

Exploring China's Legislative Framework for Copyright Protection of Video Games

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Abstract

The rapid growth of the video game industry in China has imposed pressing demands on current judicial practice, characterized by a surge in game-related copyright litigation alongside a persistent legislative lacuna. Currently, the piecemeal protection approach prevalent in Chinese judicial practice can, at best, be considered a temporary expedient. In an era of explosive industrial expansion, exploring a sound legislative framework for the legal relationships inherent in video games is not only of practical utility for dispute resolution, but also an urgent requirement dictated by technological evolution for the copyright legal regime.

Keywords

Video games; copyright protection; categories of works, legislative framework.

1. Video Games Should Be Protected as a Sui Generis Category of Works

The protection of video games can be realized through various modalities. One approach is to categorize them under existing types of works—for instance, as cinematographic works in Japan or audiovisual works in the United States—to achieve comprehensive protection. It should be noted that the approach in Chinese judicial practice—which categorizes the "overall dynamic images of a game" as an audiovisual work or a work created by a process analogous to cinematography—differs from the holistic protection model adopted in the United States and Japan. Specifically, Chinese courts tend to recognize only the constituent element of "overall dynamic images" as a protected work, whereas in the U.S. and Japan, the video game in its entirety is classified as an audiovisual or cinematographic work. Alternatively, copyright may be asserted over the game as a whole by treating it as a work of compilation. However, this article contends that the protection of video games is best served by recognizing them as an independent, sui generis category of works.

1.1. Reasons for Establishing an Independent Category of Works

There are four principal reasons for establishing a separate category of works for video games:

1.1.1. This Is Determined by the Mode of Expression of Video Games

All works consist of ideas and expression. Under Article 3 of China's *Copyright Law*, the principal basis for classifying works is their mode of expression—that is, the form in which the expression of the work is presented. For example, literary works are works expressed in written language; oral works are works expressed in spoken language; and works of fine art are works expressed through lines, colors, or other means. Therefore, in determining the category of works to which video games belong, their mode of expression should likewise be the primary consideration.

As for video games, they are jointly composed of computer programs and audiovisual presentation, and their mode of expression encompasses text, music, fine art, animation, and other elements. This constitutes a completely new mode of expression and therefore warrants recognition as an independent category of works.

1.1.2. Existing Categories of Works Cannot Provide Effective Protection for Video Games

In addition to modes of expression, Article 3 of China's *Copyright Law* also includes a special category of works: audiovisual works. Audiovisual works likewise consist jointly of multiple forms of expression, such as text, music, and moving images. This is precisely why audiovisual works can attain independent status as a category of works. If audiovisual works, which similarly involve multiple forms of expression, could fully encompass video games, then it would suffice to subsume video games under audiovisual works for protection, making it unnecessary to create a separate category of works. It is noteworthy that the copyright protection of motion pictures also underwent an evolutionary process, being categorized first as photographic works and subsequently as dramatic works, before eventually attaining independent status as a subject matter of protection. In fact, this is currently a relatively popular approach internationally, such as in the United States and Japan.

However, beyond audiovisual presentation, video games also contain a series of elements such as game rules and progression systems. Consequently, due to the highly interactive nature of games, the player's "overall experience" lies not merely in the audiovisual presentation, but even more in the interactive experience. Besides, if a video game consists primarily of static images, it cannot be subsumed under audiovisual works to enjoy copyright protection.

Considering existing categories of works cannot provide effective protection for video games, establishing a *sui generis* category of works is emerging as an increasingly viable legislative path.

1.1.3. Protecting Video Games as Works of Compilation Is Fundamentally Flawed.

Article 15 of the *Copyright Law of China* stipulates the protection of works of compilation: "A work of compilation refers to a work which is compiled of several works, fragments of works, or data or other materials that do not constitute a work, and the selection or arrangement of the contents of which possesses originality."

