

Ownership of User Generated Content and Mods in Video Games

DENIZ OZENSOY



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Video Games and Mods – The Two way Street

Standalone Game Name	Original Dependency	Mod Release	Standalone Release
Auto Chess - Time Fight Tactics (League of Legends)	Dota 2	Jan. 4, 2019	May 30, 2019
Black Mesa	Half-Life 2	Sept. 14, 2012	Mar. 6, 2020
Counter-Strike	Half-Life	June 19, 1999	Nov. 8, 2000
DayZ	Arma 2	Feb. 21, 2013	Mar. 23, 2013
Dota 2	Warcraft III: Reign of Chaos	2003	July 9, 2013
Garry's Mod	Half-Life 2	Dec. 24, 2004	Nov. 29, 2006
Heroes of the Storm	StarCraft II	2010	Jun. 2, 2015
Killing Floor	Unreal Tournament 2004	2005	May 14, 2009
PlayerUnknown's Battlegrounds (PUBG)	Arma 3	Apr. 9, 2015	Dec. 20, 2017
The Stanley Parable	Half-Life 2	July 31, 2011	Oct. 17, 2013
Team Fortress Classic	Quake	1996	Apr. 7, 1999

Video Games and Mods – The Two way Street

Feature in Mod	Official Implementation of Game
Fallout 3 Mod for building your own base	Base building becomes core game mechanic in Fallout 4 (and Fallout 76, aka the black sheep of the franchise)
Just Cause 2 mod for using multiple tether lines to bind objects and move	Multiple tether line movement implemented in Just Cause 3
Survival realism mode for Fallout 2	Implemented as hardcore mode for Fallout New Vegas
Community Mod Project for extended gameplay in Left 4 Dead 2	Modders onboarded to the development team to create the “Cold Stream DLC”
Desert Combat Mod for Battlefield 1942 providing much larger combat arenas	Mod creator onboarded to design the combat maps for Battlefield 2

Video Games and Mods – The Two way Street

Games as a Service business model further blurred the porous border between mods and games

Minecraft Updates regularly implement features first created by modders:

Mod Name	Feature introduced
Redpower 2	Jungles, jungle trees, emeralds
Tinkers Construct, redpower (frames)	Slime blocks
Terraincontrol	Terrain Config UI
ExtrabiomesXL	Mesa biomes, Redwood trees
BuildCraft	Hoppers
Enderstorage	Ender chests

Mod Name	Feature introduced
Evil Minecraft	Witches
Natura	Nether blocks
Push and shove	In game unit collision
Pam's harvest craft	Potatoes, carrots, beets
BetterLight/Ambient Occlusion	Smoother Lighting effects
Single player commands mod	Chat and commands in single player

Three Musketeers of Video Game Litigation

Midway Manufacturing Co. v Arctic International, Inc. (1982), 704 F. 2d 1009

- Facts: Arctic sold circuit boards that when installed on Midway's arcade machines, acted as a mod that sped up the rate of play.
- Issue1: Are video games copyrightable?
- Issue 2: Is speeding up a video game a copyright breach?

Lewis Galoob, Inc. v Nintendo of America, Inc (1992), 964 F. 2d 965

- Facts: Appellant (Galoob) produced the 'Game Genie' device, that real time altered the data communicated between Nintendo handheld consoles and Nintendo Game Cartridges.
- Issue1: Are derivative works that are not "fixed" nevertheless in breach of registered copyright?
- Issue2: Are audiovisual displays created by the Game Genie "derivative works"

Micro Star v Formgen, Inc. (1998), 154 F. 3d 1107

- Facts: D (Micro) downloaded free maps (for Duke Nukem 3D) made by players and sold them on discs.
- Issue 1: Did the player made maps infringe P's copyright in Duke Nukem 3D?
- Issue 2: Did D infringe P's copyright by downloading and selling these maps?

Midway Manufacturing Co. v Arctic International, Inc. (1982), 704 F. 2d 1009

Analysis of Issue 1:

Problem: Each time a video game is played, a different sequence of images and sounds appear on the screen.

Court: “Audiovisual” works can be interpreted broadly to include not fixed sequences

Problem: Is the sequence of audiovisuals work of the player or the inventor.

