



Symbiosis Law School, NOIDA



Creating Virtual Wealth: Importance of Intellectual Property in the Animation & Gaming Industry



Message

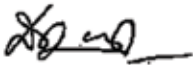
The Indian Animation and Gaming Industry has been playing a seminal role in developing India's domestic Entertainment & Media Industry.

The Indian Animation Industry is estimated to grow at a CAGR of 22% and Gaming industry is estimated to grow at a CAGR of 49% by 2012. This high growth rate should be accompanied by the investor friendly regulatory environment which will help fuel the sector with the required investment.

The Indian Animation players lack Government support through tax rebates or grants. Weak Intellectual Property regulation discourages Animation and Gaming companies in Indian to produce their own Intellectual IP though the Indian laws governing Intellectual Property Rights (IPRs) are compliant with the world standards.

I hope this Report on "Gaming and Animation Industry" will be an important breakthrough in focusing on key issues for the growth of Indian Animation and Gaming industry.

I wish INFOCOM 2011 all the success.



D S Rawat

**Secretary General,
ASSOCHAM**



D S Rawat

**Secretary General,
ASSOCHAM**

Message



Prosenjit Datta

**Editor,
Businessworld**

As India has integrated with the global economy, the importance of intellectual property rights (IPR) in the form of copyright protection and patent protection has also come to the fore. What used to be an obscure branch of corporate law – and not considered particularly important by most law firms, is increasingly taking front stage today. The tribe of lawyers who specialise only on copyright and patent litigation is increasing by the day.

Unfortunately, the Intellectual Property Laws in India have failed to keep pace with the demands of the modern, fully integrated economy. The Indian Copyright Act was framed and passed in 1957. Though it has been amended from time to time, it is still not fully equipped to deal with the changes that have been brought about by the Internet revolution. The Indian gaming and animation industry is a good example of the increasingly complex issues that are cropping up in enforcing intellectual property rights.

The animation and gaming industry needs intellectual protection because it depends tremendously on ideas and imagination. A completely new game or an animated story develops in the author or developer's mind. But what happens when an author publishes his new game and finds another similar game also hitting the market simultaneously or shortly afterwards? The complexity arises because proving that the other game was copied is notoriously difficult if the games are not exactly alike. Given that most animation masters and game developers are creative people and mostly with just rudimentary knowledge of intellectual property rights, this causes a particularly piquant problem.

This is where the white paper on IPR as it applies to the gaming industry brought out by Sujata Dev, co-chairperson of Assocham National Council on Entertainment and Media, in collaboration with the Symbiosis Law School, NOIDA is so important and useful. It simplifies the issues and pinpoints the legal points of IPR as it applies to the gaming and animation industries

My hearty congratulations to them.

A handwritten signature in black ink that reads "Prosenjit Datta". The signature is written in a cursive, slightly stylized font.

Prosenjit Datta

**Editor,
Businessworld**

Forwarding



Sujata Dev
Co-chairperson,
ASSOCHAM (E & M)

Animations & Gaming: An Indian Perspective

Global appetite for Animations and Gaming

Global animation and gaming industry, according to CY 2009 estimates, stands at \$115 billion. It has registered a compound annual growth of 12% between CY 2005 and CY 2009. The industry is likely to become a \$170 billion industry by CY 2013 at a CAGR of 10%. The sub-segments within animations: Animations entertainment, Visual Effects (VFX) and Custom Content Development, provide ample growth opportunities. Similarly, the sub-segments within gaming: PC games, Mobile games, Console games and Online games, propel growth and expansion opportunities.

In terms of market size, US is the largest market for both Animation and Gaming industries. In CY 2008, 29 animation movies were released in the US. While Europe and Japan are also major markets for gaming industries, China is the fastest growing market for gaming. Most of the animation and gaming intellectual properties originate in one of these countries.

Animation industry in India

India's animation and gaming industry is valued at \$739 million and has shown a compound annual growth of 32% between CY 2005 and CY 2009. The domestic share of India's animation revenue stands at only 30%, as of CY 2009, which amounts to only 0.6% of global consumption of gaming and animation. This illustrates enormous opportunity and domestic growth potential in this industry. Outsourcing market also has a considerable scope for expansion. In IT outsourcing and BPO, India held a few crucial advantages like :

- Abundance of skilled human resources.
- Highly competitive costs.

These advantages still hold in animation and gaming industries. However, India's share of global market stands at <10% as compared to over 50% in IT outsourcing and BPO sectors, highlighting an immense potential of growth in this industry. An estimated cost of production for 30 mins of an animated content in India is 25% less than our competitors in Philippines and Korea.

Gaming industry in India

The global gaming industry grew at an approximate CAGR of 21% between CY 2005 & CY 2009. It currently stands at \$40 billion and is expected to reach \$59 billion, despite an expected slowdown in CAGR to 10%. Currently Indian gaming industry is valued at \$239 million, CY 2009 estimate, and is expected to become a \$1.3 billion industry by CY 2013, showing a CAGR of 53%.

ARPU stagnation of Telecom operators and handset manufacturers resulted in migration to the path of M-VAS (mobile value added services) thus opening up enormous opportunities for mobile gaming. Furthermore, sustained increase in the Internet penetration and BWA(broadband wireless access), created enormous opportunities for high end Online gamings. India being the second largest mobile market with about 750 million mobile subscribers and the fastest growing market with 12 million subscribers being added every month, the growth potential on 3G platform for gaming is humongous. Also to be noted is the fact that India has a very young demography, with over 65 % of the population under the age of 35, which presents an added advantage for the expansion of the gaming industry in terms of consumption.

In addition, as per NASSCOM estimates, the cost of developing games in India is 50% less than the corresponding cost in US. This allows tremendous opportunities for outsourcing game development and services to India, especially Console, PC and Online gamings.

Although enormous opportunities present themselves before us, we need a sustained focus on

- Skill development: For development of high quality games
- Continuous creative innovation in a rapidly changing consumer demand.
- Quality enhancement: To match the international standards of quality.
- Effective revenue sharing model between Telecom operators and developers & service providers essential to propel growth of mobile gaming in India.

