COPYRIGHT AND THE PLAYER

CREATe Working Paper 2023/06

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This working paper is a pre-peer reviewed draft of an upcoming chapter in the Research Handbook of Interactive Entertainment Law (Elgar)

Abstract

This paper explores the ontological construction of *the player* in copyright law. The player has a central role in interactive entertainment; their presence is both invited, and necessary – one must play a game to experience it. Yet, play is transformed into an engagement with copyright law through the many underlying copyrights of the primary game creators. The player is now a user of a proprietary work.

This is assumed self-evident, by design, but the user is both recreational and re-creational. Does the player make decisions in a game which are original creative expressions, or are they merely following the rules of a system to its logical conclusion (playing a game)? The paper reviews existing copyright doctrine which construct the player as either an author (or performer) or a user. It focusses on the value playing a game itself, rather than any ancillary or spin-off game products.

The paper forwards a normative argument which emphasises understanding play as existing outwith this reductive production consumption binary: rather, we should try to understand play, and by extension the player, on their own terms. Those terms may exist outwith the boundaries of copyright. Debate has undercurrents of a strive towards legitimation – the award of a proprietary right or the endorsement by the law of the excepted activities. Play is not necessarily either of these things – but we should also resist the argument that everything worthwhile is productive.

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Introduction

The player has a central role in interactive entertainment law. Their use of interactive objects is both necessary and invited: to play a game is an inevitable result of following its rules as designed. Certainly, play has become more purposeful in recent years as new and innovative uses of game content have forced questions of economic, if not commercial interests on the player's behalf. Playing games, whether through live streaming or pre-record edited gameplay videos (collectively referred to in this paper as 'playthroughs'),[1] is now an activity of considerable commercial value.

Whilst play is certainly capable of generating value, this value is fundamentally underlain with a proprietary right: namely the copyright belonging to the owner of the game being played. On the face of it, the player and the game have a symbiotic relationship, neither complete without the other. But copyright inevitably categorises and makes a distinction between the *owner of a proprietary work*, and the *entity that interacts with it*; the former has long formed part of the copyright acumen, but the placement of the player is more contentious.

Broadly, this paper asks an ontological question about *what the player is* in copyright law.[2] The review of existing doctrine explores two possibilities: that the player is an author (or performer); or a user. The paper also emphasises the importance of understanding play as existing outwith this reductive production consumption binary: rather, we should try to understand play, and by extension the player, on their own terms. Indeed, whilst there are many types of game-based activities which can generate new revenue streams separate from sales of the primary game product, such as the creation of merchandise, mods, fan creations etc.,[3] this paper will more specifically focus on *the value of playing a game itself*, rather than ancillary or spin-off game products. Importantly, this paper takes a holistic appreciation of what can be considered 'play', or a 'game' and is not limited to *video* games *per se*, albeit they tend to be the most litigated type of game.

The value of play

Whilst often considered a perplexing phenomena of the digital natives, 'watching other people play games' is not new: rather, it is quite ancient, if ones considers sport as a form of ritualised,

[1] This distinction is given more nuance in Dimita, G., Harn Lee, Y., and Macdonald, M. (2022) *Copyright Infringement in the Video Game Industry*, WIPO/ACE/15/4.
[2] See reverse approach in respect of the author in Craig, C.J. and Kerr, I.R. (2021) The Death of the AI Author. *Ottawa Law Review*, 52(1) 33-86.
[3] Thomas, A. (2023) Merit and Monetisation: A study of video game user-generated content policies. *Internet Policy Review*, 12(1).

competitive play.[4] Board games date back centuries, with the earliest formalised and structured game tournaments becoming public spectacles in 1800s. For several decades, games like snooker, darts, and indeed, game shows, have been broadcast for wide public consumption. The arcade, as a site for public spectacle, has also been a proxy for this phenomena throughout the late 1900s.

It is only in more recent years that the contemporary version of 'watching other people play games' has perplexed and received popular scrutiny, apparently begging its justification and explanation.[5] In the early 00s, the rise of networked internet technologies made it possible for widespread communications of bandwidth-intensive playthroughs of video games via online platforms. This also exposed the player to the gaze of a new 'type' of user, one invested in their personality or skillset, giving rise to the niche practice of 'shoutcasting'.[6] As their ancillary development suggests, since its origin, watching a contemporary playthrough of a game has rarely been about the game in isolation, but rather has also been inherently linked to the qualities of the person playing it: the player has thus always been a central figure to this form of interactive entertainment.

