

GAME OVER OR GAME ON? - INTELLECTUAL PROPERTY CHALLENGES IN THE GAMING INDUSTRY

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Abstract

The gaming industry is a dynamic and ever-evolving landscape that thrives on innovation and creativity. In order to triumph in a highly competitive market, it is imperative for gaming industry to have a proactive Intellectual Property (IP) protection over their creations. This article delves into the interplay of Intellectual Property Rights in the world of gaming. It examines the several types of Intellectual Property (IP) pertinent to video games, the difficulties faced by publishers and creators, and the legal structure supporting IP protection and enforcement. This article provides a thorough overview of how the gaming industry harnesses and protects its priceless Intellectual Property, with a special focus on Copyright and Trademarks; highlighting merchandising in this industry and issues pertaining to counterfeiting and infringement. It also entails in-depth discussion on how streaming of video games could be regulated alongside discussing the importance of Patents in emerging technologies such as Metaverse, AR and VR.

Keywords: Video games, Merchandising, Copyright, Augmented Reality and Virtual Reality, Licensing.

1. Introduction

In this digital age, the gaming industry is one of the most booming sectors. The gaming industry has developed as a global entertainment powerhouse in the digital age, producing billions of dollars in sales each year. Intellectual Property Rights (IPR) are critical to this success because they protect the industry's ingenuity and innovation. The United States, China, Japan, South Korea, Germany, the United Kingdom, France, Canada, Italy, and Brazil ranked among the top 10 markets and nations by revenues in

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2022. China had the most gamers (696.5 million), but the US led the revenue charts (\$46.6 billion).¹

This article examines the diverse functions of Intellectual Property (IP) in the gaming industry. It delves into the numerous types of IP related to video games, the issues that developers and publishers confront, and the legal structure that governs IP protection and enforcement with a special focus on the role of Copyright and Trademarks in the industry. IP gives the life to this industry. These rights are associated with the technology used in the game and the content featured in the game. Copyright, for example, protects the artistic and creative aspects of the game such as code, sound, character designing and background music. A trademark safeguards the distinctive logos and names associated with the game and its characters, contributing essential elements of uniqueness and identity.

Intellectual Property	Elements in Game
Copyright	Code, Music, Story, Characters, website design
Trademark	Game title, subtitle, character’s names, drawing of the characters, company name, and logo

Securing IPRs in the gaming industry, especially online gaming, poses challenges due to piracy risks. Game developers tend to address these challenges through strategic collaborations, such as licensing their rights, resulting in significant economic benefits. In this dynamic market, it is crucial for game developers to proactively protect their IP rights to remain competitive and receive due recognition and financial rewards for their products such as the artistic work they have created - story, characters, music, etc.

2. Decoding the Creativity: Copyright Protection Bestowed in Gaming

To have a stronghold in the gaming industry, it is important to protect its features under the realm of IPR. One of the crucial protections is offered by copyright as it protects a fair amount of attributes of the gaming platforms.

¹ Games Market, “Top Countries and Markets by Video Game Revenues”, *available at:* <https://newzoo.com/resources/rankings/top-10-countries-by-game-revenues> (last visited on September 29, 2023).

The protection set forth under the copyright law comes from the doctrine of idea-expression dichotomy which illustrates that it is not the idea but rather the expression of the idea which is protected under the regime of copyright. In the realm of gaming, the application of this doctrine elucidates that overarching themes, such as warfare, pirates, zombies or crime, remain unprotected. Conversely, specific expressive elements integral to conveying these themes, including characters, weapons and unique abilities, fall within the purview of legal protection under IP laws. This can be understood from an example - games such as F1 2020,² Asphalt³ or Forza Horizon 5⁴ have a similar theme of car racing. The theme behind these games is not protected rather the various gaming features present in these games lie under the preview of copyright protection.

This concept has also been encapsulated in the case of *Atari v. Amusement World*⁵ wherein Atari released a game named 'Asteroids' which involved space travel and shooting of space debris; on a similar theme, a game named 'Meteors' was released by Amusement World with the addition of coloured graphic. Though Atari claimed that there was a substantial similarity in both the games however the Court held that Amusement World has not infringed the copyright of the Atari on its game 'Asteroids' as only the theme of the game was the same. Furthermore, the Court also stated that if such a protection is granted then it would create a monopoly. Thus, in this way, this case aligns with the concept that the expression of an idea is protected and not the idea itself.

Furthermore, along with the above criteria, the work must also be the original creation of the author to claim protection under copyright law wherein the author denotes the person who has created the game features that is eligible for copyright protection. Mere copying or arrangement and rearrangement of the expression of an idea behind the copyrighted work cannot fulfil the criteria of originality.

Now, when we talk about gaming features, it is important to discuss the subject matter which is present in these games. These features include the characters, music element, artwork and the programming behind the game. Section 13 of the Copyright Act, 1957 talks about various subject matters of copyright.⁶ Among these subject matters,

² F1 2020, available at: <https://www.formula1game.com/2020/buy>.

³ Asphalt, available at: <https://asphaltlegends.com/>.

⁴ Forza Horizon, available at: <https://forza.net/horizon>.

⁵ 547 F.Supp. 222 (D. Md. Nov. 27, 1981).

⁶ The Copyright Act, 1957 (Act No. 14 of 1957), s.13.

the ones that protect the elements of the game are literary work, musical work, artistic work, and cinematographic work.

Subject-matter	Definition under the Copyright Act, 1957	Video game feature	Examples
Literary work	Section 2(o) ⁷	Protection of software present for the functioning of the game. Storyline in a game.	'Baldur Gate 3' has a storyline enclosed in it.
Musical work	Section 2(p) ⁸	Protects the sound incorporated in the games.	The sound of the collection of coins, the sound of shooting in the game of 'Mario'.
Artistic Work	Section 2(c) ⁹	Characters present in the video games.	Mario, Pokémon
Cinematographic film	Section 2(f) ¹⁰	Animation, Moving images.	'The Witcher'; where the book was converted into a game and then into the movie.

