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PATENT AND COPYRIGHT PROTECTION FOR VIDEO GAMES IN INDIA: AN ANALYSIS OF LEGAL GAPS AND CHALLENGES

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ABSTRACT

This chapter undertakes a critical comparative examination of the intellectual property frameworks governing video games in the United States, the European Union, Japan, and China. The objective is not a catalogue of foreign law for its own sake, but rather a substantive evaluation of whether the legal solutions developed in those jurisdictions offer workable models for addressing India's own documented deficiencies in copyright and patent protection for the gaming sector.

India's intellectual property framework suffers from persistent gaps: the absence of a statutory definition suited to interactive audiovisual works;[1396] the inaccessibility of meaningful patent protection for game technology under Section 3(k) of the Patents Act, 1970;[1397] and the inadequacy of the idea-expression dichotomy as applied to game mechanics. Each of the four jurisdictions examined in this chapter has confronted some version of these problems and has developed judicial or legislative responses that deserve careful scrutiny.

The American experience reveals the breadth of protection that early judicial classification of games as audiovisual works can achieve, alongside the risks of an overly permissive patent regime that generates patent thickets harmful to smaller developers. The European Union's 'technical effect' standard for software patents offers a principled middle ground between total exclusion and unrestricted patentability. Japan illustrates how statutory frameworks designed for traditional creative industries can be adapted, through careful judicial interpretation and clear administrative guidance, to accommodate a global gaming industry. China, whose intellectual property law is often underestimated in comparative scholarship, has produced recent judicial decisions on game cloning that go further in protecting game experience than any other jurisdiction and offer a particularly instructive model for a developing gaming economy such as India's.

The comparative analysis leads to five core lessons, each tied to a specific reform recommendation: the need for a statutory definition of interactive audiovisual works; clearer judicial tools for drawing the line between idea and expression in game systems; adoption of a 'technical contribution'

[1396]Copyright Act, 1957 (No 14 of 1957), s 13. The Act protects 'original literary, dramatic, musical and artistic works' and 'cinematograph films and sound recordings'. Video games do not neatly fall within any of these categories.

[1397]Patents Act, 1970 (No 39 of 1970), s 3(k). The section excludes 'a mathematical or business method or a computer programme per se or algorithms' from patentability.

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standard for game technology patents; measured extension of design protection to game elements; and calibrated expansion of fair dealing exceptions to accommodate transformative creative uses.

I. INTRODUCTION

The preceding chapters of this research project have established the scope and severity of India's legal gaps in video game intellectual property. The Copyright Act, 1957, offers no clear classification for interactive audiovisual works. The idea-expression dichotomy leaves game mechanics without protection. Section 3(k) of the Patents Act, 1970, has been applied in ways that deny patent coverage to technical innovations that would attract protection in every major gaming jurisdiction in the world. The enforcement system compounds these substantive failures with procedural barriers that make litigation practically inaccessible to most developers.

A legislative reform program that seeks to address these gaps responsibly cannot proceed in isolation. Law reform is not the work of invention from scratch; it is, in large part, the disciplined evaluation of what has worked elsewhere and what may be adapted to one's own context. The field of comparative intellectual property law exists precisely because legal systems around the world share common problems, even if the contexts in which those problems arise differ significantly.

This chapter examines the video game intellectual property frameworks of four jurisdictions — the United States, the European Union, Japan, and China — for the purpose of identifying transferable lessons. These jurisdictions were selected on the basis of three criteria: the size and sophistication of their domestic gaming industries; the relative maturity of their intellectual property jurisprudence on game-related questions; and the diversity of their legal traditions, which ensures that the comparative analysis captures a range of institutional approaches rather than a single model. Together, they represent the four largest gaming markets in the world[1398] and collectively generate the bulk of global judicial and regulatory output on game intellectual property questions.

