NEW VIDEO GAME:
Japan's Video Game Producers Lose at the
Litigation Game

- By Dan Rosen*

The video game industry in Japan is anything but child's play. Annual sales of home game machines alone total more than 1 trillion yen, close to 10 billion dollars.[1] Software, which is priced much lower than the machines themselves, has generated about 600 billion yen in sales, about 5 billion dollars per year.[2] More than 200 companies compete in the production of games, employing some 23,000 people. In the year 2000, they produced 1,400 titles.[3]

While hardware sales have remained relatively steady,[4] software sales have declined, by some estimates dramatically so. The Ministry of Economy, Trade, and Industry (METI) shows sales in the year 2000 to be 70.8% of the 1997 peak figures.[5] Yet, with the introduction of new hardware systems such as Sony Playstation II, Nintendo Game Cube, and Microsoft X Box, it hardly seems likely that players are simply holding on to old games. (Video game enthusiasts are not known for their restraint in the presence of new challenges.) According to the software industry, the explanation for the decline in software sales is that consumer demand is being met by a vigorous resale industry, in which dealers buy and sell used game software.[6]

In search of relief from this problem, video game authors turned to the protections afforded by Japanese copyright law. The copyright law, however, failed to alleviate the authors' concerns because it actually offered comfort to the resellers. Under the "first sale" doctrine of copyright law, the lawful owner of a copyrighted item has the right to sell that item without incurring any duty to pay additional copyright royalties.[7] Thus, for example, part of the price of a new book goes to the author of that book. His revenue comes at the first sale. At any subsequent sale, when the person who initially purchased that book decides to sell it to someone else, the author receives nothing from that transaction. The transaction is strictly between the new buyer and the individual reselling the book.

Of course, the author is able to sell other, new copies of the same title, and for these he receives royalties. However, to the extent that readers can readily obtain used copies in suitable condition at lower prices, they are less likely to purchase new ones. Thus, the number of people who may have read a book will exceed the number of books sold and, consequently, the number of instances in which the author receives payment.

Given that reality, Japanese video game software producers instead contend their product is not like a book, but rather more like a motion picture. Under Japanese copyright law, motion pictures are not subject to the first sale doctrine. Rather, authors retain the right of distribution.[8] It was based on this distinction that video game software producers sought to end the resale business through litigation. The lawsuits ultimately reached the Supreme Court of Japan.

Japanese Courts' Application of Copyright Law to Video Games

In 1999, two cases were decided, one in the Tokyo District Court and the other in the Osaka District Court, both attempting to answer the question of how copyright law should be applied to video games. In particular, the courts were called upon to provide legal answers to two questions that are both, essentially, a matter of art and, perhaps, physics: what are cinematographic works? And, can video games be classified as such?

According to the Copyright Law, cinematographic

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works are "pictures that are expressed by making visual and aural effects analogous to cinematography and fixed in some tangible form."[9] For such works, the author maintains the right of distribution of copies.[10] That definition does little to resolve the issue, for both the video game software that one sees on a computer screen and movies that one may watch on a cinema screen involve audiovisual images arranged in a cinematographic manner. The similarity is all the more apparent when one considers a particularly well-established type of cinematographic work – animation.

The Tokyo Case

The first of the two cases was filed in the Tokyo District Court. Paradoxically, the Plaintiff in this case, Joushou Company, was a seller of used games with 163 outlets, by the name of "Chameleon Club," around the country. The defendant, Enix Corporation, is a producer of game software.[11] Enix sent a letter to Joushou, demanding that it stop reselling Enix-created products. Joushou responded by filing suit, asking the court to issue a declaration of its rights.

The game software in question was made to work with Playstation, Japan's leading platform.[12] Two specific game titles were at issue. One title was "Star Ocean, Second Story," a fantasy in which the main character travels through a virtual land fraught with enemies. Another was called "Bust a Move." It involved dancing and various competitions. Enix claimed the cost of producing "Star Ocean II" was ¥1,080,000,000, and production of the dance title was somewhat less than half that. Altogether, approximately $13 million was invested in bringing the two games to market.

