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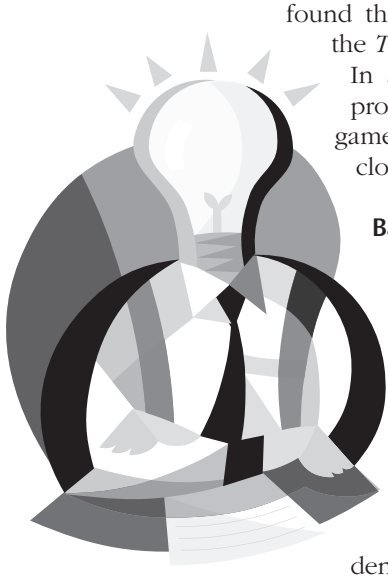
Grand Theft Video: Judge Gives Gamemakers Hope for Combating Clones

This spring, I attended the annual PAX East gaming tradeshow in Boston, one of the largest gaming events in North America. One of the high points of PAX is the focus on independent video game developers, including this year's "Boston Indie Showcase," spotlighting some great indie games available on mobile platforms.

The developers of these innovative games identified a common source of vexation: the proliferation of knock-off games, or "clones," produced by copycats seeking to cash in on the success of an existing game. While clones may not be guilty of literal copying of a preexisting game, they typically copy the look and feel of the game to an extent that goes well beyond mere inspiration.

Although many developers have taken the trouble to protect their intellectual property through copyright and trademark registration, they are frustrated to learn that these measures have historically provided relatively thin protection against cloning.

Relief may be at hand, in the form of a federal court decision from New Jersey. In *Tetris Holding LLC v. XIO Interactive LLC*, 2012 WL 1949851 (D.N.J.), the court rejected what has become a clone developer's standard defense – that it copied only non-expressive, functional elements of the original game.[1] The judge found the developer liable for infringing the *Tetris* copyright and its trade dress. In so holding, the court may have provided an important weapon for game developers to fight back against clones.



Background

The fight between Tetris Holdings and Xio centered on Xio's *Tetris* clone, "Mino," which Xio developed and sold in the Apple iTunes store. Enticed by the prospect of a quick buck, Xio admittedly downloaded the existing *Tetris* application for the iPhone and set out to make its own version. Xio did not deny that it engaged in purposeful and deliberate copying – although not at the code level – of many elements and features of *Tetris*. Xio also conceded that rather than devote resources to developing an original game, it spent its time and money researching copyright law. Based on that research, Xio concluded that it could imitate *Tetris* so long as it copied only elements of the game that it believed were functional or based on the rules of the game.

Applying the idea-expression dichotomy and the doctrines of merger and scènes à faire, which are explained below, Xio determined that there was little copyrightable expression left in *Tetris*, and Xio could freely and unabashedly clone the game. Unfortunately for Xio, the court wholeheartedly disagreed.

Finding Copyrightable Expression in *Tetris*

With Xio so candidly admitting that it knocked off *Tetris*, the court focused its analysis on the elements of the game that are potentially protected by copyright. The court first had to confront the idea-expression dichotomy. This basic tenet of copyright law allows for protection to be given only to the expression of an idea, not to the idea itself.

After reconciling the differing approaches taken in the leading cases, the court held that the underlying idea of *Tetris* should be distinguished from the game's protectable expression. This it did by dissecting *Tetris* at an abstract level and identifying the concepts that drive it. In framing its abstract dissection of *Tetris*, a pivotal part of its analysis, the court explained what cannot be protected by copyright:

> *Tetris* is a puzzle game where a user manipulates pieces composed of square blocks, each made into a different geometric shape, that fall from the top of the game board to the bottom where the pieces accumulate. The user is given a 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. But if the pieces accumulate and reach the top of the screen, then the game is over.[2]

While these basic game mechanics and rules are not protectable, the court determined that Tetris

Holding is entitled to copyright protection for the *way* it chose to express those ideas, particularly with respect to their expression in the look and feel of the game as represented by its audiovisual display.

Overcoming Merger and Scènes à Faire

In its defense, Xio relied heavily on the related doctrines of merger and scènes à faire.

Merger precludes copyright protection when an idea can be expressed in only one or a very limited number of ways. Otherwise, the originator would gain a virtual monopoly on the idea itself. Examples of merger in the context of gaming would likely include common game features such as character health meters in fighting games or the depiction of a zoomed-in rifle scope in a first-person military shooter.

The doctrine of scènes à faire applies to elements of a work that are stock or standard generally or regarding a particular topic. These are not protectable because their expression is so commonly associated with a genre or motif that it has become ubiquitous. For instance, the inclusion of hordes of mindless, shuffling undead in a zombie-themed horror game would likely qualify as scènes à faire.

Citing these doctrines, Xio argued that even if there were expression in *Tetris* separate from the underlying ideas of the game, that expression should not be protected because it relates directly to the game's rules and is dictated by its functionality. The court disagreed, holding that expression is left unprotected *only* when it is integral to or inseparable from an idea or function. The court reasoned that Xio's expansive interpretation of merger and scènes à faire would create an exception to copyright that would likely swallow any protection a game could possibly enjoy.[3] After all, most expressive elements of a game are related in some way to game rules and function. But this does not mean they are without protection, so long as their expression is distinguished from the game rules and gameplay mechanics and not essential for their operation.

