THE COPYRIGHT PROTECTION OF VIDEO GAMES FROM RESKINNING IN CHINA—A COMPARATIVE STUDY ON UK, US AND CHINA APPROACHES

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Abstract

Video games are becoming a popular form of entertainment, as well as an important part of the Internet industry. With the advancement of computing and graphics technologies, video games are now defined by various elements, which are the intellectual achievements of the designers. However, the prosperity of video games also creates a breeding ground for copyright infringements. Reskinning, as one of the popular cloning methods, has gravely harmed the interests of game designers. Being the largest video gaming market in the world, China has to deal with these issues properly to ensure healthy and sustainable development of its video games industry. In order to examine copyright protection of video games from reskinning in China, this article firstly introduced genres of video games, the current legal protection mechanisms and the subject matter of video games to demonstrate the status quo of video game and its regulation. Then the article compared the current copyright protection of video games among the US, the UK and China and analysed each legal approach for the purpose of exploring possible approaches to improve copyright protection of video games from reskinning in China. Finally, the article proposed three suggestions for Chinese copyright law from the subject matters of copyright protection, assessment criteria and industry-based self-regulation parts.

I. INTRODUCTION

With the emergence of the Internet technologies, video games\(^1\) has quickly become one of the most popular entertainment choices. Since the launch of the first mainstream video game – Spacewar! – in the US, digital games have become a worldwide industry. The global market for video games is expected to continue on its fast expansion in the future.\(^2\) However, throughout the history of digital game design and progress, there have been imitations and copies of other games. This continues to be a considerable issue in this sector. Game innovation is inseparable from imitation and sharing of ideas,\(^3\) but as a type of creative work, legislation should draw a line between legitimate inspiration and plagiarism, to serve the developers’

\(^1\) The video game is normally defined as an electronic game that contains interaction with users to generate audio-visual feedback on a two- or three-dimensional display device such as a screen, virtual reality headset or computer. The video game is constituted by various elements such as gameplay, game roles, game rules, storylines, in-game dialogue and background music.


\(^3\) The famous game Counter-Strike has been remixed and redeveloped, becoming one of the most popular game models.
interests. Thus, the legal framework for protection of video games is increasingly vital.

For China, which is the second largest video game consumer in the world, the protection of video games is particularly essential. According to the 2017 China Game Industry Report, the actual sales revenue of the Chinese digital game market reached RMB203.61 billion in 2017, representing a year-on-year increase of 23%. Mobile games account for 96% of all domestic games. China has become the largest video gaming market and the third largest mobile gaming market in the world.

However, with the rapid development of the video game market, the infringement upon video game intellectual property rights is also in an alarming increase. The 2016 Investigation Report on Infringement of Intellectual Property Rights in Online Games shows that, in 2015 and 2016, the total number of online game infringement-related court cases reached 254, which is eight times year-on-year. According to the report, the distribution of the cause of action of most of the cases were copyright infringements, mainly related to networks and online game imitation.

A. The Development of Mobile Games in the Game Industry

The swift progress of video games has led to the development of mobile games. The mobile game is defined as a type of video game that players use smartphones and tablets to play. While this new

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7 Beijing Shi Haidian Qu Renmin Fayuan (北京市海淀区人民法院) [Beijing Haidian District People’s Court]. Wangluo Youyi Qinfan Zhishi Chanquan Anjian Diaoyan Baogao (网络游戏侵犯知识产权案件调研报告) [Investigation Report on Cases about Infringement of Intellectual Property Rights in Online Games] (June 2017), http://www.netmvp.cn/uploadfile/file/20161202/20161202_a8166620.pdf.

8 TIM FIELDS, DISTRIBUTED GAME DEVELOPMENT: HARNESING GLOBAL TALENT TO CREATE WINNING GAMES (Focal Press, 2012).
industry is growing rapidly, it is also regarded as a highly controversial sector because of the low market access requirements and rapid rate of return. The mobile game industry is disruptive and is the largest and fastest-growing area of interactive entertainment. According to the 2017 China Game Industry Report, the number of mobile game players in China reached RMB460 million in 2017. The revenue of mobile games in 2017 was RMB112.21 billion, representing an increase of 38.5% over the same period of the previous year. Mobile games account for 55.8% of the video game market. A recent success story is Tencent in China, which is an Internet enterprise comprising of various businesses. Tencent’s game revenue in 2017 was $18.6 billion, with the mobile game Glory of the King accounting for the bulk of this revenue. Apart from the big game developers, independent developers, such as Daybreak and Dong Nguyen, have demonstrated that success is possible for a small game development studio. Although the revenue that independent developers make is limited to two percent of game sales in 2013, the fast growth of independent developers deserves attention.

However, there are also numerous “zombie” mobile games in various application (app) stores. As of January 2015, 83% of the mobile games (1.42 million apps) on the Apple Store had been considered “zombie” games. This tendency leads developers to clone gameplay, graphics, structures or titles of already popular games to appear in the top search results by offering a familiar experience.
Therefore, a well-designed regulatory framework for the video game industry is being called upon to address various concerns on the deteriorating environment for innovation.

**B. Reskinning – Cloning in the Digital Game Industry**

Although the video game sector is prolific and highly profitable, it is rife with the copying, imitation and redevelopment of other developers’ ideas. New developers have innovated and imitated the storylines, gameplay and some game elements of model games. To a greater extent, such copying is both healthy and essential to the industry. However, there are some developers who unscrupulously copy other games, through various game cloning methods.

The first game cloning method is one-for-one code copying. A video game is essentially a computer program with several databases. Some new developers imitate existing games by copying the code to generate a new game. In this case, the new developers use tools to clone the game code directly. This can be done through a smartphone (by using an application cloner). Some new developers use the old game’s development document to copy it directly, as it is in the Tetris case. Legally speaking, this behaviour is not controversial, because under copyright laws of most of the countries code is a copyrightable subject. Hence, directly copying the code constitutes a copyright infringement. However, whether other developers using reverse engineering to retrieve the game coding constitutes an infringement is still arguable. For instance, in Atari Games Corp. v. Nintendo of Am. Inc., the Federal Circuit Court of Appeals held that Atari’s reverse engineering was not fair use. The court declared that the intermediate copying of the Nintendo’s code during the examination of the microchip itself was fair use, but the source code itself obtained from Copyright Office was unauthorized, which cannot be protected under fair use. This opinion is also cited in other decisions on matters in connection with the use of reverse engineering by other courts.

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18 See Dean, supra note 13.

19 See FIELDS, supra note 8.


21 Atari Games Corp. v. Nintendo of Am. Inc., 975 F.2d 832 (7th Cir. 1992).

22 Sega Enterprises Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992).
The second game cloning method is imitation of game mechanics or remixture of multiple games’ mechanics. 23 This method is generally acceptable and incentivised. New developers use different expressions to describe the same game rules or gameplay. For example, Call of Duty and Counter Strike GO are both First-Person-Shooter (FPS) games. Their rules are the same, in that two rival teams engage in combat with each other to defuse a bomb, or rescue or guard hostages. At the end of each game, players are rewarded based on their individual performance (i.e. number of persons being killed). These games both use this simple gameplay through different expressions. The two games use completely different expressions, such as the appearance of characters, the weapons, storylines, background music, rules and maps. Thus, this type of imitation is allowed.24 From a legal perspective, it is regarded as the imitation of a game idea. Based on the principle of idea/expression dichotomy, this type of copying is not copyrightable.25

The third game cloning method is game reskinning, which involves changing the graphics of an existing game (usually, altering the appearance of characters), while retaining the original expression and actual gameplay.26 With game reskinning, a developer can work with an existing game and change its design, artwork, music and rename it.27 It is termed reskinning simply because there is only a change in the appearance. This method of cloning is of complex legal nature. Not all countries have a good strategy to protect video games from reskinning. Unlike the other two types of imitation manners, reskinning simply alters the graphics of existing games and but retains the gameplay, rules, storyline and other elements. It brings new challenge of idea/expression dichotomy and the uncertainty of legal nature of reskinning. The protection strategies of video games are also ambiguous. In light of such, this essay will discuss and examine the cloning technique of reskinning. In the following sections, this essay

23 See Fields, supra note 8.
24 See Katzenbac, Herweg & Roesse, supra note 17.
27 Id.
28 Id.
will demonstrate that China should protect video games from reskinning and will discuss how to introduce this protection.

C. Research Aims, Potential Contributions and Limitations

With the thriving development of the video game industry in China, there are increasing infringements of copyright in video games. This article analyses the video game genre, the business model and the subject matter of protection. It compares the current legal protection mechanisms in the US, the UK and China, with a view to explore possible approaches for China to improve the copyright protection of video games.

Through the analysis of the business model and the genre of video games, this article examined if all kinds of video games can be protected by copyright law and which genre of games or elements can be protected easier by copyright law. Moreover, this article emphasized how to protect video games from “reskinning” cloning instead of other imitation manners. Thus, after comparison between the UK, the US and China, the article concluded the relevant legal doctrines and underlined how to distinguish the gameplay, game rules and expressions and how to maximize the protection of video games from reskinning. Apart from copyright protection, in order to better serve the interests of designers, this article proposed the sector-based regulations as a supplementation through introducing and comparing with other creative industries.

II. THE VIDEO GAME INDUSTRY AND ITS GENERAL LEGAL PROTECTIONS

Video games can be categorised into several different genres. The different genres have different game elements, game rules standard and special expression in gameplay. As a result, legal protection cannot be generalized. For game developers, the business model of video games is also different for different genres, which probably incentivizes developers to use different clone manners.29

Generally, video games are covered by copyright law, patent law, trademark law and competition law.30 However, reskinning is in a

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29 See Part III of this article, in which I discuss different legal outcomes as for different genres.
30 Grosheide et al., supra note 2.
negative space of current legal protection, which causes a dilemma for developers. As the basis of video games is a computer program, the legal protection of video games mainly falls into the copyright scope. However, different legislations have different ways of categorizing the subject matter of video games in copyright law.

