
LEGAL CHALLENGES OF THE INTELLECTUAL PROPERTY RIGHTS IN THE GAMING INDUSTRY IN INDIA

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ABSTRACT

The legal challenges surrounding Intellectual Property Rights (IPR) in the gaming industry in India extend beyond copyright concerns. Trademark issues arise prominently as fantasy sports operators employ registered brand names and logos. The nuanced application of nominative fair use is critical in determining whether such usage constitutes fair identification or potential trademark infringement. Additionally, the absence of specific regulations addressing the unique aspects of interactive and online gaming poses challenges. Courts grapple with defining the boundaries of exposure rights, raising questions about the inclusion of performance statistics within this domain.

Furthermore, the recognition and protection of contributors' rights, including developers and designers, become paramount for fostering a conducive environment for innovation. As the gaming industry continues to evolve and diversify, legal frameworks must adapt to encompass emerging technologies and business models. The absence of clear guidelines on issues such as virtual goods and in-game assets further complicates the legal landscape.

The gaming industry in India grapples with a myriad of legal challenges concerning Intellectual Property Rights (IPR). One prominent issue lies in the ambiguity surrounding the copyright protection of video game content, particularly in the rapidly evolving landscape of online and interactive gaming. The interpretation of exposure rights further complicates matters, raising questions about the inclusion of player statistics within the ambit of these rights. Navigating the fine line between permissible use and infringement remains a complex task, as demonstrated in cases involving fantasy sports operators. The application of nominative fair use to trademarks used in gaming also emerges as a contentious point. This abstract underscores the crucial need for a comprehensive legal framework that addresses these challenges, balancing the interests of creators, fostering innovation, and safeguarding the robust development of the gaming industry in India. As the sector continues to flourish, clarifying and adapting legal

provisions becomes imperative to nurture a conducive environment for creativity, investment, and sustainable growth.

In conclusion, a comprehensive legal framework addressing copyright, trademark, exposure rights, and contributors' rights is essential to support the dynamic growth of the gaming industry in India. Striking a balance between protecting intellectual property and encouraging innovation is pivotal for the industry's sustained success and global competitiveness. As the regulatory landscape evolves, it becomes imperative to proactively address these multifaceted legal challenges for the benefit of creators, investors, and the gaming community at large.

Introduction

The significance of safeguarding Intellectual Property (referred to as IP) was first acknowledged in the Berne Convention for the Protection of Literary and Artistic Works of 1886, which was administered by the World Intellectual Property Organisation (WIPO). This was subsequently followed by the Universal Copyright Convention of 1951, and finally, the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement of 1995. As the gaming sector is not specifically regulated in India, video games are also not included in any particular category of intellectual property law. Despite this, the Copyright Act, of 1957 (popularly known as the "Copyright Act") does define "cinematography works." under **Section 2**¹ which states "any work of visual recording on any medium produced through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual recording and 'cinematograph' shall be construed as including any work produced by any process analogous to cinematography including video films."

The Indian Copyright Act of 1957 was established to comply with most of the International Conventions and the TRIPS Agreement. Copyright is a set of exclusive rights available to the original creator or author of artistic, dramatic, literary, computer software, computer programmes, musical and cinematographic work, and sound recordings. The author's rights enable them to sell or reproduce their work and commercially exploit it through licensing, adaptation, translation, and assignment². The definition of the "process akin to

¹ Section 2 of the Copyright Act.

² Section 14 of Indian Copyright Act, 1957.

cinematography" in the above description makes it clear that video games are clearly covered by copyright.

Additionally, since *Article 10³* of the Trade Related Intellectual Property Rights Agreement (henceforth referred to as "TRIPs") expressly states that computer programs, whether in source code or object code, shall be protected as literary works under the *Berne Convention, 1971* (henceforth referred to as the "Berne Convention"), the Copyright Act permits computer programs to be secured as literary works.