Rather than focusing directly on the statutory definition of cinematographic works, the Tokyo District Court chose to look at the audience and the method of extracting a profit from it. The court found differences in ways that audiences make use of video games and traditional motion pictures. For one thing, audiences in movie theatres, the court said, all see the same movie in the same way, regardless of space or time.[13] Audiences for game software, the court said, are different. They are not passive recipients of an *auteur's* vision but rather participants in the creative process. The players can select various permutations of the work and then actively affect its unfolding. For this reason, the Tokyo District Court ruled that the involvement of the player destroys the conditions under which the game software could be viewed as the expression of the game author.[14]

The court then attempted to further distinguish game software from theatrical films by looking at the way in which they are distributed. Theatrical movies on printed film, the court said,

> are used in a way that audio-visual expression is shown to a large audience at one time. Therefore, individual reproductions have significant economic value in the sense that they produce large admission fee profits. Unlike the distribution system for other works of which many reproductions are sold directly to the public, the reproductions of theatrical movies are distributed in a business-to-business manner (film-making companies, film distribution companies, and theatre owners). Indeed, in some cases, because of high costs, film-making companies also control the distribution system in order to recover their invested capital.[15]

Speaking practically, rather than literally, the court looked to "actual business circumstances"[16] and economic value. Those circumstances and the value, however, were the question in the lawsuit, not the answer. The litigation was filed with the intent of determining what business circumstances and rules would be and what economic value could be attached to the works. Because the sequential images were not confined to one particular pattern, the Tokyo District Court ruled in favor of the Plaintiff reseller, accepting the first sale argument over the motion picture analogy.[17]

Upon review, the Tokyo High Court affirmed the holding of the District Court.[18] Looking to the market, the High Court said that reproduction rights for cinematographic works are based on the theatrical model, in which each copy is used for a large number of people. Video game copies, on the other hand, are produced in large numbers, each of which is viewed by a small number of people at one time and—in many cases—only one at a time. Thus, it concluded, the software is not entitled to the same reproduction rights as other cinematographic works.[19]

The Osaka Case

The second case was filed in the Osaka District Court. This time, the plaintiffs were producers of games for Playstation and Sega Saturn: Capom, Konami, Square, and Namco. Defendants were a franchiser of second-hand game software stores, Akuto, and Raizu, one of its franchisees. Thus, unlike the Tokyo case, the Osaka litigation more closely resembles the orthodox American approach, in which a party

who claims to have already suffered damages sues.

In sharp contrast to the Tokyo District Court, the Osaka District Court chose to look primarily at the statutory language. The Osaka District Court also expressed the notion that the law should be understood as setting the markers for all kinds of expression: both those already well-known and others not yet mature. The court took a straightforward approach to the question, observing that cinematography involves persistence of vision, presenting what are essentially individual still images so rapidly as to fool the eye into perceiving movement. In this, the court said, there is no difference between theatrical films and video games.[20]

As for the involvement of the player, the court said that whatever his contribution, the cinematographic results are determined by the author of the game software. Thus, it concluded, game software is included in whatever rights are afforded to other cinematographic works. The statute, the court said, does not create a category of cinematographic works without right of distribution. What is available to one is available to all.[21] Thus, unlike the Tokyo District Court, the Osaka District Court ruled in favor of the software development companies.[22] However, the Osaka High Court reversed.[23]

The Osaka High Court looked to the game software industry's own behavior as reason to exclude their products from distribution protection. "Games," the court said, "are reproduced massively and sold directly to the public massively. They are sold directly to end-users, unlike theatrical films. Thus, the manufacturers are unable to control further distribution by legitimate end-users who have lawfully obtained their copies."[24]

> THE Osaka High Court reversed . . . [looking] to the game software industry's own behavior as reason to exclude their products from distribution protection.

The court viewed the cinematographic distribution right, article 26(2), as an exception to the natural premise of the free sale of goods. Adopting a social welfare stance, the court said that protection of copyrighted works should be conducted in harmony with the public interest. When an object is transferred from buyer to seller, the seller should ordinarily be able to assume that he can freely use the object or sell it himself. A market economy depends on such assumptions, it said. Producers of highly-regarded games can receive compensation through the original sale price. There is no need, the court said, to allow them a second profit through circulation.[25]

Thus the Osaka High Court ultimately concluded that the video game software industry itself had chosen a method of sales that was inconsistent with any reservation of distribution rights. The Supreme Court reviewed both cases.[26]

Japanese Supreme Court

Both the Tokyo and Osaka High Courts found that video games are indeed "cinematographic works" included within the statutory definition and ruled in favor of allowing resale of games without compensation going to the original seller. However, the Courts disagreed on the consequence of this conclusion. The Tokyo High Court said the reproductions were not copies in the same sense as movies, because, unlike video games, individual copies of movies are seen by large numbers of people at a time. The Osaka High Court, on the other hand, looked more to ordinary notions of "first sale." It was this contrast, along with the basic, underlying issue of whether video game software is cinematographic at all, that framed the argument for the Supreme Court.