Challenges before Indian Animation & Gaming industry

Animation and gaming industry faces a few challenges at the moment.

- Further required government support: Unlike the IT industry, despite having similar requirements, the animation entertainment and gaming industry is yet to receive sufficient support from the government, either in the form of tax incentives or grants.
- High production costs: Particularly in animation entertainment, due to budgetary constraints, the Indian animation industry very often lag behind, in terms of quality, when compared with the Hollywood animation industry
- Lack of trained manpower: It is the man behind the machine that matters! India has very few premium institutes & training centres to produce formally trained & academically qualified manpower to support this rapidly growing industry of Animation & Gaming.
- Weak IP regulations: One of the major problems facing the industry is weak IP regulations and their enforcements. Due to the weakness of IPR regime and lack of awareness, domestic animation players are apprehensive about producing their own IP. Moreover, outsourcing to India is also discouraged to an extent due to lack of stringent enforceable IP protection since the International players are extremely protective of their IP.

Moving forward

In the era of mobile communication and internet, when boundaries are boundless we need effective regulations to ensure legitimate business without breaking laws, intentionally or unintentionally.

Firstly, there is need of strong copyright laws to enhance revenue generation from multiple platforms & technologies. Secondly, there is a need to create strong and effective IPR regime, so that innovation is encouraged as we can't afford to lag behind in an increasingly competitive environment.

There also has to be strict enforcement of regulations to attract outsourcing to India by international players to give them a secured feeling about their IP while getting quality product at optimal price. Multidimensional facets of the industry and numerous methods of transmission and circulation of the content requires an IPR regime which can cope up with these challenges. The existing copyright laws, Indian copyright act 1957, with all the amendments, still falls short of standing up to the challenges thrown up by internet and mobile transmissions. To keep pace with the ever evolving technologies which at times are disruptive clear, well defined & non-over-lapping regulations need to be in place. Strong regulations of IP and continuous cycle of sustained innovation is the way forward. We need to get ahead of the game in order to stay in it.

My deep involvement with the Entertainment & Media industry (of which Animation and Gaming is a part) and an analysis of the value chain made me realise the need of this report. I could not have found a better & more appropriate partner than Symbiosis law school, Noida to co-author this report. My sincere thanks to the Symbiosis team for their brilliant effort!

This report would not be possible without the co-operation of the M&E industry & friends. I whole heartedly acknowledge the specialised in-puts from Deloitte and NASSCOM for providing the statistical data.



Sujata Dev

Co-Chairperson
ASSOCHAM
National Council on Entertainment & Media

Acknowledgement

I owe a great many thanks to a great many people who assisted and supported this innovative endeavour of vital importance to the industry, especially gaming and animation industry.

I wish to express my sincere gratitude to the INFOCOM, India's leading IT Conference and Exhibition from the house of ABP Group & ASSOCHAM, India's premier apex chamber of commerce and especially Ms. Sujata Dev, Co-chairperson ASSOCHAM (M&E) for sharing and providing Symbiosis Law School, NOIDA, an opportunity to prepare the white paper on 'CREATING VIRTUAL WEALTH: IMPORTANCE OF INTELLECTUAL PROPERTY IN THE ANIMATION & GAMING INDUSTRY". This white paper bears on imprint of many peoples including developers, authors and owners of games, gaming & animation industry and economies, national and international.

I also wish to express my sincere gratitude to my dear friend Mr. Rodney Ryder, Managing Partner, Scriboard, and co-author of this white paper, for guidance, encouragement and support from the initial to the final level of this project.

My special thanks to Mr. Ayan Das, Ms. Arveena Sharma, Ms. Nikita Arora and Mr. Shivshankar Swaminathan, learners at SLS, NOIDA for their research inputs in making this report a reality. It is highly commendable to see such research aptitude, analytical ability, and interpretative skills present in them at an early stage of their professional life. I also wish to express my gratitude to Prof. Sukhvinder Singh, Assistant Professor, SLS, NOIDA who rendered assistance on both research and administration fronts during the period of the project.

Thank you, thank you all!

Dr C J Rawandale (Co-author),
Director,
Symbiosis Law School,
NOIDA 201301

Preface

Creating Virtual Wealth: Role of Intellectual Property in the Animation and Gaming Industry

This paper is the product of extensive research aimed at supporting the animation and gaming industry. The paper aims at creating an environment where informed debate could take place. This is the starting point for a detailed study on the interface between intellectual property and the animation and gaming industry.

The primary purpose of this paper is to collect, analyse and highlight crucial nomenclature and information about intellectual property rights for all in the industry, policy making and academia connected to game development, no matter what they do or where they are based.

This White Paper provides a neutral legal analysis on the topic of IP rights – regardless of any particular viewpoint on the validity, appropriateness or strategic use of various forms of IP protection.

The exponential growth of the computer industry has required new laws to adequately protect the investment of the industry. The emergence of the Internet and the recent development of digital technologies used to replicate movies and music has resulted in a demand for increased copyright protection. The WIPO Copyright treaty of 1996 provides advanced copyright protection by increasing the range of protected subject matter and expanding the range of modes of disseminating

works which are regarded as infringing acts. Having encompassed technological changes and new areas of interest and concern, the treaty has widened and deepened the protection offered; reflecting the need to develop new norms and standards in keeping with advances in technology and business practices.

The increased protection afforded intellectual property has generated a debate on the appropriate scope of protection that society should afford intellectual property rights holders. Many questions arise: at what point does the granting of monopoly rights to creators stop conferring a benefit and begin heaping losses resulting from monopolies and a stifling of competition? Undeniably, as the printing press once compelled governments to develop copyright rules as a means of protecting intellectual property; technological innovations continue to exceed the conceptualisations of intellectual property law. The paper highlights the core issues involving intellectual property and the animation and gaming industry. We hope that the paper contributes to the development of a policy and regulatory environment in India that supports the animation and gaming industry.

