bpv GRIGORESCU ȘTEFĂNICĂ

GAME CLONES: HAVE WE FOUND A PROPER SOLUTION?

WARNING: GAMING LANGUAGE AHEAD!

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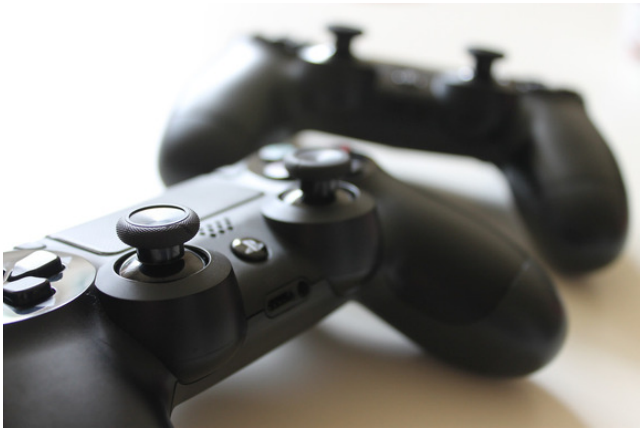
The video gaming industry has indeed become a force to be reckoned with, growing to a multi-billion dollars industry. Inevitably small-time developers want to "*borrow*" from the success of well-known titles and create better and improved versions of such games. Improving concepts and providing players with the best quality content is, without a doubt, the basis of any healthy market. However, freeriding on the success of others is and should remain something frowned upon.



Game cloning has become a significant issue in the industry, developers complaining that other developers copy their game mechanics and ideas in order to take a share of the revenue that is rightfully theirs. In this situation, we have to ask ourselves: when is "*cloning*" merely a manifestation of competition which contributes to the welfare of players and therefore should be permitted and when does it lead to the infringement of intellectual property rights?

Delineating these two situations may not be an easy thing to do in practice. The issue has raised several debates between large game development studios, which want to protect all elements and functionalities related to their games, and small indie developers, which have found inspiration in such titles and wish to create new and improved versions of these genres, by using similar concepts, methods and functionalities as the big game development studios.

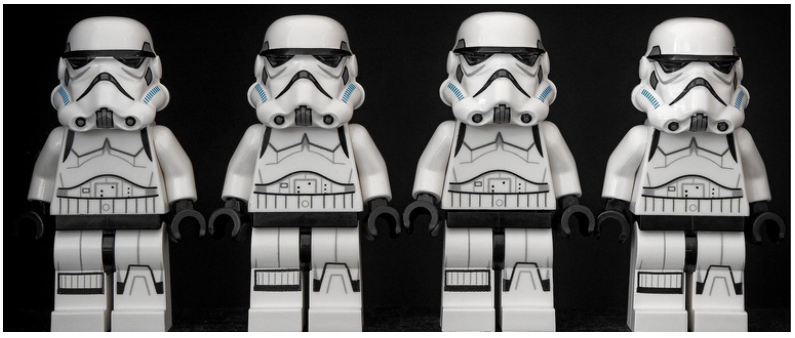
The issue with protection against clones is that conventional intellectual property rights cannot efficiently or adequately protect certain elements of the game, or this kind of protection would be costly and thus inaccessible to small indie developers (*e.g.* due to high registration and other administrative costs).

For example, characters, storyline, graphics and software code can easily be protected by copyright, as these elements represent the expression of an idea and most likely bear the personal stamp of the author.

When it comes to game mechanics, however, the issue becomes incredibly complicated. Game mechanics often represent the very soul of a game, especially when it comes to mobile games, where gameplay mechanics may decide whether a title is successful or not. Relevant examples in the industry are **Angry Birds**, **Candy Crush**, **Tetris** and other games which have created and implemented unique gameplay mechanics, recognizable worldwide by almost any player. It is without a doubt that any game borrowing the same gameplay mechanics would be heavily inspired by the aforementioned and would most certainly freeride on the reputation built by the original developers. In this case, it would be justified for the latter to seek legal protection for their work, but this has proved to be difficult when it comes to gameplay mechanics and/or other game functionalities, as shown in the following paragraphs.

So, what are the means by which a game developer can protect his work and up to what extent should this protection be awarded?

COPYRIGHT PROTECTION: SIMPLY NOT ENOUGH



Copyright covers most of the game elements, from graphics, characters, storyline, as well as source code. However, when it comes to gameplay mechanics, the situation becomes complicated and raises several concerns.

Firstly, ideas, concepts, working methods and various procedures cannot be protected by copyright. Copyright only protects the expression of an idea and in most cases game mechanics elements are not considered expressions but merely ideas, concepts or procedures/algorithms, which cannot fall under copyright protection.

