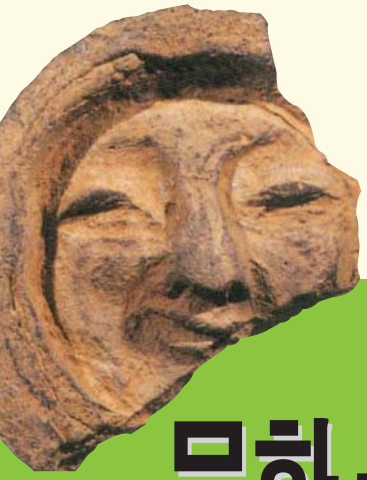
ISSN 2092-6138



제12권 제2호

문화·미디어·엔터테인먼트법

2018년 12월 30일

중앙대학교 법학연구원 문화·미디어·엔터테인먼트법연구소

목 차

New Approaches to and Limitations in Judgment on Copyright Infringement in Video Games

Seung Soo Choi
(법무법인 지평 변호사)

중앙대학교 법학연구원 문화·미디어·엔터테인먼트법연구소
문화·미디어·엔터테인먼트법 제12권 제2호(2018. 12) http://dx.doi.org/10.20995/CMEL.12.2.7

New Approaches to and Limitations in Judgment on Copyright Infringement in Video Games

Seung Soo Choi*

Index

원고투고일 : 2018.04.17. 심사일 : 심사1 2018.06.04. 심사2 2018.06.01.
심사3 2018.06.10. 게재확정일 : 2018.12.24.
* 법무법인 지평 변호사

1. Current Status of Video Game Industry and Cloning Issue

Today, video games have considerable economic and cultural influence. Its revenue has long exceeded those of movies and music, the traditional entertainment sectors. Halo Series 5, Microsoft's console game raised the revenue of USD 40 million within 24 hours of its release, exceeding that of any Hollywood blockbuster movies.[1] Well-known game publishers place game ads at enormous expense during the Super Bowl in the US. The web site Twitch allows the gamers to record their own game and use such video footages to provide streaming services to its 50 million members, and the popularity of famous pro gamers in eSports is second only to David Beckham.

The average age of game players in the US is 35, and 42% of the video game players spend an average of 3 hours a week on the game. In 2015, the worldwide revenue of the video game industry reached USD 91 billion. The US and China accounted for USD 44 among such a figure. In 2016, 80% (144 million) of the smart phone users in the US played games with their smart phones. Considerable number of mobile games can be downloaded free of charge, however, the game publishers make enormous profit through micro transactions, where the players purchase items, etc. for the game within the application. This is so-called the freemium business model. It is being established as a model through which a colossal amount of revenue can be raised from the tremendous number of smart phone users. In 2014, the mobile game industry alone realized revenue of USD 1 billion, featuring exponential growth by games such as Candy Crush Saga, Clash of Clans, and Puzzle & Dragons.

Cloned video games are lining up to join the bandwagon for opportunities to make money. A well-known example may be the unprecedented success of Angry Birds as an arcade game as well as in the mobile platform, which were followed by the release of such games in the app stores as Angry Rhino: Rampage!, Angry Alien, and Angry Pig. Recently, there is no end to copyright infringement disputes even in Korea, not to mention the dispute involving game plagiarism between 'Friends Pop', a famous mobile puzzle game,

---

1) John Kuehl, "Video Games and Intellectual Property: Similarities, Differences, and a New Approach to Protection," 7 Cybaris An Intell. Prop. L. Rev. 313, 314 (2016).

and 'Friends Popcorn' recently released by Kakao.

We will hereinafter review the theories and precedents in the US and Korea with respect to the criteria for judgment on copyright infringement in video games, and how the application of the copyright law must change to accommodate the new game environment.

2. Historical Developments in Video Game Copyright

1) Early Days

The origin of commercialization of video games was the arcade game, which was a by-product of the experimental attempts by academic researchers, and was followed by numerous household console games and arcade machines. Pong game was followed by countless imitations, and we witnessed a swift growth which came to be known as the golden age of arcade games. From the end of the 1970s until the mid-1980s, the courts in the US began to issue judgments on copyright infringement issues related to video games, and at first, it was decided that video games, which were a new type of copyright work, were copyrightable. The main issues discussed included how to classify the video game (whether as software or as cinematographic work), what conditions of fixation to apply to the interactive environment and the ever changing screen, and in which elements of the game the copyright shall be acknowledged.

2) Age of Consoles

This is the period from the end of the 1980s until the early days of the 2000s. This era witnessed innovative developments in video game consoles and hardware, which resulted in expansion of the game industry, but the fierce legal battle involving game cloning or idea-expression dichotomy were yet to unfold.

3) Age of Multi-Platforms

This refers to the present era which began in the early 2000s. With diversification of game platforms, now it is possible to play games on various platforms such as household consoles, PC, and mobile devices. Especially, mobile- and web-based video games emerged as a new type of video games. The main legal issues in copyright infringement lawsuits nowadays include issues involving substantial similarity in video games, ownership issues with respect to works created by users with in-game tools, legitimacy of digital market places in games, and freedom of expression in video game content.[2] The changes in the technical environment for game development and the structural changes in the game industry induced development of the copyright law with regard to games. In the early days, the video games were recognized as falling under the domain of copyright protection, but no noticeable changes occurred in terms of game technology or application of copyright law in the age of consoles. However, attempts to adapt the copyright laws to the new Internet economy and the mobile environment began to be made in the age of multi platforms.

3. Copyrightability of Video Games

1) Classification of Games as Copyright Works

Video games not only have various elements that can be viewed individually as copyrightable expression, but are also copyrightable as a whole. That is, the game mechanics included in a game are protected by copyright law separately as creative expression as a whole.

① Cinematographic works

Under the Korean Copyright Act, the cinematographic works are defined as "a creative production in which a series of images (regardless of whether

2) Christopher Lunsforda, "Drawing a Line between Idea and Expression in Videogame Copyright: the Evolution of Substantial Similarity for Videogame Clones," 18 Intell. Prop. L. Bull. 87, 92-93 (Fall, 2013).

accompanied by sound) are recorded, and which may be seen or concurrently seen and heard through a reproduction by mechanical or electronic devices". The definition of cinematographic work (audiovisual work) under the US copyright law is not much different ("work that consists of a series of related images that are intended to be shown by the use of a machine or device, together with accompanying sounds, if any.") According to such definitions, video games, which appear on the screen as a combination of images and audio, are easily recognized as cinematographic works. It means that they are protected separately apart from the software or hardware which enables to realize such cinematographic effects.