Court: “Playing a video game is more like changing channels on a TV than it is like writing a novel or painting a picture”

Problem: The appropriate authorship protection should be patenting the circuitboard/code

Court: “The patentability of the design of the board/code not relevant to determining the copyrightability of the stored audiovisuals”

Ratio: Video games are Copyrightable?

Midway Manufacturing Co. v Arctic International, Inc. (1982), 704 F. 2d 1009

Issue2: Did defendant breach P's copyright?

Court: "There is a large demand and potential market for sped-up video games"

Court: "to prepare derivative works" is the copyright owner's exclusive rights.

Court: "Sped-up version of the game is a derivative work"

Ratio: Since D's product competes with potential business opportunities P could have capitalized on by means of derivative works based on the original game, there is a copyright breach here.

Dicta: Sped-up phonograph record (or music) would not be a breach of copyright, because there is no market and no economic opportunity to the copyright owner for creating sped-up derivative recordings. Key question was whether D's product was in competition with the original work, or potential commercially viable derivatives of the original work.

Lewis Galoob, Inc. v Nintendo of America, Inc (1992), 964 F. 2d 965

Issue1: Are derivative works that are not “fixed” nevertheless in breach of registered copyright?

Court: The Act’s definition of “derivative work” lacks any reference to fixation, uses the term “creates” instead. Where a work is created over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time.

Court: Any generic use of the term “work” must be understood in context of the act as referring to one of the protected categories of work: audiovisual works, literary works, pictorial, graphic and sculptural works, etc.

Court: Even though there is no fixation requirement, a new work must be created. The Game Genie merely enhances [Nintendo’s] audiovisual displays.

Court: “Existence of a market does not, and cannot, determine conclusively whether a work is an infringing derivative work”.

Ratio: The Game Genie does not create derivative works, but it is, without a Nintendo cartridge, unable to create audiovisuals.

Midway Manufacturing Co. v Arctic International, Inc. (1982), 704 F. 2d 1009

Issue 2: Are the slightly altered gameplay experiences enabled by the Game Genie derivative works?

Court: Unlike Arctic's board's in *Midway* "Game Genie does not physically incorporate a portion of a copyrighted work, nor does it supplant demand for a component of that work."

Court: Further stretching the definition of "derivative work" "would chill innovation and fail to protect 'society's competing interest in the free flow of ideas, information, and commerce.'" (Citing *Sony Corp. of America v Universal Studios, Inc.* 464 US 417)

Court: "The Game Genie is useless by itself, it can only enhance, and cannot duplicate or recast, a Nintendo game's output." It does not contain or produce a Nintendo game's output in some concrete or permanent form, nor does it supplant demand for Nintendo game cartridges. Such innovations rarely will constitute infringing derivative works under the Copyright Act"

Court: "Nintendo failed to establish the reasonable likelihood of a potential market for slightly altered versions of the games at suit." ... "According to Stephen Beck, Galoob's expert witness, junior or expert versions of existing Nintendo games would enjoy very little market interest because the original version of each game already has been designed to appeal to the largest number of consumers. Mr. Beck also testified that a new game must include new material or "the game player is going to feel very cheated and robbed, and [the] product will have a bad reputation and word of mouth will probably kill its sales."

Ratio: Slightly altered gameplay enabled by the use of the Game Genie are not derivatives either, fair use.

Micro Star v Formgen, Inc. (1998), 154 F. 3d 1107

Issue 1: Did the player made maps infringe P's copyright in Duke Nukem 3D?

Court: "But, whereas the audiovisual displays created by Game Genie were never recorded in any permanent form, the audiovisual displays generated by D/N-3D from the N/I MAP files are in the MAP files themselves."

Problem: "[a] work will be considered a derivative work only if it would be considered an infringing work if the material which it has derived from a preexisting work had been taken without the consent of a copyright proprietor of such preexisting work." *Mirage Editions v. Albuquerque A.R.T. Co.*, 856 F.2d 1341, 1343" ... "To prove infringement, [P] must show that [allegedly infringing material] are substantially similar in both ideas and expression." *Litchfield v. Spielberg*, 736 F.2d 1352, 1356 (9th Cir.1984)

Court: The maps used assets that already existed in the game, which will be enough to show that the maps are substantially similar in both ideas and expression.

