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# ORIGINAL IDEA OR ILLEGAL COPYING? VIDEO GAME COPYING IN CHINA AND ITS EFFECTS ON THE U.S. VIDEO GAME INDUSTRY, FUTURE STEPS FOR U.S. DEVELOPERS AND PUBLISHERS

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**ORIGINAL IDEA OR ILLEGAL COPYING?  
VIDEO GAME COPYING IN CHINA AND ITS EFFECTS ON  
THE U.S. VIDEO GAME INDUSTRY, FUTURE STEPS FOR  
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*By Michael Wang<sup>1</sup>*

*While China has been hearing more cases and trying to limit the “reskinning” of many popular video games published by U.S. and other foreign companies, China’s copyright law is too restrictive and does not consider the multitude of precedent as to how the industry has interpreted copyright regulation for video games. China’s copyright law sets such a high bar for originality that companies can create games with similar characters having similar abilities and mechanics, but still not violate China’s copyright laws. Chinese game companies have attempted to create mobile versions of popular games in order to make quick profits as well. These circumstances are compounded upon the fact that American companies have found limited success in domestic courts due to Chinese companies successfully raising the defense of forum non conveniens, which forces American companies to file cases in Chinese courts. However, Chinese law is far weaker in protecting video game copyright, leading this to be a detriment down the road for American video game publishers and companies.*

*This results in American companies losing a significant portion in revenue due to these reskinned cloned video games and incurring higher legal costs from litigating in a foreign venue. In*

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<sup>1</sup> J.D. Candidate, Santa Clara University School of Law, 2022. The author would like to thank friends and family for their support and guidance throughout the entire process of this publication. The author would specifically like to thank Professor Colleen Chien and Professor David Greenspan for their edits and help throughout the process. As the current Editor-in-Chief of the Santa Clara High Tech Law Journal, the author would like to thank the current editorial board and associates of Volume 38 for their assistance and edits. Video game law is a fast growing field, and the author is excited to be contributing a bit to it.

*2018, mobile game publishers had lost over \$17.5 billion in revenue from video game copying.<sup>2</sup> There is also a multitude of steps for foreign publishers to release their games in China. Foreign publishers need to partner with a Chinese publisher, adding even more barriers.*

*However, there are other steps U.S. companies can take to alleviate these harms. While Chinese copyright law may not be suitable for U.S. companies to pursue successful lawsuits, China does have an Anti-Unfair Competition Law that is more flexible in the kinds of infringement it protects against. This is an avenue that U.S. developers can pursue if they wish to recoup their costs. Game companies can also reach out to live streaming services in China and give them exclusive rights to stream their game, which along with the Anti-Unfair Competition Law could greatly limit game cloning. Also, Chinese trademark law has given foreign companies much more success. Not all hope is lost for U.S. companies in attempting to protect their games.*

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<sup>2</sup> John Koetsier, *The Mobile Economy has a \$17.5B Leak: App Piracy*, FORBES (Feb. 2, 2018), <https://www.forbes.com/sites/johnkoetsier/2018/02/02/app-publishers-lost-17-5b-to-piracy-in-the-last-5-years-says-tapcore/?sh=555c1c037413#3fc98737413>.

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## INTRODUCTION

The video game industry is growing at a rapid rate, with industry giants such as Tencent, Activision Blizzard, and Electronic Arts developing many successful games that define the modern-day gaming and eSports industry. This rapid economic growth is also tied to the spawn of numerous legal issues, specifically intellectual property challenges. Many of these companies have successfully created titles that garner not only domestic but also international success. However, this success has made these games a clear target for video game cloning or reskinning. This phenomenon has been quite prevalent in the Chinese video game market.

Generally, there are two kinds of game copying, cloning and reskinning. Both are quite similar in many ways. Game cloning is when a second video game is created that either has stolen the source code from the original, or copies a significant number of similar elements as the original.<sup>3</sup> Game reskinning is taking the essential elements of the original game and adding on new artwork/names/characters. It is easier to think of reskinning as taking an original game, and sticking on a new label to it. To the consumer, at quick glance, it seems to be an entirely new game. Game reskinning corresponds to the idea of not needing to reinvent the wheel; if a game is successful, then other companies could take that same model and create a similar game to feed off the popularity. This is a common trend in the video game industry. When one genre of games becomes popular, other companies will attempt to emulate that same genre. This was the case after the success of League of Legends and the massive increase of MOBA type games, or Fortnite and the many other battle arena type games that followed. Reskinning takes this copying to a higher degree when it changes only the elements of the game, but not the game itself. Unfortunately, reskinning does run into issues when the copying is too close to be considered a copyright violation.

It is a common trend in the Chinese video game industry to engage in video game reskinning by taking successful domestic and foreign titles and changing the names of the characters, skills and/or other elements. This practice has resulted in significant losses of profit for many U.S. developers and publishers. Chinese copyright law makes it difficult for U.S. companies to protect their game assets, and when U.S. companies have attempted to bring Chinese game companies to US court, these Chinese companies have managed to dismiss the cases

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<sup>3</sup> Xiao Wang, *The Proliferation of Game Clone in China versus Copyright Law*, MAASTRICHT UNIVERSITY (Apr. 26, 2018), <https://www.maastrichtuniversity.nl/blog/2018/04/proliferation-game-clone-china-versus-copyright-law>.

under the defense of *forum non conveniens*. These copying developers have also tried to circumvent copyright claims by creating mobile versions of the popular games made by U.S. developers. These mobile developers argue that coding a mobile version of a game, as compared to the console or computer version of a game, is original enough to be protected. Unfortunately, this only further complicates the situation since it then preempts foreign developers from porting over games to the mobile platform, a phenomenon that has already been seen between NetEase and Behaviour Interactive.<sup>4</sup> This interesting behavior will be explored more in the mobile section later on this comment. All these issues have complications for U.S. publishers and developers. However, there are steps U.S. developers and publishers can take to protect their intellectual property and their games in China.

This paper will argue that, first, for U.S. companies to succeed in the Chinese gaming market, the first step is to secure a partnership with large and reputable Chinese publishers to minimize the risk of exposing their intellectual property. Second, the greatest form of protection that U.S. companies should utilize is the Anti-Unfair Competition Law since it can cover a broader range of products and cases of infringement. U.S. companies can best utilize this law is by granting exclusive streaming licenses to Chinese live streaming companies, which helps avoid many of the barriers for U.S. companies. Finally, while video games are generally protected by copyright, trademark protection in China is more anticipatory and can offer greater initial protection and is an avenue many U.S. companies in other industries have utilized to great success.

## I. BACKGROUND OF COPYRIGHT LAW

### A. *U.S. Copyright Law*

When it comes to copyright law, video games present significant legal challenges because there are so many different elements to a video game. Copyright law protects a work that is an “original work[] of authorship fixed in a tangible medium of expression, now or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>5</sup> With video games, what is considered original is constantly an issue to be resolved. Copyright law in the

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<sup>4</sup> *NetEase Games to Partner with Behavior™ Interactive to Publish Dead by Daylight™ Mobile in Selected Asian Regions*, NETEASE (Feb 28, 2020), [https://www.neteasegames.com/news/game/20200225/30576\\_865835.html](https://www.neteasegames.com/news/game/20200225/30576_865835.html).

<sup>5</sup> Garrett Huson, *I, Copyright*, 35 SANTA CLARA HIGH TECH. L.J. 54, 65 (2018).

United States does not protect a game's name, methods of playing, ideas, devices, or trademarks involved in developing, merchandising, or playing the game.<sup>6</sup> However, if there are enough literary or pictorial elements, those could be copyrighted separately.<sup>7</sup> Video games include many different types of art forms such as music, scripts, story plots, videos, paintings, characters, etc.<sup>8</sup> Generally, the protectable elements of video games include the following: (1) Audio elements—musical compositions, sound recordings, voice, imported and exported sound effects; (2) Video elements—photographic images, digitally captured moving images, animation, text; (3) Computer code—primary game engines, ancillary code, plug-ins, and comments.<sup>9</sup> These three elements are generally summarized into two categories – audiovisual works and computer code; but another complication arises as to how the entire video game is categorized.<sup>10</sup> Some experts suggest that it should be a multimedia work, while others suggest it is an audiovisual work, or even a computer program.<sup>11</sup>

The United States looks at video games on a case-by-case basis to determine what classification they should fall under, and there is significant precedent and cases for this.<sup>12</sup> The courts have attempted to clarify, through case law, what is an idea compared to what is an expression of that idea.<sup>13</sup> For example, if there is a poker video game, the idea of a poker game most likely would not be copyrightable, but the “particular shapes, sizes, colors, sequences, arrangements, and sounds that comprise a specific expression of the game could be.”<sup>14</sup> This separation is not as easy as it may seem. How the game is classified and registered makes a large difference as to whether what the plaintiff is seeking to protect is just an idea or an expression.

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<sup>6</sup> Library of Congress, *Games*, Apr. 2016  
<http://www.paforge.com/files/gamecopyright2008.pdf>.

<sup>7</sup> *Id.*

<sup>8</sup> Andy Ramos et. al., *The Legal Status of Video Games: Comparative Analysis in National Approaches*, WIPO, July 29, 2013, at 7,  
[https://www.wipo.int/export/sites/www/copyright/en/activities/pdf/comparative\\_analysis\\_on\\_video\\_games.pdf](https://www.wipo.int/export/sites/www/copyright/en/activities/pdf/comparative_analysis_on_video_games.pdf).

<sup>9</sup> *Id.* at 8.

<sup>10</sup> *Id.* at 10.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 89-90.

<sup>13</sup> *Id.* at 90.

<sup>14</sup> Matteo Mancinella, *Copyright Subject Matter and a “Light” for Designers’ Rights*, 29 SANTA CLARA HIGH TECH L. J. 523, 529 n.35 (2013).