This conclusion was affirmed by a US court precedent in the early days. In Stern Elecs., Inc. v. Kaufman, the court reviewed the issue whether the video games as an object can be granted protection concurrently as cinematographic work and also as software, and concluded that the overlapping protection was possible.

Even if the software, which is the underlying literary work, exists independently and is copyrightable on its own right, the audiovisual deployment is also evidently copyrightable as original work. There is no reason to deny further copyright protection on the ground that the audiovisual work and the computer program are concurrently embodied in one game. It is analogous to an audio tape, which concurrently embodies the musical work and the sound recording, each entitled to separate rights.

② Computer program

The computer code which enables the video games to operate, i.e. video game software, is protectable as literary work. Therefore, if the software of another game were copied to make a similar game, although copyright infringement may not be acknowledged due to dissimilarities in video, it will still constitute software copyright infringement. The consumers who purchase and use the video games are not interested in the computer code of the game, but in the audiovisual experience offered by the game. However, clone game developers do not need to copy the existing software code because they can use different software code to almost identically reproduce the audiovisual aspect and gameplay of an existing popular game.[3)]

---

3) Drew S. Dean, "Hitting Reset: Devising a New Video Game Copyright Regime," 164 U. Pa. L. Rev. 1239, 1252(2016).

The copyright issue raised after establishment of the fact that software is protectable as literary work is to distinguish between the idea and expression elements of the software.[4)]

③ Derivative work

Video games can be made from the existing copyright works, novels, comics or movies as the original, in which case the games become derivative works. In such a case, the game developer must obtain permission from the original author.

2) Idea-Expression Dichotomy and Classification of Game Elements

The fundamental principle of the copyright law is to protect the expression embodying an idea, but not the idea which is the basis for such expression. The determination of which among the numerous elements comprising a video game constitute the idea and which constitute the protectable expression is an issue directly connected with whether copyright infringement stands. We will hereinafter review the elements which draw the most controversies.

① Game mechanics

Game mechanics are constructs of rules or methods designed for interaction with the game state, thus providing gameplay.[5)] In general, game mechanics are treated as idea rather than expression.[6)] However, it is by

---

4) *Computer Associates International Inc. v. Altai Inc.*, 982 F.2d 693 (2d Cir. 1992). The plaintiff (Computer Associates) claimed copyright infringement when its ex-employee left to work at the defendant company (Altai) and developed a program, borrowing considerably from the program he had worked on while he was with the plaintiff company. In response to the copyright infringement claim, Altai engaged another employee to rewrite an entirely new computer code based on a statement listing the originally desired functions. In judging whether such newly created software was substantially similar to the plaintiff's software, the court applied the abstraction-filtration-comparison (AFC) test and found that the two programs were not similar.

5) https://en.wikipedia.org/wiki/Game_mechanics

6) Nimmer & Nimmer, §2.18[H][3][a] (no copyright may be obtained in the system or manner of playing a game or another sport.)

no means easy to distinguish between the game mechanics themselves and the expression thereof. The idea-expression dichotomy in game mechanics is very important in judging copyright infringement in games because the inventiveness of a video game lies usually on new and unique game mechanics. As the video games become more complex, the court needs to be very discreet in completely excluding copyrightability of game mechanics. It is ever so difficult to determine which aspect constitutes expression in the gap between gameplay mechanics and game graphics.[7] Copyright can be obtained in the expression elements of game mechanics, such as the design of game label, game board or card, or graphics. In case of an abstract puzzle game such as Tetris, which aspects of the game mechanics are protectable expression is determined depending on the method of embodying the rules of the game.[8]

② Look and feel of the interface

The look and feel, or total concept and feel of a game can also be copyrightable elements.[9] The look and feel of software, also known as graphical user interface (GUI), refers to the interaction between user and software through the menu, and may be the key factor in the success of the relevant game software. Software users want intuitive, informative and user-friendly GUI. The shortcut to the success of a game lies in the method in which the game players interact with the videogram. Historically, most software lawsuits involved the dispute between software with such appealing look and feel, and subsequent software imitating the same.

In *Atari, Inc. v. Amusement World, Inc.*, a precedent from the early days, the overall difference in the feel of both games was cited as one of the basis of the argument against copyright infringement.[10] In the more recent *Tetris* case, the overall look and feel of the gameplay of both games, found to be identical upon examination, was cited as the basis for the conclusion of substantial similarity.[11] Naturally, even if the look and feel of both games were found to be identical or similar, it shall be presumed that such look

---

7) Drew S. Dean , p. 1254.
8) Christopher Lunsforda, p. 98.
9) Christopher Lunsforda, p.96.
10) *Atari, Inc. v. Amusement World, Inc.*, 547 F. Supp. 222, 230 (D. Md. 1981).
11) *Tetris Holding, LLC v. Xio Interactive, Inc.*, 863 F. Supp. 2d 394, 410 (D.N.J. 2012)

and feel is the expression, rather than the idea. It is disputed whether the GUI of a software constitutes the idea or expression under the copyright law. However, in *Apple Computer, Inc. v. Microsoft Corp.*,[12] the US Court of Appeals, Ninth Circuit dismissed Microsoft's assertion that the GUI is merely an idea because it is a means of operation, and found that the protectable elements of the GUI must be separated by eliminating those that are unprotectable. If such conclusion were applied to video games, the interaction between a game and its players may also be protected.[13]

③ Art assets

The art assets such as graphic description of game characters, game soundtrack, background images, and visual appearance of the interfaces are also protectable under the copyright law. Such individual elements may be independently protectable expression apart from the game as a whole. However, the scope of protection may be reduced if such elements were mostly functional, or fall under the scope restricted by the merger or *scènes à faire* doctrine. For instance, in *Capcom U.S.A., Inc. v. Data East Corp.*, the court found that, notwithstanding the graphic analogy and similarity in the moves between various characters appearing in the defendant's martial art game and the characters in the plaintiff's game, no protection can be afforded to such similarity in the moves and characters pursuant to the doctrines of merger and *scènes à faire*, given the characteristics of such combat games.[14]

3) Copyright Limitation Doctrines

① Merger doctrine

This is a principle that where the means of expressing the underlying idea is limited, such limited expression is not copyrightable. That is because if the expression merged with the underlying idea is protected, it might end up virtually protecting the idea. If the underlying idea and expression are inseparable, such expression can be protected only when the expression has

12) *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435 (9th Cir. 1994).
13) Christopher Lunsforda, p.98.
14) *Capcom U.S.A., Inc. v. Data East Corp.*, No. 93-3259, 1994 WL 1751482, at *12 (N.D. Cal. Mar. 16, 1994).

been copied and is completely identical.[15] In a well-known case applying the merger doctrine, the court found that the bejeweled pins in the shape of a bee are not copyrightable since there is no other way of expressing such an idea.[16] The merger doctrine was applied again in a case where the court found that the rules of sweepstakes are not copyrightable because there are limited means of expressing such rules.[17] Any type of game, including video games, is comprised of the game mechanics and rules of the game, which are abstract, and thus the scope of its copyrightability is highly likely to be limited on account of the merger doctrine.