Even while there isn't a written law specifically protecting games, there are now laws that offer e-sports some fictitious protection. For example, trademark law helps protect the name, distinctive identity, and symbol of e-sports.

However, the Patent Law protects gaming accessories like joysticks, gaming consoles, and any other technological gadget that makes playing a game easier.

While the copyright law protects the game's source code, background music, and other creative aspects of e-sports. When the game's makers or developers decide not to publish its codification, trade secrets are relevant.

The Indian gaming industry is estimated by Forbes to be worth over \$890 million, and it is among the top five countries in the world for mobile gaming. The size of the gaming business is such that everyone is aware of the need for legislative protections in this area.

The Indian Copyright Act recognizes both the economic and moral rights of the owner of the copyright. These rights have been recognized in the TRIPS Agreement and Berne Convention. Economic rights enable the owner to commercially exploit their copyrightable work and receive economic benefits from it⁴. These rights have been recognized in various forms since the fifteenth century. Section 14 of the act states that the original owner or author has the exclusive right to reproduce, distribute, and communicate to the public their copyrightable work. In addition to economic rights, the Indian Copyright Act also includes moral rights under section 57, based on Article 6bis of the Berne Convention. Moral rights allow the author to

³ Article 10 TRIPS

⁴ J.A.L. Sterling, BACKGROUND AND BASIC PRINCIPLES, in WORLD COPYRIGHT LAW 279 (3 ed. 2009).

prevent, preserve, and nurture their creation. In the case of *Amarnath Sehgal v. U.O.I.*⁵, it was held that the moral rights of an author are essential to their work as it reflects their personality. Moral rights are an exception to the general rule that after an author has assigned the rights to a distributor or third party, only the latter is qualified to sue in regard to any infringements. An author can claim their moral rights even after assigning their work.

The Indian Scenario

1) Copyright

Since video games are considered "creative works" in India, they may be protected by the Copyright Law. To be more precise, these online games' many components may be protected as Copyrightable work.

Video games developed using software can also be protected in the same manner as software is under the Copyright Law. The plot, characters, music, and some portions of the code are all protected as "works" under *Section 14 of the Copyright Act*. Therefore, the aforementioned area might include key components of video games.

Additionally, video games may fall under the protection of *Berne Convention Article 2*⁶, which also covers other literary and artistic works. Video games in India may also be protected by Article 2 of the Berne treaty as the country is a signatory to the aforementioned treaty.

2) Trademark

Trademarks protect the game's characters as well as all associated names, logos, and symbols.

According to Section 30 of the Trademarks Act, 1999 (henceforth referred to as the "Trademarks Act"), there are a few instances in which nominative and descriptive fair use may be inferred.

The Trademarks Act's Section 30 (2)(a) describes the use of a registered trademark in a descriptive manner, meaning that it can be used in relation to goods or services to specify the

⁵ Amarnath Sehgal v. UOI, 2005 (30) PTC 253

⁶ Article 2 talks about protected works

kind, caliber, quantity, intended use, value, place of origin, timing of production, or other characteristics of the goods or services.

The use of a registered trademark by a person in relation to goods that have been altered to be accessories or parts of it is then covered by Section 30 (2)(d) of the Trademarks Act, provided that it is reasonably necessary to indicate that the goods that have been adapted are compatible with the goods that are marketed under the trademark.

3) Patent

"Operational techniques and methods" are not protected by the Copyright Act, which only covers the representation of computer code methods. *The Patents Act, of 1974* (henceforth referred to as the "Patents Act") steps in to save the day.

The Patents Act protects the game's operational characteristics, or its scope, as opposed to its theoretical aspects, or its creation process and final result.

Thus, in order to obtain patent protection, it is required to demonstrate that any hardware is equally important to software, as per Section 3(k) of the Patents Act, and that software must be connected.

Video games have patent protection in India since their software is connected to their hardware, which includes the controller and console, two equally significant components.