The analysis proceeds in five sections. Section II examines the United States framework. Section III addresses the European Union. Section IV analyses the Japanese approach. Section V considers the Chinese experience. Section VI distils the cross-cutting lessons for Indian reform. The goal throughout is not a survey for its own sake but a focused identification of models that respond specifically to the gaps in India's current framework.

Keywords: Video Game Intellectual Property, Patent Protection in Video Games, Copyright Protection in Gaming, Gaming Law in India, Interactive Audiovisual Works, Digital Entertainment Law

Comparative International Frameworks for Video Game Intellectual Property

I. THE UNITED STATES FRAMEWORK

A. Classification of Games as Audiovisual Works

The United States established the foundational judicial framework for game copyright earlier than any other jurisdiction. The Second Circuit's decision in Stern Electronics, Inc. v. Kaufman (1982) and the Seventh Circuit's ruling in Midway Manufacturing Co. v. Artic International, Inc. (1983) together established that video games are protected copyright works classifiable as audiovisual works.[1399] That classification extended protection to the entire visual experience of playing a game — the dynamic imagery, the sounds, and the interactive sequences — as a unified whole, even though the specific output varies between individual

[1398] NASSCOM, Indian Gaming Industry Report (2023); FICCI, The Indian Gaming Landscape (2022). The United States, European Union, Japan, and China collectively represent over 70% of global gaming market revenue.

[1398] Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1, wherein the Supreme Court of India adopted the 'modicum of creativity' test for copyright originality.

[1399] Stern Electronics, Inc. v. Kaufman, 669 F.2d 852 (2d Cir. 1982); Midway Manufacturing Co. v. Artic International, Inc., 704 F.2d 1009 (7th Cir. 1983).

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playthroughs and is co-generated by the player's actions.

This early and categorical resolution of the classification question gave American developers, publishers, and courts a stable foundation on which to build a sophisticated body of case law over the following four decades.[1400] The contrast with India, where no equivalent judicial or legislative clarification has been issued, is stark. The practical consequence of this divergence is that American developers could rely on a clearly understood scope of copyright from the industry's commercial infancy, while Indian developers today remain uncertain about the most basic questions of ownership and duration of protection.

B. The Idea-Expression Dichotomy and Game Mechanics in American Law

American courts have also developed the most detailed jurisprudence on the application of the idea-expression dichotomy to game mechanics. The influential abstraction-filtration-comparison test, developed by the Second Circuit in Computer Associates International, Inc. v. Altai, Inc. (1992),[1401] provides a structured framework for separating protectable expression from unprotectable functional elements in software. While this test was developed in the context of business software rather than games, its analytical approach has been applied in subsequent decisions dealing with game systems and interactive structures.

The limitations of copyright protection for game mechanics in the United States mirror those in India. The idea-expression dichotomy has consistently been held to prevent copyright from extending to game rules, systems, and mechanics as such, regardless of how creative those elements may be. What the American framework offers that India's does not is a developed set of judicial tools — tests, concepts, and accumulated case law — for drawing that line in specific factual situations.

C. Patent Protection: Breadth, Risks, and the Alice Limitation

The United States has historically maintained the most permissive approach to software patent protection of any major jurisdiction. American game companies have built extensive patent portfolios covering not only hardware but gameplay mechanics, interface technologies, and server architectures. The Supreme Court's decision in Alice Corp. v. CLS Bank International (2014)[1402] introduced a more demanding two-step test for software-implemented inventions, requiring that they amount to something more than an abstract idea applied on a generic computer. The Alice decision significantly curtailed the availability of patents for purely conceptual game mechanics, but left intact the protection of specific, concrete technical innovations that solve identifiable engineering problems.

A significant cautionary lesson from the American experience is the problem of patent thickets.[1403] The accumulation of overlapping software patents by large technology and entertainment companies created a licensing landscape that proved expensive and treacherous for smaller studios. Patent assertion entities have used broad game-related patents to extract licensing fees from developers who lacked the resources to litigate the validity of the asserted claims. This experience strongly argues against the straightforward transplantation of the American model into India's developing gaming ecosystem.

