

Chinese Practice in the Copyright Protection of Video Games: An Attempt Under the Element Splitting Approach

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Abstract

At present, China's legislative process concerning video games lags significantly behind the rapid development of the gaming industry. Before the amendment to the Copyright Law on June 2021, the regulations on types of works are specified through a closed enumeration method. Video games didn't fit any category and had no residual provision. In that premise, element splitting was the most efficient protection approach. This paper will analyze the current legislative situation, mainly focusing on the change of judicial approach in China's video game copyright protection and put forward suggestions.

Keywords

Video Game, Element Splitting, Chinese Practice.

1. Introduction

In recent years, it has witnessed a rapid development in Chinese game industry. A number of game enterprises with independent intellectual property rights have emerged, promoting the rapid development of related industries such as Esports and live streaming. In this context, copyright protection related to video games has gained widespread attention, and litigation concerning game copyrights also occurs frequently. In early judicial precedents, the basic approach was to use element splitting for preliminary exploration, which is closely related to copyright protection rules for games.

2. Relevant Rules on Copyright Protection of Video Games

2.1. Overview of the Legal Framework

At present, China's legislative process concerning video games lags significantly behind the rapid development of the gaming industry. In addition to the substantive laws such as the *Copyright Law of China*, the *General Principles of the Civil Code of China*, and the *Regulations on the Protection of Computer Software*, a substantial portion of the legal provisions related to video games are concentrated in judicial interpretations and other normative documents of relatively lower legal authority, most of which are oriented toward regulating online games [1].

2.2. Specific Rules for the Copyright Protection of Video Games in China

As previously noted, video games possess dual attributes of both computer programs and audiovisual presentation. Consequently, the relevant rules for these attributes are mainly found in copyright-related legal norms.

2.2.1. Computer Programs of Video Games

Video games can naturally be categorized as "computer programs" under Article 3 of the *Regulations on the Protection of Computer Software*, and thus fall within the scope of "computer software" listed in Article 3 of the *Copyright Law*. It is widely accepted in both theoretical discussions and practical applications.

2.2.2. Audiovisual Presentation of Video Games

Although the underlying computer program of video games can be protected as computer software, rights holders seldom pursue infringement claims based solely on computer program copyright in judicial practice. This is attributable to several factors:

1. Disputes typically arise from live streaming of the video games or from similarities in the visuals, music, gameplay, and plots between two games. In these cases, the subject of dispute is the audiovisual presentation rather than the underlying program;
2. Rights holders, in designing an aesthetically captivating game, develop computer program in order to obtain audiovisual presentation. Therefore, they are more concerned with securing copyright protection for the audiovisual presentation than for the computer program;
3. From the perspective of evidence, a claim based on computer program copyright infringement would require the rights holder to compare the source code of the game and compare it with the allegedly infringing work. However, right holders are generally reluctant to disclose the source code due to concerns such as commercial secrets, thereby impeding the comparison of whether the programs of two games are identical or substantially similar.

In the current academic and practical state, there is little controversy that the audiovisual presentation of video games can be protected by *Copyright Law*. However, due to the absence of explicit categorization for video games in the Article 3 of *Copyright Law* [2] on types of works, there is no clear legislative guidance on which category the audiovisual presentation of a video game should fall under for protection. In judicial practice, courts have made different types of judgments regarding the classification of video game works, and through long-term exploration and development, it has gradually accumulated valuable experience.

