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Thirty-Five Years Without Player Rights in Gameplay: Is a New Challenger Approaching?

By Ryan Fairchild†

Introduction

The fundamental legal issue underlying the esports industry is copyright. Under federal statute, protection for a copyright is provided to “original works of authorship fixed in any tangible medium of expression.”¹ The clearest original works within esports are the video games themselves. Publishers own the copyrights in those video games and therefore control the outward (or downward) flow of rights from the original copyrights in the games. That flow of rights also largely and presently correlates with the flow of money in esports. Any party—a league, tournament organizer, sponsor, content producer, streamer, player—who wants to use video game content will only be able to do so under certain circumstances, typically either by (a) doing so pursuant to an End-User License Agreement (“EULA”), if the EULA allows for such use, (b) paying the publisher for a license to use that content, or (c) risking a cease-and-desist or other legal action.²

This article examines a theory of player rights in video gameplay. If esports players and video game influencers were to possess rights in their gameplay of a video game, teams, content producers, sponsors, and other similarly situated stakeholders would have to pay not just video game publishers for a license to use the video game, but also players and influencers for a license to use their gameplay. Such rights would also diminish current risks players face. Indeed, the current dynamic in esports is for teams to acquire a license from players for rights to player content, regardless of whether players have such rights.³ Teams also typically require players to indemnify the team in the event of third-party suits (see, e.g., by a publisher who wants to enforce its

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¹ 17 U.S.C. § 102(a). See also *infra* note 13.

² Sometimes a publisher “tolerates” otherwise infringing use. See, e.g., Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617 (2008) (“‘Tolerated use’ is a term that refers to the contemporary spread of technically infringing, but nonetheless tolerated, use of copyrighted works.”). But tolerated infringement can quickly turn to intolerable infringement, in which case the infringer should expect a cease-and-desist letter and possibly other legal action.

³ The author has worked on dozens, if not hundreds of player deals.

copyrights). If players were to acquire autochthonous rights in their gameplay, those risks would abate.⁴

While courts to date have effectively held that video game players have no copyrights in their gameplay, those decisions derive from games like *Pac-Man* and *Galaxian*, which bear little resemblance to contemporary games. With the rise of increasing video game complexity, more sophisticated play, and new judicial tests involving copyrights in software output, a legal window may be opening for a player or influencer to challenge old precedent.

I. *Midway Manufacturing* and Its Progeny Presently Preclude Player Performance Rights in Gameplay

The year was 1983 and the United States Court of Appeals for the Seventh Circuit was dealing with two questions of first impression: (1) did copyright law protect a video game, and (2) could a player of a video game create a new, copyrightable work by playing the video game?⁵ Midway Manufacturing Company, creator of the now-iconic titles *Pac-Man* and *Galaxian*, brought suit against Artic International, Inc. According to Midway, Artic had infringed *Galaxian* by producing a hardware modification that sped up *Galaxian*'s gameplay and sounds.⁶ Artic had also allegedly infringed Midway's rights in *Pac-Man* by creating a nearly identical game with the highly original title of "Puckman."⁷

While Artic's actions might strike us now as fairly clear examples of copyright infringement, courts in 1983 were just beginning to consider whether video games fell under the definition of an "audiovisual work" under Section 101 of the 1976 Copyright Act.⁸ At that time, the clear applications for what constituted an "audiovisual work" were film and television. But as the court in *Midway* objectively noted, video games are different from film and television. "[E]ach time a video game is played, a different sequence of images appears on the screen of the video game machine—assuming the game is not played

⁴ Some might argue that publishers have little to no incentive to punish players for playing the publishers' games without rights. That may be the present reality, but that may change. Furthermore, as attorneys, we should always be concerned about our clients' liability, even if only possible liability.

⁵ See *Midway Mfg. Co. v. Artic Int'l, Inc.*, 704 F.2d 1009, 1011–12 (7th Cir. 1983).

⁶ *Id.*

⁷ *Id.* at 1011.

⁸ Audiovisual works are defined under Section 101 of the 1976 Copyright Act as works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objections, such as films or tapes, in which the works are embodied.