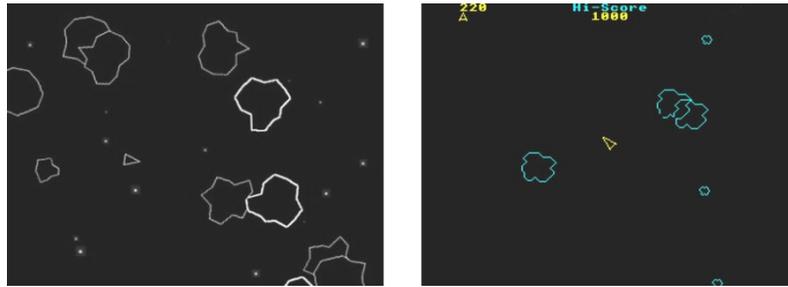


Figure 1 – Atari’s Asteroid vs. Amusement World’s Meteors

One of the first few cases involving video games was *Atari, Inc. v. Amusement World*. The court ruled in that case that the video game should be considered an idea even though Atari registered the video game as an audiovisual work.<sup>15</sup> The games in question were Atari’s Asteroids, one of the more popular 8-bit original games, and Amusement World’s Meteors.<sup>16</sup> Both games allow a player to command “a spaceship through a barrage of space rocks and enemy spaceships.”<sup>17</sup> “[W]hat the plaintiff sought to protect was not the computer program but the visual presentation of the game,” and the courts agreed that Atari could register its video game as an audiovisual work.<sup>18</sup> However, the court did not rule in favor of Atari on the copyright issue because even though the games were similar, the similarities were just of the plaintiff’s ideas, and the court had to make the clear distinction that similarities of ideas were not protectable.<sup>19</sup> This case is a bit puzzling because the court identified twenty-two similarities and only nine differences, but because of how the court applied the merger doctrine and *scène à faire*, the court did not grant

<sup>15</sup> Andy Ramos et. al., *The Legal Status of Video Games: Comparative Analysis in National Approaches*, WIPO, July 29, 2013, at 90, [https://www.wipo.int/export/sites/www/copyright/en/activities/pdf/comparative\\_analysis\\_on\\_video\\_games.pdf](https://www.wipo.int/export/sites/www/copyright/en/activities/pdf/comparative_analysis_on_video_games.pdf).

<sup>16</sup> Zihao Li, *The Copyright Protection of Video Games from Reskinning in China—A Comparative Study on UK, US, and China Approaches*, 11 *TSINGHUA CHINA L. REV.* 293, 310 (2019).

<sup>17</sup> *Atari, Inc. v. Amusement World, Inc.*, 547 F. Supp. 222, 224 (D. Md. 1981).

<sup>18</sup> Andy Ramos et. al., *The Legal Status of Video Games: Comparative Analysis in National Approaches*, WIPO, July 29, 2013, at 90, [https://www.wipo.int/export/sites/www/copyright/en/activities/pdf/comparative\\_analysis\\_on\\_video\\_games.pdf](https://www.wipo.int/export/sites/www/copyright/en/activities/pdf/comparative_analysis_on_video_games.pdf).

<sup>19</sup> *Id.*

Atari protection over its game.<sup>20</sup> Some of the similarities included the sizes of the asteroid rocks, the appearance of the rocks in waves, the slower movement of larger rocks compared to smaller rocks, the splitting of the rocks when they are hit, etc.<sup>21</sup> The court found that these similarities could only be classified as ideas.<sup>22</sup> The merger doctrine states that if an idea is inseparable from its expression, or there are limited ways of expression, the expression is not protectable.<sup>23</sup> *Scène à faire* states that if the similarities are a form of expression that cannot be avoided in any basic version of that idea, then these similarities should be excluded from the analysis of copyright infringement.<sup>24</sup> With those doctrines in mind, the court's ruling makes more sense even though the similarities in both games would indicate infringement to an ordinary user. For a game involving spaceships shooting down space rocks, these elements were either such a part of the game to begin with, or were just such a basic expression of the idea that could not be protected. Meteors did have many similarities to Asteroids, but for any game involving a spaceship trying to escape a field of asteroids, there would naturally be some common aspects, gameplay, and themes that could not be avoided. With the technology at that time, there were only so many ways of expressing an asteroid; it makes sense how the court reached its conclusion.

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<sup>20</sup> Zihao Li, *The Copyright Protection of Video Games from Reskinning in China—A Comparative Study on UK, US, and China Approaches*, 11 TSINGHUA CHINA L. REV. 293, 310 (2019).

<sup>21</sup> *Atari, Inc. v. Amusement World, Inc.*, 547 F. Supp. 222, 224 (D. Md. 1981).

<sup>22</sup> *Id.* at 230.

<sup>23</sup> Zihao Li, *The Copyright Protection of Video Games from Reskinning in China—A Comparative Study on UK, US, and China Approaches*, 11 TSINGHUA CHINA L. REV. 293, 310 (2019).

<sup>24</sup> *Id.* at 310-311.



Figure 2 – Philip’s *K.C. Munchkin* vs. Atari’s *Pac-Man*

However, in *Atari v. North American Philips Consumer Electronics Corp.*, the court favored Atari stating that while the idea of a game cannot be protected, if the work adds something new or additional to the idea, it can still receive copyright protection.<sup>25</sup> The games at controversy here were Philips’ game, called *K.C. Munchkin* and Atari’s game, called *Pac-Man*.<sup>26</sup> The court found that defendant infringed upon Atari’s copyright despite the games having a substantial number of differences.<sup>27</sup> There was a substantial part of the game that was lifted, and Philips could not succeed in proving they did not infringe by stating that they did not copy a large portion.<sup>28</sup> The difference between the prior case and this one is that the expression of the idea had something new added onto it, instead of just the idea in itself. In terms of visuals, there were several differences, but the substantial parts and ideas of the games were lifted, and hence the court still deemed that these ideas were protectable because there was something additional added on. This is allowed under copyright law. This distinction would be important for future infringement cases.

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<sup>25</sup> Andy Ramos et. al., *The Legal Status of Video Games: Comparative Analysis in National Approaches*, WIPO, July 29, 2013, at 90, [https://www.wipo.int/export/sites/www/copyright/en/activities/pdf/comparative\\_analysis\\_on\\_video\\_games.pdf](https://www.wipo.int/export/sites/www/copyright/en/activities/pdf/comparative_analysis_on_video_games.pdf).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

Video game elements that are not protectable under copyright, can be protected with trade secrets, patents, and trademarks.<sup>29</sup> U.S. copyright law is more flexible in addressing how to protect video games. Instead of classifying video games under one umbrella, the courts seek to separate the elements and address each case separately, with references to a multitude of prior history and judgments.<sup>30</sup> The courts now apply the abstraction-filtration-comparison test when determining the similarity between two games.<sup>31</sup> First, the courts identify the level of abstraction, then they filter what can be protected under copyright and what cannot, and finally, the courts compare the copyrightable material for infringement.<sup>32</sup> With a test like this, copyright law is more thoroughly analyzed when it comes to video games. This helps clarify a lot of the difficulties with classifying video games because otherwise, there are so many elements that comprise a video game, making it difficult to litigate and protect. Only elements that pass the merger doctrine and *scène à faire* can then be protectable under copyright, and then the court can determine whether there was infringement. There is quite the multitude of precedent in the courts as well. This all makes for quite a robust protection of copyright for video games.

#### B. Chinese Copyright Law

Chinese copyright law is nearly the opposite of U.S. copyright law in certain respects. There is much less precedent, and there is no specific category for video games.<sup>33</sup> While China does have protection under copyright for software programs, the closest reference to video games under that protective scheme is online games.<sup>34</sup> Online games only comprise a portion of video games, although more and more video games do tend to utilize internet connections in the status quo. However, online games is still not a good way to classify video games. Computer software is broadly defined as including all types of computer programs and related documentation, and this could include

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<sup>29</sup> *Id.* at 91.

<sup>30</sup> Please refer to the prior two examples as to how U.S. courts seek to explore the elements of a video game.

<sup>31</sup> Zihao Li, *The Copyright Protection of Video Games from Reskinning in China—A Comparative Study on UK, US, and China Approaches*, 11 TSINGHUA CHINA L. REV. 293, 314 (2019).

<sup>32</sup> *Id.*

<sup>33</sup> Andy Ramos et. al., *The Legal Status of Video Games: Comparative Analysis in National Approaches*, WIPO, July 29, 2013, at 27-28, [https://www.wipo.int/export/sites/www/copyright/en/activities/pdf/comparative\\_analysis\\_on\\_video\\_games.pdf](https://www.wipo.int/export/sites/www/copyright/en/activities/pdf/comparative_analysis_on_video_games.pdf).

<sup>34</sup> *Id.*

any kind of code-based instructions that can be run by devices with information processing capacity.<sup>35</sup> These categorizations are vague and unclear. Video games are a unique type of work that cannot simply be lumped into these categories.

China's copyright law is hence quite weak as compared to U.S. law since it does not have clear delineations as to how to categorize a video game.<sup>36</sup> The Chinese Supreme Courts have even suggested "competition law would offer more protection than copyright law."<sup>37</sup> U.S. courts have developed a clean procedure for analyzing the elements of a video game and determining whether or not there is infringement, while Chinese courts do not have a set standard for doing so, leading to high inconsistencies when prosecuting infringement cases. Chinese law also does not rely on precedent, which presents another barrier for U.S. companies.<sup>38</sup> Chinese courts have taken two methods of protecting video games: either the video game is protected separately under each element or it is "regarded as a work created by a process analogous to cinematography, which protect the continuous dynamic images."<sup>39</sup>

The first case heard in Chinese courts about video games was in 2007 between Nexon Holdings and Tencent.<sup>40</sup> The games at dispute were Nexon's Pop Tag and Tencent's QQ Tang.<sup>41</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> Zihao Li, *The Copyright Protection of Video Games from Reskinning in China—A Comparative Study on UK, US, and China Approaches*, 11 *TSINGHUA CHINA L. REV.* 293, 323 (2019).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 323-24.

<sup>40</sup> *Id.* at 324.

<sup>41</sup> Zihao Li, *The Copyright Protection of Video Games from Reskinning in China—A Comparative Study on UK, US, and China Approaches*, 11 *TSINGHUA CHINA L. REV.* 293, 323 (2019).



Figure 3 – Nexon's *Pop Tag* vs. Tencent's *QQ Tang*

In Nexon's complaint, Nexon alleged thirty-seven similarities between the games in content, gameplay, and design.<sup>42</sup> The Chinese court first looked at whether defendant had access to plaintiff's code, and indeed, Nexon had released a public beta in 2003, and Tencent published their game in 2004.<sup>43</sup> The court did not think this information was enough to prove infringement, however, since Nexon could not prove that these similarities existed before the game was published.<sup>44</sup> Among the thirty-seven stated similarities, nine of them were in the login interface and were classified as general expression which is not protectable; seven of them were deemed ideas such as the design of the woods, the aircraft etc.; and the remaining twenty-one were in-game props but the names were too short and could not meet the originality

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<sup>42</sup> *Id.* at 324-25.

<sup>43</sup> *Id.* at 325.