2.1. Copyright Infringement in the Gaming Industry: Navigating Legal challenges and Protecting Creativity

At present there is a dearth of case laws on video games in India and therefore, it is difficult to understand the legal stance. However, in the case of *Sony v. Harmeet Singh*

⁷ The Copyright Act, 1957 (Act No. 14 of 1957), s.2(o): It includes computer programmes, tables and compilations including computer [databases].

⁸ The Copyright Act, 1957 (Act No. 14 of 1957), s. 2(p): a work consisting of music and includes any graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with the music.

⁹ The Copyright Act, 1957 (Act No. 14 of 1957), s. 2(c): a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph, whether or not any such work possesses artistic quality; (ii) a [work of architecture]; and (iii) any other work of artistic craftsmanship.

¹⁰ The Copyright Act, 1957 (Act No. 14 of 1957), s. 2(f): any work of visual recording 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.

and Ors.,¹¹ the Court substantially dealt with the aspect of copyright present in the video games. In this case, various video games were developed by the plaintiff (SONY) on its popular gaming console which was termed as Play Station 3. The defendant created a pirated version of the plaintiff's game and to break its encryption, the defendant created a console named 'Jailbreak' which also helped the defendant to gain monetary benefit. Hence, a suit was instituted by the plaintiff alleging infringement of copyright and sought an injunction on the pirated version of the plaintiff's console. An *ex parte* injunction was ordered by the Court preventing the defendant from further modifying the console as well as selling, distributing, copying and creating counterfeiting products that infringed the copyright protection of the plaintiff.¹²

Furthermore, the concept expounded in the case of *Mattel v. Jayanth Agarwalla*,¹³ may find relevance in future interpretations of legal cases pertaining to video games. In this case, the plaintiff was the manufacturer of a popular board game 'Scrabble' and has alleged that the defendant has infringed its copyright in the board game by using similar rules and colour patterns in its board game named 'Scrabulous'. The question that arose before the Court was whether the rules of the games and the line patterns, colour arrangement, etc. can be protected under the copyright. The Court held that such rules and patterns cannot be protected and applied the doctrine of merger which states that when the idea cannot be separated from the expression, then in such a scenario, protection cannot be granted to the expression.¹⁴

Besides, with the help of different international case laws, we can explore how Indian Courts has examined different case laws associated with video games. In 2019, a lawsuit was filed by *Take-Two Interactive Software Inc. v. Perez*¹⁵ for infringing the copyright intact in Two-Take Software. The infringer created a program that generated virtual currency which disrupted the entire game pattern of the plaintiff as it allowed unlimited spending for illegitimate currency to be purchased in the game which led to direct and contributory infringement of copyright. Due to the plaintiff's enduring

¹¹ 2012 (51) PTC 419 (Del).

¹² Vrinda Sehgal, "Status of Copyright Protection for Video Games in India", *available at*: <https://www.lexology.com/library/detail.aspx?g=19946c7c-c158-4a9b-9486-abfe84c94f69> (last visited on October 04, 2023).

¹³ 2008 (153) DLT 548.

¹⁴ Mihir Naniwadekar, "The Fabulous Tale of Scrabulous...", *available at*: <https://spicyip.com/2008/10/fabulous-tale-of-scrabulous.html> (last visited on October 04, 2023).

¹⁵ Case No: 1:18-cv-0765 (PKC).

hardship, and recognising that continued infringement would lead to irreparable harm, the Southern District Court of New York issued a favourable order granting a permanent injunction in favour of the plaintiff. Additionally, the infringer was found liable for statutory damages totalling \$150,000, along with reimbursement of attorney's fees.¹⁶

The pivotal question of whether the license for a tattoo belongs to the artist who created it or the person whose body bears it was examined in a significant copyright lawsuit. Solid Oak Sketches sued Take-Two Interactive over unauthorised use of tattoo designs on NBA players in the NBA2K video game series. Despite the high-profile nature of the case and arguments from both sides, the US district court judge ruled in favour of the video game company. The judge emphasised that tattooists grant non-exclusive licenses to players for use of the tattoos as part of their likenesses. This decision, although specific to this case, could influence future disputes involving body art and video game representations.¹⁷

In another legal battle, the US Court ruled in *Tetris Holding LLC v. Xio Interactive*¹⁸ to safeguard the distinctive “look and feel” of the game. Tetris Holding LLC, the copyright holder of the video game ‘Tetris’ filed a lawsuit against the owner of the video game ‘Mino’ for copyright infringement. The Court sided with Tetris, concluding that while the gameplay concept itself isn't protected under copyright, the defendant replicated the game's style and artwork, constituting copyright infringement.

Blizzard Entertainment Inc. v. Bossland,¹⁹ is another intriguing case that emphasises the complexities of determining the appropriate remedy in the event of software copyright infringement in a video game. In this case, a well-known company in the industry of gaming named ‘Blizzard’ which had developed some popular games such as “Hearthstone”, “World of Warcraft”, etc., filed a copyright infringement suit against another company named ‘Bossland’ for creating and producing software that helped to “cheat”, which was against the terms of the end-user licensing agreement agreed by

¹⁶ R.K. Dewan & Co, “India: Copyright Infringement in Video Games”, available at: <https://www.mondaq.com/india/copyright/786854/copyright-infringement-in-video-games> (last visited on September 29, 2023).

¹⁷ Taylor Dafoe, Who Owns the Copyright to Tattoos? A Court Issues a Landmark Ruling Over LeBron James and Other NBA Stars' Right to License Their Body Art, available at: <https://news.artnet.com/art-world/copyright-tattoos-lawsuit-lebron-james-1819932> (last visited on September 29, 2023).

