

1-16-2014

Attack Of The Clones: Copyright Protection For Video Game Developers

Brian Casillas

J.D., Loyola Law School, 2014

Recommended Citation

Brian Casillas, *Attack Of The Clones: Copyright Protection For Video Game Developers*, 33 Loy. L.A. Ent. L. Rev. 137 (2013).
Available at: <http://digitalcommons.lmu.edu/elr/vol33/iss2/2>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Entertainment Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

ATTACK OF THE CLONES: COPYRIGHT PROTECTION FOR VIDEO GAME DEVELOPERS

*Brian Casillas**

This comment focuses on the case *Tetris Holding, LLC v. Xio Interactive, Inc.* and uses it to explore how video game developers' original innovations are protected under copyright law so as to fully restrict those wishing to "clone" these innovations for their own financial gain. The comment begins by outlining relevant copyright concepts and statutes, using case examples, and detailing the analytical framework courts use to evaluate claims asserted under copyright law. It then discusses the accommodations by both the video game industry as well as online marketplaces in order to protect original content from being cloned. After evaluating these existing accommodations, the comment outlines the financial and intellectual effect full compliance under copyright law would have on the video game industry. Lastly, the comment suggests possible action for courts and those within the video game industry to take in order to protect original ideas by developers, ultimately concluding that games on all platforms be awarded copyright certification before their release.

I. INTRODUCTION

Throughout the twentieth century, the gold standard for gauging the entertainment industry was how well a movie or music album fared upon its release.¹ However, with the technological boom sweeping households

* J.D. Candidate, Loyola Law School, 2014; B.A., University of California, Los Angeles, 2010. The author would like to thank his family (his grandparents, his mother Yolanda, father Fortino, and brother Nicholas) and girlfriend (Liliana Gomez) for their loving support and guidance throughout his endeavors. A special thank you to Professor Anne Wells for her academic assistance and responsiveness throughout the drafting and editing process. He would also like to thank Aaron Casillas for his support and guidance in helping the author navigate the complexities of the video game industry. Finally, his greatest gratitude to Chief Note and Comment Editor Sean Montgomery, Chief Production Editor Arpine Hovasapyan, and Chief Research Editor Paloma Carrero as well as the rest of the talented and hardworking staff of the *Loyola of Los Angeles Entertainment Law Review* for their dedication and meticulous work in the production of this comment.

in countries such as the United States and Japan, the video game industry has quickly clawed its way to the peak of the entertainment mountaintop.² In fact, in just one day, sales for Activision's *Call of Duty: Black Ops 2* soared past the all-time opening weekend box-office record set by Disney's *The Avengers* by more than \$300 million.³ As video games continue to transform the entertainment industry, the need to provide intellectual property protection, primarily through the extension of copyright law, has become more apparent.⁴ Specifically, game developers across the industry have identified a common source of irritation: "the proliferation of knock-off games, or 'clones' . . ."⁵ Clones are games emulated by copycats ("clone developers") who intend to capitalize on the success of an existing

1. See Tom Chatfield, *Videogames Now Outperform Hollywood Movies*, THE GUARDIAN (Sept. 26, 2009), <http://www.guardian.co.uk/technology/gamesblog/2009/sep/27/videogames-hollywood>.

2. See *id.* ("Industry insiders agree that the last few years have been something of a golden age for the videogame, with titles setting new records almost every other month for both sales and critical acclaim. . . . Perhaps the biggest global headlines of all were made in 2008 by [Grand Theft Auto IV], which on 29 April took the title of the most successful entertainment release in history. Within 24 hours, GTA IV had grossed \$310m (£157m) – comfortably more than history's most successful book (Harry Potter & The Deathly Hallows, at \$220m in 24 hours) and its most successful film (Spider-Man 3 at \$117m."); see also John Gaudiosi, *New Reports Forecast Global Video Game Industry Will Reach \$82 Billion by 2017*, FORBES (July 18, 2012, 11:35 AM), <http://www.forbes.com/sites/johngaudiosi/2012/07/18/new-reports-forecasts-global-video-game-industry-will-reach-82-billion-by-2017/> (noting that many industry insiders now look to video game sales, which have grown exponentially over the past decade, to gauge the entertainment industry's condition as opposed to merely analyzing box office sales).

3. Richard Corliss, *Beyond Marvel-ous: The Avengers Smashes Records with \$200.3 Million*, TIME ENT. (May 6, 2012), <http://entertainment.time.com/2012/05/06/beyond-marvel-ous-the-avengers-smashes-records-with-200-3-million/>; Yannick LeJacq, *'Call of Duty: Blacks Ops 2' Sales Top \$500 Million in First-Day Sales*, INT'L BUS. TIMES (Nov. 16, 2012, 12:08 PM), <http://www.ibtimes.com/call-duty-blacks-ops-2-sales-top-500-million-first-day-sales-885544>. Similarly, Rockstar's *Grand Theft Auto V* generated approximately \$800 million in sales in just 24 hours. Andrew Goldfarb, *GTA 5 Makes \$800 Million in One Day*, IGN, (Sep 18, 2013), <http://www.ign.com/articles/2013/09/18/gta-5-makes-800-million-in-one-day>.

4. See Steve Chang & Ross Dannenberg, *Hey, That's MY Game! Intellectual Property Protection for Video Games*, GAMASUTRA (Feb. 25, 2008), http://www.gamasutra.com/view/feature/3546/hey_thats_my_game_intellectual_php ("Without copyright protection, there is little incentive for authors and artists to create new creative works, because they naturally would be hesitant to create works that others could copy willy nilly without compensation to the artist. . . .").

5. Jack Schecter, *Grand Theft Video: Judge Gives Gamemakers Hope for Combating Clones*, SUNSTEIN KANN MURPHY & TIMBERS LLP (June 2012), <http://sunsteinlaw.com/grand-theft-video-judge-gives-gamemakers-hope-for-combating-clones/>.

game, and in turn, use it for their own profit.⁶ While developers of “clones may not be guilty of literal copying of a preexisting game, they typically copy” various elements of an original title, including the artistic direction and game mechanics.⁷

Although video game developers and publishers have sought to protect their intellectual property through copyright law and trademark registration, these measures have historically provided inadequate protection against cloning.⁸ Fortunately, a recent New Jersey district court decision has armed game developers with a new weapon to prevent the cloning of their work.⁹ In *Tetris Holding v. Xio Interactive, Inc.*, the District Court of New Jersey rejected the clone developer’s standard

6. See generally Justin Meyers, *Angry Clones Are Taking Over the App Store*, BUS. INSIDER (May 3, 2011), http://articles.businessinsider.com/2011-05-03/tech/29954973_1_rovio-mobile-devices-windows-phone (describing the success of *Angry Birds* and its clones, which consumers can purchase for \$0.99).

7. See Schecter, *supra* note 5; see, e.g., Meyers, *supra* note 6.

8. E.g., *Atari, Inc. v. Amusement World, Inc.*, 547 F. Supp. 222, 230 (D. Md. 1981) (“It seems clear that defendants based their game on plaintiff’s copyrighted game; to put it bluntly, defendants took plaintiff’s idea. However, the copyright laws do not prohibit this. Copyright protection is available only for expression of ideas, not for ideas themselves. Defendants used plaintiff’s idea and those portions of plaintiff’s expression that were inextricably linked to that idea. The remainder of defendants’ expression is different from plaintiff’s expression.”); *Capcom U.S.A., Inc. v. Data E. Corp.*, No. C 93-3259 WHO, 1994 WL 1751482, at *15 (N.D. Cal. Mar. 16, 1994) (“Street Fighter II and Fighter’s History bear more similarities than Street Fighter II and Mortal Kombat because they contain a greater percentage of reality based moves that are faithful to one or more of the martial arts disciplines and characters drawn largely from a pool of stereotyped human fighters. As a result, Capcom has left room for its competitors to emulate large portions of its game because many of its elements are not protectable. Capcom cannot now withdraw from the public domain ideas and standardized expression. It also cannot be heard to argue that two projectiles are similar even though they differ in size, shape, and color. To do so would be commensurate to awarding Capcom a monopoly over a range of characters and moves that it did not create. It would also allow Capcom to lay proprietary claim to all reality based fight games featuring human characters. Copyright law affords no such protection.”); see also *Incredible Techs., Inc. v. Virtual Techs., Inc.*, 400 F.3d 1007, 1015 (7th Cir. 2005) (“In contrast, we see no error of law in Judge Kennelly’s finding that the Global VR video display is subject to the *scènes à faire* doctrine. . . . [G]olf is not a game subject to totally ‘fanciful presentation.’ In presenting a realistic video golf game, one would, by definition, need golf courses, clubs, a selection menu, a golfer, a wind meter. . . . As such, the video display is afforded protection only from virtually identical copying.”); *Sony Computer Entm’t Am., Inc. v. Gamemasters*, 87 F. Supp. 2d 976, 984 (N.D. Cal. 1999) (“A simple comparison between the seized game controller and memory card packaging and the authentic game controller and memory card packaging confirms not merely a strong likelihood of confusion, but the inevitability of it. The packaging of these two types of items seized by Plaintiff from Defendants’ store bears trademarks that are identical to, or substantially indistinguishable from, SCEA’s registered trademarks.”).