A. Video Games’ Genres

There are diverse methods used to classify the genres of video games, based on the common style, sets of characteristics, gameplay, interactions and objectives. The main classification of video games includes the following categories.

Action games: Many fighting-oriented type games can be classified into this genre. Action games are represented by fast-paced pictures and movements. Players usually defeat the opponent by controlling the action of the game characters to win the game. Examples include Capcom and Bloodborne.

Adventure games: Usually the player is the protagonist in the game. To proceed, the player must solve in-game problems. These problems usually involve manipulating and interacting with objects and characters in the game. These games can be text-based and graphical, and use dialogue-boxes to demonstrate the storyline and interactions with other players. Examples include Zork and King’s Quest.

First-person shooter (FPS) games: In this genre of game, the player usually shoots their rivals through the first-person perspective and wins the game by killing their rivals. Many FPS games also support third-person views. Most FPS games are fast-paced and often require repeated actions. Some FPS games will also use storylines to enhance interactivity with players, such as the Cross-Strike (CS) and Call of Duty series.

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33 Id. at 3.
34 Id. at 4.
35 Id. at 5.
36 Id. at 6.
Multiplayer Online Battle Arena games (MOBA): This is one of the most popular game genres. This genre is played over a local area network (LAN) or via the internet. Players interact with other players in the battle arena and compete against people from all over the world. In the battle arena, players control one character in a team that competes against other teams. Typically, a team consists of five players. There is usually one main structure that must be destroyed to win. The most popular game of this genre is League of Legends.

Puzzle games: This genre normally requires players to solve a puzzle or issue in logic, memory, pattern matching or reaction time. The Tetris series is an example of this genre.

Role-playing games or multiplayer role-play games (RPG): This genre initially stems from video games in which players take on the role of an in-game character. These games contain three essential elements: 1) a specific quest or task; 2) a process of evolution of a character; and 3) careful acquisition and management of task-required items. An example of this genre is the Star Wars games.

Simulation games: Simulation games accurately recreate an experience. The themes vary and can include city or hospital settings, such as the Sims series.

Sports games: Theses are games that simulate real sports, emphasising the experience of playing and the strategies behind the sport. Examples include the NBA 2K series and the FIFA football games.

Strategy games: This genre of game can be divided into real-time strategy games and turn-based strategy games. Strategy games normally rely on real-time simulations and offer players a greater sense of specific control over a situation, such as the Hearts of Iron series.

38 Id.  
39 Id.  
40 See Hanna, supra note 32.  
41 Jane Hurst, 12 Types of Computer Games Every Gamer Should Know About, THOUGHT CATALOG (Feb. 18, 2015), https://thoughtcatalog.com/jane-hurst/2015/02/12-types-of-computer-games-every-gamer-should-know-about.  
42 Id.  
43 See Stahl, supra note 37.
B. The Business Model of Video Games

Generally, the business model of video games can be separated into two profit models. The first business model features video games that can be downloaded for free. Revenue is generated through purchases within the in-game marketplace, called “microtransactions”. These microtransactions allow players to purchase bonuses, tools or credits to progress in the game once they begin to play. This is called the freemium or free-to-play (F2P) business model. Although each transaction is quite small, this model has proven tremendously profitable. Because of a lack of financial support, many small game developers or self-publishers employ this mode to attract players.

The second business model is called pay-to-play (P2P), which is the traditional revenue model. In this business model, players are required to pay a one-time fixed licensing fee (initial price) to download or access games. For instance, on the Steam game platform, most games use this revenue mode. Big game developers prefer it, as they already have a user base big enough due to previous games. Therefore, they are not concerned with attracting players. The big companies concentrate on providing the game experience as a service. They usually care about the user experience and optimise the user experience through constant upgrades on and developments of the game.

C. The General Legal Protection of Video Games

Video games are complex and complicated, which comprises various elements, such as program coding, graphics work, music and databases. Thus, video games can be covered by several different laws.

Although the subject of video games in copyright is still arguable, copyright is the first legislative approach to be considered for the

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45 See Dean, supra note 13.
46 Id.
47 See Davidovici-Nora, supra note 44.
48 Id.
49 Id.
50 In different countries, there are different ways to manage the subject matter of video games, which will be discussed in later sections.
protection of developers’ rights. The basis of a video game is the computer program, so it naturally falls into the copyright scope. Some of the other elements in video game (images, music and text) can also be covered by copyright law.

Regarding the game company’s logos, names and titles, the concept of trademarks and trade dress would be relevant. As trademark laws protect the goodwill that enterprises have built up in their names, trademarks and trade dress, once there is a new game company attempting to confuse players in terms of logo or game’s name, the original developers can use trademark law to protect their interests. For instance, in Spry Fox LLC v. LOLApps Inc., the plaintiff claimed that the defendant made a false or misleading representation of fact, which infringed upon its Triple Town trademark.

Some new techniques may also fit within the scope of patent law. In respect of technical innovations in hardware, game design elements and technological innovations (such as software, network or database design or arrangement), enterprises can apply for patents to protect their right. Taking the system arrangement as an example, the US patent licensing company Lodsys declared in 2011 that two US patents (US 7,620,565 and US 7,222,078) were infringed by Angry Birds developer Roviou, and the Sims 3 developer EA and other well-known game developers. These infringements were all related to in-app purchasing technology.

Another area of law to which developers may resort for the purpose of protecting their video game products is competition law. Competition law protects video games in China from four aspects. The first is trade secrets, which involves the disclosure of source codes, clients lists and internal information by employees. The second aspect involves the protection of video games’ interfaces, which are difficult to be safeguarded under copyright law because of the low-originality, standard expression and indispensable elements of

51 See Kuehl, supra 25.
52 Spry Fox LLC v. LOLApps Inc. (Sep. 18, 2012) No. 2:12-00147 (2012) WL 5290158, at *1-3 (WD Wash.)
53 Sun Lei (孙磊), Wangluo Youxi de Zhuanliquan Baohu Xianzhuang Fenxi (网络游戏的专利权保护现状分析) [Analysis of the current situation of patent protection of online games]. SHIPA (Dec. 12, 2016), https://mp.weixin.qq.com/s/LnzR5Qy_Vv1q1qg5NU6WUw.
54 Id. at 34.
The third aspect involves the “free riding” of the defendant’s advertisement. The fourth aspect is related to Article 2 of the Chinese Anti-Unfair Competition Law in connection with behaviors disrupting the order of market competition that cause damage to the lawful rights and interests of other businesses or customers. In the case of video game infringement, the most typical protection is for game design and game mechanics. However, it remains controversial as to whether gameplay should be protected, and whether large-scale use of principle clauses of competition law is beneficial to the development of the video game sector.

According to the categories and elements of video games, the protectable elements under different legislative approaches are outlined in the table below.

**Table 1. Elements of Video Games that are Protected by Different Legislation**

<table>
<thead>
<tr>
<th>Copyright</th>
<th>Trade Secret</th>
<th>Trademark</th>
<th>Patent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Music</td>
<td>Customer mailing lists</td>
<td>Company names</td>
<td>Hardware or technical solutions</td>
</tr>
<tr>
<td>Code</td>
<td>Pricing information</td>
<td>Company logos</td>
<td>Inventive game play or design elements</td>
</tr>
<tr>
<td>Storyline</td>
<td>Publisher contacts</td>
<td>Game titles</td>
<td>Technical innovations, such as software, networking or database design</td>
</tr>
<tr>
<td>Characters</td>
<td>Middleware contacts</td>
<td>Game subtitles</td>
<td>/</td>
</tr>
<tr>
<td>Art</td>
<td>Developer contacts</td>
<td>/</td>
<td>/</td>
</tr>
<tr>
<td>Box design</td>
<td>In-house development tools</td>
<td>/</td>
<td>/</td>
</tr>
<tr>
<td>Website design</td>
<td>Deal terms</td>
<td>/</td>
<td>/</td>
</tr>
</tbody>
</table>


56 Id. art. 2.
D. The Importance of Intellectual Property Awareness

Video game, as an aggregate of computer programming and databases, is an innovative product that game developers shows his or her intelligence and time. According to Locke’s labour theory, property comes from the exertion of labour upon natural resources. Game developers pay intangible brainwork. Thus, as a type of labour exertion, these innovative activities are regarded as intellectual property.

However, in the video game industry, copying and imitation is inherent. To some extent, such imitation of storylines, gameplay and design elements of existing video games is conducive to the advancement of this sector. Allowing complete ownership of developer’s work would not be desirable and as it has an adverse impact on the innovation-based industry, in which a high degree of freedom in knowledge flow is required. For example, the major franchises of FPS games (CS, Call of Duty and Halo) coexist in the market, because no individual owns the FPS video game genre. It matters when some developers almost entirely mimic previous games to create a “new” game, essentially cloning gameplay, graphics or stories, hence unscrupulously harming the interests of creative developers. In this context, the video game sector (as a type of intangible intellectual property) requires intellectual property legislation to protect it. How to balance the designers’ interests and the need to incentivize the innovation has become a question.

E. Can Video Games be Protected by Copyright Law From Reskinning?

The answer to this question is still unclear, since there are a variety of video games which cannot be addressed in a completely uniform way. As the existence of the principle of copyright law, the

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57 Alan R. Glasser, Video Voodoo: Copyright in Video Game Computer Programs, 38 COMM. L.J. 103, 103 (1986).
59 See Katzenbac, Herweg & Roese, supra note 17.
idea/expression dichotomy, it is also disputable to distinguish the inherent expression and idea. As for the subject matters, laws vary in different jurisdictions and different genres of game require different protection models. The following content will discuss the influence of idea/expression dichotomy on video game infringement and compare different protection pattern in different jurisdictions.

1. The Idea/Expression Dichotomy

The fundamentals of copyright law refer to the idea/expression dichotomy, which is that the expression of an idea is copyrightable, but the underlying idea is not. Therefore, it is widely considered that mechanics (as ideas, rather than expression) cannot be protected by copyright law. However, the expression of gameplay (such as art, graphics, sounds, characters, text and interface) can be protected from reskinning by copyright law. The level of protection depends on how courts draw the line between idea and expression for the numerous elements of a game. According to the limitations of the idea/expression dichotomy, the general method to protect video games from reskinning is to protect the specific expression of the various elements.