The American approach to reverse engineering is also noteworthy. The Ninth Circuit in Sony Computer Entertainment Europe Ltd v.

[1400] Paul Goldstein, International Copyright: Principles, Law, and Practice (3rd edn, Oxford University Press 2012) ch 7, examining the relationship between classification of works and the scope of protection afforded in major jurisdictions.

[1401] Computer Associates International, Inc. v. Altai, Inc., 982 F.2d 693 (2d Cir. 1992). The abstraction-filtration-comparison test proceeds by identifying successive levels of abstraction in the program, filtering out unprotectable elements at each level, and comparing what remains with the allegedly infringing work.

[1402] Alice Corp. Pty. Ltd. v. CLS Bank International, 573 U.S. 208 (2014).

[1403] Mark A. Lemley, 'Software Patents and the Return of Functional Claiming' (2012) Wisconsin Law Review 905, analysing the risks of broad software patent claims for technology markets.

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Connectix Corp. (2000)[1404] held that reverse engineering of game hardware and software for the purpose of developing compatible products may, in defined circumstances, constitute fair use. India's fair dealing provisions under Section 52 of the Copyright Act are considerably narrower than the American fair use doctrine, and an explicit exception for interoperability-related reverse engineering would represent a valuable addition to the Indian framework.

II. THE EUROPEAN UNION FRAMEWORK

A. Copyright Harmonisation and the Software Directive

The European Union's approach to video game copyright is shaped primarily by the harmonising framework of the Software Directive 2009/24/EC,[1405] which provides for the protection of computer programs as literary works throughout the Member States. The Court of Justice's decisions in Infopaq International A/S v. Danske Dagblades Forening (2009) and Bezpecnostni softwarova asociace v. Ministerstvo kultury (2010)[1406] established an originality standard — the author's own intellectual creation — that is broadly consistent with the modicum of creativity approach adopted by the Indian Supreme Court in Eastern Book Company v. D.B. Modak (2008).[1407]

The EU framework has the practical advantage of providing a harmonised standard across all Member States, which simplifies cross-border licensing and enforcement within the European single market. The absence of an explicit EU-level definition of video games as a distinct work type has created some uncertainty at the margins, which Union-level legislators and commentators have noted as a gap requiring attention.

B. The SAS Institute Decision and Game Mechanics

The Court of Justice's decision in SAS Institute Inc. v. World Programming Ltd. (2012)[1408] is of direct relevance to the question of game mechanics protection. The Court confirmed that the functionality of a computer program — the specific results it is designed to produce and the methods it uses to produce them — is not protectable by copyright. The Court's reasoning was that extending copyright protection to software functionality would permit rights holders to monopolies ideas at the expense of technological progress, a result inconsistent with the Software Directive's purpose.

This reasoning maps precisely onto the game mechanics problem. The Court's approach implies that a game's underlying system of rules and mechanics — the turn-based combat structure, the deck-building logic, the physics-based puzzle design — cannot attract copyright protection in itself, even though the specific code that implements those systems is clearly protected. Indian courts have not yet issued an equivalent ruling, and when the question eventually arises in contested litigation, the SAS Institute decision provides a well-reasoned analytical model that Indian judges may find persuasive as comparative jurisprudence.

C. The European Patent Convention and the Technical Effect Standard

The European Patent Convention excludes from patentability, among other things, programs for computers 'as such'. The EPO Technical Board of Appeal has interpreted this exclusion through a 'technical effect' test developed in landmark decisions including Auction Method/Hitachi (T 258/03) and Duns Licensing Associates (T 154/04).[1409] Under this framework, a computer-implemented invention is patentable if it

