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Applying Copyright Law to Videogames: Litigation Strategies for Lawyers

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I. Introduction

Over the last 50 years, videogames have become a significant aspect of American history and culture. While primarily serving as a source of entertainment, videogames have also stemmed academic debates,[1] technological developments,[2] pop-culture references,[3] and multi-million-dollar career paths.[4] Videogames are arguably now just as American as baseball, hotdogs, apple pie, and Chevrolet.[5] Because of this place in American culture, videogames have historically intersected with another American "staple:" the American legal system. This intersection is especially present in the realm of

[1] *See, e.g.,* Lauren Goldbeck and Alex Pew, *Violent Video Games and Aggression,* National Center for Health Research, http://www.center4research.org/violent-video-games-can-increase-aggression/, [https://perma.cc/7NCQ-MZCZ] (last visited Apr. 15, 2018) (on file with the Harvard Law School Library).

[2] *See, e.g.,* David M. Ewalt, *Nintendo's Wii Is a Revolution*, Forbes, (Nov. 13, 2006), https://www.forbes.com/2006/11/13/wii-review-ps3-tech-media-cx_de_1113wii.html#6cb7a5b275bb, [https://perma.cc/QJ5N-D6P8] (on file with the Harvard Law School Library).

[3] *See, e.g., Meet the Voice Behind 'It's-a Me, Mario!',* Great Big Story, https://www.greatbigstory.com/stories/it-s-me-mario-meet-the-voice-behind-a-nintendo-legend, [https://perma.cc/MUA3-SK3A] (last visited Apr. 13, 2018).

[4] *See, e.g., Abayomi Jegede, Top 11 Richest Gamers in the World*, Trendrr, Jan. 22, 2019, https://www.trendrr.net/4210/top-11-richest-gamers-world-famous-net-worth-highest-paid-video-game-players/, [https://perma.cc/TNZ2-BJEQ] (on file with the Harvard Law School Library).

[5] *See* Chevrolet Philippines, *1975 Chevy TV ad: Baseball, Hotdogs, Apple Pie & Chevrolet,* YouTube, Sep. 19, 2011, https://www.youtube.com/watch?v=yYXfdnhh2Mo.

copyright law, which has long had a significant influence on the videogame industry.

This paper will explore the development of copyright law as applied to videogames, and will also discuss how attorneys can best advise their clients under this system. It will begin by discussing the early history of the videogame industry. Next, it will explore the development of copyright law, followed by contemporary issues raised by recent judicial rulings. Finally, it will review suggested legal practices, with an emphasis on providing optimal outcomes for clients.

II. Early History

The history of videogames can be traced back to the earliest iterations of modern computers. Initially, videogames were developed by computer programmers and other scientists as side projects.[6] Not only did videogames serve as a means of personal entertainment for employees working in the lab, but they also helped these scientists test and understand the computing power of the machines they were working on.[7] This trend first began in the 1940's and lasted through the 1960's.[8] Videogames proved to be extremely popular within these laboratory settings. Technological limitations restricted videogames to individual computers or networks; thus, they remained mostly unknown to the general public. In 1967, however, the path of videogames forever changed when Ralph Baer introduced his videogame prototype, "The Brown Box."[9] "The Brown Box" was a videogame console capable of playing multiple videogames on a home television set, providing the general public with the first glimpse of the modern videogame system.

Although "The Brown Box" was considered the first modern videogame, the system was never commercially released. Instead, Baer elected to license his prototype design to the company Magnavox, who released the first commercially available home console, the Odyssey, in 1972.[10] The Odyssey allowed users to play 28 different videogames from the comfort of their homes.[11] Unfortunately for Magnavox, the Odyssey was a financial failure, as Americans were instead becoming enamored with another vide-

[6] *See Video Game History,* History, Aug. 21, 2018, https://www.history.com/topics/history-of-video-games, [https://perma.cc/VR8C-J7CB] (on file with the Harvard Law School Library).

