

# The Concept of "Video Games" and the Significance of Their Classification in Copyright Law

Yanbing Xu, Guoyun Shu

Shanghai Jiaotong University, Shanghai, China

## Abstract

With the rapid development of the video game industry, the issue of copyright of video games has attracted extensive attention from scholars at home and abroad, and a large number of papers have discussed this topic. However, the relevant papers don't reach a consensus on the concept of "Video Games" at present, which leads to a situation that the number of papers researching "Video Games" is mickle, but most of them are rather disorganized and unsystematic. This paper discusses the concept of "Video Games" and their classification, and analyzes the determination of the concept of "Video Games" and the significance of their classification in copyright law, with a prospect to contribute to the research in this field.

## Keywords

Video games; Game classification; Copyright.

## 1. Introduction

According to China Gaming Industry Report in the Third Quarter of 2020 released by GPC [1] and China Game Industry Institute on October 16th, 2020, offline industries related to games such as electronic sports events have gradually recovered due to the effective control of the COVID-19. In the third quarter of 2020, the actual sales revenue in the Chinese game market was RMB 68.522 billion, growing by 3.37% quarter-on-quarter, and it increased RMB 9.309 billion yuan compared with the third quarter of 2019, which was driven by the increase in the actual sales revenue of mobile games, growing by 15.72% quarter-on-quarter. The actual sales revenue of Chinese game industry has achieved growth phases. [1] With the rapid development of the whole game industry in China, infringement acts in games also take place frequently and show diversified situations and the copyright of video games has attracted wide spread attention from scholars from home and abroad. However, currently speaking, the relevant papers do not have a set of standardized form of video game-related expressions. Although there are many papers in this field, they lack systematicness. This paper discusses the concept of "Video Games" and their classification, and analyzes the determination of the concept of "Video Games" and the significance of their classification in copyright law.

## 2. The Concept and Characteristics of "Video Games"

### 2.1. The Concept of "Video Games"

The WIPO gives an explanation about "Video Games" in the report —— 《The Legal Status of Video Games: Comparative Analysis in National Approaches》 (Video games are complex works of authorship – containing multiple art forms, such as music, scripts, plots, video, paintings and characters – that involve human interaction while executing the game with a computer program on specific hardware." See in: Andy Ramos, Laura López, Anxo Rodríguez, Tim Meng and Stan Abrams: The Legal Status of Video Games: Comparative Analysis in National Approaches, WIPO World Intellectual Property Organization, and the full report can be

downloaded from the following website: [https://www.wipo.int/export/sites/www/copyright/en/creative\\_industries/pdf/video\\_games.pdf](https://www.wipo.int/export/sites/www/copyright/en/creative_industries/pdf/video_games.pdf), last access on February 7, 2020.) that video games are complex works that incorporate human interactions through computer programs running on specific hardware.

The 《Modern Chinese Standard Dictionary》 considers "Video Games" to be: "games played with the aid of electronic devices." [3]

Some scholars of communication believe that "Video Games broadly include all kinds of games and entertainment activities carried out through various electronic devices and platforms such as television, computers, game consoles, mobile phones and web pages." [4]

A monograph defines "Video Games works" as visual software works with certain animation effects and plots, which achieve winning or losing results according to certain rules. [5]

Baidu's definition of the term "Video Games": refers to all interactive games that run on the platform through electronic devices. (Baidu encyclopedia search "video games" can be obtained. URL:<https://baike.baidu.com/item/%E7%94%B5%E5%AD%90%E6%B8%B8%E6%88%8F>, last accessed on February 7, 2020.)

Combined with the definitions above, this paper believes that the concept of "Video Games" should include two basic elements in the perspective of law, the first is "electronic", that is, it should rely on an electronic platform; the second is "game", which should include the interactive behaviors with human beings——interactivity. Based on this, this paper intends to define the "Video Games" to be included in the discussion of copyright law as an interactive game that runs on an electronic platform. Two points will be made to clarify this concept:

① With regard to "electronic platforms" and "electronic devices", the term "electronic platforms" is used in this paper. The reason is that the concept of "platform" is broader than that of "device". For example, if a player uses Nintendo's Switch console to play games, then the Switch console can be called both a 'device' and a 'platform'. In the case of "Cloud Gaming", however, the game does not virtually run on a tangible device in the player's hands, but it can still be described as running on an 'electronic platform'.

