

ARTICLE

**PLAYER, PIRATE OR CONDUCTOR? A
CONSIDERATION OF THE RIGHTS OF ONLINE
GAMERS**

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PLAYER, PIRATE OR CONDUCTER? A CONSIDERATION OF THE RIGHTS OF ONLINE GAMERS

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This paper considers the issue of online gamer rights and how they are likely to be treated by the law primarily designed to encourage and protect creative expression - copyright law. Online gaming introduces a new genre of experience where consumers buy the entertainment to produce their own entertainment. This hybrid role of a consumer/ producer has been described as that of a 'conducer'. The conducer phenomenon is not just limited to online gaming but is reflective of the greater interactivity which digital technologies introduce for people, traditionally referred to as consumers, to experience information and entertainment. It is in online gaming, however, that this phenomenon is most apparent. Taking recent controversies in the online gaming world surrounding out of game auctions of in game items, the proliferation of 'cheats' and creative fan expression, this paper explores how the issue of gamer rights raises foundational questions such as what is authorship and who is entitled to claim rights and compensation as an author? It also discusses how online gamer rights challenge existing rights schemas and whether historically recognized rights are appropriate to be transported 'as is' to this new digital landscape. Ultimately, the paper concludes that these challenges expose the problematic ideal of the Romantic, original author and the derivative works paradox. The likely assertion of traditional concepts of original authorship in favor of online gaming companies, at the expense of gamers, in the possibility space created and explored by gamers or "conductors" is problematic because it denies them the use of cultural signifiers to describe themselves and their experiences.

I. INTRODUCTION

In recent years there have been sporadic attempts by gamers of massively multi-player role-playing games ("online

games”)¹ to legally assert and define their rights in and to the online games which they play. So far, these attempts have not been successful. Nevertheless, these attempts are likely to continue because online games generate a more passionate response and stronger sense of entitlement than other types of computer games, such as console games.

One reason for this enthusiasm may be a more interactive nature of game play in online games, when compared with console games. Online games allow a gamer to choose variables – “the possibility space”² – within a range of pre-determined constraints – “the topography of that space”.³ Online games also allow gamers to interact with other gamers. Thus, in a sense, gamers determine their own game and that of each other, within the series of parameters set by the game provider. Perhaps as a result of the increased randomness of game play, gamers spend a greater period of time spent playing online games, giving rise to a feeling that they have ‘invested’ in the game, which may, in turn, contribute to gamers’ sense of entitlement in and to aspects of the game.⁴

Another reason which may explain the passion of online gamers is that game providers respond to the majority voice of gamers. For example, gamer feedback is relevant during beta testing. It also plays an ongoing role for current and future game design.⁵ Although any such comments, if adopted, will only be taken into account on a generalized basis, the participation of gamers in the development of online games may also contribute to the greater sense of gamer entitlement.

1 There are many online games in existence. This paper will focus on the following commercial online games: EverQuest, Ultima Online, The Dark Age of Camelot, There, Earth&Beyond and Asheron’s Call.

2 *Sims, BattleBots, Cellular Automata God and Go, A Conversation with Will Wright by Celia Pearce*, 2 INTERNATIONAL JOURNAL OF COMPUTER GAME RESEARCH, (July 2002), at <http://www.gamestudies.org/0102/pearce> (last visited Apr. 1, 2005).

3 *Id.*

4 *See eg.*, Gavin Carter, *It’s My Time and I’ll Sell It If I Want To*, THE ADRENALINE VAULT, Mar. 28, 2002, at <http://www.avault.com/articles/getarticle.asp?name=mmogsell> (last visited Apr. 1, 2005).

5 *See Sims, supra* note 2; *The Player with Many Faces, A Conversation with Louis Castle by Celia Pearce*, 2 INTERNATIONAL JOURNAL OF COMPUTER GAME RESEARCH, (Dec. 2002) at <http://www.gamestudies.org/0202/pearce> (last visited 10 Mar. 2005).

The issue of online gamer rights is important for the laws designed to encourage and protect creative expression (primarily copyright law) and, consequently, future creativity. Some virtual world commentators claim the issue is important because the popularity of online gaming is growing⁶ and therefore, the logic would suggest, what now appears to be a problem for a subset/ subculture of society will become a major social problem in time, so all the better to address it now. While the ability of online gaming to shed its image of being the preserve of the socially and emotionally maladjusted and become a widespread pastime has not yet been conclusively proven, the fact that this issue is currently relevant only for a limited sector of society does not detract from its general importance in the digital age.

Online gaming introduces a new genre of experience where “consumption and production are synonymous,”⁷ consumers buy the entertainment to produce their own entertainment.⁸ This hybrid role of a consumer/producer has been described as that of a “*conducer*.”⁹ The *conducer* phenomenon is not just limited to online gaming but is reflective of the greater interactivity which digital technologies introduce for people, traditionally referred to as *consumers*, to experience information and entertainment. It is in online gaming, however, that this phenomenon is most apparent. As a result, the issue of gamer rights raises foundational questions such as what is authorship and who is entitled to claim rights and compensation as an author. It also challenges existing rights schemas and poses the question as to whether historically recognized rights are appropriate to be transported ‘as is’ to this new digital landscape or whether they should be re-examined.

This paper seeks to explore the issues which these questions raise. It does not purport to present a comprehensive and empirical review of online games and their industry, nor does it purport to provide a definitive legal analysis of online

6 Edward Castronova, *Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier*, 3 CESifo Working Paper No. 618 (Dec. 2001), Center for Economic Studies & Ifo Institute for Economic Research, at <http://papers.ssrn.com/abstract=294828> (last visited Apr. 1, 2005); Raph Koster, *Declaring the Rights of Gamers*, (Aug. 27, 2000), at <http://www.legendmud.org/raph/gaming/index.html> (last visited Apr. 1, 2005).

7 See *Sims*, *supra* note 2.

8 *Id.*

9 *Id.*

games. Instead, this paper attempts to examine the challenges which online games raise for the traditional legal framework under U.S. copyright law and suggest reasons for the failure of this traditional framework to properly account for the concerns of online gamers. This paper hopes to show that the shortcomings of copyright law as regards gamer rights are symptomatic of the law's broader inability to embrace the opportunities which digital technologies introduce for all sectors of society. Gamer rights, therefore, serve as a cautionary tale for all who deal in copyright law and digital technologies.

Part II sets out a background to this exploratory discussion, briefly outlining the key features common to most online games and then considering the three most prominent controversies which have arisen recently in relation to online games. These controversies are then taken to form the basis for a consideration of gamer rights. Part III examines the most applicable area of law—copyright law—within which such issues have traditionally been considered and discusses the likely legal treatment of each of the controversies identified in Part II under copyright law. Finally, Part IV identifies three main reasons for the failure of the traditional copyright paradigm to properly recognize the rights of gamers in and to online games and briefly discusses the potential impact of such failure for future creativity.

II. BACKGROUND

There have been several controversies which have arisen recently between gamers and game providers in the online gaming community. Although there are various different types of online games, their key features and the controversies they have generated, are broadly similar, as this Part shows. These controversies illustrate the kinds of activities to which gamers appear to feel a sense of entitlement. Consequently, these controversies will be taken in this paper to form the basis of a claim of specific gamer rights (despite the fact that it is only in relation to the *out-of-game* online auctioning of *in-game* items that gamers have used the word 'right' to describe their sense of entitlement to continue this conduct).