[7] *See id.*

[8] *See id.*

[9] *See id.*

[10] *See id.*

[11] *See id.*

ogame, *Pong.* Created by the company Atari, *Pong* was an arcade style, two-dimensional game that was similar to the sport, table-tennis.[12] In this game, a player would either play with another player or with a "computer" and would take turns serving and returning the ball. Should the ball get past the players paddle, the other player would score a point. The first player to score eleven points won the game. *Pong* was immensely popular, and firmly established Atari as the early industry leader within the videogame industry.[13] With this popularity, however, came a price, for Atari soon found itself as the defendant in a copyright suit brought forth by Magnavox. In its complaint, Magnavox alleged that the Atari developers had copied the idea for *Pong* from a tennis-like game available to play on the Odyssey.[14] According to Magnavox, the *Pong* developers were first exposed to the Odyssey game during a demonstration held in early 1971.[15]

The case, however, was ultimately settled out of court and therefore never proceeded to trial.[16] Per the terms of the settlement, Atari had to pay a licensing and royalty fee to Magnavox in exchange for the continued production and sale of *Pong* games.[17] This case marks an important moment in videogame history. Prior to this lawsuit, it was unclear if copyright protection could even be afforded to videogames.[18] While the settlement ultimately left this question unanswered, it suggested the notion that, at the very least, videogame developers could use the threat of a lawsuit to induce settlements with potential infringers. Thus, developers were potentially afforded some means of protection for their creative endeavors.

III. Evolution of Copyright Doctrine

A. *Updating the Statutory Framework*

Following this initial lawsuit, Magnavox continued its litigation practices by strictly enforcing the copyrights it held.[19] Magnavox mostly lever-

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[12] *See* Rudie Obias, *11 Times Videogames Led to Lawsuits,* Mental Floss, Feb. 19, 2014, http://mentalfloss.com/article/55078/11-times-video-games-led-lawsuits, [https://perma.cc/HXM7-XW2Z] (on file with the Harvard Law School Library).

[13] *See id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *See Video Game History,* History, Aug. 21, 2018, https://www.history.com/topics/history-of-video-games, [https://perma.cc/3SND-VYTR] (on file with the Harvard Law School Library).

[18] *Id.*

[19] *See id.*

aged the videogame designs featured in the Odyssey and successfully netted over $100 million dollars as a result of settlements with other videogame developers.[20] While none of these cases ever went to trial, Magnavox had firmly established a standard for videogame developers: if you copy the design of another videogame, you will be subjected to a copyright infringement lawsuit.

For the most part, this strategy worked, as the gaming industry subsequently saw many lawsuits settled involving game developers suing the designers of "clones" and other "knock-offs" of their popular games.[21] As for the suits that went to trial, the developers were not so fortunate. The Federal Copyright Act of 1976 failed to adequately address computer programs, and as a result, courts were inconsistently applying copyright law in videogame-related cases.[22] Other computer-related industries were similarly affected by these judicial inconsistencies, which prompted Congress to investigate the matter.[23] Ultimately, Congress determined that copyright law needed to be amended to ensure future growth in the tech sector, and did so by adding computer programs to the Act in 1980.[24] These programs were classified as "literary works," and the original works of authorship within the underlying code were afforded the full protection of United States copyright law.[25] For the videogame industry, this meant that the underlying source code of a game and its subsequent mechanics were afforded copyright protection.

B. Judicial Developments

Further copyright protection was subsequently afforded to the videogame industry by the judiciary, which began classifying videogames as "audiovisual works."[26] Such classifications were in addition to the statutory protections already provided by Congress, and provided additional means for copyright holders to protect their games from unlawful exploitation by infringers. Under this new doctrinal framework, so long as the aesthetic look of a videogame appeared similar to another game, a suit for copyright infringement could be sustained. While the ideas for the games themselves, such as a tennis game, a game involving a spaceship fighting aliens, or a car

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[20] *See id.*

[21] *See id.*

[22] *See* Deborah F. Buckman, Annotation, *Intellectual Property Rights in Video, Electronic, and Computer Games*, 7 A.L.R. Fed. 2d 269, 2 (2005).

[23] *See id.*

[24] *See id.*

[25] *See id.*

[26] *See id.* at 2, 4–5.

racing game, were not afforded copyright protection, the underlying visual elements expressing those ideas were covered and protected by this new legal framework.[27] In some instances, courts would go even further, and grant copyright protection to entire games.[28] From an attorney's standpoint, this new copyright doctrine made advising clients relatively easy; so long as a client did not create a game that had the same underlying code or contained visually similar elements as another game, no litigation would occur. At the same time, if a client owned and developed a videogame, any game that appeared to be copying said game could be sued for copyright infringement.