The central question, therefore, is whether a video game—as a complex synthesis of elements—may be protected as a work of compilation, thereby rendering a *sui generis* category unnecessary. This article contends that such an approach is untenable. A work of compilation derives its protection solely from the originality reflected in the selection and arrangement of its pre-existing components. However, the production of a video game is not a mere act of "selection and arrangement," but rather a unified orchestration of various elements into an organic whole. This process is one of "original creation" rather than mere "compilation". Consequently, video games should not be categorized as works of compilation.

1.1.4. Subsuming Video Games under the "Catch-all Provision" Faces Practical Obstacles.

Although the third amendment to the *Copyright Law* introduced a catch-all provision in Article 3 for "other intellectual achievements meeting the characteristics of works," providing a potential legal basis for protecting video games not explicitly listed, significant obstacles remain in its concrete application:

(1) The criteria for "meeting the characteristics of works" are inherently ambiguous, leading to a persistent divide among legal scholars and practitioners regarding its precise scope [1].

Such disparities are reflected in the varying standards across jurisdictions regarding the "mode of manifestation" and "originality." Regarding the mode of manifestation, for instance, U.S. law mandates that a work be fixed in a tangible medium of expression to receive copyright protection, whereas Chinese law merely requires that it be capable of being expressed in some form. Furthermore, while "originality" is generally regarded as the paramount characteristic of a work, the judicial thresholds for its determination differ significantly between legal systems.

(2) The individual judicial determination of video games leads to inherent limitations and legal uncertainty.

If a video game is to be protected under the category of "other intellectual achievements meeting the characteristics of works," its status must be determined by the courts on a case-by-case basis. Consequently, such a determination applies only to the specific game in question and lacks general applicability. Furthermore, this reliance on ad hoc rulings may lead to divergent outcomes across different courts, thereby increasing the legal uncertainty surrounding the classification of video games.

1.2. Legislative Alternatives for Categorizing Video Games as an Independent Category of Works

There are several potential legislative pathways for establishing video games as an independent category of works: (a) Incorporating "video game works" into the list of works under Article 3 of the *Copyright Law*; (b) Adopting a separate administrative regulation, such as the *Regulations on Computer Software Protection*; or (c) Issuing a judicial interpretation by the Supreme People's Court.

For the purpose of robust protection, considering that the *Copyright Law* has only recently been implemented, incorporating a new category of "video game works" would necessitate a rigorous and protracted legislative process—including exhaustive research, proposal submission, draft publication, public consultation, deliberation, voting, and final promulgation. Such a time-consuming procedure contrasts sharply with the urgent needs of the video game industry, which cannot endure a prolonged legal vacuum. Furthermore, given the industry's rapid evolution, by the time the *Copyright Law* is formally adjusted, new technological developments and challenges may have already emerged, thereby exacerbating the inherent disadvantages of legislative lag.

Alternatively, adopting a separate administrative regulation generally requires delegated legislative authority under the *Copyright Law*. For instance, Article 64 of the *Copyright Law* stipulates: "Measures for the protection of computer software and the right of communication to the public through information networks shall be separately formulated by the State Council." Nevertheless, the formulation of such a regulation must also undergo a complex administrative process, including project initiation, drafting, review, decision, and official promulgation.

In light of these considerations, the author believes that establishing an independent category of works for video games should primarily be guided by the following two-fold strategy:

1.2.1. Initially Clarifying the Copyrightability of Video Games through Judicial Interpretation

This responds, first, to the urgent needs of the video game industry. Second, the current predicament of copyright protection for video games is manifested mainly in judicial practice. If the Supreme People's Court were to issue a judicial interpretation, it could be applied smoothly in cases heard by courts at all levels in China and effectively resolve problems currently existing in judicial practice.

Moreover, the *Beijing High People's Court Guidelines for the Trial of Copyright Infringement Cases* (2018) already addressed games, and in April 2020, the Guangdong High People's Court also issued the *Guiding Opinions on the Adjudication of Civil Disputes over Intellectual Property Rights in Online Games (Trial Implementation)* (Yue Gao Fa [2020] No. 3). This document set out rules on critical issues such as the determination of works, determination of ownership, and comparison for infringement. Therefore, a practical foundation already exists for the Supreme People's Court to issue a judicial interpretation recognizing "video games" as an independent category of works.