A. KEY FEATURES OF ONLINE GAMES

To play an online game requires the purchase of a CD-ROM or the download of software from the game provider's website for a one-off fee. This software is loaded into the gamer's computer and enables the gamer to connect over a network to the game provider's server. Connecting to the game provider's server technically enables the gamer to play the game. However, to be permitted to play the game, a gamer must also pay a monthly subscription fee. Given some gamers may play an online game for months if not years, ongoing subscription fees are the primary revenue source for the game provider. Hence, maximizing the number of subscription fees at any one time can be considered, from a business perspective, to be the game provider's primary objective.

When accessing the software and connecting to the game provider's server, a gamer will also be required to scroll through and acknowledge their acceptance of an End User License Agreement ("EULA"), which purports to govern the use of the software stored on the gamer's computer, and a Rules of Conduct ("ROC"), which purports to govern the gamer's behavior when connected. These two sets of terms typically cross-reference and incorporate each other so that, at any one time, a gamer has agreed to be bound by both the EULA and the ROC.

Once online and *'in the game'*, a gamer will be able to choose their avatar (the character which will represent them throughout the game), typically their avatar's class (such as, in the case of Earth & Beyond, Progen – warriors, Terrans – traders, or Jenquai – explorers) and occupation, and select aspects of their appearance (for example, color of clothes and body shape).

The activities engaged in by gamers available in most online games are: to experience the game; interact with fellow players; and, 'level up'. Leveling up is a key feature of the game because, through this process, the avatar increases their powers and skills and possibly also possessions. Leveling up by the ordinary game play requires the completion of certain tasks within the game. These tasks can include slaying *in-game* dragons or monsters and looting or acquiring items which can in turn be traded *in-game* and used to acquire greater powers or skills. Leveling up can take many hours of normal game play,

which in turn, increases the monthly subscription fees payable to the game provider.

Another important common feature of online games is interaction between gamers. Such interaction occurs in two forms. Firstly, through *in-game* chat and secondly, through joint activity and the formation of groups and guilds, by which avatars offer each other *in-game* mutual support.

It appears that there are many differences between the types of people who regularly play and enjoy online games. As a result, different gamer norms have arisen about the acceptable way to play online games. The conflict between these differing norms and the game provider's overriding business objective (of maximizing subscription revenue) has caused several controversies to arise.

B. A GAMER'S RIGHT OF OUT-OF-GAME TRADING?

Some gamers, it appears, are very time-rich and spend extended periods of time playing a game, thereby acquiring a lot of *in-game* powers, skills and possessions. Time-rich gamers can take advantage of their extended periods of game play for their own commercial benefit by auctioning these *in-game* items, such as gold coins or castles in the case of Ultima Online, on *out-of-game* online auction sites. The *out-of-game* purchase of these *in-game* items by other gamers provides the latter with a means of circumventing ordinary game play. Once an *out-of-game* auction has been completed, the seller and buyer agree to meet *in-game* to trade the auctioned item.

The *out-of-game* auctioning of *in-game* items has been, perhaps, the most controversial of all possible gamer rights. It has also come the closest to judicial scrutiny on two occasions because gamers who were 'farming'¹⁰ loudly proclaimed their right to do so.

In the first such action, Sony (publisher of EverQuest), in 2000, changed its user agreement for EverQuest gamers prohibiting the sale of their accounts and in-game items.¹¹ The

¹⁰ 'Farming' is a term to describe the practice of out of game sales of in game items.

¹¹ Greg Sandoval, *Sony to Ban Sale of Online Characters From Its Popular Gaming Sites*, CNET NEWS.COM, Apr. 10, 2000, at <http://news.com.com/2100-1017-239052.html> (last visited Apr. 1, 2005).

reasons cited by Sony for the prohibition were to maintain a level playing field between all gamers and to prevent instances of fraud, particularly given, according to Sony, people who are defrauded often turn to Sony or Verant (EverQuest's developer) for redress.

In a further effort to stop the auctioning of *in-game* items, Sony also approached online auction sites, asking that they remove the auction of items relating to EverQuest. eBay and Yahoo!, which each have a policy of adhering to requests by content owners, have complied¹² but another major auction site, Player Auctions, has continued to facilitate auctions for EverQuest items, apparently without Sony/ Verant taking further action.

In response to Sony's action, there were reports in 2001 of an attempt by some EverQuest gamers to bring a class action against Sony, Verant and eBay for cancellation of those gamers' online auctions of characters.¹³ The suit was apparently based on the argument that gamers were entitled to sell their time for money and that such sales were "protected by law".¹⁴ The web page reported to contain information about the lawsuit is no longer active and there have not been any further reports of the action. Indeed, journalistic attempts to contact the instigators of the class action, at the time news of the action first broke, were unsuccessful.¹⁵

The second action occurred early in February 2002 when Black Snow Interactive ("BSI") sought a declaratory judgment (among other remedies) against Mythic Entertainment, Inc, provider of another very popular online game – Dark Age of Camelot (DAOC). BSI claimed it was entitled to sell DAOC

12 Greg Sandoval, *eBay, Yahoo Crack Down on Fantasy Sales*, CNET NEWS.COM, Jan. 26, 2001, at <http://news.com.com/2100-1017-251654.html?tag=rn> (last visited Apr. 1, 2005).

13 *EverQuest Class Action Threat Over Auction Spat*, THE REGISTER, Jan. 25, 2001 at <http://www.theregister.co.uk/content/6/16355.html> (last visited Apr. 1, 2005); *EverQuest "Virtual Item" Debate Goes to the Courts*, IGN.COM, Jan. 30, 2001 at <http://pc.ign.com/articles/090/090838p1.html?fromint=1> (last visited Apr. 16, 2003).

14 *Id.*

15 *Id.*

characters and *in-game* items.¹⁶ BSI employees apparently avidly engaged in the practice of ‘farming’.¹⁷

In its complaint, BSI alleged that Mythic had approached eBay to shut down the auctions of BSI’s ‘farmed’ items on the basis that the auction of characters and items infringed Mythic’s copyright. BSI challenged the validity of this assertion of copyright, among other claims.¹⁸ BSI’s action was not pursued apparently because BSI did not continue to instruct their lawyers or pay their legal fees.¹⁹

These partially commenced actions which assert gamers’ right to sell their *in-game* items may not, however, be representative of all gamer concerns. Some DAOC gamers, it appears, sympathized with Mythic, rather than BSI because it was bad for the game overall.²⁰ Some EverQuest gamers also applauded Sony’s action to shut down *out-of-game* trading.²¹ For a segment of the online gamer community, it appears that *out-of-game* trading is unfair because it allows gamers to acquire new skills and items without having ‘earned’ them through the necessary *in-game* playing time (and paying the consequent monthly subscription fees). The sense of unfairness felt by these gamers conveniently supports the game provider’s objective of maximizing subscription revenues.

Nonetheless, numerous gamers loudly protested their right to conduct *out-of-game* trading²² and a considerable

16 Plaintiff’s Complaint for Declaratory Judgment; Interference with Prospective Economic Advantage; and, Unfair Business Practices, *Blacksnow Interactive v. Mythic Entertainment*, (C.D. Cal, 2000) (on file with the YALE JOURNAL OF LAW AND TECHNOLOGY) (hereinafter “Plaintiff’s Complaint”).

17 David Becker, *Game Exchange Dispute Goes to Court*, CNET NEWS.COM, Feb. 7, 2002, at <http://news.com.com/2100-1040-832347.html> (last visited Apr. 16, 2003).