Unfortunately for copyright holders, courts became rather strict in regards to what constituted actual copyright infringement. While courts consistently prevented the unauthorized sale,[29] duplication,[30] or alterations of games,[31] they were much less likely to afford protections under the "expressive elements" framework previously discussed. The most notable case in this line of judicial reasoning involved another Atari game, *Asteroids*.[32] In this particular game, a player controlled a spaceship and was tasked with having the ship survive by destroying asteroids. When an asteroid was destroyed, it would break into smaller pieces, which subsequently moved at different speeds and in different directions until the pieces became so small that they would disappear. The player would then receive points based on how many asteroids were destroyed before losing a life. After releasing this game in 1979, Amusement World released a similar game titled *Meteors*. The design and gameplay of *Meteors* were noticeably similar to *Asteroids*, prompting Atari to sue for copyright infringement.[33] Although the court found that the two games did, in fact, share many similar features, it ultimately found in favor of Amusement World.[34] Citing creative limitations given the underlying idea of the game and technical restrictions of computing technology, the court concluded that the games were different enough to be distinguished by the average consumer, and thus did not constitute infringement.[35]

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[27] *See, e.g.*, *Midway Mfg. Co. v. Bandai-America, Inc.*, 546 F. Supp. 125 (D.N.J. 1982).

[28] *See, e.g.*, *id.*

[29] *See, e.g.*, *id.*

[30] *See, e.g.*, *Atari, Inc. v. JS & A Grp., Inc.*, 597 F. Supp. 5 (N.D. Ill. 1983).

[31] *See, e.g.*, *Midway Mfg. Co. v. Artic Int'l, Inc.*, 704 F.2d 1009 (7th Cir. 1983).

[32] *See Atari, Inc. v. Amusement World, Inc.*, 547 F. Supp. 222 (D. Md. 1981).

[33] *Id.* at 224.

[34] *Id.* at 224–225, 230.

[35] *Id.* at 230.

This opinion is important because it introduced the legal copyright doctrines of merger and *scènes-à-faire* into videogame copyright law.[36] Both doctrines respectively work to limit copyright protection afforded to a work by either merging an idea and expression together such that copyright protection is limited or by preventing protection for expressions necessary to convey an idea.[37] In its decision, the court broadly applied both doctrines to *Meteors*, laying the groundwork for future judicial ruling along comparable lines of reasoning.[38]

Similar findings were subsequently found involving other games, most notably those involving a karate game,[39] a horseracing game,[40] and a fighting game,[41] thus solidifying the federal judiciary's restrictive interpretation on copyright infringement claims. From the mid-90's onwards, the judiciary made it essentially impossible for a videogame copyright holder to win a lawsuit against a potential infringer; the litigation costs were just too high when compared to the expected outcome.[42]

Attorneys were accordingly forced to adapt to this new approach to videogame copyright law as well. Those representing new developers could now advise clients that they had more or less full freedom to derive creative and artistic inspiration from previously released videogames without the ominous threat of copyright litigation. Meanwhile, attorneys representing videogame copyright holders were much more limited in the advice they could provide. These lawyers were forced to strategically concentrate their efforts on cases that would satisfy the courts strict interpretation of copyright infringement, all while counseling their clients on the financial risks that would be incurred should litigation be sought.[43] The inherent financial imbalance between the copyright holder, often an established videogame developer, and an alleged infringer, a small development team with a few employees, still made the threat of litigation a viable strategy for copyright holders. Alleged infringers could not afford the costs of fully litigating the case, and given the rarity of actual copyright litigation, were often reluctant to test the merits of their non-infringement argument. As a result, most

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[36] *Id.* at 228.

[37] *Id.*

[38] *Id.* at 228–30.

[39] *See Data E. USA, Inc. v. Epyx, Inc.*, 862 F.2d 204 (9th Cir. 1988).