Problem: The map files did not duplicate the assets, used the assets by referring to their original locations in the file system.

Court: Actual duplication or recreation of assets are not necessary. Formgen holds all rights to make any sequel stories to the character Duke Nukem. In the maps, the players still play with the Duke Nukem character, which makes them infringing derivatives in the form of sequels.

Micro Star v Formgen, Inc. (1998), 154 F. 3d 1107

Issue 2: Did D infringe P's copyright by downloading and selling these maps?

Problem: Can Micro Star claim fair use?

Court: "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417"

Court: "The fair use defense will be much less likely to succeed when it is applied to fiction or fantasy creations, as opposed to factual works such as telephone listings. *United Tel. Co. v. Johnson Publ'g Co.*, 855 F.2d 604"

Court: By selling the maps, Micro Star essentially distributed sequels to Duke's story. Formgen has an exclusive right to further Duke's stories without competition.

Problem: Did Formgen give license to create new stories by providing the official map editor tool?

Court: Nothing indicates that FormGen granted Micro Star any written license at all; nor is there evidence of a nonexclusive oral license. The only written license FormGen conceivably granted was to players who designed their own new levels, but that license contains a significant limitation: Any new levels the players create "must be offered [to others] solely for free."

EULAs & ToS'

Bethesda uses the following terms, which are industry standard:

- All uses of the Editor are for Your personal non-commercial use.
- All Game Mods developed or created by You using the Editor are for non-commercial use solely in connection with the Product, in each case subject to the terms and conditions of this Agreement.
- You alone are solely responsible for the Game Mods that You develop or create and may be held liable for Game Mods that You contribute, post, upload or otherwise make available to ZeniMax or third parties.
- No Fees for Use. In exchange for the Editor being provided to you free of charge, You agree that You will not charge or require, directly or indirectly, a fee or other consideration for others to download, install or use Your Game Mods, including without limitation selling, licensing or other commercial distribution or commercial exploitation (e.g., by renting, licensing, sublicensing, leasing, disseminating, uploading, downloading, transmitting, whether on a pay-per-play basis or otherwise) of any Game Mods without the express prior written consent of an authorized representative of ZeniMax. This includes distributing a Game Mods as part of any compilation You and/or other users may create. You further agree not to charge, accept or solicit, directly or indirectly, fees or non-monetary contributions for developing or creating Game Mods, including without limitation fees collected through "crowd funding."
- Ownership. As between You and ZeniMax, You are the owner of Your Game Mods and all intellectual property rights therein, subject to the licenses You grant to ZeniMax in this Agreement. You will not permit any third party to download, distribute or use Game Mods developed or created by You for any commercial purpose.

The Killer Blow on Modders Ownership

License to ZeniMax. Whether or not You provide a copy of one or more of Your Game Mods to ZeniMax for download from the ZeniMax Platform and in exchange for ZeniMax making the Editor available to You free of charge, You hereby grant to ZeniMax an irrevocable, perpetual, royalty-free, fully paid, worldwide, **non-exclusive right and license, with the right to sublicense through multiple tiers of distribution, to use, reproduce, modify and create derivative works from (including without limitation (a) modifications necessary to make Your Game Mods compatible with the Services (as defined in the Terms of Service); (b) modifications as ZeniMax deems necessary or desirable to enhance gameplay; and (c) where ZeniMax in its sole discretion deems modification necessary for security, statutory or other regulatory consideration), distribute, transmit, transcode, translate, broadcast, and otherwise communicate, publicly display and publicly perform and otherwise exploit and/or dispose of such Your Game Mods (or an part or element of a Game Mods),** including without limitation in connection with the operation and promotion of the Services. For clarity, the foregoing license includes, but is not limited to, ZeniMax including Your Game Mods (or elements or portions of a Game Mods) and modifications and derivative works of Your Game Mods in other Games and Services. This license is granted to ZeniMax for the entire duration of the intellectual property rights in or protecting the Game Mods. To the fullest extent permitted by law You also waive and agree never to assert against ZeniMax or its distributors or licensors any moral rights or similar rights, however designated, that You may have in or to any of Game Mods. **Subject to Your ownership of the original of Your Game Mods, ZeniMax will be the sole owner of the modifications and derivative works created by ZeniMax of Your Game Mods.** For clarity, You agree that You are not entitled to any rights or compensation in connection with the rights granted to ZeniMax in this Agreement, including without limitation the use of Your Game Mods by others.