9. See *Tetris Holding, LLC v. Xio Interactive, Inc.*, 863 F. Supp. 2d 394 (D.N.J. 2012).

defense—that it copied only non-expressive, functional elements of the original game—and instead concluded that the clone developer infringed the underlying, expressive elements of *Tetris*, as well as the game’s trade dress.¹⁰

This comment uses *Tetris Holding, LLC v. Xio Interactive, Inc.* to explore when video game developers’ original innovations are protected under copyright and trademark law, and consequently, when other developers are precluded from “cloning” these innovations for their own financial gain. Part II summarizes the current state of the video game industry and discusses the sudden rise of cloned games. Part III outlines the relevant copyright and trademark concepts and statutes, and through analysis of prior cases, it details the analytical framework courts use to evaluate claims asserted under each respective law. Part IV examines *Tetris Holding, LLC v. Xio Interactive, Inc.*, and details the case law discussed by the court in order to find when a developer, such as Xio, should be held liable for copyright infringement of a video game. Moreover, Part V discusses Tetris Holding’s trade dress claim. After evaluating these existing accommodations, Part VI briefly outlines the impact that full compliance under copyright law would have on the video game industry. Finally, this comment suggests possible courses of action that courts and those within the video game industry, such as video game developers and distributors, may take to protect original ideas by developers, and argues that video games on all platforms should be awarded copyright certification before their release.

II. BACKGROUND: VIDEO GAMES AND THE CLONING PROBLEM

A. Evaluation of Video Games

Over the past two decades, the video game market has evolved from a boutique-style industry, which initially targeted a few niche customers, to one of the biggest branches of the entertainment industry.¹¹ According to the consulting firm PricewaterhouseCoopers (PwC), the global video game market grossed \$56 billion in revenue in 2011.¹² Since 2006, when the Nintendo Wii was released, revenues have expanded by more than sixty

10. *Id.* at 404, 414–16.

11. *Shoot 'em Up*, THE ECONOMIST (Dec. 9, 2011, 2:53 PM), <http://www.economist.com/blogs/graphicdetail/2011/12/daily-chart-0>.

12. *Id.*

percent.¹³ Based on PwC’s study, “the gaming industry is more than twice the size of the recorded-music industry, nearly a quarter [larger] than the magazine business and about three-fifths the size of the film industry.”¹⁴ Moreover, PwC predicts “video games will be the fastest-growing form of media over the next few years, with sales rising to about \$82 billion by 2015.”¹⁵ UPROXX, an entertainment and pop culture website, posted an infographic on its website to demonstrate the industry’s dominance over other mediums.¹⁶ In 2007, *Halo 3*, a popular, first-person shooter video game produced by Bungie, grossed over \$300 million during the first week of its official release in the United States.¹⁷ By contrast, *Harry Potter and the Order of the Phoenix*, 2007’s biggest theatrical release, grossed \$140 million in domestic revenue during its first week.¹⁸ Even more astonishing, in 2010, Activision’s *Call of Duty: Black Ops* generated more than \$600 million in revenue during its first week of sales, while 2010’s biggest movie blockbuster, *Iron Man 2*, brought in \$128.1 million.¹⁹ A 2012 report by gaming market-research group DFC Intelligence revealed that online games will see a worldwide revenue increase to nearly \$35 billion by 2017—up from \$19 billion in 2011.²⁰ Moreover, personal computer (“PC”) game revenue sales are also expected to rise from \$20 billion in 2012 to about \$25 billion by 2017.²¹

Today, video games are generally played on three different platforms: mobile devices, consoles, and PCs or Macintoshes.²² A mobile game is a

13. *Id.*

14. *Id.*

15. *Id.*

16. The Cajun Boy, *Infographic of the Day: Videogames Pwning Hollywood in Release Week Sales*, UPROXX (June 8, 2011), <http://www.uproxx.com/gaming/2011/06/infographic-of-the-day-videogames-pwning-hollywood-in-release-week-sales/>.

17. *H3: Over 300 Million in One Week*, MAJOR NELSON (Oct. 4, 2007, 11:01 AM), <http://majornelson.com/2007/10/04/h3-over-300-million-in-one-week/>.

18. The Cajun Boy, *supra* note 16.

19. *Id.*

20. John Gaudiosi, *New Reports Forecast Global Video Game Industry Will Reach \$82 Billion by 2017*, FORBES (July 18, 2012, 11:35 AM), <http://www.forbes.com/sites/johngaudiosi/2012/07/18/new-reports-forecasts-global-video-game-industry-will-reach-82-billion-by-2017/>.

21. *Id.*

22. See Deborah F. Buckman, Annotation, *Intellectual Property Rights in Video, Electronic, and Computer Games*, 7 A.L.R. FED. 2D 269, 283 (2006); see also Erik Kain, *The*

game that is played on a cell phone or tablet such as an iPad.²³ Users normally download these games from an online store through their mobile device.²⁴ “Console games are played by inserting a game disk”—usually stored on a DVD or Blu-ray—“into a console, which is connected to the user’s television,” projector, or monitor.²⁵ Once the game is loaded into the console, the game will automatically start, as would a movie DVD or music CD.²⁶ The user then has the ability to navigate and play the game using a controller that is connected to the console.²⁷ PC games, on the other hand, are installed on a user’s computer and are then playable once the installation process is complete.²⁸ Additionally, because PC’s can be continuously upgraded with new hardware to accommodate new technologies, new games can take advantage of “next-generation” software.²⁹

B. The Cloning Problem

Common to these three different platforms is the deliberate decision by software developers, publishers, and video game companies to ensure that their games are not copied so as to protect their copyright.³⁰ For

Best Mobile Games of 2012, FORBES (Dec. 19, 2012, 7:05 PM), <http://www.forbes.com/sites/erikkain/2012/12/19/the-best-mobile-games-of-2012/> (listing the best Android and iOS games of 2012).

23. See Cory Janssen, *Mobile Games*, TECHOPEDIA, <http://www.techopedia.com/definition/24261/mobile-games> (last visited Sept. 7, 2013) (explaining what a mobile game is and how it is played).

24. See generally Stuart Dredge, *How to Download App Store Games on Your iPhone*, POCKET GAMER (July 14, 2008), <http://www.pocketgamer.co.uk/feature.asp?c=7698> (describing how users can download an application to an iPhone).

25. Buckman, *supra* note 22.

26. *Id.* (explaining that a video game can be played once the hardware has been connected to the TV and the game’s images are generated on the TV screen).

27. *Id.*

28. *Id.* (“PC games . . . are played by loading a game disk into the computer disk drive on a personal computer.”).

29. See generally Ed Ricketts, *12 Reasons PC Gaming Is Better Than Consoles*, TECH RADAR (Nov. 14, 2008), <http://www.techradar.com/us/news/gaming/12-reasons-pc-gaming-is-better-than-consoles-485178> (listing upgradeable hardware as one of the advantages of PC games).

30. See generally James Plafke, *Why SimCity’s DRM Is a Necessary Evil*, EXTREME TECH (Mar. 7, 2013, 3:18 PM), <http://www.extremetech.com/gaming/150240-why-simcitys-drm->

instance, video games developed for the PlayStation 3—a console developed by Sony—are created on Blu-ray discs.³¹ The format of these discs incorporates what is known as ROM-Mark, a serialization technology that acts as a safety guard against piracy, i.e., mass duplication and sale of unauthorized copies of the discs.³²

Surprisingly, the latest rise of copyright infringement cases in the video game industry has stemmed from within its own inner circle. Specifically, developers ranging from the solo novice to major companies are replicating the ideas, stories, graphics, arts, and other components from other original works.³³ Mysteriously, the proliferation of clones has appeared mostly on mobile gaming platforms, such as the iPhone, Android devices, and tablets, as well as arcade titles—smaller games released on Xbox Live and PlayStation Network—as opposed to games released on the three major consoles: Xbox, PlayStation 3, and Nintendo Wii.³⁴ Cloning on online marketplaces, such as Apple’s “App Store,” was most evident after the release of the highly successful app, *Angry Birds*.³⁵ Reaching over 100 million downloads, *Angry Birds* quickly sparked clones in Apple’s App Store, with titles such as *Angry Rhino: RAMPAGE!*, *Angry Alien*, and *Angry Pig*.³⁶ While the majority of the *Angry Bird* clones are accessible for free, some cloned games have the ability to generate an abundance of revenue.³⁷ Halfbot Games, an independent developer who created the game *The Blocks Cometh*, had its game stolen, including the name and the actual art assets,

is-a-necessary-evil (“DRM is a tool that companies use in order to make sure their products aren’t stolen, plain and simple.”).

31. See Scott Lowe, *Why the PS3 Is the Best Blu-ray Player*, IGN (Mar. 4, 2010), <http://www.ign.com/articles/2010/03/05/why-the-ps3-is-the-best-blu-ray-player>.

32. See *Blu-ray Disc Marketing System Explained*, CDRINFO (Oct. 4, 2005), <http://www.cdrinfo.com/Sections/News/Details.aspx?NewsId=15194>.

33. See generally Schecter, *supra* note 5 (summarizing the central arguments of *Tetris Holding, LLC v. Xio Interactive, Inc.*).