<sup>44</sup> *Id.*

requirement.<sup>45</sup> This case helped establish that Chinese courts would look at copyright infringement under an “access + substantial similarity” lens to determine infringement.<sup>46</sup> The *Nexon* case also demonstrated that Chinese courts would look strictly at the originality of each element to determine infringement.<sup>47</sup>

Another instrumental case in China’s precedent of copyright infringement in the video game industry is *Taiji Panda v. Hua Qian Gu* in 2018.<sup>48</sup> Plaintiff asserted that defendant took their mobile game and only slightly changed the appearance of the characters, but the “décor, the core elements, and the gameplay” were the same, and thus this should be recognized as reskinning.<sup>49</sup> For the access argument, plaintiff was able to demonstrate that they launched their game earlier and also that there were screenshots of plaintiff’s game used as reference points in the design documents of defendant’s game.<sup>50</sup> The defendant argued that copyright law cannot protect “the structure ..., the functional layout of the interface, the gameplay and game value ratio.”<sup>51</sup> Furthermore, the defendant contended that the game interface is functional, the gameplay is too abstract, and the in-game dialogue and text are in the public domain and cannot be protected either; but the court reached an entirely different conclusion.<sup>52</sup> Drawing from precedent (which does not often happen), the Su Zhou Intermediate People’s Court ruled that *Taiji Panda* should only be protected by a process similar to protecting works of cinematography, or films.<sup>53</sup> The court did not classify the game as computer code since players do not see the game as code, but rather view the game code through an operating device.<sup>54</sup> Hence, video games should be viewed as presentations and as a whole can be analogized to works of film.<sup>55</sup>

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<sup>45</sup> *Id.*

<sup>46</sup> Zihao Li, *The Copyright Protection of Video Games from Reskinning in China—A Comparative Study on UK, US, and China Approaches*, 11 TSINGHUA CHINA L. REV. 293, 326 (2019).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 326-27.

<sup>51</sup> Zihao Li, *The Copyright Protection of Video Games from Reskinning in China—A Comparative Study on UK, US, and China Approaches*, 11 TSINGHUA CHINA L. REV. 293, 327 (2019).

<sup>52</sup> *Id.* at 327-28

<sup>53</sup> *Id.* at 328.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

This distinction proves problematic since works of film must meet a much higher level of originality to be protectable.<sup>56</sup> The court showed that Taiji Panda created a set of storylines where players control the continuous dynamic images on the screen, hence this made it a work similar to film, and eliminated many elements that were deemed to be too low in originality or are considered functional.<sup>57</sup> The court found that plaintiff created a specific game hierarchy including the gameplay and game rules, which was protectable; as a result the defendant still infringed.<sup>58</sup> The opinion and reasoning is vague and unclear, but contains a very high standard of originality since each image would need to be considered original and copyrightable for the game to be protected as a whole. Classifying video games as a movie is a stretch, and this classification results in many complications. Video games are comprised of many more elements than just audiovisual aspects that are displayed in the game. Video games are considered interactive entertainment in which the user can make changes to the media based on their interactions and choices. Movies do not allow for the same level of choice and interactivity, so equating these two creates some issues.

## II. WHAT IS VIDEO GAME RESKINNING AND CLONING AND WHY IS IT PROBLEMATIC

Video game copying generally takes two forms, game cloning and game reskinning, both of which are prevalent in China. Cloning tends to be more blatantly obvious, often being direct code copying. This trend is not unique to China, but the advent of the mobile gaming market has significantly created an issue in game copying. In January 2015, studies showed that approximately 83% (1.42 million) of the mobile games on the Apple App Store were considered zombie games which led developers to clone the gameplay, graphics, and titles of currently trending and popular games, as a result the cloned games also appeared in the top searches when people searched for the original game.<sup>59</sup> Game copying is not necessarily an entirely bad idea since the purpose of intellectual property laws is to increase innovation and to allow inventors to profit off their hard work. Many popular games were certainly based on older games, such as Defense of the Ancients (DOTA) (originally a custom game mode using Warcraft III) and

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<sup>56</sup> *Id.* at 329.

<sup>57</sup> Zihao Li, *The Copyright Protection of Video Games from Reskinning in China—A Comparative Study on UK, US, and China Approaches*, 11 TSINGHUA CHINA L. REV. 293, 329 (2019).

<sup>58</sup> *Id.* at 330.

<sup>59</sup> *Id.* at 297.

League of Legends (LOL) (an emulation of DOTA with a different universe). The concept of having five players on each team face off against each other with the goal of taking down the opposing team's base is not a new and novel concept, but the expression of this idea has resulted in numerous games. Many multiplayer battle arena (MOBA) games have been developed from this idea, such as DOTA, League of Legends, Heroes of the Storm, SMITE, Heroes of Newerth, Battlerite, and many more.<sup>60</sup> Each of these games has their own niche and differing expression that is allowed under copyright law. This level of creativity is certainly welcome and reinforces why video game ideas cannot be protected – because that would be too limiting for developers to create new games in the same genre and with the same idea.

There are generally three types of procedures to copy games. The first method is a direct “one-for-one code copying” where developers will take the code in existing games and turn it into a new game.<sup>61</sup> This direct code copying is much easier to accomplish on mobile games because there are tools and applications to directly clone the games, and thus, courts tend to consider these to be clear cases of copyright infringement.<sup>62</sup> There is the question of whether or not reverse engineering the video game would still be considered copyright infringement. In the U.S. courts, reverse engineering is not considered fair use and is indeed infringement.<sup>63</sup> U.S. courts do seek to protect the creativity of developers, but only when this creativity is demonstrated in creating a new idea, rather than taking existing titles and making a copy that is marketed as a new game. It does not always make sense to reinvent the wheel, but it is not fair to other creators when developers blatantly copy with no repercussions.

The second method of game cloning is taking the mechanics of a game and copying them into a new game or mixing mechanics from multiple games.<sup>64</sup> This form of copying is fine as long as the games have different expressions of the same idea.<sup>65</sup> For example, Call of Duty and Counter Strike: Global Offensive are considered First-Person-Shooter (FPS) games with very similar concepts; however, the differences in characters, weapons, storylines, music, rules, maps etc.,

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<sup>60</sup> Pieter van Hulst, *Run Down the History of MOBAs in Our Infographic*, RED BULL (Sept. 11, 2017), <https://www.redbull.com/us-en/history-of-the-moba-infographic>.

<sup>61</sup> Zihao Li, *The Copyright Protection of Video Games from Reskinning in China—A Comparative Study on UK, US, and China Approaches*, 11 TSINGHUA CHINA L. REV. 293, 298 (2019).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 299.

<sup>65</sup> *Id.*

allow for both games to coexist.<sup>66</sup> Since the idea of the video game cannot be protected, as long as the expression is not substantially similar, then this kind of copying is fine, and encouraged. Game cloning is not generally problematic, but when this cloning goes beyond simple inspiration and borderlines on direct copying, legal issues arise. After all, the video game industry has developed multiple genres of games, and naturally, games of a genre will have some similarities to each other. In First-Person-Shooter games, developers will not be able to stray too far away from the original concept of the point-of-view being in first person viewpoint, and there will be some form of shooting and guns involved. Developers have the liberty of choosing what kind of universe their game is set in, the types of guns used, etc. Through these variations, multiple games can be created. Some developers may choose to set their game in a fantasy world, while another in a futuristic world, with the result being two entirely different games. However, if another developer decides to create a 5v5 game of terrorists versus counterterrorists, then they could potentially run into infringement issues because that is a substantial expression of the Counter Strike series. But creating a 5v5 shooter game of police versus thugs may not run into conflicts with Counter Strike unless some other game has this concept already. Game cloning is problematic for courts because it is difficult to differentiate inspiration from copying.

The final method is game reskinning, which is the most difficult to deal with legally. Game reskinning falls between the two methods above in which the developer will usually change the graphics but retain the original game's expression and gameplay.<sup>67</sup> This method has given developers and legal professionals a headache to deal with since the main difference is a change in appearance, particularly in countries like the U.S. which considers video games as a whole, instead of just the parts. Is a change in appearance enough to make a game different and hence non infringing? This question is difficult to answer, since it heavily depends on what was copied, and whether or not those copied elements could be protected. Game reskinning is a lucrative method to earn quick money because these games tend to have a "game experience very similar to that of the original game" and "[are] more likely to lure the original game's fans or create confusion."<sup>68</sup> However,

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<sup>66</sup> Zihao Li, *The Copyright Protection of Video Games from Reskinning in China—A Comparative Study on UK, US, and China Approaches*, 11 TSINGHUA CHINA L. REV. 293, 299 (2019).

<sup>67</sup> *Id.*

<sup>68</sup> Tracey Tang, *Why Unauthorized Reskinned Games Constitute Copyright Infringement Under China Copyright Law*, LEXOLOGY (Dec. 2, 2019), <https://www.lexology.com/library/detail.aspx?g=bd215186-ccab-41e1-b480-58b90a85cfa6>.

since copyright law only protects some expressions and not ideas or functional aspects, it is difficult to prosecute game reskinners. This blurring between what is considered an idea and an expression is a bit easier to deal with in the U.S. since there is much precedent for courts to rely on, but the Chinese courts have not had a clear bright line rule to deal with this distinction. U.S. copyright law as aforementioned tends to classify the game as a whole work while the Chinese courts look at each element individually, making it much more difficult to tackle reskinning cases.

### III. CHINESE APPROACHES TO VIDEO GAME RESKINNING AND CLONING

There have been numerous examples of video game copying in China, including the two cases mentioned prior. Some of these high-profile cases in the gaming industry have been of games made by industry giants and have attracted quite a bit of attention as to the damages reskinning can cause. These cases have demonstrated just how unclear and ambiguous the courts can get when deciding these video game disputes.

Blizzard and NetEase v. 4399 Network gained much notoriety in the news as Blizzard claimed 4399 Network copied elements of *Overwatch* in two games, *Clash of Fighters* and *Gunplay Battlefront*.<sup>69</sup> Both of these games had characters, maps, and systems that very much resembled *Overwatch*.<sup>70</sup> Shanghai Pudong People's Court found these elements similar: hero type, health points, skill descriptions of the heroes, map layout and artwork, visual effects of skill activations, and game rules.<sup>71</sup> The court separated these similarities into five layers: (1) game type; (2) detailed game rule designs based on the game type; (3) production of the game's core content which includes design of routes, each character's unique skills and weapons, and overall layout of the user interface; (4) consolidation of all game content and resources; (5) detailed design and production of elements of art.<sup>72</sup> Layers 1 and 2 were deemed to be ideas that do not require protection under copyright;

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<sup>69</sup> Julian Benson, *Blizzard Wins Lawsuit Against Chinese Developer That Ripped Off 'Overwatch'*, GAMINGBIBLE (Nov. 25, 2019), <https://www.gamingbible.co.uk/news/pc-blizzard-wins-lawsuit-against-developer-that-ripped-off-overwatch-20191125>.

