

Authorship and Moral Rights in Video Games

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Abstract

The complex and multimedia nature of video games results in several original and derivative works of copyright contained in a single game. Although there is no need to establish a new category of work and the current state of law offers comprehensive protection of the works, it also means there can be many different authors in a single production, so assignment of rights can be difficult.

This interrelation of works and their respective authors can also have a negative effect on authors' moral rights, or, more specifically, the right to claim authorship and the right to object to derogatory treatment of the work.

This article analyses the current law of the United Kingdom with regard to authorship and ownership of copyright in video games and underlying works before analysing and evaluating the moral rights of video games' contributors.

Keywords

Copyright Law; Moral Rights; Underlying Works; Paternity Right; Integrity Right

Press Start Volume 2 | Issue 2 | 2015

ISSN: 2055-8198

URL: <http://press-start.gla.ac.uk>



Press Start is an open access student journal that publishes the best undergraduate and postgraduate research, essays and dissertations from across the multidisciplinary subject of game studies. Press Start is published by HATII at the University of Glasgow.

1. Introduction

In the previous issue of this journal, I have discussed the legal nature of video games under copyright law (Stein, 2015). From a dogmatic point of view, the existence of multiple creative and derivative works in a single video game does not pose a problem. However, considering that such a complex product is created by a multitude of authors and with large financial investments being at stake, legitimate financial and artistic interests may be difficult to be balanced out. This paper aims to analyse and evaluate the laws of authorship and moral rights in video games in the United Kingdom with reference to international jurisprudence.

2. Authorship of Video Games

The complexity of contemporary video games requires a vast amount of creative and non-creative contributors. It is not uncommon that large productions consist of hundreds of participants (for example *Grand Theft Auto V* [Rockstar Games, 2013] was created by a staff of 300; McLaughlin, 2013). This raises the question of how to properly assign authorship and ownership of video games.

2.1 Authorship of Underlying Original Works

With regard to original literary, dramatic, musical or artistic works contained in a video game, s. 9(1) of the Copyright, Designs and Patents Act 1988 (CDPA) defines an author as 'the person who creates it.' This means, according to the doctrine developed in *Walter v Lane*¹, the author of each work will be the person who applied labour, skill and judgement to the work. However, the Court of Justice of the European Union (CJEU) held in *Infopaq v Danske Dagblades Forening*², that authorship required the authors' own intellectual creation only. It is still a somewhat contentious question as to how the *Infopaq* decision will affect national law (cf. Lyon, 2014), but recent case law³ suggests that even though the CJEU's ruling is considered, the traditional assessment will be made in the future.

If the work was produced in collaboration and the contributions cannot be distinct from each other, it is considered a work of joint authorship (s. 10(1) CDPA). Consequentially, all contributors fulfilling the originality requirement can claim authorship. However, it should briefly be noted that under the recently implemented S. 10A CDPA, works consisting of a literary and a musical work will give their authors co-authorship in the final work if it is created to be used together. Therefore, music

¹ [1900] A.C. 539.

² Decision from 16.07.09, Case no. C-5/08

³ Newspaper Licensing v Meltwater, [2011] EWCA 890.

accompanied by lyrics will not be treated as separate works anymore (Baden-Powell, 2013).

2.2 Authorship of Films

Determining the authors for film recordings⁴ contained in a video game on the other hand is much more difficult because films have statutory authors under UK law. In accordance with s. 9(2)(ab), only producer and principal director of a film are deemed its author, regardless of creative contribution.

For the purpose of Part I of the CDPA, the Producer of a film is defined as 'the person by whom the arrangements necessary for the making of the sound recording or film are undertaken' (s. 178 CDPA).

However, there is no statutory definition for the principal director of a film. This statutory author was added in 1994 to implement the Rental and Related Rights Directive (Directive 92/100/EEC) which required member states to consider 'the principal director of a cinematographic or audiovisual work [...] as its author or one of its authors' (Garnett et al, 2010, para 4-47). In *Stephen Slater v. Per Wimmer*⁵ it was held that 'the principal director is likely to be the person who had creative control of the making of the film.'

The person who is in charge of creative control in a video game production is commonly called lead designer (Ramos *et al.*, 2013, p. 9). Like a director of a film production, he will ultimately make final decisions regarding the creative development of the video game. Therefore, under current law, there are two statutory joint authors of films; the producer from an economic and the principal director or, in video games, the lead designer respectively from a creative aspect.

2.3 Authorship of Sound Recordings

Like films, sound recordings have statutory authors in the United Kingdom; according to s. 9(2)(aa) CDPA, it is the producer alone.