4) Industrial Design

*Section 2(d) of the Designs Act, 2000*⁷ (hereinafter referred to as the "Designs Act"), defines "design" as any features of shape, "configurations, patterns, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye. "

Therefore, the Designs Act protects the games' visual characters as well as their gaming cover and graphic interface. Only the external features of game characters and other models within the aforementioned section—such as their shapes, lines, contours, colors, and textures—are

⁷ Section 2(d) of the Designs Act, 2000

protected by industrial design protection in the gaming business; technological functionality is not protected.

5) Licensing

The success of video game production, marketing, and distribution depends on video game licensing. The game's original creator may sign several license contracts to allow for the sale and distribution of the creation.

Since the beginning of the business, developers and producers have been including licensed material in their games, not only to keep everyone entertained but also to draw in a wider audience by utilizing well-known technologies to create more authentic games. Written licenses must adhere to intellectual property laws in order to safeguard the rightful rights of the creator.

Issues Relating To Intellectual Property Protection In Video Games

1) Game Creation

Due to a variety of factors related to the creation of video games, certain programme elements are copyrighted separately, while other programme elements are either common creatives or already in the public domain and cannot be protected by copyright.

2) Common Assets

The ability to "borrow" assets for use in games is provided by a number of websites. Diverse websites utilize various approaches to grant access and permission to utilize these resources.

With the majority of their assets being utilized just once, the standalone companies create vast, complex universes. Limited assets are available to the public. Game developers usually face the challenge of reproducing these assets in order to create a new game, as it is expensive to create assets that are economically viable, which limits the number of games that smaller companies can produce.

3) Game Engines

The idea that allows a designer to create games is called a game engine. Companies that make

these engines enable game creators to build games. But certain designs or background work could look different in every game made with that engine because of limitations or peculiarities.

This feature is not protected by copyright as it is essentially the same in every game created with that engine. This logic also applies to games made using the same engine and sharing source code; they wouldn't be seen as duplication, but they also can't be protected by any intellectual property rights.

4) Producers-Developers Relation

In the past, publishers were in charge of finding (providing) funding for a game, taking losses, and, frequently, advertising it. However, a new generation of financial and distribution instruments has emerged with the advent of the Internet and independent culture.

By pre-purchasing the game, players may directly contribute to its construction through websites such as Kickstarter and Indiegogo. The business has been able to shift away from the conventional paradigm wherein publishers own intellectual property rights instead of creators because of these improvements.

5) Music Creators, Voice Actors, and Other Contributors

Contributors who don't directly alter the game's code aren't covered by copyrights for literary works, although they may be if an audio-visual copyright was lifted. Since the majority of contributors are workers, their work is regarded as work for hire and belongs to their employer rather than them in terms of authorship rights.

Challenges Faced by Game Developers

The gaming industry's exponential growth has presented several obstacles, including those related to intellectual property (IP) protection, game copying, and other related issues. The popularity of digital distribution has made it simpler for dishonest businesses to steal famous games and pass them off as their own, violating the intellectual property and good name of the original game.

The problem of game duplication is one of the largest obstacles to IP protection in online gaming. When a corporation copies a game developed by another company and sells it as its

own, this is known as game cloning. This can damage the reputation of the original game and the company that made it, in addition to violating the intellectual property rights of the game. The mobile gaming business is a prime example of game cloning, since companies may easily replicate popular games due to low entry barriers and easy access to production tools. Cloning a game might mislead users or customers and cost the original game's creators money.

INDIAS GAMING LAWS: CHALLENGES AND SOLUTIONS

- 1) The gaming sector faces a number of developing difficulties, such as incomplete or inaccurate contracts, the use of generic terms such as trademarks or logos, third-party intellectual property rights, and confidential data.