3. Evolution of the Element Splitting Approach in Game Protection

3.1. Early Stage: Split of Individual Elements

With the rapid advancement of technology and gaming industry, video games have long transcended their early simplistic audiovisual expressions and have become increasingly complex. Modern video games typically comprise a collection of various elements including computer programs, game rules, narrative progressions, scene maps, characters, music, and cutscenes. In early judicial practice in China, courts usually split each of these elements and individually analyze to determine whether they could be classified as computer programs, works of the fine art, literary works, musical works, or other categories recognized under Article 3 of the Copyright Law, and thereby be afforded copyright protection. For example, in the case “Fantasy Westward Journey v. Pocket Dream of the West”, the court observed that the game “Fantasy Westward Journey” had “set forth certain narrative elements, virtual scenes, and a variety of characters and props. Players are required to choose specific roles to get involved. Hence, apart from comprising computer programs and related documents, the game also incorporated corresponding artistic and literary works as necessitated by its design, and authors of the game software can exercise copyright over these works separately.” [3] This statement of splitting the video game into various elements and seeking copyright protection for each category separately reflected a practical judicial strategy. In the absence of explicit legislative guidance and prior analogous precedents, the element splitting method is more familiar to judges and allows them to determine copyright infringement based on previous experience, thereby completing the trial process.

3.2. Later Stage: Recognition of the Overall Game Screen as an Audiovisual Work

Although subsequent cases have shown a trend of recognizing the overall game screen as an audiovisual work (or as a “works created by a process analogous to cinematography”) eligible

for protection [4], it should be noted that such recognition does not imply that video games have achieved overall protection in Chinese judicial practice. Separating the overall game screen from its elements such as plots, music and character images to categorize it as an audiovisual work (or as a “works created by a process analogous to cinematography”) is still a form of element splitting protection rather than an integrated evaluation of the game as a whole. It does not integrate all elements of the game to determine the nature of the work from the perspective of the entire game, nor could the audiovisual work (or as a “works created by a process analogous to cinematography”) cover the computer program parts of video games. Thus, while the recognition of video game's continuous screen as an audiovisual work offers significant advantages, such as avoiding excessive fragmentation and reducing adjudication costs, it remains, in essence, a manifestation of element splitting protection rather than an overall protection of video games.

4. Judicial Practices at Different Stages

In current judicial practice in China, the identification of the type of video game work is predominantly based on the protection approach of splitting game elements. The following sections will discuss how various game elements have been addressed in Chinese judicial decisions.

4.1. Early Stage: Classic Cases of Element Splitting Protection

A representative case of early-stage element splitting protection for video games is the “Hearthstone” case [5], which is adjudicated in November 2014 by Shanghai First Intermediate People’s Court. In this case, the plaintiff, Blizzard Entertainment, contended that the defendant’s game, “Legends of Wolong”, had used, reproduced, and plagiarized various design elements from the game “Hearthstone”, including logos, interfaces, card designs, special effects, literary works, works of the fine art, audiovisual works, designs of other game elements and the behavior of the overall combination of cards and decks of each game that manifested the rules and algorithms of the game, thereby constituting copyright infringement.

Since the statutory categories of works protected by the *Copyright Law* do not include video games, the plaintiff pursued claims of copyright infringement separately for the Hearthstone logo, the game interface, card design, the combination of cards and decks, and the video and animation special effects. Although the court acknowledged that the defendant had plagiarized the game rules, in determining copyright infringement, it still analyzed the video game by splitting it into the aforementioned five elements for separate discussion.

4.1.1. Logo, game interface, and card design can be categorized as “works of the fine art”

When discussing whether the defendant has committed an infringement, the court observed that although two of the logo depictions in the defendant’s game showed “no substantial difference in shapes and aesthetic feelings formed by lines and colors. The subtle differences in detail were insufficient to form distinct shapes or provide a different aesthetic experiences to the public” [6], thereby constituting infringement of the right of reproduction and the right of communication through information network. However, the Hearthstone logos apart from these two instances had substantial differences in shape and aesthetic presentation, and thus did not constitute copyright infringement. As for the game interface and card design, the court held that the layout of the game interface and card design falls into the realm of ideas and thus is not protected by copyright; the patterns and colors of the game interface and card design constitute expression and can be protected by copyright. But in this case, although the layout of the two game interfaces and card designs was similar or even substantially similar, there

were still substantial differences in the specific patterns and colors, and thus did not constitute copyright infringement.

