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Fundamentals of Property Rights

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Abstract

Within the past decade and the birth of Web 2.0, the lines between content creators and content consumers are getting thinner. Sites like Instagram, Youtube, Twitter, and more allow anyone to create content as well as give easier access to created content. The rise of User Generated Content that takes influence or direct samples of existing work has posed a problem for those wishing to control the rights to their intellectual property. The problem has arisen in music, videography, literature, video games and more. This paper will look specifically at the User Generated Content in video games.

User Generated Content in video games can be many things but the most prominent and well-known is modding. Modding is the modification of an existing game that adds or removes something from the original product. While in other forms of media, the fair use and copyright enforcement of User Generated content are strong it seems to be allowed in the gaming community. The early integration of mods in the gaming community and their continued use shows that even though the property rights of other media is in question, a common ground of fair use can be found. This paper will look at the history of modding games, the legality of the mods, what they add to the community, and why they are ultimately positive for the industry as a whole.

Who owns the Games within Games

From *Pong* to *Mario* to *Call of Duty* video games have come a long way. From a few pixels on a screen moving up and down to millions of lines of code, models with thousands of polygons, scores, and voice acting at the scale of animated feature films video games no longer play a supporting role in media but are a dominating force. For many years the gaming industry followed in the footsteps of its predecessors. The content was created by large companies at scale and physical copies were sold in stores. This all changed when the Internet allowed not only for the mass distribution of games at lower overhead but its ability to allow smaller creators to make waves. Games began to be created not only for sales, but as creative outlets and to test the limits of engines and software. Yet another type of content surged at the advent of the internet and game distributors such as Steam, User Generated Content (UGC). Games had once been a slightly ajar door and now that door, due to the internet, is wide open.

This paper will look at the factors that allowed games to have user generated content, how this content affects the property rights and intellectual property of creators, how these user generated contents affect the industry and ultimately show that user generated content is a key driving force in the development and future of video games.

In this paper, the creators, manufacturers, and distributors will collectively be called the producers. The people who play the games, create modifications, or people who are interested in the topic will be referred to as consumers. Any other generalizations on groups will be clarified in the contents of the paper.

User Generated Content, Modding, a short history

In an era of online media, the lines between content creator and consumer have blurred. Anyone with a camera, an idea, and the drive can make content and upload it to Youtube or Instagram in a matter of minutes, the only thing standing in their way is the speed of their internet connection. No longer does one have to study acting, computer science, cinematography or any other creative art to become an artist. In addition, the access to materials in creation is must greater. Creators post their content online for free and it is very easy for someone to take

that content and pass it as their own. While this is a problem and usually a complete violation of Intellectual property rights, the real points of contention are the content that takes influence or inspiration from existing content. This User Generated Content is causing legal scholars, content creators, and economists to scratch their heads to its place in the community. Is a song cover copyright infringement? Does a mashup of songs need to credit the original creator even though it only "samples" a song? Does a modification of a game go against the game's user agreements? "In the United States, the line between the type and level of transformation required for a copyrightable derivative work and that required to constitute fair use has not been drawn clearly. (Wong 1075)" The US and many other countries have tried to tackle this problem of UGC and ultimately have failed to find a solution. In order to look deeper into this question, this paper will look at the issue through the lens of video game modding.

Though not the first game ever created, Pong is possibly the most recognizable early video game. Created by Atari's Al Alcorn in 1972 the game was simple, two paddles moved on a y-axis to hit a ball back and forth on the screen (Kent). Everyone could understand it and everyone could play it. The game was the first for many and spurred many to look deeper into the hobby. For the next decade, video games existed primarily in arcades, groups of games in large cabinets. The cost of a system that was capable of running games was very high so systems were not very common in the home. And so the era of quarter collection and high scores was afoot. But with advances in technologies, the systems became more common for the average person to have.

Castle Smurfenstein, created in 1983, is widely accepted as the first "mod" of a video game (Sobkow 12). Mod, short for modification, "are alterations of, or additions to, pre-existing video games which are created by fans colloquially referred to as 'modders'(Sobkow 6)" These mods can be anything from changing the audio, the look of a player model, the size or font of the text on the screen, and even complete overhauls of the game's core mechanics. By taking the existing Nazis in *Castle Wolfenstein* and turning them into little blue Smurfs a new form of UGC was created in modding. Though this seems silly and unnecessary, the implications of the action caused the community of gamers to see the potential of their influence on the games that they loved.

