *Mino*'s developers could have chosen different shapes and the like.

Disputes between game developers are not new. The most detailed exploration of this question in the UK arose out of something that Sherlock and John encounter early in this episode: the 'arcade' game. Nova Productions and Mazooma Games were two companies working in this sector when Nova went to court in the mid-00s arguing that some of Mazooma's games infringed on its copyright. But Mazooma succeeded – in the High Court of England and Wales and then in the Court of Appeal – primarily on the grounds that it had not copied the computer code that drove Nova's games. Indeed, one judge at the Court of Appeal – Lord Justice Jacobs – warned that copyright should not go so far as to 'become an instrument of oppression rather than the incentive for creation which it is intended to be'.

The distinction between ideas, genres, graphics, and the like, is often controversial. In episode 5 we see the centaurs throwing paperballs-cum-fireballs at the unfortunates below; this might look particularly like *Super Mario Bros*, though gamers have long had to dodge unwelcome gifts from above, whether *Donkey Kong's* barrels or even the bullets in *Space Invaders*. In 2018, the wildly popular *Fortnite* was to be the subject of a copyright action in South Korea, though the case, which was brought by rival *PlayerUnknown's Battlegrounds* (PUBG) was withdrawn at an early stage. (Both games have versions with 'battle royale' modes, inspired by the film of that name; the conceptual similarities between *Battle Royale* and *The Hunger Games* have been much discussed).

3. PROTECTING GAMEPLAY

Indeed, the *Tetris* case also reminded us how the key cases on software and copyright in the US are also from the 1980s heyday of the video game arcade, turning on allegations that the big games of the day - such as *Asteroids* and *Pac-Man* - had been unlawfully copied by others. Some proved infringement while others didn't; where infringement wasn't found, it was often because the elements alleged to have been

copied were too general in nature (tables of highest scores, various ways of representing the use of buttons and joysticks on screen).

A similar caution is evident in the 2004 English case of *Navitaire v EasyJet*, where new software (for managing air reservations) was designed to perform similar functions to a more established package, though the designers of the new software had no access to the code of the original; it was found lawful, as what was 'taken' was not a 'substantial part' of the original. The *Navitaire* case was discussed in detail in the *Nova* case.

But what of the situation where, as seems particularly commonplace in new game markets such as app stores, a successful game is quickly and (it seems) quite cheaply imitated? Does copyright have a role to play here? It has been argued that copyright law should change so that 'gameplay' is protected. Meanwhile, however, other court decisions in the EU have emphasised the limits to protecting 'functional' aspects of computer use through copyright law – such as an on-screen interface. Some old debates about IP law and computers – including whether copyright, or patent, or something that is distinctive to information technology, is the most appropriate form of protection – seem as relevant as ever.

4. FOR DISCUSSION: IS THE ANSWER IN THE BIG APPLE?

If there is a situation where a game has been 'cloned', how can that be addressed? Or, to put it another way, should platforms have any responsibility for checking the lawfulness of software distributed through that platform? In the situation of one of the most rapidly copied games – *Flappy Bird* – it was reported that, at its height, a new clone was uploaded to the Apple app store about twice an hour, and that making a new version would take about three hours. Apple are said to be taking more action against clones these days. Is this effective? Is it the right thing to do? Or should we leave it to the courts to determine what is and isn't copying in these circumstances? Overenforcement can leave other developers in a position where they can't reach their key audience, but others call for Apple to play more of a policing role.

5. USEFUL REFERENCES

Box Brown, *Tetris: the games people play* (2016)

T Phillips "'Don't clone my indie game, bro": Informal cultures of videogame regulation in the independent sector' (2015) 24 Cultural Trends 143

Y H Lee, 'Play Again? Revisiting the Case for Copyright Protection of Gameplay in Videogames' (2012) 34 European Intellectual Property Review 865-874.

Tetris v Xio Interactive (2012) 863 F Supp 2d 394 is available here: https://scholar.google.co.uk/scholar_case?case=18064882260025243346

Nova Productions v Mazooma Games [2007] EWCA Civ 219 is available here: http://www.bailii.org/ew/cases/EWCA/Civ/2007/219.html

Navataire v Easyjet [2004] EWHC 1725 (Ch) is available here: https://www.bailii.org/ew/cases/EWHC/Ch/2004/1725.html