34. See generally Tom Curtis, *Apple Removes Several iOS Copycat Games from One Offending Developer*, GAMASUTRA (Feb. 3, 2012), http://www.gamasutra.com/view/news/40101/Apple_removes_several_iOS_copycat_games_from_one_offending_developer.php (stating that there have been many games which have been removed by Apple, the negative implication of which being that the problem is not as prevalent in major console systems).

35. See Meyers, *supra* note 6.

36. See *id.*

37. See generally *id.* (listing the clones of *Angry Birds*, such as *Angry Sperm* and *Angry Rhino: RAMPAGE!*, which can be purchased for \$0.99 through Apple’s App Store).

from another developer.³⁸ The copycat game was even published a few days before Halfbot intended to publish its original work.³⁹ Furthermore, the cloned game made it on to Apple's "Top 200" chart in the App Store, and was actually featured in Apple's "New and Noteworthy" section; it eventually made it into the Top 100, selling to customers for \$0.99.⁴⁰

While game designers and avid fans alike can easily tell whether a game has been replicated by another designer,⁴¹ the ease with which a game's original designer can bring a copyright infringement claim in court has proved difficult. The difficulty stems from the lack of protection in copyright law, which only protects the "expression" of the game's rules, character art, and sound effects, rather than the concept or idea of the game.⁴² This difficulty, however, may be allayed due to the recent New Jersey District Court decision ruling in favor of one the most well-known game companies in the world, Tetris Holding.⁴³

III. COPYRIGHT LAW AND TRADEMARK: A BRIEF SYNOPSIS OF RELEVANT LAW AND ITS APPLICATION TO VIDEO GAMES

A. Copyright Law Protecting the Video Game Industry

Copyright law has a significant impact on the video game industry. It affords safeguards against activities like the illegal distribution of copies of video games or the exact replication of an original story or characters.⁴⁴ At its core, copyright law incentivizes the creation of works.⁴⁵ This theory

38. Andrew Webster, *The Clones Cometh: The App Store Is Full of Copycats, and It's Indies Who Suffer*, ARS TECHNICA (Feb. 16, 2011, 6:21 AM), <http://arstechnica.com/gaming/2011/02/halfbot-interview/>.

39. *Id.*

40. *Id.*

41. See Kyle Orland, *Defining Tetris: How Courts Judge Gaming Clones*, ARS TECHNICA (June 20, 2012, 1:23 PM), <http://arstechnica.com/gaming/2012/06/defining-tetris-how-courts-judge-gaming-clones/>. Since the majority of cloned games are based off of highly successful titles, most "gamers" (people who play video games) are likely to have already had experience playing the original game before encountering the cloned version.

42. *Id.*

43. *Id.*

44. See, e.g., *Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 617–20 (7th Cir. 1982) (discussing why *PAC-MAN* is afforded copyright protection).

45. STEPHEN M. MCJOHN, COPYRIGHT: EXAMPLES & EXPLANATIONS 22 (3d ed. 2012).

draws its “legal basis” from the Constitution which provides that “Congress shall have Power. . . to Promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁴⁶ Under the Constitution, copyright exists “to overcome the free-rider problem with public goods.”⁴⁷ This policy decision is analogous to the video game industry, as a potential developer might not want to spend several months and millions of dollars in costs to create a game if others could make and sell copies of that game without regard to the law.⁴⁸

Copyright subject matter includes “original works of authorship fixed in any tangible medium of expression.”⁴⁹ “Original work” is interpreted by the approach taken under *Feist Publications v. Rural Telephone Service*, where the court applied a two-prong test to determine originality.⁵⁰ First, the author must establish that the work is an independent creation.⁵¹ The author will only have copyright protection within the elements of the work that he or she created.⁵² Second, the work in question must demonstrate a “minimal level of creativity” on the part of the author.⁵³ This demonstration is intricately linked to interpreting a work of “authorship,” which requires the work, whether a poem, drawing, or a novel, to have been created by a human using the minimum requisite level of creativity.⁵⁴ The level of creativity need not be groundbreaking; it only has to be more than “so mechanical or routine as to require no creativity whatsoever.”⁵⁵ Thus, if a “security camera mounted in a lobby, recording 24 hours a day,

46. U.S. CONST. art. I, § 8, cl. 8.

47. MCJOHN, *supra* note 45, at 3.

48. *See generally* Webster, *supra* note 38 (addressing the difficulties that videogame developers have when dealing with clones of their games).

49. 17 U.S.C. § 102 (2006).

50. *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991).

51. *Id.*

52. *See* STEPHEN M. MCJOHN, *INTELLECTUAL PROPERTY: EXAMPLES & EXPLANATIONS* 19 (4d ed. 2012) (“Originality requires that one be the ‘maker’ or ‘originator,’ not merely one who discovers and records a fact. So facts of all stripes – scientific, historical, biographical, news of the day – are unprotected by copyright. Likewise, one that discovers a beautiful gem, flower, or geological formation has no copyright in it.”).

53. *Feist Publ'ns*, 499 U.S. at 345.

54. *See* MCJOHN, *supra* note 45, at 25.

55. *Feist Publ'ns*, 499 U.S. at 362.

captured a dramatic event, the video might be deemed uncopyrighted, for lack of an author.”⁵⁶ Lastly, work “fixed in any tangible medium of expression,” requires that the work be recorded in some physical medium, which includes “paper, canvas, disk, or computer hard drive.”⁵⁷ Therefore, “spontaneous speech or musicianship that is not recorded, (a jazz solo at a live performance, for instance) is not protected by copyright.”⁵⁸

Another portion of copyright law relevant to copyright infringement of video games concerns the protection of “audiovisual works.”⁵⁹ Audiovisual works “consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.”⁶⁰

To prove a claim of video game copyright infringement in a court of law, the plaintiff must show ownership of a valid copyright and an unauthorized copying or usage of the copyright.⁶¹ Moreover, the “plaintiff must show the fact-finder side-by-side versions of the allegedly infringing game and the copyrighted game.”⁶² This doctrine protects whole games and particular elements of the game since the “effects are fixed in a tangible medium of expression and may be reproduced or otherwise communicated for more than a transitory period.”⁶³ Plaintiffs can also utilize the “idea-expression dichotomy” to prove copyright infringement.⁶⁴ The idea-expression dichotomy extends protection to the expression of an

56. See MCJOHN, *supra* note 45, at 25.

57. *Fixed in a Tangible Medium of Expression*, NOLO’S PLAIN-ENGLISH LAW DICTIONARY, <http://www.nolo.com/dictionary/fixed-in-a-tangible-medium-of-expression-term.html> (last visited Sept. 7, 2013).

58. *Id.*

59. 17 U.S.C. § 102 (2006).

60. *Id.* § 101.

61. *Id.*

62. Buckman, *supra* note 22, at 287.

63. *Id.* at 282; see, e.g., Nintendo of Am., Inc. v. Elcon Indus., Inc., 564 F. Supp. 937 (E.D. Mich. 1982) (holding that the video game *Donkey Kong* was a unique and original audiovisual work fixed in a tangible medium of expression, and therefore subject to copyright protection, which was violated by a licensee’s unauthorized importation of the game).

64. *Rodesh v. Discronics, Inc.*, No. 91-55694 (9th Cir. 1993) (holding that the defendant’s video game that was similar to the plaintiff’s copyrighted video game was not infringing since it copied an idea rather than protectable expression).

idea of a work rather than the actual idea;⁶⁵ a detailed explanation will be provided in the section that details Xio's defenses.

1. Copyright: Limiting Doctrines and Defenses

Copyright protection, however, is limited by notable defenses and doctrines. Substantive defenses, such as the fair use doctrine can be employed to present absence of copyright infringement.⁶⁶ Additionally, copyright protection will not be warranted if there is merger or *scènes à faire*.⁶⁷ This section briefly introduces these doctrines and defenses. Courts have found that a copyright has not been infringed when there was a lack of substantial similarities between "allegedly copied games" and copyrighted games.⁶⁸

A. Merger Doctrine

The merger doctrine may be significant in rulings concerning copyright infringement because "in some instances, there may come a point when the author's expression becomes indistinguishable from the idea he seeks to convey, such that the two merge."⁶⁹ The doctrine prevents a copyright holder from suing for copyright infringement when the copyright holder would have a monopoly over "an idea when there are only a limited number of ways of expressing the idea."⁷⁰

Generally, courts are hesitant to disallow the merger doctrine in video game cases.⁷¹ These decisions have had a significant impact in what game

65. Leslie A. Kurtz, *Copyright: The Scenes a Faire Doctrine*, 41 FLA. L. REV. 79, 82 (1989).

66. See 54 AM. JUR. TRIALS 261 § 20 (2013).

67. Kurtz, *supra* note 65, at 79.

68. Buckman, *supra* note 22, at 284.

69. *Kay Berry, Inc. v. Taylor Gifts, Inc.*, 421 F.3d 199, 209 (3d Cir. 2005).

70. Timothy B. McCormack, *COPYRIGHT PRIMER: Merger Doctrine*, MCCORMACK INT'L PROP. & BUS. L. (Dec. 28, 2010), <http://www.mccormacklegal.com/blog/copyright-law-seattle/copyright-primer-merger-doctrine>.