Games were becoming less about the hardware and more about the code behind it. Early household computers like the Apple II and Commodore 64 allowed anyone with the knowhow to edit and change the game code. Game enthusiasts could take ownership of their favorite games by making them their own. Yet even with early modding in the ’80s, it wasn’t until 1997 when id Software released the source code to its most famous game, *DOOM,* that it became a craze (Kücklich).

Mods like *WorldCraft* allowed players to design and create their own levels in the already popular game. In a *Popular Science* article on the subject, David Kushner said, “[t]he Doom Editor Utility was a watershed in the evolution of the participatory culture of mod making. (Kücklich)” id Softwares saw this as an opportunity to drive community engagement in the next games and made sure the *Quake* and *Quake II* both included level editors allowing players to create within the games. This allowed the consumer to create new content for the game, adding new levels and new game features that even the game developers did not think of. The *Quake* series spawned many mods, but the most famous of them all was not free to play community made product but a commercial one.

The game was *Half-Life (1998)* and it was a huge hit on its own. It was created by Valve Software using elements of the engine behind the *Quake* franchises and allowed industry newcomers Mike Harrington and Gabe Newall to make a name for themselves. The game pushed the limits of first-person shooters, FPS, of the time, and its dystopian setting and story attracted many. It added new mechanics and ideas, making it quantifiably different from *Quake,* though it used parts of its engine. As influential as *Half-Life* was on its own, it was the modding community of the game that made Valve the superstar that it is today. By offering the engine and the assets to creators they enable many to create new game modes, new weapons, and even entirely new games, particularly in the game of *Counter Strike* (Kücklich).

Counter Strike, created in 1999 by Minh Le and other students, quickly became one of the most popular online games. Taking the engine, base code, assets, and other elements for the single-player shooter *Half-Life, Counter Strike* was a multiplayer experience that was quickly picked up by Valve itself and has been published in three iterations over the past 20 years. Today *Counter Strike* remains one of the top games online with millions of players and tournaments

with prize pools in the millions. The once mod has blossomed into one of the largest franchises in gaming history and is the crown jewel of the First Person Shooter.

Valve, following in the footsteps of id Softwares, saw the possibility behind modding and reshaped its business model to, “embrace modding as part of the gameplay experience made available to their fans. (Kücklich)” Yet Valve Softwares, the company that created the game that *Counter-Strike* was spawned from, bought the game from Le. They did not have to take this step, they were legally entitled to the derivative content that was created, but in order to pay respect to the brainchild behind their most successful mod, they chose too. What does that mean for the property rights of games modification? What are the legal ramifications of modding when it doesn’t go over as well as Valves’ experiences with it?

Games are by their nature a “co creative media” (Kücklich). Unlike watching a movie, listening to a song, or reading a book there is input into the game by the consumer. From pushing the joystick up in Pong moving one's paddle to the detailed character creation in modern role-playing games, the user's input into the game is needed. This led many in the industry, particularly on the production side, to become weary of the laws protecting their property.

Property Rights of Game Producers

“Video-game modifications, although sometimes economically beneficial and often encouraged by video-game producers, pose a multitude of legal and policy problems. (Fiordo 740)” Like other forms of media, there are protections from the infringement of intellectual property, IP. Yet unlike other media forms, there was a sense of co-creation with video games. While the law states one thing, the consumer may feel that they are entitled to something else as they feel intensely connected to the content.

Producers have the sole right of production, forbidding others from releasing copies of their IP. In addition, they have control over the creation and distribution of derivative works, i.e. sequels or other works that use many elements from the original game (Sobkow 10). Readings of these protections would put mods under the latter, as derivative works, since the mods used pre-existing assets and source code. This would mean that modders would need the permission

of the game creator to modify it in any way, however, this rarely happens. Most game companies allow their engines and assets to be used for mod creation so long as they remain free and issues do not arise until that line is crossed.

Look at the 1998 court case of *Micro Star v FormGen* for an example of this. *FormGen* who created the *Duke Nukem 3D* game included a map editor and builder with the release, like many other game companies at the time. Many fans made maps and modifications existed without legal action from the producer, even though they could take legal action if they felt so inclined. That was until *Micro Star,* a computer software distributor, took around 300 community created maps and burned them onto a CD for sale as *Nuke It*. Not only were they selling a third-party add-on to a game they had no legal claim over, but they also took maps created by the community, ones that were created with the intention of being free, and sold them for profit. The court ultimately ruled that this was copyright infringement and many thought that this settled the legality of modding, at least in the US. While this may have settled the arguments in the United States, it did not settle it internationally. Since the community of gamers exists on the internet and are of many nationalities this court ruling helps a select few (Sobkow 11,12).

