
When Clones Attack: How to Protect Social/Mobile Games from Copying

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August, 2012

The mobile gaming industry is experiencing an invasion of clones. While cloning has a long and varied history, it has become more prevalent with the explosion of social and mobile games. Take, for example, *Words With Friends*, a variant on *Scrabble*, and the scores of *Minecraft* clones on the market. As game development times decrease and the useful lifetime of games diminishes, cloning has become more lucrative: games are easier to copy, and there are more of them to clone. The influx of copycat games in the mobile space brings with it new legal questions—are these clones merely off-brand digital replicas or are they blatant theft?

Historically, protection for video games has been obtained through copyrights and patents. Copyright protection can extend to the expressive, non-functional elements of a game, such as audiovisual display and the underlying source code, but not the ideas behind the game itself. Patent protection extends to the functional aspects of games, such as gameplay mechanics.

These protections notwithstanding, the limitations of intellectual property rights to deter cloning are a sore spot for the industry. Aside from the usual challenges initiating litigation presents (lawsuits can be expensive, lengthy, and uncertain), the scope of protection afforded by copyrights in videogames is distinct, and patents can take years to obtain. In addition, the costs of being the victim of cloning has increased as developers invest more and more in marketing their games, only to see knockoffs emerge after a game reaches threshold popularity. Cloning is not necessarily easy to defeat within the parameters of traditional intellectual property litigation, as the following examples demonstrate.

Patenting Play

Patent disputes over video game hardware—and in particular consoles and other peripherals—abound. In fact, among the earliest video game patent disputes involved Magnavox's claim to exclusive licensing rights to three patents dealing with a "television gaming apparatus" previously licensed to Atari for the classic game *Pong*. But video game patents extend to game methodology, too. In 2004, Sega sued game publisher Fox Interactive and Electronic Arts for allegedly using technology from a Sega-owned patent in the game *The Simpsons: Road Rage*. That patent claimed a "game display method" by which the player uses a map to drive around a virtual city while a large arrow hovers above the driver showing how to reach a destination. Sega used similar technology in its *Crazy Taxigame* and sued for patent infringement. The parties settled before claim construction for an undisclosed sum.

More recently, Japanese game maker Konami digital Entertainment Co. sued Harmonix, MTV, and Viacom alleging the popular game *Rock Band* infringed three of Konami's patents. Among the patents at issue was one that addressed dividing game play into different sections for different instruments and displaying instructional play patterns for each—essentially, a method of divided game play. After two years of litigation, the parties settled in 2010 for undisclosed terms.

The Copyright Creed

Copyright litigation has long been the favored avenue of protection for game developers. For instance, in 2003, Incredible Technologies sued Virtual Technologies over Virtual's game *PGA Golf Tour*, claiming it copied Incredible's *Golden Tee* game. Incredible copyrighted the game imagery and instructional guide. The Seventh Circuit found that though it was "pretty clear" Virtual set out to copy "PGA Golf Tour," most of the similar elements were not protectable. For example, the trackball system used in gameplay was deemed a functional feature, possibly eligible for patent protection but not copyright. And the golf-related imagery appearing in both games was subject to the *scenes a faire* doctrine, meaning the presentation of a realistic video golf game would by definition need golf courses, clubs, a wind meter, etc.

Zynga faced similar challenges in its recent litigation with Brazilian developer Vostu. In 2011, Zynga accused Vostu of infringing Zynga's copyrights in connection with Vostu's clones of *FarmVille*, *Zynga Poker*, *Petville*, and *Café World*. Zynga alleged Vostu copied Zynga's games so closely that the clones inadvertently included bugs. In turn, Vostu claimed Zynga could not claim ownership over certain game elements, and that Zynga itself is a well-known cloner. The parties settled in December 2011 and Vostu made changes to its games as part of that settlement.

Establishing that the protectable elements of a game were copied seems to be the predominant challenge game developers face in protecting their works through copyright law. This challenge forms the crux of the dispute between game developers Spry Fox and LolApps in Washington federal court. In 2011, Spry Fox sued LolApps for copyright infringement and false designation of origin over Spry Fox's copyrighted *Triple Town* game. LolApps had previously been in negotiations with Spry Fox to launch *Triple Town* on Facebook. Spry Fox entered into a non-disclosure agreement with LolApps pursuant to which Spry Fox granted access to a closed, beta version of *Triple Town* to allow LolApps to evaluate the game for publication. But six months after signing the NDA, LolApps abruptly ended negotiations and launched its clone, *Yeti Town*. On the day of the launch, an LolApps executive sent a potentially damning Facebook message to a Spry Fox creator: "I need to back out of any further discussions on Triple Town. We've just published a game on iOS that you're not going to like given its similar match-3 style." Spry Fox made that email a centerpiece of its complaint, alleging that LolApps deliberately copied the game rules, user interface elements, layout, visual presentation, sequence and flow, scoring system, and overall look. LolApps moved to dismiss the action claiming Spry Fox alleges infringement of *non-copyrightable* elements only, and moreover that the games are not substantially similar. A motion to dismiss is currently pending before the court, and the arguments made in briefing go to the very scope of copyright protection in video games. If Spry Fox's complaint is dismissed, it will further signal that intellectual property rights are inadequate to remedy cloning.

Takeaways and Best Practices

The Spry Fox case is instructive in demonstrating that the law favors copiers, not developers. Spry Fox had an NDA with LolApps in place, and presumably a launch deal within reach. But now it finds itself embroiled in litigation that could drag on for years, easily outliving the popularity and potential profitability of its game. With those risks in mind, there are still best practices game developers can and should undertake in order to best position themselves when the clones attack:

1. **Include more protections in your Nondisclosure Agreement (NDA).** *Before* sharing source code, demos, or ideas with potential partners, consider executing an NDA that specifically prohibits cloning or the use of any derivation of the IP shown to the other party. The NDA should include a presumption regarding the developer's remedies in the event the game is ultimately cloned, and most importantly, copying should be defined more broadly than copyright protection allows. Because you will be negotiating a contractual right, you are not limited to the strictures of intellectual property law. While you may find this somewhat time consuming on the front end, it could avoid disputes later.
2. **Scramble the code.** Oftentimes cloners simply reverse engineer a popular game in order to copy it. One way to avoid this is to obfuscate the source and machine code of your game so that it cannot be reverse engineered. Amazon has promoted this idea in its Appstore.
3. **Consider patent protection.** Patents are costly, take a long time to obtain, and are more traditionally used in the video game space to protect consoles and peripherals. But they can also be extremely broad in scope and extend protection to game rules, processes performed by a game, and methods of game play. Consider whether the patenting of specific in-game elements is appropriate for your game.
4. **Explore what copyright can do for you.** Copyright is the most traditional form of protection for in-game elements and can be helpful in preventing cloning. Copyright protection extends to expressive, non-functional aspects of the game such as background music, specific visual depictions of characters and art, and source code. What copyright will not protect are the contents of game rules (as opposed to expression), the functional procedure and mechanics of a game, and *scènes a faire* elements. A registered copyright can be a powerful tool, and can also help attract investors and financing, giving developers some negotiating credibility.
5. **If you do get cloned, launch a media offensive.** One way to challenge a clone is not in the courtroom, but on the web. If your game is cloned, consider launching a media offensive on the blogosphere to draw attention to the cloned game.