Another Example from Second Life:

Except as otherwise described in any Additional Terms (such as a contest's official rules) which will govern the submission of your User Content, you hereby grant to Linden Lab, and you agree to grant to Linden Lab, the **non-exclusive**, unrestricted, unconditional, unlimited, worldwide, irrevocable, perpetual, and cost-free right and license to use, copy, record, distribute, reproduce, disclose, modify, display, publicly perform, transmit, publish, broadcast, translate, make derivative works of, and sell, re-sell or sublicense (through multiple levels)(with respect to each Product or otherwise on the Service as permitted by you through your interactions with the Service), and otherwise exploit in any manner whatsoever, all or any portion of your User Content (and derivative works thereof), for any purpose whatsoever in all formats, on or through any media, software, formula, or medium now known or hereafter developed, and with any technology or devices now known or hereafter developed, and to advertise, market, and promote the same.

Why use a mutual licensing scheme?

“As between You and ZeniMax, You are the owner of Your Game Mods and all intellectual property rights therein, subject to the licenses You grant to ZeniMax in this Agreement.”

“You hereby grant to ZeniMax an irrevocable, perpetual, royalty-free, fully paid, worldwide, **non-exclusive right and license**”

Video Game producers are afraid that your mod might infringe on a third party’s copyright, and don’t want to be sued for indirectly infringing anyone’s copyright by virtue of having created the tool that enabled the infringement.

- For example Marvel sued NCSoft Corp (a Korean video game studio) alleging that by permitting users to create avatars that resembled Marvel copyrighted superheroes, NCSoft indirectly infringed on Marvel’s copyrights.

However, they want the right to use without having to pay for any good ideas modders come up with (think about Minecraft).

Legal Conclusions Following the Caselaw and EULAs

Per Micro Star, almost all mods are derivative works.

They are often tolerated by the video game studios, who actively profit from the great ideas modders come up with subject to the particular terms of the relevant EULA or ToS.

Even though the Modders nominally remain the owners of all the copyright in their creation, they are forced to give free and perpetual licenses to the developing studios, and barred from any kind of compensation, including crowd-funding, from 3rd parties.

Controversy regarding whether the developer can sell player created mods.

The Misfit: Total Conversion Mods

Many popular video games start their life as mods dependent upon the physics engine of existing video games (as shown in slide 3).

However, total conversion mods do not fit the 'sequel therefore derivative' analysis applied in Micro Star. Quiet often, the characters, stories, and even the genre of the mod is entirely different from that of the game it is modded upon.

If EULAs were construed strictly, and enforceable as is at court, the video game company that created the progenitor game can claim as derivatives all the other games that was created using its framework.

It seems the main concern that prevents video game studios from following such legal recourse cannot be found in the legal system, but the obvious absurdity and public outrage such a course of action would create.

Canadian Context



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**Fair Dealing
(Copyright
Act (R.S.C., 1985,
c. C-42) s. 29)**

s. 29: Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright. (including, Criticism, Review, News reporting)
s. 29.21: Non-commercial user-generated content
s. 29.22: Reproduction for private purposes
s. 29.23: Reproduction for later listening or viewing

**Fair Use (17 US
Code 107)**

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, [including](#) such use by reproduction in [copies](#) or [phonorecords](#) or by any other means specified by that section, for purposes [such as](#) criticism, comment, news reporting, teaching ([including](#) multiple [copies](#) for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1)**the purpose and character of the use, [including](#) whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2)**the nature of the copyrighted work;
- (3)**the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4)**the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Fair Dealing

Exhaustive language: Use must be for the purpose of “research, private study, education, parody or satire”

- Most mods are none of these, so Canadian Fair Dealing offers even less protection to modders than fair use.