Having suitable service or developers' contracts with the game developer can greatly lessen the difficulties arising from an incomplete or inaccurate assignment of rights and their enforcement in India. White labeling gaming software might provide difficulties if the gaming corporation lacks the necessary authorization to pursue third parties that violate its intellectual property rights. One of the main problems for gaming firms is inaccurate, insufficient, or incomplete licenses and assignments.

There is yet another branding difficulty. "The majority of gaming corporations utilize general titles as their brands or trademarks, such as cricket, ludo (a strategic board game adapted from the Indian game Pachisi), poker, rummy, or poker". "Before releasing the game in India, the companies should adopt and use distinctive brands and marks, and preferably conduct preconflict checks."

Regarding intellectual property rights (IPRs) and proprietary data, gaming companies use player names, photos, jersey numbers, and other indicators in the game format or for promotion and advertising, which may violate the owner's exclusive rights. "With the growth of fantasy sports and involvement of personalities and fictional characters in gaming, it is crucial to recognize and obtain permission to use third-party IPRs," the statement reads. Fantasy sports and other mobile games rely on real players' goals, records, and other material. While they may not fall under the standard intellectual property rights, they are still protected in many countries as private information or quasi-proprietary rights. The game corporation that is exploiting the content might face difficulties if it is used without authorization."

- 2) The significance that trademark law has gained in the last ten or so years is evident from the latest advancements. "The name of a game determines its identity, which then spreads to its visuals and—most importantly—its characters. While a game's name must be chosen in accordance with trademark law, the character of the game must be developed with copyright considerations in mind.

However, it's not quite obvious what kinds of content—such as a game's character, graphic representation, sound design, plot, etc.—are protected by copyright laws. It is getting more and harder for owners of brand names and authors of content that is protected by copyright to successfully and effectively protect their intellectual property (IP) in light of the increased exposure and accessibility of both brands and content.

It is imperative for a game's inventor, developer, and owner to prioritize comprehensive game protection over merely implementing piecemeal measures to preserve individual game components. Furthermore, until the owner aggressively prosecutes violators who violate the game's intellectual property, simply safeguarding it will not be adequate. It could also be accurate to say that novel concepts might be necessary in order to uphold rights. If a game's owner is wealthy, it should have an online investigative team that evaluates games from other sources, particularly those that are directly competing with it. Other game developers should think about contracting out this kind of work to other companies, as it will be affordable and yet provide good outcomes.

Indian Legislation – Copyright Act, 1957

According to the Indian Copyright Act, of 1957, the person who causes the creation of any computer generated literary, dramatic, musical, or creative work is referred to as the author. A painting, sculpture, drawing, engraving, photograph, or any other type of artistic workmanship, whether or not it has artistic qualities, is considered an artistic work. An architectural construction is also considered an artistic effort. It is often mentioned that a literary work contains computer programmes. Consequently, it can be said that video game base codes are eligible for copyright protection just like any other software or literary creation. Software programmers' rights were added by the Copyright Amendment Act of 1994.

Video games are not subject to censorship or legal categorization, in contrast to filmmaking. Video games' legal categorization is determined only by modifications made to business

procedures, and even then, only by specific case-specific technicalities. Because video games are novel and there is a lack of precedence, it is unclear if they fall within the umbrella of cinematographic works. Cinematographic films are defined as any work of visual recording that contains a sound recording accompanying such visual recording under **Section 2(f) of the Indian Copyright Act**⁸. Cinematographs are interpreted to encompass any work created by any method similar to cinematography, including video films. Therefore, it is suggested that, with careful interpretation, video games might be classified as cinematographic films by interpreting the phrase "any process analogous to cinematography," however this is disputed because there isn't much precedence for this topic.

The case of *Mattel Inc. and Ors. v. Jayant Agarwalla*⁹ is centered around the copyright protection of the game 'Scrabble' in India. In this legal dispute, the plaintiffs, who own the 'Scrabble' trademark globally (excluding the USA and Canada), claimed copyright protection in India for the game's layout and rules under the International Copyright Order, of 1991. They argued that it falls under the category of artistic work.