1.2.2. Incorporating "Video Game Works" as an Independent Category in the Copyright Law Provisions on Types of Works once Conditions are Mature

Prioritizing judicial interpretation followed by formal provisions in the Copyright Law is an preferable strategy for addressing rapidly evolving technologies. As illustrated by the controversy over whether "digitization" constitutes an act of reproduction, this matter was first addressed in Article 2 of the *Supreme People's Court's Interpretation on Several Issues Concerning the Application of Law in the Trial of Copyright Disputes over Computer Networks*, promulgated in December 2000. The interpretation stipulated: "The provisions of Article 10 of the Copyright Law regarding various copyright rights shall apply to the copyright in digitized works." Subsequently, the amended *Copyright Law* that took effect in June 2021 formally added "digitization" to the definition of the "Reproduction Right" under Article 10. This established legislative path provides a viable model for the independent categorization and legal protection of video games.

1.3. Supplementary Clarification on the Independent Status of Video Game Works

Recognizing video games as an independent category of works is not mutually exclusive with the concurrent copyright protection afforded to their constituent elements. This principle is consistent with the treatment of audiovisual works under Article 17 of the *Copyright Law*. This Article stipulates that while an audiovisual work is protected as a unitary whole, the authors of the screenplay, music, and other components that can be used separately shall have the right to exercise their copyrights independently.

2. Ownership of Copyright in Video Games

In current judicial practice, there is little controversy regarding the ownership of copyright in video games. This clarity is attributable, on one hand, to the stringent administrative approval and registration procedures required prior to the publication of video games. On the other hand, it arises from the fact that the production of games is typically completed by teams within video game development companies. Although the production process involves multi-party collaboration across various elements—such as plot, music, fine arts, animation, and special effects—the creators are generally bound by employment contracts with the developer. In cases where creation is commissioned to third parties, copyright ownership is also usually clearly stipulated by contract. Accordingly, in practice, copyright in video games generally vests in the development company, and no significant divergence has emerged on this point in existing litigation.

It is argued by some scholars[2] that the copyright ownership of video games could draw upon the framework for audiovisual works. Under Article 17 of the current *Copyright Law*, the copyright in an audiovisual work is fundamentally vested in the producer, while authors such as the director, screenwriter, cinematographer, lyricist, and composer retain the Right of Authorship and the Right to Remuneration. However, there are substantial differences between video games and audiovisual works in terms of their creative processes. Taking cinematographic works as an example, the filmmaking process usually takes the form of a "film crew," where the relationship between the producer and personnel (such as actors and directors) is typically not a standard employment relationship. Consequently, the provisions regarding works for hire do not apply to cinematographic works, making it essential for the *Copyright Law* to specifically stipulate their copyright ownership.

By contrast, although game production also involves collaboration among art, music, and post-production personnel, these individuals are essentially employees of the development company or are commissioned by the developer. Thus, under the existing legal framework, the

ownership of video games can be adequately regulated by the rules governing works for hire and commissioned works, rendering additional special provisions unnecessary.

3. Content of Copyright in Video Games

3.1. Application of Existing Rules

Regarding the content of copyright in video games, the application of existing rules primarily concerns whether and how the provisions on exclusive rights under Article 10 of the *Copyright Law* apply to video games. According to Article 10 of the *Copyright Law*, the exclusive rights enjoyed by different categories of works vary. For instance, the Right of Exhibition is afforded to works of fine arts and photographic works, whereas other types of works are not entitled to such rights; similarly, the Right of Cinematography is reserved for audiovisual works. In the context of copyright in video games, the application of existing rules mainly involves the following two scenarios:

3.1.1. Application of Special Rules

Since a video game is characterized by two components: computer software and audiovisual presentations, the existing rules applicable to computer software and audiovisual works are likewise applicable to video games. For example, the Right of Rental specifically granted to computer software and audiovisual works, as well as the Right of Projection enjoyed by audiovisual works under Article 10, may both be applied to video games.