For example, courts have identified that specific expressive elements of gameplay are copyrightable, including game labels, the design of game boards, playing cards and graphical works. Regarding the interface of video games, courts sometimes consider the total feeling and concept of games when assessing if there are substantial similarities between two games. In Atari, Inc. v. Amusement World, Inc., the court ruled there was no copyright infringement because the overall feeling was different between the two games.

2. Subject Matter of Video Games in Copyright Law

Due to the interactivity, speciality and complexity of the production of video games, copyright law provisions cannot be easily

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63 See Dean, supra note 13, at 3.
64 Tetris Holding, 863 F. Supp. 2d at 404.
applied to the protection of video games. In this regard, different countries have adopted different legislative measures.

In the US, the courts view video games as computer programs, which are copyrightable because “a computer program can be the subject of a copyright as a literary text.” From the players’ perspectives, the code is behind the audio-visual experience of playing the game. Consequently, in Atari, Inc. v. Amusement World, Inc., the work is also copyrightable as an audio-visual work.

In the UK, the High Court of Justice decided in Electronic Techniques (Anglia) Ltd. v. Critchley Components Ltd. to use categorised copyright protection to protect video games. As illustrated in Table 1, video games can be separated into several different elements and each element can be categorised into a corresponding copyrightable subject. Generally speaking, a video game is a single product, but is protected by many levels of copyright law (for example, the storyline or text is classified as literature, the music is classified as musical works).

In China, the subject of video games in copyright law is still controversial. In Nexon Holdings v. Tencent Ltd., the court did not clearly categorise video games into any kind of work in Chinese copyright law. The court directly assessed if there were substantial similarities between the two games. In Taiji Panda v. Hua Qian Gu, the court categorised video games as being analogous to cinematography work.

Depending on different categories in copyright of video games, the protection steps, processes and approaches are different in each jurisdiction, which means the results of video game litigation are different. The following section compares and analyses video game copyright protection in the US, the UK and China.

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66 Williams Elecs., Inc. v. Artie Int’l, Inc., 685 F.2d 870, 875 (3d Cir. 1982).
68 Electronic Techniques (Anglia) Ltd. v. Critchley Components Ltd. [1997] FSR 401
III. COMPARISON OF US, UK AND CHINESE COPYRIGHT PROTECTION OF VIDEO GAMES

Over the past few decades, courts in different jurisdictions have established a precedent of granting limited legal remedy for video games to developers. They allow numerous clone developers to receive benefits. However, with progress in graphics and information technology, such precedent seems to be insufficient to address new concerns arising therefrom. In the US, earlier cases were more often found in favour of the original game developers, but decisions have evolved since then. This chapter compares three different jurisdictions (the US, the UK and China), analysing whether China should protect video games from reskinning.

A. Court Decision Shifts in US Case Law

A few early cases in the US demonstrated that intellectual property law provides a very thin legal remedy for video games, unless there is a case of identical copying. In *Stern Electronics, Inc. v. Kaufman*, the court granted the plaintiff’s motion to issue a preliminary injunction against the alleged infringer. When the court conducted a surface-level test, it found that the graphics and game mechanics of the defendant’s game and plaintiff’s game were virtually identical. Thus, without adopting complicated legal doctrines, the court ruled in favour of the plaintiff’s claim. However, with the evolution of the video game industry, these few cases are not sufficient to protect original game creators, because copycats now use a more complex and smart strategy to mimic original games. This is called reskinning.

1. Early Precedents in The US

In *Atari, Inc. v. Amusement World, Inc.*, although a thorough legal analysis template was established, the court ordained that the

72 The very thin legal remedy means that in US early cases, the court ruled in favour of cloning developers. The copyright protection is limited to original game developers.
73 See Capcom, N.D. Cal.; Data East USA, Inc., 862 F.2d at 204; Atari, Inc., 547 F. Supp. at 222.
75 In the *Atari* case, the US courts clarified the subject matter of video games, that is, protecting video games as a whole. It also established the extrinsic/intrinsic test and ordinary observer test. In the extrinsic test, the court will individualise the game rules, then filter out the non-protectable elements. In the
similarities between the two games were not sufficient to support the plaintiff’s claim. 76 This decision favours the clone developers’ interests, as they were able to imitate a successful game that was created by another game studio. In October 1979, the plaintiff, Atari, Inc., introduced Asteroids, a video game in which the player commands a spaceship through a barrage of space rocks and enemy spaceships. 77 In 1981, the defendant, Amusement World, Inc., a small, closely-held corporation employing a total of five people, attempted to enter the lucrative video game industry and released a video game called Meteors. The plaintiff claimed that Meteors shared many features with their Asteroids game. This would be described today as reskinning. Atari, Inc. filed a copyright infringement claim.

As these two video games were played on video game arcade, the court deemed that Asteroids was an audio-visual work. The court then employed the ordinary observer test 78 to locate substantial similarities. The court identified that, in both video games, the player shoots their way through a barrage of space rocks, which is their core design. The court then identified twenty-two similarities and nine differences between the two games. However, the court held that these similarities were not decisive to determine copyright infringement. The court noted that the doctrines of merger 79 and scènes à faire 80 may cause these similar elements to be unprotectable in the copyright field.

The merger doctrine states that, if an expression is inseparable from an idea, where there are only a few ways to express the idea, it becomes one of only a limited number of ways to realise that idea. Hence, this expression is not protectable. 81 The scènes à faire intrinsic test, the court will analyse the substantial similarities between two games. Regarding the ordinary observer test, the court uses neutral observers’ comments to assess similarities, such as online game bloggers’ comments. See Atari, Inc., 547 F. Supp. at 222. 76

76 Id.

77 See Tetris Holding, LLC et al; See also Spry Fox LLC, 2:12-00147 WD Wash. at 1-3.


79 Id.

80 See Atari, Inc., 547 F. Supp. at 222.

doctrine refers to “incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic.”\textsuperscript{82} The French term translates as “scenes that must be done”.\textsuperscript{83} Under the \textit{scènes à faire} doctrine, “similarity of expression, whether literal or nonliteral, which necessarily results from the fact that the common idea is only capable of expression in more or less stereotyped form will preclude a finding of substantial similarity.”\textsuperscript{84} In other words, in the \textit{Atari} case, if the similarities were forms of expression that simply could not be avoided in any version of the basic idea of a video game involving space rocks, they should be excluded from analysis of copyright infringement.

The court properly\textsuperscript{85} applied the limiting doctrine\textsuperscript{86} that \textit{Meteors} was not substantially similar to \textit{Asteroids}. The court found that there were substantially similar elements between the two games, but most were inevitable and compulsory for creating a space-rock shooting game. According to the aforementioned tests, most of these similarities were inevitable, based on the requirements of the game consisting of a spacecraft combating space rocks. The technical necessities of the graphics in the medium of video games also confined the expression of this genre of game. As this similarity was inevitable, the court was of the view that the dissimilar parts became specifically essential. According to the foregoing test, nine dissimilarities were found. This was sufficient to make the defendant’s game not substantially similar to the plaintiff’s game. The court ultimately ruled that the similarities were unprotectable components, implying that these components did not infringe the plaintiff’s copyright and there was no copyright violation.

\textit{Atari} case applied a series of different legal doctrines. First, the court investigated the idea being expressed this genre of game. The court then defined the realm of the potential expression of such an idea by narrowly interpreting the range of these manifestations and by detecting the limitations of the state-of-the-art. As a result, the court

\begin{footnotesize}
\begin{enumerate}
\item See Dean, \textit{supra} note 13, at 3.
\item See Casillas, \textit{supra} note 31, at 153.
\item See Casillas, \textit{supra} note 31, at 153.
\item See Casillas, \textit{supra} note 31, at 153.
\item Limiting doctrine means the use of doctrine of merger and \textit{scènes à faire} to determine which game elements are copyrightable.
\end{enumerate}
\end{footnotesize}
found very limited copyrightable elements. The application of this legal method combined the merger and *scènes à faire* doctrines, which exerted a profound influence on the video game infringement cases that followed.\(^87\)

In another representative case, *Data East USA v. Epyx, Inc.*, the Northern District of California court delivered a similar verdict to the *Atari* case, although the court had initially granted a preliminary injunction against the defendant’s alleged game imitation.\(^88\) As the genre of the games in this case were karate-based video games, the court applied a detailed analysis method and found fifteen similar components between the two games, including special karate action, game rules, game background and a referee in the karate match. In light of these similarities, the court granted an interim injunction against the defendant. However, with the idea/expression dichotomy and the initial merger and *scènes à faire* doctrines being applied, the result was reversed.

The application of these legal doctrines excluded substantial elements that were previously considered copyrightable. Consequently, the court deemed that the fifteen similarities were all compulsory elements in karate video games. Most of the similarities between the two games were inseparable, indispensable or the standard treatment of the idea of karate. Hence, these similarities could not be copyrightable. The court also defined the scope of the potential expression of a karate game. The result resembled the judgement of the *Atari* case, which demonstrated technical limitation as the main factor that minimised the range of possible expressions. Therefore, the court decided in favour of the defendant.

2. The Shift in The Current Litigation in The US

As the internet and computing technology have been rapidly progressing, the genre of games has become more varied since the 1980s.\(^89\) The advancement of Graphical prowess, computing power, general sophistication and Central Processing Unit (CPU) technology led to more colourful and lavish expression in video games. The

\(^{87}\) For example, the court then concludes Abstraction-Filtration-Comparison test (AFC test) and also consider the total feeling and concept of video games.

\(^{88}\) See *Data East USA, Inc.* 862 F.2d at 204; See also *Capcom U.S.A. Inc.* WL 1751482.