② About "works", there are many papers or monographs that directly use the term "Video Game Works" to refer to the object of study. (Refer to Sun Lei and Cao Liping, "Judicial Protection of Intellectual Property Rights of Online Games", China Legal System Publishing House, September 2017, p. 27; Zeng Xiangxin, "Research on Copyright Objects of Electronic Game Works", Master's thesis of Jiangxi University of Finance and Economics, June 2017, p. 16. Another example: Tian Hui: "Research on the Determination of Copyright Infringement of Computer Game Works under the Overall Protection Model", in Journal of Dalian University of Technology (Social Science Edition), November 2019, which also adds "work" after "computer game") This paper argues that the use of the term "Video Game Works" presupposes that "Video Games" can be protected by copyright law before being demonstrated. Moreover, the absence of the word "Works" does not affect the fact that it is an object of study in copyright jurisprudence, as Article 3 of the Copyright Law of the People's Republic of China (hereinafter referred to as the "Copyright Law") uses the term "computer software" instead of "computer software work" in its provisions on types of works. Of course, after the debate, if it is suggested that the Copyright Law should add "Video Games" as a separate type of work, the reference to "Video Games Works" should be used.

## 2.2. Characteristics of "Video Games"

In the perspective of law, this paper believes that to be the object regulated by copyright law, and be different from other types of works, the "Video Games" should have the following essential characteristic features:

### 2.2.1. Relying on Certain Electronic Platforms

This characteristic distinguishes video games from sports competitions such as football and basketball and traditional games such as poker and table games. At the same time, the fact that video games should be based on a certain electronic platform is also determined by the nature of video games. Video games are essentially computer programs that are presented as a dynamic combination of graphics and music on running. Therefore, the "reliance on electronic platforms" determines that video games are essentially programs that can be run through certain electronic devices. At the same time, as the result of the operation of the program is a certain audio-visual effect, there is a discussion about whether the game screen can be protected as an audio-visual work (The definition here is quoted from Copyright Law of the People's Republic of China, which will come into force in June 2021. Prior to that, the Copyright Law adopts the definition of "cinematographic works and works created by methods similar to those used in the production of films". similarly hereinafter.). However, video games are actually a combination of computer programs and audiovisual effects, with computer programs being the essence and audio-visual effects being the form of expression.

### 2.2.2. In An Audio-visual Form of Expression

In the scope of copyright law, the external expression of the video games must be aesthetically pleasing, with a combination of sound, images and animation effects as the external form of expression. On the one hand, purely textual and simple expressions that are not aesthetically enticing cannot give players effective mental stimulation and thus tend to have a smaller market share and are less likely to cause copyright disputes; on the other hand, the expressions of such games are likely to fail to meet the requirements of copyright law in relation to works and cannot be the object of copyright. Presented with audio-visual effects can distinguish video games from computer programs. If video games were to be protected as computer programs, they would not reflect the part that is presented in audio-visual form, which is probably the part that the right holder would most like to claim as his copyright. In the WIPO report, it is also stated that video games are complex works that include, for example, music, scripts, plots, videos, paintings and characters. ("Video games are complex works of authorship – containing multiple art forms, such as music, scripts, plots, video, paintings and characters – that involve human interaction while executing the game with a computer program on specific hardware." See in: Andy Ramos, Laura López, Anxo Rodríguez, Tim Meng and Stan Abrams: *The Legal Status of Video Games: Comparative Analysis in National Approaches*, WIPO World Intellectual Property Organization, and the full report can be downloaded from the following website: [https://www.wipo.int/export/sites/www/copyright/en/creative\\_industries/pdf/video\\_games.pdf](https://www.wipo.int/export/sites/www/copyright/en/creative_industries/pdf/video_games.pdf), last accessed on February 7, 2020) This statement is indicative of the fact that video games are primarily using audiovisual as a form of expression.

