Entertainment Law Review

1997

Case Comment

South Africa: video - video games constitute "cinematographic films"

Owen H. Dean

Subject: Intellectual property. **Other related subjects:** Media and entertainment

Keywords: Copyright; South Africa; Video games

Legislation: Copyright Act 1978 s.23 (South Africa)

Copyright Amendment Act 1992 (South Africa)

Case: Golden China TV Game Centre v Nintendo Co Ltd (Unreported - South Africa)

Ent. L.R. E11 **Facts:** The judgment is an appeal against a decision of the Transvaal Provincial Division of the Supreme Court of South Africa (judgment of Hartzenberg J.) in which it was held that video games fall within the definition of “cinematograph films” in the Copyright Act 98 of 1978, even after the Act was amended so as to specifically include “computer programs” as copyrighted works.

Nintendo Co. Ltd (the respondent) is a large Japanese company which designs, produces and distributes video games. The appellants are importers, wholesale distributors, and/or retailers of video games. Over the years, copies of the original Nintendo games were regularly imported from Taiwan and the appellants were allegedly dealing in these copies. Nintendo, which claimed to be the owner of the copyright subsisting in its video games, alleged that the appellants' importing of, and dealing in, the copies of the original Nintendo games amounted to an infringement of its copyright in terms of section 23(2) of the Copyright Act. Nintendo consequently sought and was granted an interdict against the appellants under the terms of which they were ordered to refrain from dealing in the copied Nintendo games.

In the appeal it was undisputed that the video games in which the appellants were dealing were copies of the video games in which Nintendo claimed copyright. It was also undisputed that the appellants had the necessary “guilty knowledge” required by section 23(2) of the Copyright Act. The main issue which the court had to decide was whether or not copyright did subsist in the video games as cinematograph films. Nintendo's argument was that a video game qualified as a cinematograph film.

The 1992 Copyright Amendment Act was brought into operation three days after the date that proceedings were instituted before the Provincial Division of the Supreme Court. Consequently, the express exclusion of computer programs from the definition of “cinematograph films” (an amendment of the 1992 Amendment Act) was not considered by the Provincial Division. Before the 1992 amendment, cinematograph films were defined as “the first fixation by any means whatsoever on film or any other material of a sequence of images capable, when used in conjunction with any mechanical, electronic or other device, of being seen as a moving picture and of reproduction, and includes the sounds embodied in a soundtrack associated with the film”. The 1992 Copyright Amendment Act expressly excluded computer programs from this definition. The amended Act also afforded specific protection to computer programs in that “computer programs” were added to the list of works which qualified for copyright protection. As there was some uncertainty as to whether the Transvaal Provincial Division should have considered the amended definition of cinematograph film, the Appeal Court gave judgment on the matter with regard to the law both before and after the 1992 amendment.

Before considering whether a video game falls under the definition of “computer program” or “cinematograph film”, it was necessary to have regard to the actual development process of the video game. First, drawings are done which embody the basic idea of the game. Next, the screen text, sound effects and play sequence are prepared. A computer program is then written which encapsulates all these features and controls the visual display of the game. Integrated circuits are then manufactured and the visual elements of the game are stored in an encoded form. The data stored on these circuits is fixed and unchangeable. The data stored on the microchips is then

electronically converted into video signals which define a coloured and moving graphic display on the screen.

Held: The court upheld the decision of the Transvaal Provincial Division and decided that video games do fall within the broad compass of the definition of "cinematograph films", whether considering the law before or after the 1992 amendment.

The court found that the "cinematograph film" definition was worded in very general terms and that it should be interpreted liberally, as the intention of the legislature was to promote human ingenuity and industry rather than to impede and stifle it. The court then proceeded to test video games against each separate element of the definition of cinematograph films.

The primary point of dispute in this regard was whether or not a video game comprised "a sequence of images" as required by the definition of "cinematograph film". The appellants contended that a video game did not comprise a "sequence of images" as the images displayed on the video screen are, to a certain degree, variable and controlled by the player. The sequence of images in the case of an ***Ent. L.R. E12*** ordinary cinematograph film, on the other hand, are totally fixed and unchangeable. The appellants based their argument on the fact that in terms of the definition, the sequence of images had to be "capable of reproduction". The appellants argued that because the sequence of images in the case of a video game was changeable, it was not capable of reproduction. The court, however, held that the definition required that the film itself be capable of reproduction and not the sequence of images. Furthermore, it was held by the court that although the sequence of images is subject to the manner in which the game is played by the particular player, the player cannot create an entirely new sequence which is not already stored on the video game's microchips. The player is restricted to only those sequences which have been stored by the original developer. The images are, to a large degree, repetitive and unchangeable. The court concluded that the video game's sequence of images do comply with the body of the requirements of the definition, both before and after the 1992 amendment.

The court then had regard to the 1992 amendment of the definition which expressly excluded computer programs from the scope of cinematograph films. The court found that this exclusion had no effect on the case as it was common cause that although computer programs were used during the development of video games, and although the games may possibly have been embodied in a material form by way of computer programs, the games themselves did not constitute computer programs. The appeal was accordingly dismissed with costs.

Comment: After the Transvaal Provincial Division judgment in this case, the view was held by many that although the court had correctly held video games to constitute "cinematograph films" in terms of the definition thereof before the 1992 amendment, the later specific exclusion of computer programs from the definition of cinematograph film would override this judgment. The Appellate Division has consequently, rather surprisingly, upheld the decision of the Provincial Court that video games qualify as cinematograph films and not computer programs, even in terms of the amended definition.

The court can be supported for its view that the various definitions of "works" should be interpreted as widely as possible in order to provide the broadest possible protection to copyright owners. For this reason, it was necessary before the 1992 amendment to include video games under cinematograph films. It would seem, however, that the 1992 amendment removed any such necessity. The 1992 Amendment Act specifically included computer programs as a new type of "work" which qualified for copyright protection. A computer program is defined as "a set of instructions fixed or stored in any manner and which, when used directly or indirectly in a computer, directs its operation to bring about a result". As video games are based primarily on computer programs, they would more naturally fall under this broad definition. It seems rather artificial and contrived to place video games under the heading of cinematograph films when they would automatically be considered by most to be computer programs.

Furthermore, it must be considered why the legislature saw fit to specifically exclude computer programs from the definition of cinematograph films. It would seem logical to suppose that the legislature's intention was to indicate clearly that there is to be no overlap between computer programs and cinematograph films and that any work which should rightly be placed under the scope of a computer program should not mistakenly be placed under the compass of a cinematograph film.

One would hope, however, that the judgment will not be interpreted to mean that a video game will qualify only as a cinematograph film and not as a computer program. It is possible that the decision

will be taken to mean that the video game in fact embodies two separate works in which copyright subsists. Copyright could subsist in the film which is comprised of the display of images on the screen; and copyright could subsist in the computer program which makes the video game work.

As the court did not in fact discuss this issue, simply holding that it was “common cause” that the video games were not computer programs, it would seem that the question is still open to debate and still awaits further consideration by the Appellate Division.

Ent. L.R. 1997, 8(1), E11-12