\(^{89}\) Bill Loguidice & Matt Barton, *Vintage Game Consoles: An Inside Look at Apple, Atari, Commodore, Nintendo, and the Greatest Gaming Platforms of All Time* (Focal Press 2014)
The emergence of mobile games has reshaped the gaming industry’s structure, and allowed for easy game creation and aided clone developers. Court’s attitude on video games copyright has changed accordingly.

In Tetris Holding, LLC v. Xio Interactive, Inc., the court realised a new paradigm of revolution and duplication in the game industry. Since its creation in 1984, Tetris has become a widely known video game across diverse platforms, including mobile phones. However, in 2009, game studio Xio launched the Mino game on the Apple platform. Because of the similar game mechanics and game user interface, Mino was regarded as a clone of Tetris. Mino officials actually admitted that they used Tetris as a reference to aid them in developing the game. Xio claimed that, in light of the merger and scènes à faire doctrine, and few other precedents, they did not infringe Tetris Holding’s copyright, because they only copied the abstract gameplay – which is not copyrightable.

The court disagreed with Xio’s opinion. To determine whether Xio infringed Tetris Holding’s copyright, the court required that Tetris Holding must establish ownership of a valid copyright and prove Xio’s unauthorised copying of their work. Xio recognised that Tetris Holding owned the registered copyright for Tetris and did not deny that they purposefully and deliberately copied many elements from the Tetris game. Thus, the crux of this case was whether the copied elements could be protected by copyright law.

First, the court introduced the idea/expression dichotomy. 17 U.S.C. § 102 (a) and 17 U.S.C. § 102 (b) provides that:

> ‘[c]opyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.’

Subsection (b) states that:

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90 See Tetris Holding, LLC et al; See also Casillas, supra note 31.
91 Tetris Holding, LLC et al at 397.
93 17 U.S.C. § 102 (a) and (b).
‘[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.’

Although the legal doctrine was clear, and the video game was subject to this legislation, the court found it difficult to apply this article directly because the idea/expression dichotomy was too abstract in the case.\textsuperscript{94}

After examining the differing approaches and cases, the court invoked \textit{Computer Associates International v. Altai, Inc.}\textsuperscript{95} and \textit{Atari, Inc. v. North American Philips Consumer Electronics Corp.}\textsuperscript{96} to conduct the abstraction-filtration-comparison test (AFC test) when assessing the similarity between the two games.\textsuperscript{97} According to this test, to determine the substantial similarity of the nonliteral elements in copyright, the courts are first required to identify the scope of abstraction of the game and then to distinguish the various materials and separate the non-copyrightable from the protectable. After the non-copyrightable elements are filtered, the protectable materials need to be compared, to determine whether there has been a sufficient amount of copying.

In the \textit{Tetris} case, the court first abstracted the underlying game mechanics and gameplay of Tetris, stating that these abstract rules were not copyrightable. The court claimed that the abstract game components and the indispensable or inseparable features of expression cannot be covered by copyright law. Consequently, the abstract rules and indispensable features of Tetris were out of range of copyright.\textsuperscript{98}

However, after filtering out the non-copyrightable components, the court found that some original and distinct expressions were eligible for copyright protection, such as the characteristic falling pieces and the expression of the look and feel of the audio-visual display. Then, the court compared the similarities in the copyrightable elements

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{94} See Casillas, \textit{supra} note 31, at 155.
\item \textsuperscript{95} See \textit{Computer Associates International, Inc. v. Altai, Inc.}, 982 F.2d 693 (2d Cir. 1992).
\item \textsuperscript{96} See \textit{Atari, Inc.}, 672 F.2d at 607.
\item \textsuperscript{97} See \textit{Tetris Holding, LLC et al.}; See also \textit{Computer Associates International, Inc. v. Altai, Inc.}, 982 F.2d 693 (2d Cir. 1992).
\item \textsuperscript{98} Casillas, \textit{supra} note 31.
\end{itemize}
\end{footnotesize}
between Tetris and Mino. The court concluded that there existed substantial similarities between them, because such similarities would cause a person without specific knowledge of video games to be unable to distinguish between them. Mino appeared to focus on the commonness, rather than the endeavour to avoid. The AFC test mainly depends on the extent of the total concept and feeling of which the accused game has acquired the copyrightable game elements.\textsuperscript{99}

In the \textit{Tetris} case, both the video games looked almost identical. Without the differences pointed out, an ordinary consumer would not have been able to distinguish between the two games. Thus, after careful examination, the court deemed that the similarities in visual appearance and expression between them constituted literal imitation.\textsuperscript{100} The court then examined the similarities in style, colour and movements by using the AFC test and concluded that the design and style of Mino was almost indistinguishable from that of Tetris in these aspects.\textsuperscript{101}

Although Xio claimed that, based on the \textit{scènes à faire} and merger doctrines, there were few components that could be protected in Tetris Holding’s work, the court deemed that these doctrines could not be applied in this case. First, the \textit{scènes à faire} doctrine has very little relevance to games like Tetris, which is a puzzle game of distinctive character and ‘does not have special expression or common image that must be used.’\textsuperscript{102} Tetris is built upon an imaginary foundation, lacking any grounding in the real world. Thus, there are no standard expressions for abstract puzzle games.

Second, the merger doctrine cannot be applied here. The court noted that the merger doctrine holds when an idea and its particular expression become inseparable, especially when there are only a few ways to express the particular idea.\textsuperscript{103} After examination, the court concluded that Mino’s developers had potential alternatives to express the same game mechanics and rules, because of the advancement in computing technology and graphics.\textsuperscript{104} Therefore, copyright

\textsuperscript{99} Id.  
\textsuperscript{100} Id. at 409.  
\textsuperscript{101} Id.  
\textsuperscript{102} See Tetris Holding, LLC et al.  
\textsuperscript{103} Id. at 413.  
\textsuperscript{104} Id. at 412.
legislation in the US protected Tetris because the style, design, shape and movement of the pieces were expressions amounting to the expression of rules and abstract mechanics. These elements were not ideas or functional abstracts or features inseparable from ideas.\textsuperscript{105} Hence, the court discounted Xio’s motion to dismiss the copyright claim.

In 2012, in the remarkable US case, \textit{Spry Fox LLC v. LOLApps Inc.}\textsuperscript{106}, the court had already familiarised itself with the idea/expression dichotomy, the AFC test and the merger and \textit{scènes à faire} doctrines.\textsuperscript{107} The crux of this case was to determine substantial similarity. The court then applied the prong extrinsic and intrinsic tests to this case.

The extrinsic test, like the abstraction and filtration components of the AFC test, considers the objective similarities between both the ideas inherent in the copyrighted work and the alleged copied work, to filter out the non-copyrightable components\textsuperscript{108} in light of the § 102(b) of 17 U.S.C. and the merger and \textit{scènes à faire} doctrines.

The intrinsic test (second stage) is a subjective comparison of the two games through the viewpoint of ordinary observers, concentrating on the total concept and feel of the two works.\textsuperscript{109} The court used the phrase analytic dissection to refer to these two processes.\textsuperscript{110}

After the extrinsic test, the court excluded some components of \textit{Triple Town} by applying the \textit{scènes à faire} doctrine, which involved the use of game coins, an in-game marketplace, and some functional elements indispensable to the idea of the game (\textit{e.g.}, a six-by-six grid game board). In spite of the visual differences between the various components and some excluded elements, the court in \textit{Spry Fox} deemed that many elements of \textit{Triple Town} were expressive and had been appropriated into a substantially similar work in \textit{Yeti Town},

\hspace{1em} \begin{itemize}
  \item \textsuperscript{105} Id.
  \item \textsuperscript{106} See \textit{Spry Fox LLC}, 2:12 WD Wash. at 1-3.
  \item \textsuperscript{107} It involved a strategy puzzle game. Spry Fox developed a puzzle matching game where users can match different objects on a screen to create new objects in an ascending hierarchy. The defendant, 6Waves, signed a contract with the plaintiff to help develop this game on a different platform. However, after several months 6Waves launched its own match-style game similar to \textit{Triple Town}, called \textit{Yeti Town}.
  \item \textsuperscript{108} Cavalier v. Random House, Inc. 297 F.3d 815, 822 (9th Cir. 2002); See also Roth Greeting Cards v. United Card Co., 429 F.2d 1106 (9th Cir. 1970).
  \item \textsuperscript{109} See \textit{Spry Fox LLC}, 2:12 WD Wash. at 1-3.
  \item \textsuperscript{110} Id.
\end{itemize}
including the hierarchy of objects (matched items turn into higher level item), the game background, and the presence of an antagonistic wild creature.\textsuperscript{111} The court also noted that the in-game dialogue boxes that express game mechanics were copyrightable, although the extent of protection may be thin.\textsuperscript{112} Overall, with these objective similarities considered under protectable expressions, it was at least plausible that \textit{Yeti Town} could pass the extrinsic test for substantial similarity.\textsuperscript{113}

The court conducted the intrinsic test by validating the reports from online video game bloggers to illustrate whether there was substantial similarity between these two games. As neutral ordinary observers, the online bloggers found it was tough to distinguish between these two games and found that they had substantially similar overall concepts and feelings. Therefore, the court concluded that Spry Fox’s allegations could plausibly pass the extrinsic and the intrinsic tests.\textsuperscript{114}

3. Summary of US Protection Mode

Based on the legal approaches adopted in the above US cases, one can see that judgements on video game have undergone a dramatic shift. In previous precedents,\textsuperscript{115} the courts granted thin legal protection to video games from reskinning because of the difficulty in distinguishing between the expression and the idea in them. Thus, most infringement cases involving video games failed,\textsuperscript{116} and they had the effect of shrinking the realm of copyright protection for video games. By contrast, in the recent cases, like \textit{Tetris} and \textit{Spry Fox}, courts have increased awareness of the issue of video game reskinning and have devised a series of methods to distinguish original games from their copies.\textsuperscript{117} With the advancement in graphic and computing technology, numerous methods have become available to create developers’ original expressions by using the same idea or gameplay. As delivering a new ground for creative expression in video games,

\textsuperscript{111} See Dean, supra note 13.
\textsuperscript{112} See Dean, supra note 13.
\textsuperscript{113} See Spry Fox LLC, 2:12 WD Wash. at 1-3.
\textsuperscript{114} Spry Fox LLC, 2:12 WD Wash.
\textsuperscript{115} See Capcom U.S.A. 93 WL at 3259; Data East USA, Inc. 862 F.2d at 204; Atari, Inc. 547 F. Supp. at 222.
\textsuperscript{116} See Dean, supra note 13, at 15.
new technological processes require judges to recalibrate the application of the merger and scènes à faire doctrines and apply both more lightly to existing works. Separating game ideas from their expression is easier than before, so copyright law can play a stronger role. To some extent, this trend also serves game studios’ and original developers’ interests.