This interlinkage between gaming and the player has resulted in the rise of the gaming personality, those players whose livelihood (in whole or in part) is supported by playing a game for the enjoyment of others. In 2021 alone, over 250 million game-related videos, and 90 million hours of livestreams, were uploaded to YouTube.[7] Many of these personalities are supported financially through the goodwill of their viewers, whether by their time or voluntary monetary contributions. This is mainly facilitated through systematised revenue generation mechanisms on online platforms, including subscriptions, payment models (e.g., Patreon), ad revenue monetisation, fan donations, or sponsorships. In combination, these can result in considerable commercial value, and for the fortunate few, it is possible to make a lucrative living from the profession of playing games.[8] The viewer can accompany the player through lengthier, multi-part, narrative led games (e.g., *The Last of Us*, *Dungeons and Dragons*), or shorter, repetitive,

[4] It is outwith the remit of this paper to discuss the full extent of the parallels between game and sport – see Thomas, A. (2020) A question of (e)Sports: an answer from copyright*. Journal of Intellectual Property Law and Practice*, 15(12), 960 – 975.

[5] See BBC (2020) New research suggests playing video games has lots of benefits. (BBC Newsround, 12 August 2020) < https://www.bbc.co.uk/newsround/53740172> accessed 24 May 2023.

[6] The concept is a hybrid derived from sportscasting, and named after the Shoutcast service, an early prototype of streaming media.

[7] Wyatt, R. (2021). Upping our gaming [Blog]. *YouTube Official Blog*. <https://blog.youtube/inside-youtube/innovation-series-gaming/> accessed: 25 May 2023.

[8] Saab, H. (2021). 10 most popular gaming YouTubers, ranked by subscribers. *Screen Rant*. <https://screenrant.com/most-popular-gaming-youtubers-ranked-by-subscribers/> accessed: 25 May 2023.

often competitive, plays (e.g., *The Fall Guys*, *Among Us*). Playthroughs of board games or tabletop roleplaying games also accelerated in the 00s. Gaming teams like Critical Role, a table-top roleplaying group, are amongst the most highly profitable online channels, with almost 20,000 viewers per day on Twitch alone.[9] Nonetheless, as with most 'winner-takes-all' cultural markets,[10] these experiences are not typical: it is estimated that almost 95% of streams only have between 0 – 5 concurrent viewers at any given time.[11]

Indeed, excluding eSports players and speedrunners, many of the best paid players are not highly skilled, nor are they esteemed critics or influencers (though their opinion may be influential); instead, most of the value they contribute is light-hearted entertainment, usually, but not exclusively, humorous in nature. The viewers interaction with the player may be more personal, utilising responsive chat functions, or even joining the player in an online, networked game.

However, whilst much of the value extracted from 'watching other people play games' comes from the player themselves, this is an activity which is unavoidably heavily reliant on proprietary game content belonging to the game's owner. The outputs of the game itself are a focal point of the playthrough, indispensable and interrelated to watching the player's interaction and response to it. Despite this symbiotic relationship, the treatment of the player and the game have different legal implications, precisely because of this underlying proprietary interest.

Copyright and games

To understand the legal treatment of the player, we first need to understand the legal treatment of the game. Play, to the extent it is a personal activity typically undertaken for leisure or frivolity, has historically been outwith the boundaries of copyright, being a law mostly concerned with the regulation of literary and artistic works in the public, rather than private, sphere. Impressing the question of copyright onto the player has been stimulated for two reasons. First, unlike the older forms of observed play, modern gaming is, more often than not, underlain with a proprietary product: namely, the game itself. Unlike traditional sports or ancient board or street games, the games of today are usually *owned*. The result is that the mere act of playing or interacting with a game has implications for copyright owners and its enforcement. Second, as play has become

[9] Galloway, R. (2021) Twitch data reportedly leaks online including source code, streamer earnings, encrypted passwords, and more. (Dot eSports) <https://dotesports.com/streaming/news/twitch-data-reportedly-leaks-online-including-source-code-streamer-earnings-encrypted-passwords-and-more?utm_source=twitter&utm_medium=social&utm_campaign=dottwt> accessed: 25 May 2023.

[10] See e.g., Thomas, A., Battisti, M., and Kretschmer, M. (2022) Authors' Earnings and Contracts 2022. A report commissioned by the Authors' Licensing and Collecting Society.

[11] Hernandez, P. (2018) The Twitch Streamers who spend years broadcasting to no one. <https://www.theverge.com/2018/7/16/17569520/twitch-streamers-zero-viewers-motivation-community> accessed: 24 May 2023.

professionalised and monetised, this new quasi-commercial dimension makes transparent the value of play itself. Who, in short, deserves a reward, if any, for playing? Whose creativity is more, or less deserving? The creator who makes the play possible (the game author/owner) or the player themselves (who dynamically inputs the commands that generate the output of play)?