Authored by Symbiosis Law School, Noida and Scriboard, New Delhi
Concept, Research & industry in-puts by Sujata Dev

About Symbiosis Law School, NOIDA

Symbiosis Law School, Noida is an eminent premier law school of the country. It stands for academic excellence, intellectual discipline and professional leadership through legal academics globally. Since inception in 2010, being an off campus centre of Symbiosis International University, Pune, it envisions the reputation of Symbiosis around Delhi, the constitutional capital of India. It is located in one of the best-planned cities of modern India, biggest industrial and institutional hub surrounded by institutions of national and international repute.

SLS, Noida is introducing a new era of innovative learning, inter-disciplinary knowledge and industrious environment with unique orientation and methodology of legal pedagogy in place. Classes are highly interactive, delivered not only by the best academicians but also by the legal luminaries of the field. It strongly believes that law students should stick not only to theoretical teaching but also inculcate and improve the court room etiquettes, research experience and advocacy skills through court room and related exercises such as moot court, mock trials, drafting of pleadings and client counselling. Research is an integral part of studies including interdisciplinary research involving collaboration between academic fraternity, students, and industry. SLS, Noida's efforts are shared by the contribution of members of the bar and bench, corporate sector and international experts. It is the only Law School in India, chosen by the INFOCOM, India's leading IT Conference and Exhibition from the house of ABP Group and ASSOCHAM, India's premier apex chamber of commerce to draft a report on 'Creating Virtual Wealth: Importance of Intellectual Property in the Animation & Gaming Industry' to be published in February 2011.

SLS, Noida through various cells and society's including Mooter's Society, Legal Aid and Literacy Cell, Environmental and Social Welfare Society, Law, Innovation & Technology Cell, Cultural Cell, Sports Cell, and Training & Placement Cell, not only grooms student-leadership but also provides wider opportunities for their overall development in co-curricular and extra-curricular activities such as elocution, debates, quizzes, model United Nations, dramatics, short-filming or making of documentaries, singing-dancing, sports and student festivals.

SLS, Noida strives towards supplementing reforms in the field of law; to groom students to become the unified face of our legal fraternity, to produce knowledge disseminators and to produce individuals who are the torchbearers of the legal system of the country. Our effort is aimed at producing an intellect that believes in reforming rather than punishing and has the potential of hoisting the flag of truth and justice in an unflinching manner.

About ASSOCHAM

The Associated Chambers of Commerce and Industry of India (ASSOCHAM), India's premier apex chamber covers a membership of over 300,000 companies and professionals across the country. It was established in 1920 by promoter chambers (Bombay Chamber of Commerce & Industry, Cochin Chamber of commerce & Industry, India Merchants Chamber, Mumbai, The Madras Chamber of Commerce & Industry, PHD Chamber of Commerce & Industry) representing all regions of India.

As an apex industry body, ASSOCHAM represents the interests of industry and trade, interfaces with Government on policy issues and interacts with counterpart international organizations to promote bilateral economic issues. ASSOCHAM is represented on all national and local bodies and is, thus, able to pro-actively convey industry viewpoints, as also communicate and debate issues relating to public private partnerships for economic development.

ASSOCHAM members represent the following sectors:

- Trade (National and International)
- Industry (Domestic and International)
- Professionals (e.g. CAs, lawyers, consultants)
- Trade and Industry Associations and other Chambers of Commerce

ASSOCHAM operates through 90 Expert Committees that provide an interactive platform to Members for interaction and aid formulating Policy recommendations so as to facilitate Economic, Industrial and Social Growth.

These encompass areas such as: Domestic & International Trade, Commerce, Industry, Services, Agriculture, Education, Food Processing, IT & BPO, Economic Affairs, TQM, Energy, Environment, Capital Market, Banking & Finance, Direct & Indirect Taxation, WTO & IPR, Infrastructure, Pharma, Health, Biotechnology & Nanotechnology, Tourism and Telecom.

Leading Corporates like Aditya Birla Management Corporation Ltd., Boeing, DLF, IBM, Reliance Communications, Reliance Industries, TATA, Northrop Grumman, Cable & Wireless, Warburg Pincus, SREI Infocom, Ernst & Young, Huawei Telecommunications, ZTE Telecom, Qualcomm, Centurion Bank of Punjab Limited, Diageo India Pvt. Ltd., DSP Merrill Lynch, Geojit Financial Services Ltd., GMR Infrastructure Ltd, ITC Limited, Jet Airways (India) Private Limited, Kotak Mahindra Asset Management Co. Ltd, Microsoft, Spice Communications Pvt. Ltd., Videocon Ltd., Vodafone are some of the Esteemed Members of ASSOCHAM.

About ASSOCHAM please log on www.assochem.org

About INFOCOM

INFOCOM, a Businessworld initiative from the house of ABP was initiated in 2002 as a forum that would demonstrate India's quest to be the IT superpower, and has today turned into a forceful and dynamic event that sets the pace for development in the Information and Communication Technology (ICT) sector, bringing potential partners together and helping the industry connect with associates and customers. INFOCOM is the largest congregation of ICT professionals, buyers-sellers, corporate leaders, academics, visionaries, and policymakers in India.

INFOCOM runs on the format of a Conference and Exhibition and closely works with all stakeholders to create a powerful platform that endeavours to synergize and aid this process of change and transformation in India and abroad. It brings together some of the best global minds in hardware, software, telecom together with the experts on the business

side from various industry verticals and policy makers to brainstorm, showcase, network, build brands and prepare for the best that is yet to come. At INFOCOM it has been our constant endeavour to provide various platforms in the form of conferences, exhibitions, roundtable discussions, leadership awards, knowledge workshops etc in order to project the potential of the Indian ICT industry as an engine of economic growth to the nation and beyond.