17 U.S.C. § 101.

exactly the same way each time.”⁹ Notwithstanding that difference, the Seventh Circuit Court of Appeals held that video games were “audiovisual works” under the Copyright Act, relying on Congress’s initial intention for a broad reading of the Act.¹⁰

A second question remained: does a player of a video game create a new copyrightable work by merely playing the game?¹¹ The player could change what happened on the screen by moving a joystick, which the court said could be “a little like arranging words in a dictionary into sentences or paints on a palette into a painting.”¹² But was playing a video game sufficiently similar to writing or painting so that each performance of a video game could be considered the work of the player instead of the game’s creator?¹³ The court answered no: “Playing a video game is more like changing channels on a television than it is like writing a novel or painting a picture.”¹⁴ At that time, because of the static nature of the map, the camera view, the options of play, and so forth, the player could not

create any sequence he wants out of the images stored on the game’s circuit boards. The most he can do is choose one of the limited number of sequences the game allows him to choose. He is unlike a writer or a painter because the video game in effect writes the sentences and paints the painting for him; he merely chooses one of the sentences stored in its memory, one of the paints stored in its collection.¹⁵

Those sentences sum up the status of a player’s performance rights in video game play for the last thirty-five years.

The holding in *Midway Manufacturing* was reaffirmed, and in some ways expanded, over the following decades. In *Red Baron-Franklin*

⁹ *Midway Mfg.*, 704 F.2d at 1011.

¹⁰ *Id.*

¹¹ *Id.* This question is, or at least should be, of particular interest to esports players.

¹² *Id.*

¹³ The primordial requirement of copyrightability is originality. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). But the required amount of originality is quite low. *Id.* (“Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, no matter how crude, humble or obvious it might be.” (internal quotation marks and citations omitted)). For protection under the Copyright Act, works must be both original and “fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. § 102. Given the low threshold required for originality, the current failure of courts to find copyrightability in gameplay is surprising.

¹⁴ *Id.* at 1012.

¹⁵ *Id.*

Park, Inc. v. Taito Corp., 883 F.2d 275 (4th Cir. 1989), the Fourth Circuit Court of Appeals held that playing a video game in an arcade constituted a public performance under Section 101 of the Copyright Act.¹⁶ In that case, Red Baron operated arcades with various video games, including the game Double Dragon.¹⁷ Taito, the creator of Double Dragon, had registered the game for copyright in the United States. Taito argued its rights in Double Dragon included rights of distribution and public performance, part of the typical copyright bundle under Section 101. Red Baron had acquired grey market copies of Double Dragon and had not obtained a license or other permission from Taito. The district court had held that the first sale doctrine extinguished “all rights [Taito] had under the copyright laws, including the right of public performance, so that Red Baron did not infringe.”¹⁸ In reversing the district court, the Fourth Circuit reasoned that, while the first sale doctrine precluded infringement based on the right of distribution under copyright law, the doctrine did not remove any other rights under copyright law, including the right of public performance.¹⁹ Red Baron had therefore infringed Taito’s copyright because it had not obtained a license to publicly perform the game.²⁰

Later, in a case involving Valve, creator of Dota 2 and Counterstrike: Global Offensive, the United States District Court for the Western District of Washington cited *Red Baron* favorably in rejecting a defendant’s argument that “playing video games in public is not a public performance.”²¹ The court in *Valve* also contrasted *Red Baron* with the decision from the Ninth Circuit Court of Appeals in *Allen v. Academic Games League of America, Inc.*, 89 F.3d 614 (9th Cir. 1996). In *Allen*, the Ninth Circuit held that playing board games in public did not constitute a “public performance.”²² Despite that holding, the end result

¹⁶ *Id.* at 279 (concluding both that the “operation of a video game constitutes a performance” under Section 101 and that, because “video arcades are open to the public,” playing Double Dragon at an arcade was a public performance). *Red Baron* built upon the foundation established by *Midway Manufacturing*, noting that the Fourth Circuit had agreed previously with the Seventh Circuit (in *Midway Manufacturing*) that “video games are copyrightable as audiovisual works.” *Id.* at 278. From there, the Fourth Circuit simply applied the plain language of 17 U.S.C. § 101—that to perform a work “publicly” meant to perform it “at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered”—which applied to playing a video game in an arcade open to the public. *Id.* at 278–79.