For example in the case *SAS Institute v World Programming C-406/10*, the European Court of Justice stated that: "*neither the* ***functionality*** *of a computer program nor the* ***programming language and the format of data files used*** *in a computer program in order to exploit certain of its functions constitute a form of expression of that program and, as such, are not protected by copyright in computer programs* […]." In other words, borrowing the concept of a game, the methods used to play a specific game, or other necessary functionalities could not lead to copyright infringement if no copyright protected elements (*such as code, graphics, models*) were copied.

Secondly, for copyright to protect a particular work, this has to be original or, how the European Court of Justice stated: it has to bear the personal stamp of the author. In most of the cases, although its distinctive character is undisputed, gameplay mechanic elements hardly have any originality trait. In most of the cases, these elements constitute "*scène à faire*", which means that when they are indispensable for the genre, they do not represent the intellectual creation of the author. For example, having multiple skill trees giving various abilities in an RPG game could not be considered original elements, since levelling up characters belonging to different classes is a common element of the RPG genre.

In conclusion, copyright is an essential intellectual property right when it comes to protecting the creation of game developers, but it also has its shortcomings. Game mechanics and other functionalities do not fall under the protection awarded by copyright.

PATENT PROTECTION: IS IT AN OPTION?

Unlike copyright protection, patents seem to be a suitable way of protecting the game developer's creations. However, this does not mean that any game feature and/or functionality may be registered as a patent, as in most cases developers are faced with severe obstacles in proving that their creation fulfils all the relevant conditions.

A patent may only be registered provided that the invention is new, involves an inventive step, and is susceptible of industrial application.

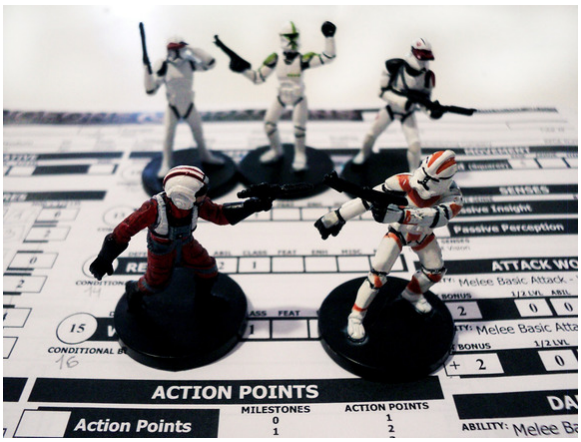
The technical contribution of software patents is usually one of the most challenging conditions to prove by the applicants. Nevertheless, the European Patent Office seems to have admitted the registration of patents on game mechanics, considering that such condition is fulfilled if the inventions are not concerned solely with the rules of the game (*which are not patentable as such)*. They have to aim to provide a solution to the technical problem and/or to achieve a further technical effect (*e.g.* the manner in which such rules are implemented in the game). A good example would be the Konami case, in which the European Patent Office concluded that highlighting a secondary point of interest in a football game to improve the overall experience and facilitate gameplay represents an invention that is eligible for patent protection.

Other famous examples of such game mechanics patents include Microsoft's US patent the "*tag*" mechanism which defines the Midweek Madness game, BioWare's US patent for the graphical speech interface available in the popular Mass Effect franchise and the list goes on.

The novelty conditions of a patent, although not as difficult to prove as the technical contribution condition, could also represent an obstacle in obtaining a patent. With respect to the novelty condition, the European Patent Convention states that an invention is new if "*it does not form part of state of the art*", which is defined by "*everything made available to the public by means of written or oral description, by use, or in any other way, before the date of filing* [....]". In other words, for a specific gameplay element or functionality to be patentable, it should not be currently comprised in state of the art. Thus, game mechanics or functionalities which have already been implemented are not patentable anymore as they are not novel. This fact means that registering a patent is not a suitable protection mechanism for developers that have already launched their games.

Thus, as mentioned above, games currently under production could be eligible for patent protection, but even so, one problem remains: patents are usually expensive and may take a significant amount of time to obtain them. In the gaming industry speed in launching new games and/or DLCs to existing games is of utmost importance. Furthermore, the costs may be exponentially increased considering that developers would have to file several patents for each game element which they intend to protect, before even being able to test the performance and profitability of the game. Of course, big development studios are most likely going to afford such an approach, but for small indie developers, this could lead to corporate suicide. That is why the latter find themselves in a situation in which they cannot adequately protect their creation in its entirety.