However, depending on the nature of the production, this person is not necessarily identical with the producer of the video game. The producer of a sound recording is defined exactly as the producer of a film in s. 178 CDPA, but although the notion of 'undertake' in s. 178 CDPA also includes a financial responsibility, mere financing of the recording is not sufficient to establish status as producer (Garnett *et al.*, 2010, para 4-42). Therefore, if the sound department of a video game production enjoys a high amount of freedom in the production of sound recordings, the person who undertook the necessary arrangements could be the

⁴ 'Film' in this circumstance refers to the category of work, which the recording of a video game falls under, not films or cut-scenes contained (cf. Stein, 2015, p. 50).

⁵ [2012] EWPC 7.

head of the sound department rather than the producer of the video game.

2.4 Authorship of Video Games as a Whole

The list of authors of copyrighted works within a video game is almost as long as the list of creative contributors overall. But while finding the author for every work within the video game, copyright law cannot tell us who is the author of 'the video game' and consequently can claim paternity (see below, 4.3) to it.

One could argue that every author of a work within a video game should be deemed author of the game as a whole. This argument could be supported by drawing an analogy to s. 10A(1) CDPA that deems authors of a musical and a lyrical work produced in collaboration as co-authors of the work as a whole. The section was included in the Act to implement the Copyright Term Amendment Directive (Directive 2011/77/EU). The Directive aimed at harmonising the term of protection for musical works including lyrics, which was calculated from the death of the last author of the work in some countries whereas other countries applied separate terms of protection (Recitals 18-19 of the Directive).

The reason to treat musical and literary works in the context of music as a common work is that they are intended to be used together (s. 10A(1) CDPA). In principle, it is the same situation with video games. They consist of separate works which are intended to be used together, so one could argue to apply the rules of co-authorship analogous and deem every author of an underlying work as co-author of the video game as a whole.

However, if the intent of the European legislative was to harmonise protection for any kind of product created in collaboration and consisting of several works, it would have enacted the directive accordingly. Drawing this analogy would also go far beyond the scope of interpretation of the concisely phrased CDPA.

The issue can be addressed more convincingly by comparing video games and films. Both are protected as films within the meaning of the CDPA and both regularly have underlying original works (Stein, 2015). And although there is a considerable amount of interactivity in a video game that is missing in a film; according to *Stern Electronics v. Kaufman*⁶ and the Italian Corte di Cassazione⁷, the audiovisual display is the determinant aspect for the popularity of a video game and can therefore be considered dominant part of the product.

⁶ 523 F. Supp. 635 (EDNY 1981).

⁷ Corte di Cassazione (2009) I.I.C. 107.

Even though films have underlying essential works, when speaking of a film in terms of copyright law, only 'film' as defined in s. 5B(1) CDPA is meant. Consequently, when video games are deemed films and their recording is protected as such, then this equivalence to conventional film production must be expanded to the question of authorship. Therefore, authors of video games will be most likely lead designers and producers. Authors of the underlying original works are only deemed authors of their respective creations.

2.5 Appraisal

When analysing authorship of video games, a crucial issue becomes apparent. It is neither wrong to categorise video games as films, nor to say that the audiovisual display of a video game is its key feature.

It might be dogmatically correct to say that authorship of video games is confined to authorship of each separate creative contribution and only producer and lead designer can claim authorship of the final product as a recording, but it appears this evaluation misses the notion of collaborative contributions to a final product. However, this issue appears less dramatical when putting the copyright category of film into perspective. Protected is not the creative effort but the recording itself (s. 5(1) CDPA), and as held in *Nova Productions Ltd. v. Mazooma Games*⁸, protection only covers exact reproductions by photographic means.

Lastly it should be kept in mind that video games are a product of interdependent creative contributions, original works and their authors. This interdependence was described by Sundara Rajan in relation to films as a metaphorical pyramid forming 'a new kind of hierarchy' with 'the final version of the film [...] at the summit of this pyramid' (2011, p. 396). With this picture in mind, one could say every work of and every contributor to a video game has a place within that pyramid.

The film as primary work is on its summit, existent because of the organisational skills of the leading roles within the production. The underlying original works and sound recordings are below, forming a creative foundation for the final product. From this perspective, deeming producer and lead designer as authors of the final video game does not appear as an unreasonable choice anymore.

3. Ownership of Copyright

A different question is that of copyright ownership. Contrary to authorship, which is of a more personal nature and important to determine the scope of moral rights (see below 4.), copyright ownership has a commercial character protecting the property right in copyrighted works (Waelde *et al.*, 2014, p. 85). With regard to the complex product

⁸ [2006] R.P.C. 14.

of a video game, it is therefore important that the producer or publisher holds all necessary rights to exploit the game. Under S. 11(1) CDPA, first ownership of a work vests in the author who created it. The provision is straightforward and there are no special rules to be applied regarding video games.