71. See Buckman, *supra* note 22, at 283 ("When the idea of a game and its expression coincide or merge so that the expression provides nothing new or additional, copyright law provides no protection except in cases of identical copying. The farther the expression gets from the initial idea of a game, the more protection the game will be afforded."); see, e.g., *Midway Mfg. Co. v. Bandai-Am., Inc.*, 546 F. Supp. 125, 138 (D.N.J. 1982) (discussing the substantial similarity requirement between the copyrighted game and its clone).

developers are allowed to implement within the games they create.⁷² Specifically, common game features, such as character health meters in fighting games or the depiction of a “zoomed-in rifle scope in a first-person” shooter are not solely authorized for one game developer’s use, but for all.⁷³ Moreover, if the merger doctrine were applied to video games, several first-person shooter games, including Activision’s *Call of Duty* series and Bungie’s *Halo* series, would not be able to utilize various concepts such as “perks”—bonuses that players can equip to their characters to give special abilities—shared throughout games across a particular genre.⁷⁴ The merger doctrine is integral to the gaming industry because “[w]hen the idea and the expression of the idea coincide, then the expression will not be protected in order to prevent creation of a monopoly on the underlying ‘art.’”⁷⁵

B. Fair Use

Fair use permits “researchers, educators, scholars, and others [to] use copyrighted works without seeking permission or paying royalties.”⁷⁶ The court in *Campbell v. Acuff-Rose Music* utilized a four-step approach to determine whether application of the fair-use doctrine was appropriate.⁷⁷ This approach included:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.⁷⁸

72. See generally *Midway*, 546 F. Supp. at 138 (discussing the substantial similarity requirement between the copyrighted game and its clone).

73. Schecter, *supra* note 5.

74. *Perks*, GIANT BOMB, <http://www.giantbomb.com/perks/3015-366/> (last visited Sept. 7, 2013).

75. *Educ. Testing Servs. v. Katzman*, 793 F.2d 533, 539 (3d Cir. 1986).

76. Aaron Larson, *Fair Use Doctrine and Copyright Law*, EXPERT LAW, (Sept. 2003), http://www.expertlaw.com/library/intellectual_property/fair_use.html.

77. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576–77 (1994).

78. *Id.* at 577.

Courts are in conflict as to whether fair-use should protect video game developers' works.⁷⁹ For instance, in *Sony Computer v. Connectix Corp.*, the Ninth Circuit Court of Appeals held that intermediate copying in the process of creating non-infringing emulator software was a protected fair use.⁸⁰ Connectix's emulator software, entitled "Virtual Game Station," enabled purchasers to play games specifically made for Sony's PlayStation console on their personal computers rather than only on the PlayStation.⁸¹ The court noted the copyright between protected expression and unprotected ideas, and functional elements and found that, "where disassembly is the only way to gain access to the ideas and functional elements embodied in a copyrighted computer program and where there is a legitimate reason for seeking such access, disassembly is a fair use of the copyrighted work."⁸²

On the contrary, the Federal Circuit Court of Appeals held that Atari's reverse engineering of a "wrongly obtained reproduction of its competitor Nintendo's special program for preventing its home video game system console from accepting unauthorized game cartridges"⁸³ was not a fair use.⁸⁴ While the court acknowledged that "reverse engineering of properly obtained copies of a work would be a fair use,"⁸⁵ it underscored that the fair use exception is not an invitation to misappropriate protectable expression.⁸⁶ In this case, Atari had deciphered every part of the program,

79. *See, e.g., Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 602 (9th Cir. 2000) ("The fair use issue arises in the present context because of certain characteristics of computer software. The object code of a program may be copyrighted as expression but it also contains ideas and performs functions that are not entitled to copyright protection. Object code cannot, however, be read by humans. The unprotected ideas and functions of the code therefore are frequently undiscoverable in the absence of investigation and translation that may require copying the copyrighted material. We conclude that, under the facts of this case and our precedent, Connectix's intermediate copying and use of Sony's copyrighted BIOS was a fair use for the purpose of gaining access to the unprotected elements of Sony's software.").

80. *Id.* at 596.

81. *See id.* at 602

82. *See, e.g., id.* (citing to *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1527–28 (9th Cir. 1992)).

83. *See generally* Buckman, *supra* note 22, at 307.

84. *See Atari Games Corp. v. Nintendo of Am. Inc.*, 975 F.2d 832 (7th Cir. 1992).

85. *See generally* Buckman, *supra* note 22, at 307 (noting that this is "especially [true] since it is impossible to understand the object code on a computer chip without reverse engineering").

86. *See Atari Games*, 975 F.2d 832.

the creative organization, sequencing elements as well as the elements necessary for the program's main function, and possessed an unauthorized copy of Nintendo's program.⁸⁷ Thus, the court found that the source code for the Atari's program was not protected under the fair use doctrine.⁸⁸

C. Scènes à faire

Scènes à faire was defined in *Alexander v. Haley* as "incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic."⁸⁹ Courts analyze *scènes à faire* in two ways: first, a court analyzes the scenes "because identical situations call for identical scenes," and second, it determines whether the scenes "are standard or 'stock.'"⁹⁰ In either context, *scènes à faire* are regarded as unprotected by copyright law.⁹¹

In the context of video games, this would include things such as a baseball bat in a baseball video game, or a basketball in a basketball video game. Since it would be nearly impossible to create a game without these stock characters and settings, these elements are not protectable because their expression is so commonly associated with a genre or motif that they have become ubiquitous.⁹²

B. Trademark and Trade Dress

Though the preponderance of cases involving intellectual property rights in video games concern copyright issues, a number of courts have also addressed trademark and trade dress issues.⁹³ Trademark laws, as

87. *Id.*

88. *Id.*

89. *Alexander v. Haley*, 460 F. Supp. 40, 45 (S.D.N.Y. 1978).

90. Kurtz, *supra* note 65, at 81.

91. *Id.*

92. Case precedent also suggests that courts will not allow *scènes à faire* as an avenue of copyright protection. In *Hoehling v. Universal City Studios, Inc.*, a historical interpretation of the Hindenburg incident that was contained in Hoehling's book, was not protected by his copyright and could freely be used by subsequent authors such as individuals and corporate defendants "[b]ecause it is virtually impossible to write about a particular historical era or fictional theme without employing certain 'stock' or standard literary devices." 618 F.2d 972, 979 (2d Cir. 1980).

93. Buckman, *supra* note 22, at 284; *see, e.g., Nintendo of Am., Inc. v. Brown*, 94 F.3d 652 (9th Cir. 1996) (granting summary judgment against sellers of video game cartridges that were identical to the plaintiff's video games); *Nintendo of Am., Inc. v. NTDEC*, 822 F. Supp.

codified in the Lanham Act,⁹⁴ are meant to “prevent the use of identical or similar marks in a way that confuses the public about the actual source of goods and services.”⁹⁵ Moreover, trademark laws “protect the goodwill that companies have built up in their names, marks, and trade dress.”⁹⁶ Trademark cases are unique from copyright and are decided on a case-by-case basis to determine whether there is a likelihood of confusion between the items.⁹⁷ Trade dress affords protection to an item under trademark law “if it is distinctive and a showing can be made that the average consumer would likely be confused as to product origin if another product had a similar appearance.”⁹⁸ The unauthorized sale of identical video games, the use of identical or almost identical names for similar games, and the sale of game-modification devices have all be found to be trademark infringement.⁹⁹

1462 (D. Ariz. 1993) (holding that seller of counterfeit Nintendo video game cartridges was liable for trademark infringement); *Sony Computer Entm’t Am., Inc. v. Gamemasters*, 87 F. Supp. 2d 976 (N.D. Cal. 1999) (holding that allegedly counterfeit video game hardware were likely to cause consumer confusion as to original source and therefore violated the manufacturer’s trademarks); *Midway Mfg. Co. v. Bandai-Am., Inc.*, 546 F. Supp. 125 (D.N.J. 1982) (finding trademark infringement because there was a likelihood of confusion between the video game mark “Galaxian” and an identical mark used by defendant on a very similar game); *Midway Mfg. Co. v. Dirkschneider*, 571 F. Supp. 282 (D. Neb. 1983) (finding defendants liable for trademark infringement because they had substantially copied a manufacturer’s video games and used the same or similar names for their copies).

94. 15 U.S.C. § 1125(a) (2006) (“Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services or commercial activities by another person, or (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.”).

95. Buckman, *supra* note 22, at 284.

96. *Id.* at 284–85.

97. *Id.* at 285.

98. *Trade Dress*, NOLO’S PLAIN-ENGLISH LAW DICTIONARY, <http://www.nolo.com/dictionary/trade-dress-term.html> (last visited Sept. 7, 2013).