[1404] Sony Computer Entertainment Europe Ltd v. Connectix Corp., 203 F.3d 596 (9th Cir. 2000).
[1405] Software Directive 2009/24/EC of the European Parliament and of the Council (23 April 2009).
[1406] Bezpecnostni softwarova asociace v. Ministerstvo kultury (C-393/09) [2010] ECR I-13971 (CJEU); Infopaq International A/S v. Danske Dagblades Forening (C-5/08) [2009] ECR I-6569 (CJEU).
[1407] See Eastern Book Company v. D.B. Modak, (2008) 1 SCC 1, paras 42-56, discussing the standard of originality applicable under the Copyright Act, 1957.
[1408] SAS Institute Inc. v. World Programming Ltd. (C-406/10) [2012] (CJEU).
[1409] EPO Technical Board of Appeal, Auction Method/Hitachi (T 258/03) [2004]; Duns Licensing Associates (T 154/04) [2006].

produces a technical effect that goes beyond the ordinary physical interactions between software and hardware.

This standard offers a principled and practically workable middle ground between India's current position, which tends towards blanket exclusion of game-related software innovations, and the pre-Alice American model. The technical effect test filters out purely conceptual or business-method claims while remaining open to genuine engineering innovations. The relevance of this model for India is reinforced by the fact that Section 3(k) of the Patents Act, 1970, contains its own per se formulation, which implies a similar distinction between bare computer programs and technical inventions implemented through software.[1410]

III. THE JAPANESE FRAMEWORK

A. Classification and Judicial Adaptation

Japan occupies a distinctive place in any comparative analysis of game intellectual property law. It is the country of origin of several of the world's most commercially and culturally significant game franchises and is home to some of the largest game companies in the world. Japanese copyright law classifies video games as cinematographic works — a categorization that protects the dynamic visual output of a game as a unified audiovisual experience. Japanese courts have interpreted this classification flexibly and purposively, extending its scope to accommodate the interactive and non-linear character of game content.

This willingness to adapt established statutory categories through careful judicial reasoning, rather than waiting for legislative revision, provides one model for how Indian courts might approach the same challenge under the existing Copyright Act. The classification question in India could potentially be resolved through a purposive reading of the existing provisions, as the Japanese courts have demonstrated.

B. Patent Practice and Administrative Guidance

Japan's approach to software-related patents broadly follows the European model, permitting the patenting of software-implemented inventions that produce technical effects. The Japanese Patent Office has published detailed examination guidelines for software-related inventions, illustrated with practical worked examples that allow applicants to assess the patentability of their innovations with a degree of confidence.[1411] Japanese game companies have made extensive use of the patent system, building portfolios that cover both hardware innovations and specific technical game systems.

The quality and specificity of the Japanese Patent Office's examination guidelines represent a model that the Indian Patent Office would benefit from replicating. The Indian Computer Related Inventions Guidelines have been revised multiple times and remain insufficiently specific in their application to game technology. Publishing examination guidelines with worked examples drawn from the game development context — procedural generation algorithms, artificial intelligence behaviour systems, real-time rendering optimisations — would materially reduce the uncertainty that currently discourages Indian developers from investing in patent protection for their technical innovations.

C. Design Protection

Japan also makes extensive use of design protection for game-related products, including game hardware, controller designs, and the visual presentation of game interfaces.[1412] Indian game developers have largely not explored design protection as a tool for protecting the

[1410] Indian Patent Office, Guidelines for Examination of Computer Related Inventions (2016). The guidelines acknowledge the per se exclusion but lack sufficient specificity for game technology applications.

[1411] WIPO, Standing Committee on Copyright and Related Rights, Study on Copyright and the Public Domain, SCCR/19/8 (2009), noting the challenges posed by interactive digital works to traditional copyright categorisation.

[1412] Designs Act, 2000 (No 16 of 2000). Design protection covers the features of shape, configuration, pattern, ornament, or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms.

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visual distinctiveness of their products. The Japanese experience suggests that it may offer a useful complement to copyright in protecting the non-functional visual elements of games that fall short of the originality threshold for copyright or the technical character requirement for patent protection.