¹⁸ 863 F. Supp. 2d 394 (2012).

¹⁹ [2019] EWHC 1665 (Ch).

players for playing that game. In this event of copyright infringement, ‘Blizzard’ chose an account of profits as an appropriate remedy rather than the damages. which would have been unfeasible as quantifying the exact damages suffered by ‘Bossland’ would have been challenging and its decision to pursue an account of profits helped to get the improper gains from the sale of its software.²⁰

3. Streaming of Video Games: An Infringement or a Fair Use

There has been a surge in streaming of video games on various platforms such as Twitch, Loco Rooter, YouTube. These platforms help streamers to broadcast their games for their live audience which in turn also helps them to extract revenue from subscriptions. The audience also has the option to interact with the streamers and write their comments and views in such a video stream. The emergence of live-video streaming has brought in legal challenges associated with the rights of the copyright holders of the games and concerns - to what extent can streamers use the intellectual property of these owners? Therefore, it needs to be analysed whether such ‘live streaming’ through these platforms leads to infringement of copyright under Section 51²¹ of the Copyright Act, 1957 or whether it falls under the exception of ‘fair use’ as mentioned under Section 52²² of the Act.

Before delving into its legal aspect, it is important to understand the practical ways of its usage. The use of this Intellectual Property can be both with the consent of these game developers or without it. When permission has already been given by the game developers; then no problem arises. But, there can be instances when no permission has been accorded to these streamers. Still, they can be saved from an infringement suit by the copyright holders of the game. This conduct can be interpreted as a business strategy of the copyright holders as it helps in the promotion of their business and attracts more users for such games. Therefore, even though on the face of it, streaming video games seems like an infringement of copyright, these game developers turn a blind eye.

²⁰ Razvan Popa, “IP Insight - Blizzard v Bossland: Cheaters Never Prosper...”, *available at*: <https://www.lexology.com/library/detail.aspx?g=eb1bfc59-5bcf-4f59-acd5-5cab01ce8ae3> (last visited on September 30, 2023).

²¹ The Copyright Act, 1957 (Act No. 14 of 1957), s.51.

²² *Id.*, s.52.

The copyright owners of games such as Minecraft allow the streaming of videos with the unique content of the streamers along with the commentary incorporated in it.²³ In a similar fashion, Sony impliedly encourages streaming of the gameplay by providing a built-in share feature²⁴ likewise Microsoft has updated its Xbox App²⁵ and provides a share tab²⁶ to ease in the live streaming. On the contrary, developers such as Nintendo have a strict streaming policy that needs to be abided by the streamers otherwise they might be liable for the infringement of copyright.

Now, divulging the legality of live-streaming or a recorded video, Section 51 of Copyright Act protects the unauthorised use of the original copyrighted work of the owners. In the context of video-game streaming, though the code behind the game is not used but characters, graphics, music, and texts affiliated with these games are communicated to the live audiences which fall under the ambit of copyright protection. Therefore, the use of such gaming features in the public domain without the consent of the copyright owner will amount to infringement under Section 51 of the act. However, the comments by the live audience on these streaming platforms will fall under the exception of fair use, as Section 52 permits criticism and review of the work. Under this exception, the person is allowed to evaluate the underlying idea of copyright work or the work itself. When a comment is given in the chat box by the live audience, it can be in form of appraisal or negation the copyright work

The court can exercise different approaches while analysing whether the streaming of video games leads to infringement or not. Firstly, it can be discerned whether a whole or substantial part of a work has been brought into the public domain or not. Secondly, whether the game is story-driven or requires a particular set of skills. If it is the first case, then it is least likely to get protection while in the latter case, some protection can be conferred. Thirdly, whether there is a presence of a comment section or not as its

²³ “Minecraft Usage Guidelines Purpose”, *available at*: <https://www.minecraft.net/en-us/usage-guidelines#> (last visited on September 29, 2023).

²⁴ Tommy I, “How to Stream to YouTube from Your PS5 and the Benefits of Doing So”, *available at*: <https://tubeast.com/how-to-stream-to-youtube-from-your-ps5-and-the-benefits-of-doing-so#> (last visited on September 29, 2023).

²⁵ Alexander Cope, “Xbox App on PC receives upgrade to stream console games via Xbox Remote Play”, *available at*: <https://www.windowscentral.com/new-update-has-upgraded-xbox-app-pc-power-stream-console-games-xbox-remote-play#> (last visited on September 29, 2023).

²⁶ Laurent Giret, “Twitch Streaming is now Natively Integrated on Xbox Consoles”, *available at*: <https://www.thurrott.com/games/263283/twitch-streaming-is-now-natively-integrated-on-xbox-consoles#> (last visited on September 29, 2023).

absence can derive it from the defence of fair use being a derivative work. Lastly, whether the streaming is solely for commercial purposes or not. Thus, the court can resolve these sets of principles while determining infringement suits for live streaming. However, due to the absence of legal precedence, the legal stance of streaming of video games and the application of the concept of fair use is still an unexplored legal terrain.