About INFOCOM please log on www.indiainfocom.com

Legal Issues In The Gaming Industry In Particular Reference To Intellectual Property: An Overview

Introduction:

A video game is usually defined as “an electronic or computerized game played by manipulating images on a video display or television screen.”¹ These would take into its ambit all types of console games, PC games, online games and wireless games. The industry of video gaming has grown exponentially over the past few years with turnovers in billions of dollars and very high fast paced growth structure. Although the game developers are aware of the intellectual property rights that are present in the hardware used in the development of the game, they are often unaware of the potential of the intellectual property that is present in the software used in developing and continued use of a video game. Such ignorance of the intellectual property present in their developed work leads to avoidable litigation, massive financial losses and in the event that the developer is a corporation, significant business disruption. This paper will deal with a general overview of some of the intellectual property rights present in the Gaming Software, more specifically the copyright present in it and various issues and solutions such as licensing with reference to case laws that would highlight the importance of protecting intellectual property in the video game.

Gaming Software basically consists of a number of things such as the ‘code’, the animation, the characters; the scenario etcetera bundled together to create a game. Gaming Software is a computer program, which consists of the code of the game design. Hence, by definition, ‘Gaming Software’ comes under the tenet of literary works, subjected to copyright. But copyrights primarily protect the expression of an idea rather than the idea itself. This creates a vague boundary of protection, and thus, patenting becomes the convenient method of protecting the program code, which gives the inventor exclusive rights over the content for a period of 20 years. Thus, parts of Gaming Software can be copyrighted, the others patented, whilst the name and logos can be trademarked.

Registering ones’ IP is a very crucial and important task as it protects the inventor or creator’s work. *Intellectual property* [IP] is a term referring to a number of distinct types of creations of the mind for which a set of exclusive rights are recognized—and the corresponding fields of law.² While these rights are not actually property rights, the term “Property” is used because they resemble property rights in many ways. Under intellectual property

law, owners are granted certain exclusive rights to a variety of intangible assets, such as musical, literary, and artistic works; discoveries and inventions; and words, phrases, symbols, and designs.

Common types of intellectual property include copyrights, trademarks, patents, industrial design rights and trade secrets.³

Copyright is a set of exclusive rights granted by the law of a jurisdiction to the author or creator of an original work, including the right to copy, distribute and adapt the work. Exceptions and limitations to these rights strive to balance the public interest in the wide distribution of the material produced and to encourage creativity. Exceptions include fair dealing and fair use, and such use does not require the permission of the copyright owner. All other uses require permission and copyright owners can license or permanently transfer or assign their exclusive rights to others.

It is the expression of the author’s ideas that is protected rather than the ideas themselves. Ideas, as such, are not protected by copyright. A person, who has made his idea public, for example in an oral presentation, has no means of preventing others from using it. But once that idea has been expressed in tangible form, copyright protection exists.⁴

Copyright laws applicable to a game: There are several different parts that, when combined, make up a game. Those parts are: [1] the game code, [2] the characters, [3] the dialogue, [4] audio/music, if any, [5] the video and [6] the storyline. Each is individually copyrightable. Although the copyrights are separate, it is the expression of the whole game that makes it copyrightable.

To Register a Copyright

It is not mandatory to register a copyright. The author or the creator of a work has absolute rights over his work as soon as the work is created. There is no need of any type of formalities for the acquirement of copyright, certificate for registration of copyright. The entries made therein serve as prima facie evidence in a court of law, with reference to dispute relating to ownership of copyright. But a registered copyright will always benefit because it is evidence accepted by the court of law, in case of non-registration the burden of proof lies on the creator.

Procedure for registration of a copyright in India

1. Application for registration is to be made on Form IV [Including Statement of Particulars and

¹ European Commission, Study on the Economy of Culture in Europe”, October 2006, Available at http://ec.europa.eu/culture/eac/sources_info/studies/economy_en.html, site visited at 9 A.M. 5th Feb. 11. ² Richard Raysman, Edward A. Pisacreta and Kenneth A. Adler “Intellectual Property Licensing: Forms and Analysis” Law Journal Press, 1999-2008. ³ Available at http://en.wikipedia.org/wiki/Intellectual_property ⁴ WIPO



Statement of Further Particulars] as prescribed in the first schedule to the Rules;

2. Separate applications should be made for registration of each work;
3. Each application should be accompanied by the requisite fee prescribed in the second schedule to the Rules;
4. The applicant or the advocate in whose favor a Vakalatnama or Power of Attorney has been executed should sign the applications. The Power of Attorney signed by the party and accepted by the advocate should also be enclosed.
5. Each and every column of the Statement of Particulars and Statement of Further Particulars should be replied to specifically.

Registration of copyright can be done in the copyright registers office.

After filing the application the applicant has to wait for a mandatory period of 30 days, so that no objection is filed in the copyright office with respect to the applicant's work if there is no objection the application goes for the approval of the examiners. In case of an objection the applicant is given 30 days to clear the discrepancy. So on an average registration should take about 2 to 3 months.⁵

IPR in the various stages of Game Development

IP in Game Design

Game design is the art and science of creating the game itself, not the code or the graphics, but the ideas, stories, worlds, characters, game play, mechanics and so on. All these elements are included under a design document.

The first essential of game design is to copyright the creation, which is automatically done by virtue of it being documented. This can be efficiently done by documenting the element and saving it with the required copyright symbols or text.

The question of the element coming under intellectual property is uncertain, on grounds of it being "original" or not. The various elements [viz. characters, worlds, stories, etc] can be questioned on their originality, as most can be still derived from an exterior source, although not completely. One may take ideas from somewhere and use them in game design as long as they're not completely identical to the former. In this case, the designer will have copyrights on the creation, but not necessarily claim it as his "original intellectual property".

Character: The term "character" covers both fictional persons [human like Tarzan, James Bond and non-human like Sonic the Hedgehog, Donald Duck, etc] and real persons [famous personalities used in the game]. In order to merchandise a character, the character needs have an attribute, which is largely unique and recognisable to the public at large. Those personality attributes are: name, image, appearance, voice, or even symbols representing the character's personality.

