



CULTURE CLASH

PROTECTION OF GAMES AND GAME CONTENT IN AN INTERNATIONAL SETTING

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March 17, 2006
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Explosion of Game Segment in the U.S. Entertainment Industry ¹

- Games and consoles are a \$27.5 billion industry, now overshadowing traditional film box office;
- Games have permeated our culture to the extent of evoking a *Wall Street Journal* multipage feature on February 18-19, 2006; *The New Hollywood – the Power Players*.
- As IP alliances emphasize over and over, intellectual property industries are a critical engine of U.S. economic growth. Gaming is an important element of that growth.



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U.S. Intellectual Property Industries:

- Contribute 40% to all growth, 60% of growth of exportable products;
- Contribute to gross domestic product, 20% of private sector contribution, 40% to exports;
- One of the U.S.'s highest paying employers (18 million workers);
- Core copyright industries contribute \$33 billion in net export revenues in 2003; contribute to balance of trade.

Source; International Intellectual Property Alliance ("IIPA"), NBC Universal report, *Engines of Growth*, November, 2005.

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Protection Of U.S. Intellectual Property Industries Continues To Be A National And International Priority; Games Raise Unique Issues

- Regional lockout; a device used by certain games; the programming practice, code, chip, or physical barrier used to prevent the playing of media designed for a device in one country in a version marketed in another country.
- Main regions; Japan, North America, Europe, Australia, Pacific.
- Some version of "lockout" may be more effective than legal action or treaty enforcement for games, but may be seen as hindering marketing.
- Bypasses for territorial restriction are prosecuted worldwide.

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How do games (MMORPGs, video games, others) differ from other entertainment industry sectors?

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- The largest game producers in the world are in Southeast Asia (Korea), with superior technology.
- Largest and most advanced game producer also in the East.
- U.S. producers and consumers are followers.
- Unlike filmed entertainment, we are protecting a competitively growing sector, and are not the market leader.
- To the extent domestic games incorporate popular elements of American culture, they are nonetheless subject to piracy.

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Remedies Differ In The International Context

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Classic infringement litigation in District Court is only one limited protection option used by content providers. One example;

- *Marvel v. NCSoft Corp., et al.* Marvel, creator of a universe of Super Heroes®, sued the creator and distributor of an MMORPG designed to bring “the world of comics alive;” players created their own avatars, and some copied popular Marvel characters.

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- Marvel has created a universe of famous comic book characters



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“City of Heroes” MMORPG

- Massively multiplayer online role playing game (MMORPG)
- Developed by Cryptic Studios; published by NCSoft
- Brings the “world of comics alive”



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Marvel's Copyright Theories

- Direct infringement
 - Does game design directly infringe by incorporating elements of Marvel Super Heroes?
 - Wolverine's signature claws
 - The Thing's orange rock-like skin
 - Iron Man's signature red and yellow armor and helmet
 - Phoenix's costume

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Marvel's Copyright Theories

- Contributory infringement
 - “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another”
 - *Sony* defense of substantial non-infringing use?
- Vicarious infringement
 - Direct financial benefit to the defendant
 - Right and ability to supervise the infringers
- Inducement liability (*MGM v. Grokster*)
- Case resolved by confidential settlement
- Very difficult to monitor and prevent incorporation of known characters in internet games, but it can injure owner.

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Columbia Pictures Industries, Inc. v. Gary Fung, et al.

- On February 23, 2006, MPAA and major studios filed seven federal copyright infringement lawsuits in different states against file swapping websites for facilitating the illegal sharing of games, movies, and television shows.
- A “Torrent” site contains an index of files available on a network. The sites instruct the user how to obtain and download a desired file illegally.
- One defendant is based in Canada, one site is West-Indies based.

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Davidson & Associates v. Jung, 422 F.3d 630 (8th Cir. 2005)

- Facts describe panoply of technological protections built into online gaming service and computed gaming software for “Battle.net.” Defendants disabled these protections and argued that this was legitimate reverse engineering. The Court of Appeals affirmed the anti-circumvention and anti-trafficking holdings against defendants.

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Other Actions

- Asian litigation over theft of user's property in MMORPGs
- Actions preventing third parties from hosting online play of console and PC games without license
- MMORPGs owners claim license preventing ownership used to attack outline sellers of scarce property in game



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Factors Facilitating Infringement and Piracy in World Markets

- In the last fifteen years, increases in world trade and ready availability of technology has created new business opportunities in newly developed areas, accompanied by massive counterfeiting of entertainment and software products – why?
- Despite differences, games are subject to same practical realities and laws as other copyrighted products.