However, an indispensable concern about this essential shift in copyright litigation is that stricter law may lead to overprotection, which could deter innovation because the improvement of video games is achieved mainly through iteration and imitation. Borrowing ideas is “the driving mechanism of innovation in the games.” If the legal regime is too stringent, there would be only one FPS, one city builder and one real time strategy game. This shift could arguably increase lawsuit costs and fears of litigation concerning with related parties, because courts would have to conduct much deeper scrutiny of the cloned games. Therefore, this trend in US law may discourage developers from genuine creation and innovation based on the existing game mechanics. In the Spry Fox case, the court approve the plaintiff’s copyright infringement claim, which might slightly influenced the game industry: between 2010 and 2014, the value of computer and video game sales fell from $17.1 billion to $15.4 billion.

B. UK Current Legal Regime for Video Games

Historically, the video game industry stemmed from the US market. However, it has now progressed to be a worldwide industry. In different jurisdictions, the legal status and attitudes regarding video games are also different. Compared to the US,
copyright protection of video game industry in the UK concentrates on the exact copied part instead of the whole game.

1. Categorised Protection Under Copyright Law

Unlike the US, there is no system of registration of copyright under the Copyright, Designs and Patents Act 1988 (hereinafter referred to as CDPA) in the UK. In sections 3 to 6 of the CDPA, there is a list of categories of works protected by copyright, which video games (as a whole work) do not fit into, so these games can only be protected through their individual creative parts. Courts in the UK tend to manage video game copyright infringement by protecting the various creative contributions. For instance, in *Nova Productions Ltd. v. Mazooma Games Ltd.*, the court deemed that the alleged copyright infringement referred to every individual copyright for the video game. Thus, unlike the US, the UK courts can directly analyse the issue of infringement by examining whether the copied part is subject to copyright protection, rather than examining the copyrighted work as a whole. In *Electronic Techniques (Anglia) Ltd. v. Critchley Components Ltd.*, the High Court of Justice ruled that a particular video game product may be protected by a number of different categories of copyright. Following the reasoning of the court, video games can be treated as products that contain several copyrighted original elements. However, protecting video games depends on the genre of the various original works contained in the games. There are diverse creative components in a video game; therefore, there are a variety of different copyrightable original works in video games.

(a) Computer programs

First, a video game can be protected as a computer program under copyright law. In section 3(1)(b) and (c) of the CDPA, computer programs and preparatory design materials are copyrightable subject

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131 Id.
132 See Sellars & Bicknell, supra note 120.
matter. However, this manner of protection has a drawback, which is that the graphic user interface (hereinafter referred to as GUI) does not fall in the scope of protection. In Bezpečnostní softwarová asociace v. Ministerstvo kultury, the Court of Justice of the European Union (hereinafter referred to as CJEU) clarified this point.\textsuperscript{133} Therefore, only the coding \textit{per se} can be covered by copyright law as a literary work, which means that visual appearance is not covered, and this protection is not able to stop game reskinning.

\begin{itemize}
\item[(b)] \textit{Literary works}
\end{itemize}

Legislation provides that video games can be considered literary works. In many RPGs, simulation games (hereinafter referred to as SIMs), and strategy games, the creation of the storyline or the background for the player, through dialogues boxes or other text, is common and essential. Section 3(1) of the CDPA does not exclude certain forms of expression from the definition of literary work.\textsuperscript{134} According to the \textit{University of London Press Ltd. v. University Tutorial Press Ltd.} case, the court defined literary work as ‘work which is expressed in print or writing, irrespective of the question whether the quality or style is high.’\textsuperscript{135} Thus, the storyline or other in-game text could be protected as literary work. However, the protection of in-game texts through copyright is not sufficient to protect against game reskinning.

\begin{itemize}
\item[(c)] \textit{Dramatic works}
\end{itemize}

The visual display of the story in a video game can be categorised as a dramatic work.\textsuperscript{136} There is no clear definition to dramatic work in section 3(1) of the CDPA,\textsuperscript{137} because, it simply stipulates that ‘“dramatic work” includes a work of dance or mime’. In \textit{Norowzian v. Arks Ltd.}, the court clarified dramatic work under the CDPA as ‘a work of action, with or without words or music, which is capable of

\begin{footnotes}
\item[134] Copyright, Designs and Patents Act 1988, § 3(1).
\item[135] University of London Press Ltd. v. University Tutorial Press Ltd. [1916] 2 Ch. 601; \textit{See also} Hollinrake v. Truswell [1894] 3 Ch. 420.
\item[136] Stein, \textit{supra} note 131.
\item[137] Copyright, Designs and Patents Act 1988, § 3(1).
\end{footnotes}
being performed before an audience.’ 138 As a result, in *Nova Productions Ltd. v. Mazooma Games Ltd.*, the court excluded dramatic works from literary works ruling that ‘a work cannot be both a dramatic work and a literary work.’ 139 While this stipulation is explicit to some extent, this reduction minimises the copyrightable subject matter. Some spoken text or dialogue in the storyline may not be protected as a literary work nor as a dramatic works 140 because, in light of *Nova Productions Ltd. v. Mazooma Games Ltd.*, only the visually perceivable content in video games can be protected.

The second requirement for dramatic works is a certain degree of drama. 142 If the visual appearance cannot achieve the degree of drama, it is difficult for a game to obtain protection as a dramatic work. The genre of a game partly decides its degree of drama: the degree is higher in RPGs or strategy games than in sports games, where the genre emphasises the recreation of realistic sports.

The last requirement is that the work must be able to be performed. 143 Most high-end video games possess strong interactivity, which means that the video game’s animation will differ every time it is played. Thus, only some genres of video games, which lack interactivity and in which images shown on the screen do not change, can be covered as dramatic works. Protection as dramatic work is denied on the grounds that animation technology cannot be protected, which makes live performance impossible.

*(d) Video game characters*

In-game characters can also be protected by UK law. 144 Within different genres of games, the in-game characters can be classified as fictional characters, for example, the video game characters in the *Call of Duty* series use various fictional roles.

However, in *Wombles Ltd. v. Wombles Skips Ltd.*, the court ruled that the name of a fictitious character cannot be protected by

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138 *Nova Productions Ltd.*, EWCA Civ 219, para. 43; *See also* Green v. Broadcasting Corporation of New Zealand RPC 700 (1989).
139 *Nova Productions Ltd.*, para. 60.
140 Stein, *supra* note 131, at 46.
141 *Nova Productions Ltd.*, para. 35.
142 Id.
143 Id.
144 Sellars & Bicknell, *supra* note 120.
copyright. But Stein also argued that it is a defect that copyright law that does not cover fictional words, trademark law may provide a remedy. In *Exxon Corporation and Others v. Exxon Insurance Consultants International Ltd.*, the court held that fictional words cannot be protected as literary work. These fictional words or name of a character should be protected by trademark law.

*(e) Artistic work*

Visual characters can also be protected as artistic work under section 4(1) of the CDPA. In *Anacon Corporation Ltd. v. Environmental Research Technology Ltd.*, the court clarified that visually significant elements are subject matter that can be protected as artistic works. In *Michael Mitchess v. British Broadcasting Corporation*, the court furtherly clarified that the drawings of fictional characters were held to be protected as artistic works. With regard to the definition of paintings and drawings of artistic work, section 4(2)(a) of the CDPA stipulates “any painting, drawing...” Therefore, there should be no distinction between states drawn by hand and characters created by computer. In-game characters made by computer-aided design can also be covered in this manner. Protection as an artistic work can cover all elements that are visually significant, and include any painting or drawing. Correspondingly, besides in-game characters, other elements that are visually significant are entitled to be protected as artistic works. This can extend to in-game models and the game design structure.

*(f) Sound and music works*

Music and sound are essential parts of a video game that can be separated from the visual elements and gameplay. However, in terms of game clones and reskins, musical works do not pose any particular threat. They can be protected under section 3(1) of the CDPA, which rules that ‘a musical work means a work consisting of

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145 Stein, supra note 131, at 47.
146 Id.
150 Stein, supra note 131, at 44.
151 Id.
music, exclusive of any words or actions, intended to be sung, spoken or performed with the music.\textsuperscript{152} If the infringement involved the lyrics of musical works, then it would be protected as literary work under the same subsection.

2. Summary of UK Protection Mode

The above discussion has illustrated that video games are protected in the UK under a number of different categories of works within the CDPA. Although the current legal status may cause confusion, it is systematic once there is an obvious copyright infringement. However, the legal status demonstrates that legal protection is still thin in the UK, because categorised copyright protection will not efficiently deter game reskinning.

However, some argue that more stringent copyright protection is not desirable, because it would cause many legal issues and stifle the advancement of the video game industry, as copying of game mechanics is conducive to creative innovation.\textsuperscript{153} Therefore, to some extent, legislation can be a stumbling block that limits the development of innovation. So they propose that the video game industry should establish a powerful self-regulation mechanism to protect in-game elements and game ideas.\textsuperscript{154} The interests of creators and inventors of video games can be best protected through licensing. This self-regulatory mechanism will be discussed in detail in Part III, D.

C. China’s Current Legal Protections

Due to China’s “legal nature” argument about video games, there are no solid legal approaches for examining the similarities between video games. Additionally, the interactive nature of video games also presents grey areas concerning the legal argument in China. Supreme People’s Court also suggested that competition law would offer more protection than copyright law.