Like the High Courts, the Supreme Court concluded that game software is, by all means, "cinematography" as defined in the copyright law.[27] Beyond that, the Court agreed with the High Courts' position that the reproduction right attendant to cinematography admits of no distinction between various kinds of cinematographic works. Thus, it found that video game software authors do, in fact, enjoy the same cinematographic distribution rights as do movie producers. Nevertheless, the Court found in favor of the game resellers.[28]

The paradoxical conclusion was reached by way of the game producers' own conduct. The Court said that while the producers had the right of distribution, they had exhausted that right by distributing their work directly to the public.[29] This distinction, the Court admitted, is nowhere written in article 26. But article 26 needed to be interpreted, it said, as the law made no mention of the applicability (or inapplicability) of the first sale doctrine to cinematographic works. In its interpretation, the Supreme Court reiterated the appeal of the Osaka High Court to the social utility of the free market.[30]

In this regard, the Court rejected any contention that the meaning of article 26 is to be judged on the industry as it stood when the law was enacted.[31] The Court noted that article 26 was designed to effectuate the provisions of the Berne Copyright Convention,[32] which was a recognition of the need to protect the revenue stream for motion pictures distributed for theatrical release. Despite this, it said,

the language of the statute itself provides no basis for distinguishing between older and newer forms of the medium. As a result, the Court needed to look elsewhere for a justification for treating game software differently.

The Court concluded that the video game producers, who were seeking a judicial declaration to their claim of distribution rights, had in effect given up any such rights by doing business.[33] The producers had asked for judicial recognition of their position that they sold end-users only the right to possess the game themselves, not to redistribute them. But the Court observed that the trade practices of the game software producers differed dramatically from those of feature film producers, who only rent their product to theatres and then insist upon its return. Unlike feature film producers, the game producers had ceded control of their product by placing it into the ordinary stream of commerce, the court concluded. Thus, it ruled that the producers had abandoned their downstream distribution rights, even while they were insisting upon them.[34]

In reaching this conclusion, the Court compared the copyright issue to one it addressed in a patent case several years earlier.[35] In that case, the Court examined the factors to be considered in deciding whether a patent holder had exhausted its distribution rights. Recalling its analysis in the previous case, the Court said:

> 1. Protection of an author's copyright must be accomplished in harmony with the public interest.
> 2. When rights are transferred, the transferee may reasonably believe that he has acquired whatever rights were held by the transferor. In a copyright case, that means that when an object is transferred, the transferee believes that he too has acquired the right to transfer to another. Were that not so, the free circulation of products in the market would be impeded, to the ultimate detriment of copyright holders.
> 3. Authors already are paid when they assign their works the first time. There is no need for them to reap a windfall by profiting from subsequent reassignments.[36]

The Court found these factors equally applicable in the copyright context and used them to determine that purchasers of game software enjoy both the expectation that they can resell what they have bought as well as the legal right to do so.

Absence of Litigation in American Courts

The resale of video game software also takes place in the United States, but no serious impediments seem to have been erected to the practice. Unlike Japanese law, the U.S. has no special reservation of distribution rights for film producers. Rather, film producers, like all other copyright holders, have the right "to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending."[37]

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In the case of motion pictures, distribution to theatres for display is the first, but only one, of many methods of exploiting one's copyright. The theatre obtains a license to exhibit the film, yet is given no rights of ownership in the physical medium in which the motion picture is fixed. To the contrary, the delivery of the celluloid and its return are typically explicitly denoted in the contract and, in any event, are well-known trade customs.

One model contract very carefully defines the scope of the license and its limitations:

> 1. Subject to the payment of the license fees specified in the Schedule (which is hereby made a part of this agreement) and all the other terms and conditions hereof, the Distributor hereby grants to the Exhibitor, and the Exhibitor hereby accepts from the Distributor, a limited license under the copyright of the Picture to exhibit the same publicly, but only at the Theatre and for the period and commencement date set forth in the Schedule. This license shall extend to no other time, place, use or purpose.
> 2. License Restrictions: The License herein granted shall extend only to the exhibition of the specific print of the Picture delivered by the Distributor to the Exhibitor . . . and shall not extend to the exhibition of any other print [or the use of reels of any other size].
> . . .