The copyright interest of the game creator has compounded over time, despite initial scepticisms.[12] Games are now understood as a copyright intensive, complex multi-media[13] which can be protectable either as standalone subject matter, severed into their composite parts (e.g., the underlying works comprising the code and audiovisual outputs),[14] or possibly a combination of both.[15] In theory, using even very small amounts of game content could be considered qualitatively substantial, thus triggering potential enforcement proceedings. Nonetheless, the playthroughs considered here, which include the majority, or entirety, of the playable content of a game will be considered a *prima facie* substantial use of a copyrighted work. By way of example, narrative-led games can take up to 200 hours to complete, whereas many non-linear games make thousands of gameplay hours possible (e.g., multiplayer online titles such as *World of Warcraft*, or *Dungeons and Dragons*). Even where the player does not demonstrate the totality of a work in every permutation in a single session, the quality *and* quantity of copyright work used is substantial in a playthrough. This has implications for the rights of reproduction, public performance, making available and/or communication to the public[16] of the video game and/or its constituent parts.[17]

It should also be noted that copyright is severable and many aspects of a player's contribution to a playthrough may have separate copyrights in themselves, distinct from the capture of the game outputs. This commonly includes the screen capture of the players face, their commentary, and accompanying graphics or audio clips. For the most part, these separate contributions are overlaid against the focal point of a playthrough, which is the audiovisual game content itself. However, whilst copyright is severable, this does not detract from the fact, nor

[12] Being at least part software, the copyrightability of games pre-recognition of computer programmes within the copyright corpus would be uncertain (in the US, protectability of computer programmes was implemented into s101 17 USC in 1980 and in the EU, through the Computer Programs Directive initially made in 1991).
[13] Aplin T. (2005) *Copyright Law in the Digital Society: The Challenges of Multimedia* (Hart Publishing)
[14] Ramos A, Rodriguez A, Lopez L, Abrams S, and Meng T, (2013) *The Legal Status of Video Games: Comparative Analysis in National Approaches*. WIPO Report.
[15] Case C-355/12 *Nintendo Co Ltd v PC Box SRL* [2014] EU:C:2014:25.
[16] Noting that some limitations to communication to the public of the 'essential elements' of a user interface may be excluded from this ambit - see Case C-393/09 *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvo kultury* [2010] EU:C:2010:816 at para 57.
[17] Dimita, G., Harn Lee, Y., and Macdonald, M. (2022) *Copyright Infringement in the Video Game Industry*, WIPO/ACE/15/4.

defend, the use of that game content – it has not become 'unrecognisable' from its original form and is instead a substantial permutation of a game's possibilities.[18] Perhaps more importantly however, none of these supplementary forms of creativity are *meaningful* when divorced from the play of the game: the player, the play, and the display of the game are intrinsically linked. A playthrough, when considered holistically, relies on a symbiotic relationship and presence of both the player and the game: the latter is a vessel, or medium, through which the player must interact.

In sum, there is no doubt that copyright is implicated in the act of playing a proprietary game. But just because copyright is implicated does not mean that it is enforced: importantly, the trigger point of infringement of copyright gives rightsholders a *choice* about how their works should be regulated but does not result in an automatic penalty. Indeed, many rightsholders will find that observed play is an effective form of indirect marketing and brand management, potentially bringing obscure games to populace (e.g., *Among Us* and *Rocket League*), or resurrecting older titles through new modes of play (e.g., *Dungeons and Dragons*). Others take a more conservative approach by re-routing monetised content to apportion an 'appropriate amount' for the player's contribution (see e.g., ex-Nintendo Creators Program). As no one size fits all, game rightsholders typically modify or enforce their statutory rights through contract, rather than relying on the default law of copyright.[19]

The lack of reliance on copyright law in this community reveals a bigger, foundational tension where play is concerned, namely in relation to copyright's ability to regulate and categorise interactive works where the value is extracted from its use. Traditionally, copyright's view of the world is rather simplistic: it is a world that assumes a binary between those who create and those who consume, namely the author, and the user.[20] This binary also implies an implicit hierarchy between those who make (the recipient of a legal right) and those who take. The player is disruptive to this binary and to a degree lives outwith it: the act of playing is not necessarily always creative as much as it is mechanical (progressing through the rules of a game). But nor is it necessarily purely consumptive in the sense of traditional, passively consumed media: choice, skill, and actualisation of game outputs are necessary characteristics of a player. Playing is thus Janus-faced in that it is both recreational (leisurely), and re-creational by resulting in new and creative outputs.

[18] C-476/17 *Pelham v Hutter* [2019] EU:C:2019:624.
[19] Thomas, A. (2023) Merit and Monetisation: A study of video game user-generated content policies. *Internet Policy Review*, 12(1).
[20] Ginsburg J, (1997) Authors and Users in Copyright, *Journal of the Copyright Society of the USA*, 45.