3.1 Works Made Under Employment

However, s. 11(2) states an exception to the rule of first authorship when 'a literary, dramatic, musical or artistic work or a film is made by an employee in the course of his employment'.

This exception will apply to many cases, as in commercial video game productions, game designers and other creative contributors are employed to create works. It should also be briefly noted that sound recordings are not included under s. 11(2) CDPA. According to Garnett et al., this is due to the fact that employees will never have sufficient independence to be considered producer of a work (Garnett *et al.*, 2010, para 4-47).

3.2 Pre-Existing Works Used in Video Games

When the producer of a video game does not hold initial ownership of copyright in a work used in the game, either by means of authorship or by statutory assignment in the case of a work made by an author in the course of employment, he must obtain the necessary rights to incorporate the work into the game without infringing the owner's copyright. This can be achieved either by assignment of copyright or license granted by the copyright owner.

The assignment of copyright will give the assignee the most extensive rights to exploit the work, as he will gain the proprietary rights in the work (Garnett et al., 2010, para 5-205). According to s. 90(3) CDPA, the assignment must be made 'in writing signed by or on behalf of the assignor.' The previous owner of copyright will lose his proprietary rights in the work, therefore this method of obtaining the rights to use a work in a video game will be less frequent in practice, as there might be other uses of the work the initial copyright owner wishes to commercialise. Contrary to the assignment of copyright, a license will give the licensee only contractual rights, the proprietary rights remain with the licensor.

A license can be exclusive, which authorises 'the licensee to the exclusion of all other persons, including the person granting the license, to exercise a right which would otherwise be exercisable exclusively by the copyright owner' (s. 92(1) CDPA). The licensor can grant a licensee either an exclusive license to use the work in a video game, or a non-exclusive license in which case he retains the possibility to exploit the work otherwise. The appropriate type of license depends on case and the nature of the licensed copyright material.

4. Moral Rights in Video Games

Copyright law in the United Kingdom traditionally focuses on the economic rights in works (Bainbridge, 2008, p. 128). And indeed, when dealing with copyright, economic matters are important.

But on the other side, copyright protects works of creativity, and even after transmission of economic rights in a work, the author still has valid interests in it. Under Article 6bis of the Berne Convention⁹ authors have two moral rights, the right to claim authorship (paternity right) and the right to object to derogatory treatment (integrity right).

In 1988, the United Kingdom implemented the provisions of Article 6bis of the Convention in the newly enacted CDPA (Davies and Garnett, 2010, p. 33). However, the protection of moral rights in the UK is impaired by the requirement that the paternity right must be asserted by the author on the one hand and the possibility of waiving both the right of integrity and the right of paternity on the other hand (ss. 78(1), 87 CDPA). It can be argued that this 'cautious approach' prevents abuse of moral rights, but keeping in mind the disadvantage of authors against powerful contracting parties, the possibility of waivers and the requirement of assertion of the right to claim authorship appears unsatisfactory (Bainbridge, 2012, p. 128).

4.1 Contributors Entitled to Moral Rights

Generally, every author of a work is entitled to the right of paternity as well as the right of integrity. S. 77(1) CDPA states that 'the author of a copyright literary, dramatic, musical or artistic work, and the director of a copyright film, has the right to be identified as the author or director of the work' and s. 80(1) CDPA states that 'the author of a copyright literary, dramatic, musical or artistic work, and the director of a copyright film, has the right [...] not to have his work subjected to derogatory treatment.' It should also be briefly noted that under s. 84(1) CDPA, everyone has the right not to have a work falsely attributed to him. If the work in question is a work of joint authorship in accordance with s. 10(1) CDPA, each author is entitled to these rights. The provisions are clearly defined with regard to original works and need no further analysis.

But unlike original works, moral rights in films are not held by the author but the director (ss. 77(1), 80(1) CDPA). Although according to s. 9(2)(ab) CDPA, only the *principal* director can claim authorship to a film, moral rights can be held by joint directors, if the film 'is made by the collaboration of two or more directors and the contribution of each director is not distinct from that of the other director or directors' (s. 88(5) CDPA). This regulation can lead to the obscure situation of

⁹ Berne Convention for the Protection of Literary and Artistic Works, as enacted on 9/9/1886 and last amended on 28/9/1979.

someone being able to claim moral rights despite not having authorship. However, these regulations slightly correct the authorship issue in films by granting moral rights not to the statutory authors but the director(s) as creative minds in the production.