### 2.2.3. Having Interactivity

Celia Pearce, a professor of game design at Northeastern University, has pointed out that games are meant to be "played", which distinguishes them from other cultural texts, so that video games are not self-contained in the way that books or films are. (Pearce, C. (2002). *Story as Play Space: Narrative in Games*, in King, L. (ed), *Game On: The History and Culture of Video Games*, London: Lawrence King, pp112-19. Cited in: Pingping Guan: "Interactive Media Theory - Multiple Interaction and Narrative Model of Video Games", PhD thesis, Zhejiang University, June 2010, p. 42) When one reading a book or watching a film, he is knowing a character, whereas when one plays a game, he is guiding a character. "The 'play' is what makes video games interactive and is an important feature that sets them apart from other art forms. This interactivity comes from the 'executability' of the computer program. Because computer programs can respond to human actions, they have a mechanism to respond to the player's actions in the game, thus allowing the player to gain a sense of dominance over the game and

mental satisfaction from this interactive behavior. The intervention of the player's behavior has also led to a discussion in copyright law whether the player can constitute a co-author or a performative author. Protecting games as audiovisual works would fail to take into account the interactive nature of video games as an essential kernel.

#### **2.2.4. Guided by the Rules of the Game with the Aim of Winning or Losing**

Video games have rules, that is, how the game is played, how it works and what the conditions for victory are. The rules of the game are the features that distinguish video games from computer programs. Children's toys may be more focused on the process of playing, but video games have a 'win-lose' outcome, which can give the player mental stimulation and makes the game purposeful. "The 'purpose' distinguishes video games from films and books, and the rules pre-set to achieve that purpose distinguish them from computer programs.

### **3. Different Ways of Classifying Video Games and Their Significance in Copyright Law**

#### **3.1. Classified by the Way They Are Played**

In the video game industry, there is no united way to classify games. Broadly speaking, game genres can be divided into six main categories according to the way they are played (Refer to Baidu Encyclopedia entry: "Types of games" at <https://baike.baidu.com/item/%E6%B8%B%E6%88%8F%E7%B1%BB%E5%9E%8B/360147?fr=aladdin>, last accessed on Feb. 17, 2020): action, adventure, simulation, role-playing, casual, sandbox and others, with each of these seven categories having dozens of branches according to their content, forming a large "game genre tree". There may be crossover and overlap between different game genres, for example, sandbox games generally contain elements of action, role-playing and adventure.

The classification depended on the way they are played has two main aspects of significance in copyright law:

Firstly, the different ways in which games are played lead to differences in the copyright protection for different types of games.

For example, role-playing games often have a predetermined story background, a complete plot, and more complex relationships between characters, such as 《World of Warcraft》 and 《Diablo》, etc. These games also tend to have better performance in art, music, and animation, which will not only involve the question of whether the specific expression (the combination of game graphics, animation, and music) constitutes an audiovisual work or a movie-like work, but also involve the question of whether the borrowing (like filmize them or adapt them into novels) of basic expression (storyline, background, relationship between characters) can be an infringement to the author's copyright. Action games, on the other hand, generally do not contain a complete plot, such as 《Contra》 as a representative of fighting games and 《Counter-Strike》 as a representative of shooting games, both of which do not contain a complete plot, but have higher requirements for game design, such as game maps, perspectives, actions during the fighting, and special effects, etc. Whether these can be protected by copyright is a topic that can be discussed. Other games, such as text adventure games, may be difficult to be classified as audiovisual works because of their poor audiovisual performance in terms of graphics and sound effects. And the recent rise of sandbox games, because they allow to change or influence or even create the world, so these games give players more room for creativity, for example, in 《Minecraft》, players can choose between three modes of survival, creation and adventure, and can use the basic elements of the game (cube) to build a variety of buildings, if players want to play role-playing games, they can even use the platform of 《Minecraft》 to

build a role-playing game. In this type of game, it may often bring about a discussion of whether players' behaviors constitute cooperation or deduction.

Second, the different ways in which games are played may affect the criteria for judging whether it constitutes substantial similarity when determining copyright infringement.