② *Scènes à faire* doctrine

Scènes à faire refer to the events, characters or backgrounds that are unavoidable or almost obligatory for a genre of its type. It is a French phrase meaning "scenes that must be done without fail". Its concept overlaps with the merger doctrine to a certain extent in terms of their premises. According to the *scènes à faire* doctrine, if a certain expression cannot but be expressed in a typical manner with respect to an idea, whether in a literal or non-literal way, the similarities between such expressions shall be acknowledged as copyright infringement. An element typical of, and commonly connected to, a certain genre, such as a common character, is not copyrightable. This doctrine is applicable to the theme, style and genre of the video games. For instance, in a video game featuring vampires, a stake driven into the heart, coffins, garlic, bloodsucking scene, or a scene avoiding the sun, etc. would be the *scènes à faire*. Any expression to which the *scènes à faire* doctrine is applicable, is copyrightable only when completely identical reproduction has been made, just like the expressions to which the merger doctrine applies.

---

15) *Apple Comput., Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1444 (9th Cir. 1994).
16) *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738 (9th Cir. 1971).
17) *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967).

4. Criteria for Judgment on Copyright Infringement in Video Games

Since the idea and expression are connected and overlap uniquely in almost all types of game genres, the court cannot but be concerned about defining the boundary between idea and expression. This is an issue that shares the same line of concern as the policy framework of how to find balance between imitators and creators without restricting innovation in games.[18)]

The key in the judgment on copyright infringement is the criteria based on which the similarities between two works is to be determined. There are mainly three types of judgment criteria in the US, namely, the ordinary observer test, total concept and feel test, and abstraction -filtration-comparison (AFC) test.

When examining the substantial similarity, it is necessary to determine first which elements in the applicable games are copyrightable, that is, which element constitutes the idea and which constitutes the expression. Then, it is necessary to eliminate the other elements which are not copyrightable under the merger or scènes à faire doctrine. The elements that remain thereafter shall then be deemed copyrightable, and be the basis for judging the substantial similarity.

1) Ordinary Observer Test

According to the ordinary observer test, the court needs to determine from the perspective of an ordinary observer whether the allegedly infringing work unduly exploits the elements of the original work. This test requires the court to make judgment based on the immediate response of an ordinary observer to the applicable work, without analytically disassembling the work, or taking an expert witness. The court usually applies stricter criteria in eliminating the uncopyrightable elements of the game, given that the decision is made from the perspective of an ordinary observer.

---

18) Drew S. Dean, p. 1240.

2) Total Concept and Feel Test

Basically, the total concept and feel test adopted by the US Court of Appeals, Ninth Circuit is similar to the ordinary observer test, with the difference that the court makes an objective assessment on the similarities between the two works based on the testimony of an expert, before the asking whether an ordinary observer would find them substantially similar.

At the external analytic stage, the court rules out uncopyrightable elements by applying the idea-expression dichotomy, or the merger or scènes à faire doctrine. Unlike the ordinary observer test, this test utilizes expert witnesses. If the court finds objective similarities between the individual elements of both works through the external assessment, it then proceeds to internal assessment. The internal assessment asks whether an ordinary person would find similarities between the two works in terms of total concept and feel. After all, this test is identical with the ordinary observer test, but for the additional two stages of analysis carried out to determine objective similarities.

3) Abstraction-Filtration-Comparison (AFC) Test

Finally, the AFC test abstracts the work first, and then eliminates ideas, etc. by applying the merger or *scènes à faire* doctrine. After elimination of the uncopyrightable elements, the works are compared based on the remaining elements. The court compares the similarities based on the elements remaining after the elimination at the previous stage, rather than the works as a whole. That is, at the first stage, the concept of the work is analyzed and abstracted into a more general concept, and then uncopyrightable ideas are eliminated by applying the *scènes à faire* or merger doctrine. At the second stage, the uncopyrightable elements are eliminated from the copyrightable elements. Finally, the similarities between them are compared based on the remaining elements. When compared with the ordinary observer test or total concept and feel test, which compare the works in their entirety, this is different in that it makes the comparison based only on the remaining copyrightable elements.[19)]

19) Evan Finkel, "Copyright Protection for Computer Software in the Nineties," 7 Santa Clara Computer & High Tech. L.J. 201, 223 (1991).

The difference among the above three tests is that they reconstruct the elements of the works and analyze their individual elements before comparing the similarities, but the similarity is that they apply the copyright limitation doctrines in isolating the copyrightable elements from the uncopyrightable.

5. Video Game Copyright Infringement Cases

1) United States

During the last 30 years, most video game copyright infringement cases were ruled in favor of the defendants. The court attitude, which found the scope of copyright protection for video games comparatively narrow, is attributable to the expansion of cloning in the video game sector. This is reminiscent of paradox of piracy where the American fashion industry is said to have rather prospered thanks to the design knockoff practice and weak protection system for intellectual property rights. They say that fashion copycats have driven the designers to always lead the competition through ceaseless creation of new designs at all times. This logic that the fashion industry was rather advanced owing to weak protection of intellectual property rights relating to fashion could be applied also to the video game sector, and even allow one to argue that we should take a positive view of game cloning. On the other hand, a counterargument may also be raised that the prevalence of game cloning has the disadvantages of discouraging the creative will of game developers, and of blocking the development of new and innovative games.