18 See Plaintiff’s Complaint, *supra* note 16.

19 See *BSI Update: Bells Are Tolling!*, posted by Rasputin, at <http://www.unknownplayer.com/archive/02/06/07/727.php> (last visited Apr. 16, 2003).

20 *Id.* (lamenting the fact that Black Snow Interactive hurt gamers and required Mythic to spend money on lawyers’ fees, rather than paying bonuses to Mythic’s employees); see also Greg Sandoval, *Sony to Ban Sale of Online Characters From Its Popular Gaming Sites*, CNET NEWS.COM, Apr. 10, 2000, at <http://news.com.com/2100-1017-239052.html> (last visited Apr. 16, 2003) (noting that message boards welcomed the ban).

21 *Id.*

22 See Carter, *supra* note 4.

number of gamers continue to participate in online auctions on sites such as Gamers Auction and eBay.²³ This suggests that a body of gamers feel that they should be able to auction their *in-game* items and characters.

It is interesting to note that *out-of-game* trading of *in-game* items does not appear to be troubling all game providers. eBay continues to host auctions for *in-game* items from several online games, other than EverQuest, and even Sony has not yet pursued Players Auctions. However, some game providers have responded technically, rather than legally, to the issue and changed the game architecture. In Microsoft's *Asheron's Call 2*, for example, more superior items degrade after three *in-game* days, items are restricted to certain levels and the most powerful items cannot be traded or dropped.²⁴ These technical measures are designed to discourage *out-of-game* auctions of *in-game* items and may have some degree of success.²⁵

C. A GAMER'S RIGHT OF IN-GAME TECHNICAL ADVANCEMENT?

Another means used by some gamers to advance their *in-game* characters, other than through regular game play, involves the use of technical means which are frequently referred to as 'cheats'. Cheat programs, it seems, are not widely discussed by and within the industry because of concern at admitting weaknesses in a game.²⁶ Few gamers have voiced a *right* to cheat but the persistent occurrence of 'cheating' suggests some gamers do see it as a legitimate means of play. For example, some gamers blame the poor game design, which

23 On April 16, 2003, eBay had 185 pages of items for sale in connection with Internet games including The Sims Online, Diablo II, Earth & Beyond, Dark Age of Camelot and Ultima Online. A large section of the Players Auction website is devoted solely to online auctions of game characters and items.

24 Stanford Law Class, *Law in a Virtual World*, Presentation: *Asheron's Call 2*, Apr. 2003 (on file with the YALE JOURNAL OF LAW AND TECHNOLOGY).

25 *Id.*

26 David Becker, *Cheaters Take Profits out of Online Gaming*, ZDNET.COM, June 7, 2002, at <http://zdnet.com.com/2100-1104-933853.html> (last visited Apr. 17, 2003); Matt Pritchard, *How to Hurt the Hackers: The Scoop on Internet Cheating and How You Can Combat It*, GAME DEVELOPER, July 24, 2000, available at http://www.gamasutra.com/features/20000724/pritchard_01.htm (registration required) (last visited Apr. 17, 2003).

makes ordinary game play boring, as creating a legitimate need and fair reason to cheat.²⁷

There have been several different instances of cheating in a range of online games. In *Ultima Online*, cheat programs enable gamers to acquire *in-game* items or skills without completing the usually necessary amount of game play, in some instances taking those items or skills from other gamers.²⁸ In *EverQuest*, cheat programs such as macros have been employed to enlarge piles of cash²⁹ or to provide a map of where monsters and other characters are, thereby thwarting the intended 'quest' nature of the game.³⁰ In *Diablo*, a game update enabled some gamers to crash the sign-on system and gain access to the accounts of other gamers, whereupon those other gamers' characters were erased or stripped of their most powerful items.³¹

Game providers are concerned about cheating, apparently because of their desire to attract new gamers without online gaming experience.³² Game providers apparently believe that experienced gamers are likely to simply move servers or they have sufficient knowledge to be able to avoid or secure redress for any cheating they encounter. Newer gamers, it is feared, are more likely to take a bad experience as a result of the cheat as symptomatic of the entire game experience and log off permanently. This discouragement of new gamers will adversely impact subscription revenues. In addition, the acquisition of *in-game* benefits by those gamers who employ cheats also shortens their game playing time, thereby also reducing the amount of subscription fees they pay.

Game providers have identified the need to "protect the integrity of gamers who have invested significant time and

27 GREG COSTIKYAN, *THE FUTURE OF ONLINE GAMES* 73 (1999), available at <http://www.costik.com/writing.html> (last visited Apr. 1, 2005).

28 Becker, *supra* note 26.

29 *Inflation Threatens EverQuest Economy*, BBC NEWS, Oct. 21, 2002, at <http://news.bbc.co.uk/2/hi/technology/2345933.stm> (last visited Apr. 16, 2003).

30 *EverQuest Battles Cheat Software*, BBC NEWS, Dec. 2, 2002, at <http://news.bbc.co.uk/2/hi/technology/2534061.stm> (last visited Apr. 1, 2005).

31 Mark Ward, *Hackers Kill Off Heroes*, BBC NEWS, Jan. 3, 2003, at <http://news.bbc.co.uk/2/hi/science/nature/1097330.stm> (last visited Apr. 1, 2005).

32 See *supra* note 26.

money in this game . . . [as] . . . very important.”³³ The aim of the game provider, it appears, is to provide all gamers with an equitable, fair gaming experience. And according to some experienced gamers, combat against a character which has been enhanced by cheats discourages the weaker, non-cheating gamer from further participating in the game.³⁴ Despite this, cheat programs continue to exist and to be updated to circumvent technological fixes designed to block them. This suggests that some gamers are able to justify their use of technical means of *in-game* advancement and support a gamer’s right to use cheats.

In some respects it is difficult to discern a difference between the use of some *in-game* technical advancements and the *out-of-game* acquisition of *in-game* benefits through an *out-of-game* auction. However, as the above discussion shows, some cheats do more than just rapidly advance a gamer’s character. Some cheats also destroy the skills and items acquired by other characters or steal skills and items from another character, appropriating them to the cheating gamer’s character (*destructive cheats*). These types of cheat programs seem intended to ruin the experience of other gamers, and hence, no doubt, their characterization as being unfair. However, other types of cheats are very similar to *out-of-game* auctions of *in-game* items because they simply allow a gamer to enhance their character’s skills or experience other than by normal game playing (*advancement cheats*). Game providers have avoided making such fine distinctions between ‘destructive cheats’ and ‘advancement cheats’ and have classified all cheats (indicated by the labelling effect of the word “cheat”) as bad.

Game providers generally rely on technology and social norms to prevent all types of cheats. One common response to cheats are technological fixes to block cheats. Another common approach seems to be to rely on gamer norms. Some game providers claim that “[m]ost of our notification of people breaking the rules comes from other gamers.”³⁵ Game providers argue that social networks – a “network of trust” - should be the main tactic to combat cheating.³⁶ This is instead of reducing the incentive for destructive cheats, for example, by improving game design to make it less boring. Again, this response is consistent with the intention of maximizing subscription revenues.

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.*

D. A GAMER'S RIGHTS OF CREATIVE GAME-RELATED EXPRESSION?

In addition to conflicts over the commercial and technical rights of gamers, there have also been controversies about the extent to which gamers can use *in-game* items as the source of creative expression. Two examples are illustrative.