Furthermore, if other elements within a video game can independently constitute works, the exclusive rights associated with those categories of works shall also apply. For instance, if a map in a video game is identified as a graphic work, the Right of Exhibition pertaining to such works shall apply. If the documentation of a video game is identified as a written work, the Right of Translation exclusive to written works shall likewise be applicable.

3.1.2. Application of General Rules

Apart from the rules governing specific categories of works, Article 10 of the *Copyright Law* also stipulates rights applicable to all types of works, which may likewise be applied to video games. These include the Right of Publication, Right of Authorship, Right of Reproduction, Right of Communication through Information Network, and Right of Broadcasting.

3.2. Specific Issues Concerning Exclusive Rights in Video Games

Beyond general rules, video games possess distinct characteristics that diverge from traditional works, resulting in certain peculiarities regarding their exclusive rights. These are elaborated upon below.

3.2.1. Game Plug-ins and the Right of Alteration

As video games are structured as computer software at their underlying level, they inherently involve issues regarding the Right of Alteration. Within the legal discourse of video games, a subject of intense scrutiny is whether game plug-ins constitute an infringement of this right. Some scholars define a plug-in as "a program—distinct from the game client—that is purposefully designed to exert a direct or indirect influence on an online game or a series of programs related to it[3]."

In December 2003, the *Notice on Commencing Special Rectification of "Private Servers" and "Plug-ins"* was jointly issued by the General Administration of Press and Publication, the Ministry of Information Industry, the State Administration for Industry and Commerce, the National Copyright Administration, and the National Office for the Elimination of Pornography and Illegal Publications. This document established specific regulatory frameworks for plug-ins in the field of online games. As early as late 2005, a plug-in targeting the game QQ Fantasy generated illicit profits exceeding RMB 190,000 within just a few months[4]. Furthermore,

during the "Clean Cyberspace 2022" campaign, public security organs nationwide intensified their crackdown on such activities. For instance, in a case publicized by the Cyber Security Department of the Jingmen Public Security Bureau in Hubei Province involving the "unlawful control of computer information systems for profit," the funds involved reached over RMB 10 million[5].

Arguably, game plug-ins represent a unique illegal phenomenon within the video game industry. In judicial practice, due to the substantial magnitude of illegal gains involved, these cases frequently trigger criminal liability. Consequently, the discussion of copyright infringement per se remains relatively rare in both judicial practice and legal academia.

This article contends that whether a plug-in program constitutes an infringement of the Right of Alteration in video game software should be examined from the following perspectives:

(1) Legal Interpretation of the Right of Alteration

The provisions regarding the Right of Alteration of software are primarily enshrined in Article 8 of the *Regulations on the Protection of Computer Software* (hereinafter referred to as the "Software Regulations"). This article defines the Right of Alteration as "the right to supplement or abridge software, or to change the sequence of its instructions and statements." Under this provision, the Right of Alteration governs "acts of modification performed upon software," which specifically refers to "acts of supplementing or abridging a computer program and its relevant documentation, or changing the sequence of its instructions and statements." To be more specific:

First, the Right of Alteration is directed at a specific category of work—computer software. The *Software Regulations* provide a rigorous definition of the programs and documentation that constitute computer software. Article 3(1) of the Regulations on the Protection of Computer Software defines a "computer program" as "a coded instruction sequence which may be executed by devices with information processing capabilities such as computers, or a symbolic instruction sequence or symbolic statement sequence which may be automatically converted into a coded instruction sequence for the purpose of obtaining certain expected results." Article 3(2) defines "documents" as "literal descriptions or charts used to describe the content, structure, design, functional performance, historical development, test results and usage of a program, such as program design instructions, flowcharts, and user's manuals." If an act of modification is not directed at a computer program or its relevant documentation used to describe the program, it falls outside the regulatory scope of the Right of Alteration.

Second, the Right of Alteration controls specific conducts—namely, acts of supplementing, abridging, or reordering the instructions and statements of a program or its documentation. Any other alterations made to software that do not fall within these descriptions should not be recognized as acts of "modification" controlled by the Right of Alteration.