① *Stern Electronics, Inc. v. Kaufman and Midway Manufacturing Co. v. Dirkschneider* cases

In *Stern Electronics, Inc. v. Kaufman* case, the court accepted the plaintiff's preliminary injunction claim by finding that the gameplay and graphics of the defendant's game were virtually identical with those of the plaintiff's popular game, Scramble.[20] In the ensuing *Midway Manufacturing Co. v. Dirkschneider* case, the court also ruled in favor of the plaintiff by

20) *Stern Elecs., Inc. v. Kaufman*, 523 F. Supp. 635 (E.D.N.Y. 1981)

finding that the defendants' games were for all practical purposes identical to the plaintiff's games (Pac-Man, Galaxian, Rally-X).[21] In both of these cases, the court found infringement only through superficial analysis, without applying the idea-expression dichotomy or the copyright limitation doctrines, because the imitation games were virtually identical with the original games.

In this regard, it is not appropriate to directly apply the above two precedents to the other countless game imitation cases that followed. That is because, while the above two precedents required simple criteria for judgment on similarities since the infringement involved almost identical reproduction, the judgment on copyright infringement with respect to video games have become more complicated, and the details of analysis for judgment on infringement have also become more complex, with the progress in the applicable media and platforms during the scores of years that followed. Recently, unlike the precedents in the earlier days, the court applies more analytic judgment and theories, rather than jump immediately to the conclusion of infringement, notwithstanding the existence of almost identical elements in the imitation games when compared with the original games.

③ *Atari, Inc. v. Amusement World, Inc.* case[22]

In 1979, Atari released an arcade game called Asteroids and immediately gained tremendous popularity. Two years thereafter, a competitor released Meteors, which is nowadays believed to be a clone of Asteroids owing to numerous similarities thereto. The court acknowledged that Asteroids was copyrightable as audiovisual work, and that it was fixed on a medium. The court applied the ordinary observer test in the ensuing judgment on substantial similarities. First of all, the court found that the key idea in Asteroids was the players' combatting space rocks. The court went on to distinguish 22 similarities and 9 dissimilarities between both games.

However, applying the merger and *scènes à faire* doctrines, the court found that the numerous similarities are not a decisive factor in the judgment on copyright infringement. That is, such similarities are forms of expression that simply cannot be avoided in any version of the basic idea of a video game involving space rocks. The court applied the copyright infringement limitation doctrines and ruled that Meteors was not substantially

---

21) *Midway Mfg. Co. v. Dirkschneider*, 543 F. Supp. 466 (D. Neb. 1981)
22) *Atari, Inc. v. Amusement World, Inc.*, 547 F. Supp. 222 (D. Md. 1981).

similar to Asteroids. The court found that most of the similarities were inevitable, given the requirements of the idea of a game involving a spaceship combatting space rocks, and given the technical demands of the medium of a video game. In conclusion, the court denied copyright infringement although it acknowledged that the defendant clearly borrowed from the plaintiff's game idea.

The judgment is believed to have made a new advance when compared to the past video game plagiarism cases. Above all, it was concluded that an expression that inevitably accompanies the idea of a game is not copyrightable as an 'expression' under the copyright law according to the merger and *scènes à faire* doctrines, due to such facts as that there is the technical limitation which prevents such an idea from being expressed in various forms. According to such criteria for judgment, only a few expression elements of the game in Asteroids are protectable.

④ *Data East USA v. Epyx, Inc.* case[23)]

The issue in this case is the similarities between karate games. They included karate martial art moves, rules of the game, manner in which the background scenes change, and use of a referee during the match, etc. Although the district court ruled in favor of the plaintiff, the US Court of Appeals, Ninth Circuit eliminated the uncopyrightable expressions and ruled on substantial similarities by more strictly applying the idea-expression dichotomy, and the merger and *scènes à faire* doctrines. Fifteen similarities were found to be uncopyrightable because they were standard characteristics that inevitably accompany the idea of a karate combat game. The court also pointed out that the scope of possible expression in a karate combat game was limited due to technical limitations in hardware. The same logic in the grounds for judgment in the previous Asteroids case was applied.

⑤ *Capcom U.S.A. v. Data East Corp.* case[24)]

This case also involved a martial art combat game, and the court found there was so substantial similarity. The plaintiff asserted that the defendant's game "Fighter's History" copied the style, appearance and moves of the

23) *Data East USA v. Epyx, Inc.*, 862 F.2d 204, 209 (9th Cir. 1988).
24) *Capcom U.S.A. v. Data East Corp.* No. 93-3259, 1994 WL 1751482 (N.D. Cal. Mar. 16, 1994)

combat in the plaintiff's game "Street Fighter II", while the defendant rebutted that they are characters and moves that are common and typical in karate games in accordance with the merger and *scènes à faire* doctrines. The court ruled in favor of the defendant. The issues in the case were 8 characters and 27 martial art moves, and the court found that among them, 3 characters and 5 special moves in Fighter's History were similar to those that are copyrightable in Street Fighter II. However, given that Street Fighter II is comprised of a total 12 characters and 650 martial art moves, most of which are ordinary kicks and punches that are not copyrightable, the court found that despite the similarities in 3 characters, they were not sufficient to find overall substantial similarity between the two games.

Capcom case reaffirmed the court's generally pessimistic attitude toward copyright protection in the video game sector.

The logic and conclusion of the above three precedents were repeated likewise in cloning, which came to be prevalent in the video game sector. However, there were cases where copyright infringement was acknowledged, notwithstanding application of the copyright infringement limitation doctrines.

⑥ *Atari, Inc. v. North American Philips Consumer Electronics Corp.* (Pac-Man)[25]

The court found that the key idea in the plaintiff's Pac-Man game was the "maze-chase game where a central character passes through the various passageways of the maze, scoring points, while avoiding capture by the monsters or pursuit characters". The court rules that while most of the game was not protectable in accordance with the merger doctrine, it was protectable "at least to a limited extent [insofar as] the particular form in which it is expressed provides something new or additional over the idea". The court found especially that audio elements and certain visual elements were copyrightable expressions. The court eliminated the elements such as the maze, scoring table, and tunnel exits as the *scènes à faire* that are uncopyrightable, but found that Pac-Man character and the pursuing monster characters were distinctive and expressive elements, and the defendant's game which plagiarized such elements was substantially similar thereto. This finding seems somewhat exceptional when compared to the

25) *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607, 610-13 (7th Cir. 1982).

Asteroids case mentioned above. In this regard, this Pac-Mac judgment cannot be deemed to have established the general standard in video game copyright cases.

2) Korea

① Bomberman case[26)]

The original game is an arcade game where the character strategically places down bombs on the checkerboard-shaped game board, which explode after a certain amount of time with cross-shaped blazes which kill the other players. The board consists of soft blocks destructible by the bombs, non-destructible hard blocks, and passageways through which the characters can move through, and the character obtains various items when the soft blocks are destroyed.