99. Buckman, *supra* note 22, at 284; *see, e.g., Nintendo of Am., Inc. v. Brown*, 94 F.3d 652 (9th Cir. 1996) (affirming summary judgment against sellers of video game cartridges that were identical to the plaintiff’s video games as infringing on the plaintiff’s trademarks); *Sega Enters. Ltd. v. MAPHIA*, 857 F. Supp. 679, 688 (N.D. Cal. 1994) (granting motion for preliminary injunction on the basis that plaintiff was likely to prevail on their claim that the defendant’s use of Sega’s trademark would confuse consumers downloading copied games from

IV. TETRIS HOLDING V. XIO: COPYRIGHT INFRINGEMENT

A. Basis of the Lawsuit

In June of 1984, Alexey Pajitnov (“Pajitnov”) created what many describe as the most famous video game of all time, *Tetris*.¹⁰⁰ Originally developed in Russia during the 1980s, *Tetris* was “exported to the United States” and has since been adapted for several video game platforms, including Apple’s iPhone and Nintendo’s GameBoy.¹⁰¹ Pajitnov later formed Tetris Holding, LLC, along with fellow game designer, Henk Rogers.¹⁰² As of the time of the case, Tetris Holding, LLC owned the copyrights to the visual expression of the game.¹⁰³

Tetris revolutionized the puzzle game genre with its unique “falling pieces” that players could arrange in order to clear lines and has been re-released on over 30 platforms.¹⁰⁴ More specifically:

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

the defendant’s website); *Midway Mfg. Co. v. Strohon*, 564 F. Supp. 741, 754 (N.D. Ill. 1983) (holding that distribution of a modification kit designed to speed up the video game, *PAC-MAN*, and which included *PAC-MAN* cartoons would likely confuse consumers into thinking the kit “emanated from the same source as PAC-MAN”).

100. *Bios*, TETRIS, <http://www.tetris.com/about-tetris/bio/alexey-pajitnov.aspx> (last visited Apr. 21, 2013).

101. *See Tetris Holding, LLC v. Xio Interactive, Inc.*, 863 F. Supp. 2d 396 (D.N.J. 2012).

102. *See id.*

103. *See id.*

104. *About Tetris*, TETRIS, <http://www.tetris.com/about-tetris/index.aspx> (last visited Sept. 7, 2013).

accumulate and reach the top of the screen, then the game is over.¹⁰⁵

In addition to its innovative design, *Tetris* is also one of the most popular video games of all time, selling 35 million copies throughout its nearly four decades of existence on the “Game Boy” console alone.¹⁰⁶

Nearly twenty-five years later, in May 2009, Xio Interactive (“Xio”), a video game development company founded by recent college graduate Desiree Golden (“Golden”), produced *Mino*, a video game strikingly similar to *Tetris*.¹⁰⁷ The game pieces were colored and shaded the exact same way as they were in *Tetris*, and the game board in *Mino* was the exact height and width of that in *Tetris*.¹⁰⁸ To make matters worse, Xio distributed *Mino* via the Apple App Store,¹⁰⁹ thereby giving approximately 6.4 million users access to the game.¹¹⁰ In August 2009, Tetris Holding learned of *Mino*’s existence and, pursuant to the Digital Millennium Copyright Act (“DMCA”), sent takedown notices to Apple.¹¹¹ In response to the takedown notices, Apple promptly removed *Mino* from the Apple App Store.¹¹² Xio responded by sending two counter-notifications to Apple.¹¹³ Wary of a potential lawsuit from either party, Apple then informed Tetris Holding that the games had to be reinstated unless it filed a lawsuit against Xio.¹¹⁴ In December 2009, Tetris Holding brought five claims against defendants, Xio, in the New Jersey district court.¹¹⁵ The

105. *Tetris Holding*, 863 F. Supp. 2d at 409.

106. *About Tetris*, *supra* note 104.

107. *Tetris Holding*, 863 F. Supp. 2d at 397.

108. *Id.* at 397–98.

109. *Id.* at 397.

110. See *iPhone Users Watch More Video . . . and are Older Than You Think*, NIELSEN WIRE (June 10, 2009), <http://www.nielsen.com/us/en/newswire/2009/iphone-users-watch-more-video-and-are-older-than-you-think.html> (“As of April 2009, Nielsen estimates that there are 6.4 million active iPhone users in the U.S.”).

111. *Tetris Holding*, 863 F. Supp. 2d at 397. Under the DMCA, “copyright holders and their agents can demand removal of allegedly infringing content” by providing a complete takedown notice; see also *DMCA Takedown 101*, BRAINZ, <http://brainz.org/dmca-takedown-101/> (last visited Sept. 7, 2013).

112. *Tetris Holding*, 863 F. Supp. 2d at 397.

113. *Id.*

114. *Id.*

115. *Id.* at 396.

court addressed only two out of the five claims brought forward: 1) Xio's infringement of Tetris Holding's copyright protection of Tetris and 2) Xio's infringement of Tetris Holding's trade dress protection.¹¹⁶

B. Copyright Infringement Claim

To determine whether Xio infringed upon Tetris Holding's copyright, the court explained that Tetris Holding must establish ownership of a valid copyright, as well as Xio's unauthorized copying of original elements of Tetris Holding's work.¹¹⁷ Here, Xio acknowledged that Tetris Holding owned the registered copyrights to each and every iteration of *Tetris*, and admitted that it downloaded Tetris Holding's iPhone application and used it to develop its own iPhone application, *Mino*, for profit.¹¹⁸ Xio did not deny engaging in purposeful and deliberate copying of many elements, artistic direction, and features of *Tetris*.¹¹⁹ Rather than devote resources to developing its own original game, Xio instead spent its time and money researching copyright law.¹²⁰ Based on that research, Xio concluded that it could imitate *Tetris* as long as it only copied the functional, non-expressive elements of the game.¹²¹ Relying on the idea-expression dichotomy and the doctrines of merger and *scènes à faire*, Xio determined that because there was little copyrightable expression left in *Tetris*, it could freely and blatantly clone the game.¹²² Because the parties agreed that there were no "genuine issues of fact" in connection with their motions on the copyright and trade dress claims,¹²³ the court had to decide whether to grant summary judgment to Tetris Holding.¹²⁴ The court focused its analysis on the elements of the game that may or may not be potentially protected by copyright.¹²⁵

116. *Id.*

117. *Id.* at 399 (quoting *Dun & Bradstreet Software Servs., Inc. v. Grace Consulting*, 307 F.3d 197, 206 (3d Cir. 2002)).

118. *Tetris Holding*, 863 F. Supp. 2d at 397.

119. *Id.* at 397, 399.

120. *Id.* at 399.

121. *Id.*

122. *See id.*

123. *Id.* at 399.

124. *Tetris Holding*, 863 F. Supp. 2d at 399.

125. *Id.* at 400.

C. Introduction to Idea-Expression Dichotomy

First, the court confronted the “idea-expression dichotomy,” and defined it by using relevant language from 17 U.S.C. § 102 (a) and (b).¹²⁶ 17 U.S.C. § 102 (a) provides as follows: “Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”¹²⁷ Subsection (b) states: “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”¹²⁸

While difficult to apply in the context of computer programs, the idea-expression dichotomy simply states: “[C]opyright will not protect an idea, only its expression.”¹²⁹ To understand how the statute is applied to the case at hand and how courts distinguish between protectable and unprotectable ideas, the *Tetris Holding* court examined previous cases pertaining to computer software.¹³⁰ First, the court mentioned *Apple Computer, Inc. v. Franklin Computer Corp.*¹³¹ In that case, Apple sued Franklin Computer Corporation for copyright infringement of its computer operating system.¹³² Siding with Apple, the Third Circuit Court of Appeals held that copyright infringement could exist in computer programs expressed in object code or embedded on a ROM (electronic read-only memory device).¹³³ Specifically, the court held that there was nothing to suggest that a computer operation system program, as distinguished from application programs, is *per se* precluded from copyright protection.¹³⁴

126. *Id.*

127. 17 U.S.C. § 102(a) (2006).

128. *Id.* § 102(b).

129. *Tetris Holding*, 863 F. Supp. 2d at 400.

130. *See id.* at 400–02.

131. *Id.* at 400; *see Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983).

132. *Apple Computer*, 714 F.2d at 1244.

133. *Id.* at 1249.

134. *Id.* at 1253.

Next, the *Tetris Holding* court discussed *Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc.*¹³⁵ In *Whelan*, a computer program developed by Jaslow Dental Laboratory for a dental laboratory operation was protected under copyright laws because copyright protects the program's structure, not just its literal code.¹³⁶ In reaching its conclusion that computer programs are literary works under copyright law,¹³⁷ the court determined that the main function of the program should be identified as the "idea" while everything else not strictly necessary in the program should be designated as the "expression."¹³⁸

Additionally, the *Tetris Holding* court addressed *Computer Associates International v. Altai, Inc.*, which departed from the approach in *Whelan* and employed the "abstraction-filtration-comparison" ("AFC") test.¹³⁹ There, Computer Associates sued Altai for copyright infringement of a computer program designed to be easily "ported" (installed) between operating systems.¹⁴⁰ To determine the substantial similarity of the non-literal elements of a computer program, the court utilized the AFC test.¹⁴¹ Justice Hand first defined this test in *Nichols v. Universal Pictures Corp.*¹⁴² There, the plaintiff alleged that her copyrighted play, which concerned the family difficulties between a married Jewish man and an Irish woman, was infringed upon by defendant's movie;¹⁴³ the movie was about identical marriage difficulties between the families of an Irish man and a Jewish woman.¹⁴⁴ In his opinion, Justice Hand explained:

135. *Tetris Holding*, 863 F. Supp. 2d at 401-02; see *Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222 (3d Cir. 1986).

136. *Whelan Assocs.*, 797 F.2d at 1248.

137. *Id.* at 1234.

138. *Id.* at 1236.

139. *Tetris Holding*, 863 F. Supp. 2d at 401-02; see *Computer Assocs. Int'l v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992).

140. *Computer Assocs.*, 982 F.2d at 696, 698-700.