[40] *See Rodesh v. Disctronics, Inc.*, No. 91-55694, 1993 U.S. App. LEXIS 26255 (9th Cir. Sep. 30 1993).

[41] *See Capcom U.S.A., Inc. v. Data E. Corp.*, No. C 93-3259 WHO, 1994 U.S. Dist. LEXIS 5306 (N.D. Cal. Mar. 16, 1994).

[42] *See* Buckman, *supra* note 22.

[43] *See id.*

copyright cases were settled between the mid-90's up and through the mid-2000's, but the overall scarcity of these lawsuits still resulted in the release of countless "clones" of formerly released games.[44]

C. Application of Doctrine

The judicial development of copyright law in the years following the initial lawsuit between Magnavox and Atari allows for an interesting intellectual hypothetical. Given the details of that particular case, it is quite possible to conclude that the lawsuit would have been decided in favor of Atari had the case gone to trial. First, it was unclear at the time if copyright law even applied to computer programs, as Congress had not amended the Copyright Act yet.[45] Second, if the assumption is made that the law and related doctrine as developed by the mid-1990's would have been applied by the courts, then Atari still would still have won the case. The underlying idea of *Pong* is not protectable under copyright law, just the expression of that idea. Although Atari freely admitted that its developers were inspired by the tennis game Magnavox developed, no such copying of Magnavox's protected material actually occurred.[46] Atari developers simply used their inspiration to create their own unique game, with their own unique code, when they developed *Pong*.[47] These facts, when coupled with the limited ways in which a two-dimensional table tennis game can be expressed and other technological limitations provides even more evidence in favor of Atari. It is therefore highly unlikely that Magnavox would have emerged victorious had the two parties ultimately gone to trial.

IV. New Developments

A. Recent Cases

Recent judicial developments may be once again changing the application of copyright law to the videogame industry. In a 2012 opinion, a court held that the videogame *Mino,* developed by the company Xio Interactive, was infringing on the copyright of another game, *Tetris,* owned by Tetris

[44] *See* Obias, *supra* note 12.

[45] *See* Buckman, *supra* note 22.

[46] *See Video Game History,* History, Aug. 21, 2018, https://www.history.com/topics/history-of-video-games, [https://perma.cc/B4E3-KNMA] (on file with the Harvard Law School Library).

[47] *Id.*

Holding.[48] *Tetris* is a widely popular puzzle-game that involves players dropping various arrangements of 4-block shapes onto a plane. The shapes respectively stack, and when an entire line is filled by these blocks, the line disappears and points are earned. *Mino* uses these same mechanics, including the layout of the plane, the shapes, and the speeds at which they fall.[49] However, like other games discussed above, *Mino* developers claimed that they were merely "inspired" by *Tetris,* as independently developed the code, mechanics, and images for *Mino.*[50] Given the strict application of copyright law previously discussed, Xio Interactive believed that its game would not constitute as an infringement on the copyright of *Tetris.* The court, however, elected to not apply a broad application of the merger or *scènes-à-faire* doctrines in its decision, thus diverting from the decisions of previous cases.[51] In its opinion, the court cited technical capabilities of computers as no longer being a limiting factor in copyright protection, and that multiple means of expressing the underlying idea of *Tetris* were available to the *Mino* developers.[52]

The outcome of *Tetris Holding* is far from dispositive. Xio Interactive elected to forgo the appeals process, so no subsequent appellate history exists.[53] As such, it remains to be seen whether the positions advanced by the holding reflect the view of the entire Third Circuit, or if the particular facts of this case make it an outlier to otherwise consistent copyright jurisprudence. Because the case was later cited in another decision by the District of New Jersey,[54] it seems rather unlikely that the *Tetris* case was an outlier. Instead, *Tetris Holding* may be marking the development and adoption of new videogame copyright doctrine by the District of New Jersey, and perhaps, the Third Circuit.

Another judicial development of note involved a dispute between the companies Spry Fox and 6Waves, in which 6Waves was alleged to have infringed on the copyright of the Spry Fox game, *Triple Town*.[55] These two companies developed games with the essentially same gameplay and mechanics, but which were themed differently, as *Triple Town* was suburb

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

[49] *Id.* at 411.

[50] Id. at 397.

[51] *Id.* at 412.