Better luck at s.29.21: Non-commercial user-generated content

- 29.21 (1) It is not an infringement of copyright for an individual to use an existing work or other subject-matter or copy of one, which has been published or otherwise made available to the public, in the creation of a new work or other subject-matter in which copyright subsists and for the individual — or, with the individual’s authorization, a member of their household — to use the new work or other subject-matter or to authorize an intermediary to disseminate it, if
 - (a) the use of, or the authorization to disseminate, the new work or other subject-matter is done solely for non-commercial purposes;
 - (b) the source — and, if given in the source, the name of the author, performer, maker or broadcaster — of the existing work or other subject-matter or copy of it are mentioned, if it is reasonable in the circumstances to do so;
 - (c) the individual had reasonable grounds to believe that the existing work or other subject-matter or copy of it, as the case may be, was not infringing copyright; and
 - (d) the use of, or the authorization to disseminate, the new work or other subject-matter does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the existing work or other subject-matter — or copy of it — or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.

The Game Genie, but in Canada:

Nintendo of America Inc. v Camerica Corp, [1991] FCJ No. 58

Facts: Nintendo asked for an injunction to enjoin Camerica from selling the Game Genie in Canada.

Nintendo: "Pursuant to that Act, copyright subsists in every original literary, musical, dramatic and artistic work. "Literary work" as defined in section 2 of the Act expressly includes computer programs and has been judicially interpreted to include computer programs embodied in a memory chip. Not only does copyright subsist in the computer program which contains the set of instructions or statements that is used in a computer to operate the video game, but in the plaintiffs' opinion, it also subsists independently in each of the dramatic, literary, musical and artistic works which are embodied in the audiovisual display of the game.

Court: Refused to answer the merits underlying copyright infringement allegations. Applied the Turbo resources factors on injunctions to find that there was a serious legal question, but that Nintendo failed to prove an irreparable harm.

Aftermath: No further action in Canada since the question was settled in the US.

Ownership implications in Canada:

Fair dealing only applies to exhaustive categories, and would not protect modders against infringement claims.

Non-commercial user-generated content might provide a legal shield, depending on the court's interpretation of what is commercial use within the realm of video games.

- Regardless, it wouldn't grant ownership of the content created.
- In contrast, you can have commercial fair-use in the US, which would make ownership of copyright in mods desirable.

Very little Canadian case-law video game copyright disputes, even less so regarding mods.

29.21(1)(d) Substantial adverse effect test

Canadian courts likely to fail to appreciate the economic dynamics between mods and video games. Mods have many economic externalities on video game sales

- Mods require the player to purchase a copy of the game. Theoretically a mod could run on a pirated copy, but mods do not encourage piracy. The issue of piracy is an entirely different issue.
- Modding is the one of the few proven ways to find a job in the video game industry. If modding was made illegal, video game studios would have to actually invest money and resources in to development of highly mobile talent.
- Modding expands the life-span of a game but continuously introducing fresh gameplay experience. Games with extensive modding communities have very loyal and enthusiastic player bases (Minecraft, Bethesda Games)
- No proof that mods compete with actual game sales. Tons of free mods exist for any given popular game, and if anything it keeps the community enthusiastic about the franchise. Game sales are soaring regardless of modding activity for heavily modded franchises. Nintendo is likely the greatest benefactor of modding communities despite their hostility to unauthorized use of their copyrights.

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Cases:

- *Midway Manufacturing Co. v Arctic International, Inc.* (1982), 704 F. 2d 1009
- *Lewis Galoob, Inc. v Nintendo of America, Inc* (1992), 964 F. 2d 965
- *Micro Star v Formgen, Inc.* (1998), 154 F. 3d 1107
- *Marvel Enterprises, Inc. v. Ncsoft Corporation*, Case No. CV 04-9253-RGK (PLAx) (C.D. Cal. Mar. 9, 2005)
- *Nintendo of America Inc. v Camerica Corp.*, [1991] FCJ No. 58

Statutes:

- Copyright Act (R.S.C., 1985, c. C-42)
- 17 U.S. Code Title 17 – Copyrights
- Public Law 94-553 Title 17 – Copyrights (1976 version)