MULTIMEDIA TRADEMARKS: A DOUBLE-EDGED SWORD

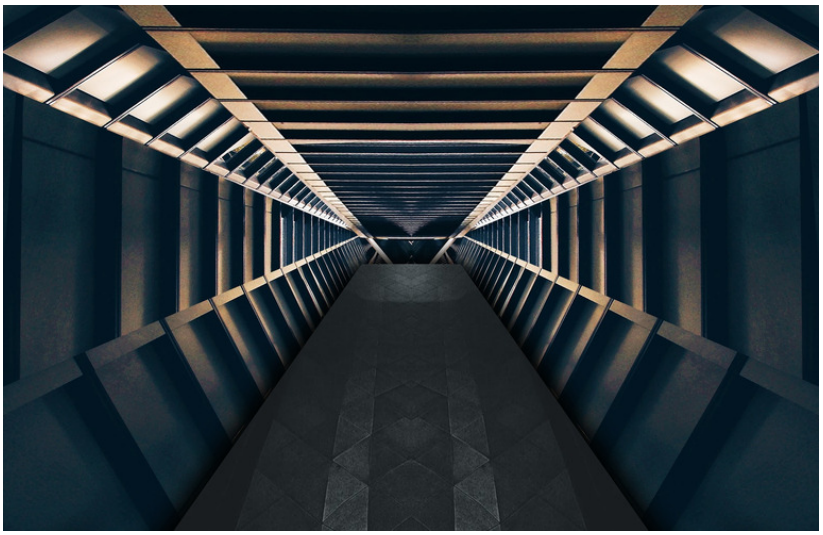


In the European Union, trademarks may be registered in each Member State, or applicants may opt for registering a European Trademark, which would be automatically registered throughout the entire European Union. The registration of European trademarks is regulated by the European Trademark Regulation, which up until October 1st, 2017, stated that a trademark must be susceptible of "*graphical representation*" to be registered.

This condition was removed, allowing for the first time the registration of multimedia trademarks consisting only of images and sounds.

This amendment creates enormous opportunities for game developers, which have been previously unable to protect their games in whole, because of the shortcomings that copyright and patent protection had posed. The registration of a multimedia trademark for specific game mechanic elements could potentially solve the deficiencies of copyright and patent protection and could protect game developers from significant financial losses caused by the game cloning industry. So what's wrong with it?

On the one side, trademarks are an adequate mechanism to protect developers against free riders (*i.e.* against other developers which copy the game mechanics of a successful title): they are cheap, relatively easy to register and trademark holders benefit from extensive protection.



On the other hand, the extensive protection granted to trademarks could potentially hinder creativity on the market, as no developer would be able to implement or use, in any other way, any game mechanic or functionality that would create a risk of confusion with the registered trademarks. This situation would drastically limit the use of certain concepts and methods by game developers, and it could potentially increase costs of games (*due to the necessity to pay royalties*). Ultimately, it could even lower the quality of new content: being limited to recycling the same mechanics over and over again, game developers might not change and improve functionalities.

An example of such multimedia trademark application is the "*Kill Cam*" game mechanic specific to the Sniper Elite franchise. The multimedia mark is currently under review with the European Union Intellectual Property Office. This mark shows the specific "*kill cam*" game mechanic which consists of a slow-motion close-up of the bullet from the sniper's gun up to the enemy's body and is readily accessible on the authority's website. It is yet uncertain whether such a mark will be accepted in the current form or not.

SO, HOW CLOSE ARE WE TO SOLVING THE GAME CLONING ISSUE?

The issue with game clones is far from being resolved, but it is safe to say we are moving in the right direction. At this point, it is a waiting game. We deem that the outcome of the "*Kill Cam*" trademark could be a relevant factor to the on-going battle against game clones, but remains to be seen if and to what extent could the trademark be enforced against infringers. We expect to see an increased number of game development studios who opt for registering trademarks to protect game elements which fall between the gaps of conventional intellectual property protection.

The possibility to register multimedia trademarks consisting only of images and sounds, brought about by the changes in the European Trademark Regulation, is most welcome. It is for the European Union Intellectual Property Office to do the fine tuning on which game mechanic elements need this protection, and which would inevitably lead to unacceptable obstacles in the game development market. In our view, such protection should only be awarded to game mechanics which are inherently distinctive and representative to a game, to prevent overly broad protection which may hinder creativity and prevent healthy competition on the market.

In other words, the purpose of intellectual property rights should remain the protection of the developers' creations and not a mean to increase the profit of game developers at the cost of hindering creativity on the market and blocking innovation attempts.

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