4.1.2. Textual descriptions accompanying cards and deck compositions can be categorized as “literary works”

Although the combination of cards and decks essentially represents game rules and gameplay, which are not protected by copyright and thereby the defendant’s act of copying the plaintiff’s card combinations does not constitute copyright infringement, the textual descriptions of cards and decks (i.e., the explanations of the game rules) could be protected as literary works. Nonetheless, considering that individual card descriptions were often too simplistic to meet the requirement of originality and the similar explanatory expressions might be inevitable because of the limitations of game rules and gameplay, the court ultimately determined that there was no copyright infringement of textual descriptions in this regard.

4.1.3. Video and animation effects can be categorized as “cinematographic works and works created by a process analogous to cinematography”

The court reasoned that the video and animation effects in video games met the requirements set forth in Article 4 of the *Implementing Regulations of the Copyright Law*, which define such works as those “filmed on a certain medium and consisting of a series of images, with or without accompanying sound, which are projected or otherwise communicated by means of appropriate equipment.” [7] Accordingly, the court determined that the “card store and expansion pack opening animations” in the defendant’s game were substantially similar to those of the plaintiff, constituting an infringement of reproduction rights. However, the “green halo animation” [8] did not qualify to be protected as “cinematographic works and works created by a process analogous to cinematography” because it failed to meet the criteria of “consisting of a series of images”.

In summary, the “Hearthstone” case exemplified the element splitting approach whereby the court divided the video game into five categories: Hearthstone logo, game interface, card design, card-and-deck combinations, and video/animation effects, and separately examined whether each of the five qualified as an works of the fine art, literary works, cinematographic works or works created by a process analogous to cinematography under the *Copyright Law*. Ultimately, the court only determined that two Hearthstone logos in the defendant's game and the card store and expansion pack opening animations respectively infringed on the plaintiff’s copyright as works of the fine art and cinematographic works. As a classic precedent concerning the protection of game element splitting approach, the case offers judicial approaches for the protection of video game copyrights in the absence of explicit provisions in *Copyright Law*, holding significant implications. The case set forth several key principles:

First, game rules and gameplay, in their abstract form, are not protected by copyright, but the explanatory text describing these rules can be protected as literary works. Yet if the expression merges with the rules to the extent that there are only a limited number of possible expressions, then such expression cannot be protected.

Second, while the operational interface and layout of a game fall into the realm of ideas and are not protected by copyright, the shapes and patterns manifested through specific lines, colors may be protected as works of the fine art.

Third, videos and animations in a game, which meet the requirements of being “filmed on a certain medium and consisting of a series of images, with or without accompanying sound, which are projected or otherwise communicated by means of appropriate equipment”, can be classified as “cinematographic works and works created by a process analogous to cinematography” and thus get protected by copyright.

4.2. Later Stage: Cases Protecting the Game Screen as Audiovisual Works

Regarding video game elements eligible for protection as audiovisual works, there have been two stages in judicial practice. The first stage involved splitting elements such as animation effects and video sequences into categories eligible for protection as audiovisual works. The second stage involved categorizing the whole game screen as an audiovisual work for protection.

4.2.1. Video and Animation Effects

In the “Hearthstone” case [9], the plaintiff sought protection for video and animation effects as audiovisual works, while the defendant argued that these elements were insufficient in originality and did not fall within any category recognized by the *Copyright Law*. Shanghai First Intermediate People’s Court, however, held that there is no distinct category of “audiovisual works” in *Copyright Law*, therefore, the only possible approach was to evaluate whether the video and animation effects qualified as “cinematographic works and works created by a process analogous to cinematography” [10] to get protection. Besides, the court found that the videos and animation effects in “Hearthstone” were composed of a series of images and had characteristics analogous to cinematographic works. Additionally, the elements showed requisite originality and can be protected as works created by a process analogous to cinematography. However, the “green halo animation”, which merely involved a green halo effect around a card during an immediate attack, did not meet the criteria of being composed of a series of images and therefore was not qualified for protection.

Hence, if the videos and animation effects in a game meet the requirements of the *Copyright Law* for audiovisual works or works created by a process analogous to cinematography, they can be categorized and protected accordingly.