[52] *Id.*

[53] *See id.* at 394.

[54] *See Granger v. ACME Abstract Co.*, 900 F. Supp. 2d 419, 425 (D.N.J. 2012).

[55] *See Spry Fox LLC v. LOLApps Inc.*, No. 2:12-CV-00147-RAJ, 2012 WL 5290158, at 1 (W.D. Wash. 2012).

themed, while 6Wave's game, *Yeti Town,* was mountain themed.[56] In examining the protectable expressive elements of both games, a court determined that the protected elements were "substantially similar enough" to move the case forward to discovery. In its ruling to deny 6Wave's motion to dismiss, the court also highlighted the factors expressed in the *Tetris* case, namely, computing capabilities and range of expressions available.[57] While the case ultimately settled, it marked another potential diversion from the established application of copyright law to videogames.[58]

B. *Application of Doctrine*

Returning again to the lawsuit between Magnavox and Atari, the hypothetical introduction of these new developments would make Magnavox, and not Atari, the winner of this lawsuit. The two games were clearly substantially similar, and as noted previously, Atari openly admitted that it used the Magnavox tennis game in the development of *Pong.* Atari, however, could have defended itself by applying the traditional doctrine of videogame copyright law by arguing for broad interpretations of the merger and *scènes-à-faire* doctrines. Specifically, the argument would be based around creative limitations in how the idea of a tennis game could be expressed and restrictions on computer technology. Had the court applied the reasoning in *Tetris Holdings,* that computer technology cannot be argued as a limitation when infringing on a copyright, then these arguments put forth by Atari would probably not have sufficed. By applying *Tetris Holdings,* the court could have reasoned that advancements in computing technology when compared to early generations (i.e. those in the 1950's and 1960's) made it so that there were multiple means of expressing the underlying idea. The court therefore, could have determined that by creating *Pong,* a game substantially similar to Magnavox's own game, Atari infringed on Magnavox's copyright. This result, although hypothetical, highlights the impact that these new judicial developments may have if they ultimately supplant the traditional videogame copyright doctrine.

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[56] *See id* at 6.

[57] *See id* at 6.

[58] *See* Jack Schecter, *Bears Beat Yetis! Another Copyright Defeat for Video Game Clones,*Oct. 24, 2012, Sunsein, Kann, Murphy & Timbers, https://sunsteinlaw.com/bears-beat-yetis-another-copyright-defeat-for-video-game-clones/ [https://perma.cc/24LU-ZZGZ] (on file with the Harvard Law School Library).

C. Potential Explanations

The fact that several district courts have, at the very minimum, allowed cases of videogame copyright infringement to proceed to the discovery process may be indicating a greater shift of judicial application of videogame copyright law. While it is unclear why some districts are adopting such polices, one possible explanation may be in the ages of the judges themselves. As highlighted in the beginning of this paper, videogames are a relatively recent phenomenon that a "younger" crop of judges may simply view differently than their more experienced contemporaries. The judge that wrote the opinion for the *Tetris* case was 18 when *Pong* was released,[59] and the judge in the Spry Fox case was 22,[60] meaning that both have spent the majority of their adult lives with videogames being a part of American culture.

A feasible argument, therefore, would be that prolonged exposure to videogames has provided these particular judges with more nuanced opinions on the topic, which in turn has been reflected in their respective judicial opinions. While such a hypothesis cannot be proven without further jurisprudence, it would be interesting to follow future videogame copyright cases, and compare the decisions with the ages of the judges issuing the opinions. If video copyright jurisprudence continues along the lines of the *Tetris Holding,* then this explanation may hold some merit, and will introduce an additional variable in the legal calculus that an attorney must conduct when advising a client.

Another potential explanation for why the pendulum may be swinging back in favor of copyright holders is simply the notion that judicial interpretations of statutory frameworks fluctuate over time. As the general viewpoints of society change, judges tend to reinterpret previous rulings to reflect those changing values. This explanation is slightly different than the one above, in that judges are not reflecting their own values into the opinion, but rather, the values of society. This idea may be a more plausible explanation. Federal judges constantly attempt to keep their individual opinions out of their judicial rulings, as they do not want to be accused of straying from Justice Holmes' renowned dissent in *Lochner v. New York.*[61]

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[59] *See Freda L. Wilson,* WIKIPEDIA, https://en.wikipedia.org/wiki/Freda_L._Wolfson, [https://perma.cc/SW77-7VHX] (Mar. 10, 2019) (on file with the Harvard Law School Library).