<sup>70</sup> *Id.*

<sup>71</sup> Tracey Tang, *Why Unauthorized Reskinned Games Constitute Copyright Infringement Under China Copyright Law*, LEXOLOGY (Dec. 2, 2019), <https://www.lexology.com/library/detail.aspx?g=bd215186-ccab-41e1-b480-58b90a85cfa6>.

<sup>72</sup> *Id.*

Layer 5 could be copyrightable but there were very few similarities here.<sup>73</sup> Layers 3 and 4 posed the question of whether or not they could constitute ideas or expressions.<sup>74</sup> The court found that reskinned games tend to copy Layers 3 and 4 while changing Layer 5, but Layers 3 and 4 are where companies put “substantial effort in the most time-consuming and costly game development stages.”<sup>75</sup> Finally, to determine if Layers 3 and 4 are protectable, the game features and player experience must be taken into consideration.<sup>76</sup> The court found that these external embodiments of the game rules can be considered expressions, hence there was infringement.<sup>77</sup>

This is the classic example of game reskinning, and it is interesting to note that 4399 tried to argue that elements taken from *Overwatch* were not considered original and not protectable under copyright.<sup>78</sup> Based on precedent where Chinese courts have looked at each element individually, it would seem that *Overwatch*’s idea of combining a FPS type game and giving the characters skills much like a Multiplayer Online Battle Arena (MOBA) game would be an idea that is not protectable. However, one crucial difference between this case and prior aforementioned cases is that Blizzard filed this lawsuit alongside its publishing partner in China, NetEase.<sup>79</sup> In August 2008, NetEase signed an agreement with Blizzard to license Blizzard’s games of *Starcraft II*, *Warcraft III*, and the *Battle.net* client.<sup>80</sup> Since then, Blizzard has extended its publishing deal with NetEase to January 2023 and has allowed NetEase to overseas eSports for Blizzard games in the Chinese region.<sup>81</sup> The Pudong Area People’s Court granted judgment

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Tracey Tang, *Why Unauthorized Reskinned Games Constitute Copyright Infringement Under China Copyright Law*, LEXOLOGY (Dec. 2, 2019), <https://www.lexology.com/library/detail.aspx?g=bd215186-ccab-41e1-b480-58b90a85cfa6>.

<sup>77</sup> *Id.*

<sup>78</sup> Julian Benson, *Blizzard Wins Lawsuit Against Chinese Developer That Ripped Off ‘Overwatch’*, GAMINGBIBLE (Nov. 25, 2019), <https://www.gamingbible.co.uk/news/pc-blizzard-wins-lawsuit-against-developer-that-ripped-off-overwatch-20191125>.

<sup>79</sup> *Id.*

<sup>80</sup> *Blizzard Entertainment and NetEase to Introduce Starcraft II and Battle.net Platform into Mainland China*, NETEASE (Aug. 13, 2008), <http://ir.netease.com/news-releases/news-release-details/blizzard-entertainment-and-netease-introduce-starcraft-ii-and>.

<sup>81</sup> Trent Murray, *Blizzard Entertainment and NetEase Extend Publishing Partnership through 2022*, THE ESPORTS OBSERVER (Jan. 10, 2019), <https://esportsobserver.com/blizzard-netease->

in favor of Blizzard and NetEase holding that 4399 Networks did infringe and ordered payment of a fine of 4 million RMB, or \$569,000.<sup>82</sup>

Another well-publicized lawsuit is that of Riot Games and Tencent vs. Shanghai Moonton. Riot Games owns the popular MOBA League of Legends, and asserted that Shanghai Moonton had created multiple games infringing upon Riot's copyright and trademarks with Magic Rush: Heroes, Mobile Legends: 5v5 MOBA, and Mobile Legends: Bang Bang.<sup>83</sup> Riot Games had filed multiple infringement notices since Shanghai Moonton took the exact characters, maps, skills, and other aspects of the game and ported them directly over to their mobile versions of their game.<sup>84</sup> Riot Games originally sued Shanghai Moonton in federal court in the Central District of California but this was dismissed due to *forum non conveniens*.<sup>85</sup> The court found that it would be unfair to try this case in the U.S. since Riot is fully owned by Tencent and Tencent was already suing Shanghai Moonton in a Chinese court.<sup>86</sup> It would have been difficult to try this case in California because there is a Chinese prohibition on taking depositions in China for foreign litigation.<sup>87</sup> In the suit in China, Tencent and Riot

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china/#:~:text=Blizzard%20Entertainment%20has%20extended%20its%20partnership%20with%20Chinese%20publisher%20NetEase,in%20mainland%20China.

<sup>82</sup> Julian Benson, *Blizzard Wins Lawsuit Against Chinese Developer That Ripped Off 'Overwatch'*, GAMINGBIBLE (Nov. 25, 2019), <https://www.gamingbible.co.uk/news/pc-blizzard-wins-lawsuit-against-developer-that-ripped-off-overwatch-20191125>.

<sup>83</sup> Riot Games Inc. v. Shanghai Moonton Tech. Co. Ltd., No. 2:17-cv-4986, at 2 (C. D. Cal. July 6, 2017).

<sup>84</sup> *Id.* at 4-14.

<sup>85</sup> Shuying Lin, *Riot v. Moonton: Dismissal of Copyright Infringement Claims on Forum Non Conveniens Grounds*, FORDHAM INTELL. PROP. MEDIA & ENT. L.J. (Apr. 11, 2018), <http://www.fordhamiplj.org/2018/04/11/riot-v-moonton-dismissal-of-copyright-infringement-claims-on-forum-non-conveniens-grounds/>.

<sup>86</sup> *Id.*

<sup>87</sup> *China*, TRAVEL.STATE.GOV: U.S. DEPT. OF STATE-BUREAU OF CONSULAR AFFAIRS (May 1, 2019), <https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/China.html#:~:text=China%20does%20not%20permit%20attorneys,for%20use%20in%20foreign%20courts.&text=Consular%20depositions%20would%20require%20permission,a%20deposition%20without%20that%20permission.>

Games were awarded 19.4 million RMB, approximately \$2.9 million USD.<sup>88</sup>

Another Chinese developer that has run into similar legal issues with reskinning is NetEase. There have been multiple claims over their games that seem to be reskinned versions of the original. When NetEase originally released Identity V, many players noticed a large resemblance of the game to Dead by Daylight, with some minor differences, primary of which is that Identity V ran on mobile.<sup>89</sup> NetEase later announced during beta tests that NetEase would collaborate with Behaviour Interactive developers (creators of Dead by Daylight) and this collaboration was confirmed on April 7, 2018.<sup>90</sup> On May 21, 2018, Identity V released a video with Dead by Daylight's Game Director and Product Manager who stated that they were hired to serve as consultants on the game.<sup>91</sup> There were still some disagreements in the process before the partnership and cooperation was announced.<sup>92</sup> Two years later, NetEase announced that it was partnering with Behaviour Interactive to bring Dead by Daylight Mobile to select Asian regions.<sup>93</sup> While there was no lawsuit here, and both parties ended up collaborating, there could very well be underlying reasons why Behaviour chose not to pursue a lawsuit. Dead By Daylight could easily have been ported over to mobile and perhaps upon seeing the great success Identity V had, Behaviour probably saw it as an easier move to collaborate with NetEase instead of pursuing a lawsuit.

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<sup>88</sup> Aaron Mickunas, *Riot Games Parent Tencent Wins \$2.9 Million in Lawsuit against Moonton CEO*, DOT ESPORTS (July 18, 2018), <https://dotesports.com/league-of-legends/news/source-riot-games-parent-tencent-wins-lawsuit-mobile-legends-31079>.

<sup>89</sup> Josh Hawkins, *What are the Differences Between Identity V and Dead by Daylight*, PRIMA GAMES (July 11, 2018), <https://primagames.com/tips/what-are-differences-between-identity-v-and-dead-daylight>.

<sup>90</sup> *Identity V Game Development*, FANDOM, [https://id5.fandom.com/wiki/Identity\\_V\\_Game\\_Development](https://id5.fandom.com/wiki/Identity_V_Game_Development) (last accessed on Jan. 8, 2022).

<sup>91</sup> *Identity V – Message from Dead by Daylight Team*, YOUTUBE (May 21, 2018), [https://www.youtube.com/watch?v=\\_hqZE87KpW8&ab\\_channel=IdentityV](https://www.youtube.com/watch?v=_hqZE87KpW8&ab_channel=IdentityV).

<sup>92</sup> *Identity V Game Development*, FANDOM, [https://id5.fandom.com/wiki/Identity\\_V\\_Game\\_Development](https://id5.fandom.com/wiki/Identity_V_Game_Development) (last accessed on Jan. 8, 2022).

<sup>93</sup> *NetEase Games to Partner with Behaviour Interactive to Publish Dead by Daylight Mobile in Selected Asian Regions*, NETEASE GAMES (Feb. 28, 2020), [https://www.neteasegames.com/news/game/20200225/30576\\_865835.html](https://www.neteasegames.com/news/game/20200225/30576_865835.html).