6. Return of Print: The Exhibitor shall, immediately after the last exhibition of the Picture, return the print tails out, and the reels and containers furnished therewith (a) to the Distributor's local exchange from which the Exhibitor was served, or (b) to a common carrier designated by the Distributor. The Distributor shall pay the cost of transportation. If directed by the Distributor to ship the print elsewhere, the Exhibitor shall so ship it, transportation charges collect.[38]

Following the theatrical distribution (often very quickly thereafter, if ticket sales are not impressive), the film may be licensed to cable television, television, international markets, and/or airline in-flight entertainment. These are all licenses to exhibit, as compared with what is often the final step in the chain: direct sales to consumers of copies fixed in videotape and videodisk.

Compared with this elaborate cycle seen in the distribution of films, video game software distribution is unadorned by time limits and returns of prints and other restrictions. The works, "audiovisual works," to be precise,[39] are sold first and last to consumers in the medium of a physical object that the consumer may possess. Consumers are thus free to transfer that physical object as they see fit. Copying or public performance would be illegal, but transfer is not.

The video game rental industry has become a mainstay of the American entertainment landscape; however, the rapid advances of the telecommunications industry may change its business model. Just as rental of DVDs is migrating to online services, so too is that of game software. Right now, the typical company operates like a video rental shop, purchasing multiple copies of the most popular titles, but some companies are looking to other business models to stock their shelves. [40] GetAnyGame, for example, solicits individual game owners to send in their unwanted games, rather than trading them or reselling them for a small amount of the original purchase price. The company offers to send the consumer $2 each time "his" game is rented to another. Renters pay a flat monthly fee of $20 and are allowed to keep the rented games as long as they like.[41]

The software industry, however, may be poised to regain control from the migration of games from hard-copy to on-line environments. As on-line gaming proliferates, the need for physical copies of software diminishes, eliminating the distribution gap between producer and consumer. High-speed connections and more powerful processors allow not only access to sophisticated games, but also the attraction of competing with other players in real time. As with the music industry, the role of distribution companies, at least as they are now, would seem in jeopardy.

Distribution companies in the music industry have been, and continue to be, confronted with a number of new alternatives to their established way of doing business. A step in that direction is the iTunes Apple Music Store started at the end of April 2003. The five major recording labels are participating in the project, in which users can download any of 200,000 titles for 99 cents apiece. The software is designed to limit copying to no more than two additional Macs.[42]

Other sites authorized by recording companies and artists also are springing up after the legal battles surrounding Napster[43] and MP3.com, in which on-line music exchanges were found to violate copyright law.[44] While the recording industry is still looking for the business model that will satisfy both listeners and producers, the momentum toward some form of on-line delivery—without hard copies—may serve as a roadmap for video game software producers, and an opportunity for such producers to expand their influence.

Possible Approaches to Dealing with Copyright Law in the Realm of Video Games

Video games present a legal problem that may be more difficult for courts to solve than the games themselves. In Japan, each court took a somewhat different approach. In its opinion, the Tokyo District Court tried to differentiate between movies and video games by focusing on the role of the audience. That court emphasized the fact that while movie audiences are passive and have no effect on the course of the movie, video game audiences actively affect the progression of the storyline. To illustrate the difference that the Tokyo Court emphasized, consider the Pokemon cast. They were originally characters in a Nintendo video game, but have since also become the stars of a motion picture (and sequels). The movie is the same whenever and wherever it is seen by juvenile aficionados and their parents. Pokemon the game, however, will differ depending on the player's skill and luck.[45]

While this is an enticing theory, it does not entirely hold true. Contrary to the Court's conclusion that video game audiences have some real control over the storyline, the very notion of a game involves matters that are not within the player's complete control. The creator of the game, like that of a movie, has determined the narratives and sequences. Indeed, the game creator has determined what the results of the player's actions will be.

Relying on this distinction could have severe consequences for the video game industry. For if authorship is denied completely, then the game producers would seem to have no claim to copyright in *any* form, meaning that the authors would not even be able to assert copyright rights over the *first* sale of the game, much less any subsequent sales. If an analogy is to be drawn from traditional copyright at all, the more apt one would seem to be derivative works,[46] in which a subsequent author makes use of an existing copyrighted work: a musical play based on a novel, for

example. In that situation, the underlying copyright is not extinguished. To the contrary, the subsequent author must obtain the right to use it in order to exploit what he has separately created.