Overall, according to the Chinese judicial practice, there are two main ways to protect video games under the copyright law. Firstly, the video games can be protected separately by each element (e.g. the in-

\textsuperscript{152} Copyright, Designs and Patents Act 1988, § 3(1).
\textsuperscript{153} Katzenbac, Herweg & Roese, supra note 17.
\textsuperscript{154} Id. at 853-854.
game visual design can be protected as the work of fine art\textsuperscript{155}; the in-game task description, dialogue and descriptive parts can be protected as literary works\textsuperscript{156}). Secondly, the video game can be regarded as the work created by a process analogous to cinematography, which protect the continuous dynamic images when video game operates.

Although the first protection manner can protect the most important elements of the video game, the limitation of this mode is also evident. Primarily, in some simple expression game, (e.g. strategy game, puzzle game or card game) the expression of the core part of the game is tough to meet the requirement of originality for the simplicity.\textsuperscript{157} Furthermore, this mode is inflexible to prevent the clone from reskinning. As the foregoing, copycats normally alter the appearance of the game role and visual design and revise the descriptive part, which may not be regarded as copyright infringement.

Thus, the following part focuses on the discussion of second protection manner in China and compares two individual cases with different court judgements, to outline the current legal protections for video games from reskinning in China.

1. \textit{Nexon Holdings v. Tencent Ltd.:} The First Case of Video Game Infringement in China

In 2007, the South Korean game giant \textit{Nexon Holdings} (hereinafter referred to as Nexon) filed for copyright infringement and unfair competition against \textit{Tencent Ltd.} (hereinafter referred to as Tencent)\textsuperscript{158} in China.\textsuperscript{159} They alleged that Tencent’s recently launched online strategy game \textit{QQ Tang} was a copy of Nexon’s popular game \textit{Pop Tag}. Nexon argued that they owned the copyright to their game and released a statement explaining that there were 37 similarities between two games, involving game content, gameplay


\textsuperscript{156} See \textit{Zhuzuoquan Fa} (著作权法) [Copyright Law] art. 3(1).

\textsuperscript{157} Wang Qian (王迁), \textit{Dianzi Youxi Zhibo de Zhuzuoquan Wenti Yanjiu} (电子游戏直播的著作权问题研究) [\textit{Research on the Copyright of Live Video Games}], 2 ELECTRONICS INTELL. PROP. (电子知识产权) 11, 15 (2016).

\textsuperscript{158} Tencent Ltd. is a Chinese internet giant, providing internet-related services, digital entertainment, artificial intelligence and technology both in China and globally. In 2018, the value of this company reached 580 billion USD, becoming Asia’s most valuable company.

\textsuperscript{159} See \textit{NEXON Holdings et al.} (Shenzhen Intern. People’s Ct. Mar. 6, 2017, No.8564).
and game design. Tencent’s defence argued that there was no substantial similarity between the two games; as such, the plaintiff could not prove their proposition.

In this context, the Chinese court concluded there were two cruxes in this case. The court first found that the plaintiff had released public beta in 2003, and a year later, in 2004, Tencent published their new game. Thus, Tencent could have accessed the plaintiff’s work. However, regarding the 37 alleged infringements, the court maintained that the plaintiff did not provide enough evidence to prove that the 37 similarities appeared prior to the defendant’s game release, thus the court deemed that the defendant should bear the disadvantages.

Focusing on the second issue, 9 of the 37 alleged similarities were within the login interface of game, which is classified as general expression, so the plaintiff should not be entitled the exclusive copyright. After the exclusion, the plaintiff believed that there were 7 substantial similarities in the defendant’s work including the design of the woods, the aircraft, the placement of the players and the map structure. After reviewing the game content and comparing the alleged similarities, the court judged that there was no substantial similarity, so the court still disagreed. Most of the elements were categorised into the idea sphere, which cannot be covered by copyright law.

Regarding the final 21 alleged similarities, most were in-game props. The court examined these from a literature perspective. However, because the names of the game props were too short, they could not reach the originality requirements of copyright law, so the court deemed that they should not be protected by copyright law. From an artwork perspective, there was a difference in the design of the game props in the plaintiff’s and defendant’s games. Thus, they were deemed not substantively similar.

160 Id.
161 The public test version of their game.
162 See NEXON Holdings et al. (Shenzhen Intern. People’s Ct. Mar. 6, 2017, No.8564).
163 Id.
164 Id.
165 Id.
166 Id.
167 Id.
168 Id.
Overall, the court held that the defendant’s game QQ Tang and the plaintiff’s game Pop Tag were not substantively similar. Therefore, the defendant did not infringe the plaintiff’s copyright. Based on the above legal analysis, the court concluded two legal principles: the first was whether the defendant had accessed the plaintiff’s work, and the second was whether there were substantial similarities between the two related games.

This case was the first game copyright litigation in China and it established a series of principles of game copyright infringement for Chinese courts. The criteria of examination of the court is “access + substantial similarity”. This means that the plaintiff has to prove whether the defendant was able to access their work and whether there were substantial similarities between the two games. The case also clarified that, in China, the degree of originality of each element is the key to determining whether copyright law can protect it. If the degree of originality is limited, the rights holder may not be entitled to copyright protection.

2. Taiji Panda v. Hua Qian Gu

In the Taiji Panda v. Hua Qian Gu case, the legal verdict of the Su Zhou Intermediate People’s Court in 2018 stated that the defendant’s mobile game imitated the plaintiff’s mobile game rules and gameplay in the process of design, which constituted copyright infringement.

In 2015, the plaintiff found that the mobile game Hua Qian Gu launched by the Tianxiang Company had multiple elements of similarity to their game Taiji Panda. After a comparison, they assumed that Hua Qian Gu had completely mirrored and used their game interface; there were substantial similarities between the two games, including the decor, the core elements, and the gameplay of Taiji Panda; Hua Qian Gu only changed the appearance of the characters in the game, which constitutes reskinning. Thus, Taiji Panda filed a litigation of copyright infringement to the court.

The plaintiff asserted that Taiji Panda was launched first, so it was possible for the defendant to access their game. The plaintiff provided the software document record showing that Taiji Panda was

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169 Id.
171 Id.
launched before *Hua Qian Gu*. Additionally, from the software development document of *Hua Qian Gu*, the functional module description, module structure diagram, functional flow chart and functional detailed design were all related to *Taiji Panda*. The screenshots of the game interface of *Taiji Panda* were just in the design documents of *Hua Qian Gu*. Therefore, the plaintiff deemed that the defendant infringed their copyright.

However, the defendant claimed that copyright law cannot protect the structure of game, the functional layout of the interface, the gameplay and the game value ratio, primarily because the video game as a whole does not constitute “the work” in the sense of copyright law in China. There is no precedent regarding video games as the “other works” stipulated in article 3(9) of *Copyright Law*. It is still arguable whether video games can be recognised as ‘works created by an analogous method of film production’ in China. Thus, video games do not constitute “the works” in copyright law and *Taiji Panda* cannot be protected by copyright law.

Defendant also argued that the gameplay, the structure of game, the functional layout of the interface, and the game value ratio are all within the scope of an idea, which cannot be protected by copyright law. Gameplay and in-game value ratios are too difficult to fix and are abstract, so should be excluded from the sphere of copyright law. In terms of the functional layout of the interface, it should belong to the artwork perspective, but only the aesthetic and creative pictures can be protected. The whole game interface is functional, which cannot be protected by copyright. Regarding the in-game dialogue and the in-game text, these elements are standard expressions, which should fall in the public domain.

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172 Id.
173 Id.
174 Id.
175 Article 3 For the purpose of this Law, the term “works” includes works of literature, art, natural science, social science, engineering technology and the like which are created in the following forms: (9) other works as provided for in law and administrative rules and regulations.) See *Zhuzuoquan Fa* (著作权法) [Copyright Law] art. 3(6), (9).
178 Id.
However, the court disagreed. After reviewing the relevant copyright precedents in China, the court firstly ruled that the video game *Taiji Panda* constituted work created by a process analogous to cinematography in article 3(6) of Chinese copyright law and that the video game should be regarded as a whole. First, the court concluded that the essence of video games is a collection of computer code and game information data. However, players do not perceive and read coding and data directly, they access the video game from an operation interface. Thus, the whole operation interface is the manner of presentation of a video game and the video game should be recognised as a whole. Second, the court concluded that video games should be protected as work created by an analogous method of film production. Article 2 of *Implementing Regulations of the Copyright Law* stipulates that:

> ‘[T]he term “works”, used in the Copyright Law refers to original intellectual creations in the literary, artistic and scientific domain, in so far as they are capable of being reproduced in a certain tangible form.’

The court deemed that, from the whole operations performance, *Taiji Panda* includes an excellent game interface and various gameplays and hierarchies, as well as plenty of intellectual achievements by the game design team. Hence, it belongs to the original intellectual creators in the literary, artistic and scientific domains. Additionally, Article 4(11) of the *Implementing Regulations of the Copyright Law* stipulates that:

> “[C]inematographic works and works created by a process analogous to cinematography means works which are recorded on some materials, consisting of a series of images, with or without accompanying sound, and which can be projected with the aid of suitable devices or communicated by other manners”

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179 See Zhuzuoquan Fa (著作权法) [Copyright Law] art. 3(6); See also Woniu Technology Inc. (Suzhou Interm. People’s Ct. Mar. 30, 2018, No. 00201).
181 Id.
184 Zhuzuoquan Fa Shishi Tiaoli (著作权法实施条例) [Implementing Regulations of the Copyright Law] art. 4(11).
Compared with video games, film works have higher requirements for originality of their continuous images, and they are required to have a certain story in Copyright Law. Taiji Panda is an ARPG online video game, which contains a set of storylines. Taiji Panda also conformed to the requirement of continuous images, because players control the continuous dynamic images that are presented to the screen.\textsuperscript{185} Therefore, the court concluded that Taiji Panda constitutes work created by a process analogous to cinematography.