(2) Assessing Infringement of the Right of Alteration in Game Plug-ins

Whether a plug-in program constitutes an infringement of the Right of Alteration of a video game's computer software should be evaluated based on the specific type of plug-in and the underlying technical circumstances.

First, the subject matter of the Right of Alteration is software, defined as computer programs and their relevant documentation. A computer program is defined as a "coded instruction sequence that can be executed," which excludes the "coded data" it invokes. During software operation, "instruction codes" temporarily stored in RAM are not directly executable by the computer in that state and, therefore, should not be identified as a "computer program" (which encompasses both source and object codes). Consequently, if a plug-in is designed to modify the instruction codes temporarily stored in RAM during the operation of a video game, such an act does not constitute an infringement of the Right of Alteration.

Besides, different conclusions may be drawn regarding whether various types of plug-in programs infringe upon the Right of Alteration:

(a) If a plug-in modifies the "coded instruction sequence" of a video game's computer program and fails to meet the requirements for the user's right of necessary modification, it constitutes an infringement of the Right of Alteration.

(b) If a plug-in only modifies the instruction codes in RAM, and since such codes are not identified as a "computer program," it does not constitute an infringement of the Right of Alteration, even if it achieves changes to the game's functions or interface.

(c) Since plug-in programs are often provided to the unspecified public for profit, they fail to satisfy the prerequisite of "not providing the modified software to any third party." Therefore, they generally do not qualify for the exception under the user's right of necessary modification.

3.2.2. Applicability of the Right of Distribution and Right of Rental to Video Games

Based on the definitions of the Right of Distribution and Right of Rental under the *Copyright Law of China*, the answer to this question should be distinguished by the medium of the video game.

(1) Standalone Games and Console Games

The Right of Distribution and Right of Rental under the *Copyright Law* both govern the transfer of tangible media. Specifically, the Right of Distribution controls the transfer of ownership of the "original or copies" of a work, while the Right of Rental controls the temporary transfer of possession of such "original or copies" for profit. Therefore, regarding standalone games on optical discs and console games on cartridges, both the Right of Distribution and Right of Rental are applicable.

Whether the exhaustion of the distribution right (also known as the "first-sale doctrine") applies to video games was once a subject of intense debate in Japan. Due to the unique nature of the Japanese gaming industry, where console games dominate the market, games are frequently distributed via cartridges. A common practice arose where players would sell completed game cartridges on the secondary market. Under the first-sale doctrine, rightsholders are generally unable to prevent the resale of such used cartridges.

In response, game developers sought judicial confirmation that video games constitute cinematographic works to invoke the Right of Distribution (specifically the distribution right for films in Japanese law). This would allow them to bypass the "first-sale doctrine" applicable to ordinary works and maintain control over the second-hand market. However, in the 2003 judgment Heisei 13 (Ju) No. 952, the Supreme Court of Japan, while confirming that video games qualify as cinematographic works, ruled that they remain subject to the "first-sale doctrine" applicable to general works.

This article concurs that the first-sale doctrine should apply to video games fixed on optical discs or cartridges for the following reasons:

(a) Compared to cinematographic works, the mode of exploitation of video games is more akin to that of ordinary works. Cinematographic works are typically exploited through public screenings in theaters, which often involve a single showing consumed by a large audience simultaneously. In contrast, both standalone and console games are consumed by one or a few individuals after purchase. The act of a consumer buying a cartridge to play at home more closely resembles purchasing a book for reading than buying a cinema ticket to watch a film in a theater.

(b) States often maintain stringent regulatory systems for the public screening, theater scheduling, and distribution of profits regarding cinematographic works, whereas no such profit-sharing management system exists for video games. Furthermore, in its judgment on Case No. 952, the Supreme Court of Japan emphasized that one reason the distribution right for

films does not exhaust is the immense production cost involved; allowing exhaustion might prevent rightsholders from recovering their investment. Video games do not face this specific systemic issue. Considering these factors, to prevent rightsholders from controlling every subsequent circulation of a commodity and profiting repeatedly, if the sale of second-hand books is subject to the first-sale doctrine, the substantially identical act of selling second-hand game cartridges should be treated likewise.