IV. THE CHINESE EXPERIENCE

A. The Evolution of Chinese Game Intellectual Property Jurisprudence

China's video game intellectual property framework has evolved rapidly over the past decade, driven by the explosive growth of the Chinese gaming market and a succession of high-profile disputes between major game companies. The Chinese courts have developed a body of jurisprudence that is, in several respects, more innovative and responsive to the specific challenges of game intellectual property than the equivalent case law in Western jurisdictions.

The Guangzhou Internet Court's decision in NetEase v. Zhejiang Youxi Technology Co. Ltd. (2018)[1413] represents a significant departure from the strict application of the idea-expression dichotomy. The court's reasoning extended limited protection to distinctive game systems and rules on the basis that they reflect the developer's specific creative choices — not merely abstract ideas, but a particular creative arrangement of rules and mechanics that constitutes original expression. This approach offers a potentially important model for jurisdictions, including India, where the strict application of the dichotomy leaves game mechanics entirely unprotected.

B. The Tencent Decision and the Protection of Game Experience

The most far-reaching judicial contribution to game intellectual property protection in any jurisdiction in recent years is the Shenzhen Intermediate Court's decision in Tencent v. Shanghai Yingxun Technology (2021).[1414] The court held that a rival game had infringed Tencent's rights by replicating the core interactive experience of its PUBG Mobile title, even without literally copying the underlying code or individual visual assets. The court reasoned that the combination of game elements — the game's map design, survival mechanics, equipment systems, and overall game flow — constituted a creative expression protectable under copyright, and that the reproduction of this overall expression, even in independently created code and art, amounted to infringement.

This decision is, to date, the most significant judicial response to the game cloning problem anywhere in the world. It goes beyond what any Western court has been prepared to affirm and directly addresses the most commercially damaging form of game copying — the mobile game clone that reproduces the experience of an original without technically copying its code. Indian courts have not yet confronted this question squarely. When they do, the Tencent decision will provide the most directly relevant comparative precedent available.

C. Contextual Caution

The Chinese experience should be assessed with appropriate contextual awareness. China's legal system operates within a different institutional framework than India's, and the enforcement of intellectual property rights in China has historically involved state interests in ways that do not translate directly to the Indian context. The doctrinal innovations of the Chinese courts are nonetheless of genuine analytical value, precisely because they represent a jurisdiction grappling with the same practical challenge — protecting game developers in a rapidly growing, highly competitive market — that India faces.

V. COMPARATIVE LESSONS FOR INDIAN REFORM

A. The Classification Imperative

[1413] NetEase v. Zhejiang Youxi Technology Co. Ltd., Guangzhou Internet Court (2018).

[1414] Tencent v. Shanghai Yingxun Technology, Shenzhen Intermediate Court (2021).

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Every jurisdiction examined in this chapter has found it necessary, through either legislation or authoritative judicial decision, to provide a clear framework for the classification of video games as copyright works. The United States did so judicially in the early 1980s. The European Union addressed it through the Software Directive and subsequent Court of Justice decisions. Japan achieved it through a purposive judicial interpretation of its cinematographic works category. China has developed an increasingly sophisticated body of case law addressing the question directly.

India is the outlier. Several decades after the earliest American decisions on game copyright, India still has no authoritative judicial or legislative guidance on how games fit within the Copyright Act's categories. This is not a peripheral ambiguity; it is a foundational gap that undermines the entire structure of game intellectual property protection. The reform recommendation that flows from this comparative lesson is clear: India requires either a statutory amendment introducing a defined category of interactive audiovisual works or an authoritative High Court or Supreme Court decision that settles the classification question on principled grounds.

B. Better Tools for the Idea-Expression Dichotomy

All major jurisdictions recognize the idea-expression dichotomy and apply it to exclude abstract game mechanics from copyright protection. What distinguishes the more developed systems is not that they have abandoned the dichotomy but that they have developed more refined analytical tools for applying it in game-specific contexts. The American abstraction-filtration-comparison test and the European Union's functional exclusion reasoning both provide structured frameworks that Indian courts could usefully draw upon.