Audio-visual works including fictional characters [films, video games, photographs, film frames or stills] will, as a whole [image and soundtrack], generally enjoy copyright protection if they meet the required criteria. This will be more probable since audio-visual fictional characters will often have "started life" as drawings [storyboard or strip-cartoons] or being described as a literary work. Copyright protection may extend to individual visual attributes or the physical or pictorial appearance [costumes, disguises or masks] of a fictional character.

The copyright process differs from country to country. While many countries provide, for the system of registration of industrial design, not all provide substantive examination of the design [novelty and/or originality]. For the creator of a character, copyright is basically the right to respect his creation and also to derive profit from the work by collecting, for a limited period, the revenue generated by the use of his creative work. This implies that no one can have a share in the profits or rights over the character but the creator himself. Hence, each and every character needs to be copyrighted individually [with their distinct attributes like colour, shape, pose, voice, etc.]

IP in Audio

The process of including audio in games can be a complicated task and needs the consultation with an attorney who has specialized knowledge in the particular area. In order to acquire the rights of an audio track for inclusion in a game, two separate copyrights need to be taken care of, one of the sound recording, and the other the underlying musical composition. For inclusion in a game, both these copyrights need to be acquired. The sound recording involves just the recording of the song by the artist's performance. The sound recordings are typically owned by the record labels as opposed to the musician[s] who created them. The musical composition, in turn, involves a separate copyright owned by the musician[s] himself as an exclusive property.

The most convenient way to obtain music rights for a

⁵ Available at www.copyright.gov.in

Intellectual Property in games is not all about the game characters, although they are the representative facets of the game. IP is a vast subject matter in games, including different forms viz. patents, trademarks, designs and copyrights.

game is through “Work-made-For-Hire”. This involves hiring someone to compose and record music especially for the game. A work-made-for-hire is a copyright created by an employee within the scope of his or her employment, or a work which is commissioned for, among eight other categories, audio-visual works. This will ensure copyrights of both the recording and the composition from the very beginning, and the problem of tracking down the rights from some pre-existing owner is evaded.

In order to use pre-recorded and existing music in the game, one needs to go through a two-step process of acquiring the required rights. First, one compulsively require the rights to use the recording of the song by the artist. This is done by means of a “Master Use License”.

Next, one needs to acquire the rights of the underlying musical composition of the song. This can be done through a “Synchronisation License” or “sync[h] license”. This licence is so called because it involves the right to use the required composition in synchronisation with the visual or situational part in the game.

Thus, the ownership and transfer of licenses in the inclusion in a game can be summarized as:

IP in Graphic Art

Intellectual Property Rights find its most common application in the area of graphic art. There are two major trends that influence this:

The trend towards realistic setting for some games [city streets, familiar real-world settings], and, the scope of production involved in today’s games, making or creating all assets from scratchless are less practical. Using or taking photographs of important buildings, works of art, people, private property and other copyrighted stuff,

requires the permission of the owner of those things. This is required for even generic objects like trees, rocks, etc, because even though they might not be looking like the original, still are the same. Hence, due permission is required in cases to use them.

Images found on the Internet have a copyright associated with them even if they are not marked as such, since copyright protection is afforded simply by the creation of such image. Any artist who wants to use this type of source material needs to inform their lead or project manager so that a business decision can be made as to how to approach the situation. In some cases it may be more appropriate to take new photographs specifically for the project, to avoid any infringement. This is particularly important for a commercial game.

An analogous situation may arise when a team does multiple projects, and wants to use again art assets between the projects. For instance both may need a rock texture. Before reuse, it necessitates the need for determination of ownership of these assets. The publisher may own the art assets from one game, or they may be jointly owned. The ownership may include some restriction on how they are used [for instance only for sequels or derivative products].

Copying real world locations: One growing trend in particular genres of games are to use real-world locations or objects in game environments. If the object being created is an everyday object, like a table or chair, it is best to not copy directly from an existing object. For example one may choose to use a desk lamp in your game, however one could have an issue if it looked too much like the Pixar lamp or even a commercially available lamp. In the latter case, one could get permission, much like a product placement in a movie.

In order to base a game in a particular location, a good rule of thumb would be to contact the local authority requesting any information on permission required for using cityscapes or particular characteristic buildings. Similarly, to use buildings, it is required to take the permission of the owner to use the images of the building explicitly.

If you intend on basing a game in a particular location, a good rule of thumb is to contact the local authority requesting any information on permission required for using cityscapes or particular characteristic buildings. If you wish to use a particular building, contact the owner of the building, if applicable, and obtain permission to use images of the building explicitly.

Copying Real People: Use of real-life people as images in games, also requires permission to be granted. A recent example is the case of an EA football game that had to be removed from sale because a player depicted in it had not given his permission for his image to be used. EA had gotten permission from some of the leagues in question, but it turned out this player was not a member of either league.

IP Ownership

Intellectual Property in games is not all about the game characters, although they are the representative facets of the game. IP is a vast subject matter in games, including different forms viz. patents, trademarks, designs and copyrights.

The Current Paradigm

License-based Games: A publisher obtains the commercial license from the author[s] of the original content [viz. comic books, sports leagues, movie studios, car manufacturers, authors, etc.]. This license mostly focuses on the exploitation of the widely recognised trademarks [ex-World Wrestling Federation] and also the widely recognised copyrighted material [characters, storyline of movies, etc].

Next, the publisher extends this licensed intellectual property to a developer[s], which he appoints to design the game within the budget limits set by the publisher. This license gives the developer access to the protected material [logos, drawings, score, script, 3D models for CGI etc.] for inclusion in the game. While in the process of game design, the developer has to initiate new operations on this protected material, in order to encapsulate them in interactive game play, thus creating an array of IP of his own. Assignment of ownership of this IP is subjective to the publishing contract existing between the publisher and developer. However, this IP is usually assigned to the publisher by default. Thus, the developer may not further exploit this original IP without procuring the license to do so from the real owner: the publisher.