141. See *id.* at 706-12.

142. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

143. *Id.* at 120.

144. *Id.*

[A] great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out [T]here is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his “ideas,” to which, apart from their expression, his property is never extended.¹⁴⁵

In other words, this test requires courts to first identify the expanding levels of abstraction of the program.¹⁴⁶ Second, at each level of abstraction, courts must distinguish the material that is protectable by copyright, and then filter out the unprotected material for further examination.¹⁴⁷ After the non-protected content is excised, it must then be compared to the copyrighted material to determine sufficient copying.¹⁴⁸ In adopting the AFC test to determine if there was substantial similarity between the parties’ computer programs, the *Altai* court ultimately determined that the defendant’s appropriated material were “non-protectable expression.”¹⁴⁹

1. Idea–Expression Dichotomy: AFC Test Applied to Video Games

The underlying concepts of the AFC test have been used to determine copyright infringement in video games.¹⁵⁰ In *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, the Seventh Circuit Court of Appeals held that even though most of the elements of the video game *PAC-MAN* were not protectable, there were specific copyrightable expressions within the game that were infringed by the “substantially similar”¹⁵¹ game, *K.C. Munchkin*.¹⁵² The court, using Justice Hand’s definition of the abstraction test, stated that the plaintiff’s game, *PAC-MAN*, could be described accurately in reasonably “abstract terms, much

145. *Id.* at 121.

146. *Computer Assocs.*, 982 F.2d at 706–07.

147. *Id.* at 707; *see also Tetris Holding*, 863 F. Supp. 2d at 402.

148. *Computer Assocs.*, 982 F.2d at 710; *see also Tetris Holding*, 863 F. Supp. 2d at 402.

149. *Computer Assocs.*, 982 F.2d at 714-15.

150. *See, e.g., Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 617 (7th Cir. 1982) (finding that *PAC-MAN* characters distinguished themselves from conceptually similar video games enough to be protected expression); *Midway Mfg. Co. v. Bandai-Am., Inc.*, 546 F. Supp. 125 (D.N.J. 1982).

151. Buckman, *supra* note 22, at 284.

152. *Atari, Inc.*, 672 F.2d at 617.

in the same way as one would articulate the rules to such a game.”¹⁵³ Therefore, the defendant’s use of indistinguishable video game characters infringed on the plaintiff’s copyright.¹⁵⁴ Specifically, the court found that plaintiff’s famous *PAC-MAN* characters such as the “gobbler” and the “ghost monsters” distinguished *PAC-MAN* from all other games.¹⁵⁵ Thus, copyright protection extends “to at least a limited extent the particular form in which [a game] is expressed (shapes, sizes, colors, sequences, arrangements, and sounds).”¹⁵⁶

Similarly, in *Midway Manufacturing Co. v. Bandai-America, Inc.*, the New Jersey District Court held that the shapes of the “insectile” aliens¹⁵⁷ in Midway’s *Galaxian* were protectable under copyright and trademark law.¹⁵⁸ Resembling the facts of the *Tetris* case, the court presumed that the defendant, Bandai-America, had access to the plaintiff’s game and imitated components of *Galaxian* in order to improve its own game.¹⁵⁹ After comparing both games, the court found that there was overwhelming evidence to suggest that the defendant had copied features of *Galaxian*.¹⁶⁰ These identical features included: “musical themes, insectile alien characters, and very similar play and sequence of images.”¹⁶¹ The court rejected the defendant’s contention that the features were ideas rather than expressions, “leading to the conclusion that the defendant could have pursued the same basic game idea without copying the plaintiff’s” features.¹⁶² Famously, the court proclaimed that “is also unquestionable that video games in general are entitled to copyright protections as audiovisual works.”¹⁶³

153. *Id.* at 617.

154. *Id.* at 619–20.

155. *Id.* at 617.

156. *Id.* at 617.

157. *Midway Mfg. Co.*, 546 F. Supp. at 137.

158. *Id.* at 146.

159. *Id.* at 145–46.

160. *Id.* at 147.

161. Buckman, *supra* note 22, at 294.

162. *Id.*; *see also Midway Mfg. Co.*, 546 F. Supp. at 148.

163. *Midway Mfg. Co.*, 546 F. Supp. at 139.

2. AFC Applied to *Tetris Holding*

After examining these differing approaches and cases, the *Tetris Holding* court ultimately utilized the AFC test to determine if there was a substantial similarity between *Tetris* and *Mino* in violation of copyright law.¹⁶⁴ First, the court concluded that the underlying mechanisms and rules of *Tetris* were not protectable.¹⁶⁵ Specifically, the court noted that copyright protects neither the abstract elements of a game nor the “expressive elements that are inseparable from them.”¹⁶⁶ As a result, the basic components of *Tetris* are void of any copyright protection.¹⁶⁷

The court, however, determined that *Tetris Holding* is entitled to copyright protection for the way it chose to express those ideas—such as the way in which *Tetris Holding* designed *Tetris* pieces—particularly with respect to their expression in the look and feel of the game as represented by its audiovisual display.¹⁶⁸ The court reached this conclusion by comparing *Tetris* and *Mino* “‘as they would appear to a layman’ [by] concentrating ‘upon the gross features rather than an examination of minutiae.’”¹⁶⁹ In fact, the AFC test “does not involve ‘analytic dissection and expert testimony,’ but depends on whether the accused work has captured the ‘total concept and feel’ of the copyrighted work.”¹⁷⁰ Because the two games placed side by side look almost identical, the “common layman” approach would be satisfied where, “[w]ithout being told which is which, a common user would not be able to decipher between the two games.”¹⁷¹ Of importance to the court was “[i]f one has to squint to find distinctions only at a granular level, then the works are likely to be substantially similar.”¹⁷² Moreover, after watching videos of the two

164. See *Tetris Holding, LLC*, 863 F. Supp. 2d at 403 (D.N.J. 2012) (“[The court] must delineate between the copyrightable expression in *Tetris* and the unprotected elements of the program, then evaluate whether there is substantial similarity between such expression and Defendant’s *Mino* game.”); see also *id.* at 408–12.

165. *Id.* at 404.

166. *Id.* at 409.

167. *Id.*

168. See *id.* at 404.

169. *Id.* at 409 (citing *Universal Athletic Sales Co. v. Salkeld*, 511 F.2d 904, 908 (3d Cir. 1975)).

170. *Atari, Inc.*, 672 F.2d at 614.

171. *Tetris Holding*, 863 F. Supp. 2d at 410.

172. *Id.*

games, the court found that the similarity between the visual expression of *Tetris* and *Mino* was “akin to literal copying.”¹⁷³

Moreover, the court utilized the AFC test to analyze the extent of similarities between the style, color, and movements of the game pieces.¹⁷⁴ The court was surprised to find that the way in which the *Mino* developers created the style of game pieces was “nearly indistinguishable” to those implemented in *Tetris*.¹⁷⁵ Both games’ pieces were the same in the way they “move[d], rotate[d], [fell], and behave[d];”¹⁷⁶ the colors of the pieces in both games were bright and colored almost exactly the same;¹⁷⁷ and the interior borders of the pieces in *Mino*, including the shading and textures, were used in almost the exact same fashion as those used in *Tetris*.¹⁷⁸ Hence, copyright protection was warranted because “[t]he style, design, shape, and movement of the pieces are expression; they are not part of the ideas, rules, or functions of the game nor are they essential or inseparable from the ideas, rules, or functions of the game.”¹⁷⁹ In reaching this conclusion, the court found Xio’s argument that the *Tetris* game pieces were “related to a rule or function of the game [to be] without merit.”¹⁸⁰ The court’s acceptance of Xio’s reasoning would have allowed Xio “free reign to copy another’s expression” just because the expression is described in enough detail to relate it to a rule or function.¹⁸¹

In conclusion, the court held that it would be unconscionable to deny copyright protection on the expressive elements of *Tetris*’ game pieces.¹⁸² Because Xio blatantly copied these pieces, it defied what the court believed to be the “very purpose of copyright law.”¹⁸³

173. *Id.*

174. *Id.* at 409–11.

175. *Id.* at 410.

176. *Id.*

177. *Tetris Holding*, 863 F. Supp. 2d at 410.

178. *Id.*

179. *Id.* at 411.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Tetris Holding*, 863 F. Supp. 2d at 411.

D. Xio's Defense: Merger, Scènes à Faire and Fair Use

In its defense, Xio relied heavily on the related doctrines of merger and *scènes à faire*.¹⁸⁴ Xio argued that even if there were expressions in *Tetris*, separate from the underlying ideas of the game, those expressions should not be protected because they relate directly to the game's rules and are dictated by their functionality.¹⁸⁵ The court disagreed, holding that expression is left unprotected only when it is integral or inseparable from an idea or function.¹⁸⁶ The court reasoned that Xio's expansive interpretation of merger and *scènes à faire* would create an exception to copyright that would likely disallow any protection a game could possibly enjoy.¹⁸⁷ Each is explored in detail below.