The imitation game applied the same to an online game and used water balloons instead of bombs, but adopted the same expression in operation such as existence of soft blocks and hard blocks, alteration to the soft blocks through chain explosion of bombs (water balloons) caused by blazes (gush of water) triggered by explosion of bombs (water balloons), similar method of operation and functions of items including gloves, shoes and space ships, constant range of influence of blazes (gush of water), and the character comprised of a head and the body in equal proportions which is unable to pass through bombs (water balloons), but evades the blazes (gush of water) in the passageways and knocks down the enemies or the other players with blazes (gush of water).

The copyright owner of the original game asserted that they constitute copyright infringement as intrinsic expressions, a type of expression albeit distinguishable from specific extrinsic expressions such as maps, background, block types, and item shapes, while the owner of the imitation game responded that they were a type of idea or typical expression that are not copyrightable.

In the above Bomberman case, the court, under the premise that the genre, underlying background, unfolding method, rules, stage developments,

---

26) Seoul Central District Court judgments 2005 *Gahap* 65093 (main claim), 2006 *Gahap* 54557 (counterclaim) rendered on January 17, 2007.

etc. are merely ideas constituting concept, method, solution, and creative tools of the game, and that the idea is not copyrightable if it is in any way limited in terms of technology or concept in its expression, denied copyright infringement on the ground that Bomberman game involves the use of bombs to kill the enemies or other players in a rectangular playfield, which does not leave much option other than evasion of the blazes or the chain reaction; and that the distinction between soft blocks and hard blocks, limitation in the movement of characters once the soft blocks are destroyed by the blazes, use of items to push away or kick the bombs, restriction in the movement of the bombs, and alterations to the soft blocks, etc. are not copyrightable expressions, and the other items or expressions are different in color or esthetic sense.

② Candy Crush Saga district court judgment[27)]

The original game (King.com's Candy Crush Saga) is one of match 3 games where the players gain points when they have made a linear match of three or more of the same tiles, which are then cleared. Unlike the other match 3 games, this game introduced new features such as the hero mode (where the bonus is granted to the neighboring tiles during the next turn, additional bonus is given when the players have arranged specific patterns, and such bonus is maintained if they have challenges left after achieving the goals presented at each stage), level completion if the player has diminished the villain's energy, and interference with the game through use of certain cells, tiles or characters. The defendant's game (Forest Mania by Avocado Entertainment) created concept and feel similar tothe original game by not only adopting such features, but also taking the forest as the background (farm in the original game), and shaping the underlying map of the game into an S-shaped river (S-shaped road in the original game).

In addition, the defendant maintained similar colors and shapes in the nodes and notice bars, in addition to other similarities such as characters with 3-dimensional faces, basic colors of the tiles, and moves of the hint characters.

In Candy Crush Saga judgment, the court found that the expression of operation arranged to be the rules of the original game are not creative on

27) Seoul Central District Court judgment 2014 *Gahap* 567553 rendered on October 30, 2015.

the ground that the rules added by the original game are merely ideas, that arrangement and realization of such rules in the game do not have any effect upon the game episode or story itself, and that both games cannot be expressed in various forms in smart phones.

Naturally, with respect to the maps, characters, tiles and moves, substantial similarity was denied on the ground that they are not characteristic expressions of the original game due to differences in specific expressions, and limitation on expression given the characteristics of match 3 games.

A common point in these two cases is that the abstract rules of the video game, as well as the considerably detailed expression of operation are considered as a type of the rules of the video game. Accordingly, the domain of uncopyrightable idea would be widened considerably at the abstraction/filtration stage during the AFC test, and in addition, the limitation on expression due to format of the arcade game is emphasized, notwithstanding considerable development in hardware, thereby requiring considerable level of creativity for protection of expression.[28)]

The next point is that in running the AFC test and making the final judgment on similarity, there is tendency to emphasize minor differences after analysis of each element, rather than to find similarities in the overall feel and concept. Naturally, this tendency can be deemed to be similar to the US court's finding in *Atari, Inc. v. Amusement World, Inc.*, which is virtually the first decision on substantial similarities in video games, where notwithstanding 22 similarities with the original game, such similarities were found to be attributable to limitations in a game combatting space rocks ,and in the hardware in the early days. There seems to be something wanting in the Korean precedents in that they emphasized such differences although the games in the above decisions would have felt and conceived to be different as a whole if shown to the consumers in black and white.[29)]

---

28) Min-Soo Seul, "Limit of Protections by Copyright and Its Alternative," Human Rights and Justice (June 2016), p. 34.

29) Min-Soo Seul, p. 34, 35.

6. New Trend in Video Game Copyright Judgments

1) United States

The video game industry has achieved impressive growth owing to extraordinary progress in the graphic technology, computing power, and improvement in development and distribution environment. Consequently, the mobile game industry was able to mass produce countless original games, but also witness proportionate increase in cloning. Against such backdrop of progress in game development technology and prevalence of cloned games, there is also a view that the court's existing paradigm of copyright infringement judgment does not fit the new technical environment.[30] In recent noteworthy precedents, attempts have been made to newly distinguish between idea and expression, or to expand the scope of copyright protection in existing games by restrictively applying the merger and *scènes à faire* doctrines.

① *Tetris Holding, LLC v. Xio Interactive,* Inc.[31]

Tetris became widely popular throughout the world soon after its release in 1984, and was thereafter released in various platforms including the smart phone. In 2009, Xio released a similar game at Apple App Store under the name Mino. This is a clone of Tetris. The company which developed Mino admitted to having downloaded Tetris iOS app in developing Mino, and that it is a different version of Tetris. However, Xio asserted that there were few expressions in Tetris that were protectable if one were to apply the *scènes à faire* and merger doctrines. They are saying that Tetris has extremely few art assets as the game mechanics of an abstract puzzle.

However, the court found that the *scènes à faire* doctrine has little weight in instances such as this because there are no expressive elements "standard, stock, or common" to a unique puzzle game that is divorced from any real world representation. Next, Tetris is a puzzle game where a user manipulates pieces composed of square blocks that fall from the top of the game board to the bottom where the pieces accumulate. The user is given a

30) Drew S. Dean, p. 1264.
31) *Tetris Holding, LLC v. Xio Interactive, Inc.*, 2012 WL 1949851 (D.N.J. May 30, 2012).

new piece after the current one reaches the bottom of the available game space. While a piece is falling, the user rotates it in order to fit it in with the accumulated pieces. The object of the puzzle is to fill all spaces along a horizontal line. If that is accomplished, the line is erased, points are earned, and more of the game board is available for play.