There is no protection for moral rights in sound recordings in the United Kingdom, but as protection for films explicitly includes accompanying sound tracks in s. 5B(2) CDPA, there is indirect protection through moral rights in films.

The persons entitled to this protection however are the lead designers of video games. Although being in charge of the final design of the product, they are usually not involved in sound production at all. Given the nature of sound recordings as derivative works protected without an originality requirement it is questionable if moral rights protection should be afforded at all, but granting rights to the author of a different work, excluding the creator of the recordings cannot possibly be the solution to this issue.

4.2 Moral Rights in Underlying Computer Programs

Video games contain code as any other software. Although computer programs are protected as literary works in accordance with s. 3(1)(b) and (c) CDPA, several differences in copyright subsist, not at last because of the EU Software Directive¹⁰. One grave difference is that according to ss. 79(2)(a) and 81(2) CDPA, authors of computer programs do not enjoy moral rights. The reasoning of the legislator to exclude protection of the paternity right was that although computer programs are literary works, they were "different in many ways from books' and therefore it would, as an example, be inappropriate 'for the authors of the computer programs running teletext services to be identified each time someone wants the latest news or cricket score" (Parliament, 1987). Equally, protection of the integrity of the work was deemed inappropriate for it would inhibit copyright owners from updating and maintaining programs (ibid).

The general exclusion of computer programs from moral rights protection has been considered derogatory and suggests that 'a computer program is to be regarded as a lesser species of copyright work' (Davies and Garnett, 2010, p. 157). Understandably, the legislator expressed concerns that protection of moral rights might inhibit the commercial exploitation of computer programs but these concerns could have been addressed differently.

The integrity right could have been restricted to cases which do not unreasonably obstruct commercial exploitation of the work. While it is

¹⁰ Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs.

doubtful if updating or maintaining a computer program constitutes derogatory treatment at all, (Davies and Garnett, 2010, p. 275) for the avoidance of doubt, these cases could have been expressly excluded from protection.

Japanese copyright law for example excludes any 'modification necessary for enabling the use, in a given computer, of a program otherwise unusable there or make the use of a program more effective in a computer' from the right of integrity (Doi, 2001, p. 214).

While it might be arguable if moral rights protection for computer program should exist, Article 2(1) of the Berne Convention explicitly includes "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression" to the notion of literary and artistic works, and Article 6*bis* of the Convention states no exception for moral rights protection in computer programs either. Therefore, under the Berne Convention moral rights in computer programs do enjoy protection (Sundara Rajan, 2011, p. 290). The Parliaments decision to provide for an exception of moral rights in ss. 79(2)(a) and 81(2) CDPA consequentially is hardly justifiable.

4.3 Paternity Right

Under s. 77(1) CDPA, every author of an original work and director of a film has the right to be identified as such. With regard to video games there are two specific issues. Firstly, it is clear that every author has the right to be identified as author of the specific work but it is not apparent who is entitled to be identified as author or at least contributor to the video game as a whole product. Secondly there is the question in which manner the authors of the video game or underlying works respectively are to be identified to respect their paternity right.

According to s. 77(7)(a) CDPA, any author is 'to be identified in or on each copy' of the work or 'if that is not appropriate, in some other manner likely to bring his identity to the notice of a person acquiring a copy'. Furthermore, 'the identification must in each case be clear and reasonably prominent'. It follows from the phrasing 'reasonably prominent' that consideration of authors as well as practicability must be taken. To determine the required form of identification, it must also be looked at the industry practice (Davies and Garnett, 2010, p. 133). The usual practice in films is to show contributors in film credits either at the beginning or the end of the film (Sundara Rajan, 2011, p. 433). In computer programs there is commonly an 'about the program' button under which credits to the contributors are shown (ibid, p. 308).

In video games, both variations are practised. Especially video games that tell a linear story which eventually comes to an end show 'game credits' equivalent to those of films. Other games that do not have a finite story such as most strategy games will more likely have a 'credits'

button in the options menu or the main menu. Both possibilities can be considered reasonable prominent. Although credits which appear on a screen while playing the video game are not 'on' the copy, they are nevertheless 'in' the copy within the meaning of s. 77(7)(a) CDPA because they are embedded in the digital data of the medium (Davies and Garnett, 2010, p. 133).

