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COPYRIGHT INFRINGEMENT IN THE VIDEO GAME INDUSTRY – EXECUTIVE SUMMARY

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ABSTRACT

The video game industry is one of the most successful of the creative industries. It is young, born-digital, global, fast-paced, highly innovative, creative and interactive. Video games *per se* are complex digital products, whose creation, distribution and consumption are incentivized, enabled and facilitated by intellectual property rights (IPRs). And as video game companies adopt a wide range of distribution models and revenue streams from multiple sources — especially due to the integration of other media, live events and performances — we are also witnessing a conceptual shift from video games as *digital products* to video games as *digital services*. From a copyright perspective, these fundamental changes in the video game industry's business models call for a different and varied range of enforcement strategies.

The design, development, and distribution of videogames, together with users' consumption of and interaction with video games take place within a framework shaped by different types of IPRs, together with a complex array of contracts among all relevant stakeholders — developers, publishers, distributors, retailers, platform owners and players — on a global scale. These contracts are essential for allocating rights in ways that enable the commercialization of video games and give rise to the multiple business models that coexist in the video game industry. Of crucial importance are also the end-user license agreements (EULAs), which players must

* The views expressed in this document are those of the authors and not necessarily those of the Secretariat or of the Member States of WIPO.

agree to in order to play the video game concerned. They specify in detail the permissions and restrictions that apply to the use of the software.

To complete the snapshot of this multi-layered digital ecosystem, one should mention the increasing role of regulation that is shaping the industry, and specifically in relation to viable monetization and distribution models. From renewed interest in regulating micro-transactions and inappropriate content, to empowering users and consumers and creating a safe digital environment for users, especially children and young people, the video game industry is back in the regulatory spotlight.

Given the nature of video games and the industry ecosystem, copyright law and license agreements are particularly pertinent to shaping business models and practices. Video games are inherently immersive and interactive media that push the boundaries of creativity and challenge the traditional allocation of rights, which will also vary across different jurisdictions (ranging from regions with rich and mature video game case law to regions with no relevant cases at all, in itself an important observation). This study provides a global insight into copyright infringement and enforcement strategies in the video game industry and identifies both particular high-risk areas (heat maps) and approaches for successfully addressing them on the national and international level (recommendations). While specific enforcement strategies will depend on various factors, including the nature of the infringement, their potential detrimental effect, the nature of the company seeking to take action, the identity of the potential infringer, the jurisdiction in which it takes place and so on, it is still possible to recognize some common themes.

The study also aims to: 1) outline the range of creative uses and business practices specific to the video game industry; 2) analyze the potential risks associated with these uses and practices and practical challenges right holders face when enforcing their rights; 3) consider any discrepancies between legal provisions, business practices and creative uses and how they may be resolved; 4) identify future trends with regards to emerging practices and enforcement strategies.

I. OVERVIEW

1. Video game right holders encounter a variety of threats due to potential copyright infringement, especially when the video game is commercially successful. These threats can originate from competitors, players and third parties in general, intending to use the work without authorization or beyond the terms of the license. Some threats are similar to those in other creative industries (such as piracy, either through the unauthorized online distribution of digital copies or the sale of physical copies), but others are specific and often unique to the subject matter of video games (e.g., key and account selling).

2. The methodology employed by this study was to identify key practices and uses of video games; consider any features unique to the video game industry; establish implications for copyright protection/infringement and potential overlap with other types of IPRs; evaluate the level of risk and identify enforcement strategies (including where a particular practice or use is tolerated) as well as practical challenges that right holders face in enforcing their exclusive rights and any discernible variance when it comes to different markets. A number of key factors had to be considered, including the type and genre of the game in question, the distribution and business models, the nature of the player base and its relationship with the right holder and the jurisdiction. Specific legislative approaches, business insights and relevant case law are cited where appropriate.

3. These factors produce a matrix in which different game genres as well as different distribution and business models may lead to different types of copyright infringement, which in turn call for different copyright enforcement strategies. The activities are grouped thematically based on the aspect of the work at the center of the analysis:
- the video game or key aspects of the video game – including distribution and access (e.g., cloning, emulators and ROMs, key selling and account selling);
 - altering the video game (e.g., modding, in-game uses of third-party IPRs);
 - interfering with the integrity of the video game and/or the experience of other players (e.g., cheating, private servers); and
 - creative re-purposing of the video game (primarily by players, e.g., in-game user creations, user-generated content, live-streaming).

A. CLONING

4. Video game clones primarily involve the copying of the overall game design and gameplay, character roles or winning requirements, without the duplication of individual elements such as the underlying software, the art or the music. This issue has become particularly significant in the context of the mobile games industry, whose business model means that successful mobile games are most susceptible to this kind of imitation. In jurisdictions where the different elements that make up a video game are protected as separate works, with no protection afforded to the audiovisual display generated during play, right holders have had difficulty enforcing their rights against the producers of clones, though they have had more success in jurisdictions where copyright laws are more expansive. Due to the costs and risks of litigation, smaller, independent developers prefer to rely on notice-and-take-down procedures and non-legal strategies, such as “naming and shaming” perceived producers of clones.