That such underlying idea of Tetris is not copyrightable is identical with the previous findings of the court. However, unlike previous findings, the court found that the *scènes à faire* or merger doctrine could not be applied to the present case because Xio did have many alternatives in expressing the rules of the game or idea of Tetris.

Accordingly, the court found that the following elements are protectable expressions: the dimensions of the playing field, the display of "garbage" lines, the appearance of "ghost" or shadow pieces, and the display of the next piece to fall, etc. The court pointed out that considering the exponential increase in computer processing and graphical capabilities since the early days of video games, it cannot accept that Xio was unable to find any other method of expressing the Tetris rules other than a wholesale copy of its expression.

[Figure] Tetris (left) and Mino (right)

Such a conclusion is clearly differently from the court's findings in previous similar cases. The court abstracted the Tetris rules to a higher level, and left open another possibility that these rules may find another original expression. The merger doctrine does not block the copyright protection possibilities for Tetris in every respect. That is, it is important that the fact that the competing game developer could have expressed the fundamental idea of Tetris in another way, without making a wholesale copy of its expression.

The court made it clear that while the game rules are not copyrightable, but the expressive elements are copyrightable. It is also noteworthy that the *scènes à faire* application in puzzle games was strictly limited. In fact, this involves virtually the same level of reproduction as the aforesaid *Stern* or *Dirkschneider* case, but the court in *Tetris* did not ignore the merger or *scènes à faire* doctrine, rather uniquely applied these limitation doctrines and ultimately reached the conclusion that they are not applied appropriately.

Tetris case is also unique in that the technical progress was one of the main considerations in the judgment on infringement in video games. While the technical limitations worked as limitation on expression for video game developers, now that the technical progress has come up to a certain level, Xio could have found other means to express Tetris rules with some more effort. This is clearly distinguishable from *Atari, Inc. v. Amusement World, Inc.* and *Data East USA v. Epyx, Inc.* where the court found that no alternative expression could be found due to technical limitations, and accordingly expanded the application scope of the merger doctrine. This is where the Korean courts differ with respect to their findings in Bomberman or Candy Crush case.

② *Spry Fox LLC v. LOLApps Inc.*

In 2011, Spry Fox released a game called "Triple Town" where the player uses an object to match with other objects, upon which the matching objects disappear and are replaced by an object that is one step up in the game's hierarchy. Spry Fox executed a development contract with 6Waves LLC in order develop and release the game in Facebook or at Apple App Store. However, after several months, 6Waves severed its relationship with Spry Fox and released its own version of the App Store game "Yeti Town". This was a match 3 game in a style similar to Triple Town. Spry Fox filed a copyright

infringement claim, against which 6Waves filed a motion for dismissal, and the court conducted copyright infringement analysis in order to rule on the motion for dismissal.

First of all, the court applied the idea-expression dichotomy, and doctrines of merger and *scènes à faire*. The underlying idea in Triple Town is a hierarchical matching game where a player matches 3 identical objects in the lower hierarchy which will be replaced by an object that is one step up in the game's hierarchy. Spry Fox did not claim infringement on the basis of such underlying concept, but on the unique hierarchical structure where the bushes becomes a tree and the trees become a hut, unique characters (the bear as an antagonist), and the playing field which is similar to lawn.

The court applied the *scènes à faire* doctrine and eliminated from protection a number of scenes from Triple Town, such as use of coins to maintain the score or to purchase other strategic advantages at an in-game store. The court also eliminated a functional element, that is, the choice of a six-by-six game grid. Despite such eliminations, still many elements of Triple Town were found to be protectable expression, and the expression elements such as object hierarchy, depiction of the field, and existence of antagonistic animals were found to have been used similarly in YetiTown. It is noteworthy that the court found infringement notwithstanding notable visual differences between the two games, e.g. the game grid being a meadow in Triple Town while it is a snowfield in Yeti Town, and differences between the objects and characters. The court also took into consideration the opinion of several video game bloggers that they were substantially similar.

Unlike *Tetris* case, *Spry Fox* case is noteworthy in that the substantial similarity was acknowledged although the artworks and sound elements of Yeti Town differed from those of Triple Town. The court stated in the grounds for judgment that it focus on the similarities rather than the differences in comparing the two games, notwithstanding such differences.

[Figure] Triple Town (left) and Yeti Town (right)

The new attitude of the court shown in the above decision shows awareness of the game cloning problem, which is increasing especially in the mobile game industry. This is different from the court's attitude in the previous *Amusement World, Epyx*, and *Capcom* cases. The court acknowledges that technical progress signifies expansion of the opportunity for creative expression in the video game sector, and adjusted the politic scope of application of the merger and *scènes à faire* doctrines. With emphasis on the fact that the progress in computer and graphic technologies has enlarged the scope of expression and creativity, the court applied the copyright limitation doctrines more loosely than in the cases of early days. Thus, the court sounded the alarm on game cloning.

2) Korea: Candy Crush Saga district court judgment[32)]

The plaintiff asserted that its game is the result of a combination of long experience and know-how and investment of personnel/material resources, and the defendant imitated or modified, extremely partially, such new rules and method of expression in releasing its version of the game. The plaintiff asserts that such an act falls under the act of unfair competition under

32) Seoul Central District Court judgment 2014 *Gahap* 567553 rendered on October 30, 2015.

Article 2(1)(j) of the Unfair Competition Prevention and Trade Secret Protection Act (the "UCPA") and also a tort under the Civil Code.

As acknowledged above, many new rules that did not exist in any of the previous match 3 games were applied in the plaintiff's game, and the developer's creativity and efforts are indispensable in adding, modifying and applying such new rules to match 3 games. Since it is easily recognizable from empirical rule that the plaintiff has invested tangible/intangible assets including enormous manpower and expense, as well as its technologies and know-how during the development of the game, the court found that the plaintiff's game is an outcome achieved through substantial investment or efforts on the part of the plaintiff.