4. Safeguarding Brands: Trademark protection in the Gaming Industry

There is competition in every field and the gaming industry is no exception. When it comes to ‘video games’, the association with the game is primarily tied to its name. To assert exclusive rights over the name or tagline, developers commonly pursue trademark registration. A trademark is a distinctive sign that is legally protected and used to identify goods and/or services in commerce. As a result, the proprietor of a trademark enjoys the exclusive right to use a sign to describe goods and/or services. The verbal element, the figurative element, or both may make up the entire sign. Additionally, the proprietor of a properly registered trademark may advertise that trademark to its customers with the certainty that no other organisation may imitate or usurp that trademark. A trademark’s validity period is ten years after registration, and it can be extended once every ten years.²⁷

The trademark registration guarantees that the brand would not be lost in the social media and application stores, where there are countless games with similar names. The same holds true for choosing the right domain name, creating a social media account, and avoiding aggressive search engine optimisation techniques.²⁸

The importance or need of trademark registration in the gaming industry:

- It prevents a conflict from arising by using a similar pre-existing mark.
- By registering video game titles as trademarks, an exclusive right is granted, including to exclude others from using any similar marks thereof.
- Trademark becomes a valuable asset and protects the future success of the company. A trademark safeguards a company’s economic success by establishing a distinctive brand identity that builds consumer trust and loyalty. It deters

²⁷ The Trade Marks Act, 1999 (Act No. 47 of 1999), s.25.

²⁸ Saransh Chaturvedi, “Creating Video Games: Make Sure Not to Infringe Other’s Trademark”, *available at*: <https://www.mondaq.com/india/trademark/1189530/creating-video-games-make-sure-not-to-infringe-others-trademark> (last visited on September 30, 2023).

potential infringement, enhances market position, and opens avenues for licensing and partnerships, contributing to sustainable growth and competitiveness in the business landscape.

- The market share of the business grows as a result of having a trademark which boosts attention from venture capitalists and other investors. This is due to the fact that trademarking gives the video game company more franchising opportunities.
- It opens merchandising options which will be dealt with in detail later in this article.

In the Indian scenario, the Trademarks Act of 1999 protects that game titles, subtitles, names of the characters, logos, and slogans.²⁹ The classes for trademark registration often sought by the company or the game creators under the Nice Classification (which is an international classification of goods and services used for the registration of marks) are generally:

Class 9 which includes the apparatus and instruments of games like headsets, and smart glasses.³⁰

Class 28 includes toys and apparatus for playing games.³¹

Class 41 includes services related to education and entertainment.³²

Class 42 includes services related to computer programming.³³

Some famous game titles such as *Temple Run*, *Candy Crush Nintendo*, *Zapak*, *WWE*, *Tetris*, *Legend of Zelda*, *Warner Bros.*, etc. are successfully registered with the designated Indian IP offices.

4.1 Merchandising in the Gaming Industry: Branding beyond the Game

Gaming merchandise plays an important role in engaging and monetising a fan base. In simple words, merchandising is a marketing technique where goods or services are decorated and embellished with established intellectual property with the aim that such embellishment will induce the public to buy them. A toy made in the shape of Pac-

²⁹ The Trade Marks Act, 1999 (Act No. 47 of 1999), s.2(1) (zb).

³⁰ Nice Classification, Nice Agreement, 1957 available at: <https://www.wipo.int/classifications/nice/en/> (last visited on September 30, 2023).


³¹ *Ibid.*

³² *Supra* note 30.

³³ *Ibid.*

Man, a t-shirt with an image of Subway Surfer, or a coffee mug carrying the image of a map of Call of Duty. Fictional characters such as Tarzan, Batman and Mario and their appearance in the form of drawings or photographs, an organisation’s logo etc., can be registered as trademarks subject to the conditions of registrability. When such a character distinguishes the goods or services of one undertaking from those of others, it becomes a trademark under common law, even without registering it. The early 1980s were when video game items first appeared. The earliest video games to sell items were some of the classics including Mario, Pac-Man, and Donkey Kong.

These products initially just consisted of straightforward novelty items like stickers, keychains and action figurines. They were not particularly available in chain stores either. They were mostly offered for sale in specialist shops and sellers of video games. In today’s time, the gaming industry is booming with a revenue of billions, merchandising is one such source of revenue for the gaming industry and it includes a much wider range of items. There have been many prominent brands collaborating with the most popular games in the world.

<p>Ralph Lauren x Fortnite</p>  <p>Source: https://www.ebay.ca/itm/225707233967</p>	<p>Balmain x Pokémon</p>  <p>Source: https://promnicesk.live/product_details/32161768.html</p>	<p>Balenciaga x Fortnite</p>  <p>Source: https://www.voguebusiness.com/technology/balenciaga-launches-on-fortnite-what-it-means-for-luxury</p>
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Gaming merchandise benefits greatly from branding. Characters, in-game objects and recognisable logos all serve as emblems for the common gaming experience that players enjoy. Fans exhibit brand loyalty by confidently showcasing their allegiance to preferred games through the choice of clothing and accessories. Gaming merchandise is frequently seen by gamers as more than just a simple commodity; it also serves as a

symbol of their identity and affiliation with the gaming world. It is essential for building fan communities. Limited editions, exclusive releases, and collectibles foster a feeling of community among fans enabling them to interact and share their love for the game. Gamers can exhibit their products and immerse themselves in the thriving gaming culture through gaming events, conferences and meet-ups.³⁴

4.2 A Battle of Trademarks *vis-a-vis* Counterfeiting and Infringement

The gaming industry faces challenges such as counterfeiting and infringement of trademarks on merchandise. One of the main features of a trademark is to act as a source identifier but if there is an infringement of a trademark then it will cause confusion among the consumers and economic, quality, and goodwill loss to the real owner or the registered proprietor. Legal recourse is available to combat these issues, with courts upholding the rights of trademark holders to protect their brands from unauthorized reproductions.