Yet even that analogy fails, because, unlike true derivative works, the players of video games do not fix their contribution in any tangible form. One commentator compared a video game to an unedited film, in which the selection of pictures and sequences has not yet occurred.[47] He emphasized that editing is an essential element of what is generally recognized as a movie. Explaining that the presence of a skillful editor, or the lack of one, may make the difference between a masterpiece and a piece that is soon forgotten, this commentator argued for a more strict understanding of the fixation requirement.[48]

THE courts are not deciding how video games should be treated in an ideal world, but rather determining how they are viewed under the statutory world that legislatures create.

On the other hand, in the United States, Nimmer notes that while fixation requires sufficient permanency or stability to allow more than transitory perception, this is satisfied, in the case of video games, by the features that *do* appear the same, no matter how the game proceeds.[49] With video games, although sequences may develop in different ways, the characters and their on-screen environment are certainly determined by the author of the game and not by the player. To give a pedestrian but easily-understandable example, Super Mario may be capable of many things, but one thing he is not capable of is becoming Pikachu from the Pokemon game.

Whether either of these approaches is correct, at least they both look to the statutory definition of the objects at issue, the works themselves. That, after all, is the essential challenge facing courts. The courts are not deciding how video games should be treated in an ideal world, but rather determining how they are viewed under the statutory world that legislatures create.

The Future of Copyright in the Video Game Realm

Of all the options available to it, the Supreme Court of Japan took the practical approach. Insofar as results only are concerned, the decision certainly seems reasonable. The movie industry and the video game industry have been substantially different, in production, use, and distribution. It is certainly true that, unlike sellers of video games, producers of theatrical films guard the prints jealously, destroying most of them after the film has completed its first run.[50]

Perhaps, however, the two worlds are moving closer together. Indeed, a number of participants have migrated between the two, with games becoming movies[51] and movie actors and directors becoming involved in games.[52] Beyond that, movie producers have begun experimenting with digital projection, in which prints are replaced by images broadcast to theatres through secure satellite signals.[53] Even so, the movie and videogame industries have grown up in different ways, and society has come to view them (quite literally) differently as well. The problem is not so much the result as it is the process of reaching the result, in particular—where it was made.

The Japanese legislature hardly had video game software in mind when it enacted the copyright law in 1970. The language it selected for motion picture-type products and their distribution rights was broad. One might well believe that it was intentionally so, in order not to confine the medium to existing technology. The question has therefore become should the courts save the legislature from its own language, even when it is far from clear that the legislature wishes such a rescue operation? One commentator suggests that the Supreme Court's decision

> can be highly regarded in that, by compensating … for the legal vagueness, it properly interprets law to show a certain direction in the midst of the ambiguousness regarding the broadening concept of "cinematographic work;" the Supreme Court in this case ascertains the part of law they can interpret in correspondence with the emergence of unexpected situations, and tries to flexibly interpret such part in pursuit of proper results.[54]

The consequence of such result-oriented jurisprudence, however, resounds beyond the immediate case. First of all, there is the circular problem of courts tailoring decisions to achieve particular results, no matter how laudable they may be, rather than confronting the law as it is. Secondly, the courts' rewriting of the statute, creating a new distinction of exhausted and unexhausted cinematographic distribution rights, has the effect of cutting off the legislature's own consideration of the problem.[55] This is not a question of a vague statute. Rather, it is a statute that is quite clear but directs results that the Court finds inappropriate.

Of course, the Diet can now act and supplant the

decision if it wishes. However, that is unlikely, if for no other reason than the decision has solidified both consumer and business expectations. Even if the Diet chooses to enter the discussion, it does so on the basis of an altered legal landscape in which the Court has changed the law rather than done the hard work of enforcing it and letting the legislature decide whether some new approach is necessary.[56]

Copyright law, however, is a legislative creation, and the Japanese legislature *should* face the issue. The legislature chose to create a broad definition of cinematographic works. If video game software, which meets the criteria of the definition, is to be treated differently, the legislature should make that determination, not the courts. The public and the law would be better served by full consideration by elected representatives rather than judicial reconstruction. There are a number of ways in which the Diet could choose to address videogame software, from fitting it into the existing broad definition to creating an entirely new category. Regardless, though, of how videogames are ultimately to be treated under copyright law, this is a decision that should be made by the legislature and not the courts.