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A. Cultural Factors

1. American intellectual property legal system embodies 18th Century values and is constitutionally based.
 - Lockean individualism and Newtonian physics promote the values of creativity and competition.
 - Western tradition values *property rights*; U.S. patent and copyright laws allow holders to exclude others from using, making, copying, or distributing for limited times – “legal monopolies” – which have been recognized in European law since at least 1460.

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A. Cultural Factors (cont'd)

- Explicit constitutional grant; U.S. Const., Article III, cl. 8; Congress “has the power to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”
- These concepts have survived changing technologies; we enforce them domestically and internationally in a post-modern universe and global economy.
 - “From its beginning, the law of copyright has developed in response to significant changes in technology.” *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 430 (1984).
 - “Copyright was technology’s child from the start.” Paul Goldstein, *Copyright’s Highway: From Guttenberg To The Celestial Jukebox* (1994).

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A. Cultural Factors (cont'd)

2. Western concepts are antithetical to cultural values, beliefs of many new and developing economies;
 - Example; many East Asian countries are strongly influenced by China.
 - Generalizing, in the largely Confucian tradition, intellectual works belong not to the creator or author but to society; copying is part of an accepted learning process. Indeed, "imitation is the greatest form of flattery." Copying is a respected profession.
 - There are numerous regional cultural variations. But cultural factors and beliefs can and do impede effective protection efforts.

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B. Other Factors Driving Product Piracy

1. Economics; in newly developed or developing countries, imported items requiring hard currency are more expensive than local pirated products.
2. Popularity of Western pop culture and Japanese culture in developed or developing new economies; huge demand for music, videos, and games that can be more cheaply satisfied illegally.
3. Explosion of East Asian economies has created a need and demand for foreign products filled by counterfeiting.

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B. Other Factors Driving Product Piracy (cont'd)

4. Business technology and consumer technology are key to East Asian and other area growth; need to import operating software and applications. Microsoft applications and games are among the most frequently counterfeited items.
5. Pirated products appear more rapidly in the marketplace than legitimate ones; games can be duplicated from a single disc.
6. Pirated copies of software are much cheaper than “legal” versions, making legitimizing the market difficult.

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Benefits of Piracy in New and Newly Developing Economies

[If host countries were not enriched, piracy would not exit.]

- Rapid satisfaction of consumer demand; promotes goal of competition process, consumer satisfaction.
- Makes goods available to people who otherwise could not afford them; “If I sold the real thing, I wouldn’t even sell 10 percent of what I’m selling now” (retailer in Thailand). Small business entrepreneurship.
- Buying pirated goods strengthens local industry as against supporting large multinationals; plays into negative view of U.S., large companies.
- “Support your local pirates.”
- Expands country’s technology base.

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How Piracy Injures Newly Developed Or Developing Economies

- International aspects offend and discourage investment by other nations and companies that are net exporters; incentives for investment removed.
 - Would investment follow halting piracy and outweigh loss of pirated industry? We do not know.
- Allegedly linked to organized crime.
- Hampers development of legitimate businesses in newly developed economies.
- Business Software Alliance; strengthening IP laws and stopping piracy generates more and faster IT growth.

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Remedies In The International Context; Trade Sanctions

- To what extent does trade law impact fundamental copyright doctrines?
- To what extent is U.S. copyright law part of a larger whole?
- To what extent can U.S. policy dictate implementation of various multilateral agreements or invoke unilateral measures and trade sanctions?

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Domestic Proceedings

- U.S. Customs Service may exclude importation of copies which, if made in the United States, would constitute infringement.
 - 17 U.S.C. §§ 602(b), 603(a).
 - Does not apply to “gray market” goods, only to entirely unauthorized copies.
 - Seizure, forfeiture, destruction.
- Normally follows an application to the court, but owner may go directly to the customs service.
- Narrow application to importations.

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International Trade Commission

- Like Customs Service, Section 337 of The Tariff Act of 1930 bars importation of infringing goods, as well.
- Advantage; highly expedited timeline (12-18 months); altered by GATT to “the earliest practicable time after” the investigation commences.

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Section 301

- U.S. Trade Representative (USTR) may use trade measures as leverage to protect United States intellectual property. USTR may negotiate to eliminate an unfair trade practice (e.g., failure to protect intellectual property), retaliate against foreign government.
 - Trade Act of 1974 and Omnibus Trade and Competitiveness Act of 1988 govern Section 301.
- Action is mandatory if USTR determines a violation or trade burden exists.

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Special 301

- Subject to contrary rulings by the Dispute Settlement Body (“DSB”) of the World Trade Organization (“WTO”).
- Provides for identification of countries that deny adequate protection or market access to United States intellectual property rights.
- Three levels; a “watch list” and a “priority watch list” for egregious violators, and for the most egregious, designation as a “priority foreign country” (“Special 301”).