Subsequently, the court explained that the expression of gameplay in Taiji Panda could be protected.\textsuperscript{186} First, the court excluded the elements that could not be protected by copyright law, such as abstract expression, non-original expression, industrial standard expression, and the components in the public domain.\textsuperscript{187} After review, the court excluded in-game credits and coins and the in-game marketplace, because they are low in originality and are standard expressions.\textsuperscript{188} The court also eliminated the layout of the interface in Taiji Panda, such as the nine-by-nine grid, the vertical list, pop-up boxes and vertical list combinations, because these elements are all functional.\textsuperscript{189} As much as copyright does not protect ideas, it does not protect the functional processes that are indispensable to the ideas inherent in a game.

Although the court clarified that the general idea of Taiji Panda was not protectable, they summarised the copyrightable elements and expression. In this case, Taiji Panda systematically designed a creative game hierarchy, which exhaustively described the gameplay and game rules. Game developers also expressed the ARPG genre’s game through the special game interface, with the continuous dynamic image of the game and straight text form in the interface. This specific expression leads players could clearly perceive the originality and uniqueness of this game. In Taiji Panda, the gameplay settings, such as character selection, character growth, and battle are narrative, and the gameplay rules are based on the detailed presentation of the game interface. There were many novel ways that the defendant could have

\textsuperscript{185} Wang, supra note 158, at 15.
\textsuperscript{186} See Woniu Technology Inc. (Suzhou Interim. People’s Ct. Mar. 30, 2018, No. 00201).
\textsuperscript{187} Id.
\textsuperscript{188} Id.
\textsuperscript{189} Id.
chosen to express the rules of Taiji Panda. As a result, the court ruled that the detailed presentation of game rules via the game interface design constituted a specific expression of gameplay. Thus, the court ruled that the defendant infringed the plaintiff’s copyright.

This case represents a sharp break from other precedents for video game litigation in China. It clarifies the protectable subject of video games in copyright law in China, although there are still some drawbacks. Through this case, the court also updated the judgement standard of video game lawsuits, to include “originality + access + substantial similarity”.

3. Summary of China Protection Mode

The above paradigmatic cases established different criteria for video games’ litigation in China. The first case established the fundamental principle of video game infringement in China: “access + substantial similarity”. In the process of assessing similarity, the court excluded standard expressions and elements in the public domain, highlighting the requirement of originality. However, this principle also faces challenges in copyright law. For example, in Nexon Holdings v. Tencent Ltd., the court did not clearly categorise video games into any type of works in Chinese copyright law, but directly adopted the “access + substantial similarity” principle, which demonstrates a lack of legal basis. Further, unlike the US, the courts in China overemphasised the importance of originality, which excluded certain elements with a low-level of originality out of the scope of copyright protection.

In Taiji Panda v. Hua Qian Gu, the court further develops the originality principle. First, the court categorised video games as a work created through a process analogous to cinematography and recognised video games as a subject under copyright law. However, under article 4(11) of Chinese Implementing Regulations of the Copyright Law, it is still arguable whether video games are

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190 Id.
191 These drawbacks are demonstrated in the analysis section.
192 Xi Li, The crux of the category of video, 1 IP CHINA 56 (2018).
193 Id. at 135.
‘recorded on some materials.’\textsuperscript{195} Thus, the problem of subject matter for video games under copyright law still exists. Regarding the process of assessing similarity, the criteria applied in the case are vague;\textsuperscript{196} there lacks a clear or standardised legal approach.\textsuperscript{197} The applicability of copyright law to video games is still uncertain.\textsuperscript{198} In terms of assessing substantial similarities between different video games, unlike in the US, the judges themselves would observe and assess the similarities in China.\textsuperscript{199} Due to a lack of video game experience, the judges often reach conclusions that are far removed from the industry practice and less “professional”.\textsuperscript{200}

\textbf{D. Comparison and Analysis of US, UK and China}

This section compares and analyses the legal approaches discussed above to show whether China should protect video games from reskinning, and how to improve the current legal approach in China.

First, compared with the UK and China, the legal protection of video games in the US is more stringent, e.g. including the legal status of video games and assessment approaches of plagiarism. In terms of the legal status of video games, the US normally recognises a video game as a computer program or an audio-visual work\textsuperscript{201} so that the video game can be protected as a whole.\textsuperscript{202} This approach protects video games from reskinning. Protecting video games as a whole subject can better serve the interests of original developers. Even though copycats can imitate a game through reskinning (merely changing or modifying the appearance of characters and/or the background), the original developers can protect their games through

\begin{itemize}
\item \textsuperscript{195} Zhuzuoquan Fa Shishi Tiaoli (著作权法实施条例) [Implementing Regulations of the Copyright Law] art. 4(11).
\item \textsuperscript{196} Wang, supra note 158, at 33.
\item \textsuperscript{197} Id. at 35.
\item \textsuperscript{198} Id.
\item \textsuperscript{199} Id. at 36.
\item \textsuperscript{200} Id.
\item \textsuperscript{201} 17 U.S.C. § 101 Audiolial works “consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.”
\item \textsuperscript{202} “[A] computer program, whether in object code or source code, is ‘literary work’ and is protected from unauthorised copying”. See Apple Computer v. Franklin Computer 714 F.2d 1240, 1249 (3 Cir. 1983); See also Midway v. Bandai 546 F. Supp 125, 139 (D.NJ. 1982); Teris v. XIO 863 F. Supp 2d 395, 401 (D.NJ. 2012). The video games are protected as audio-visual work.
\end{itemize}
copyright law, as long as the gameplay constitutes a special expression.

The various legal standards of substantial similarities, e.g. the ATF test, scènes à faire and merger doctrines, and the intrinsic and extrinsic test, clarifies the differences between a legal imitation and an illegal copy.\footnote{See Dean, supra note 13.}

This shift in the US makes it easier for large internet developers to obtain legal protection. Firstly, and most importantly, in light of the Tetris case, the rights-holders do not need to consider rudimentary visual distinctions for copyright protection.\footnote{Tetris Holding, LLC et al.} This ruling is followed in the Spry Fox and Da Vinci cases,\footnote{See Spry Fox LLC 2:12 WD Wash; See also DaVinci Editrice S.r.l. v. Ziko Games, LLC et al, No. 4:2013cv03415 - Document 44 (S.D. Tex. 2014).} where the courts found copying, even though cloned games looked dramatically distinct from their antecedents. Secondly, although some functional elements are excluded, such as grid arrangement and in-game marketplaces, the court still leaves a number of components and expressions available for protection. For game developers, it may be sufficient to defeat a motion to dismiss and pressure its counterparties of clones games following the Tetris Holding, Spry Fox, and Da Vinci cases.

However, it also brings uncertainty to the game industry. Firstly, for independent or small developers, the ability to legally protect their games are limited.\footnote{See Dean, supra note 13.} Even though the copyright legislation is more stringent in the US, independent developers that lack financial budgets and therefore access to legal advice are less likely to obtain copyright protection.\footnote{Id.} The complicated and complete copyright system and legal tests mean that courts must conduct more detailed analysis.\footnote{Id.} This may cost more money and time in the litigation process, which may be more unbearable for independent or small developers.\footnote{Id.}

According to a research, the cost of filing a copyright litigation on video game infringement in the US (attorney fees and cost of the case)
This undoubtedly excludes small developers from copyright protection. Correspondingly, small studios’ capability of protecting their games from reskinning cloning is limited, because this legal claim requires plaintiffs to prove their expression constitutes specific expression of gameplay and collected evidence of substantial similarities.\textsuperscript{211} As the developer of Threes said ‘all these games’ ideas can happen so fast nowadays that it seems tiny games like Threes are destined to be lost in the underbrush of copycats and iterators.\textsuperscript{212}

The stringent legislation on video games may also stifle innovation. In the video game sector, sharing and imitation is an essential part of innovation.\textsuperscript{213} Many commenters believe that ideas of a novel game thrive from a sharing community, where the advancement of a game can be prompted in a collaborative environment.\textsuperscript{214} It is important for game designers to share their ideas to obtain inspiration.\textsuperscript{215} Independent designers depend on the open and honest exchange of ideas.\textsuperscript{216} Stringent legal protections, like in the US, encourage game developers to strictly protect their products, which stifles innovation because fewer people would share their ideas in a free community without financial rewards.\textsuperscript{217} This community culture moulds the game industry, although it is also tough for game developers to ensure the free flow of ideas to keep the industry thriving, while concurrently obtaining financial profit from their own ideas.\textsuperscript{218}

Imitation is also an essential part for the creation of video games.\textsuperscript{219} The game industry largely consists of slightly modified clones.\textsuperscript{220} Borrowing ideas and remixing previous games can promote innovation. In each genre, there are many variations of the same type


\textsuperscript{211} See Casillas, \textit{supra} note 31, at 157.


\textsuperscript{213} See Katzenbac, Herweg & Roesse, \textit{supra} note 17, at 849.

\textsuperscript{214} Id.

\textsuperscript{215} Id. at 850.

\textsuperscript{216} Id.

\textsuperscript{217} Id.

\textsuperscript{218} Id.

\textsuperscript{219} Id. at 851.

\textsuperscript{220} Id.
which unavoidably involve similar gameplay. In this context, stringent legislation that factually prohibits of imitation would impede small developers’ creativity, due to a lack of sufficient financial resources to purchase licenses.221

Furthermore, as of 2016, 9.7% of American-based game companies are small businesses.222 This means that if the policy is unnameable to small developers, it may influence the industry. An investigation into computer and video game sales in the US reported that computer and video game sales fell from $17.1 billion to $15.4 billion between 2010 and 2014.223 The over-stringent legislation may play a role in the declining of the video game market.

Compared to the US and China, the UK legislation protects the various components of the video games, rather than protecting it as a whole.224 This protection method is remarkably systematic, because the video game is regarded as a combination of many innovative works.225 With the development of the video game industry, the UK court also realised that a video game is much more than a computer program.226 Additionally, this legal approach clarifies the nature of the video games. The creative elements in video games are covered by the legislation.