NetEase has also been embroiled in a lawsuit with Bluehole Studio (now known as KRAFTON), the parent company for PUBG Corporation. NetEase had released two battle royale games called Rules of Survival and Knives Out, and PUBG sued in California district court for copyright infringement, trade dress infringement, and unfair competition.<sup>94</sup> PUBG argued that many weapons, clothing, and even the general idea of 100 individuals parachuting onto an island to be the King of the Hill were copied.<sup>95</sup> Additionally, whenever users typed in PUBG into the app store, Knives Out would pop up as one of the options, prompting unfair competition issues.<sup>96</sup> One of the iconic copies was that of the frying pan because in no other shooter game are frying pans thought to be a weapon, and the frying pan used was the same shape and design.<sup>97</sup> NetEase fired back that PUBG was attempting to monopolize the whole battle royale genre and block competition.<sup>98</sup> PUBG countered that despite NetEase claims that it was dissimilar enough, many of the elements it points out that are different were implemented after litigation had begun.<sup>99</sup> Ultimately, both parties decided to settle, but the settlement was confidential so the details are unknown and all the games are still up and running.<sup>100</sup>

In “MU Online” vs. “Miracle Legends”, the Shanghai Pudong New Area Court held that the combination of names, game characters, maps, skills, weapons etc., can be considered part of the storyline and hence are considered literary works even though standalone, they may not meet the level of creativity.<sup>101</sup> This case also recognized that even though consecutive game pictures are copyrightable as works of cinematography, the defendant reskinned the maps, scenes, designs etc.<sup>102</sup> The defendant brought up an interesting defense by arguing that

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<sup>94</sup> Liang Chenyu, *Attack of the Clones: NetEase Denies Copying after PUBG Sues*, SIXTH TONE (Apr. 9, 2018), <https://www.sixthtone.com/news/1002059/attack-of-the-clones-netease-denies-copying-after-pubg-sues>.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *PUBG & NetEase Settle “Battle Royale” Copyright Lawsuit*, THE MCARTHUR LAW FIRM (Mar. 24, 2019), <https://smcarthurlaw.com/pubg-netease-settle-battle-royale-copyright-lawsuit/>.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Tracey Tang & Vincent Wang, *China: How to Protect Your Online Games in China*, MONDAQ (Mar. 28, 2017), <https://www.mondaq.com/china/trademark/580544/how-to-protect-your-online-games-in-china>

<sup>102</sup> *Id.*

the similarities are incomparable since the plaintiff had a 3-D game while the defendant had a 2-D game.<sup>103</sup> The court did not agree with this distinction and ruled in favor of the plaintiff.<sup>104</sup>

In “Hearthstone: Heroes of Warcraft” vs. “Crouching Dragon Legends”, the Shanghai No.1 Intermediate People’s Court ruled that the game rules, gameplay, and the layout of the game interface are expressions of ideas and hence not protectable under copyright law.<sup>105</sup> The court further emphasized that some rules and gameplay have a limited number of expressions, so granting copyright protection on those would create a monopoly.<sup>106</sup> Hence, Blizzard ultimately lost on the copyright argument.<sup>107</sup> However, it also brought claims under China’s Anti-Unfair Competition Law, and on this claim, the court ruled that Blizzard’s product “is an intellectual and creative product with considerable commercial value.”<sup>108</sup>

This is not the only instance where U.S. companies have succeeded. In another case in “World of Warcraft” vs. “Everyone Warcraft”, Blizzard yet again manages to find success under the Anti-Unfair Competition Law.<sup>109</sup> The Guangzhou IP Court ruled that Blizzard’s game name, and certain user interfaces were associated with them and created a unique trade dress that could be protectable.<sup>110</sup> Defendant’s use of their name and other factors have caused public confusion and thus, violates the Anti-Unfair Competition Law.<sup>111</sup>

The final case to explore the application of the Anti-Unfair Competition Law is HuoMao TV vs. Douyu TV for exclusive live streaming rights of the DOTA 2 Asia Championships. The Shanghai Pudong New Area Court ruled that defendant’s unauthorized live streaming “directly damaged the plaintiff’s competitive advantage obtained from its exclusive broadcasting right” and thus “violated good

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Tracey Tang & Vincent Wang, *China: How to Protect Your Online Games in China*, MONDAQ (Mar. 28, 2017), <https://www.mondaq.com/china/trademark/580544/how-to-protect-your-online-games-in-china>.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Tracey Tang & Vincent Wang, *How to Protect Your Online Games in China*, MONDAQ (Mar. 28, 2017), <https://www.mondaq.com/china/trademark/580544/how-to-protect-your-online-games-in-china>.

<sup>111</sup> *Id.*

faith principles and generally accepted commercial ethics.”<sup>112</sup> In this case, there was no violation of copyright, but the defendant was still held liable for this unauthorized streaming.<sup>113</sup>

*A. Significance of these Cases on Future Solutions*

These cases have demonstrated a few interesting solutions that U.S. game developers and publishers are taking, and can take in the future to mitigate their losses and to combat against game cloning. The first is a step that companies such as Blizzard Activision and Riot Games have undertaken, which is to license their games to a Chinese publisher. There is evidence that Chinese courts tend to favor state owned enterprises and domestic firms, so this solution would be in the best interest of U.S. companies to try to have some domestic influence on their side.<sup>114</sup> Also, having a stronger understanding of how Chinese law differs from U.S. law and how civil procedure and trial works in Chinese courts would be beneficial. However, a U.S. developer leasing to a Chinese publisher could also result in what happened with NetEase, taking many of their licenses and producing reskinned versions of those games. There is certainly a risk here. U.S. companies are constantly aware of the possibility of intellectual property theft, and are concerned about the fact that the Chinese government has been known to be accused of intellectual property theft, especially through forced technology transfers and industrial espionage practices.<sup>115</sup> There are certain cases in which the Chinese government mandates disclosure of trade-secret technologies in order to do business in China, so this is certainly a concern on the minds of US developers and publishers.<sup>116</sup>

This leads to the second issue of addressing the dismissal of U.S. cases to Chinese courts and how U.S. companies ought to deal with those restrictions and complications. Again, a better understanding of Chinese law and having domestic influence would help here. Partnering with a Chinese publisher also allows for greater simplicity in the game approval process. There are quite a number of benefits to do so.

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Karen Yeung, *China's Courts 'Biased' Towards State Giants Due to Political Pressure, Study Shows*, SOUTH CHINA MORNING POST (July 26, 2019), <https://www.scmp.com/economy/china-economy/article/3020173/chinas-courts-biased-towards-state-giants-due-political>.

<sup>115</sup> Charles Duan, *Of Monopolies and Monocultures: The Intersection of Patents and National Security*, 36 SANTA CLARA HIGH TECH. L.J. 369, 376 (2020)

<sup>116</sup> *Id.*

Another potential solution that is costly, but could be viable to counter reskinning, is for game companies to enter the mobile game market. In 2017, revenues for video games in China was 203.61 billion RMB, of which mobile games accounted for 96%.<sup>117</sup> Many of these reskinned games tend to be mobile versions and have taken over the market quite successfully, as mentioned earlier in this comment. There are a multitude of reasons why mobile games have taken off and been more successful. Many game genres are not difficult to convert over to a mobile platform, especially given the ever-increasing processing power of smartphones. This does require an investment by these companies to develop two versions of each game – a computer/console version and a mobile version. But this is a recent trend in the market, such that many game giants have adopted development of mobile versions as well as their console/PC versions because this is where the money is going.<sup>118</sup>

But the solution that some companies have realized as being much more successful involves pursuing suit under laws other than copyright law. China's trademark law is quite developed, but is limited in what it can protect in a video game. Generally, trademark protection is limited to elements such as game name, icons, and images of key characters. Still, trademark is a field of intellectual property in which foreign firms and companies have found success in.<sup>119</sup> The issue is that trademark law in China is a first to file system and does not have a use requirement, which could lead to individuals squatting on trademarks and trademark trolling.<sup>120</sup>

This brings us to the strongest solution for U.S. companies, which Blizzard has already started to experiment with. China's Anti-Unfair Competition Law is the tool that U.S. developers and publishers should be considering in their litigation against Chinese companies because it does not involve the protectability of the intellectual property, but rather focuses on whether or not the games would cause

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<sup>117</sup> Zihao Li, *The Copyright Protection of Video Games from Reskinning in China—A Comparative Study on UK, US, and China Approaches*, 11 TSINGHUA CHINA L. REV. 293, 296 (2019).

<sup>118</sup> *It's Official: The Console-to-Mobile Gaming Revolution is in Full Swing*, CHARTBOOST (June 12, 2015), <https://www.chartboost.com/blog/console-to-mobile-gaming-revolution/>.

<sup>119</sup> Tracey Tang & Vincent Wang, *China: How to Protect Your Online Games in China*, MONDAQ (Mar. 28, 2017), <https://www.mondaq.com/china/trademark/580544/how-to-protect-your-online-games-in-china>.

<sup>120</sup> Sharon Urias, *Trademark Protection in China*, LEXOLOGY (Mar. 11, 2019), <https://www.lexology.com/library/detail.aspx?g=055c995b-170f-4b4b-ae84-a18523057410>.

confusion among consumers, very much resembling one of the aspects of infringement in U.S. copyright law.<sup>121</sup> This is perhaps the most effective solution since this law can easily tackle cases where a Chinese developer has copied most of the gameplay, rules, and design. There is a high chance that a claim under the Anti-Unfair Competition Law could succeed since there is clear claim for causing confusion resulting in unfair competition. These reskinned games are supposed to feel like the original game, and tends to be marketed to cater to the same audiences as well, further emphasizing the likelihood of causing confusion.

This solution can be taken one step further to solidify the cause of confusion if U.S. developers look into signing licenses not only with specific Chinese publishers, but also with live streaming companies. The streaming industry is rapidly growing, and especially in China, so promoting a game and giving exclusive streaming rights allows for the chance that there could be greater confusion. If a cloning company attempts to promote itself through these live streaming sites, it would be easier for these U.S. companies to claim that the games are too similar and are copied, causing unfair competition.

#### IV. BUSINESS STRATEGY APPROACHES TO THE CHINESE MARKET

##### A. *Promotion Methods for US Companies*

As mentioned prior, the case of 4339 Networks and Shanghai Moonton demonstrated an interesting trend where both companies were compensated well due to U.S. companies joining with Chinese publishers to litigate in Chinese court. Chinese courts have a negative reputation since they are “under political pressure to protect state-owned enterprises.”<sup>122</sup> Local courts engage in judicial favoritism to protect the state-owned enterprises and firms in their provinces, and they purposely suppress judicial opinions about these firms to avoid any negative information that could reflect badly upon the Chinese Communist Party.<sup>123</sup> While companies such as Tencent are not

<sup>121</sup> Chanyuan Zhu, *Getting Creative: When to Protect Trade Dress Under Trademark or Competition Law*, LEXOLOGY (Sept. 24, 2000), <https://www.lexology.com/library/detail.aspx?g=ae0d70eb-9755-4425-9e08-8a18f502718e>.

<sup>122</sup> Karen Yeung, *China’s Courts ‘Biased’ Towards State Giants Due to Political Pressure, Study Shows*, SOUTH CHINA MORNING POST (July 26, 2019), <https://www.scmp.com/economy/china-economy/article/3020173/chinas-courts-biased-towards-state-giants-due-political>.