In his dissent to the *Betamax* case on home videotaping in the United States, nearly twenty years ago, Justice Blackmun said, "courts cannot avoid difficult problems by refusing to apply the law. We must 'take the Copyright Act . . . as we find it,'[57] and 'do as little damage as possible to traditional copyright principles . . . until the Congress legislates.'"[58] While it may be too late for the Japanese courts to take such a deferential view of the copyright law, it is not too late for the Japanese legislature to revisit the law and to reach its own conclusion about how to respond to rapidly changing technologies.

ENDNOTES

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[1] Nobuo Komenami, *Structural Analysis of the Gaming Industry,* 21 Kobe Int'l Univ. Econ. & Mngmt. Rev. 36, 42 (2001) (1999 sales of home game machines totaled ¥1,067,806,000,000).

[2] *Id.* at 54.

[3] Ministry of Economy, Trade, and Industry, *The Current Situation of the Game Industry and its Problems, at* http://www.meti.go.jp/policy/media_contents/downloadfiles/0313game.pdf, at 6 [hereinafter METI].

[4] Komenami reports that sales of hardware declined from 1998 to 1999, but not drastically so.

1. ¥1,091,622,000,000
2. ¥1,092,850,000,000
3. ¥1,067,806,000,000

Komenami, *supra* note 1, at 42.

[5] METI estimates, as of November 2001:

1997 ¥583,259,000,000
- (i) ¥513,663,000,000
- (ii) ¥485,089,000,000
- (iii) ¥413,065,000,000

METI, *supra* note 3, at 1.

[6] One estimate put domestic sales of new game software at 485.1 billion yen and resold software at 198 billion for 1999. *See* Komenami, *supra* note 1, at 68-69. Another possibility is that younger people, the prime consumers of video games, are redirecting more of their time and energy to cell phones and internet. *Id.* at 62-64. Beyond that, increasing numbers of game players practice their hobby online, often with real time competitors, rather than with individual copies of game software. South Korea is further along this road, with the popularity of PC-Bangs, internet cafes with high-speed broadband connections. One estimate is that 54% of South Koreans play games online. *See Miracle Workers,* Guardian Unlimited, Oct. 17, 2002, *available at* http://www.guardian.co.uk/internetnews/story/0,7369,812943,00.html (last visited Sept. 29, 2003).

[7] Japanese copyright law states that the author's right of distribution does not include those copies that have already been distributed by the copyright owner or one operating with his permission. Law No. 48, May 6, 1970, § 26-2.2.1 (as amended by Law No.131 (2000)) [hereinafter Japan Copyright Law]. In U.S. Copyright Law, the first sale doctrine is set forth in section 109 of the Copyright Act of 1976: "[T]he owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such person, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord." 17 U.S.C. § 109(a) (2003).

[8] Japan Copyright Law, *supra* note 7, § 26.

[9] *Id.* art. 2(3).

[10] *Id.* art. 26(1).

[11] Enix's web site can be found at http://www.enix.co.jp.

[12] In 1999, the year the lawsuit was filed, Playstation's sales were nearly double those of Nintendo 64 and Sega Dreamcast combined. METI, *supra* note 3, at 2. Sega has since

decided to refashion itself as a game software producer rather than try to compete with a separate hardware platform.

[13] Joushou Co. v. Enix Corp., 1679 Hanrei Jiho 3, 9 (Tokyo Dist. Ct. 1999).

[14] *Id.* at 9-10.

[15] *Id.* at 8-9. By contrast, the Osaka District Court noted the existence of so-called "interactive" films, in which elements change based on decisions made by the audience at various junctures. These surely are copyrightable, the court said. So too, it concluded, are video game productions. Joushou Co. v. Enix Corp., 1699 Hanrei Jiho 56, 58 (Tokyo Dist. Ct. 1999). I recall from my high school years one such film displayed at the Hemisfair '68 international exhibition in San Antonio, entitled Kinoautomat. Apparently, I am not the only one who remembers. *See* Vit Havranek, *Future Cinema: The Cinematic Imaginary After Film, at* http://www.zkm.de/futurecinema/havranek_werk_e.html (last visited Sept. 29, 2003). Kinoautomat is documented in numerous web sites, many of which are in the Czech language, as the inventor was himself Czech.