The defendants, who had a similar online game called 'Scrabulous,' were accused of using deceptive metatags. For instance, they employed the same color border tiles and a star pattern on the central square, which the plaintiffs considered an infringement of artistic work.

However, the court ruled against granting copyright protection to the plaintiffs, citing the doctrine of merger and **section 15(2)**¹⁰ of the Indian Copyright Act. The doctrine of merger suggests that if there are limited ways to express an idea, copyright protection may not be granted. Section 15(2) of the Indian Copyright Act indicates that copyright does not apply in cases where the idea and expression cannot be separated.

As a result of the court's decision, the defendants were prohibited from infringing the 'Scrabble' trademark and using marks, including 'Scrabulous,' that could be deemed deceptive or similar to 'Scrabble.' This case underscores the intricate nature of copyright protection, involving legal considerations such as the doctrine of merger and specific statutory provisions. It also highlights the significance of trademark protection in disputes involving marks that may cause

⁸ Section 2(f) of Indian Copyright Act, 1957

⁹ *Mattel Inc. and ors. v. Jayant Agarwalla* 2008 (153) DLT 548

¹⁰ Section 15(2) of the Indian Copyright Act

confusion.

In a case before the Delhi High Court, *Sony Computer Entertainment v. Harmeet Singh*¹¹, an extensive discussion on the originality of work unfolded. The defendants in this case were found altering the internal software program of Sony PlayStation's three consoles and selling them. This legal battle marked a significant moment as it was the first time the courts thoroughly explored the originality of content in video games, providing clear legal insights into the matter. The court responded by issuing an injunction against the defendant, specifically addressing the unauthorized manipulation of technological software in Sony gaming consoles.

As the video game industry continues to advance, it brings forth new challenges, especially in the realm of online gaming. Currently, it remains uncertain whether video games fall under specific categories of work eligible for copyright protection. The judiciary has yet to address specific issues related to interactive gaming. It is crucial to recognize the legal status of contributors for the ongoing development and progress of the gaming industry.

Identifying Issues:

1) Lack of a distinct category for digital games:

Digital games are made up of two main parts: (i) audio-visual components such as pictures, (ii) software that controls the audio-visual components and allows for user interaction. Each of these components will have its own copyright protection in India. However, because "digital games" are not a defined class recognized by Indian law. Under Indian law, a digital game cannot receive copyright protection on its own. To put it another way, India uses a "distributive classification" to safeguard digital games against copyright infringement.

The components of a digital game that can be protected under Indian law are extremely difficult to determine. The lack of clarity has resulted in an increase in clone/copycat games as well as piracy. Because the difference between creative expression and unprotectable thoughts is still blurry, it is easy for copies to copy the original content in digital games.

2) Lack of game patentability:

Patents can give protection for features of a game that are outside the purview of copyright

¹¹ Sony Computer Entertainment v. Harmeet Singh 2012(51) PTC

protection, such as gaming strategies, graphic design, and user interface, as long as it can be demonstrated that these are new, original, and have an industrial application. However, according to Indian patent law, the "mere" act of playing a game does not qualify as an invention, hence games or the specific technologies or techniques contained inside them are not patentable.

Finally, E-sports is a prime example of how developing industries and technological improvements can expose both new aspects of IP law and flaws in its current design. The development of IP legislation is frequently dependent on the introduction of new industries and technologies. This movement argues for a return to basics, with new technologies considered as facilitating the evolution of IP law rather than requiring brand-new, sector-specific rules. New areas and technology bring both opportunities and challenges. When such concerns arise, intellectual property law should not be employed quickly. New technologies provide an opportunity to thoroughly think on more broad guiding principles that are not bound to any single technology.