<sup>123</sup> *Id.*

government-owned enterprises, they are some of the more successful domestic companies and certainly, there has been evidence that Tencent has facilitated the CCP in censorship and surveillance.<sup>124</sup>

Tencent is not the only big name in the video game industry in China, but certainly places quite high. This is a list of ownership in large U.S. gaming companies that Tencent has: Riot Games (100%), Epic Games (40%), Ubisoft (5%), Activision Blizzard (5%) etc.<sup>125</sup> This is just a small list for Tencent who has significant ownership in non-U.S. companies and game giants as well.<sup>126</sup> Some of the other big names in the Chinese video game industry are NetEase Games (partnered with Blizzard), FunPlus, Lilith Games, and IGG.<sup>127</sup> Certainly, there are multiple options for U.S. companies to partner with, but there is still the concern that sharing and licensing the game with these companies would equate to sharing the intellectual property and not truly finding a better way to protect these companies' intellectual property. Not including the aforementioned examples of Identity V, Knives Out, and Rules of Survival, when Diablo: Immortal was announced, many users noticed the similarities of button placement and other elements in Crusaders of Light and Endless of God.<sup>128</sup> While Blizzard has claimed that their partnership with NetEase on this game was from the ground up, there still remains some doubt as to whether or not Blizzard was utilizing NetEase's expertise in making these kind of games and reskinning a version that would fit the Diablo universe.

But, given this knowledge of the Chinese legal regime and system, it would make sense for U.S. companies trying to promote in China to look for these larger publishers and work with them. Of course, another reason why U.S. companies need to find a Chinese publisher is that Chinese law requires all digital games to have a license

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<sup>124</sup> Sarah Cook, *Worried about Huawei? Take a Closer Look at Tencent*, THE JAPAN TIMES (Mar. 28, 2019),

<https://www.japantimes.co.jp/opinion/2019/03/28/commentary/world-commentary/worried-huawei-take-closer-look-tencent/>

<sup>125</sup> Steven Messner, *Every Game Company that Tencent Has Invested In*, PC GAMER (August 9, 2020), <https://www.pcgamer.com/every-game-company-that-tencent-has-invested-in/>.

<sup>126</sup> *Id.*

<sup>127</sup> Junjie, *Chinese Top Game Publishers and their Hottest Mobile Games*, PANDAILY (March 29, 2020), <https://pandaily.com/chinese-top-game-publishers-and-their-hottest-mobile-games/>.

<sup>128</sup> Jeff Grubb, *Diablo: Immortal looks like other NetEase games...that look like Diablo*, GAMESBEAT (Nov. 2, 2018), <https://venturebeat.com/2018/11/02/diablo-immortal-netease-reskin/>.

from a regulator and to get an ISBN before they can publish in China.<sup>129</sup> China has these rules in place because of Chinese restrictions as to game content, for example the extent of gore and blood that can be in games.<sup>130</sup> Because of this, only Chinese majority-owned companies are allowed to submit to the licensing process, hence this workaround is going to be difficult.<sup>131</sup> The Chinese market is too significant to lose given the lucrative nature of the market, so companies will inevitably have to recognize and try to make long lasting relationships with larger companies. However, this really would only benefit the larger developer and publishers, leaving the small indie game companies out of luck.

One example of this is the recently popular mafia type game, *Among Us*. This game has picked up much traction due to popular Twitch and YouTube streamers playing this game and genuinely having fun. During the COVID-19 quarantine period, this game has allowed friends to have a way to bond together. Developer Innersloth is a small indie company of thirteen individuals –six programmers, three artist/designers, one animator, one community director, one player support member, and one producer.<sup>132</sup> However, given the popularity of this game, a Chinese clone of the game has been created and has dominated the Chinese app stores because InnerSloth has not published a localized version of *Among Us* for the Chinese community.<sup>133</sup> The Chinese clone is called *Werewolf Among Us*, and has had downloads that have beaten out popular mobile games in China right now.<sup>134</sup> For such a small company that has recently gained global fame and a strong player base, understandably, they likely do not have the resources to pursue litigation with companies in China. Yet they are losing out so much in revenue. This is certainly a problem that the gaming industry needs to consider, since a strong copyright system ultimately helps out larger companies more, because they have the resources to pursue protection and enforce it.

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<sup>129</sup> Dean Takashi, *China is Approving More Foreign Games, But Not So Many American Ones*, VENTUREBEAT (Feb. 18, 2020), <https://venturebeat.com/2020/02/18/china-is-approving-more-foreign-games-but-not-so-many-american-ones/>.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *About*, INNERSLOTH, <http://www.innersloth.com/About.php> (last visited Nov. 19, 2020).

<sup>133</sup> Helen A. Lee, *This Among Us Clone is Causing an Uproar*, SVG (Nov. 12, 2020), <https://www.svg.com/278021/this-among-us-clone-is-causing-an-uproar/>.

<sup>134</sup> *Id.*

There is also another issue of concern about even promoting in China. In 2018, there was a change in game regulators that resulted in a nine-month ban on licensing, and subsequently in 2019 a trade war between the U.S. and China ensued.<sup>135</sup> China did not outright ban games from the U.S., but had significantly reduced the number of games licensed from the U.S. with no reason stated, so it can be assumed that there was a political reason for this action.<sup>136</sup> In 2019, the games that were approved from the U.S. belonged to the casual and midcore genres such as Sports, Racing, Simulation, and Strategy, but larger titles such as Call of Duty Mobile and Fortnite for example, still had not been licensed.<sup>137</sup> There is no doubt that this is problematic for developers. Due to the current political climate, Beijing is actually speeding up the development of a blacklist that could be used to punish U.S. tech firms.<sup>138</sup> This is negative news for U.S. video game developers since it increases the difficulty even more for these companies to promote their games in China at this rate.

## V. LEGAL APPROACHES TO RESKINNING AND CLONING

### A. *Complications from Forum Non Conveniens*

Chinese copyright law is not only inconsistent, but also not favorable for U.S. companies since the classification of video games as a cinematographic works makes it difficult for elements of a video game to be considered original. Also, not looking at the video game as a whole work, but rather separating it apart into smaller elements and judging each smaller part as protectable makes it more likely for developers reskinning games to get away without punishment. Certainly, U.S. companies still have found success in Chinese courts. But for the U.S. game industry as a whole, U.S. copyright law is much more beneficial to protecting U.S. interests. However, that becomes problematic if U.S. companies cannot even get their cases heard in U.S. forums and have U.S. copyright laws apply.

The defense of *forum non conveniens* is evoked not primarily because the defendant wishes to pursue a more appropriate forum, but

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<sup>135</sup> Dean Takahashi, *China is Approving More Foreign Games, But Not So Many American Ones*, VentureBeat (Feb. 18, 2020), <https://venturebeat.com/2020/02/18/china-is-approving-more-foreign-games-but-not-so-many-american-ones/>.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Lingling Wei, *Chinese Leaders Split Over Releasing Blacklist of U.S. Companies*, THE WALL STREET JOURNAL (Sept. 21, 2020), [https://www.wsj.com/articles/chinese-leaders-split-over-releasing-blacklist-of-u-s-companies-11600708688?mod=searchresults\\_pos4&page=1](https://www.wsj.com/articles/chinese-leaders-split-over-releasing-blacklist-of-u-s-companies-11600708688?mod=searchresults_pos4&page=1).

rather to move the case into a foreign forum that has more defendant-friendly rules and laws.<sup>139</sup> The requirement for determining if a foreign jurisdiction is adequate is determined by if the defendant can be served by process and the foreign court is able to hear this case, then US courts will not hesitate to dismiss this case.<sup>140</sup> However, there is no clarity or consistency in how the courts will consider whether a foreign forum is “so clearly inadequate or unsatisfactory that it is no remedy at all.”<sup>141</sup> What constitutes an inadequate remedy is unclear, and courts do not consider proof of general corruption in the foreign forum enough to convince them that the forum is inadequate.<sup>142</sup> Even if the plaintiff tries to show “that the substantive law applied in the alternative forum is less favorable than that of the present forum,” it is not enough to convince the courts not to dismiss.<sup>143</sup> This is problematic for U.S. firms as it has been demonstrated how Chinese copyright law is not favorable to U.S. companies and bringing suit in a different venue ultimately would result in difficulties.

This situation does not improve, because once the cases get pushed into the Chinese courts because of a dismissal due to *forum non conveniens*, they go to the intermediate courts in China which have a panel of judges and judicial accessors similar to jury members in the U.S. court system.<sup>144</sup> As seen earlier, Chinese courts run on civil law, so precedent is just used as reference but not authority.<sup>145</sup> There is the limitation that if a foreign entity is going to be in litigation in a Chinese court, the lawyer must be Chinese barring even U.S. members of international law firms from representing clients in Chinese courts.<sup>146</sup> These cases can then be transferred to adjudicative committees if the issue is difficult or is monetarily significant.<sup>147</sup> Copyright cases tend to fall under this category since the punishments of infringement could be high enough to cause bankruptcy.<sup>148</sup> When a case ends up in the adjudicative committees for consideration, the records of adjudication are not made public or made available to the parties, and there is a

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<sup>139</sup> Chenglin Liu, *Escaping Liability via Forum Non Conveniens: ConocoPhillips Oil Spill in China*, 17 U. OF PA. J. OF L. AND SOC. CHANGE 137, 143 (2014).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 144.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 145.

<sup>144</sup> Courtney L. Gould, *China as a Suitable Alternative Forum in a Forum Non Conveniens Motion*, 3 TSINGHUA CHINA L. REV. 59, 70 (2010).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 71.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 73.

tendency for members of these committees to decide these cases in favor of their political alliances and opinions.<sup>149</sup> There is no jury trial or punitive damages awarded in the Chinese courts, and yet this is not a deterrent for dismissal by U.S. courts because of *forum non conveniens* either.<sup>150</sup> Added on to that is the high level of corruption, local protectionism, and strong governmental influences on the courts.<sup>151</sup>

This all points to an unfavorable position for U.S. companies when they are forced to litigate in China because of dismissal. But as times have changed, U.S. companies have still managed to find successes in foreign courts. In 2017, three foreign companies, two of which were U.S.-based, won well publicized and favorable judgments.<sup>152</sup> Interestingly enough, all three of these disputes were trademark cases.<sup>153</sup> But, just because there is some success in Chinese courts by foreign litigants does not imply that there is no bias. The issue still stands that U.S. companies will find it difficult to prosecute in the U.S., and this will ultimately be most damaging for smaller U.S. game developers. Smaller game developers usually do not have the necessary funds to obtain copyrights. Enforcing copyrights requires an even larger investment. If these companies are forced to pursue litigation in China, they will have to incur even greater costs.