A relief against infringement can be sought by way of Sections 29 and 135 of the Trade Marks Act which deals with passing off/infringement. Section 29 defines infringement when another person uses a trademark that is the same or similar to the registered trademark for the same or similar goods or services.³⁵ Whereas Section 135 provides civil remedies for trademark infringement and passing off both. Trademark counterfeiting comes with wilful infringement, all counterfeiting marks are infringing but all infringing marks may or may not be counterfeiting. The individuals or entities knowingly engage in the unauthorised replication or imitation of a registered trademark with the aim of deceiving consumers. This intentional act goes beyond mere inadvertent or accidental infringement, emphasising a purposeful effort to exploit the established reputation, goodwill and market presence associated with the authentic trademark. Counterfeiters intentionally produce and distribute imitation goods, often with the intention of capitalising on the popularity and trust associated with the genuine trademark, leading to potential economic harm, reputational damage, and legal consequences for the legitimate trademark owner.³⁶ Section 102 of the Act defines counterfeiting in terms of

³⁴ “Branding in the Gaming Industry: How Creating a Recognizable Image Shapes Successful Gaming Ecosystems”, available at: <https://www.brandagency.com/blog/branding-in-the-gaming-industry> (last visited on September 30).

³⁵ The Trade Marks Act, 1999 (Act No. 47 of 1999), s. 29.

³⁶ *Id.*, s. 135.

‘Falsifying’ and ‘falsely applying trademarks’.³⁷ Section 103 of the Act provides with penalties for applying false trademarks, trade descriptions, etc.³⁸

In an interesting recent case of *Winzo Games Private Limited v. Google LLC and Ors.*,³⁹ infringement of trademark was caused by disparagement. It ignited a different angle to ‘infringement’ under Section 29 of the Trade Marks Act. WinZO, a digital gaming and tech company offering a variety of games through mobile apps and their website, discovered in November 2021 that Google displayed a warning message to users attempting to download the WinZO app. The warning asked, “This type of file may harm your device. Do you want to keep WinZO.apk anyway?”⁴⁰

In response, WinZO filed a lawsuit seeking a permanent injunction and other remedies, alleging that Google’s warning harmed their digital gaming services' reputation under the ‘WinZO’ marks under Section 29. The court ruled that the warnings were not unique but mandated by IT Rules to protect users. There was no trademark infringement, and the disparagement claim was dismissed due to a lack of product comparison and that the use of the plaintiff’s trademark in the aforesaid warning shall not constitute as a “mark likely to be taken as being used as a trademark” in terms of Section 29(4) of the Trademarks Act, 1999.⁴¹

However, Section 30 of the Act provides with certain defences or exceptions in the cases of infringement which is often sought in India. It talks about fair use which includes broadly two types of fair use.

Descriptive fair use [Section 30 (2) (a)]

It deals with the use of the mark where it represents the nature, quality, quantity, intended use, value, place of origin, date of manufacture or service delivery, or other attributes of the goods or services.

Normative fair use [Section 30 (2) (d)]

It deals with the use of a trademark by an individual in connection with products that are designed to complement or be an add-on to other products or services that the

³⁷ The Trade Marks Act, 1999 (Act No. 47 of 1999), s. 102.

³⁸ *Id.*, s. 103.

³⁹ (14.02.2023 - DELHC): MANU/DE/0911/2023.

⁴⁰ LexOrbis, “Case Law Updates”, 39 (2023).

⁴¹ *Id.* at 40.

trademark has been used in connection with without violating other parties' rights. It usually covers news, analysis, critique, parody, comparison marketing and any other non-commercial use of a trademark that is registered.⁴²

Furthermore, the Madras High Court defined "reasonably necessary" under Section 30(2)(d) and established three requirements for what constitutes "normative fair use" in the *Consim Info Pvt. Ltd. v. Google India Pvt. Ltd.*⁴³ case. These requirements include:

- the product or service in question having to be one that is not easily identifiable without use of the trademark.
- the mark(s) may only be used to the extent it is reasonably required to identify the good or service; and
- The user may not use the mark in any way that would imply sponsorship or endorsement by the owner of the trademark.⁴⁴

The defence of fair use in the gaming industry depends on how such trademarks were used: either to cause a false impression or association with the trademark owners in order to obtain unwarranted financial benefits; or to identify only the actual players, teams, and their brands.

An another interesting case in Swedish Court was *Bethesda Softworks LLC v. Mojang*. Mojang was sued by Bethesda, who claimed that the developer's latest project 'Scrolls' violated their trademark – "The Elder Scrolls". An amicable settlement to the legal dispute granted Mojang permission to use the name 'Scrolls' without any association with the 'RPG' gaming subgenre.⁴⁵

Video games with a war theme are fantastic examples because they have generated a lot of debate and criticism on how accurately they depict real-world objects. The *Humvee*'s maker, AM General, filed a complaint alleging that the popular military vehicle was improperly used in the Call of Duty video game. A District Court in New York decided the dispute in the first instance in March 2020. The Court ruled that Activision Blizzard's use of trademarks related to AM General's Humvees is shielded by

⁴² The Trade Marks Act, 1999 (Act No. 47 of Year 1999 Dated 30th. December 1999), s. 30.

⁴³ 2013 (54) PTC 578 (Mad)

⁴⁴ MANU/TN/1816/2010.