The recent use of End User Licence Agreements, EULA, helps producers set the guidelines between mods and illegal content. These EULA vary from game to game, some promoting the creation of free mods while prohibiting one that costs money. Others, such as those of CD Projekt RED, allow for the use of fan-made content in advertising. Yet there are those companies that wish to hold a tighter grip on Intellectual Property. In the EULA of *Star Wars Galaxies: And Empire Divided,* paragraph 8 included the following lines: you hereby exclusively grant and irrevocably assign to our licensors and us all rights of any kind or nature throughout the universe to such Content (Sobkow 15). The use of EULAs has helped game companies craft their own property rights on their content, tailoring the use of their Intellectual Property, on an international scale. However, these EULAs are not devoid of criticism.

The take it or leave it agreements are a requirement before the game can even install onto one's device. EULAs like many “clickwrap (Sobkow 16)” agreements that are commonplace on most online transactions have been questioned by academics and governments in both the US and the EU. This means that even if the license agreement is broken, they are not guaranteed to

stand up in court, losing the producers both time and money. Their dense walls of text written in legalese would take hours to read one, and often a single single agrees to many of these a year.

The legal status of mods are constantly in flux and vary from game to game. Yet they are prominent in most games today. Producers allow them to persist for a number of reasons, one of which is the borderless and pseudo-anonymous state of modders. With most games being sold over the internet with no hard copies, an American producer can release a game to the whole world with one keystroke. Modders can work together from across the world, in countries with varying levels of Intellectual property protections. “The cost of litigation is often disproportionately high for reasons related to geographic distances, jurisdictional ambiguity or difficulty of identifying infringers**.** (Sobkow 13)” Even if a producer can find the offender making the illegal mod and even if they can prosecute them in the proper court of law, the rate of return on these litigations is very low. Mods, which are usually distributed for free, have a much lower market value than the video game itself. The likelihood of recovering any sort of monetary value is very low. Coupled with the likelihood of a producer finding the judgment that they want, mods are usually left alone.

In addition, producers know from first-hand experience that their communities are not afraid to speak out against what they see as restrictive laws or over-complicated contractual terms. Modders are not afraid to break the agreements that they make with producers, seeing their crusade for creativity as a noble one, beyond the constraining bounds of legality.

Possibly the biggest reason that producers allow mods to persist is the cohesion that modding creates in the community. Mods are often made by people who love the games. They want to add to the experience, tweak the problems that they see, and ultimately make the game better. Games like *Counter-Strike* and *Team Fortress* started as mods and became incredibly popular, being bought by the source code owner and turned into franchises of their own. Other games have been driven by mods created by the community. The recent Nintendo Release of *Mario Maker* is essentially a map editor sold as a stand alone game. The company saw the potential of allowing its consumer to create and share maps with one another and capitalized on it. Video Games are input based mediums and mods allow for greater levels of input into the game.

Minecraft is a great example of this. Created by a Swedish developer, Notch, the blocky style sandbox game is written in Java, a widely known computer language. The game gave access to all of its source files on the computer browser, allowing anyone with a text editor to mod the game. From the very beginning, people began to tweak and update the code to put more into the game. Over the 10 plus years of development and updates on the game, it is easy to see how modding has influenced the direction of the game. Many features that started as free mods, posted on discussion boards and forums were taken by the game's developers and introduced into the official release. The game, already driven by community engagement, was allowing its users to develop the game in the background. This is not to say that the team at Mojang, now owned and operated by Microsoft, didn't put in their own ideas and concepts, but many of the games now core mechanics were once mods. This incentivizes not only creation in the community for the sake of creation but to see the fruits of their labour put into the game they love.

What do mods give to the Gaming Industry

Beyond the history and the legality of game modifications, user generated content like mods can bring a lot of benefits to gaming companies. They help with the promotion of games, not only by the creation of new ones within the engine, ie *Counter-Strike*, but also to promote the community and relationship between producer and consumer. A producer that has a good reputation with the community of modders will often be looked upon more favorably than one that is harsh to modders.

Mods also help preserve the shelf life of older games. *Half-Life: Generation* was a rerelease of the game four years after the initial drop. It included some new game modes but its biggest selling points were its inclusion of two of its most successful mods, *Counter-Strike* and *Team Fortress Classic* (Kücklich). The game was resold at full price and outperformed bargain price rereleases. Gabe Newell, Valve Software CEO, said, "'A mod extends the shelf life of the product over time' (Kücklich)." Games have been around 60 USD for a long time. For many people that is an investment that they expect to be able to use for a long time. Mods, especially

ones that add new levels, new quests, or overhaul the whole game entirely, make an old game feel new and stretch the 60 dollar investment further.

