

Kluwer Copyright Blog

Getting paid to play? Copyright, contract, and the rewards for UGC

Amy Thomas (CREATe, University of Glasgow) · Tuesday, June 21st, 2022

Users are increasingly prolonging the lifespan and value of a video game past its initial release date through user-generated content (UGC). The little-understood phenomenon of ‘watching other people play games’ is now a commonplace fact of life online. This phenomenon is responsible for creating game influencers, and those game influencers have also in turn created derivative game industries (see e.g., [the story of Rocket League](#), now a world-famous eSport). With the prevalence of ‘crunch culture’, game mods are increasingly becoming an important source of post-release quality assurance (see e.g., the community response to [Cyberpunk 2077](#)). An even more complex (and recent) example is the hype surrounding *Elden Ring*’s user-created character, fabled knight ‘Let Me Solo Her’, the character itself being a form of UGC, which has in turn spawned UGC of its own with [dedicated fan works in the](#)



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community. In sum, a user's interaction with a game can repurpose it in a reciprocal manner that both feeds from, but also feeds into, the game industry.

The existence of this dialectical relationship between rightsholder and user sits at odds with the principles of the copyright system which often assume a dichotomous, all-rights-reserved model of creativity. Likewise, limited copyright exceptions don't accommodate for this broadly construed 'use' of a work. Resultingly, this UGC, from the perspective of black-letter copyright law, gives a rather reductive presumption of infringement, rather than enablement of this new form of cultural creativity.

In my project, [You Can Play](#) (see also working paper [here](#)), I explore how contract, rather than copyright, is the key enabler of user creativity in this industry. Through standard form UGC policies, the industry has created an almost Creative Commons-style system of user enablement. These are responsive contractual tools that both reflect the needs of the industry, and encourage us to reflect on whether copyright can learn anything from them.

For example, a key question arising from the project is not whether UGC should be available – something with which much of copyright discourse has been recently ([and rightly](#)) preoccupied. Indeed, for the most part, the UGC policies surveyed in this project are far more enabling of UGC than copyright itself – for example, more than half of the game publishers surveyed permit streaming of the entirety of a game without restriction. Instead, the project explores another fundamental question about copyright incentives: who should reap the rewards for the creation of UGC?

Copyright will restrict most 'commercial' uses of a game, which are presumptively unfair when it comes to the application of a possible exception. Broadly construed, this can prohibit using something for the purposes of making a profit, which could apply to, e.g., revenue accrued through streaming. UGC policies take a much more nuanced approach to this concept, distinguishing between 'commercialisation' and 'monetisation'. Passive ad revenue, fan donations and partnership programmes with online platforms are all frequently permitted by game publishers, which in effect allow the creator of the UGC to earn some monetary compensation (i.e., profit). I would suggest that this allowance for monetisation of UGC acknowledges the unique value of the user's creativity by permitting routes for passive income to the user, whereas copyright's catch-all conceptualisation of commercialisation is, counterintuitively, more restrictive. 'Commercial' use is instead more narrowly construed by game publishers to mean use for the benefit of a company (e.g., using a game character in an advertisement), which is universally prohibited. There is therefore a strong industry-wide understanding of the user as a natural person – a player (*homo ludens*) – in a very different way to what copyright assumes.

Hostility towards another company's use of the game product is likewise reflected in game publishers' protection of their own corporate brand image. Indeed, there is a clear difference between the treatment of monetisation where the user is adding their

own transformative inputs to the interactive game world, versus the treatment of game assets which have a static value that can be used outwith it. Screenshots, for example, are puzzlingly restricted in UGC policies compared to streaming a video (despite, in principle, copyright considering them both to be a type of 'frame', or series thereof). But, if we can imagine that capturing a static picture of a game character can have significance to the branding of a game, this restriction is quite meaningful. Indeed, 'game photographer' is now a profession in itself, for which top game publishers regularly recruit to curate the image of their game to the outside world. Merchandise is likewise heavily restricted in UGC policies: so again, there is a difference between playing *Minecraft* infinitely and earning endless money from it, and taking a screenshot of the Enderman, printing it on a t-shirt, and selling it. Likewise, usage of game soundtracks outwith accompanying footage of the game is heavily restricted, and usually can't be used in unrelated content (e.g., in a product review). In combination, there is a suggestion that the industry treatment of UGC differs for products of interactive works, where a user can add their own meaning through the process of play (e.g., a stream), versus repackaging aspects of the brand and selling these outwith the game world (e.g., merchandise). For the former, there is no conflict with the sale of a primary product or substitution effect for experienced play versus observation, but for the latter - the static asset - there is both a threat to the brand, as well as potential routes for future markets. All use is not equal, in this respect.

In summary, copyright is, according to some theoretical paradigms, intended to incentivise precisely the type of creativity outlined in this blog; but it seems that UGC in the context of the game industry is thriving in spite of copyright, rather than because of it. In fact, the initial grant of copyright is only useful here insofar as it allows game rightsholders the discretion to forsake some of those rights to UGC creators through contract, which in turn reconfigures some economic rewards in favour of the 'user'. Whilst this realignment of rewards provokes copyright policy to force a re-interpretation of commerciality and fairness, it is fundamentally built on shaky foundations. In interrogating the question of *who* should be rewarded here, we are faced with the paradoxical fact that the very concept of UGC situates the user as an authorial creator, who is simultaneously treated both in copyright and contract as an excused allowance rather than the recipient of a lawful entitlement (the title, and exclusivity, of an author). Consequently, and in future, we might hope that copyright will wrangle more with the justifications behind this, rather foundational, demotion of a creative work to generated content.

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