Original Content Games: In this scenario, the developer creates original content in the form of script, storyline, characters, etc. This content will automatically

incorporate copyrights in its design documents from its inception, and may also include designs that may be registered. It might further include trademarks on title. The underlying technology may also be patented. At this stage, the developer has full ownership of the originally-developed intellectual property.

Eventually, a publisher approaches and signs the developer for marketing and releasing this original game. Now, subject to the publishing contract existing between the publisher and developer, clauses may assign the original IP to the publisher as part of the publishing deal. Thus, the developer may not further exploit the IP without procuring the license to do so from the new owner: the publisher.

Depending upon the revenue generated from the released original content, the publisher may dole out license of the original IP to the same developer or some other in order to develop a sequel. At this stage, the original content game becomes a license-based game, with the publisher as the inherent owner.

The Ideal Paradigm

As can be seen, the situation at present gives the publisher an upper hand in generally every stage, owing to the fact that the newly developed IP automatically becomes the property of the publisher. The ideal paradigm gives a brief about how IP ownerships can be a little more convenient if a few changes are made in the present scenario.

License-based Game: As in the present scenario, the publisher secures the commercial license from the author[s] of the original content and then doles out this licensed IP to the developer who he appoints to design the game around the content, within the assigned budget parameters. The developer would have a full or partial access to the material for inclusion as art, storyline, characters etc.

Now, protection of one sort or another [patents, designs] should be sought to the developer, in order to grant them with the freedom to exploit them as per the requirements of the game. With the technological solutions newly endowed to them, the developer will be more freely able to incorporate the software code and other IP in form of interactive game play. This is not to be viewed as against the position of the publisher, but as a way to find a midway for the developer-publisher ownership transfer rift; as the newly created IP will belong to the developer for unrestricted use.





Original Content Games: As usual, the developer creates the original content for the game, which will be inclusive of copyrights, patents that will need to be registered. The title should be trademarked. Thus, the developer would have full ownership of the in-house developed and registered intellectual IP.

A publisher then signs up with the developer in order to release the game in the market. Now, regarding the publishing contract between the publisher and the developer, clauses assigning the original IP to the publisher should in fact be assigned to the developer for the duration of the publishing deal. The publisher thus cannot exploit this original IP without procuring a license of the owner in this case: the developer. Thus in this scenario, the developer enjoys certain freedoms to exploit the created IP. It would be dependent on the developer to decide whether the original game becomes a sequel-spawning title or if any of the IP may be used at will, in other games.

IP Issues affecting the Gaming Industry:

Infringement of Copyright

Meaning of Copying: Reproduction of a computer program, which is not in the form of a cinematographic film, shall constitute infringement⁶. Copying for the purposes of copyright law occurs when a computer program has been transferred from a permanent storage device to a computer's random access memory ['RAM']. The loading of copyrighted computer software from a storage medium, that is, hard disk, floppy disk, or read only memory ['ROM'] into the memory of a central processing unit, causes a copy to be made. In the absence of ownership of copyright or express permission by licence, such acts constitute copyright infringement. Copying software into RAM is temporary fixation. The loading of software into a computer constitutes creation of a copy under Copyright Act, 1957.

Taking a temporary copy of the electronic information for limited purpose of extracting unprotected public facts

would be fair use and not actionable. The playing of a disk in a console or personal computer does not involve making a copy of the whole or 'substantial part' of the computer software embodied in a disk. In the ordinary course of operating a console or a PC, the temporary storage of a substantial part of computer software embodied in a disk in the computer's RAM will not involve a reproduction of the software in material form.

Substantial part: The fact that the two games perform the same functions or produce the same display on the screen, will not by itself mean that there has been copying, although this may give rise to an inference that copying has happened. Copying may take the form of copying lines of instruction, either verbatim or only colourable imitation or the structure of the plaintiff's program may have been reproduced, in whole or in part. The usual principles will apply in determining whether, the part of plaintiff's program that has been taken amounts to substantial part.

Whether a defendant, who has observed the results of the plaintiff's program in operation, without having access thereto, will infringe copyright if by a process of reverse engineering, he produces a program, which is substantially similar to the plaintiff's. If the defendant has merely taken the idea of the plaintiff's program, and has, by his own efforts, created a work, which resembles the plaintiff's, he will not have infringed, since he will not have taken any unfair advantage of the plaintiff's labour, skill and effort. The position would be different if the defendant, in addition to merely reproducing the results of the plaintiff's program, had observed and reproduced the routines by which they were achieved.

Substantial similarity: Existence of identical unnecessary instructions and statements and common errors are the strongest proof of substantial similarity⁷. When the copy or the reproduction is not exact, the court must examine the degree of resemblance. In comparing the works and keeping in view the idea and general effect created by the original, there should be

⁶ Section 2[m] Copyright Act, 1957 ⁷ Atari Games Corps v. Nintendo of America Inc. 24 USPQ 2d 1015[1992] [Fed Cir]

A license is merely a leave to do something that would otherwise amount to as being unlawful; and not a partial assignment of the copyright. Licenses are limited in terms of time, territory and scope

such a degree of similarity as would lead one to say that the alleged infringement is a copy or reproduction of the original of the design having adopted its essential features and substance.

Civil Remedies for Infringement of Copyrights

Where a copyright has been infringed, the owner of the copyright would be entitled to all such remedies by way of injunctions, damages, and accounts and otherwise as are or may be conferred by law for the infringement of a right⁸. However, if the defendant proves that at the time of infringement he was not aware and had no reasonable ground for believing that copyright subsisted in the work, the plaintiff would be entitled only to the remedy of injunction in respect of the infringement and a decree for the whole or part of the profits made by the defendant by the sale of the infringing copies as may be found reasonable by the court. The costs of all parties in any proceedings in respect of the infringement of copyright would be the discretion of the court.

Mod Chips

A modification chip, ['Mod chip'] is a small electronic device used to modify or disable built-in restrictions and limitations of computers, specifically videogame consoles. It introduces various modifications to its host system's function, including the circumvention of region coding, digital rights management, and copy protection checks for the purpose of running software intended for other markets, copied game

media, or unlicensed third-party software. Mod chips are mainly used in digital disk based videogame systems due to the availability and low cost of user-writable media. In addition to games consoles, mod chips are also available for some DVD players to circumvent region code enforcement and user operation prohibitions.