The first example is an EverQuest gamer who wrote a fictional piece about the rape of an EverQuest character “barely in her 14th season”, giving rise to speculation that the piece was nothing more than violent child pornography.³⁷ Sony and Verant requested the third party service provider who hosted the story to remove it and the gamer’s then current gamer account was terminated.³⁸ Sony and Verant cited reputational interests as well as their proprietary rights to control derivative works based on EverQuest, as grounds for their action.³⁹ Sony/Verant’s spokespeople said variously that their action was motivated because: “a person’s actions [made] EverQuest a game that other people don’t want to play”; and, because they were “concerned about the perception of online games to the mainstream public” and, Sony/Verant didn’t “need people equating this story with EverQuest”⁴⁰. Again, Sony/ Verant’s action was consistent with a desire to maximize subscription revenue, in this instance, by expanding their customer base.

In the second example, some Quake gamers recently conducted an in-game performance of “Quake/Friends”. As part of the performance, Quake avatars assumed the role of each of the Friends characters and reenact the pilot episode of the TV show, using the game’s instant-message system, and, at the same time, were able to be killed by other, non-performing

37 Tim Richardson, *Fantasy Gamer in Porno Row*, THE REGISTER, Oct. 6, 2000, at <http://www.theregister.co.uk/content/archive/13788.html> (last visited Apr. 1, 2005).

38 Jongodwin, *Banned for Roleplaying: An Interview With Mystere*, November 9, 2000, at <http://www.joystick101.org/?op=displaystory&sid=2000/11/3/74932/4052> (last visited Apr. 17, 2003).

39 T.L. Taylor, *'Whose Game Is This Anyway?': Negotiating Corporate Ownership in a Virtual World*, 227-242, 235, in *COMPUTER GAMES AND DIGITAL CULTURES CONFERENCE PROCEEDINGS* (F. Mäyrä ed. Tampere University Press, 2002) available at <http://www.itu.dk/~tltaylor/papers/Taylor-CGDC.pdf> (last visited Apr. 1, 2005).

40 *Id.*

Quake gamers.⁴¹ The mix of the “brutal ‘Quake’” with the “genteel ‘Friends’” was intended to provide cultural criticism on both “pop-culture creations that ‘present a fantasy, a simplistic view’ of the world”.⁴²

It is difficult to argue that the depiction of a (possible) child-rape in Mystere’s story was more reputationally damaging to EverQuest, than the “Quake/Friends” performance, which enables the *in-game* massacre of family show characters. However, there have been no reports of attempts to prevent the ‘Quake/Friends’ performance. Perhaps, the reputational damage is more confined in the case of the latter because Mystere’s story was posted ‘*out-of-game*’, whereas the ‘Quake/Friends’ performance occurred *in-game* at a specific time and therefore, arguably, less likely to be discovered by other gamers and the general public. Another difference may lie with the different game providers for EverQuest and Quake, and their different tolerance levels for fan creative expression.

The prevalence of gamers seeking to creatively express their game experience through literary, artistic, musical and other expressive means suggests that gamers feel a need or right of game-related creative expression.

III. AN INITIAL REVIEW OF LIKELY LEGAL RIGHTS IN ONLINE GAMES

To date in the U.S., there has been no final adjudication of the rights of gamers or online games. Several decisions have considered earlier manifestations of online games, such as video and computer games, and these are helpful in identifying the likely approach of a court to the question of gamer rights because they raise similar issues. However, as will be discussed below, these decisions are of limited value in clarifying gamer rights because of the less complex nature of the relationships and technology involved in the video and computer game lawsuits.

41 Matthew Mirapaul, *Take That, Monica! Kapow, Chandler!*, N.Y. TIMES, Mar. 3, 2002, available at <http://www.nytimes.com/2003/03/03/arts/design/03MATT.html?ei=1&en+c7b9bd9429ddc2>. (last visited Mar. 3, 2003).

42 *Id.*

A. WHO OWNS THE GAME?

The primary area of law against which to consider online games is copyright law. Online games will typically be protected by copyright and indeed most, if not all, are registered with the U.S. Copyright Office,⁴³ with the game provider claiming ownership.⁴⁴ In addition, one of copyright's exclusive rights—the right to prepare derivative works⁴⁵—is frequently cited by game providers as the legal basis supporting their actions to shut down *out-of-game* trading or *out-of-game* creative expression. Game providers (and the courts) will therefore turn first to copyright law to locate their rights and those, if any, of gamers.

In the U.S., copyright law is intended to achieve the well-known and oft-cited purpose of maximizing the production and dissemination of creative expression.⁴⁶ U.S. copyright law is said to be utilitarian because it offers private incentives for the purpose of realizing this public objective. Under economic theory, copyright law represents an attempt to solve the “economic problem”⁴⁷ of intangible goods, namely that such goods are non-excludable and indivisible.

The touchstone of copyright is originality. Copyright arises in relation to specified categories of works⁴⁸ (including audiovisual works which is the category within which online games fall) which satisfy the requirements of being “works of original authorship” and being fixed in material form.⁴⁹

43 See, e.g., Registration No. PA-933-147 (registered May 10, 1999), by Sony Computer Entertainment America, Inc. for ‘*EverQuest*’ – video game, PC version, with U.S. Copyright Office, *available at* <http://www.loc.gov/cgi-bin/formprocessor/copyright/locis.pl> (search conducted on April 1, 2005, using search phrase “PA-933-147”).

44 Although the certificate of registration is not conclusive evidence of ownership. Under § 410(c) of the 1976 Copyright Act, 17 U.S.C. § 410(c) (Deering, LEXIS current through P.L. 109-2), certificates of registration provide only *prima facie* evidence of the validity of copyright and the facts stated in the certificate, including the identify of the copyright owner.

45 The 1976 Copyright Act § 106(2), 17 U.S.C. § 106(2) (Deering, LEXIS current through P.L. 109-2).

46 PAUL GOLDSTEIN, COPYRIGHT § 1.14 (2nd ed., 2003) [hereinafter GOLDSTEIN].

47 *Id.*, § 1.14.1.

48 The 1976 Copyright Act § 102, 17 U.S.C. § 102 (Deering, LEXIS current through P.L. 109-2).

49 17 U.S.C. § 102(a) (Deering, LEXIS current through P.L. 109-2).

Originality for copyright purposes means that a work has not been copied from another source⁵⁰ and shows “at least some minimum degree of creativity.”⁵¹ The more fanciful a work, the more likely a court will find copyright subsisting in even the smallest variation of the work from existing materials.⁵² This means that online games, which are highly fanciful and set out visual images of new and imaginary worlds, are likely to be located close to the core of copyright protection.

The issue, however, is who owns such copyright as exists in online games. Copyright law dictates that the ‘author’ is the first owner of copyright.⁵³ Under a typical copyright analysis, the game provider is likely to be the first-in-time author of an online game because the provider and its employees and contractors identify the parameters of the imaginary world and set about coding it. However, given gamers develop and experience the storyline as *conductors*, the question is whether and to what extent gamer participation gives gamers rights of copyright ownership in the overall game.