But, depending on how we classify the player under the copyright binary, only one of these activities results in the award of a legitimated, enforceable copyright. Thus, we must ask, is the player making decisions in a game which are original creative expressions, or are they merely following the rules of a system to its logical conclusion (that is, are they simply playing the game)? This leads us to the fundamental ontological question of this paper, about *who the player is in copyright law*. Indeed, if we wish to regulate the player and understand their value, we first need to know what they are.

Player as author

Positioning the player as an author is a potentially powerful line of argumentation, in part because the award of authorship is perceived as *legitimisation* through the lens of the law. If play is authored, it is copyrightable: if it is copyrightable, it is assumed, the player has done something valuable, worthy of the reward of a legally recognised right in respect of their creativity. Perhaps more so with games rather than other forms of media, this quest for legitimisation forms a bigger identity crisis associated with 'low culture'.[21]

This argument is not without its merits in the sense that there is a logical connection between the creative choices made by a player in executing the game rules and the related outputs. Perhaps so more than other forms of media, games dynamically respond to the player's interaction: the player determines the pacing and sequencing of the game and, even if some aspects are pre-determined, the process of *reaching* that determination is infinitely variable. In game and theatre studies, the possibility that the player's creative choices make them an author is uncontroversial:[22] but in the strictest legal sense, such an argument has yet to be explicitly recognised in legislation or by courts.

Historically, the dynamic and interactive nature of games has not been enough to grant any authorial interest to the player. Legal argumentation submitting that the player is an author is better understood as an unsuccessful defence strategy employed by defendants deflecting responsibility for any infringing similarities with a pre-existing work. This may be by disputing the fixation of the pre-existing work (infinitely variable by the player's own inputs), or by arguing

[21] See e.g., Ebert, R. (2010) Video games can never be art. <https://www.rogerebert.com/roger-ebert/video-games-can-never-be-art> accessed: 24 May 2023.
[22] Lastowka, G. (2013). Copyright law and video games: A brief history of an interactive medium. *SSRN Electronic Journal*. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2321424> accessed: 24 May 2023.

that the original creative choices in a game are actualised by the player, rather than the developer.[23]

The earliest example of this defence strategy is evident in *Stern Electronics v Kaufman*,[24] a case concerning a 'clone'[25] of the arcade game *Scramble.* Here, the defendants submitted that no copyright infringement had taken place, as the audiovisual outputs of *Scramble* lacked sufficient fixation to attract copyright protection in the first instance. Rather, they argued, it is the player who controls the outputs of a game; that they determine the similarities in the sequencing of game events through their own choices. This was not accepted by the court, who reasoned that the player only generated a variation of an audiovisual output that was ultimately pre-determined by the game developer. This was such even if that pre-determination existed only in theory rather than reality, with every possible permutation of game outputs in theory being stabilised in some form in the game's memory. The mere *capacity* for repetition of effects and the constancy of them within a game was sufficient to make *Scramble* a fixed original expression of the game developer – not the player.[26]

Similar arguments were attempted *Midway Mfg Co v Artic,* likewise concerning 'clones' of *Galaxian* and *Pac-Man*.[27] As in *Stern Electronics*, the defendants again submitted that the plaintiffs had no copyright interest in the underlying game for their clone to infringe. Under this reasoning, the plaintiff was not responsible for the choices and arrangements of outputs happening on a game screen, but rather it was the player that made these creative decisions. Likewise as in *Stern*, the court continued to be unpersuaded that the 'true' author of a game was its player; the capacity for repetition and relatedness of a series of images in a game was enough to prove a fixated, original creation of the game developer. The player, by contrast, behaved in a manner more similar to 'changing channels on a television':[28]

> … [the player] 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 paintings stored in its collection.[29]

The *Midway* case also suggested, rather ambiguously, that even if a player through their creative choices was considered an author of sorts, this would nonetheless be considered an

[23] Noting that as most of these cases took place pre-recognition of computer software within the copyright corpus, there may also be legal strategy to focussing only on visual comparisons between games, belying a normative/policy concern around the production of game clones at the time.
[24] *Stern Electronics* Inc. *v. Kaufman*, 669 F.2d 852 (2d Cir. 1982).
[25] Katzenbach C., Herweg S., and van Roessel L. (2016) 'Copies, Clones and Genre Building: Discourses on Imitation and Innovation in Digital Games' *International Journal of Communication*, 10.
[26] Also accepted in *William Electronics Inc. v Artic Intern*, 685 F.2d 870.
[27] *Midway Manufacturing Co. v. Artic International In*, 2d 1009 (7th Cir. 1983).
[28] Ibid. at 1011.
[29] Ibid. at 1012.

