

Chapter 28

Computer Games and Intellectual Property Law: Derivative Works, Copyright and Copyleft

Pedro Pina

ESTGOH – Polytechnic Institute of Coimbra, Portugal

ABSTRACT

Digital technology has been stressing copyright traditional balance between rightholders' and users' interests. In fact, it allows the move from a mere passive consumption role to a player-as-producer model that potentiates the creation of user-generated transformative uses.

Since, traditionally, copyright reserves full control over derivative works to the author of the original work, that branch of law may be (mis)used a tool for controlling users speech.

In the present chapter, the author briefly studies the particular tension between the current copyright paradigm, based on the dichotomy active creator – passive consumer, and the control over creative transformative usages of digital works in the field of computer games, such as mods or add-ons, and exposes some reactions that go from voluntary licensing schemes, such as copyleft licenses, to compulsory licenses.

INTRODUCTION

Computer games are one of the most impressive meeting points where technology, copyright law, participatory culture and proprietary rules have

been facing recently. In fact, considering that recent digital technology allows several usages of copyrighted works that give the consumer the power to leave a merely passive and consumptive role and to easily become a content creator, it is today relatively simple, not only for professional programmers, but also for game players

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to change the game's content, its characters and narrative. In this sense, digital technology promoted the move from what Salen and Zimmerman (2004) call a performative model to a player-as-producer paradigm that potentiates the creation of user-generated transformative uses, *i. e.*, "the use of existing expression as an input into the creative process, resulting in the creation of new expression that, while still embodying elements of the original work, is original in its own right" (Suzor, 2006, p. 1).

However, copyright was drawn under an analogical paradigm where the user was simply a passive consumer of works and where serious infringements could only be caused by editors or publishers with proper resources. Today, reality has dramatically changed and almost everyone connected to the internet can obtain software able to facilitate the creation or the adaptation of digital works. In the latter case, even if there isn't a commercial purpose behind the change, the unauthorized use of an intellectual work may break one of the core powers that traditionally copyright law grants the author: the power to exclusively explore all the usages of its creation, excluding others from using it without proper authorization and, normally, remuneration.

Consequently, in these cases of creative consumption, the recognition of exclusive exploitation rights may trump innovation, creativity and freedom of expression as transformative use and derivative works cannot be made unless the holder permits its creation and future exploitation.

The exposed legal solution has been facing criticism not only by some software developers but also by online electronic games players. In fact, in the first case, broader than the computer games context, adaptation and improvement of software can only be developed if (and in the terms) the holder wishes it, since he/she doesn't disclose the source code that is necessary to create adapted or derivative works. In the second case, the narrative, the scenarios and the characters constructed by players of interactive electronic games, particu-

larly of online role playing games, may affect some of the most important justifications for granting copyright and exclusive exploitation rights to the game's publisher, which are regarded to the fact that the work may be considered an extent of his/her personality or an award for his/her labour. In fact, as Baldrice (2007, p. 684) notes,

"while commercial entertainment software companies design and publishers release the initial game product, the end-users of the software are themselves often responsible for creation of additional content, which then contributes to, expands, and sometimes even eclipses the original game and its user experience".

In the present chapter, I intend to briefly study the particular tension between the current copyright paradigm, based on the dichotomy active creator – passive consumer, and the control over creative transformative usages of digital works in the field of computer games.

COPYRIGHT, COPYLEFT AND TRANSFORMATIVE USES OF SOFTWARE

It is undeniable that, beyond or through code, software, in general, and computer games, in particular, have a creative and cultural content. Furthermore, in the context of the knowledge economy, the information and communication technology (ICT) industrial sector has been growing, and digital creative contents have been recognized an increasing economic value.

One of the most relevant mechanisms that were created to protect creativity, originality and investments in the area was intellectual property law, which grants the holder strong exclusive rights to explore his/her work, excluding others from that without proper authorization and, normally, remuneration.

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