In the context of video games, gamer participation was held to be insufficiently creative to render the gamer the author of each play of the game. In *Midway Manufacturing Co. v. Artic International, Inc.*⁵⁴, Chief Judge Cummings said of gamer participation:

Playing a video game is more like changing channels on a television than it is like writing a novel or painting a picture. The player of a video game does not have any control over the sequence of images that appears on the video game screen. He cannot 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 a limited number of sequences the game allows him to choose. He is unlike the writer or the painter because the video game in effect writes the sentences and paints the

50 GOLDSTEIN, *supra* note 48, § 2.2.1.

51 Feist Publ’n v. Rural Tel. Serv., 499 U.S. 340 (1991).

52 GOLDSTEIN, *supra* note 48, § 2.2.1.

53 The 1976 Copyright Act § 201, 17 U.S.C. § 201 (Deering, LEXIS current through P.L. 109-2). Under § 201(b), the ‘author’ is the employer, where the work was made in the circumstances of employment, or person for whom the work was made, where the works comes within the definition of a “work made for hire.”

54 704 F.2d 1009 (7th Cir. 1983)

painting for him; he merely chooses one of the sentences stored in its memory, one of the paintings stored in its collection.⁵⁵

Clearly, the level of gamer interactivity has increased since the “Galaxian” video game considered by the Seventh Circuit in *Midway* some twenty years ago. In online games, gamers can control the sequence of images which appear before them, choose the visual representation of their characters and give voice and emotion to their characters. Particularly in games such as *There.com*, the gamer contributes considerably to the images which appear to them and other players, and is invited and encouraged to do so by the game provider. In addition, gamer contribution is persistently stored with the game (and in its servers). The question is, though, whether this greater and persistent contribution is of the kind which courts are likely to recognize as entitling the gamer to rights in the game.

The findings in *Midway* and similar video game cases may not be dispositive of the issue of online gamer rights because game technology has changed to become more interactive. Also, the video game cases were forged in the context of commercial competitors, where one game provider accused another of wholesale copying. Thus, gamer contribution has only been considered from the perspective of whether it invalidated the game provider’s claim of copyright, not whether it contributed to the existence of copyright.⁵⁶ The changes in the technology and in the relationship between the complainants (*i.e.* from being between two game providers to being between a game provider and a gamer) are, however, unlikely to afford gamers proprietary rights for their contributions in the overall game for two reasons.

Firstly, with the exception of *There.com* where gamer contribution may be highly creative, gamer participation is unlikely to be viewed as any more than selecting from pre-determined images and sequences. Although present-day online games involve a greater level of selection, this higher level is unlikely to be sufficiently creative to satisfy the Seventh Circuit’s analysis, because the higher level of interactivity still derives from the greater range of choice from pre-determined

55 *Id.* at 1012.

56 *See also* *Stern Elecs. v. Kaufman*, 699 F.2d 852, 857 (2d Cir. 1982).

images and sequences, rather than a larger amount of gamer-created expressive and creative contribution. Secondly, even in the case of games such as *There.com* where gamer contribution is creative and more akin to painting and writing text, it may be insufficient to give gamers rights in the game itself. Courts may distinguish the game, the ‘*topography of space*’⁵⁷, from gamer contribution in the ‘*possibility space*’⁵⁸ and, by so doing, remove the game, in its entirety, from the claim of gamers.⁵⁹

A focus on the ‘*topography of space*’ was evident in *Stern Electronics Inc. v Kaufman*⁶⁰ where the Second Circuit relied on “[t]he repetitive sequence of a substantial portion of the sights and sounds of the game” to find that the video game in question qualified for copyright protection as an audiovisual work.⁶¹ In that case the defendant appealed a preliminary injunction issued by the District Court for the Eastern District of New York enjoining it from selling “knock-offs”⁶² of the plaintiff’s ‘Scramble’ coin-operated video game.

The appellant-defendant argued that Stern, the game provider, did not enjoy copyright in the audiovisual elements of its computer game because the images appearing on the screen during each play of the game varied according to the actions taken by the gamers and therefore did not meet the fixation or originality requirements for copyright subsistence. The Second Circuit affirmed the District Court’s rejection of this argument.

The appellate court reasoned that several aspects of the games, such as the shapes, colors and sizes of a gamer’s spacecraft, enemy spacecraft, the terrain which appears and the sequence in which it appears, in addition to the sounds heard whenever a spaceship is destroyed, remain constant during each play of the game. Although some of the sights and sounds may not be seen or heard each time the game is played, they remained capable of being seen and heard. These stored and pre-determined images and sounds invalidated the argument

57 See *Sims, supra* note 2.

58 See *Sims, supra* note 2.

59 This paper will not consider the possibility of gamers being joint authors because the first of the two requirements, the intention to produce a joint work is clearly absent in the case of online games.

60 *Stern Elecs.*, 669 F. 2d at 852.

61 *Id.* at 856.

62 *Id.* at 855.

that the gamer's playing of the game caused an original work to be created with each game play.

The reasoning by the Second Circuit here seems to hang copyright on the parameters set by the game providers – the '*topography of space*.' The court disregarded the '*possibility space*' which allows gamers to determine their own journey through a game and causes variations to each gamer's experience of the game. Again, similar to the 'Galaxian' game considered in *Midway*, the game at issue here would not have had the same level of gamer interaction as online games nor would it have persistently stored gamer contribution. However, if a court focuses solely on the parameters of the game, these differences will not alter the court's disregard of claims that the gamer's experience is copyright protected.

The focus on '*topography of space*' in *Stern v Kaufman* is interesting when compared with copyright's *scènes à faire* doctrine, which is applied to other fictional works such as novels and plays.⁶³ Under this doctrine, courts have withheld copyright protection from elements of works which are "preordained by the work's unprotectible idea", typically the basic plot and character type.⁶⁴ Thus, an author will not be able to claim exclusive rights to those elements which naturally flow from the situation being portrayed.⁶⁵ Cases in which the doctrine has been applied include instances of prayer, the playing of a piano and the hunger motive in church scenes⁶⁶ and the presences of drunks, prostitutes and abandoned cars in a New York scene.⁶⁷ Although some may doubt whether it is possible to identify pre-ordained scenes and characters naturally flow from the imaginary worlds represented in online games, it seems the courts are undeterred by the highly fanciful nature of the subject matter. In *Zambito v Paramount Pictures Corp.*⁶⁸, for example, the U.S. District Court for the Eastern District of New

63 GOLDSTEIN, *supra* note 48, § 2.3.2.2.

64 *Id.*

65 *Id.*

66 Schwarz v. Universal Pictures Co., 85 F.Supp. 270 (S.D. Cal. 1945).

67 Walker v Time-Life Films, Inc., 784 F.2d 44 (2d Cir. 1986).

68 613 F.Supp. 1107 (E.D.N.Y. 1985), *aff'd* 788 F.2d 2 (2d Cir. 1985).

York classified several elements in the film *Raiders of the Lost Ark* as dictated by the scene described.⁶⁹

It can be argued that the *scènes à faire* doctrine should be applied to online games, just as it is to other highly fanciful works such as novels and plays. All online games involve similar plotlines and characters, with varying levels of particularization. Courts seem readily able to identify pre-ordained, unprotectible elements of a scene, regardless of whether it reflects 'real life' or an imaginary world. As such, it is not difficult to see that certain features of spacecraft, enemy craft and out-of-space terrain in *Earth & Beyond* or the lands and storyline of *EverQuest* may necessarily flow from the nature of the scene displayed in an online game and therefore be unprotectible under the *scènes à faire* doctrine, rather than the hook on which to hang copyright subsistence. Treating the game parameters, created by game providers, as unprotectible *scenes a faire* would preclude game providers from claiming copyright in the '*topography of space*' of a game, leaving open the possibility that copyright could subsist in the gamer-created '*possibility space*'.