unauthorised derivative work given its interrelatedness to the pre-existing work. In such cases where no prior authorisation was given to the player, this would be considered an infringing creation to which no copyright would attach. Ultimately, this was confirmed in *Micro Star v FormGen*,[30] where the defendants offered for sale a disk comprising player-made maps for *Duke Nukem 3D*. As with *Stern* and *Midway*, the defendants again argued that the plaintiffs had no copyright interest to pursue in the first instance, as it was the player who made the maps through their own creative choices - that the player was the entity that determined the output which was ultimately repackaged and offered for sale. The court, however, affirmed the suspicion in *Midway* that these were unauthorised derivative works, despite the facilitation (and perhaps presumed authorisation) of those creations via an in-game building tool. Lamentably, the court did not consider in detail the degree to which the player's contributions constituted an original expression: rather they were treated, by omission, as a natural by-product of following the rules and facilitations of the game.

This topic has received more attention recently in the UK, with the *Nova v Mazooma*[31] case considering a 'clone' of a virtual emulation of billiards. Defendants again submitted that the plaintiff did not author any valid copyright in the audiovisual outputs of the game. Rather, it was the player who was actualising key aspects of the alleged similarity, such as the movement of a cue, and the angles with which they attempted a shot. Albeit under a different statutory framework, the court's reasoning is similar to the earlier US cases: the court held that the sequence of computer-generated frames in a video game are authored by the *person who made the arrangements necessary to create the frame images.*[32] In such cases, this is the game publisher or developer rather than the player who has 'actualised' them. The court more explicitly rejected the role of the player in authoring anything 'original', as an essential pre-requisite of copyright protection:

> . . . the player is not, however, an author of any of the artistic works created in the successive frame images. His input is not artistic in nature and he has contributed no skill or labour of an artistic kind. Nor has he undertaken any of the arrangements necessary for the creation of the frame images. All he has done is to play the game.[33]

Within this dictum is a suggestion that if a player can contribute an 'artistic' kind of contribution (rather than, perhaps simply moving a billiards cue), this could be original and thus potentially grant a copyright interest to the player. But how much artistry, if indeed this is synonymous with

[30] *Micro Star v. FormGen* Inc. 154 F.3d 1107 (9th Cir. 1998).
[31] *Nova Productions Ltd v Mazooma Games Ltd & Ors* [2007] EWCA Civ 219.
[32] Following the statutory language of s9(3) of the Copyright, Designs and Patents Act 1988.
[33] Ibid. para 106.

originality,[34] is possible within a game, being an activity that is inherently bound by rules and limitations.

The capacity for repetition and interrelatedness of images and choices within a game, even if only in theory, has historically been persuasive to finding there was no capacity for a player to make authorial contributions (notwithstanding that an emulation of billiards, as a case-by-case example, is perhaps not a high watermark for in-game creativity). Drawing parallels between the copyright protection of sports which, by analogy also comprises players who make choices within a system of rules and limitations, we see that this argument has been given short thrift. Of football, the CJEU explicitly stated that there is 'no room for creative freedom for the purposes of copyright' given that matches are subject to the rules of a game.[35] Thus, whilst there seems to be no suggestion that a player's choices within a game could represent skill, this has not been treated as synonymous with *creativity* and, thus by extension, copyright. Rather, the normative argument underlying this assumption is that play is a natural by-product of mastering a *system or process*, traditionally outwith the boundaries of copyright.[36]

The conclusion from the 'player as author' argument suggests that courts have found the *playing* of a game as antithetical, indeed oppositional, to original, creative expressions that may attract a copyright: these activities are assumed to be *de facto* different in their purpose. Players might have a degree of *agency* to make choices in a game, but this is not considered authorship. Rather, elements of game interaction are treated as invariable, with fixed components and sequences, and a static range of inputs and outputs. Agency itself thus seems illusory as all choices within a game are treated as being pre-determined, satisfied even if only in theory, by the game developer's design and mere *capacity* for anticipating infinite re-uses.

Player as performer

As illustrated above, courts have demonstrated little sympathy for the 'player as author' line of argumentation. But the concept of player agency has been an ongoing curiosity for courts and scholars alike: agency can evolve to participation and meaningful actions that result in decisions and choices which dynamically alter a game, even if they are ultimately constrained by a larger

[34] Whilst it is outwith the scope of this working paper to offer a full review of the originality standard across jurisdictions, 'originality' is generally defined by 'skill, labour and judgement' in the UK, 'free and creative choices' in the EU, and a 'modicum' of creativity in the US.

[35] *Football Association Premier League and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd (C-429/08) EU:C:2011:613. Para 86.* In the US, see similar reasoning in *NBA v Motorola* 105 F.3d 841 (2d Cir. 1997).