The 'substantial investment or efforts' under Article 2(1)(j) of the UCPA refer to those required to create something new that has not existed before. In this regard, it is noteworthy that the court, in response to the defendant's assertion that the plaintiff's game which has not risen to such a level does not constitute the 'outcome achieved through substantial investment or efforts', found that there is no basis for such an interpretation, but that if such an interpretation were carried, it would excessively narrow the application scope of Article 2(1)(j) of the UCPA, and be contrary to the legislative purpose of the said provision which is to regulate a new type of unfair competition which cannot be regulated with the existing provisions related to intellectual property rights, and therefore, that the defendant's assertion in this regard is without merit.

Also with respect to whether the defendant's release of the game constitutes "any other acts of infringing on other persons' economic interests for one's own business without permission, in a manner contrary to fair commercial practices or competition order", the court found that the defendant's act of releasing its game and providing the same to the general public falls under the act of unfair competition under Article 2(1)(j) of the UCPA in light of the following facts: (1) the plaintiff's game newly introduced and added to the existing match 3 games many rules such as the 'basic bonus rules' and 'additional bonus rules', which were identically applied in the defendant's game, (2) the plaintiff's game was developed and released through Facebook as its platform in April 2013, and the defendant's game was released merely approximately 10 months thereafter on or around February 11, 2014, which was before the plaintiff's game was officially

released in the Korean market, (3) it is reasonable to conclude that the defendant's game was developed on the basis of the plaintiff's game in light of such timing of release, and similarities with the defendant's game in terms of the rules of the game and method of playing, (4) the plaintiff and the defendant are competitors as the developer and distributor of mobile games, and likewise, both their games are of the same type, to which various identical rules were applied additionally, while basically being match 3 games, (5) although the defendant's act cannot be said to have reached the level of infringement upon the plaintiff's copyright, according to the specific forms of realization of each game mentioned above, considerable similarities are found between the two games including the method of expression, used effects, and graphics, and (6) the users also agree that their games are almost identical.

[Figure] 'Farm Hero Saga ' (left) and 'Forest Mania ' (right)

3) Korea: Candy Crush Saga high court judgment[33)]

Unlike the district court judgment, the appellate court for Candy Crush Saga, which drew considerable attention, ruled in favor of the defendant. However, it upheld the district court's conclusion which dismissed the plaintiff's assertion on the ground that there was no substantial similarity with respect to copyright infringement. However, it overturned the lower court's conclusion that it falls under Article 2(1)(j) of the UCPA.

33) Seoul High Court judgment 2015 *Na* 2063761 rendered on January 12, 2017.

① Copyright infringement

The court found that the rules of the plaintiff's game fall under the domain of idea, and that there are differences between the means of expression of ideas in both games on the basis of the following facts: that with respect to copyright infringement, the rules of the game, as a tool for determining the concept, genre or method of deployment of the game, are merely one of the materials comprising the game, and fall under the domain of unprotectable ideas; that in finding game copyright infringement, the focus should be on the aspect of expression such as the visual appearance or characters; and that the *scènes à faire* doctrine is applicable in expressing the idea of the rules of match 3 games.

The court concluded that they discovered substantial differences upon detailed analysis of the elements of the screen and design of both games.

In the meantime, the court found that the combination and arrangement of rules of the game also basically fall under the domain of ideas, and that if the finding of copyright infringement were made based on the similarities between the overall concept or feel, it would unreasonably expand the scope of copyright protection even to ideas.

② Judgment relating to Article 2(1)(j) of the UCPA

The court presented the guideline that Article 2(1)(j) of the UCPA should be applied to the extent not contradicting or conflicting with the existing intellectual property laws including patent law and copyright law, and shall be applied only when there are 'special circumstances' which may not be justified in light of the fair transaction order and free competition order in order to regulate the use of another person's achievements that are not protectable under the existing intellectual property rights.

The examples of 'special circumstances' suggested by the court include obtaining the achievements or ideas of another person through unlawful means including theft, imitation of appearances in markedly inconsistently with the contractual obligations with the predecessor or principle of good faith, intentional interference with the business of competitors or use thereof with the sole purpose of inflicting damage, or when no creative element has been added by the imitator.

The court found no such special circumstances in the case at hand on the basis of the following facts: that the rules of the game basically fall

under the domain of ideas; that the merger or *scènes à faire* doctrine is applicable in expressing the rules of match 3 games; that there is no evidence to suggest that the defendant obtained information relating to the plaintiff's rules of the game through unlawful means; that the defendant newly added creative elements which are not present in the plaintiff's game, and that plaintiff obtained sufficient revenue after the release of its game.

This case is significant in that it harmoniously established the relationship between Article 2(1)(j) of the UCPA and the existing intellectual property rights system.

7. Changes in the Environment Surrounding Video Games, and Countermeasures against Copyright Infringement

Compared with 50 years ago when the video game was first introduced, the current graphic technology has made impressive progress, and the computing power in operating or using the games has grown beyond comparison. Moreover, the development environment has become very facilitative due to easy accessibility to development tools, and the video game industry has shown considerable growth through activation of numerous platforms including the mobile. While such development contributed to mass production of many original games in the field of mobile games, it also proliferated cloning proportionately. Given such advancement in game development technology and prevalence of cloned games, the application of existing paradigm for judgment on copyright infringement such as the idea-expression dichotomy or the merger doctrine is considerably liable to elicit the criticism that they do not fit with the new technical environment.

If the existing paradigm for judgment on copyright infringement were applied, most of the similar/imitation games would be able to evade the liability for copyright infringement, and such trend in court judgments is liable to exacerbate and trigger massive game cloning in video game development, ultimately discouraging the true creative will of game developers.

It seems that the tendency to expand application of Article 2(1)(j) of the UCPA is being made in Korea as an attempt to overcome the limitations in existing criteria for judgment on copyright infringement. Article 2(1)(j) of the UCPA is rapidly expanding in Korea, and as can be seen in the district court judgment for Candy Crush Saga, is moving toward replacing to a certain extent the scope of copyright protection which had been comparatively narrow. However, the UCPA is a type of competition law intended to maintain sound order in transactions, similar to the Monopoly Regulation and Fair Trade Act. The sound order in transactions will have to be within the minimum extent agreed to by the society in free market economy. If any act of using an existence beyond the scope of intellectual property rights already granted under the law is embraced in the concept of breach of transaction order, it is liable to be regulation of extremely ambiguous act in general. From this perspective, the brake put on by the appellate court in Candy Crush Saga case in the trend to expand application of Article 2(1)(j) of the UCPA shall be assessed to be considerably affirmative. In supplementing the intellectual property law through tort-related legal principles, the possibility of supplementation shall be assessed on the basis of the grounds for justification of the intellectual property law, and shall be allowed only in cases where it is evident that absent such supplementation through tort, there will be no sufficient incentive for other people who have created intellectual work or obtained information with power to attract the consumers.