However, it is unlikely that courts will disregard the investment and creativity of game providers in constructing the parameters of online games such as to invalidate their claim of copyright in the game for three reasons. Firstly, game providers do particularize their world, storyline and characters beyond the abstract and they set fairly detailed parameters from which gamers choose their experience. This means that game providers are likely to have a claim to much of the expressive, detailed content of the game, even if the ideas of some spacecraft and space terrain are unprotectible ideas. Second, courts are likely to refuse to recognize gamers are sharing rights to the overall game because, as discussed in Part IV (A) below, it offends the notion of the individualistic, Romantic author on which copyright is premised. Thirdly, a consequentialist

69 *Id.* at 1112 (holding that "[u]pon close inspection, plaintiff's remaining claims of actionable similarity fall within the category of unprotectible *scenes a faire*. That treasure might be hidden in a cave inhabited by snakes, that fire might be used to repel snakes, that birds might frighten an intruder in the jungle and that a weary traveler might seek solace in a tavern, all are indispensable elements to the treatment of "Raiders" theme, and are, as a matter of law, simply too general to be protectible." (citations omitted).

approach⁷⁰ would also reject gamers as authors because of the inefficiency and confusion which would result from a finding that gamers shared authorship with game providers.

If, as the decisions of *Midway Manufacturing v. Artic International* and *Stern v. Kaufman* suggest, courts hold that game providers own rights in the online game as a 'topography of space', then the question becomes whether players also own rights in the game elements, which they create and select in the 'possibility space' in their role as *conducer*.

B. DO GAMERS HAVE RIGHTS TO *IN-GAME* ELEMENTS?

There are two obstacles to a finding that gamers own rights to *in-game* elements. The first obstacle is whether the nature of gamer contribution to in-game elements is such as will be recognized and accorded rights by law. The second is that gamers are usually contractually precluded from claiming any rights.

As discussed above, when gamers play an online game they choose aspects of their character's appearance and possessions and make decisions about the experience which their character will have during the game. As a result of this experience, their character typically 'levels up', that is, acquires more powers and skills, which in turn, typically enables their character to acquire more detailed items and appearance.

The issue is whether these contributions are protectible and original expression. For copyright to subsist, the amount of contribution must be more than a merely trivial variation⁷¹ and involve a modicum of creativity⁷². Mere effort and labor are insufficient.⁷³ This means that the frequent refrain by gamers that their entitlement to rights is based on their investment of time in the game⁷⁴, is unlikely to be recognized under copyright law.

Where the variation involves works in the same medium (as is the case with online games because a gamer's character and possessions remain *in-game*), courts will typically look for

70 See *infra* note 112 and accompanying text.

71 GOLDSTEIN, *supra* note 48, § 2.2.1.

72 *Feist Publ'ns*, 499 U.S. at 340.

73 *Id.*

74 See *supra* note 4.

the combination of elements, which, taken together, create a “different look” or distinguishable variation from existing material.⁷⁵ Certainly, a visual comparison of a gamer’s character when an account is opened with the same character after an extended period of game play, suggests that the character may surpass the different look and distinguishable variation threshold.

While a gamer may contribute to the appearance, their contribution is arguably little more than a series of choices and combinations of pre-determined colors, shapes and other images, to which a series of relationships and experiences are attached. Whereas a painter, who makes choices and selections from naturally occurring and long standing, industrially created scenes and colors (to which no one claims copyright), may claim, under copyright law, the resulting creative expression for their own, it seems doubtful that copyright law would recognize and accord rights to the creativity of gamers for their selection and co-ordination of elements, which represent someone else’s creative expression, nor for gamers’ association of such elements with relationships and personal meaning. The Seventh Circuit’s characterization in *Midway Manufacturing v. Artic International* of a gamer’s contribution as similar to that of a television viewer selecting channels is illustrative of copyright’s likely disregard for the type of contribution gamers make to online games.

Other *in-game* items which a gamer acquires, such as gold coins or castles in the case of Ultima Online or new shields for the spacecraft in the case of Earth&Beyond, will not change visibly during game play. The value of these items for a gamer is their accumulation and their association with the character. This is not a value which copyright law recognizes and, thus, a gamer’s claim to have contributed original expression to such items is even weaker than in relation to their character’s appearance.

Even if the nature of gamer contribution is such as would typically be protected under copyright law, gamers are generally contractually precluded from asserting such rights. The EULAs and ROCs of most online games expressly prohibit the making of derivative works and disavow the right of gamers to claim any

75 GOLDSTEIN, *supra* note 48, § 2.2.1.

rights in and to their contributions to online games.⁷⁶ To the extent that the EULAs and ROCs are valid and enforceable against gamers, gamers will not have any rights to their contribution, assuming that they create derivative works because section 103(b) of the 1976 Copyright Act provides that no rights to derivative works arise where such works are made unlawfully.

Although the EULAs and ROCs expressly purport to remove the ability of gamers to assert the rights discussed in Part II, the more interesting question is whether gamers are making derivative works. On the one hand, if gamers are making derivative works then their contribution would be copyrightable pending a successful challenge to the applicability of the EULA and ROC. Alternately, if gamers are not infringing the game provider's derivative works right then gamers should be able to continue with their activity free from game provider interference, again pending a successful challenge to the EULA and ROC.

C. DO GAMERS CREATE DERIVATIVE WORKS?

The right to create derivative works is one of the exclusive rights of the copyright owner.⁷⁷ Derivative works are defined expansively—a definition decried by some as “hopelessly overbroad”⁷⁸—to include works which “are based on” or adaptations of an existing copyrighted work.⁷⁹ The derivative works right will be infringed where the defendant's work copies from the plaintiffs and is substantially similar to the plaintiff's protectible (original) expression.⁸⁰ The challenge therefore is to, firstly, identify whether an original work is copied in an allegedly derivative work and, secondly, where the allegedly

⁷⁶ See, e.g., Ultima Online, *the Ultima Online License Agreement*, Sections 5(a) and (d), available at <http://support.uo.com/agreement.html> (last visited April 18, 2003); EA Online, *EA Online Terms of Service*, Section entitled “EA.com Software”, available at <http://www.ea.com/global/legal/tos.jsp> (last visited April 23, 2003).

⁷⁷ The 1976 Copyright Act § 106(2), 17 U.S.C. § 106(2) (Deering, LEXIS current through P.L. 109-2).

⁷⁸ *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1110 (9th Cir. 1998) (Kozinski, J.).

⁷⁹ The 1976 Copyright Act § 101, 17 U.S.C. § 101 (Deering, LEXIS current through P.L. 109-2).

⁸⁰ Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 209, 209 (1983).

derivative work takes a new and different form, to determine a suitable test by which to measure the similarity of the works in question. The precise scope of what constitutes a derivative work is, therefore, vague.

One lead copyright scholar has sought to explain derivative works by identifying a functional line between the derivative works right and the reproduction right, as follows:

The reproduction right leaves off and the derivative works right begin at that point at which the contribution of independent expression to an existing work effectively creates a new work for a different market.⁸¹

Apparent in this statement is a market-based approach to defining the derivative works rights, namely, that a derivative work comes into existence to the extent that it contains new material and targets a new and different market than that of the original material. Under this approach, the derivative works right is designed to enable an original rightsholder to receive additional revenues for licensing to this new market and, theoretically, the original rightsholder can take these additional revenues into account when investing in the creation of their original material, and proportion their investment accordingly.⁸²

Several cases have considered the derivative works right in the context of video and computer games. And again, despite the limitations of such decisions by virtue of the simpler technology and relationships in question, noted above, these cases are instructive of copyright law's likely approach to the derivative works right in the online gaming environment.