4.2.2. Overall Game Screen

4.2.2.1 Cases recognizing the overall game screen as an audiovisual work or work created by a process analogous to cinematography

A seminal case which recognized the overall game screen as “work created by a process analogous to cinematography” is the “MU” case. Many media outlets commented that this marked the first instance in which Chinese court recognized the overall game screen as a “work created by a process analogous to cinematography”. [11] In the trial of first instance of “MU” case [12], the Pudong New Area People’s Court of Shanghai held that, in terms of the overall game screen, its mode of expression, wherein, following the player’s operations, the game characters continuously unfold a narrative within a virtual setting, producing a sequence of images combined with text and other content, and was transmitted via computers in a manner similar to that of cinematographic works. Furthermore, based on the interpretation of Article 2(1) of the *Berne Convention* concerning “work created by a process analogous to cinematography”, which does not restrict the method of “filming” but merely requires a mode of expression process analogous to cinematography. Therefore, the court confirmed that the overall game screen could be protected as a “work created by a process analogous to cinematography”.

In the second instance [13], the Shanghai Intellectual Property Court held that because video games present continuous dynamic images rather than static scenes during gameplay, and affirmed the judgment of first instance.

Subsequent to the “MU” case, it gradually became a trend that the overall game screen was increasingly recognized as an audiovisual work or work created by a process analogous to cinematography in other cases. For instance, in the “Tai Chi Panda v. Hua Qian Gu” case [14], both the trial and appellate courts confirmed that the overall dynamic screen of the game “Tai Chi Panda” could be regarded as a work created by a process analogous to cinematography. Similarly, in the “Overwatch v. Hero Firefight” case [15], despite the game’s being of the FPS

genre [16], the court found that the continuous dynamic images, whether the movement of heroes or the process of using weapons and releasing skills, met the requirement of being “composed of a series of images with or without sound” as set forth in the *Berne Convention* and *Chinese Copyright Law*, and thus could be recognized as a “work created by a process analogous to cinematography”.

Under the current *Copyright Law*, the earlier “cinematographic works and works created by a process analogous to cinematography” has been replaced by the term “audiovisual works”. Consequently, after June 1 of 2021, judicial practice has predominantly employed the term “audiovisual works” when categorizing the overall game screen. On June 18, 2021, in the copyright infringement case of the game “Legend of Mir”, the Shanghai Third Intermediate People’s Court confirmed that the continuous dynamic images in the game constituted “audiovisual works” [17] under the *Copyright Law*. This case was even publicized as “the first criminal case protecting the audiovisual works of video games” [18]. Although further legislative clarification on the definition of “audiovisual works” is still anticipated, the court in that case held that the continuous dynamic images of the game, which can be categorized as “works created by a process analogous to cinematography” under the *Copyright Law* of 2010 and “audiovisual works” under the current *Copyright Law* according to relevant judicial practice and precedents, were clearly protected by *Copyright Law*.

4.2.2.2 Cases not recognizing the overall game screen as an audiovisual work or work created by a process analogous to cinematography

There are also precedents in judicial practice where the overall game screen was deemed not to constitute a work created by a process analogous to cinematography. For instance, in the “KOF v. Digimon Adventure” case, the first instance court held that the activities of characters and the progress of levels do not constitute continuous images and lack the concrete expression method of film plots, therefore do not constitute cinematographic works. [19] The second instance court confirmed this view, noting that the overall screen in video game, which includes static images depicting elements such as teams, fighters, bars, stores, inventory, missions, and guilds, were primarily presented in a static form, realizing the change and switch of static images based on the player’s operations. Except for some beginners guide and automatic battle scenes that exhibited a few seconds of continuous display, most of the game screens did not show continuity and failed to impart the impression of movement of characters or objects in the screens, nor did they convey corresponding plots or storylines, therefore did not constitute continuous dynamic images of “work created by a process analogous to cinematography” [20].