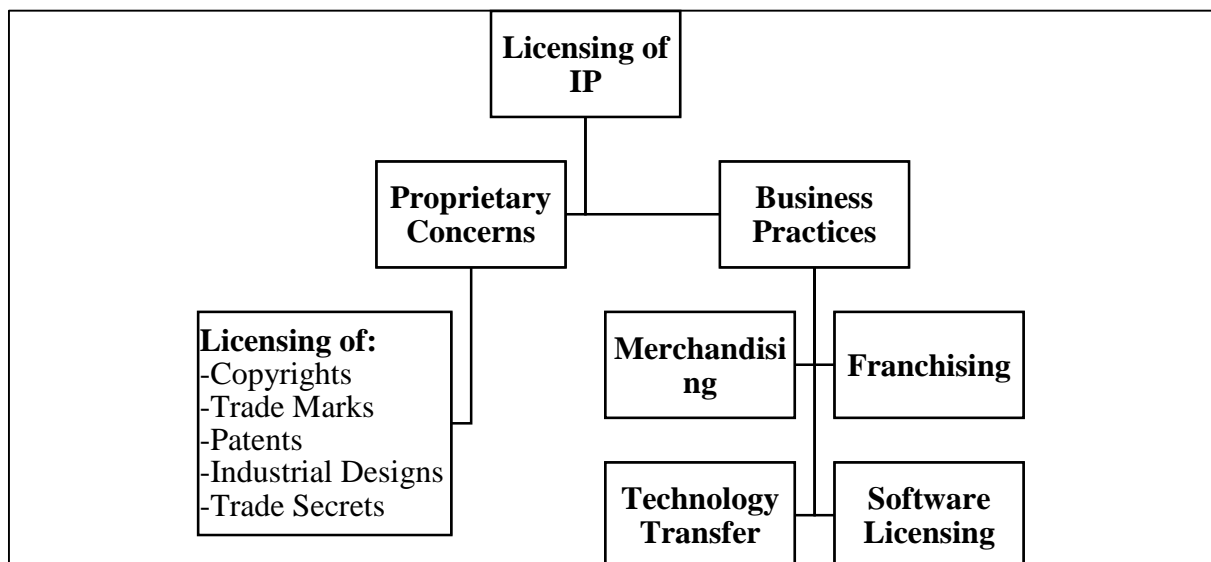
⁴⁵ No. 8:09-cv-02357-DKC (D. Md. Sept. 8, 2009).

the US First Amendment. The Rogers test, developed in the 1989 *Rogers v. Grimaldi*⁴⁶ case, was employed by the Court in its analysis. The test allows claims of trademark infringement to be rejected if the trademark is used creatively and does not mislead consumers. According to the District Court’s ruling, “If the purpose of art is realism, then adding vehicles from actual military to contemporary warfare games surely advances that goal”.⁴⁷

5. Monetizing Innovation and Creativity through IP Licensing in the Gaming Industry

IP licensing serves as the life force of the gaming industry, nurturing creativity and catalysing growth through collaborative ventures that captivate a global audience. As the gaming sector undergoes unprecedented expansion, adeptly navigating the intricate terrain of IP licensing agreements will remain pivotal for the triumph of developers, publishers and IP proprietors. By embracing innovation and harnessing legal expertise, the gaming industry is poised to unlock its boundless potential.

Licensing is one of the important ways of trading whereby the owner grants rights to another to use that property while continuing to retain ownership over it.



⁴⁶ Complaint at 1-2, AM, (S.D.N.Y, Nov. 7, 2017) (No. 2:17-cv-08644).

⁴⁷ Anthony J. Dreyer Shay Dvoretzky, “Supreme Court Sharply Limits Applicability of Rogers v. Grimaldi Test for Trademark Infringement”, available at: <https://www.skadden.com/insights/publications/2023/06/supreme-court-sharply-limits-applicability> (last visited on September 30, 2023).

In the world of video games, licensing can go both ways. Other gaming businesses may be granted sublicenses to use items that were either entirely original or obtained through other licensed means. One instance is when Epic Games and Warner Bros. obtained a license from Gearbox and 2K Games to use their Borderlands franchises in their well-known battle royale game Fortnite. This licensing may apply to more than one gaming corporation, and it frequently does.⁴⁸ Examples of consumer product-based licenses include the licensing of foam pixelated pickaxes and swords from Mojang's open-world crafting game Minecraft or character models and action figures of "Guardians" from Bungie's Destiny franchise. Even adaptations for cinema and television, like "The Witcher" on Netflix or "Prince of Persia: The Sands of Time" from Walt Disney, can be viewed. Another great example is LEGO, all the characters come from licensed characters such as Star Wars, Mario, Batman and Harry Potter.⁴⁹ It is quite evident how Intellectual Property Rights in video games are no longer only for entertainment but a profitable business.

5.1. Understanding Licensing through the lens of Marvel Universe

Marvel has been successful in leveraging the market worth of its superheroes through several lucrative licensing deals since it is the owner of the intellectual property rights in its creative works. These agreements outline the terms and conditions by which a manufacturer may produce, for instance, a toy in the likeness of a certain character. They also define and regulate the business relationship between the licensee and the licensor.⁵⁰

Marvel's licensing policy allowed it to spread its characters outside of comic books to a variety of media formats, such as movies, television, and video games, from the late 1970s through the early 1990s. For example, Marvel's licensed characters are Spiderman, Ironman, Hulk, and Wolverine. have been licensed to many game developers' companies to avail the game on Play Station or Play Store or App Store for iOS users.

⁴⁸ JD Feuerstein, "Licensing and IP Management in Gaming Industry", *available at*: <https://fadel.com/licensing-ip-management-in-the-gaming-industry/> (last visited on September 30, 2023).

⁴⁹ *Ibid.*

⁵⁰ Nicole J. S. Sudhindra, "Marvel's Superhero Licensing, 2012", *available at*: https://www.wipo.int/wipo_magazine/en/2012/03/article_0005.html (last visited on September 29, 2023).

The elements that can be monetised are Character licensing and Storyline licensing. There can be two kinds of licensing; ‘primary licensing’ in which IP usually consists of copyrighted material and trademarks associated with particular brands as well as the rights of an individual’s likeness. Another is ‘Secondary Licensing’ in which IP creates a gaming environment but is not necessarily the focus of the game and it might include names, planes, locations, cars or other identifiable IP.⁵¹


SL. No.	Games	Licensed to (Publisher)
1.	Marvel’s Guardians of Galaxy ⁵² 	Square Enix It is a Japanese video game production enterprise. Platform: PlayStation 4, Microsoft Windows, Xbox One, Xbox Series X/S, PlayStation 5, Nintendo Switch
2.	Marvel’s Spider-Man 2 ⁵³ 	Sony Interactive Entertainment It is a multinational video game enterprise owned by Sony Group. Platform: Play Station 5
3.	Marvel’s Avengers ⁵⁴	Square Enix It is a Japanese video game production enterprise.