#### B. *Anti-Unfair Competition Law Protection*

The best method of protecting intellectual property in China for video games however, does not come from laws related to intellectual property. China's Anti-Unfair Competition Law comes in to protect products where intellectual property law may not be applicable or effective.<sup>154</sup> This has been effective when there is a violation of good faith because the defendant has made "false or misleading publicity about its game or tries to take a free ride on the

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<sup>149</sup> Courtney L. Gould, *China as a Suitable Alternative Forum in a Forum Non Conveniens Motion*, 3 TSINGHUA CHINA L. REV. 59, 82 (2010).*Id.* at 74.

<sup>150</sup> *Id.* at 75.

<sup>151</sup> *Id.* at 83.

<sup>152</sup> Christopher K. Pelham & Qiqi Wei, *Foreign Companies' Victories in Chinese Courts Support Forum Non Conveniens Motions in U.S. Courts*, JONES DAY (Oct. 2017), <https://www.jonesday.com/en/insights/2017/10/foreign-companies-victories-in-chinese-courts-support-forum-non-conveniens-motions-in-us-courts>.

<sup>153</sup> *Id.*

<sup>154</sup> Tracey Tang & Vincent Wang, *China: How to Protect Your Online Games in China*, MONDAQ (Mar. 28, 2017), <https://www.mondaq.com/china/trademark/580544/how-to-protect-your-online-games-in-china>.

fame of plaintiff's games, brands, and images, or confuse the public."<sup>155</sup> Creating a mobile version of a game would help with pursuing litigation under this law since any copying could easily confuse the public. U.S. companies can easily show that the game copiers are trying to free ride off the fame and brand of their companies. Blizzard Entertainment has successfully used this to shut down two game copiers of their brands for World of Warcraft and Hearthstone, as mentioned in the prior cases.

The law also is quite detailed in what constitutes as a violation of fair competition. Individuals and businesses cannot pass off the registered trademark of another, or use without authorization the name, packaging or decoration of a well-known good.<sup>156</sup> Individuals and businesses also cannot use the business name if it would share such similarity that it would cause buyer confusion, and they cannot falsely use symbols of quality and symbols of famous and high-quality goods.<sup>157</sup> As mentioned prior, Chinese copyright law is not consistent and is problematic in how it categorizes and analyzes video games. Hence, many elements of a video game cannot receive copyright protection because they do not meet the originality requirement under a work of film framework. U.S. companies could pursue litigation under this law and get their rights protected. Companies would need to show that their interests and profits were damaged by the actions of these copiers. Hence, since video game reskinners meet these elements, U.S. companies have the tools to indicate that these reskinners are violating this law. Chinese courts have recognized that when games change merely the colors and names but not the underlying game design and gameplay, that it is tossing out the hard work and development costs of the original company. Game companies invest heavily into developing the artwork for their game, game concepts, and storylines. Game reskinners bypass all that time and monetary investment to make a quick and easy profit. These actions are frowned upon, and Chinese courts have been willing to punish these actions.

The Anti-Unfair Competition Law is also broad as to what it can protect unlike copyright law. The law indicates that it covers the unique protection of a game, and this includes the game's "complete visual image which is represented by its user interfaces, scenes,

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<sup>155</sup> *Id.*

<sup>156</sup> (中华人民共和国反不正当竞争法) [Law Against Unfair Competition of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sep. 2, 1993, effective Dec. 1, 1993).

<sup>157</sup> *Id.*

characters, and props.”<sup>158</sup> User interface is a huge aspect of a game and some Chinese courts have disagreed on whether it can be protectable because under copyright, user interfaces may not be protected if there is a limited expression. The uniqueness requirement of the Anti-Unfair Competition Law resembles that of distinctiveness in trademarks; if a game’s overall impression can be connected to the game developer, then it can be protected.<sup>159</sup> This law could be the answer that U.S. companies could utilize. Instead of worrying about *forum non conveniens* and the difficulty of Chinese copyright law, U.S. companies just need to have substantial evidence that their brand and their characters are unique, and show that defendant did not act in good faith, and is stealing profits.

Of course, there is still the issue that Chinese courts may have a level of corruption so that it would be difficult for U.S. companies to get a fair decision. But this issue can be addressed by properly finding Chinese publishers to which U.S. companies can license their game to. As a result, a Chinese company will be suing on behalf of the U.S. company to help mitigate some of the domestic company bias that is prevalent. This law would then demand that companies pursue trademarks in China and utilize their American copyrights to further hone their image and uniqueness. This does not benefit smaller companies who would not have the resources. However, this is a significant deal for larger companies. Intellectual property rights are difficult to enforce but going through Anti-Unfair Competition Law would provide much more beneficial options.

### C. *Licensing with Live Streaming Companies*

The Anti-Unfair Competition Law can be taken even one step further. As mentioned earlier, the Shanghai Pudong New Area Court decided, in the case of HuoMao TV vs. Douyu TV, who had exclusive rights to live stream the DOTA 2 Asian Championships and found that defendant was not authorized to broadcast since plaintiff had exclusive broadcasting rights.<sup>160</sup> This notion can be taken one step further. Video

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<sup>158</sup> Mingfei Sun & Ji Yin, *New Developments in IP Protection in the Game Industry: A Case Study of “Everyone Warcraft”*, KING & WORLD MALLESONS (Oct. 12, 2016), <https://cmkwmlive.kwm.com/en/cn/knowledge/insights/on-ip-protection-of-video-games-cases-20161012>.

<sup>159</sup> *Id.*

<sup>160</sup> Tracey Tang & Vincent Wang, *China: How to Protect Your Online Games in China*, MONDAQ (Mar. 28, 2017), <https://www.mondaq.com/china/trademark/580544/how-to-protect-your-online-games-in-china>.

game companies could specifically target a few live streaming companies and provide them licenses and exclusive broadcasting rights to their games. This puts the burden of enforcement into the hands of these livestreaming companies. If a livestreaming company finds another company that is streaming the game, they can bring suit. If a video game copier tries to promote their game on the same platform, there is an easy case under the Anti-Unfair Competition Law that this is direct competition and is purposely misleading by confusing the consumer base. Even if the video game copier promotes on another platform, that is still confusing the consumer. But now this benefits U.S. companies more since they are not the ones that need to initiate the litigation, saving time, money, and effort.

It will cost money to draft these licenses and get these agreements in place. But once these U.S. companies have a Chinese publisher and live streaming exclusive rights with specific companies, this puts U.S. companies in a much better spot to ensure their intellectual property is protected. This solution can also bring in profit for video game companies as well. Studies show that by the end of 2020, there will be approximately 524 million online livestreaming users in China, which means 40% of the population and 62% of internet users will be live streamers.<sup>161</sup> In 2019, the industry reached 433.8 billion RMD, which is around \$66 billion USD, and these numbers are expected to double in 2020.<sup>162</sup> Especially during the pandemic, livestreaming has been a way for users to connect with each other and this is a perfect way for brands to promote their products. Because people are unable to go outside as much, if U.S.-based video game companies give exclusive rights to stream their games and events they host, more people will be aware of their games and this can help increase their player base. There is already competition between various developers to have their games be streamed on select services. These live streaming companies can themselves pursue litigation against other live streaming companies if the game is streamed on another platform. By having Chinese live streaming companies promote their product to more individuals and pay revenue from their license agreements, this can help increase revenue for video game companies and help resolve video game copying issues at lesser costs. This would be an extension of current existing practices, so it would not require too much extra investment other than monetary investment.

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<sup>161</sup> Ashley Dudarenok, *INSIDER|Livestreaming in China: Only for Sales or is there Brand Value?*, TECHNODE (June 12, 2020), <https://technode.com/2020/06/12/livestreaming-in-china-only-for-sales-or-is-there-brand-value/>.

<sup>162</sup> *Id.*

While this does sound like a great idea, one minor issue is that the big Chinese video game developers already have a hand in the live streaming market. Tencent has already invested in Huya and Douyu, while NetEase is starting to recruit streamers for its own app Look.<sup>163</sup> U.S. companies would be dealing with the same companies if they would like to work with the more successful streaming services. If their concern was that the Chinese publisher they were working with is creating reskinned games off of the license granted to them, then it seems as if there is not much of a solution here. But perhaps having the developer and live streaming service being part of the same umbrella could facilitate a lot of the litigation.

#### *D. Trademark Protection*

Yet another option instead of protecting copyright is to look at trademark protection for video games. This is a much more affordable process, and there is an option to preempt potential infringement cases. Under Chinese Trademark Law, any mark, including “any text, graph, alphabetic letter, number, three-dimensional symbol, color combination, sound, or any combination thereof” can be protected.<sup>164</sup> Of course, trademark law is quite limited in what it is able to protect in a video game. Trademarks can protect logos, game titles, and some designs, but the level of protection it offers as compared to copyright is limited. Most game designers are concerned with their original content, such as their characters and their skills, or the overall gameplay.

However, there is one advantage trademark protection has over copyright. China has a first-to-file system, and there is no “use in commerce” requirement.<sup>165</sup> US companies can choose to file a domestic application for trademark registration through the Chinese Trademark Office (CTMO), or they can go through the Madrid System to file a trademark application that seeks protection in all WIPO member countries, China included.<sup>166</sup> Since China does not have a use

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<sup>163</sup> Jingli Song, *China’s second largest online gaming company NetEase eyes game-centric live-streaming business*, KRASIA (Aug. 20, 2019), <https://krasia.com/chinas-second-largest-online-gaming-company-netease-eyes-game-centric-live-streaming-business>.

<sup>164</sup> Chanyuan Zhu, *Getting Creative: When to Protect Trade Dress Under Trademark or Competition Law*, LEXOLOGY (Sept. 24, 2000), <https://www.lexology.com/library/detail.aspx?g=ae0d70eb-9755-4425-9e08-8a18f502718e>.

<sup>165</sup> Sharon Urias, *Trademark Protection in China*, LEXOLOGY (Mar. 11, 2019), <https://www.lexology.com/library/detail.aspx?g=055c995b-170f-4b4b-ae84-a18523057410>.