In judicial practice, the criteria of "contact + substantial similarity" is often used to determine whether infringement exists, and in determining whether two works are substantially similar, the perception and experience of the relevant audience is one of the elements in determining whether they constitute infringement. (In the second instance judgment of Qiong Yao v. Yu Zheng, the Beijing High Court had the following statement to show the role of the audience's experience and perception in determining infringement:" The original judgment held that the audience's perception and appreciation of the similarity between the two works before and after is also an important factor in determining infringement, the trial court did not err in considering the audience's perception and experience as a factor for consideration, .....") In the case of books and movies, the audience's perception and experience are often given through narrative or visual effects because there is no audience interaction. However, because of the interactive nature of games, many types of games do not have a complete plot, and players do not rely entirely on narrative or visual effects when they feel the game, but more on the game play and operation that show interactivity. For example, in the "《Hearthstone》" case, the plaintiff Blizzard Entertainment Co., Ltd. believes that the defendant Shanghai Youyi Network Technology Co., Ltd. developed the 《Legend of Wolverine》 who have used, copied and plagiarized its copyrighted 《Hearthstone Legend》 game logo, interface, card face, special effects, written works, art works, audio-visual works and design in other game elements, game cards and their combination that can show the rule and algorithm of 《Hearthstone》. However, the court divided the logo, interface, card face design, and dynamic effects of 《Hearthstone》 and concluded that 《Legend of Wolverine》 constituted copyright infringement only in the 《Hearthstone》 logo and the "card store and opening expansion pack animation". (Shanghai First Intermediate Court 2014-Hu-Min-Chu-Zi-23) However, these two games are both card games and do not contain a complete plot. At this time, if only the game name, art design and other audio-visual elements are replaced, the rules of the game are highly consistent, and it is still easy to bring the same experience and feeling to the players. If the infringement of electronic games is judged by the criteria of substantial similarity, the game type will become one of the influential factors if the overall perception and experience of the audience is considered.

### **3.2. Classified According to the Electronic Platforms That the Game Relied on**

According to the different electronic platforms on which the games are based, electronic games can be classified into arcade games, computer games, console games, mobile games, etc. The significance of such classification in copyright law is mainly reflected in the following: firstly, the different running terminals will lead to differences in game design, (Based on the results of the author's research at Hero Hootsuite Technology Co Ltd (Shanghai branch) on 11 January 2019, although it is the same shooting game, if it is run on a mobile phone, it cannot be as accurate as a computer game when designing scenes and movement trajectories because the screen of the mobile phone is relatively small and the configuration of the mobile phone processor is often inferior to that of a computer.) and such differences are likely to bring about differences in players' experience and perception, thus affecting the outcome of whether the works constitute substantial similarity in infringement determination. Secondly, different operating terminals may lead to different audience groups and markets occupied by different types of games, which may lead to differences in the determination of the "existing market and potential market of the copyright owner".