[36] Bently L. (2021) The Football Game as a Creative Work, in Senftelben, M., Poort, J., van Eechoud, M., van Gompel, S., and Helberger, N*., Intellectual property and Sports: Essays in Honour of P. Bernt Hugenholtz* (Wolters Kluwer).

system. This has given rise to metaphors which analogise games as theatre, and the player as an actor (performer) therein.[37] Particularly in relation to the participatory spectatorship of Shakespearean era theatre,[38] it is possible to connect the actor, charged with interpreting a pre-determined script, and the player of a game who likewise can imaginatively fill unspecified or ambiguous actions or directions. Whilst ultimately awarded a more limited pool of rights,[39] the 'player as performer' argument shares similar appeal to the 'player as author' in seeking legitimisation and protection of play in copyright law.

As with authorship proper, it is difficult to find support for the 'player as performer' in doctrine. The UK court in *Nova* acknowledged that the player had a central role in actualising the sequence of game events through their interpretative agency:

> Although the game has a set of rules, the particular sequence of images displayed on the screen will depend in very large part on the manner in which it is played. That sequence of images will not be the same from one game to another, even if the game is played by the same individual.[40]

Interestingly, it was also this lack of stability caused by the interpretations of the user which was damning to a game's classification of a 'work of action [...] capable of being performed'.[41] The court ruled, rather reductively, that it was simply 'a game', again suggesting that this is somehow *oppositional* to the creative endeavour of a performer. Likewise, in *Allen v Academic Games,*[42] US courts initially held that playing board games in public spaces was not a 'performance' of a literary or dramatic work such that it could be controlled by a copyright owner. Here, the determination was largely driven by public policy rather than a strict doctrinal approach: the court showed reluctance to allow copyright owners to dictate the manner of how and when people could play games. The same logic has, however, been rejected for player 'performances' of *video* games in arcades[43] and cyber cafes,[44] which have more emphatically been categorised

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[37] See Murray, J.H. (1997) *Hamlet on the Holodeck* (MIT Press); Bushnell, R. (2016) *Tragic Time in Drama, Film and Videogames* (Palgrave MacMillan); Fasciana, S. (2022) The Gaming Theatre Company: players. Gameplay, performance and the law, Interactive Entertainment Law Review, 5(2).

[38] See McDonagh, L. (2021) *Performing Copyright: law, Theatre and Authorship* (Hart Publishing)

[39] Performers rights typically include the rights to make or record their performance, and the right to control the use of those recordings.

[40] *Nova Productions Ltd v Mazooma Games Ltd & Ors* [2007] EWCA Civ 219 at para 116. Noting that The Nova court's interpretation of 'sufficient unity' was based on *Green v Broadcasting Corporation of New Zealand* [1989] 2 All ER 1056, which suggested that dramatic formats must contain a degree of repeatability from performance to performance. Subsequent developments in *Banner Universal Motion Pictures Ltd v Endemol Shine Group Ltd* [2017] EWHC 2600 (Ch) instead defined unity as requiring more of a baseline framework from which something may be repeated in a recognisable, rather than uniform, fashion. See also *Ukulele Orchestra of Great Britain v Clausen* [2015] EWCH 1772.

[41] Ibid.

[42] *Allen v. Academic Games League of America, Inc.*, 89 F.3d 614 (9th Cir. 1996).

[43] *Red baron-Franklin Park Inc v Taito Corp.*, 883 F.2d 275.

[44] V*alve Corp v Sierra Entertainment*, 431 F.Supp. 29 1091.

as activities requiring the prior authorisation of the game rightsholder. Whether this also extends to the public communications/broadcasts of game playthroughs taking place via online platforms has yet to be confirmed.[45]

Arguably, the courts' approaches to the 'player as performer' are less coherent than the rather emphatic rejection of the 'player as author'. There is throughout an implicit recognition that a player can be creative (performative) in making unpredictable choices within a game, yet there is reluctance to classify them as anything more than an *unauthorised* performer, whose activity is but an extension of the game rightsholders interest (except, perhaps, for board games being 'performed' or otherwise in a physical public space). The player may have agency in the choices they make, and these may be performative, but this is ultimately dampened and distorted by the mere presence of the game creator's initial copyright interest and pre-cognition of those choices.

Player as user

If the player is neither author nor performer, the implicit binary assumed in copyright suggests that they must be a consumer or user of a game product. This is often a very neutral designation, a term that merely suggests someone who at any time *lawfully* interacts with a copyrighted work. The user may simply be accessing or consuming the work, but may also implicate a degree of creative re-use that could see the user as the beneficiary of a copyright exception. Categorising the player as a user in this way is again a means of seeking legitimisation in the eyes of the law: to say that playing a game benefits from an exception, and is thus not infringing the rights of others, is a result of a lawful designation that play is an activity that is socially, politically, or economically beneficial to allow.