On the contrary, we may consider solving the prevalence of cloned games or imitation games in the game copyright sector through modern transformation of the copyright infringement doctrines. For instance, the merger and *scènes à faire* doctrines have often been used to deny copyright infringement, but having achieved considerable level of technical progress, the criteria for judgment on game copyright infringement need to move toward restricting the application scope of the merger doctrine. In this regard, the appellate judgment on Candy Crush Saga leaves something wanting, with its conclusion that the combination and arrangement of rules of the game basically fall under the domain of ideas, without properly considering the similarities in overall concept or feel.

Therefore, it befalls the Korean court in video game copyright infringement cases to establish the scope of copyright protection through in-depth consideration, rather than evade through a general provision such as Article 2(1)(j) of the UCPA.

The list of reference

Chong, Kyong Sok, “Copyright Infringement in Game Software,” Human Rights and Justice (June 2005).

Dean, Drew S., “Hitting Reset: Devising a New Video Game Copyright Regime,” 164 U. Pa. L. Rev. 1239(2016).

Kuehl, John, “Video Games and Intellectual Property: Similarities, Differences, and a New Approach to Protection,” 7 Cybaris An Intell. Prop. L. Rev. 313(2016).

Lampros, Nicholas M., “Leveling Pains: Clone Gaming and the Changing Dynamics of an Industry,” 28 Berkeley Tech. L.J. 743(2013).

Lunsforda, Christopher, “Drawing a Line between Idea and Expression in Videogame Copyright: the Evolution of Substantial Similarity for Videogame Clones,” 18 Intell. Prop. L. Bull. 87(Fall, 2013).

Park, Seong-Ho, “Non-Infringing Acts of Intellectual Property Laws and the General Tort Doctrine,” 「Informedia Law」Vol. 15, Issue 1 (2011).

Seul, Min-Soo, “Limit of Protections by Copyright and Its Alternative,” Human Rights and Justice (June 2016).

<국문초록>

비디오게임 저작권침해판단에 대한 새로운 접근과 한계

최 승 수

50년 전 비디오 게임이 처음 소개되었을 때와 비교하면 현재의 그래픽 기술은 인상적인 발전을 이루었으며 게임 운영 또는 사용에 대한 컴퓨팅 능력은 비교할 수 없을 정도로 커졌다. 또한 개발 환경은 개발 도구에 대한 접근성이 쉽기 때문에 매우 용이 해졌으며 비디오 게임 산업은 모바일을 포함한 수많은 플랫폼의 활성화를 통해 상당한 성장을 보였다. 이러한 개발은 모바일 게임 분야에서 많은 오리지널 게임의 대량 생산에 기여했지만 비례하여 복제게임이 확산되었다. 게임 개발 기술의 발전과 복제 게임의 보급을 감안할 때 아이디어 표현 이분법이나 합체이론과 같은 저작권 침해에 대한 판단을 위한 기존 패러다임의 적용은 새로운 기술 환경에 맞지 않는다. 저작권 침해판단을 위한 기존 패러다임이 적용되면 대부분의 유사 / 모방 게임은 저작권 침해에 대한 책임을 회피 할 수 있으며 법원 판결의 이러한 추세는 비디오 게임 개발에서 대규모 게임 복제를 악화시키고 유발하여 궁극적으로 게임 개발자의 진정한 창조적 의지를 저해한다. 저작권 침해에 대한 기존 판단 기준의 한계를 극복하기 위한 시도로 부정경쟁방지법 제2조 제1항 차목의 적용을 확대하려는 경향이 한국에서 제기되고 있는 것으로 보인다. 그러나 부정경쟁방지법은 경쟁법의 한 유형으로서 자유 시장 경제에서 사회가 동의한 최소 범위 내에 있어야 한다. 저작권 침해 이론의 현대적 변형을 통해 게임 저작권 분야에서 복제된 게임이나 모방 게임의 보급을 해결할 것을 고려할 수 있다. 예를 들어, 합체이론과 표준삽화이론은 종종 저작권 침해를 부인하는데 사용되었지만 상당한 수준의 기술적 진보를 달성한 경우 게임 저작권 침해에 대한 판단 기준은 합체이론의 적용 범위를 제한하는 방향으로 이동해야 한다. 따라서 부정경쟁방지법 제2조 제1항 차목과 같은 일반조항을 통해 회피하기보다는 심층적인 고려를 통해 저작권 보호 범위를 설정하기 위하려는 시도가 필요하다.

주제어 : 비디오게임, 저작권침해, 복제게임, 아이디어 표현 이분법, 합체이론, 표준삽화이론, 부정경쟁방지법

<Abstract>

New Approaches to and Limitations in JudgmentonCopyrightInfringementinVideoGames

Seung Soo Choi

Compared to the first video game introduced 50 years ago, the current graphics technology has made impressive progress and the computing ability for game operation or use has grown to an unmatched extent. The development environment is also very easy because it is easy to access development tools, and the video game industry has grown significantly through the activation of numerous platforms, including mobile. This development contributed to the mass production of many original games in the field of mobile games, but the game cloning spreads proportionally. Considering the development of game development technology and the spread of replicated games, the application of the existing paradigm to judge copyright infringement such as idea expression dichotomy or integration theory does not fit the new technology environment. With the existing paradigm for copyright infringement, most similar/mimicry games can avoid responsibility for copyright infringement, and this trend in court rulings worsens and causes large-scale game duplication in video game development, ultimately hindering the true creative will of game developers. It seems that there is a tendency in Korea to expand the application of Article 2 of the UCPA as an attempt to overcome the limitations of existing judgment standards for copyright infringement. However, the UCPA is a type of competition law that should be within the minimum range agreed by society in the free market economy. The modern transformation of copyright infringement theory can be considered to solve the spread of replicated games or imitation games in the field of game copyright. For example, the merger theory and scene a faire are often used to deny copyright infringement, but if a significant level of technological progress is achieved, the criteria for judging game copyright infringement should move toward limiting the scope of application of the merger theory. Therefore, it is necessary to try to establish the scope of copyright protection through

in-depth consideration rather than avoiding through general provisions such as Article 2 of the UCPA.

Keywords : Video game, copyright infringement, game cloning, idea e-pression dichotomy, merger theory, scene a faire, UCPA