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Special 301 (cont'd)

- Denial of protections warrants addition to the “watch list.”
- “Super 301” – revived in 1994 for one year – enabled an even higher level of identification. May be reenacted.
- What does the list really mean?



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Examples

- IIPA has urged the Trade Representative as recently as February 13 to designate Russia as a “priority foreign country” as an egregious offender. Complaint is failure to protect intellectual property, with respect to piracy for music CDs, film DVDs, software, games software, etc. were 70-80% in 2005.
- Also sought suspension from Generalized System of Preferences (“GSP”) (duty-free access to U.S. markets), a significant threat.



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Taiwan

- In 1993, USTR placed Taiwan on the “priority watch list.” At the time, Taiwan was the world’s fourteenth largest exporter and not a signatory to the (then) General Agreement on Tariffs and Trade (GATT). This designation followed intensive negotiations with Taiwan and resulted in some concessions. Taiwan argued that strategy was to keep Taiwan under continuous pressure.
- Other countries on list: Pakistan, Brazil, Russia are under investigation (by January 24, Pakistan had made progress); loss of Generalized System of Preferences is one penalty.
- Potential threats and being listed often resolve matters (Poland).

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China

- China is a permanent fixture on lists.
- USTR was to visit Beijing February 27 to obtain more information on intellectual property enforcement efforts. As of February 15, China claimed to have shut down 76 web sites, including servers with gaming sites.

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Unilateral vs. Multilateral

- As examples illustrate, “Special 301’s” unilateral action permits trade retaliation against a targeted country, in comparison to the multilateral approach of TRIPs (Trade Related Aspects of Intellectual Property Rights) in the WTO.
- Not unexpectedly, targeted nations (Thailand, Brazil, Taiwan) are not happy at what they see as being the target of aggressive U.S. copyright industries’ actions; invokes cultural and diplomatic clashes.
- Trade sanctions under Special 301 need not be limited to industries involved in piracy.

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International Compacts

- General Agreement on Tariffs and Trade (“GATT”) and Uruguay Round Agreements, resulting in the WTO.
- GATT supplemented U.S.’s Berne Union membership (1989); Berne enforcement is limited to actions brought by one country against another, must be heard in international court.
- At same time as Uruguay Round proceeded, U.S. revived “Super 301” for potential use against Japan and China; problems were negotiated (1994-1995).
- TRIPs does not replace U.S. unilateral action.

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TRIPs

- TRIPs (Trade Related Aspect of Intellectual Property Rights) was included in Uruguay Round.
- Protects intellectual property and geographical indications (e.g., Parmesan, champagne).
- Adherence to Uruguay Round Agreements requires compliance with TRIPs; emerging countries who want the free trade benefits of the WTO must sign onto TRIPs (with an extension for developing nations which expires this year).

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TRIPs (cont'd)

- Adopts principles of prior intellectual property treaties (Berne Convention, Rome Convention).
- Unique aspect; decision-making mechanism which replaces toothless mechanisms of conventions.

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TRIPs: Main Provisions

- Berne protection for foreign as opposed to domestic claimants incorporated.
- National treatment; each member must accord foreign nationals the same treatment as its own nationals with respect to intellectual property protection (with certain exceptions found in pre-existing treaties).
- Goes beyond Berne to most favored nation treatment (again, with exceptions).



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Copyright Under TRIPs

- Must comply with Berne, absent moral rights.
- Protection for computer programs, whether source or object code, as literary works; database protection (but not facts) also included.
- Rental prohibition (movie rentals permitted under U.S. law).
- Minimum duration – 50 years from date of publication (or creation for unpublished works).
- Special protection for “unfixed” performances that alters U.S. copyright law, not “writings.”



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Enforcement

- Multiple enforcement mechanisms to treat infringement, intercept pirated goods, and provide interim relief.
- Willful copyright piracy is subject to criminal prosecution.
- WTO members must enforce these provisions.



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Dispute Settlement Understanding

- Creates a Dispute Settlement Body which hears disputes between member states after receiving a written complaint, through an adjudicatory panel.
- Three panelists, government or academic; if requested, must include a panelist from developing country.
- Panels act confidentially.
- Dispute Settlement Body adopts the panel report unless there is an appeal.



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Dispute Settlement Understanding (cont'd)

- This is a far more effective mechanism than existed in prior conventions. Prior to TRIPs, WIPO was charged with implementing the earlier conventions.
- Previous IP agreements could not be enforced; TRIPs compliance may be enforced through WTO.
- Countries must provide adequate remedies through administrative and judicial channels.