Mod chips operate by replacing or overriding a system's protection hardware or software. They achieve this by either exploiting existing interfaces in an unintended or undocumented manner, or by actively manipulating the system's internal communication. Mod chips circumvent the security embedded into consoles. To install the mod chips into a hardware system, it is necessary to dismantle the product and, in some instances, remove the components. Mod chips open the system to third party and make it available for copying; therefore the availability of a mod chip for a console system is undesirable for console manufacturers

Mod chips have been adjudicated to be illegal in various countries around the world, the United States, the United Kingdom and Hong Kong. Countries across the globe are adopting similar laws aimed at illegal circumvention of security measures. People caught selling or installing them may be subject to criminal prosecution and may also be liable for civil damages arising from it.

Piracy in the Gaming Industry

Piracy in the gaming industry has been around as long as the industry itself. Piracy has been one of the biggest issues faced by the industry. A survey of gamers has shown that, for every three purchasers of a game, there has to be one pirate that owns an illegal copy of the game.

Let's take a look at the extent to which levels of piracy apply to the current generation platforms. There are two main handheld systems, Sony PSP and Nintendo DS; and four main home systems. The PSP platforms is risky for developers because of the potential loss of sales due to games piracy, as it had the misfortune of being hacked pretty early on from its initial release. The games on the DS platform are in a cartridge form, hence more difficult to copy. However, recently, the pirates have begun using a flash card reader device that uses game ROM's and plays them on the DS. The home system consists of the three consoles, Sony PS3, Microsoft XBOX 360, Nintendo Wii and the PC Games. The PS3 has only been partially hacked⁹ so far, and seems to have won the battle against pirates. It uses the Blu-Ray technology, which is expensive to copy. The Nintendo Wii, hasn't faced many problems with the pirates either. The XBOX 360 however, is a

⁸ Section 55[1]Copyright Act, 1957 ⁹ Sony v. Geohot. "Sony filed a lawsuit against Mr. Geohot, who hosts PS3 hacking tools on his website geohot.com"



game software very similar to the PC, and has been easily hacked. Pirates have installed 'Mod chips' in this system as well. The PC is the most easily hacked platform for games. Almost every piece of game software has been cracked for the PC. Pirates can download practically any game they want with a tool called Bit Torrent. Many speculate that the PC gaming is going to die soon because of the rampant piracy on this platform, for no developer would want to spend resources making games to facilitate the pirate economy.

Game developers used a technique called Digital Rights Management ['DRM'], which is used by hardware manufacturers, copyright holders and publishers to limit the use of digital content and devices, to combat piracy. The technology inhibits the use of digital content not desired or intended by the content provider. DRM limits the number of systems the game can be installed on by requiring authentication with an online server. Most games with this restriction allow three or five installs, although some allow an installation to be 'recovered' when the game is uninstalled. This not only limits users who have more than three or five computers in their homes [seeing as the rights of the software developers allow them to limit the number of installations], but can also prove to be a problem if the user has to unexpectedly perform certain tasks like upgrading operating systems or reformatting the computer's hard drive, tasks which, depending on how the DRM is implemented, count a game's subsequent reinstall as a new installation, making the game potentially unusable after a certain period even if it is only used on a single computer. This backlash against 3 activation limits was a significant factor in Spore becoming the most pirated game in 2008. DRM has proven to be a mockery of protection measures, for pirates have always found way around it, and in case of Spore, used it as a means itself, to help them pirate it. On the face of it, DRM has harmed and hindered the legitimate buyers more than the pirates; it should be done away with.

Valve Steam's digital distribution system, is a relatively better way to keep a check on the legitimacy of the product. It is used as a launch pad that keeps track of the games on owns, and checks the authenticity on start-up. Another way of ensuring games remain piracy free, is by running them only from official servers. An example of such a game would be World of Warcraft; to play it you must have a subscription and an authenticated user ID to connect to the server that contains the control for the actual game.

Licensing Issues

A license is merely a leave to do something that would otherwise amount to as being unlawful; and not a partial assignment of the copyright. Licenses are limited in terms of time, territory and scope. The owner of the copyright may grant interest in the right by the license. The license has to be in writing and signed by the licensor or by his duly authorised agent¹⁰.

A licensee has the right to make 'alterations' in the concerned work with respect to the implied restrictions upon this right. A licensee who has failed to satisfy a condition of the license or has materially breached the licensing contract has no rights to give a sub-license under which the sub-licensee can take cover in a copyright infringement case and therefore, both the licensee and the sub-licensee can be held liable for acting without authorisation and thereby infringing the licensors copyright. A licensee, not being an exclusive licensee¹¹, cannot sue for infringement of copyright, unless he joins the copyright proprietor as a defendant in the action. Where the doing of anything is authorised by the grantee of a license or a person deriving title from the grantee and it is within the terms or implied terms of license for him to authorise it, then, it is taken to be done with the license of the grantor and of every other person, upon whom the license is binding.

A shrink-wrap license is a term that refers to any software license agreement which is inaccessible to the purchaser until after purchase. Users have no way of reading the terms and conditions until they install the software. In placing a shrink-wrap license provision on its software product, the producer seeks to: prohibit unauthorised copies; prohibit software rental; prohibit reverse engineering and modification to the software; limit the use of the software to one central processing unit; limit liability¹². This, however, creates problems for the developers for the customers would want to return the product if they are not satisfied with the terms. In India, a 'shrink-wrap' or 'click-wrap' license would be valid and enforceable only if the licensor or his duly authorised agent signs the same.