Mods do not only add a sense of community within a game or give people a creative outlet, they have a direct monetary value on the games themselves. In a journal from Julian Kücklich titled Precarious Playbour: Modders and the Digital Games Industry, Kucklich explores the concepts that modders are not just enthusiasts about the game, but unpaid labour that is willing to work for nothing but satisfaction. “From a labour theory standpoint, it seems that modders add a considerable amount of value to commercial games (Kücklich)."

While most are not modding for the monetary value, the game producers reap many benefits at no cost of labour. With the advent of affordable digital technologies such as computers, the average person is able to create high quality content at a considerably low cost. The labour that the modders give is “[s]imultaneously voluntarily given and unwaged, enjoyed and exploited (Kücklich).” The organization of modders is providing free content with zero transaction costs. The work that modders put into their creations is labour towards a product that they don’t actually own. End User Licensing Agreements (EULA) often prohibit the creators of the mods from claiming them as their own, leaving the creators of the mods with no property rights over their creations. This means that game companies are receiving free updates and ideas from the community that they own at no cost, often requiring the modders themselves to purchase creation kits or assets.

The question arises however on how to classify the labour that the modders contribute to the game. Kücklich in his article creates a hybrid classification of “playbour”(Kücklich). The act of modding entertainment for one's own enjoyment or betterment falls in a grey area between leisure and work, play, and labour. The commercialization of leisure is not a new concept in capitalism, in fact some would argue that the capitalization of leisure activities lead to the development of the economic system that dominates the world.

To clarify this point further we must classify leisure. There are different types of leisure, some are productive and some are not (Kücklich). Hunting, fishing, woodworking and others are productive leisure, a product or good is harvested or created as a result. Video games, watching television, listening to music are unproductive labour, they bring enjoyment but do not produce

anything. While productive labour has existed, it was not until the availability of technology that allowed this productive labour to turn into a market.

Platforms like Esty, an internet site where people can sell their crafts, to websites like Sourceforge, a free online platform that lets users share programs, allow creators and "playbourers" to offer their services at a mass scale. Some would classify these "playbours" as freeriders, using the free platform of the internet or games to create products without providing anything back to the consumer. While by definition this may be true, in practice it is not. The word freerider has a distinctly negative connotation, that the people are taking away resources from others. But in the age of the internet there are more than enough resources to go around and many do not take anything but the knowledge of creation to make. In addition these "playbourer" are not degrading the integrity of the resource but rather enriching it.

Yet, modding is not always good. A common example of this is hacking. Hacking is a form of cheating in video games that allows players to gain an unfair advantage over their opponents in some way. Hacking is considered a mod, as it takes the source code, or a recreation of said code, to give players advantages. This mostly occurs in competitive games like MOBAs and FPSs but is not limited to that. They can be the ability to see players through walls, the ability to move quicker than normality possible, and even programs written to assist in aiming and movement. This is the main stage where producers step in and stop modifications. Many games have software that runs in the background to detect cheats. The severity of punishments for cheating varies from game to game, but bans are freely handed out by producers. Yet their programs cannot find all the cheaters or hackers.

In recent years this "playbour" has become an even bigger occurrence with the advent of cosmetic skins. *Counter-Strike Global Offensive (GS:GO)* is the latest iteration of the Valve franchise. Released in 2012 the game quickly found its place among others as a massive eSport, with multinational tournaments with prize pools in the millions of dollars. At launch, the game was averaging around 14 thousand players per month. Yet it was the introduction of cosmetic skins to in-game guns, cosmetics that gave no statistical advantage, that drove community involvement in the game. Users could create skins and upload them to Steam, the online store selling games owned by Valve. Users could vote on the skins that they liked and have the

possibility of them being added to the game. Like other games these skins cost real money, but unlike others and thanks to the dual ownership of *CS:GO* and Steam, they could be sold on the market place for Steam Credits, the equivalent of a gift card. Currently the value of the *CS:GO* skin market is in the billions of dollars. In 2015, after the release of skins and some updates to the game, *CS:GO* had an all-time high, with 823,649 players in a single day (Hardenstein 121). The game that started as a mod had become one of the largest games available.