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Problems

- The reality is that each WTO member may not be able to enforce anti-piracy controls within its borders and developing countries may not have the necessary resources.
- Product and software piracy may be a profitable domestic industry; enforcement efforts ignore the benefits to different cultures. What is foregone in taxes may come in as bribes. ("It's only business.") Each country must balance the benefits with international problems. Where status quo is more attractive, many countries will not yield.
- Going through procedures will likely not assist game segment.

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Problems (cont'd)

- Copyright industries cannot ignore the benefits of illegal activity.
- Unknown if panel hearings will be an adequate deterrent.
- In areas like East Asia, piracy is regional; TRIPs targets countries. May be ineffective.



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Alternatives To “One Size Fits All” Treaty Application

- Regional strategies of cooperative enforcement, differentiating among regions.
- Helping local firms and individuals in poorer countries acquire technology.
- Make legally licensed materials more available in developing countries.
- Public – private agreements.
- Technological options.



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Digital Millennium Copyright Act

- WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty became in force in U.S. in March and May, 2002.
- The Digital Millennium Copyright Act implements the treaties and updates U.S. laws with respect to information technology.
- Deals with scope of liability for related defendants as set forth in *Sony; Fonovisa v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996) (imposed liability on swap meet owner).

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Digital Millennium Copyright Act (cont'd)

- Need to harmonize *Sony* with treaty requirements – providing adequate legal protection and effective remedies against circumvention.
- 17 U.S.C. §§ 1201-05, added to Copyright Act, prohibit circumvention of technological measures of protection, protect the integrity of copyright management information, and set out penalties.
- DMCA balances the interests of content providers and users.

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Digital Millennium Copyright Act (cont'd)

- § 1201 focuses on unauthorized circumvention but safeguards certain interests; prevents unlocking the locked door. Nor may someone market a circumvention of protection device. Law enforcement, libraries, and security-related research are exempted.
- Basic copyright law, e.g., fair use, is not impacted.

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Liability of On-Line Service Providers (17 U.S.C. 512)

- Issue; where does a court draw the line for liability for infringement?

Early cases:

- *Playboy Enters., Inc. v. Frena*, 839 F.1552, 1554 (M.D. Fla. 1993). BBS was liable for direct infringement.
- *Sega Enters., Inc. v. Maphia*, 857 F.Supp. 679, 683 (N.D. Cal. 1994); sysop liable for others uploading of games.
- *Religious Technology Center v. Netcom Online Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995; no direct infringement, contributory infringement was correct approach. No vicarious liability.

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Section 512 (17 U.S.C. 512); Safe Harbors

- Limits but does not preclude liability for service providers.
- Idea is to allow providers to carry transmissions initiated by others that are automatic when they cannot select the recipient.
- No editing of content.
- Otherwise relegated to copyright defenses.
- Who is a service provider? Who qualifies for the safe harbor? Why? Napster did not. eBay did. Arguably, content owner is not a service provider.
- How does this impact games?

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Section 512 (17 U.S.C. 512); Safe Harbors (cont'd)

- Service provider must lack knowledge that it is carrying infringing material.
- “Red flag” test – no notice.
- No financial benefit.
- Must take down infringing material after notice.

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Other Developments

- February 10, 2006; Danish Supreme Court ordered ISPs to terminate file sharers' internet connections.
- Denmark's largest telecom was ordered to disconnect internet connections when informed of infringement, or threat of injunction.
- Ruling confirms that illegal file sharing breaches two E.U. directives, thereby applying throughout European Union.

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U.S. v. Slater, 348 F.3d 666 (7th Cir. 2003)

- Operation of a website designed to pirate software was not "fair use" and did not serve educational goals merely because operated by a professor; purpose of organization was to make software available on the internet.

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Korea and China

- South Korea manufactures Krazy Kart, a racing game.
- Nexon, the distributor of Krazy Kart, has complained bitterly about a Chinese imitation that followed on the heels of Krazy Kart's introduction in China.
- Not considering legal action at this time. Why? Economics? Free advertising?
- Computer-based gaming is 43.3% of South Korea's cultural product exports.

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Webcasting

- Webcasters seek under WIPO to acquire property right in their transmission streams, like broadcasters.
- Proposed WIPO treaty gives broadcasters a right beyond U.S. law in the program stream (needed to prevent signal theft).
- Webcasters seek the same protection; Internet Society claims differences.
- May conflict with U.S. copyright law.

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Conclusion

- Legal framework is at its most developed today.
- Still complex and unwieldy.
- May not sufficiently recognize practical realities.
- For games, technical protection rather than legal protection may be most effective.



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