1. Merger

The *Tetris Holding* court stated, "Merger exists when an idea and its particular expression become inseparable."¹⁸⁸ Further, the court declared, "[M]erger is appropriate 'when there are no or few other ways of expressing a particular idea.'"¹⁸⁹ However, here, merger was inapplicable because the court determined that there were several possible ways in which Xio could have created its own original expression of the rules as set forth in *Tetris*.¹⁹⁰ Xio's own expert witness revealed that there could have been an "almost unlimited number" of ways Xio could have designed *Mino* in which the game still could have functioned as perfectly as *Tetris* has.¹⁹¹ Moreover, there was not a merging of Tetris Holding's idea and the ways in which it was expressed in *Tetris* because the specific *Tetris* pieces were "not necessary . . . to design a puzzle video game."¹⁹²

184. *See id.* at 403.

185. *Id.* at 411.

186. *Id.* at 405, 408.

187. *Id.* at 411.

188. *Id.* at 403 (citing *Kay Berry, Inc. v. Taylor Gifts, Inc.*, 421 F.3d 199, 209 (3d Cir. 2005)).

189. *Tetris Holding*, 863 F. Supp. 2d at 403 (quoting *Educ. Testing Servs. v. Katzman*, 793 F.2d 533, 539 (3d Cir. 1986)).

190. *Id.* at 412.

191. *Id.*

192. *Id.* at 411 (internal quotations omitted).

In its defense, Xio claimed that there was no other way in which it could have chosen to express the rules of *Tetris* and pointed to a similar game released by Nintendo Co. Ltd. (“Nintendo”), named *Dr. Mario*.¹⁹³ *Dr. Mario*, like *Tetris*, was a puzzle game in which objects would float down the screen and the user would have to find ways to eliminate these objects before the screen would “fill up.”¹⁹⁴ In Nintendo’s own specification of *Dr. Mario*’s mechanics, Nintendo described the game as a “variation on the rules of *Tetris*.”¹⁹⁵ However, the court quickly noted that Nintendo expressed its ideas in *Dr. Mario* in a different manner than its *Tetris* counterpart.¹⁹⁶ For instance, in *Dr. Mario*, the user controlled “pills and viruses” instead of the brick-like shapes used in *Tetris*.¹⁹⁷ Moreover, the objective in *Dr. Mario* was different than *Tetris*, in that the user had to eliminate viruses as part of the pattern based on the color of the objects instead of eliminating the objects simply based on their shapes.¹⁹⁸

Additionally, the *Tetris Holding* court stated that because there had been an exponential increase in graphical capabilities since the early 1990s, the fact that Xio was unable to design its rules, in any way other than *Tetris*, demonstrated “wholesale copy of its expression.”¹⁹⁹ In all, the court concluded that the merger doctrine did not apply in this instance because there were “many novel ways” from which Xio could have chosen to express and design the rules of a game similar to *Tetris*.²⁰⁰

2. Scènes à faire

“‘[S]cènes à faire’ (literally meaning a scene that must be done), applies to expression that is so associated with a particular genre, motif, or idea that one is compelled to use such expression.”²⁰¹ In other words, the

193. *See id.* at 412.

194. *Id.* *see also* Gerald Villoria, *Dr. Mario 64 Hands-On*, GAMESPOT (Mar. 16, 2001, 4:29 PM), <http://www.gamespot.com/dr-mario-64/previews/dr-mario-64-hands-on-2697604/> (explaining how Nintendo 64 version operates).

195. *Tetris Holding*, 863 F. Supp. 2d at 412.

196. *See id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Tetris Holding*, 863 F. Supp. 2d at 403.

doctrine applies to elements of a work that are stock or standard either generally or regarding a particular topic.²⁰² In this case, Xio wanted the court to apply the doctrine of *scènes à faire* to elements of *Tetris*.²⁰³ If a specific expression, such as the blocks used in *Tetris*, is “so” associated with a particular idea that one is compelled to use such expression, there should be no protection under the *scènes à faire* doctrine.²⁰⁴

Frybarger v. International Business Machines Corp. illustrates the *scènes à faire* doctrine.²⁰⁵ In that case, the plaintiff claimed that the defendants infringed his copyright when the defendants incorporated elements of the plaintiff’s game into their own.²⁰⁶ The court analogized the ideas used in the two respective video games to the *scènes à faire* doctrine by reasoning that when similar features in a video game are “as a practical matter indispensable, or at least standard, in the treatment of a given [idea],” they are treated like ideas and are therefore not protected by copyright.²⁰⁷ Ultimately, the *Frybarger* court held that, while there were several similar features between the plaintiff’s and defendant’s games,²⁰⁸ there was no copyright infringement since the expression of the plaintiff’s ideas were “indispensable” and could only be protected against “virtually identical copying.”²⁰⁹

The *Tetris Holding* court referenced *Incredible Technologies, Inc. v. Virtual Technologies, Inc.*, where the court analyzed whether the developer of an arcade golf game infringed on another arcade game since both games employed a trackball that “the user would roll back to simulate a back stroke and then roll forward to simulate the swing itself.”²¹⁰ There, the

202. See generally *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980) (“Because it is virtually impossible to write about a particular historical era or fictional theme without employing certain ‘stock’ or standard literary devices, we have held that *scènes à faire* are not copyrightable as a matter of law.”).

203. *Tetris Holding*, 863 F. Supp. 2d at 404.

204. See *id.* at 403–08.

205. *Frybarger v. Int’l Bus. Machs. Corp.*, 812 F.2d 525 (9th Cir. 1987).

206. *Id.* at 527.

207. *Frybarger*, 812 F.2d at 530 (citing *Atari, Inc.*, 672 F.2d at 616) (quoting *Alexander v. Haley*, 460 F. Supp. 40, 45 (S.D.N.Y. 1978)).

208. *Id.* at 529–30.

209. *Id.* at 530 (citing *Atari, Inc.*, 672 F.2d at 616)).

210. *Tetris Holding*, 863 F. Supp. 2d at 408; see also *Incredible Techs., Inc. v. Virtual Techs., Inc.*, 400 F.3d 1007 (7th Cir. 2005).

court asserted that “the use of the trackball was functional and not subject to copyright”²¹¹ because:

Like karate, golf is not a game subject to totally “fanciful presentation.” In presenting a realistic video golf game, one would, by definition, need golf courses, clubs, a selection menu, a golfer, a wind meter, etc. Sand traps and water hazards are a fact of life for golfers, real and virtual. The menu screens are standard to the video arcade game format, as are prompts showing the distance remaining to the hole. As such, the video display is afforded protection only from virtually identical copying.²¹²

The *Tetris Holding* court found that *Tetris* is a puzzle game of distinctive character, a game that “does not have stock or common imagery that must be included.”²¹³ Thus, like a science fiction film with robots or a hero film with the protagonist fighting an evil villain, certain aspects of a game (like a trackball) would be determined as *scènes à faire* and thus, not receive copyright protection.²¹⁴ In conclusion, the court reasoned that *scènes à faire* is inapplicable because *Tetris* is “wholly fanciful presentation” and “a unique puzzle game,” and because “[it] does not have stock or common imagery that must be included.”²¹⁵

3. Fair Use

Lastly, Xio raised fair use in defense of the accusations that Xio purposefully infringed other elements of *Tetris*.²¹⁶ First, the court found that the style, design, shape and movement of the *Tetris* pieces, as used in *Mino*, were not part of, essential to, or inseparable from the ideas, rules or

211. *Tetris Holding*, 863 F. Supp. 2d at 408.

212. *Incredible Techs.*, 400 F.3d at 1015 (citation omitted).

213. *Tetris Holding*, 863 F. Supp. 2d at 412.

214. *See generally id.* at 403 (discussing *scènes à faire* and explaining that there is no copyright protection when expression is so associated with a motif, genre or idea).

215. *Id.* at 412.

216. The court considered four non-exclusive factors in determining whether the defense applies: “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.” *Tetris Holding*, 863 F. Supp. 2d at 414–15 n. 15; *see also* 17 U.S.C. § 107 (1992).

functions of the game.²¹⁷ As to these elements of *Tetris*, the court found that it was not necessary for “*Mino* to mimic *Tetris*’s expression other than to avoid the difficult task of developing its own take on a known idea.”²¹⁸ Other elements included:

[T]he 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.²¹⁹

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*.²²⁰ Specifically, the court explained:

These elements are aesthetic choices that the designers of *Tetris* made to show or express game play; the game would function that same with or without these expressions or if Xio had designed its own expressions instead of copying from *Tetris*. I note also, this District has found expression and infringement for video game animation sequences, albeit at the beginning of the game rather than at the end, which is the case here.²²¹

In its defense, Xio admitted having infringed only a “very small portion of the overall copyrighted work” but conceded on all other elements of the fair use defense.²²² The court ultimately determined that Xio’s fair use defense failed and granted summary judgment in favor for Tetris Holding since Xio infringed “a substantial amount of the overall copyrighted work.”²²³

217. *Tetris Holding*, 863 F. Supp. 2d at 413.

218. *Id.* at 411.

219. *Id.* at 413.

220. *Id.*

221. *Id.* at 414.

222. *Id.* at 414–15.

223. *Tetris Holding*, 863 F. Supp. 2d at 415. In its motion, Tetris Holding also cited four decisions by the U.S. Customs Service that held that the visual expression of *Tetris* to be copyrightable expression. However, these four decisions were not made available in the court’s opinion. See *id.* at 414.

