WHAT YOU DON'T KNOW ABOUT MARIO BROS. AND COPYRIGHT

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Today, it is difficult to question the artistic character of video games. A mixture of audiovisual works and technological prowess, the contemporary video game differs from traditional computer programs and asserts itself more than ever as an artistic work in its own right. However, due to the complex and transdisciplinary nature of this medium, it may be difficult to characterize its nature from the copyright perspective.

In this regard, the World Intellectual Property Organization (WIPO) published this summer a comparative analysis of different national approaches concerning the determination of the legal status of video games. In this document, WIPO examines the legislation of a dozen countries, including Canada, to highlight the legislative distinctions relating to the qualification of the work and the determination of the identity of the copyright owner.

Full WIPO study is available online at http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/comparative_analysis_on_video_games.pdf.

The Situation in Canada

In Canada, there is no consensus on the classification of video games under the Copyright Act (the "Act"). Indeed, since the courts have not ruled on the issue, it is up to the authors and the practitioners to provide possible interpretations.

From the start, it is clear that video games can be classified as "computer programs" due to the fact that they aim "to be used directly or indirectly in a computer in order to bring a specific result". Under this classification, it is the source code of video games that would be protected. Indeed, it would be included in the category of "literary works" under the Act.

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However, this interpretation provides only partial protection to creators. Indeed, video games are, by their nature, very different from functional computer software programs such as word processing softwares, since they also are an amalgam of various works. Thus, in addition to the source code, many other elements present in a video game could be protected through copyright. These include music, film sequences, characters, narration and user interfaces.

In the case *Nintendo of America Inc. c. Camerica Corp*, (1991) 34 C.P.R. (3d) 193, the Court found that it was certainly plausible that the Act provides protection for audiovisual elements of a video game, but the arguments against this notion were also defendable. The Court therefore stated that it was a serious issue to be resolved at trial [*Louis-Pierre Gravelle et Jean-François JOURNAULT, « Protection des jeux vidéo : La propriété intellectuelle en mode multijoueur », Développements récents en propriété intellectuelle*, 2012, p.421].

In addition to benefiting from individual protection [In the case *Re : Sonne c. Fédération des associations de propriétaires de cinéma du Canada*, the Supreme Court stated that the inclusion of an existing recording of a musical performance in a film had the effect of bringing this benefit within the scope of the term "soundtrack". It remains to determine whether this interpretation could be implemented for video game], the various components of a video game may also be protected as a "compilation". Indeed, the Act defines "compilation" as

> (a) a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof; and/or
> (b) a work resulting from the selection or arrangement of data;

a definition that suits well the reality of video games.

With regard to the identity of the copyright owner, there are two competing interpretations. On one hand, when the work is conducted by a multidisciplinary team, it could be described as a "work of joint authorship", or a "work conducted by the collaboration of work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors [*WIPO, The Legal Status of Video Games : Comparative Analysis in National Approches*, 2013, par. 54]."

On the other hand, to the extent that the game in question was created by a compartmentalized team, it might rather be called a "collective work", which term includes "any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated ". However, due to the fact that the separate elements integrated in the video game are necessarily united in its source code, some argue that this classification should not be applied.

Finally, because video games are interactive by nature, some authors focus on the contribution of the user and the protection that could benefit the content generated therefrom.

For a detailed analysis of the issue, note that lawyers Louis-Pierre Gravelle and Jean -François Journault of the law firm Robic LLP published in 2012 a comprehensive article entitled “Protection des jeux vidéo : La propriété intellectuelle en mode multijoueur”. In this text, available (in French) at http://robic.com/admin/pdf/1069/421F-LPG-2012.pdf, the authors focus on the different protectable elements of video games under Canadian law including copyright, trademarks, patents and industrial designs.

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