### 3.3. Classified by Whether Get Access to the Internet at the Time of Operation

Video games can be divided into online games and stand-alone games according to whether they are connected to the Internet when running. The term "online game" is currently the most widely used concept in China, and is used in academic, industrial and judicial circles, including various related policies and regulations. In the WIPO report, it is also believed that the closest expression to the "Video game" (The closest reference to video games in Chinese law is to 'online games'." Andy Ramos, Laura López, Anxo Rodríguez, Tim Meng and Stan Abrams: The Legal Status of Video Games: Comparative Analysis in National Approaches, WIPO World Intellectual Property Organization, Page 28, Paragraph 63, [https://www.wipo.int/export/sites/www/copyright/en/creative\\_industries/pdf/video\\_games.pdf](https://www.wipo.int/export/sites/www/copyright/en/creative_industries/pdf/video_games.pdf), last accessed on Feb. 17, 2020) in China is "online game". I think this phenomenon is related to the research process of legal issues related to games in China. Broadly speaking, the discussion of legal issues that may arise from games in China can be divided into two stages: the first stage was at the beginning of this century, around 2003, which attracted the attention of academics due to the frequent disputes around the theft, loss and trade of virtual equipment. (For example, the case of Li Hongchen v. Arctic Ice, which was called "the first case of online game in China" in 2003, can be found in the civil judgment of the first trial, Beijing Chaoyang District People's Court 2003-Chao-Min-Chu-Zi-17848, and the civil judgment of the second trial, Beijing Second Intermediate People's Court 2004-Chao-Min-Zhong-Zi-02877) Since there is no transfer and loss of virtual goods in stand-alone games, that is, disputes over virtual goods exist only in online games, and the study and regulation of virtual goods are also meaningful only in online games. Therefore, the judicial practice at that time, including the policies, regulations and normative documents (Refer to the Notice on Strengthening the Management of Approval of Imported Online Games, the Notice of the Ministry of Culture on Improving and Strengthening the Management of Online Game Content, the Notice on Implementing the <"Three Definitions" Regulations of the State Council and the Relevant Interpretation of the Central Editorial Office to Further Strengthen the Management of Pre-approval of Online Games and Approval of Imported Online Games, the Notice on Strengthening the Management of Virtual Currency in Online Games, the Interim Measures for the Management of Online Games, and the Notice of the Ministry of Culture on Regulating the Operation of Online Games and Strengthening the Supervision Work in the Middle and Afterwards, and other policies, regulations and normative documents) issued, and the academic research all revolved around "online games". The academic research focused on the discussion of the property nature of virtual objects, and basically did not bring about much debate in the field of copyright law, except for the issue of copyright infringement that may be involved in part of self-service and plug-in. The second stage is that in recent years, with the rise of the internet broadcast industry, there have been cases of unauthorized broadcasting of game footage, resulting in disputes. (For example, the "Yao Yu v. Douyu" case, which occurred in 2015 and was called the "first case of online game live streaming in China", can be found in the civil judgement of the first trial, Shanghai Pudong District People's court 2015-Pu-Min-Chu-Zi-191, and the civil judgement of the second trial, Shanghai Intellectual Property Court 2015-Hu-Zhong-Zi-641) At the same time, due to the rapid development of the domestic game industry, a large number of game companies have emerged, so some imitation of existing games have also occurred, such as the emergence of a large number of "skin-change games" (There is no common definition on "skin-change game" , but I deem that it is a game that merely replaces the name, artwork and other audiovisual elements of the game, with the gameplay and content calculated are essentially the same as the previous game). The disputes arising at this time show the copyright demand of the game industry, and the academia have responded to this demand, and recent researches basically focus on the copyright field, exploring whether video games can be protected by copyright, and if they can be the object of copyright protection, which type of works can video

games be classified as, and whether they should be protected as a whole; and whether the network broadcast and retransmission of games on the Internet are acts controlled by the right of network information transmission; whether the network broadcast or retransmission of games may be regarded as fair use in the sense of copyright law. Although, in the second phase of the study, stand-alone games may also face the same problem, that is, stand-alone games may also be imitated, or broadcasted or retransmitted in the network without authorization, but scholars' study follows the habit of the first phase, which is limited to the scope of "online games".

To sum up, a large number of researchers use "online game" to refer to the object of study, to a large extent, due to the customary name of previous researches. In this paper, we believe that on the premise that "online games" cannot cover "stand-alone games" and there are commonalities between the two in terms of copyright, unless the research is specifically focused on the characteristics of "online games, it is appropriate to use the superior concept - "video games" to cover "stand-alone games".

#### 4. Conclusion

Compared with traditional copyright works, video games have comprehensive and complex characteristics, which are usually manifested as a collection of computer programs, game rules, plot evolution, scene maps, characters, music, transitional animation and other elements. It is because the video games have the audio-visual presentation in the organic combination of multiple elements, in judicial practice, the use of split protection or overall protection for copyright infringement decision, will produce different results. At the same time, the different types of video games, the different platforms on which they are played, and the way in which they are played, may have a different impact on whether two works constitute substantial similarity. For this reason, judicial practice should take full account of the types and characteristics of games when dealing with cases relating to video games before making a verdict.

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