For this reason, jurisdictions with more generous exception frameworks, particularly the US, have been cited as possibly more amenable to permitting playing a game as a *defence* to infringement, if not an explicit acknowledgement of its value and/or creativity in itself. Transformative fair use appears frequently in scholarly literature as a viable, albeit untested, defence to the creation of a playthrough.[46] It is assumed that in jurisdictions which excuse these activities, the new sequence of play generated by the player could be interpreted as making a sufficiently distinct creative expression, thus constituting a viable defence to infringement.[47]

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[45] The only known case was eventually settled outside of court*: Epic Games Inc v Mendes,* Case No. 17-cv-06223-LB.

[46] Copyright Act, 1976, 17 USC s107.

[47] See Fasciana, S. (2022) The Gaming Theatre Company: players. Gameplay, performance and the law, Interactive Entertainment Law Review, 5(2); Hagen, D. (2018) Fair Use, Fair Play: Video Game Performances and "Let's Plays" as Transformative Use. *Washington Journal of Law, Technology and Arts*,

However, sceptics may point to the trap posed above: most courts have been reluctant to acknowledge *any* creative expression within the pre-set determination of a game system. This seems to preclude either an authorial interest, or a defence in its favour: 'transformations' of a game in a playthrough are inherently recognisable, and interrelated to the game creators design.

In jurisdictions with closed, enumerated and fixed-purpose exceptions systems, such as the UK and EU, the legal position of the 'player as user' is much bleaker. Unless the player satisfies criteria set by circumstance and purpose, they are unlikely to benefit from a copyright exception, thus making play an infringement rather than a lawful use. Playthroughs are rarely limited by circumstance and purpose, and are unlikely to be e.g., a targeted parody of a game, or a criticism and review of its merits or demerits. Nor are they, in a similar manner to samples and repurposing, entirely unrecognisable from the original game.[48] Rather, as illustrated at the outset of this paper, playthroughs more often encompass a conduit for the player's personality or skill. For example, a viewer may watch a famous speedrunner because of their talent in subverting the game system and completing it in the shortest possible time; another may choose to watch a game personality due to their relationship with the audience rather than their skill, or indeed, may be amused at their (inept) approach to certain genres (e.g., reacting to jump-scares in horror games) which is humorous, if not parodic. In brief, the *purpose* of a playthrough and the *value* derived from it is largely based on the interaction a user has with the player themselves, rather than the game *per se*. This presents a natural limitation to copyright's ability to categorise the player as a user in legislatures more preoccupied with *uses.*

Further complications arise due to the economic value that play can now generate through e.g., subscriptions, advertising revenue, or patron platforms. Often, copyright exceptions, and thus lawfulness of use, are precluded on the condition that they are enacted *fairly*. Factors which affect this fairness may be tied to a monetary condition – either that there is no adverse effect on the primary market for the original work,[49] or that the new (re-used) work is non-commercial in nature.[50] If it is determined that it's within the foresight of a game creator to monetise

13(3); and D Burk, (2013) Owning eSports: Proprietary Rights in Professional Computer Gaming, 161 *University of Pennsylvania Law Review.*

[48] C-476/17 *Pelham v Hutter* [2019] EU:C:2019:624 paras 31-38.

[49] See e.g., Copyright Act, 1976, 17 USC s107(4).

[50] While there is no static definition of commerciality in copyright law, the definition given by Creative Commons indicates that this could be 'any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation. See: Creative Commons, 'Defining "Noncommercial": A Study of How the Online Population Understands "Noncommercial Use"' [2009] Creative Commons Report, 11.

playthroughs of their game, or that playthroughs by others may divert or distort sales of the primary work, then this may be fatal to the 'player as user' argument.

This leads cyclically to the most recent diagnosis that the player exists in the legally grey area as a creator of 'user generated content'.[51] The player has qualities of both the author (including the performer) and the user: they can be creative without being a creator in the eyes of the law, and re-use existing works in a manner that may be infringing, if not necessarily harmful. Whilst a pragmatic categorisation, the ambiguous definition of the player lacks stability. The utilitarian undertones of copyright which beg the need to categorise also exposes a significant defect in its design: the label of user generated content can be used to deny the legitimisation afforded by the designation of either author (or performer) or the user, and disguise the contestable constructions which make it so. The player perhaps defies categorisation under a strict binary of consumption and production, between authorship and usership, and rather is something which needs to be understood on its own terms.