In *Midway Manufacturing v. Artic International*⁸³ a marked-focused approach is evident. In that case, a game provider brought an action against the supplier of circuit boards which sped up the rate of play for the game provider plaintiff's 'Galaxian' and 'Pac-Man' video games. The Seventh Circuit held that the circuit board infringed the plaintiff's derivative works right because of the enormous demand for sped-up video games. The court distinguished sped-up video games from music records played at a faster speed (which the court had previously held did

81 GOLDSTEIN, *supra* note 48, § 5.3.1.

82 *Id.* § 5.3.

83 704 F.2d 1009.

not infringe the derivative works right) with the following reasoning:

[T]he additional value to the copyright owner of having the right to market separately the speed-up version of the recorded performance is too trivial to warrant legal protection for that right. The speeded-up video game is a substantially different product from the original game. As noted, it is more exciting to play and it requires some creative effort to produce. For that reason, the owner of the copyright on the game should be entitled to monopolize it on the same theory that he is entitled to monopolize the derivative works specifically listed in Section 101.⁸⁴

The defendant's creative effort in producing the circuit board and their business acumen in identifying the market demand for a more exciting and faster-paced game were not rewarded but were found by the Seventh Circuit, once the market validated their efforts, to properly be part of the copyright owner's monopoly.

A different approach to delineating the scope of the derivative works right, with respect to video games, was adopted by the Ninth Circuit in *Lewis Galoob Toys Inc. v Nintendo of America, Inc.*⁸⁵

In *Galoob*, Nintendo had appealed the dismissal of an injunction against the defendant for the marketing of 'Game Genie'. 'Game Genie' was a device which allowed a player to alter features of a Nintendo game, up to a maximum of three. For example, the device enabled a gamer to increase the number of lives of their character or the speed at which their character moved. 'Game Genie' was designed to be inserted between the game cartridge and the Nintendo system, where it would block the value for a single data byte sent by the game cartridge to the central processing unit in the Nintendo system and replace it with a new, increased value. By increasing the values, the game features would be correspondingly increased. This effect was, however, temporary and no alteration of the data stored in the Nintendo game cartridge or system occurred.

84 *Id.* at 1014.

85 964 F.2d 965 (9th Cir. 1992).

The Ninth Circuit compared the '*Game Genie*' with the Artic modified chip at issue in *Midway* and noted that:

The Game Genie does not physically incorporate a portion of a copyrighted work, nor does it supplant demand for a component of that work. The court in *Midway* acknowledged that the Copyright Act's definition of "derivative work" "must be stretched to accommodate speeded-up video games." Stretching that definition further would chill innovation and fail to protect "society's compelling interest in the free flow of ideas, information and commerce.

In holding that the audiovisual displays created by the '*Game Genie*' are not derivative works, we recognize that technology often advances by improvement, rather than replacement.⁸⁶ (Citations omitted).

Thus, the court held that the Game Genie did not infringe Nintendo's derivative works right because it only enhanced the gaming experience, it did not reproduce or incorporate any part of Nintendo's copyrighted game.

The Ninth Circuit considered the derivative works right in the context of video games again in *Micro Star v Formgen Inc.*⁸⁷ but shied away from applying its earlier innovation-focused approach, and instead seemed to adopt the market-focused approach of the Seventh Circuit in *Midway*. Formgen had distributed a build utility with its "*Duke Nukem*" game and encouraged gamers to create new levels with it and post them to the Internet. The defendant had downloaded these to a CD and sold it as "*Nuke It*". When a gamer ran the CD, the game referenced the *Nuke It* MAP files⁸⁸ for the new levels but pulled up images from the *Duke Nukem* art library to generate the images that make up that level.

Formgen claimed that the images created when *Nuke It* was run with *Duke Nukem* constituted infringing derivative

86 *Id.* at 969.

87 154 F.3d 1107 (9th Cir. 1998).

88 *Id.* at 1110 (explaining that "[e]ach MAP file contains a series of instructions which tell the game engine (and through it, the computer) what to put where.").

works. The court agreed. It held that the *Nuke It* MAP files constituted a sufficiently permanent description of the images from the *Duke Nukem* game to infringe. As such, the court reasoned that the *Nuke It* levels were “surely sequels, telling new (though somewhat repetitive) tales of Duke’s fabulous adventure”⁸⁹.

This decision has been criticized as applying an unjustifiably broad test of substantial similarity.⁹⁰ The Ninth Circuit in this decision retreated from its earlier innovation-focused approach and adopted a very expansive notion of reproduction. The mere referencing, by a series of instructions, of visual images, was held to be substantially similar to and have copied those same visual images. The court’s reasoning here ignores the fact that, in order for the *Nuke It* program to operate, the gamer must have also purchased the *Duke Nuke* program⁹¹ and therefore, arguably does not supplant demand for the original work. Thus, the court’s approach is more similar to the market-based approach of the Seventh Circuit – finding derivative works infringement where an enterprise is deriving commercial benefit from an original work at the outskirts of the market for that original work after having copied a small portion of the original work.

The results of the *Midway*, *Galoob* and *Microgen* cases may seem illogical to many gamers and game providers. In *Midway* the use of a game enhancer was deemed copyright infringing whereas, in *Galoob* a cheat was held to be non-infringing. This suggests that the derivative works right may not consistently protect the interests of the game provider *simpliciter* and that a more detailed assessment is required. Applying these approaches to the controversies discussed in Parts II(B) (gamer’s right of out-of-game trading), (C) (gamer’s right of in-game technical advancement) and (D) (gamer’s right of game-related creative expression) it appears that all of these activities potentially infringe the derivative works right because they all take-off where the reproduction right ends. They are each activities based on the game which do not involve the mere copying of the game or game elements. The following sections seek to consider the likely status of the gamer rights discussed

89 *Id.* at 1112.

90 Lydia Pallas Loren, *The Changing Nature of the Derivative Works in the Face of New Technologies*, 4 J. SMALL & EMERGING BUS. L. 57, 73 (2000).

91 *Id.* at 86.

in Parts II(B),(C) and (D) above under the above derivative works analyses.

1. SALE OF IN-GAME ITEMS - TOO COMMERCIAL?

The auction of *in-game* items does not involve an exact reproduction of original game content. The items being auctioned are the original game content, as made available by game providers and sometimes enhanced by gamers. However, the auctions typically only describe in words the *in-game* item being auctioned. These descriptions could be argued to be similar to the MAP files in that they reference permanently stored items. Such references were held to infringe the derivative works right in *Micro Star v Formgen*. This type of embodiment was sufficient for the Ninth Circuit to find it to be an infringing replacement of the original content in the game. In addition, a successful market for such auctions has been established. Thus, applying the Seventh Circuit's logic in *Midway*, the copyright owner of the original work is entitled to monopolize on this new market.