¹⁷ *Id.* at 277.

¹⁸ *Id.* at 277–78.

¹⁹ *Id.* at 280–81.

²⁰ *Id.* at 281.

²¹ See *Valve Corp. v. Sierra Ent. Inc.*, 431 F. Supp. 2d 1091, 1097 (W.D. Wash. 2004).

²² See *id.* (citing *Allen v. Academic Games League of Am., Inc.*, 89 F.3d 614 (9th Cir. 1996)). The Ninth Circuit’s decision appears to be based in large part on policy:

of *Red Baron* and its progeny is that publishers also hold rights in the public performance of their games, to the exclusion of players.

II. A New Challenger Approaches? New Cases Provide a Window for Player Rights

Only in the last year have decisions emerged that provide the groundwork for pushing back on *Midway Manufacturing* and its thirty-five-year preclusion of players developing rights in their gameplay.

First, in 2018, Epic Games sued various creators of software cheats for its game, Fortnite.²³ Though only considering the matter on default judgment, the court in *Epic Games* openly questioned why the logic of *Allen* should not apply to video games as well.²⁴ The Ninth Circuit in *Allen* had reasoned that the term “play,” which had traditionally applied to playing music or records, had

not been extended to the playing of games. To do so would mean interpreting the Copyright Act in a manner that would allow the owner of a copyright in a game to control when and where purchasers of games may play the games and this court will not place such an undue restraint on consumers.²⁵

Despite the compelling logic of *Allen*, the court in *Epic Games* declined to consider whether to apply that same logic to video games, noting that it lacked full briefing on the matter because it was considering only a motion for default judgment.²⁶

The term “play” [as defined in Section 101 of the Copyright Act] has not been extended to the playing of games. To do so would mean interpreting the Copyright Act in a manner that would allow the owner of a copyright in a game to control when and where purchasers of games may play the games and this court will not place such an undue restraint on consumers.

Whether privately in one’s home or publicly in a park, it is understood that games are meant to be “played.”

Allen, 89 F.3d at 616–17. Perhaps the court in *Allen* would have come out differently if the players of the board games possessed merely a license, as is now often the case with video games, instead of “us[ing] their own games, purchased from Allen.” *Id.*

²³ See *Epic Games, Inc. v. Mendes*, No. 17-CV-06223-LB, 2018 WL 2926086, at *1 (N.D. Cal. June 12, 2018).

²⁴ *Id.* at *9 (“The concerns the *Allen* court had about giving copyright owners too much control over when and where purchasers of their games can play them might logically apply to video games too. Are video games different?”).

²⁵ 89 F.3d at 616.

²⁶ 2018 WL 2926086, at *9 (“[T]he court declines to rule on whether posting a video on YouTube of gameplay from a video game does or does not infringe upon a copyright holder’s 17 U.S.C. § 106(4) rights.”).

Second is the case of *Rearden LLC v. Walt Disney Company*,²⁷ which examined copyright issues surrounding the software used to create the lifelike depictions of Grand Moff Tarkin and Princess Leia in Star Wars and other similar motion capture animations of human faces. In that case, the United States District Court for the Northern District of California reasserted a test for computer programs in a way that provides a potential window for players to gain rights in their gameplay. Disney had used the MOVA Contour Reality Capture Program—owned by Rearden—to create the motion capture animation for a number of films including *Beauty and the Beast*, *Deadpool*, *Terminator*, and others.²⁸

Rearden brought two principal claims against Disney. The first was that Disney violated Rearden’s patent for the MOVA software by using the software without authorization via a third-party contractor. But the second claim was novel: Rearden argued that Disney had infringed Rearden’s copyright *in the output from the MOVA software*. In other words, Rearden was arguing that it owned whatever audiovisual images Disney had created with the MOVA software.²⁹ The parallel question in esports is whether the owner of software (a game publisher) can claim copyright in the output from the software (the player’s gameplay).