4.2.2.3 Summary: key factors considered in determining whether an overall game screen constitutes an audiovisual work or work created by a process analogous to cinematography

A synthesis of the above cases reveals that there are several key factors to consider when determining whether an overall game screen is qualified as an audiovisual work or work created by a process analogous to cinematography in Chinese judicial practice:

① Extension of the “filming” requirement

With the development of technology, the recognition of audiovisual works or cinematographic works under copyright law is also constantly evolving. The Judicial Research Institute of the Supreme People’s Court has observed that the scope of the “filming” requirement as set out in the *Implementing Regulations of the Copyright Law* has also expanded. The requirement of “filming” is no longer limited to traditional production methods, therefore, the restriction on recording equipment in the concept of audiovisual works no longer exists. In terms of artistic forms, video games with certain plots, character roles, or scene settings bear a close resemblance to audiovisual works and both are a comprehensive form of art, which combines various types of works such as text, music, and art via computer programs. In the absence of

explicit statutory categorization of video game works under Copyright Law, their nature aligns more closely with the characteristics of audiovisual works [21].

② Requirement of presenting continuous dynamic images

Judicial practice typically requires that the overall game screen present continuous dynamic images rather than a series of static images when determining the type of work of overall game screen. If the overall screen primarily consists of a series of static images, it is difficult to satisfy the requirements for protection as an audiovisual work or work created by a process analogous to cinematography, and it may mainly be considered the possibility of protection under the category of works of the fine art. Compared with continuous dynamic images, plots are not an absolute necessity. Although traditional cinematographic works often have plots and story developments, in genres such as shooting games without traditional narrative, if the overall game screen is continuous and dynamic, it can also meet the requirements of cinematographic works.

5. Conclusion: Advantages and Disadvantages of the Element Splitting Approach

There is no denying that, in the early stages of copyright protection for video games, the element splitting approach played a significantly constructive role. This approach facilitated easier comparison for infringement analysis and streamlined judicial proceedings to some extent. However, split protection may also give rise to challenges regarding the determination of originality, potential for overlapping or ineffective protection, thus cannot effectively curb the occurrence of infringement behaviors. Given that the Copyright Law has been amended to include the an open concept in work category of “other intellectual achievements conforming to the characteristics of the works”, it may be more appropriate to shift from split protection to an overall protection approach for video games.

Acknowledgments

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References

- [1] For example, the Guangdong Higher People's Court's Guidelines for the Trial of Civil Disputes Involving Intellectual Property Rights in Online Games (Trial Implementation) released in April 2020; the Ministry of Culture's Interim Measures for the Administration of Online Games' implemented in August 2010 (this regulation was abolished in July 2019); the Notice on Improving and Strengthening the Management of Online Game Content' issued by the Ministry of Culture in 2009; and the Notice on Strengthening the Management of Virtual Currency in Online Games' jointly issued by the Ministry of Culture and the Ministry of Commerce in 2009.
- [2] Article 3 of Copyright Law of China: For purposes of this Law, the term “works” means intellectual achievements in the fields of literature, art and science, which are original and can be expressed in a certain form, including: (1) written works; (2) oral works; (3) musical, dramatic, quyi, choreographic and acrobatic art works; (4) works of the fine arts and architecture; (5) photographic works; (6) audiovisual works; (7) graphic works such as drawings of engineering designs, product designs, maps and sketches, and model works; (8) computer software; (9) and other intellectual achievements conforming to the characteristics of the works.
- [3] Beijing Haidian District People's Court, (2013) Haidian Civil Initial No. 27744.