Intellectual Property Rights in Fantasy Sports – A Critical Analysis

1) IP Rights: Use of Players' Names, Team Logos, and so forth

The use of player names and team logos in fantasy sports platforms is a problem. These platforms allow users to select specific players from different teams using player names, team logos, and other information. While users are granted some intellectual property rights, such as picture rights, there isn't much valid legislation available on this topic in India.

Dream sports platforms are designed with alliances, contests, and players in mind, rather than specific players. The platforms have regular commercial game plans with teams that allow them to use their intellectual property. The names and images of athletes are used by dream sports platforms only for identification purposes, and their use does not imply endorsement of the dream sports game.

Unfortunately, Indian courts have not handled publicity rights cases related to fantasy sports platforms well, which makes this a complicated issue.

2) Right to Publicity and Trademark Protection

In Dream11, players select their preferred team by choosing the best 11 players from an upcoming game. It is important to understand the concepts of the right to privacy and publicity. The right to publicity refers to a celebrity's entitlement to manage and prevent the unauthorized use of their name, likeness, voice, and other aspects of their identity. There is some uncertainty about whether a player's publicity rights extend to their performance statistics, but US courts have clarified that players have the right to publicity over their performance metrics, which prevents commercial exploitation without permission.

On the other hand, there have been cases where courts have found that using a celebrity's likeness to promote a related product does not violate their publicity rights, as there is a significant public interest in the information conveyed by the league. However, ambiguity arises when player statistics or images are used for commercial purposes. Fantasy sports operators may argue that the use of such publicity rights is nominative and permissible when necessary to identify the player. This becomes acceptable when used for nominative purposes and with the appropriate license to avoid intellectual property infringement.

Identifying Issues:

There is no distinct category for digital games:

Digital games consist of two main parts: (i) audio-visual components such as pictures, and (ii) software that controls the audio-visual components and allows user interaction. Each of these components receives its own copyright protection in India. However, there is no defined category for "digital games," which can create confusion.

Copyrightability of Sports Statistics

When creating fantasy sports games, it is important to obtain licenses for using a player's image, name, likeness, and personal information from the player or their respective organizations. Additionally, licenses are required for using team names and logos. However, do statistics that include game-play information and characteristics also require licenses? For example, a football player's passing accuracy may be simple numbers or historical data for a layman, but for a fantasy football manager, it is essential information to make decisions about selecting that player. Facts and statistics have been essential to the operation of fantasy sports games since their inception. This information can be obtained from a specific source or publicly available

data, but it may still be subject to copyright infringement claims from the owner. Therefore, determining the copyrightability of facts becomes crucial.

Conclusion

With the technological advancements in the video game industry, it is important to note that many video games may share similar base code and be developed on the same line of software programs. Video games are created with a combination of different elements that can be copyrighted individually. However, due to their complex and multifaceted nature, video games pose numerous challenges in terms of copyright protection. Developing a video game can involve a number of individuals engaged in various aspects of authorship. Therefore, whether these stakeholders hold any protection for their work depends upon the contribution and originality of the work and the specific requirements of each jurisdiction. Although the current legislative framework does not provide protection for video games and their work from being infringed, an innovative set of intellectual property strategies, in accordance with the provisions of the Indian Copyright Act of 1957, can impeccably protect the interests of the development team and other stakeholders involved. As the industry continues to grow rapidly, proportional legal protection from infringement of video games would benefit the video game industry and all concerned investors, developers, and players.

In summary, the field of intellectual property rights (IPR) encounters challenges within the Indian video game industry. Ambiguities surrounding the copyright protection of video game content, especially in the context of online and interactive gaming, present significant obstacles. The interpretation of exposure rights, encompassing the use of player statistics, introduces further complexity. Likewise, the application of nominative fair use concerning trademarks used by fantasy sports operators remains a disputed issue. It is crucial to clarify and update legal frameworks to address these evolving concerns, ensuring the protection of creators' rights, fostering innovation, and sustaining the continued growth of the video game industry in India.