[16] 1679 Hanrei Jiho at 10. In the United States, the Supreme Court ordered a division between movie production studios and theatres on antitrust grounds. United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

[17] 1679 Hanrei Jiho at 3.

[18] Enix Corp. v. Joushou Co., 1747 Hanrei Jiho 60 (Tokyo High Court 2001).

[19] 1747 Hanrei Jiho at 76-78. One may well wonder why used videotapes and DVDs of movies are freely bought and sold in Japan, as they are, without question, cinematographic works. Indeed, their producers could assert the distribution right to curtail resales, but in fact they do not. Apparently, they have adopted a business model that foregoes the exercise of this right and, instead, prices the products cheaply enough to encourage buyers to buy new over used. *See* Moriyuki Kado, Commentary on Copyright Law by Articles 186-87 (3d ed. 2000).

[20] Capcom, Inc. v. Akuto, Inc., 1699 Hanrei Jiho 48, 56-58 (Osaka Dist. Ct. 1999).

[21] *Id.* at 58.

[22] *Id.* at 48.

[23] Akuto, Inc. v. Capcom, Inc., 1749 Hanrei Jiho 3 (Osaka High Ct. 2001).

[24] 1749 Hanrei Jiho at 19.

[25] *Id.* at 15.

[26] 1785 Hanrei Jiho 3 (Supreme Court of Japan 2002).

[27] 1785 Hanrei Jiho at 8, 10.

[28] *Id.*

[29] *Id.* at 8, 11.

[30] *Id.* at 8.

[31] *Id.* at 8, 10-11.

[32] Article 14 of the Berne Convention provides:

(1) Authors of literary or artistic works shall have the exclusive right of authorizing:
(i) the cinematographic adaptation and reproduction of these works, and the distribution of the works thus adapted or reproduced . . . .

Berne Convention for the Protection of Literary and Artistic Works, art. 14, Sept. 9, 1886, as last revised July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221.

[33] 1785 Hanrei Jiho at 8, 10.

[34] *Id.* at 9, 11.

[35] 51 Minshu 2299 (Supreme Court of Japan 1997).

[36] 1785 Hanrei Jiho at 8, 10.

[37] 17 U.S.C. § 106 (3) (2003).

[38] Donald C. Farber, Entertainment Industry Contracts: Negotiating and Drafting Guide, form 20-2, ¶¶ 1-2, 6 (1986).

[39] 17 U.S.C. § 102 (a)(6) (2003).

[40] *See* Peter Rojas, *For Economical Gamers, a Rental with No Due Date*, N.Y. Times, Apr. 3, 2003, at G7.

[41] *See* http://www.getanygame.com.

[42] Some users have found a way to circumvent the file-sharing restrictions. *See* Jon Healey, *Song Sharing by iTunes Users Stirs Piracy Concerns*, L.A. Times, May 14, 2003, at C1.

[43] A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002).

[44] *See, e.g.,* Chambers v. Time Warner, Inc., 282 F.3d 147 (2d Cir. 2002), *remanded to* 2003 U.S. Dist. LEXIS 3652 (S.D.N.Y. 2003); Copyright.net Music Publ'g L.L.C. v. MP3.com, No. 01-Civ-7321, 2003 U.S. Dist. LEXIS 2988 (S.D.N.Y. 2003).

[45] The example is my own, not the court's.

[46] *See* Japan Copyright Law, *supra* note 7, art. 28 (stating that "[i]n exploiting a derivative work, the author of the underlying work has the same rights as those of the author of the derivative work under this section.") *See also* 17 U.S.C. § 103. *See generally* 1-2 Melville B. Nimmer, Nimmer on Copyright § 3 (2002).

[47] Hideo Ogura, Commentary on Copyright Law 121 (2000).

[48] *Id.*

[49] In video games, however, the images and sequences are in fact determined by the author, who creates a set of rules by which they will be activated. They are not at all random matters.

> The video game "Defender" was held to be sufficiently "fixed" in that the attract mode never varies by reason of player participation, and even in the play mode "there is always a repetitive sequence of a substantial portion of the sights and sounds of the game, and many aspects of the display remain constant from game to game regardless of how the player operates the controls. "It was held as regards the video game "Galaxian," where the object is to destroy a convoy of "aliens" that continually shift from side to side, that copyright infringement may be claimed by reason of the reproduction and/or performance of "the shape of the aliens, what they look like and how they move."