- [4] After the third revision of China's Copyright Law, the concept of "cinematographic works and works created by a process analogous to cinematography" from the 2010 Copyright Law was absorbed into the current Copyright Law as "audiovisual works". Cases that occurred before the current Copyright Law took effect in June 2021 still followed the original provisions, recognizing the entire dynamic images of video games as cinematographic works. However, subsequent cases have classified them as "audiovisual works". Therefore, this article uses the term "audiovisual works/cinematographic works".
- [5] Shanghai First Intermediate People's Court, (2014) Hu No. 1 Min Wu (Zhi) Initial Civil Case No. 23.
- [6] Shanghai First Intermediate People's Court, (2014) Hu No. 1 Min Wu (Zhi) Initial Civil Case No. 23, Page 13.
- [7] Article 4 of the Implementing Regulations of the Copyright Law.
- [8] The "Green Halo Animation" is a dynamic effect that displays a green halo around the card's border, indicating that it can be used for an immediate attack in the game.
- [9] Shanghai First Intermediate People's Court, (2014) Hu No. 1 Min Wu (Zhi) Initial Civil Case No. 23.
- [10] In Article 3 of the Copyright Law of China, which was promulgated on November 11, 2020, and implemented on June 1, 2021, "audiovisual works" replaced the phrase "cinematic works and works created by a process analogous to cinematography." However, since the case occurred under the provisions of the copyright law that took effect in 2010, the court's judgment followed the then-existing copyright law, classifying it as "works created by a process analogous to cinematography".
- [11] Feng Fei, '5 Million Yuan Compensation Sets New High: First Domestic Case Recognizing Online Game Full Screenshots as cinematographic works Renders Initial Judgment', China Intellectual Property News, May 13, 2016, available at <http://www.ciplawyer.cn/html/jdalbq/20160513/122611.html>, (last visited July 24, 2022); Zhu Junchao, 'MU Case Final Judgment Announced: Court Recognizes Game Full Screenshots as Works Created by a Process analogous to Cinematography', Zhihu, April 10, 2017, available at <https://zhuanlan.zhihu.com/p/26284384>, (last visited July 24, 2022).
- [12] (2015) Pu 3 Min (Zhi) Initial No.529.
- [13] Shanghai Intellectual Property Court, (2016) Hu 73 Min Zhong 190.
- [14] First Instance: Suzhou Intermediate People's Court of Jiangsu Province (2015) Su Zhong Zhi Min Initial No. 201; Second Instance: Jiangsu Higher People's Court (2018) Su Min Final No. 1054.
- [15] First Instance: Shanghai Pudong New Area People's Court (2017) Hu 0115 Min Initial 77945; Second Instance: Shanghai Intellectual Property Court (2020) Hu 73 Min Final 148. However, since the parties withdrew their appeal during the second instance, the first instance judgment took legal effect.
- [16] First-person shooter games (FPS) also feature continuous visuals, but unlike role-playing games (RPG), FPS games typically lack rich storylines. The extensive continuous visuals are not pre-set; instead, they are dynamically created by multiple players following game rules through their individual actions.
- [17] Reporter Guo Jianfeng, 'Mir Changes to Legend of Memory, Legend of Jiangnan? Copyright Infringement Case of the Game Legend of Mir Announced at First Instance Trial', Xinmin Evening News, June 18, 2021. available at <http://newsxmw.xinmin.cn/fatan/2021/06/18/31977449.html>, (last visited on July 24, 2022).
- [18] Bruce, 'The First Criminal Benchmark Case of 'Audiovisual Works' After New Law Revision: A New Era for Strong Intellectual Property Protection in the Game Industry,' Zhichanli, May 13, 2021,

available at <https://baijiahao.baidu.com/s?id=1699636728034727985&wfr=spider&for=pc>, (last visited on July 24, 2022); Financial, 'First Criminal Protection Case for Online Game Audiovisual Works Announced Today', Financial Network, June 18, 2021, available at <https://baijiahao.baidu.com/s?id=1702914714976236476&wfr=spider&for=pc>, (last visited on July 24, 2022).

[19] Putuo District People's Court of Shanghai, (2017) Hu 0107 Min Initial No.27752.

[20] (2020) Hu 73 Min Final No. 33.

[21] Tao Kaiyuan and the Civil Division III of the Supreme People's Court, 'Intellectual Property Case Guidance' 2017, Volume 1 (Total Volume 29), People's Court Press, pages 162-164.