⁵¹ Timofey Rubchenko, “Licensing of storyline and characters in video game industry: New research project at MIPLM”, available at: <https://ipbusinessacademy.org/research-project-licensing-of-storyline-and-characters-in-video-game-industry> (last visited on September 30, 2023).

⁵² Tom Philips, “Square Enix’s Guardians of the Galaxy is single-player, without DLC or microtransactions”, available at: <https://www.eurogamer.net/articles/2021-06-13-square-enixs-guardians-of-the-galaxy-is-completely-single-player-without-dlc-or-microtransactions> (last visited on September 30, 2023).

⁵³ “Marvel’s Spider-Man 2 and Marvel’s Wolverine revealed”, available at: <https://blog.playstation.com/2021/09/09/marvels-spider-man-2-and-marvels-wolverine-revealed/> (last visited on September 30, 2023).

⁵⁴ Sal Romano, “Marvel’s Avengers launches”, available at: <https://gematsu.com/2019/06/marvels-avengers-launches-may-15-2020> (last visited on September 30, 2023).

		<p>Platform: PlayStation 4, Microsoft Windows, Xbox One, Xbox Series X/S, PlayStation 5, Nintendo Switch</p>
<p>4.</p>	<p>Marvel’s Realm of Champions⁵⁵</p> 	<p>Kabam</p> <p>Kabam is an interactive entertainment company. As of March 1, 2017, Kabam was acquired by Netmarble.</p> <p>Platform: Android, iOS</p>
<p>5.</p>	<p>Marvel’s Midnight Suns⁵⁶</p> 	<p>2k Games</p> <p>2K is an American video game publisher based in Novato, California.</p> <p>Platform: Microsoft Windows, PlayStation 4, PlayStation 5, Xbox One, Xbox Series X/S</p>

The above table shows how Marvel has licensed their characters and storylines to enter into some leveraged profitable licensing agreements.

6. Emerging Technology in the Gaming and Potential IP Challenges

Augmented Reality (AR) and Virtual Reality (VR) are the most emerging technologies and talked about in the gaming Industry. Users can experience and interact with digital environments that either overlay or entirely replace the physical world using AR and VR technologies. For instance, mobile phone apps like Pokémon Go and Snapchat filters use the camera to overlay information or virtual objects on top of real-world surroundings. On the other hand, VR is a technology that enables users to

⁵⁵ Rachel Paige, “NYCC 2019: Become Your Own Marvel Super Hero and Conquer the Battleworld with All-New MARVEL Realm of Champions Game”, available at: <https://www.marvel.com/articles/games/nycc-2019-all-new-marvel-realm-of-champions-game> (last visited on September 30, 2023).

⁵⁶ Charlie Hall, Marvel’s Midnight Suns is the next game from the XCOM team, available at: <https://www.polygon.com/22641096/marvels-midnight-suns-announcement-trailer-xcom-firaxis-gamescom-2021> (last visited on September 29, 2023).

experience a virtual depiction of the real world. However, as users need a suitable headgear and controller to experience VR, it can be expensive. The Metaverse created by internet giant Meta is the most well-known and current VR example.⁵⁷

When we hear technology, the Intellectual Property that comes to our mind is ‘Patent’ which is governed by the Indian Patent Act, 1970. Patent is an exclusive right to exclude others from manufacturing, importing, or exporting the technology in lieu of disclosure to the respective Patent Office. It plays a crucial role in safeguarding AR/VR technologies and ideas. Patent applications for AR/VR breakthroughs cover a wide range of topics, such as novelty and enhanced user engagement techniques as well as hardware and software advancements. Patents covering headset designs, gesture control systems, and content creation tools are just a few of the significant AR/VR patents that have been submitted in recent years such as:⁵⁸

APPLICATION NUMBER	TITLE OF INVENTION	APPLICANT'S NAME
201741008331	SYSTEM AND METHOD FOR ENHANCING AUGMENTED REALITY (AR) EXPERIENCE ON USER EQUIPMENT (UE) BASED ON IN-DEVICE CONTENTS	SAMSUNG ELECTRONICS CO. LTD
3179/KOLNP/2013	SPECIAL REGIONAL ONLINE VIDEO GAME FORUM BASED ON LOCATION	SONY COMPUTER ENTERTAINMENT AMERICA LLC
202017021279	INTERACTIVE VIDEO GAME SYSTEM	UNIVERSAL CITY STUDIOS LLC
201847017649	DUAL MODE AUGMENTED/VIRTUAL REALITY (AR/VR) NEAR EYE WEARABLE DISPLAYS	OSTENDO TECHNOLOGIES INC.
7177/DELNP/2015	DELEGATING VIDEO GAME TASKS VIA SHARING SERVICE	AMAZON TECHNOLOGIES, INC.

⁵⁷ Yogesh K. Dwivedi, Laurie Hughes, *et. al.*, “Metaverse beyond the hype: Multidisciplinary perspectives on emerging challenges, opportunities, and agenda for research, practice and policy”, *66 International Journal of Information Management* 2 (2022).

⁵⁸ IP India, “Patent Search”, available at <https://iprsearch.ipindia.gov.in/publicsearch>.