Who owns the Games

Even though the modders and normal players may not hold the rights to the games, they vastly outnumber the producers, giving them more power than they realize. They are, as Kücklich calls them, a *Dispersed Multitude.* They exist on platforms provided by producers where they discuss the actions of said producers and the implications of EULA updates (Kücklich). They are able to influence the development of games through mods and interactions with producers. This puts the consumers in a powerful position, not necessarily with financial capital, but with social. Though it would be a logical conclusion that the game producers hold exclusive rights to the game, the reality is that those who play the games and create content for it feel a strong sense of attachment and ownership.

Producers act under the assumption that their EULAs settle all disputes pertaining to their Intellectual Property. They assume that they own all the content produced within their engines or that use their source code or assets, ie anything derivative. This, however, is not the sentiment around those in the community. They see modding as “open source” and disregard most of the rules set in place by EULAs. Gamers and modders alike push the limits of EULAs, claiming UGC as their own property, even when EULAs explicitly say differently. The norms that the community sets, one where, “Reworking someone else’s work is not regarded as theft but more as paying homage to a good job, as long as the author of the original is credited for his or her part. (Sobkow 21)”

The community is more afraid of ridicule from within than from legal actions from the outside. What is considered fair or right in the eyes of the gamer is less about what the EULA

states and more a subjective perception of the producer, the modification, and the community as a whole. The perception property rights of games have become split, between producers and consumers.

One way that producers have found to combat split in ownership perception is to lean into it. By creating a more cohesive community that follows the licensing agreements and regulations set into place by the producer, they will have fewer problems with breaches of their copyright.

One method is through outsourcing moderation to the community. Many games outsource their compliance with game rules and regulations, including those covered in the EULA. As much as there are those who will disregard every rule and possible violation of copyright there are those who help the producer enforce it. By delegating some of the enforcement of regulations to the community, producers can shape the community norms to better fit that of their EULAs. This applies not only to mods made in good faith that accidentally violate EULAs but with illegal mods like hacks. Producers will outsource the identification and even the judgment of cheaters and hackers to their communities. Games like CS:GO, whose Overwatch system allows trusted veteran players to review anonymous game footage and report their results directly to the game manufacturer. This extends the trust and community that is created between the producers and consumers.

As seen before, community members are more likely to react to social pressures than to formal punishment, so changing the norms of the community is a priority for many producers. In order to wrangle the sometimes wild and group think community, producers need to have a "strategy of 'good governance'(Sobkow 41)". A give and take is needed from the producers to create cohesion as a whole, not just within the gaming community. "Reciprocity motivates people to repay the actions of others with like actions–value received repaid with value given, kindness with kindness, cooperation with cooperation, and non-cooperation with retaliation. The perception of fair treatment of fans inspires fair treatment in return (Sobkow 42)." The community of gamers feels like they are the custodians of the property, even though they do not own it. The enforcement of Intellectual property is important not only to the creators of the

games but to the modders. With so much involvement from both producer and consumer, the sense of attachment to this medium of entertainment is strong.

Conclusion

Like other forms of entertainment and media property rights are granted to encourage competition and innovation. In an attempt not to stifle innovation peoples Intellectual property is protected, and Video games are no exception. They are protected from the copying of their property and have the rights on derivations of said property. Yet, modding video games do not fit so easily into the puzzle. Yes by definition modding takes existing property and changes it, something that usually would not be allowed in other property rights issues. It is derivative of the parent material, but it does so much more. It has the ability to create cohesion in a community based around a commodity. It is able to provide free labour and promotion for the existing property. Modding takes the preexisting product and expands it in ways that others may never have thought to do. It exists in a legal grey area with support from producers and the community as a whole. The organizations and the institutions both support this apparent violation of property rights for the benefit of both, free content and publicity for the publishers and leisure and creative outlets for the modders.

Modding has a long history in gaming. From the first with *Castle Smurfenstein* to modern adaptations of mods being some of the biggest games. Modding and other user generated content, though tricky to handle in terms of property rights, plays a major role in the future of gaming. As the modding community, “move[s] toward the center of the game industry', (Kushner, n.d.), it is becoming harder for the industry to uphold the claim that modding is merely a marginal activity that has no economic implications. (Kücklich)” Innovation in many games comes directly from modding. Pushing engines to their limits and adding user generated content is the driving force behind the progress of the industry. The battle between producer and consumer will continue on who has the right to regulate and change the property, but this battle will ultimately bring new enthusiastic people into the community. Games will continue to be tampered with, with or without the consent of the creator. However, if the two come together like

many companies have with their communities better games, better mods, and a more cohesive community is ahead.

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