

# Kluwer Copyright Blog

## Overkills and Wipes: Aligning copyright with the video game industry's needs: Part 2

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*This is a two-part post summarising the authors' findings from the report on [Copyright Infringement in the Video Game Industry](#) which was prepared by the authors for the World Intellectual Property Organization. Part 1 looked at the state of the art of the video game industry, as well as at cloning and cheating. This part analyses infringement and enforcement in the video game industry with respect to emulators, ROM files, livestreaming and Let's Play videos.*



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### Emulators and ROM files

Emulator programs enable players to run video games on hardware and/or software platforms other than those for which the games were originally designed. They are particularly important to players of so-called 'retro' games, as they allow such games to be played on contemporary devices. Emulator programs are typically used in conjunction with ROM files, which contain data extracted from physical copies of video games. Both emulator programs and ROM files are often created and made available by and to enthusiasts of retro games via retro-gaming websites, almost universally without the authorisation of the rightholders concerned. Until recently, these activities were largely ignored by rightholders as they were directed at older titles that were no longer being actively marketed. This has now changed to some extent following a resurgence of interest in retro games, with some major video game companies making older titles available for sale once again. For instance, Nintendo has recently extended the Switch Online service by adding over 60 retro game titles, including Super Mario 64, Mario Kart 64, Yoshi's Story or The Legend Of Zelda: Ocarina Of Time. This also bears significance for the purposes of video game preservation.

While there is some uncertainty around the creation and making available of emulator programs (given that copyright exceptions in multiple jurisdictions allow reverse-engineering of software and the gathering of interoperability information to some extent), the creation of a ROM file will

almost always amount to copyright infringement, as it involves the duplication of the entirety of the video game concerned. Because of this, console manufacturer and major publisher Nintendo has been successful in taking legal action under US law to compel the shutdown of ROM hosting websites (see [here](#) and [here](#)). However, it should be noted that Nintendo's aggressive enforcement strategy has resulted in [significant backlash](#) from their player base and the retro-gaming community at large.

### **Let's Play Videos and Livestreaming**

Historically, the video game industry had no objections to most types of user-generated content, because fan fiction, video mash-ups, memes or machinima have not been viewed as a serious threat to the industry's business model. To the contrary, it may have been viewed positively as promoting the games concerned to new audiences and increasing existing players' engagement. Recently, however, one type of user-generated content has caused some concern for the industry, namely Let's Play videos. These are videos that document the playthrough of a video game, usually with humorous or critical commentary on the part of the player. Let's Play videos are often monetised, typically through advertising revenue split between the creator of the video and the platform on which the video is hosted. This may also be a source of dissatisfaction for the original rightholder, who does not typically receive a share of these revenues.

Related to Let's Play videos is the practice of livestreaming, where players broadcast themselves playing a video game — typically with commentary — to a live audience online. A livestream shares certain similarities with a Let's Play video, but the latter features a higher degree of editing and curation while the former is an unedited, real-time performance. Internationally, the most popular livestreaming platform is [Twitch](#), with [Facebook Gaming](#) and [YouTube](#) coming in a distant second and third. These platforms provide streamers with opportunities for monetisation via platform advertisements, viewer subscriptions and donations. Livestreaming is potentially problematic for the same reasons as Let's Play videos: it gives audiences access to the game without requiring them to purchase it, and it is monetised in ways that do not involve the original rightholder.

Because Let's Play videos and livestreams incorporate all or most of a game, their creation will almost certainly implicate the reproduction rights in the game and/or its constituent works. Depending on the jurisdiction, uploading a Let's Play video or broadcasting a livestream to a hosting platform where it can be viewed by the general public potentially implicates the public performance right, the making available to the public right and/or the communication to the public right in these same works. In some jurisdictions, creators of Let's Play videos and livestreamers may be able to rely on copyright exceptions to justify their activities. This is more likely to be successful in jurisdictions that have a specific exception for user-generated content (such as Canada) or an open-ended system of copyright exceptions (such as fair use in the US) rather than a closed-list system of exceptions (such as EU Member States and the UK). Even in jurisdictions with an open-ended system of exceptions, however, creators will not always be successful in bringing Let's Play videos or livestreams within the scope of those exceptions, especially where they do not involve a significant degree of player input and creativity. In one case, the [Guangzhou High Court](#) held that a particular instance of livestreaming was not sufficiently transformative in the fair use sense as its value was still ultimately derived from the video game itself.

In most cases, therefore, rightholders will be able to make a strong case that Let's Play videos and livestreams amount to copyright infringement. Enforcement is also relatively straightforward: all the major video hosting and livestreaming platforms have notice and takedown policies which rightholders can rely upon to have unauthorised videos removed and unauthorised livestreams terminated. However, it should be borne in mind that Let's Play videos and livestreams are often effective marketing vehicles for video games and play an important role both in attracting new players and maintaining existing players' engagement. Rather than enforcement, it may be more beneficial for rightholders to implement policies that allow players to create Let's Play videos and engage in livestreaming provided they adhere to certain restrictions as to presentation and content (see, for instance, [here](#)). The clearer these policies are, the easier it will be for players to comply with them. This issue has been recently highlighted in a [study](#) by Amy Thomas, which examines UGC policies of video game creators in order to identify trends in regulating user creativity in this industry.

## Conclusion

As the case studies show, there is a range of responses which rightholders can adopt when it comes to potentially infringing uses and practices — from strict enforcement of their exclusive rights to tolerating, compromising on and even encouraging some of these practices. The analysis also makes it clear that not all of these uses and practices pose a commercial threat. The distribution of unauthorised ROMs for retro games, while a clear case of copyright infringement, is unlikely to have any effect on rightholders' revenues unless the rightholders are already marketing or planning to market the titles in question. Equally, while rightholders have a strong case of copyright infringement against players who create Let's Play videos or engage in livestreaming, as well as a straightforward route for having unauthorised videos and livestreams taken down, a more effective business strategy would be to work with these players. The case studies also show that copyright litigation may not always be the best option for cases that present a real threat to rightholders' revenues and commercial reputation. A well-drafted EULA remains rightholders' strongest bulwark against the providers of cheat software and players who use them, while other forms of intellectual property protection — and even non-legal solutions such as 'naming and shaming' — may well prove more effective for dealing with producers of game clones. It is advisable, therefore, for rightholders to have a multi-layered strategy instead of relying on copyright litigation alone. Finally, the importance of maintaining an honest reputation and a positive relationship with the player base should not be underestimated, and rightholders should bear in mind that an aggressive enforcement strategy may significantly undermine any goodwill they have built up with their player base.

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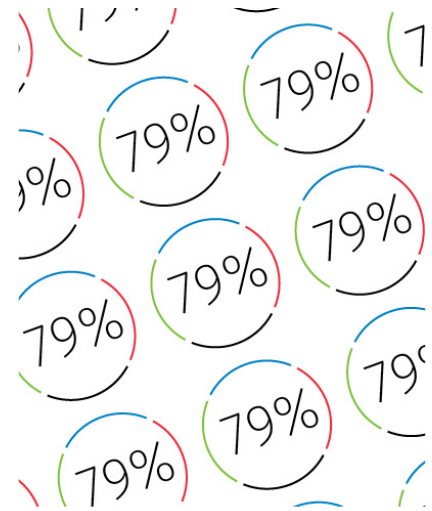
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This entry was posted on Wednesday, April 26th, 2023 at 8:03 am and is filed under [Communication \(right of\)](#), [Enforcement](#), [Infringement](#), [Technological measures](#)

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