[60] *See Richard A. Jones,* WIKIPEDIA, https://en.wikipedia.org/wiki/Richard_A._Jones, [https://perma.cc/TX74-YFGM] (Mar. 10, 2019) (on file with the Harvard Law School Library).

[61] *See generally, Lochner v. New York*, 198 U.S. 45, 74-75 (1905).

This opinion famously set forth the precedent that judges should not input their own opinions into the law, but rather, should allow the general public opinion to rule the day, and continues to be a point of articulation between justices today.[62] The rulings set forth in *Tetris Holding* may be an extension of this theory of adjudication.

V. Applications to Practicing Attorneys

From an advisement and advocacy standpoint, attorneys must be aware of the traditional statutory and judicial interpretations of copyright law, as well as the new developments discussed above. While these new developments introduce more uncertainty into the application of copyright law, a variety of strategies can still be utilized to ensure the optimal outcome for a client.

A. Representing Videogame Copyright Holders

The new developments in copyright law can dramatically expand the legal strategies available to attorneys representing videogame copyright holders. While the tried and true method of threatening litigation against infringers still remains the best tactic, these threats now carry more weight. Not only will the cost of litigation potentially induce the alleged infringer into settling, but the fact that courts have shown an openness in siding with copyright holders only places more pressure on the opposing party.

Strategy-wise, a good practice would be for attorneys to advise their clients to register any copyrights they have with the United States Copyright Office. While the Copyright Act automatically affords copyright protection to works created after 1976, registration of the work grants the copyright holder the option to sue for statutory damages.[63] Statutory damages can award a copyright holder up to $150,000 per instance of intentional infringement, and serve as an excellent monetary deterrent towards potential infringers.[64] While holders of non-registered copyrights can still sue for actual damages or profits, these are more difficult to prove in court,

[62] *See e.g., Romer v. Evans*, 517 U.S. 620 (1996).

[63] 17 U.S.C. § 504(c) (2010).

[64] *See* Richard Stim, *Copyright Infringement: How Are Damages Determined?* Nolo (N.D.), https://www.nolo.com/legal-encyclopedia/copyright-infringement-how-damages-determined.html, [https://perma.cc/Q6DV-8MQV] (on file with the Harvard Law School Library).

and may not provide the same level of deterrence that statutory damages create.[65]

Secondly, attorneys should always bring infringement suits in the Federal District of New Jersey, as this is currently the federal district with the friendliest laws towards videogame copyright holders.[66] Given the transient and national presence of videogames, it is highly probable that the alleged infringer has conducted business within the state, thus making it practically impossible for the infringer to claim a defense under lack of personal jurisdiction[67] or venue.[68]

Lastly, if procedural rules prevent a suit from being brought in the District of New Jersey, then the second-best strategy would be for the client to bring the suit in whichever federal district the Federal Rules of Civil Procedure dictate is proper. While bringing a suit in another district is riskier, *Spry Fox* has shown that other courts are open to adopting the rationale of *Tetris Holdings.*[69] This reasoning, in turn, could persuade the alleged infringer to settle, and thus avoid the risk of having another district adopt the rationale developed by the District of New Jersey. If the lawsuit does proceed to trial, it is possible that such rationale is, in fact adopted, creating another district in which copyright holders can bring an infringement case. Although mired with uncertainty, this strategy is still a worthwhile option for attorneys to suggest to their clients, as it will potentially lead to a favorable outcome and further redefine the judicial application of copyright law.

B. Representing New Videogame Developers

Attorneys representing videogame developers also have several legal tools at their disposal when representing their clients. To avoid any inconsistencies with the strategies discussed above, videogame developers will not be viewed as copyright holders for the purposes of this section.

The first, and perhaps most important step in this representation is for attorneys to advise their clients about the new legal developments of *Tetris Holding* and other similar cases. Doing so will to put the clients on notice regarding what creative liberties they may take when developing a new

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[65] *See id.*

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

[67] *See Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

[68] *See* 28 U.S.C. § 1391(b)(3) (2011).