(2) Online Games

Currently, online games dominate the Chinese gaming market. Since the client programs of online games are generally downloaded directly to local terminals, no tangible medium is involved. Consequently, it is difficult to apply the Right of Distribution or the Right of Rental. However, the act of downloading from a network fits the definition of the Right of Communication through Information Network under Article 10 of the *Copyright Law*; therefore, such activities are regulated by the Right of Communication through Information Network.

3.2.3. Applicability of the Right of Projection and the Right of Broadcasting to Video Games

(1) On-site Display of Games as an Act Controlled by the Right of Projection

According to the *Copyright Law*, the Right of Projection is defined as "the right to publicly reproduce works of fine arts, photographic works, audiovisual works, or other works, by a projector, slide projector or any other technical equipment." Since video games contain audiovisual presentations, and judicial precedents have protected their continuous dynamic images as audiovisual works, the Right of Projection is applicable to video games. Even if a specialized category for "video game works" is established in future copyright legislation, it should still be encompassed within the scope of the Right of Projection.

The Right of Projection is a typical "right of communication to the public present at the site of the communication[6]," which involves disseminating a work to an audience physically present. Other rights falling into this category include the Right of Exhibition and the Right of Performance. Regarding video games, various activities can be controlled by the Right of Projection, such as: a game company publicly displaying portions of game footage at a new product launch; conducting game demonstrations for a live audience at a gaming exhibition; or a rightsholder providing equipment—such as Nintendo's Switch or NetEase's VR (Virtual Reality) headsets—for the public to engage in interactive experiences or to view game content.

(2) Game Live-streaming as an Act Controlled by the Right of Broadcasting

The definition of the Right of Broadcasting under the 2010 *Copyright Law* was unable to regulate game live-streaming. Furthermore, since live-streaming is not an interactive communication, it did not fall within the scope of the Right of Communication through Information Network. Prior to the implementation of the current *Copyright Law*, game live-streaming was classified as neither "broadcasting" nor "communication through information network," and could only be regulated by the catch-all provision: "other rights which shall be enjoyed by the copyright owner."

The current *Copyright Law* has amended the Right of Broadcasting to: "the right to publicly disseminate or rebroadcast works by wire or by wireless means, and to disseminate broadcast works to the public by loudspeaker or any other similar instruments for transmitting signs, sounds or images, but excluding the right mentioned in Subparagraph (12) of this paragraph." Game live-streaming clearly falls under the scenario of "publicly disseminating or rebroadcasting works by wire or by wireless means." Therefore, under the current *Copyright Law*, game live-streaming constitutes an act of broadcasting—specifically, an act controlled by the first sub-clause of the Right of Broadcasting.

Distinct from the Right of Projection, the Right of Broadcasting (specifically the right to "publicly disseminate or rebroadcast works") corresponds to the "right of communication to

the public[7]" under the *Berne Convention*, which controls the right to communicate works to an audience not present at the site where the communication originates (remote audience). As the majority of game live-streaming is currently conducted via the internet, it is classified as an act of broadcasting.

4. Conclusion

Based on current judicial practice regarding video games in China, several considerations are proposed for the refinement of the existing legislative framework. In the interim, video games may be protected under the catch-all provision of Article 3 of the current *Copyright Law*, which covers "other intellectual achievements conforming to the characteristics of a work," and their comprehensive protection should be further clarified through judicial interpretations or other legal documents. As circumstances permit, a distinct category for "video game works" should be incorporated into the *Copyright Law* to ensure specialized protection. Furthermore, regarding ownership of copyright in video games, the existing rules are sufficient and can be applied without further adjustment. Finally, with respect to the exclusive rights of copyright, a bifurcated approach should be adopted to distinguish between general rules and the unique characteristics of video games, ensuring they are applied respectively to address the complexities of this medium.

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