Player as player

As neither author nor user, this leads to the self-evident conclusion as to the legal status of the player in copyright law: they are simply, a player. When exploring the player as author, performer or user, this self-evidential nature is in part hampered by a poor conceptual vocabulary through which a court can attempt to understand games, play, and by extension the player. Inevitably, courts have turned to analogies with traditional media that situates the player as a passive viewer of a television, or a browser of an art gallery (or indeed, in the Microstar case, a 'paint-by-numbers kit').[52] Belying these comparisons is the more critical possibility that the legal treatment of games to date has been temporal, generational, and determined by a specific demographic of law-maker within a specific period of time.

These analogies to traditional media have been unhelpful precisely because the player is both a spectator of a work, and an active participant within it. The player as performer analogy, whilst often rejected by the courts, is perhaps closest to understanding 'play' as a more Shakespearean tragedy in this respect. Play is temporal, unfixed, and constantly changing: the player has both power and is powerless, and within the game, they will repeat, replay, rebirth/spawn, with no permanency of choice. Actions by the player can manifest and be received differently when taken once versus multiple times by the same versus another player, or within the same game

[51] Thomas, A. (2023) Merit and Monetisation: A study of video game user-generated content policies, *Internet Policy Review*, 12(1).
[52] Para 1110.

session or other, and so on. These are elements of process, rather than the 'building blocks' of copyrightable subject-matter, and it is for this reason, that play, and by extension the player, should be considered outwith the scope of copyright protection.

This conclusion is not necessarily inconsistent with the general principles of copyright protection, and rather is more aligned than the often imperfect analogies used by the court. As a fundamental rule, copyright does not (should not) protect 'rules, space, players and goals'.[53] Play, likewise, is a functional output from those rules and spaces. Precisely for the same reasons that sport has been denied copyright protection, the temporal, unfixed and unpredictable nature of the rules and systems which comprise a game tend to fall outside the remit of copyright protection as a matter of policy - whether for fairness of contest or otherwise. This limitation suggests that copyright should *exclude* systems where entertainment is supplied by users (or players) who follow procedures, methods, rules or systems, rather than the author as the entity supplying the entertainment which is experienced. Just as a player may not have a copyright interest in play, nor should this be considered an extension of a rightsholders interest based on the infinite variety of what an author can 'predetermine'.

Throughout this analysis, it is evident that courts have become preoccupied with the significance of the game output as an audiovisual work, as a natural extension of the interest in the underlying proprietary software. There is an assumption that copyright will automatically attach to all interactions with a game, precisely because the game itself is *owned*. However, the result of this (rather literal) reasoning is that uncopyrightable activities are artificially converted into something which can be commodified.

Importantly, the suggestion that play is a natural endpoint to a rightsholders interest is not to dismiss or delegitimise this activity. Nor does it dismiss that a game, in itself, can be a creative work. Throughout this paper, the symbiotic relationship between the two, and the socially, culturally, and economically beneficial by-products stemming from this, are shown to be precisely the types of creativity that copyright seeks to achieve. This does not mean that its intervention is necessary. Rather, by acknowledging that play itself, and its associated outputs, are outwith the scope of the law, we can resist reductive arguments that suggest everything that is culturally valuable and worthwhile *requires* a copyright.

[53] Boyden B.E. (2011) Games and other Uncopyrightable Systems, 18 *George Mason Law Review.*

Conclusion

To effectively regulate the player in copyright law, we first must understand how they are constructed: their misidentification leads to their mismanagement, and ultimately the erasure of the creative and valuable by-products of play. Yet, as this paper has illustrated, play often defies categorisation. It is neither a purely productive, nor consumptive activity. For this reason, games and other interactive entertainment media, force us to ask ontological questions about how we define the *interactor*, and indeed about how we define the bounds of creativity. This can expose limitations and inconsistencies in the law, allowing us to peel apart their illusory constructions.

As this paper has illustrated, many parties seek to legitimise play by categorising it within copyright law, whether as an author of a work, a performer of a play, or a lawful user who can benefit from a copyright exception. The player does not fit neatly into any of these categories, and consequently has been deprived the benefits of each. Instead, this paper presents a normative argument that players should be understood on their own terms and that play is a valuable end in itself. Indeed, 'player' is used throughout this paper as a specific designation, deliberately implying, and limiting the quality of a person's interactivity with a game. It is a ludic term for a ludic medium, that situates the player in a ludic context. This symbiotic relationship between player and game is self-sustaining: there is no evidence that commodifying play is conductive to encouraging behaviours of social, cultural or economic creativity. Rather, by carving out a space where copyright should not reasonably exist, understanding play on its own terms is an acknowledgement that creativity is possible, and the player valuable, without the copyright stamp of approval.

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2023/06 DOI: 10.5281/zenodo.8135896

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