Comparing *Tetris* and its Clone

After viewing screenshots and videos of gameplay, the court concluded that Xio infringed numerous aspects of protectable expression from *Tetris*. First and foremost, the court found that the style, design, shape and movement of the *Tetris* pieces, which were copied by Xio, were not part of and were not essential to or inseparable from the ideas, rules or functions of the game. With respect to these aspects of *Tetris*, the court found that "there was no necessity for *Mino* to mimic *Tetris's* expression other than to avoid the difficult task of developing its own take on a known idea."[4]

The court found that Xio had also copied other discrete copyrightable elements from *Tetris*, including the dimensions of the playing field, the display of "garbage" lines, the appearance of "ghost" or shadow pieces, the display of the next piece to fall, the change in color of the pieces when they lock with the accumulated pieces, and the appearance of squares automatically filling in the game board when the game is over.[5]

Although the court noted that each of these additional elements might not constitute infringement standing alone, taken together, they further demonstrated the wholesale copying of the protected look and feel of *Tetris*.

Trade Dress

Xio was also found to infringe on Tetris Holding's trade dress in the game. Tetris Holding claimed that its trade dress in *Tetris* comprises the brightly colored *Tetris* game pieces formed by four equally-sized, delineated blocks, and the rectangular playfield which is higher than it is wide.[6]

Xio did not dispute that the *Tetris* trade dress was famous and had acquired secondary meaning, or that consumers would likely confuse *Mino* for *Tetris*. Instead, Xio argued that the asserted *Tetris* trade dress was merely functional. Again, the court sided with Tetris Holding, finding that the design choices in *Tetris* were basically arbitrary flourishes that were not related to the reason *Tetris* works or functions.[7]

Implications

Although the ultimate meaning of this case may be altered on appeal, it presents intriguing implications.

For game developers concerned about clones, the case highlights the importance of protecting their work through copyright registration, which is an essential precondition to a lawsuit for copyright infringement. While the case for infringement was made easier by Xio's flagrant and wholesale copying, the legal standard applied by the court, addressing the overall look and feel of the game, may presage more robust copyright protection for video games.

This case also demonstrates that the critical fight with clones will be over the appropriate level of abstraction of the game mechanics and gameplay. The *Tetris* developer's victory was almost assured once it persuaded the court to identify the underlying game rules and gameplay at a very high level. Having adopted a relatively high-level understanding of the idea of *Tetris*, the court could readily identify more detailed, granular expressions of that idea that qualified for copyright protection.

Another intriguing aspect of the case relates to how technology may affect copyright protection afforded to video games. Not once, but twice, the court in *Tetris Holding* commented on the exponential increases in computer processing and graphical capabilities. Implicitly, as these improvements in technology significantly expand the creative limits of

IP INSIGHT *continued on page 19*

[15]For 2012, the wage threshold for classifying a cleaner as a household employee is $1,800, or about $35 per week, if the cleaner does not qualify as an independent contractor.

[16]FICA stands for the Federal Insurance Contributions Act (which funds social security and Medicare) found at 26 U.S.C. § 3101 *et seq.* FUTA stands for the Federal Unemployment Tax Act (which funds federal unemployment insurance) found at 26 U.S.C § 3301 *et seq*.

[17]Employee compensation is a deduction or a component of costs of goods sold, depending upon the type of business.

IP INSIGHT *continued from page 15*

game developers, clones may have diminishing success in arguing that their wholesale copying is permissible because expression has merged with idea.

Already, the *Tetris v. XIO* decision is being cited to support similar attempts to crack down on clones. In another closely-watched case, *Spry Fox LLC v. LOLApps Inc. and 6Waves LLC, et al.*, 12-cv-00147-RAJ (W.D. Wash.), cloners LOLApps/6Waves moved to dismiss claims of copyright infringement, arguing that nothing copied from the original Spry Fox game was protectable. In opposing that motion, Spry Fox filed a notice of authority in June citing the *Tetris v. Xio* decision.

Finally, it is important to recognize another important concern of many game developers who worry that cracking down on clones might hurt innovation in gaming. One need not look very far to find examples of great games that were clearly inspired by their predecessors. But even to the extent *Tetris Holding* may tighten the screws on clones, its holding should not be overstated. The case does not extend copyright to cover ideas, nor does it minimize the exceptions to copyright protection provided by the merger or scènes à faire doctrines. However, for developers who have chosen to knock off, wholesale, the look and feel of a game, *Tetris Holding* gives warning: Clone at your own peril! **TFL**

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Endnotes

[1]*Tetris Holding LLC v. XIO Interactive LLC*, 2012 WL 1949851 (D.N.J.).

[2]*Id.* at *13.

[3]*Id.* at *10.

[4]*Id.* at *15.

[5]*Id.* at *16.

[6]*Id.* at *18.

[7]*Id.* at *19.