Assignment and License: Assignment constitutes a complete transfer of rights, whereas, in a license there is only a limited transfer of rights by the terms of the license. Where the consideration is the payment of royalties or a share of profits instead of downright payment, then the copyright is not assigned. The ability of the author to revise the work, and to keep updating

10 Section 30 Copyright Act, 1957 11 Section 2[j] Copyright Act, 1957 12 ProCD v. Zeidenberg 38 USPQ 2d 1513 [1996,DC]

Game developers are often tempted to add a desirable quality of verisimilitude to the gamers experience by using popular brands in the game

it, weighs heavily against assignment, it is then a license only. Whether a particular transaction is an assignment or a license depends on the terms used. A clause granting to the licensee sole and exclusive license to broadcast or distribute in a particular country would mean assignment if even if the parties are described as licensor or licensee.

It is not uncommon for a movie, novel or a television program to provide inspiration for a video game. It has become a standard practice for a movie/novel series to cross the gaming market, to name a few, Harry Potter, The Godfather, and Reservoir Dogs. The guiding principle that video game developers should employ is that virtually everything that appears in the game, which is not an independent, original creation of the video game developer will need to be licensed. As early as the development stage, developers/publishers should draft licenses that cover the use of third-party's intellectual property right¹³. For example, a developer obtained the rights to use a celebrity's likeness in a video game in 2008, but waited until 2010, a few months before the game launches, to obtain the rights to use to the celebrity's likeness in advertisement for the game. If the celebrity's career has taken off in the interim, then the rate the celebrity can command for a commercial endorsement might be higher than the developer's entire promotional budget.

The game developer will have to obtain rights to use the image, name and likeness of an actual person, living or dead. Even though the actor has granted a motion film studio to exploit, in which the actor's performance is embodied, the actor may not have granted the game developer the rights that will allow him to exploit his individual name or likeness in the game, as per the movie the game is based on. In some cases, the actor may not wish to participate in the video game adaptation. For

example, in Electronic Arts ['EA'] could not obtain Al Pacino's consent, and therefore the central character, Michael Corleone, in EA's The Godfather game neither looks or sounds like Al Pacino¹⁴.

When the basis of a game developer's creation is an existing literary work, a book, comic, stage play or its underlying narrative, theme, plot or characters, the developer needs to determine whether any rights in the work have been previously granted to a third party. If the novel has already been adapted into a movie or television series, it is likely that the publisher granted these rights to a third party movie or television producer. In cases where the rights in the underlying literary work have already been granted to a third party for exploitation in an audio-visual work, the author may no longer be in control of those rights. Thus, the developer may need to acquire the audio-visual rights from the film studio. Game developers should be careful while copying an original work that is in the public domain, and see whether there are copyrighted derivative works based on the original. Although a derivative work may be in the public domain, the original underlying work may still be copyrighted. In case the developer wants to use copyrighted music in the game, he will have to obtain synchronization right¹⁵, which are licensed by the music publisher. These rights may not allow the developer to exploit the music across all platforms or in television advertisements. In such a case, it is advisable to obtain a broad license that allows the developer to exploit the music in perpetuity for all media. The audio components and the concrete details of the visual presentation of a video game constitute the copyrightable expression of an otherwise unprotected idea¹⁶.

Game developers are often tempted to add a desirable quality of verisimilitude to the gamers experience by using popular brands in the game. If he does so without a license to use these brands, the publisher risks being sued by a company who does not appreciate having its brands referenced in the video game¹⁷. In the case of authorised product placement in a game, where the product owner himself, wants to advertise his product through the gaming platform, in that case the license agreement between a product sponsor and the developer should clearly articulate the degree of creative control the developer is allowed in integrating the product sponsors products and logos into the game.

¹³ The Licensing Journal, Feb 2008, Vol. 28 No. 2, Aspen Publishers ¹⁴ Douglass C. Perry, "The Godfather: The Game".IGN.COM, March 21, 2006, available at <http://xbox.ign.com/articles/697/697341p1.html>. Interestingly, Mr. Pacino gave his consent to appear in Vivendi Universal's Scarface Game. ¹⁵ Electronic Arts [EA] was sued for infringement by copyright owners of the song "Terminal Intensity" which was used background music for some menu selection screens. ¹⁶ Atari Inc. v. North American Philips Consumer Electronics Corp., 672 F.2d 607 [7th Cir. 1982] ¹⁷ Electronic Arts [EA] was sued by Bell Helicopter Textron Inc. for EA's alleged use of Bell's helicopter in games such as Battlefield Vietnam.

Multi-platform Content Distribution

In the era of convergence, there is an overlap of technology and access. Most of the digital contents transverse seamlessly from one device to another, and are available on multiple devices. In IP mode, content is available Television [IP TV], computers and mobiles. One game may be available on different platforms. It is for the owner to determine whether he wants to sell his right to a content aggregator, who can further distribute it to various telecom operators. The copyright holder in this case, gives different copyrights for each platform. The owner of these IP rights has the exclusive right over his IP. He may sell individual rights like computer rights, IP TV rights, and computer right, to the respective telecom operator.

In a case of infringement of copyright in such a convergent scenario, the content aggregator will be held responsible, and to some extent the telecom operator as well, provided he was aware that the content he was distributing was infringed. The content aggregator will be held liable under section 63 of the Copyright Act, 1957. In such a case, indemnification given to the copyright holder, by the content aggregator, will not be valid.





With the advent of every new technology, the copyright & IP scenario changes & calls for amendments. The copyright regulatory environment in India is very well drafted & has stood up to the challenges of both advanced & disruptive technologies. The Copyright Act, 1956 has gone through multiple amendments to facilitate the growth of the industry. However, some gaps are yet to be plugged to create a watertight regime, in order to protect the pilferage of revenue & to distribute the revenue so generated legitimately, to the rightful players in the value chain.

The endeavour through this brief report was to create awareness & answer few queries raised by the industry. We would soon come up with a more detailed treatise in the form of a hand book accompanied with a DVD, based on industry needs in near future.



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Indian animation & gaming industry is relatively very small compared to countries like Japan, Korea or USA; this signify it has a huge potential of growth, supported by mobility growth & youth population. This for sure will call for a more regulated & well defined Intellectual Property & copyright regime to capture revenue.