Rearden’s arguments and the court’s rebuttal both focused on a case called *Torah Soft v. Drosnin*.³⁰ The *Rearden* court, in explaining *Torah Soft* and rejecting Rearden’s copyright claim, stated that “[a]ssuming that a copyright in a computer program may extend to its output, Rearden must adequately plead that the MOVA Contour program does the ‘lion’s share’ of the creating and that the end-user’s role in creating the final product is ‘marginal.’”³¹ The court focused on the film actor’s role in creating the output from the MOVA software:

Here, unlike in *Torah Soft*, where the user merely inputs a word into the program, MOVA Contour’s user inputs a two-dimensional camera capture that may range from Dan Stevens’[s] ‘facial expressions of all the scenes we had done on previous days’ to the ‘subtle and dynamic motions performed by the actor [Josh Brolin playing Thanos in Guardians of the Galaxy [sic]]’ to ‘Brad Pitt’s 44-year-old-face.’³²

Because the creative input was deriving from the actor—or in the esports comparison, the player—and not from the program itself, Rearden could not claim copyright in the MOVA software’s output.³³ Indeed, while

²⁷ 293 F. Supp. 3d 963 (N.D. Cal. 2018).

²⁸ *Id.* at 967–69.

²⁹ *See id.* at 969–70.

³⁰ 136 F. Supp. 2d 276 (S.D.N.Y. 2001)

³¹ *Rearden*, 293 F. Supp. 3d at 970 (quoting *Torah Soft*, 136 F. Supp. 2d at 283).

³² *Id.* at 971.

³³ *Id.*

Rearden tried to emphasize the work done by the MOVA software, the court noted that Rearden “repeatedly acknowledge[d] the actors’ contributions throughout the complaints.”³⁴

Conclusion

The holding in *Rearden*, echoing *Torah Soft*, provides a potential test in a new context that could help to displace *Midway Manufacturing* and its thirty-five-year prohibition on player gameplay copyrights. Long gone are the days of *Pac-Man* and its static level design and its comparison to changing channels on a television. Now, players control camera angles and placement. They engage in complex multiplayer matches while making unending split-second strategic decisions, often on three-dimensional maps. The skill level and, yes, even artistry of their play attracts millions of viewers.³⁵ At this point, players do the “lion’s share” of creating the output that is their gameplay. Maybe all that is needed to overturn thirty-five-year-old precedent—and to reap the corresponding economic rewards—is a new challenger.³⁶

³⁴ *Id.*

³⁵ Bolstering this position is the fact that some foreign esports players are now being granted EB-1A visas. Matt Best, *Huhi Becomes Permanent North American Resident*, VPEsports (July 15, 2018), <https://www.vpesports.com/leagueoflegends/clg-huhi-greencard-visa-north-american-resident>. Obtaining an EB-1A visa requires demonstrating “extraordinary ability in the sciences, arts, education, business, or athletics through sustained national or international acclaim.” *Employment-Based Immigration: First Preference EB-1*, U.S. Citizenship and Immigration Services, <https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-first-preference-eb-1> (last visited April 25, 2019).

³⁶ A lingering question is whether a game publisher can recapture any gameplay rights via the terms of use included as part of licensing a game. While this article and its author are not as concerned about a player’s rights in gameplay vis-à-vis the publishers (as opposed to a team, tournament organizer, content producer, sponsor, etc.), terms of use or terms of service *may* constitute a contract of adhesion depending on how they are worded. See, e.g., *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 606 (E.D. Pa. 2007) (“The TOS are a contract of adhesion. Linden presents the TOS on a take-it-or-leave-it basis. A potential participant can either click ‘assent’ to the TOS, and then gain entrance to Second Life’s virtual world, or refuse assent and be denied access. Linden also clearly has superior bargaining strength over Bragg. Although Bragg is an experienced attorney, who believes he is expert enough to comment on numerous industry standards and the ‘rights’ or participants in virtual worlds . . . he was never presented with an opportunity to use his experience and lawyering skills to negotiate terms different from the TOS that Linden offered.”); see also *Evans v. Linden Research, Inc.*, 763 F. Supp. 2d 735, 740–42 (E.D. Pa. 2011) (contrasting the facts of *Bragg* in finding that changes to Linden’s terms of service no longer made the arbitration clause unconscionable).

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