The next term one must have come across is Metaverse, it is the combination of virtual and augmented reality technologies. With the Metaverse, Non-Fungible Tokens (NFTs) have gained immersive popularity. These are unique digital assets that represents the ownership of artwork or other forms of virtual or digital assets. They are available to buy, sell or trade with verified ownership. The rise in NFTs have led to significant IP Challenges as well such as copyright, trademark infringement and some unauthorised contractual disputes.⁵⁹ A recent lawsuit involving the sale and exchange of NFTs offered on Striker's website and mobile applications using players' names, photos and other attributes in *Digital Collectibles Pte Ltd. and Ors. v. Galactus Funware Technology Private Limited and Ors.*⁶⁰ After obtaining an NFT Player Card on Striker, a user is not required to take part in any fantasy games on Striker. The NFT Player Card is easily tradable or sellable by the user.⁶¹ It is further submitted that in the said case, there was a disclaimer on the website and the real images themselves were not being used as non-fungible token ('NFTs'). Both being competing gaming platforms and granting ex parte injunction order would have gravely prejudiced the business of the defendants as the Hon'ble Court determined that the plaintiff's application to be exempt from advance service was not legitimate in light of the defendants' almost six-month operation of their game and the fact that the defendants are the plaintiff's direct competitors in the industry.⁶²

In *Marvel Enterprises, Inc. v. NCSOFT Corp.*,⁶³ the latter company made a video game with superhero-like characters and attire. The names were not utilised in a professional capacity or directly in connection with the product's sale, distribution, or advertising. Thus, the court rejected the Marvel's claim for direct, contributory, and vicarious copyright infringement, direct trademark infringement, the court dismissed plaintiffs' claims for both contributory and vicarious trademark infringement. The court held that Marvel failed to allege that NCSOFT's users had used Marvel's marks in commerce or in connection with the sale, offering for sale, distribution, or advertising of any goods or services, and thus there was no infringement on the part of defendants' users

⁵⁹ *Supra* note 57 at 13-14.

⁶⁰ CS (Comm) 108/2023 (Delhi High Court).

⁶¹ 2023 SCC OnLine Del 2306.

⁶² Angad makkar, "Delhi HC Shapes Contours of the Right to Publicity: Digital Collectibles v. Galactus Funware", available at: <https://iprmentlaw.com/2023/05/09/delhi-hc-shapes-contours-of-the-right-to-publicity-digital-collectibles-v-galactus-funware/> (last visited on October 01, 2023).

⁶³ CV 04-9253-RGK (PLAx) 74 U.S.P.Q. 2d 1303 (C.D. Cal. 2005).

for which defendant could be secondarily liable.⁶⁴ In the case of *Incredible Technologies, Inc. v. Virtual Technologies, Inc.*,⁶⁵ the creator of the golf arcade videogame ‘Golden Tee’ filed legal action against a rival company for violating its copyrights in the game’s visual display. The Court found that some of the game’s display was incidental to the customary treatment of a round of golf game and as such, was not protected by copyright. However, in the case of *Midway Mfg. Co. v. Bandai-America, Inc.*,⁶⁶ it was held that all video games, including VR content, are audio-visual works and therefore, they are eligible for copyright protection.

Therefore, it is safe to say that technologies like AR, VR, networked devices, user-generated content, and the Metaverse have transformed the gaming experience. Some big internet giants like Facebook, Microsoft, Apple and Samsung are dominating the market with their patents in AR/VR technology and creating ground-breaking products like haptic feedback gloves, VR retail malls, AR mapping, and AR spectacles in order to compete in a market that is expected to be worth billions of dollars. Given the huge stakes, there has never been fiercer competition for AR/VR patents than now which points towards the emergence and growth of Intellectual property protection with the evolving technology in video games.

7. Conclusion

In the ever-changing world of technology, Intellectual Property plays a significant role in granting exclusive rights to the creators of patents, copyrights, trademarks or designs. This serves to secure their innovations and provides a competitive edge in the fast-paced world of technological advancements. However, with the advancement of technology and the advent of new gaming features, several problems have been encountered by IP holders while enforcing their rights, especially with respect to video games. Severe setbacks are being faced in preventing game cloning where the entire IP is copied such as when the source code of the game Lugaru HD was realised by

⁶⁴ Ellie Gibson, “Marvel vs. NCsoft: legal battle continues over City of Heroes”, *available at*: <https://www.gamesindustry.biz/marvel-vs-ncsoft-legal-battle-continues-over-city-of-heroes> (last visited on October 01, 2023).

⁶⁵ Case No. 03 C1183 400 F.3d 1007 (2005).

⁶⁶ 546 F. Supp. 125 (D.N.J. 1982).

the developers under the GPL license, it was cloned by iCloner and released on the App Store with the name Lugaru.⁶⁷

Furthermore, hassle occurs in protecting individual features of video games since few are already in the public domain. Creating an asset for a game development and protecting it under the copyright regime is a predicament as assets developed by the website would not be protected and creating own asset for the game is not economically viable for the small players in the gaming industry. Alike designs created using game engines also face a similar challenge in their protection although these designs look different but are created using the same engine.⁶⁸

It can be discerned from the above challenges that the gaming business in India may immensely expand and profit if new or improved Intellectual Property regulations are brought in the following areas: Protection of virtual goods and currencies from unauthorised usage or theft as in-game purchases and virtual economies grow as these are not sufficiently protected by any Indian IPR legislation. The necessity for a robust procedure in patent application is paramount, serving as a vital tool in protecting advanced video game technology.

At present, even though there is a robust mechanism to protect intellectual property rights in the Indian legal system, there is room for enhancement and improvement in terms of the laws relating to the business of video games. These are not specifically protected by the Indian legislature albeit the pivotal role in a game's success. In such an evolving industry that fosters innovation and has an eminent impact on the potential economy of the country, there is a requisite to revise and develop the IP laws and make them compatible with this dynamic ecosystem which can be ensured by passing specialised legislation to protect game mechanics, virtual goods, and game engines, as well as by streamlining the patent application procedure.

⁶⁷ Andrew Webster, "The clones cometh: the App Store is full of copycats, and it's indies who suffer", available: <https://arstechnica.com/gaming/2011/02/halfbot-interview/2/> (last visited on September 30, 2023).

⁶⁸ *Supra* note 12.