[69] See Spry Fox LLC v. LOLApps Inc., No. 2:12-CV-00147-RAJ, 2012 WL 5290158 (W.D. Wash., Sept. 18 2012).

videogame. While a client may certainly still draw inspiration from a previously published game, a good strategy for a lawyer would be to advise the client to limit the number of inspirational elements used in their new game. By doing so, the *Tetris Holding* line of reasoning would be most likely be inapplicable to their game should they be sued for copyright infringement. Further, if the client is in fact inspired by a previously published game, an attorney should check to see if that game is registered with the Copyright Office. If the game of inspiration is in fact registered, then even more precautions should be taken to avoid the imposition of statutory damages.[70] These precautions may involve changing the art style of the videogame, altering any elements that may be deemed to be too similar to the registered game, or perhaps, maybe even ceasing the development of the game entirely.

Attorneys should also attempt to limit their clients contact with judicial districts that are adopting the *Tetris Holding* style of reasoning. Methods of limiting such contact include not having a principle place of business in that district and engaging in minimal sales in that district. Given the transient nature of videogame sales, however, the later step may be impossible to implement. However, it still serves as a legitimate method of avoiding a lawsuit in that particular federal district.[71]

If the client does find itself being sued in the District of New Jersey, or any other district that is applying *Tetris Holding*, then the attorney should motion to transfer the case to another federal district.[72] The new district should be one that still applies the more traditional method of videogame copyright law, as this method will most likely result in a favorable ruling for the client. Assuming the transfer is granted, the client's argument should be based on why the court should utilize the traditional application of videogame copyright law in deciding the case. This argument would give the client the best chance of winning the lawsuit, and may even prompt the plaintiff to drop the case entirely.

Meanwhile, if the motion for transfer is not granted, a similar argument should still be put forward by the client. When arguing for the traditional application of copyright law, and not the *Tetris Holding* rationale, the attorney must attempt to distinguish *Tetris Holding* as an outlier that should be confined to the facts of the case. The attorney should then subsequently work to separate the facts of the client's game from those of *Tetris Holding* to further reinforce this notion. While this strategy is far from guaranteed suc-

[70] *See* 17 U.S.C. §504(c) (2011).
[71] *See* 28 U.S.C. §1391 (2011).
[72] *See* 28 U.S.C. § 1404 (2011).

cess, it provides the best probability for a favorable outcome and may nonetheless convince the court to rule in favor of the client.

Litigation, of course, may not be the best option, as an out-of-court settlement may be the most beneficial outcome for the client. Costs associated with litigation can be astronomical in modern times,[73] and settlements do not always spell doom for the videogame developer.[74] Atari serves as a perfect example, because even after its settlement with Magnavox, the company still became one of the preeminent companies in the videogame industry.[75]

VI. Conclusion

Since the advent of modern videogames, copyright law has held a strong influence on the industry and its development of games. As the industry has matured and evolved, so too has judicial application of copyright law. While recent developments in these judicial applications may disrupt long-standing doctrine, it remains to be seen if the federal judiciary is willing to adopt these new standards. Attorneys, therefore, should be aware of the traditional applications as well as these new developments in order to best advise their clients.

A variety of legal strategies exist to help achieve these goals, and will vary depending on whether the client is a copyright holder looking to sue an infringer or videogame developer wanting to minimize legal exposure. In practice, clients tend to fall into both categories, as copyright holders are often videogame developers themselves. Attorneys must be able to recognize and address the individual needs of a client, and apply the appropriate legal strategies that will best satisfy those needs. By following these practices, attorneys representing copyright holders and attorneys representing videogame developers can ensure the most optimal outcomes for their clients.

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[73] *See Litigation Cost Survey of Major Companies,* Duke Law School, May 10, 2010, http://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_0.pdf, [https://perma.cc/254X-Q4WW] (on file with the Harvard Law School Library).

[74] *See Video Game History,* History, Sept. 1, 2017, https://www.history.com/topics/history-of-video-games, [https://perma.cc/H8F6-KNJK] (on file with the Harvard Law School Library).

[75] *See id.*