<sup>166</sup> *Id.*

requirement, for video game developers who are seeking international success, they can get a head start and have their game names, and other aspects protected early on. Getting a trademark registered in China takes around a year to finish processing, after which the process for enforcing trademarks is much easier.<sup>167</sup>

For video games, the biggest disadvantage to utilize trademark protection is the limitation as to what trademarks can protect. However, as mentioned, there are multiple methods of game copying, and getting logos, character names, and game names protected can only limit game cloning to a certain extent. If the game title is protected under trademark, this makes the likelihood of confusion more difficult. Game reskinners need to make more significant changes to the game to further avoid confusion. Game cloners rely on having similar gameplay and similar characters, including titles and names, to draw and attract the same player base. Because they have a high degree of similarity, this can cause confusion in usage. Shutting down the option of Chinese game companies to copy aspects protectable by trademark cuts down on potential profits for these copiers. This does not prevent these copiers from still taking the original game and reskinning it, but it hinders their marketing strategy. Video game copying is intended to be a quick lucrative process requiring little investment. If consumers see a certain new game having similar characters but a different name, there is a high chance that they would not be confused and believe the copied game is another version of the original game.

Also, the lack of a use in commerce requirement is helpful for both larger and smaller game companies. This allows companies to get their product registered as soon as they have a name for their new game. Unfortunately, because there is no use requirement, there has been an increase in what is known as trademark trolling, where a trademark “troll” will register marks that they can then use to subsequently hold companies for ransom and sue them for “infringement” even though there is no usage.<sup>168</sup> So trademark registration is a process that should be done early. However, while every video game developer seeks to create a successful video game, being able to predict whether or not a video game can become successful internationally, in China, or domestically in the U.S. is hard to say. Among Us is one of those

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<sup>167</sup> Dan Harris, *China Online Gaming: Trademark and Copyright and Patent Protections*, CHINA LAW BLOG (Apr. 11, 2018), <https://www.chinalawblog.com/2018/04/china-online-gaming-trademark-and-copyright-and-patent-protections.html>.

<sup>168</sup> Sharon Urias, *Trademark Protection in China*, LEXOLOGY (Mar. 11, 2019), <https://www.lexology.com/library/detail.aspx?g=055c995b-170f-4b4b-ae84-a18523057410>.

examples, since Innersloth created this game back in 2018, but only recently did it become massively popular.<sup>169</sup> The game was very much a more interactive version of Mafia, and the conditions of quarantine that COVID-19 has thrust upon our daily lives has allowed this game to thrive and become popular.<sup>170</sup> Should all U.S. developers just trademark whatever names they can come up with that their game could be called eventually? This seems highly impractical, but to a lesser degree, this could be a viable option.

But certainly, this is a probable option since U.S. firms have found huge success through trademark law in other industries. In 2017, Under Armour Inc. won a trademark infringement lawsuit against a Chinese company called Uncle Martian since Uncle Martian had a logo that was nearly identical.<sup>171</sup> Later that year, New Balance won a trademark infringement lawsuit against a company called New Boom, again, copying identical logos.<sup>172</sup> This is a direct hit against reskinning games since the company attempting to copy the game must now create a logo and title that are different to avoid a trademark infringement suit. This should be an option video game companies consider when protecting their games.

#### CONCLUSION

Chinese copyright law has its problems in its implementation and consistency, and has an originality requirement that is difficult to meet. This proves problematic for U.S. video game companies who are trying to protect their intellectual property from the rise of Chinese video game copying. Game cloning and game reskinning are not hard to prosecute in the United States, but U.S. companies cannot bring Chinese companies to court in U.S. forums due to the *forum non conveniens* defense. Thus, U.S. companies are forced to prosecute in Chinese courts, where the law is not in their favor. In order for U.S. companies to publish their games in China, they need a Chinese publisher which exposes their intellectual property and games. However, there are some methods to combat this. The best protection

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<sup>169</sup> Shawn Farner, *The Real Reason Among Us Got So Popular So Fast*, LOOPER (Nov. 6, 2020), <https://www.looper.com/274102/the-real-reason-among-us-got-so-popular-so-fast/>.

<sup>170</sup> *Id.*

<sup>171</sup> Christopher K. Pelham & Qiqi Wei, *Foreign Companies' Victories in Chinese Courts Support Forum Non Conveniens Motions in U.S. Courts*, JONES DAY (Oct. 2017), <https://www.jonesday.com/en/insights/2017/10/foreign-companies-victories-in-chinese-courts-support-forum-non-conveniens-motions-in-us-courts>.

<sup>172</sup> *Id.*

right now is from China's Anti-Unfair Competition Law which indirectly allows companies to protect their intellectual property by preventing other companies from engaging in bad faith business competition. This can be taken a step further if U.S. game companies decide to give exclusive streaming rights of their games to specific China-based live streaming sites. This helps address the issues of high costs of litigating in a foreign country, and instead places the burden of litigation on the Chinese live streaming companies that the U.S. companies licensed with. This helps reduce the potential foreign company bias and heavily reduces costs, while providing another source of revenue. Trademark protection is an avenue that US companies in other industries have been exploring and used successfully and this may be true for the video game industry as well. Thus, while Chinese law may not be the most beneficial for U.S. video game companies, there is still a strong source of hope that U.S. video game companies are able to protect their products.

#### ADDENDUM

The author recognizes that the Chinese video game market has changed drastically in the past year in 2021. In the later half of 2021, China released even more stringent requirements on the entertainment industry in an attempt to clean up the entertainment industry and to remove the addiction elements present.<sup>173</sup> Before these new restrictions, young gamers were already restricted to playing no more than 90 minutes of games on the weekdays and three hours a day on the weekends.<sup>174</sup> With these new restrictions, young gamers are now completely barred from playing on the weekdays, and can play for a maximum of one hour on Friday, Saturday, Sunday and holiday evenings.<sup>175</sup> This raises the question as to whether video games are even relevant in China anymore. While the younger population is not the main money earning populace, most individuals become interested in video games at a young age and continue playing them. After the original restrictions in 2019, Tencent reported that in the second quarter of 2021, players under 16 only accounted for just 2.6% of its gross

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<sup>173</sup> John Letzing, *What's behind China's video game restrictions?*, WORLD ECONOMIC FORUM (Sep. 6, 2021), <https://www.weforum.org/agenda/2021/09/what-s-behind-china-s-video-game-restrictions/>.

<sup>174</sup> Chris Buckley, *China Tightens Limits for Young Online Gamer and Bans School Night Play*, N.Y. TIMES (Aug. 30, 2021), <https://www.nytimes.com/2021/08/30/business/media/china-online-games.html>.

<sup>175</sup> *Id.*

receipts in China for video games.<sup>176</sup> Still, young players found ways of sneaking around the ID verification systems by using their parents' IDs and to get around the restriction of needing to play only from 8 to 9PM on Fridays, Saturdays, and Sundays.<sup>177</sup> Tencent, NetEase, and other gaming companies saw their stock prices fall greatly after a Chinese newspaper referred to their video games as spiritual opium, evoking a traumatic past.<sup>178</sup>

Not only are there restrictions on who can play games, but there are also tighter restrictions as to what games can be played. There was a recent memo from an internal training course that was organized by the officially recognized gaming association that mentioned that "games are a new art form that must highlight 'correct values' and an accurate understanding of China's history and culture."<sup>179</sup> There was already a long period of time with no monthly game approvals from the National Press and Publication Administration, and now there are restrictions such that there cannot be violence, there must be certain gender standards, and there cannot be any historical simulation where facts could be distorted.<sup>180</sup> The ban on violence would certainly dismiss games such as Call of Duty, while the gender standards would take out games such as The Last of Us 2. Game approvals are a lot stricter now with more restrictions set, so game developers should certainly consider how that could affect their business. Another potential loss of revenue is in esports since this could greatly limit ambitions of younger players to pursue a professional esports career. Like most sports, esports is no exception to having caps on age at which professionals can compete at their best. This could pose an issue as well for developers to consider.

Are these restrictions something game developers should be concerned with? In terms of monetary loss, unless these developers are creating games that criticizing China, distorting Chinese history, showing extremely violence, or challenging gender norms (at least what the CCP believes to be so), then their games can still be approved,

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<sup>176</sup> *Id.*

<sup>177</sup> Josh Ye, *China's tighter video game restrictions spring a few leaks during country's long holidays as kids seek online fun*, SOUTH CHINA MORNING POST (Oct. 7, 2021), <https://www.scmp.com/tech/policy/article/3151560/chinas-tighter-video-game-restrictions-spring-few-leaks-during-countrys>.

<sup>178</sup> *Id.*

<sup>179</sup> Sofia Brooke, *What to Make of the New Regulations in China's Gaming Industry*, CHINA BRIEFING (Nov. 16, 2021), <https://www.china-briefing.com/news/what-to-make-of-the-new-regulations-in-china-online-gaming-industry/>.

<sup>180</sup> *Id.*

just with a slightly slower process. In China, there are approximately 720 million gamers, with about 110 million of them below the age of 18, so in terms of revenue loss, this won't be too drastic seeing as there were time restrictions and spending limitations on this group prior to 2021.<sup>181</sup> Tencent's financials showed that in-game revenue from those under 16 fell from 3.2% in Q4 2020 to 2.6% in Q2 2021, while NetEase's financials saw less than 1% of its revenues from those 18 and under.<sup>182</sup> The market share of revenue coming from this age group is insignificant, and this is partly due to a growing trend to reduce gaming addictions starting from as early as 2005.<sup>183</sup> Game developers should not be primarily concerned with the monetary loss from these restrictions, and instead should be more concerned in the decrease of advertising revenue. There will certainly be fewer individuals who are active users and this could influence the advertising revenue which may be a point of concern for companies seeking to run on a free-to-play model, relying on advertising for a large portion of their revenue.<sup>184</sup> These new restrictions should make it even more clear to companies what kinds of games would have a higher chance of approval, so this could end up being beneficial for U.S. developers.

Overall, industry experts do not believe that these changes should change the video game scene in China drastically. These changes were to be expected based on Xi Jinping's recent trends of monitoring the entertainment industry and controlling the tech industry. Of course, there could be even more changes added that could completely change the whole calculus of the Chinese video game industry. However, the Chinese Communist Party should be very well aware of the large profits that the video game industry could bring. Tencent and NetEase have tried to diversify their portfolios and invest into other industries as well, scaling back some of their video game investments and employees. Game developers just need to be more cautious in choosing which video games to send for approval in the Chinese market, as well as understanding that the process may take a bit longer. In terms of protecting their video games, there have not been any eye-catching cases in litigation, but the former mentioned strategies should still be viable, and a good plan of attack.

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<sup>181</sup> *Id.*

<sup>182</sup> Shen Lu, *Is China's new limit on video games a big deal for its gaming sector*, PROTOCOL (Sept. 3, 2021), <https://www.protocol.com/china/china-game-time-limit-companies>.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*