Categorised protection is probably conducive to the innovation and iteration of the video game sector, because games are not protected as a whole.227 This means that developers can use game mechanics and gameplay with less restraints. Because UK legislation only protects the creative elements of games and does not protect gameplay or the expression of game rules, as long as the imitation is not a one-for-one copy of original game (referring to graphic assets, mechanics and sound), it is more likely to be acceptable in the UK. If new developers can avoid copying the copyrightable elements from their target game, then they can use or remix other games’ mechanics. Therefore, this

223 Computer and Video Game Sales, supra note 125.
224 Stein, supra note 131, at 44.
225 Id.
226 Nova Productions Ltd, para. 33.
kind of imitation and sharing may promote the advancement of the game industry.

However, this legal approach cannot deter imitation via reskinning. Because the legislation only protects the creative in-game elements and categorises games as a combination of various different components, once copycats alter the appearance of these copyrightable elements, (such as the game’s sounds, backgrounds, storyline and the dialogue) it is difficult to protect video games from reskinning under the current approach. Even if there are infringements, the copycat merely undertakes responsibility of the copied elements rather than the whole game, which means the legal remedies are limited.

Nevertheless, Katzenbach, Herweg and Roessel assert ‘stronger legal protection is not desirable, because it would only cause all kinds of legal headaches and would mean shooting ourselves in the foot, because the copying of game mechanics is assumed to be conducive to creative innovation.’ Industry regulations can cover some genres of games that cannot be protected by copyright law, such as the Sudoku game, which possesses a low level of originality and elements that are indispensable to the idea inherent in the game. Self-regulation may be a solution in the game industry.

The game industry may establish a self-regulating system similar to the system in the television format industry. In the television format industry, because of the lack of legal regulations, a self-regulation system was developed to combat copycats. For example, Idols is the one of the most successful television formats, so they restricted the issue of format imitations from legal and commercial perspectives. The Idols producers first used a network of “spotters” to detect

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229 Lunsford, supra note 62.
230 Nova Productions Ltd (n 129) para 33.
231 See Katzenbac, Herweg & Roesse, supra note 17, at 849.
232 Idols (also known as SuperStar) is a television format originated by British television producer Simon Fuller, which has become one of the most successful television formats sold worldwide.
imitations, which allowed them to find imitators at the outset and enabled them to negotiate or use other protective methods.  

In the television industry, there are gentlemen’s agreements and a degree of trust and honour between each other, which guarantee that every developer is willing to respect others’ outcomes instead of imitating. A gentlemen’s agreement consists of social norms and relationships, which allows for a strong, norm-based IP system to exist. If infringements occur, the producers of Idols use deterrent letters or letters of claim from their legal departments stating they will pursue this infringement if commercial manners fail. Producers also have a professional team to teach purchasers how to use this format. Because imitators cannot grasp the essence of the format, there definitely is a degree of taint if copycats directly copies another’s format. There are also retaliatory measures. If a format is copied without permission, other format developers will cut off the supply of not only current format but also future version to copycat. Thus, a few developers have suggested that social norms and industry regulations contributes to the game industry, where the financial rewards for creative ideas or hard work are given to the deserving people. Developer ethics and their role in the innovative process can also guarantee that the development of the game industry satisfies the normative expectations. Compared with stringent legislation, developers can have an open environment for innovation. Self-regulation and industry regulation protection may be a supplement to the current legal regulation.

Compared with the US and the UK, Chinese copyright protection is unclear and inconsistent. Firstly, although in the Taiji Panda case, the court regarded video games as work created by a process analogous to cinematography, the subject matter is still unclear. Article 4(11) of the Chinese Implementing Regulations of the

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\begin{align*}
&234 \text{Id.} \\
&235 \text{Id.} \\
&236 \text{Id. at 12.} \\
&237 \text{Id.} \\
&238 \text{Id.} \\
&239 \text{Id. at 16.} \\
&240 \text{See Katzenbac, Herweg & Roesse, supra note 17, at 850.} \\
&241 \text{Id.} \\
&242 \text{Id.} \\
&243 \text{Id. at 851.}
\end{align*}
Copyright Law mandates that ‘cinematographic works and works created by a process analogous to cinematography means works which are [recorded] on some materials…’. Some scholars argue that “record” in Chinese literally just means “use a camera to record” or “filming”. Obviously, video games are not produced via filming, but consist of algorithm and data. Thus, recognising video games as works analogous cinematography has a logical defect.

The assessment for substantial similarity also lacks certainty. There lacks regulations in China to clarify the application of the similarity assessment. This vague assessment lead to too much discretion for the judges. The current criteria, i.e. “access + substantial similarity”, is too vague and abstract and lacks specific steps. Therefore, in trial there are significant deviations and it is difficult for judges to reach a conclusion solely based on this criteria. Further, due to the lack of intrinsic test and “expert” testimony mechanism, judges are often tough to make a precise assessment in this special industry. In the Spry Fox case the US court used online game bloggers’ comments as evidence to prove the similarities between games, as they were more professional in the game industry. The Chinese courts may take similar methods.

Third, the legislation in China sets a high threshold for originality of elements in video games. The legislature believe that copyright law can protect only intellectual creations that are original and can be replicated in some tangible form. It follows that some simple and low-originality elements are not copyrightable and are excluded from

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244 Zhuzuoquan Fa Shishi Tiaoli (著作权法实施条例) [Implementing Regulations of the Copyright Law] art. 4(11).
245 Wang, supra note 158, at 33.
246 Li Jiexi (李婕茜), Wanglou Youxi Zhengti Goucheng “Leidian Zuopin” de Sifa Duan Rending ji Zhengyi Dian (网络游戏整体构成“类电作品”的司法端认定及争议点) [The Recognition and Argument in Practice on the “Semi-film” Status of Online Game], SHIPA (May 2, 2018), https://mp.weixin.qq.com/s/I4HM3oeiYN86pRTAZGxvA.
247 Id. at 144.
248 Id.
249 Id.
251 See Spry Fox LLC, 2:12 WD Wash.
copyright protection, even though they constitute a specific expression of gameplay. Hence, some developers in certain genres of games will struggle to obtain copyright protection, because elements in these games have a low level of originality, or are treated as standard expressions, such as Sudoku and strategy games. Thus, Chinese copyright protection cannot cover all game genres. Many games are still at risk of imitation.

**E. Suggestions to China**

Regarding the protection of video games under copyright law, the Chinese legislature should be in the following three aspects.

First, the subject of video games under copyright law should be clarified. Under Article 4(11) of the Chinese Implementing Regulations of the Copyright Law, “record” only means filming while using a camera.\(^{253}\) This definition is obviously paradoxical with the decision made by the Chinese courts. Amending the Chinese copyright law and clarifying the definition are urgent.

One possible solution is expanding the meaning of “record” in analogous cinematography work. In this way, the process of producing video games can be covered under this concept. Additionally, the Chinese legislature should clarify the subject of video games in copyright law. Currently, there is only one case in which the court recognised video games as analogous to cinematography work. The Chinese legislature should clearly stipulate or amend copyright law to categorise video games.

Second, the Chinese legislature should specify the criteria and procedure for assessing the similarity between claimed video games and if the game can be protected as a whole in litigation, a systematic legal approach should be established. The US also protects video games as a whole, instead of categorised protection. China could establish a systematic approach like the US to enhance the certainty of judgements. For example, China could introduce the AFC test and the merger and *scènes à faire* doctrines to clearly stipulate the criteria and procedure of element exclusion.\(^{254}\)

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254 Some in-game elements cannot be copyrighted because they are standard expressions or possess low-originality.
In assessing the substantial similarities between two games, China could also introduce the intrinsic test. Like US courts, introducing the intrinsic test (such as the comments of online game bloggers or other experts) is suitable for the development of the video game industry. Because video games increasingly involve technical issues, it is necessary to introduce online game bloggers’ comments or experts’ testimony, to help judges to decide the similarity of the games.

Third, establishing industry-based self-regulatory mechanism is imperative. Like the development of television industry in the UK, sometimes self-regulation is a good supplement to legislation. The requirement of originality is indispensable, which means some low-originality elements cannot be copyrighted, such as in-game props or the descriptions of props.

Furthermore, developers in some game genres will find it difficult to obtain copyright protection, because they contain too many standard expressions, or due to the difficulty of separating expression from gameplay. For instance, Sudoku is a simple strategy game genre. The gameplay is simple and easy, so the expression of gameplay is limited. Many elements are regarded as a standard expression, a functional expression or indispensable to gameplay, which means that many games cannot be copyrighted. Hence, establishing a self-regulation system is beneficial for this genre of games. China should introduce an industrial regulation system and social norms to regulate the areas where it is difficult to apply copyright law. This multiple protection mechanism is beneficial to the development of the video games industry.

IV. CONCLUSION

The main purpose of this article is to improve the copyright protection of video games from reskinning in China. Given the discussion and comparison of the practicality, adaptability, and acceptability of the US and the UK experiences and combined with China’s status quo, a multiple protection mechanism to protect video games in China is needed, i.e. the specific copyright protection plus industry-based self-protection mechanism.

255 See Spry Fox LLC, 2:12 WD Wash.
256 Wang, supra note 158, at 36.
At present, the most exigent task is to clarify the mode of protection. The protection mode of video games should depend on each game’s genre, as it is related to the expression of gameplay and game mechanism. Further, the assessing criteria and procedures should be more specific. Regarding the assessment of substantial similarity, the intrinsic test could be introduced. Meanwhile, the systematic assessment criteria should also be established.

In terms of the video games that contain highly original elements, they can be protected through two approaches, i.e. categorised protection and whole protection. For the games that contain many simple expression and standard expression, the industry-based self-regulatory mechanism can play a role. Law is not the only mechanism to strike the balance of industry innovation and developers’ interests. Social norms and industry regulations may be effective for protecting the interests of innovators. Licensing in the video game sector may spur the innovation of new games. Thus, the multiple protection mechanism could better serve the interests of this industry.