B. EMULATORS AND ROMS

5. Read-only memory (ROM) files contain digital data extracted from physical copies of video games. These are particularly important to players of older or retro games: by using a ROM file in conjunction with an emulator program, players are able to play these older titles on contemporary software and hardware platforms. Until recently, the players’ use of emulators and ROM files were largely ignored by right holders as these were directed at older titles no longer being marketed. This has now changed, following a wave of renewed interest in retro games. While the creation and use of emulators has been found to be non-infringing in jurisdictions where the issue has been litigated, the distribution of ROM files will almost always amount to infringement as it involves the wholesale reproduction of the video games concerned. Video game companies’ enforcement strategies reflect their overall corporate strategies. Companies with plans for re-launching their older titles have been actively pursuing litigation against the operators of ROM sites, while companies with no such plans seem content to ignore these activities.

C. GAME INTEGRITY

6. Cheating in video games by using hacks, bots and the exploitation of bugs as well as the provision of unauthorized private servers has strong copyright implications, in particular for the reproduction right, the communication to the public right, the circumvention of technological protection measures (TPMs) and the breach of EULAs. Video game providers have been very

active in their enforcement against users and creators of these tools, establishing extensive case law (in particular in the United States of America (USA), Germany, the United Kingdom and China).

D. MODDING

7. “Modding” refers to the practice of altering one or more aspects of a video game, ranging from small tweaks to complete overhauls. Mods generally require the user to have access to the original video game as they are incapable of functioning without it and do not operate as stand-alone pieces of software. While normally tolerated, this practice potentially displaces sales of official new content, especially as the video game industry gradually pivots towards some variation of the games-as-a-service model. To date, enforcement strategies have been focused on mods that disrupt the online component of a video game by giving their users an unfair advantage over other players, generally by suspending or terminating the accounts of these users.

E. IN-GAME USE OF THIRD PARTIES’ INTELLECTUAL PROPERTY

8. Video games are often entangled in pop culture and have an increasing focus on realism, thus often raising the question whether certain inclusions or references to third parties’ IPRs (e.g., vehicles, works of architecture, weapons, Easter eggs¹, dance moves, cameos, etc.) need to be licensed from the relevant right holders, or whether the use is permitted under applicable law. This has been extensively litigated until very recently (especially in the USA) and has an important effect on the risk assessment of game developers’ and publishers’ business decisions.

F. CREATIVE USES

9. As games are inherently interactive and creative digital media, user creativity is often welcomed and encouraged, despite the fact that it may result in infringing use of the original work (this will depend on the degree and quality of the creative choices users have within the game). Given the beneficial nature of user creativity (popularity, user engagement, community building), this practice is largely tolerated. In isolated cases, right holders resort to notice-and-take-down procedures or alternative approaches such as open licenses that embrace creative uses of video game content.

II. KEY FINDINGS

10. Enforcement strategies differ substantially depending on several factors, including the type of game, the genre, the distribution and business models, the nature of the allegedly infringing activity, the defendant (context, purpose of use, market share of the defendant), the plaintiff (corporate strategy, market share of the plaintiff, community relationship) and jurisdiction. Nevertheless, some common themes and strategies can be identified.

11. Given the interactive nature of video games and business models that fully exploit the aspect of creativity and community, it is clear that not all potentially infringing activities pose a threat and therefore need not be enforced. In fact, some unauthorized activities might even be beneficial, directly or indirectly, to the right holder in, for example, addressing bugs, improving

¹ Hidden messages, jokes and secret features added to video game to reward players.

and expanding the content through streaming, modding or creating fan works. The level of risk is represented in the study's heat map. Enforcement might not always be the best option, especially when success is not guaranteed. In fact, enforcement might not result in the desired or anticipated solution, leading to only temporary or unsatisfactory outcomes (e.g., the "Streisand effect"² and the "whack-a-mole" problem³), or a counterproductive legal precedent. Often, alternative legal approaches or technical solutions are available (which might also be more cost effective). The following preliminary considerations are particularly crucial in identifying a suitable enforcement strategy:

- When it comes to potential copyright infringement, video game companies show a tendency to tolerate certain uses and practices as long as they have positive economic and marketing impact.
- Right holders refrain from enforcement where it is not strategically sound in terms of costs and outcomes (e.g., if enforcing copyright does not address the underlying issue).
- In some cases, right holders embrace creative uses of video games through unconventional license schemes (subject to certain limitations).
- The industry has been innovative and proactive in finding alternatives to litigation by reaching out directly to the alleged infringers or implementing contractual and/or technical solutions.

12. Certain trends are also identified. In particular, the enforcement of intellectual property rights and licensing agreements are likely to play an even bigger role in this fast-paced, cutting-edge industry, from cross-licensing agreements to inter-operability issues arising from the expansion of user-generated content in video games and the metaverse.

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² Named after an incident involving the US singer Barbara Streisand, this describes a phenomenon where attempts to suppress information have the inadvertent effect of spreading that information further.

³ A phenomenon where a pervasive problem keeps recurring even after it is supposedly resolved.