Nimmer on Copyright, § 2.18 [H][3][b] (2002).

[50] Most prints are recycled into polyester used for other products. Tracking papers are issued to ensure that the prints are not retained, and the reels of various films are mixed in boxes to discourage scavenging. The chief executive of one recycling company says, "We issue a certificate of destruction based on the print numbers supplied with the film and the number of reels. We're very, very security conscious." Michael Mallory, *The Cutting Room,* L.A. Times, Feb. 17, 2003, at E1.

[51] Among them, Pokemon, Super Mario Brothers, and Lara Croft: Tomb Raider.

[52] For example, as the sequel to "The Matrix Reloaded" was being planned, the producers envisioned distributing a video game entitled "Enter the Matrix." The game would include scenes with the film's actors shot especially for the game itself. The plot was made to intersect that of the movie as well. Cox News Service, *'Matrix' Game to Join Sequel,* Milwaukee Journal Sentinel, Feb. 10, 2003, at E1, *available at* http://www.jsonline.com/bym/tech/news/feb03/117208.asp?format=print (last visited Sept. 29, 2003).

[53] *See* Godfrey Cheshire, *The Death of Film/The Decay of Cinema*, 12 N.Y. Press 34, *available at* http://www.nypress.com/print.cfm?content_id=243&author_id=14 (last visited Sept. 29, 2003). The leading advocate of the abolition of film and its prints is George Lucas. *See* Ron Magid, *Exploring a New Universe,* American Cinematographer, Sept. 2002, at 1, *available at* http://www.theasc.com/magazine/sep02/exploring/index.html (last visited Sept. 29, 2003) (interview with George Lucas).

[54] Tsunashige Shirotori, *Japan's Supreme Court Decision on the Sales of Used TV Game Software,* CASRIP Newsletter (Center for Advanced Study and Research on Intellectual Prop., Seattle, Washington), Autumn 2002, at 8, 10.

[55] Many commentators believe that the matter should have been resolved by the legislature itself. *See, e.g.,* Ryuichiro Sengen, Lectures on Copyright Law 30-31 (2000); Yoshiyuki Tamura, An Outline of Copyright Law 162 (2001).

[56] Some years ago, I wrote an article urging that courts take a forward-looking approach "in which they bring statutes up-to-date." Dan Rosen, *A Common Law for the Ages of Intellectual Property,* 38 U. Miami L. Rev. 769, 828 (1984). The article was an attempt to apply Prof. (later Dean, now Judge) Guido Calabresi's theory of judicial revision to the intellectual property area. *See* Guido Calabresi, A Common Law for the Age of Statutes (1982).

In reaching the conclusion of this discussion of the Japanese video game software decision, I recalled that previous article and wondered if I had changed my mind. Upon close inspection, it seems not . . . or at least not so much.

In that earlier article, I argued that Courts should follow the common law method of treating like cases alike. I then criticized the *Betamax* decision, in which the Court held that home videotaping was a fair use despite clear Congressional language limiting fair use to factors that, for the most part, did not include home taping. Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984); *see also* Rosen, *infra* at 816-27.

I was critical of the Court's conclusion that an absence of specific statutory language about a particular kind of technology meant that the new technology must be different from what was already known when the statute was written. I argued that, instead, Courts should read the

statutory language for its principles, and treat cases of new technology in the same way as those of prior technology. Copyright law, I argued, is mostly concerned with copying, regardless of what kind of machine does the copying. That, it seems to me, is the same argument I am making here. The Japanese copyright law sets forth a broad definition of cinematographic works, one that the Supreme Court found the video games satisfied. But then, the Court chose to treat like cases differently, creating on its own a distinction between motion pictures and video games based not on their nature but, rather, the practical difficulty of enforcing a restriction in the market.

This was essentially the same misstep made by the U.S. Supreme Court in the *Betamax* case. Justice Blackmun, in dissent, criticized the majority for shying away from a correct decision on liability because of the difficulty of fashioning relief. *Sony*, 464 U.S. at 499 (Blackmun, J., dissenting).

[57] Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 401-02 (1968).

[58] *Id*. at 404 (dissenting opinion); quoted in *Sony*, 464 U.S. at 500 n.51 (Blackmun, J., dissenting).