The Chinese Tencent decision suggests a more protective approach — one in which the creative combination and arrangement of game elements, even if each element individually is unprotectable, may constitute protectable expression when taken together. India's courts should be alert to this approach and may find it useful in cases involving comprehensive game experience copying, which represents the most commercially destructive form of game cloning in the mobile market.

C. Reforming Section 3(k): The Technical Contribution Model

The comparative analysis strongly supports the reform of Section 3(k)'s application to game technology. The Indian provision's own per se language is consistent with the European Patent Convention's analogous exclusion and implies a similar distinction between bare programs and technical inventions. The EPO's technical effect test, developed over decades of Board of Appeal jurisprudence, provides India with a ready-made framework for translating this implication into consistent examination practice.

Reform in this area should be measured, not wholesale. The cautionary lesson from the United States argues strongly against simply opening India's patent system to the full range of game-related software claims. The appropriate model is the European one: clear statutory or guideline language establishing that computer-implemented inventions are patentable where they make a technical contribution to the prior art, accompanied by rigorous examination standards that maintain the quality of granted patents and effective mechanisms for challenging weak patents once granted.

D. Design Protection and Underutilized Tools

The Japanese experience highlights the underutilization of design protection in India's game intellectual property ecosystem. The Designs Act, 2000, provides a registration-based protection regime for the visual appearance of articles. Game developers have rarely used this tool, even though the visual

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design of game interfaces, characters, and hardware represents significant creative and commercial investment. Encouraging the use of design protection, alongside copyright and patent, would provide Indian game developers with a more comprehensive intellectual property toolkit.

E. Fair Dealing and Transformative Uses

Several of the jurisdictions examined in this chapter have developed more flexible approaches to fair dealing or fair use exceptions than India's Section 52 of the Copyright Act currently provides. The American fair use doctrine, as applied in Connectix Corp., permits reverse engineering for interoperability. European Union law provides explicit exceptions for interoperability research under the Software Directive. Japan permits a degree of transformative use in educational and personal creative contexts. India's fair dealing provisions are narrow and have not been updated to address the specific challenges of the digital and gaming environment. A targeted expansion of Section 52 to accommodate interoperability-related reverse engineering and non-commercial transformative fan creativity would bring India's framework closer to international norms without significantly weakening protection for developers.

VI. CONCLUSION

The comparative analysis undertaken in this chapter yields a set of concrete, evidence-based lessons for Indian reform that are grounded in what the world's leading gaming jurisdictions have actually done, not merely in what might theoretically be desirable. These lessons converge on a consistent finding: the gaps in India's video game intellectual property framework are not unique to India, and the responses that other jurisdictions have developed — whether through legislation, judicial decision, or administrative guidance — are largely adaptable to the Indian context.

The United States demonstrates that early, clear judicial classification of games as audiovisual works creates a stable foundation for an entire industry's legal development, and also that patent regimes without adequate quality controls can generate harms as significant as those they are designed to remedy. The European Union shows that a principled technical effect standard for software patents can provide meaningful protection for genuine innovation without the risks of overbreadth. Japan illustrates the value of purposive statutory interpretation and detailed administrative guidance. China offers the most aggressive judicial response to game cloning, one that Indian courts should consider carefully when confronting equivalent fact situations.

The central reform priorities that emerge from this comparative analysis — a statutory definition of interactive audiovisual works, revised Computer Related Inventions guidelines adopting a technical contribution standard, expanded design protection, and more flexible fair dealing exceptions — are elaborated in the reform recommendations of Chapter VIII. None of them requires a radical overhaul of India's intellectual property architecture. Each represents a targeted, proportionate response to a specific, documented gap, grounded in lessons drawn from jurisdictions that have confronted and addressed the same challenge.

India's aspiration to become a global hub for digital creativity is a policy objective that its intellectual property framework must be capable of supporting. The comparative evidence assembled in this chapter makes clear that achieving this objective requires deliberate and specific legal reform. The tools that other jurisdictions have developed over decades of engagement with the game intellectual property problem are available to India. The question is whether India chooses to use them.

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