The more complicated question is who is eligible to claim a paternity right to video games. This question is not easy to address and possibly cannot be answered fully. It was suggested above, that for the purpose of authorship, the authors of a video game's film should be considered author of the game as the audiovisual aspect of the video game is the most dominant part of it and film copyright protects the recording and thus the entirety of the video game. But for the purpose of identifying creative contributors to video games, this approach is rather inappropriate as it grants only lead designers recognition as authors. In the credits of a video game, the credits to all contributors including their role in the production are shown together, suggesting contribution to a common product rather than authorship of separate works.

Indeed, s. 77 CDPA is in line with this assumption. Authors of underlying works need not be identified when copies of their works are issued to the public, but rather when copies of a recording containing their work in form of a film are issued to the public. Clearly, there is a reference to the way these works are interconnected. If every author of an underlying work of a video game must be mentioned on every copy, then consequentially, all authors must be mentioned as authors of the product. Therefore, every author of any work consistent in a video game can claim authorship to the video game. This is a remarkable outcome considering that although there is no authorship as such in video games, there is a common right of paternity in the final product.

4.4 Integrity Right

In the United Kingdom, under s. 80(1) CDPA every 'author of a copyright literary, dramatic, musical or artistic work, and [...] director of a copyright film, has the right [...] not to have his work subjected to derogatory treatment.' As discussed above, although technically, there is no author of video games as such, from a spiritual point of view every author of any work included in a production can claim paternity to the video game by virtue of his contribution. However, according to s. 80(1) CDPA, authors of original works and directors of films can only object to derogatory treatment of their own works. This raises the question if authors can object to actions which do not strictly affect their own works, for example if a final video game differs from what the author of the underlying work had in mind or if there are alterations to the video game or certain aspects of it that keep the work in question untouched.

In *Konami Co., v. Ichiro Komami*¹¹ the Tokyo District Court dealt with a case where the defendant used a female character of the video game *Tokimeki Memorial* (Konami, 1994) in an animated pornographic work showing the character having sexual intercourse (Tessensohn, 2000). The court held that not only was this a distortion of the image of the character but also to 'the intention of the game'. It recognised the complex interrelation of works within video games and expanded the scope of the right of integrity of the artistic work to the entire video game.

However, UK copyright law hinders the application of this doctrine. Article 6bis of the Berne Convention names distortions, mutilations, other modifications or *other derogatory actions* as infringing actions to the right of integrity. But under S. 80 CDPA, authors can only object to derogatory treatment which is defined as 'any addition to, deletion from or adaptation of the work'. It has been argued that the wording of the CDPA excludes cases of putting unaltered works in different contexts from the right of integrity (Davies and Garnett, 2010, p. 240; Cornish, 1989). However, the position of the government appears to be that works do enjoy protection under s. 80(1) CDPA in these cases¹².

If there was a possibility of infringement of the right of integrity by using an unaltered work in a different context this would give authors of video games' underlying works protection in two very important situations. Firstly, the use of a work in a video game contrary to the expectations of the author could violate the author's right of integrity. Secondly, the use of a video game in a derogatory manner could amount as a derogatory action towards any underlying work, even if the work in question was not used or altered itself, as the works in video games are interconnected, the 'intention' of the work expands towards the whole game.

5. Summary

There is no authorship of video games as such, but as film copyright protects the recording which contains all underlying works, the statutory authors of the film can be considered as being the closest to authors of the video game as a whole. While this finding appears unsatisfactory, creative contributors still retain authorship in underlying works they have created.

The rules of copyright ownership are to the advantage of the producer. However, in large-scale productions this is important because in the end video games could not be published if not all necessary rights are assigned to the publisher.

¹¹ Case No. 10 (wa) 15575 from 30/08/1999

¹² 'The use of a photographic image to promote a product to which the author has ethical objections is an example of infringement of the moral right of integrity' (Intellectual Property Office 2009).

Moral rights protection for authors of video games can be described as insufficient to protect their justified interests. The requirement of assertion of moral rights and the possibility of waivers is a well known issue which is not limited to the subject matter of video games alone.

Furthermore, with regards to the Berne Convention, the lack of moral rights protection for computer programs in the United Kingdom is a contentious matter. While the UK Parliament's argument, computer programs differ from conventional literary works, itself is sound, the compatibility of the relevant provisions with the rights conferred by the Convention is questionable.

The scope of the right of paternity is slightly obscure in the CDPA when it comes to products consisting of several works. Although, for the purpose of the right to be identified as author or director, the interpretation of the Act and the industry practice of showing names of authors together suggests a common paternity right in the video game and will sufficiently protect the interest of authors as co-creators.

Protection of the right of integrity however is not sufficient at all. The definition of derogatory actions is far too narrow to comply with the Berne Convention and excludes many cases in relation to video games, especially when there is no direct treatment of an underlying work.

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