V. TETRIS HOLDING V. XIO: TRADEMARK & TRADE DRESS

After addressing the copyright infringement, the court addressed whether Xio had willfully infringed on Tetris Holding's trade dress in the game.²²⁴ The court had to analyze whether Xio had advertised and packaged *Mino* to potential users so as to confuse them and leave them believing it was an authorized iteration of *Tetris*.²²⁵ Tetris Holding was required to "prove that (1) the trade dress is distinctive in that it has acquired secondary meaning; (2) the trade dress is not functional, and (3) there is a likelihood that consumers will confuse Xio's *Mino* product for that of Plaintiffs' *Tetris* product."²²⁶ Tetris Holding's trade dress included "the brightly colored Tetriminos, which are formed by four equally-sized, delineated blocks, and the long vertical rectangle playfield, which is higher than wide."²²⁷ Tetris Holding's basis for this infringement of trade dress pertained to the manner in which Xio advertised and packaged *Mino* to potential users of the game because it would confuse the users into believing that *Mino* was an "authorized iteration" of *Tetris*.²²⁸

Xio did not dispute that the *Tetris* trade dress was distinctive and had acquired secondary meaning, or that consumers would likely confuse *Mino* for *Tetris*.²²⁹ Instead, Xio opposed the second element of trade dress, asserting that *Tetris*'s trade dress was merely functional.²³⁰ A feature is functional if "it is essential to the use or purpose of the device or when it affects the cost or quality of the device,"²³¹ and if the right to use it exclusively "would put competitors at a significant non-reputation-related disadvantage."²³²

224. Tetris Holding, LLC v. Xio Interactive, Inc., 863 F. Supp. 2d 394, 415 (D.N.J. 2012).

225. *See id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* The judge further ruled that, "Xio's apparent concession that there is a likelihood customers will confuse the two products also supports my finding of substantial similarity between *Tetris*'s copyrightable content and *Mino*." *Id.* at 415 n.17.

230. *Tetris Holding*, 863 F. Supp. 2d at 415.

231. *Traffix Devices v. Mktg. Displays*, 532 U.S. 23, 33 (2001).

232. *Id.* at 32 (quoting *Qualitex Co. v. Jacobson Products Co., Inc.*, 514 U.S. 159, 165 (1995)).

In response to the trade dress claim, Xio argued that Tetris Holding's claim was preempted by the Supreme Court's decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.*²³³ There, Fox sued Dastar, alleging violation of section 43(a) of the Lanham Act after Dastar produced video copies of a Fox television series that had entered the public domain.²³⁴ Xio relied on *Dastar*, in which the Court explained that, "one cannot bring unfair competition claims based on illegal copying when the copied materials are in the public domain."²³⁵ The *Tetris Holding* court rejected this argument since Dastar's conduct was "a copyright action that he tried to shoehorn into a Lanham Act claim because the copyright had expired and his work was therefore in the public domain."²³⁶ Here, Tetris Holding had not disguised its copyright claim as a Lanham Act claim: "their trade dress claims [were] meant to address the consumer confusion that developed because Xio packaged and advertised its game in the same manner as *Tetris*."²³⁷

Ultimately, the court sided with Tetris Holding, concluding that the color and style of the pieces in *Tetris* were not considered functional under trade dress.²³⁸ Moreover, the court proclaimed that the elements of trade dress were "not mandated by the use or purpose of the game" since several other alternatives were available to a game designer like Xio without affecting the functionality of the game.²³⁹

VI. RAMIFICATIONS

Although the ultimate meaning of this case may be altered on appeal, it already presents intriguing implications. This is especially true for game developers concerned about clones. For game developers, the case "highlights the importance of protecting their work through copyright registration, which is an essential precondition to a lawsuit for copyright

233. *Tetris Holding*, 863 F. Supp. 2d at 416; see *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

234. *Dastar Corp.*, 539 U.S. at 23.

235. *Tetris Holding*, 863 F. Supp. 2d at 416.

236. *Id.*

237. *Id.*

238. *Id.* at 415–16.

239. *Id.*

infringement.”²⁴⁰ While it was easy for the court to find infringement due to Xio’s deliberate and blatant copying of *Tetris*, the ruling may nonetheless provide more copyright protection for video games since the court focused on “the overall look and feel of the game.”²⁴¹ The case also raises questions as to when parties such as Apple, who require developers using in-app purchasing to share 30 percent of their revenue,²⁴² are liable for approving games that are blatant knock-offs.²⁴³ To incentivize Apple (as well as others who operate online “marketplaces”) to safeguard their games, developers should include provisions in their contracts that impose liability on store operators for not providing adequate stop-measures for selling clones.

This case also establishes that the most important fight with clones will be “over the appropriate level of abstraction of the game mechanics and gameplay.”²⁴⁴ Tetris Holding’s victory in the case was only guaranteed once it convinced the court to identify the underlying game rules and game play at a “high level.”²⁴⁵ Specifically, having adopted a relatively “high-level” understanding of the idea of *Tetris*, the court “could readily identify more detailed . . . expressions of that idea that qualified for copyright protection.”²⁴⁶

Another intriguing aspect of the case relates to how technology may affect copyright protection afforded to video games. Not once, but twice, the *Tetris Holding* court commented on the “exponential increase” in computer processing and graphical capabilities.²⁴⁷ Implicitly, as these improvements in technology significantly expand the creative limits of game developers, developers of clones may have diminishing success in arguing that their wholesale copying is permissible because expression has merged with idea.

240. Schechter, *supra* note 5.

241. Orland, *supra* note 41.

242. Don Reisinger, *Microsoft, Apple in Battle Over App Store Fees – Report*, CNET (Dec 11, 2012, 9:46 AM), http://news.cnet.com/8301-13579_3-57558482-37/microsoft-apple-in-battle-over-app-store-fees-report/.

243. See Webster, *supra* note 38 (noting how easy it is for a clone to be released in Apple’s App Stores despite there already being a nearly identical game).

244. Orland, *supra* note 41.

245. Schechter, *supra* note 5.

246. *Id.*

247. Tetris Holding, LLC v. Xio Interactive, Inc., 863 F. Supp. 2d 394, 402, 412 (D.N.J. 2012).

Conversely, the decision in *Tetris Holding* may harm titles unlike *Tetris* and developers like Xio that have not been in existence as long.²⁴⁸ Even though the judge granted copyright protection to many of the relatively basic elements of *Tetris*, Xio still could have maneuvered “around the copyright protections with some relatively simple changes” to *Mino*.²⁴⁹ For instance, if all of the shapes in *Mino* were five blocks, the grid had contrasting dimensions, and the blocks were not identically styled, perhaps the court would have found that Xio had not infringed on Tetris Holding’s copyright.²⁵⁰ Since *Mino* and *Tetris* are almost impossible to tell apart in side-by-side videos and screenshots, the court could easily decide in favor of Tetris Holding.²⁵¹ Unfortunately, the majority of clones are visually distinct enough that an observer can tell they are not the same game when placed next to whichever game they are allegedly copying, making it harder to prove infringement and more difficult for a future court to reach the same ruling.²⁵²

VII. CONCLUSION

The New Jersey District Court’s decision in *Tetris Holding* raises a critical issue regarding the use of original ideas, and provides a clear and comprehensive ruling that will likely help future cases involving copyright infringement in video games. In this instance, Xio did not dispute that it intentionally copied the look and feel of the *Tetris* video game, even if not its source code.²⁵³ While many in the industry have “expressed concerns that the decision will stifle creativity and encourage copyright holders to pursue frivolous lawsuits, the decision will help protect copyright holders against clone producers like Xio.”²⁵⁴

248. See Orland, *supra* note 41.

249. *Cf. id.* (noting that copycats can make relatively minor changes to escape infringement liability and highlighting various elements of *Tetris*).

250. *See id.*

251. *See id.*

252. *See id.*

253. *Tetris Holding, LLC v. Xio Interactive, Inc.*, 863 F. Supp. 2d 394, 415 (D.N.J. 2012). The judge further ruled that, “Xio’s apparent concession that there is a likelihood customers will confuse the two products also supports my finding of substantial similarity between *Tetris*’s copyrightable content and *Mino*.” *Id.* at 415 n.17.

254. *Cloning Video Games Is Copyright Infringement: You Can’t Just Copy Tetris*, STONELAW, (July 10, 2012), <http://www.stoneslaw.net/2012/07/10/cloning-video-games-is-copyright-infringement/>.

Since Xio's made a blatant reproduction of *Tetris*, there is a good chance that this decision will not harm new and creative games that only share some elements or inspiration with their predecessors.²⁵⁵ Nevertheless, the ruling in this case will help consumer markets such as Apple's App Store turn down the plethora of knock-off clones that have been present in the store in the past few years.²⁵⁶ Specifically, these online marketplaces will be able to look to this case to see which games in their store have crossed the line as clones. The marketplaces can then remove these clones from their respective stores and can also reject any clones from developers who wish to offer/sell their clone within the store. Contrary opinions might argue that the decision in *Tetris Holding* only helps those games that have been imitated to a point so obvious that even a district court judge would not know the difference. Regardless, the case here is a monumental win for developers with original ideas and innovations. To further ensure that copyright infringement is no longer a point at issue, online marketplaces, stores, and publishers, should come together to develop a committee that awards copyright certification to a title before it is released for public consumption.

255. *Id.*

256. *See Meyers, supra* note 6.