A finding that the derivative works right in a game was infringed by the *out-of-game* auctions for *in-game* elements from that game can be challenged in two respects. Firstly, any such finding relies on a less than rigorous application of the test for substantial similarity (discussed above).⁹² The auctioning of *in-game* items would likely survive a more stringent application of the substantial similarity test. Finding that a word description of *in-game* items are substantially similar to and physically incorporate those *in-game* items could lead to the absurd position that gamers could not even describe their gaming experience to friends or other gamers in emails or chat rooms. Secondly, the purchase by *out-of-game* auction of *in-game* items arguably bolsters the market for the original game. *Out-of-game* auctions of *in-game* items may benefit the game provider by expanding the market of gamers to include the time-poor and by retaining more experienced gamers, who can use their experience to 'farm' in-game items.⁹³ This therefore reduces the

92 See *supra* notes 92-93 and accompanying text.

93 See Carter, *supra* note 4.

extent to which the practice “supplants demand for a component of a work”.⁹⁴

Under the innovation-focused approach in *Galoob*, *out-of-game* auctions should survive an allegation of derivative works infringement because, for the reasons identified above, they do not supplant demand for the original game but instead they increase demand and the market for the original game.

A finding of non-infringement depends, however, on deciding that the *out-of-game* auction method does not involve the physical incorporation of a portion of the copyrighted work, which, as also discussed above, in turn requires a rigorous substantial similarity test. It also requires a court to accept that gamers may derive direct commercial benefit from their game play, even if it does not come at the expense of game providers. It may be difficult for courts to feel comfortable that gamers have ‘earned’ and are entitled to such benefits, particularly in the face of game provider complaints.

On the whole, it seems that the commerciality of *out-of-game* sales of *in-game* items and their substitutability for *in-game* acquisition of those items, renders the practice more likely under a market-based approach to constitute an infringement of the game provider’s derivative works right. Moreover, if a broad interpretation of the concept of reproduction is adopted, *out-of-game* auctions are more likely to be a derivative work. However, these conclusions rely on dubious conclusions with respect to the actual harm to the game providers’ market and the proper scope of the substantial similarity test. The better view is that *out-of-game* auctions do not infringe the game providers’ derivative works right. While this means, on the one hand, that game providers are not creating derivative works to which copyright will grant recognition, it also means, on the other hand, that the game provider’s copyright is not being infringed and thus, gamers should be able to continue with *out-of-game* auctions.

2. USE OF ‘CHEATS’ MAY NOT INFRINGE.

Under the innovation-focused approach in *Galoob*, many cheats will not infringe the derivative works right because they are transitory interferences with game play and do not necessarily involve a reproduction or replacement of game

94 *Lewis Galoob Toys*, 964 F.2d at 969.

content. However, the non-infringing status of cheats depends on how it works and is less likely to apply to destructive cheats. If a cheat causes an item which was previously associated with one gamer to now be associated with another gamer (the one employing the cheat) it will cause the deletion of the address for that item in a character database and its recreation elsewhere.⁹⁵ These types of cheats may therefore come closer to the replacement considered infringing even by the innovation-focused approach of *Galoob*.⁹⁶

Under the market-focused approach of the Seventh Circuit in *Midway* and the Ninth Circuit in *Micro Star*, the status of cheats depends on the court's interpretation of the market impact of these activities. On the one hand, the purveyors of cheats do not derive direct *out-of-game* commercial advantage from their activities. No *out-of-game* market has been established for cheats. Moreover, cheats, particularly advancement cheats, may act as a retention device (similar to *out-of-game* auctions), keeping experienced gamers playing the game because the cheats make it more interesting, or keeping inexperienced gamers playing the game because they are able to rapidly enhance their powers and skills. On the other hand, cheats, particularly destructive cheats, could be argued to harm the market for the game because they may discourage current and future gamers, who do not cheat, from playing. All types of cheats may reduce the amount of time spent playing the game, and thereby deprive a game provider of subscription revenue. Under a market-focused approach, a game provider may be able to argue persuasively that the use of *in-game* technical advancements infringes their derivative works right, particularly if a court fails to distinguish between advancement cheats and destructive cheats.

Overall, however, it is far from clear that copyright necessarily proscribes the use of all types of cheats. Although game providers seek to stop the use of all types of cheats in the interests of encouraging and maintaining broad-based popularity for their games, it is not certain that copyright law will condone their efforts in every instance. Copyright's

⁹⁵ For a discussion of the technical workings of an online game see Molly Stephens, *Sales of In-Game Assets: An Illustration of the Continuing Failure of Intellectual Property Law to Protect Digital-Content Creators*, 80 TEX. L. REV. 1513, 1516-1519 (2002).

⁹⁶ *Lewis Galoob Toys v. Nintendo of America, Inc.*, 964 F.2d 965, 969 (9th Cir. 1992).

treatment of cheats will depend on how the cheat operates and whether the court adopts a market- or innovation-focused approach. The fact that some cheats may not infringe the game providers' derivative works right means that game provider should not be able to stop those cheats.

3. CREATIVE FAN EXPRESSION – A SPECTRUM OF INFRINGEMENT LIKELIHOOD?

Online gaming fans' creative expression presents a difficult task for identifying whether and when a derivative work is created. Existing precedent for the treatment by copyright law of creative fan expression can be found in fan fiction. Fan fiction typically involves a fan writing a story based on a fully-developed character from a movie or television program. For these more traditional types of fan fiction, the characters on which the writings are based are likely to be highly particularized by the movie or show's producers and identifiable with the movie or program. As such, fan fiction is considered highly likely to infringe the derivative works rights of the show's producer in their developed character and the discussion about this type of fan fiction typically focuses on seeking to excuse it from infringement under the rubric of fair use.⁹⁷ In the case of online games, it is less clear that creative fan expression infringes the derivative works right and thus, a discussion of fair use is presumptive (and beyond the scope of this paper).

Creative fan expression may take various forms. It may be, like the *Mystere* story, a story written about an *in-game* character. It may be fan art, generated using either visual elements from the game or simply evocative of the fan's interpretation of the game. Alternately, it may be like the 'Friends'/ 'Quake' *in-game* performance. A final legal determination of each type of fan creativity will differ according to the amount of reproduction and similarity the fan works have to the protected aspects of the game.

For example, a story based on a fan's character, which describes their emotions and experiences with other gamers and only loosely references the online game, its landscape and avatar classes is less likely to constitute a derivative work because it is

⁹⁷ See generally Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651 (1997).

based on those elements which are gamer created, rather than determined by the game provider. Certainly, several EULAs and ROCs recognize that gamers own the right to the text which they contribute to conversations as part of playing a game.⁹⁸ Similarly artwork or music which is simply inspired by a particular game world or avatar or experience should be less likely to amount to a derivative work if they do not copy elements from the game. Artwork which reproduces visual images from the game is more likely to infringe the derivative works right because it copies directly. Similarly, a story which describes the game landscape and game provider determined storyline in detail is more likely to infringe because it will tend to be substantially similar (albeit in a different form).

It is therefore perhaps appropriate to see the issue of online gaming creative fan expression as a spectrum of likelihood of derivative works infringement. Along this spectrum, however, it is important to note that the higher level of gamer contribution to the character development and experience should decrease the likelihood of infringement of the derivative works right, particularly when compared with more traditional types of fan fiction.

Considering the examples of creative fan expression discussed in Part II(D) above, it seems that both are at the lower end of the derivative works spectrum as regards the game. Fiction similar to the Mystere story should be less likely to infringe the derivative works right because it is based on a character who is only partly developed by the game provider and then only as regards their visual appearance and generalized descriptions of their character type, for example, that they are a dwarf or elf or goblin. The emotion and character of Mystere was been created by the gamer and it is to this detail that her story refers.

In-game performance pieces such as 'Friends'/ 'Quake' are also less likely to infringe the rights of the game provider

98 See, e.g., Ultima Online Terms of Service, at <http://support.uo.com/agreement.html> (providing that "[c]ontent may be provided under license by independent content providers, including text contributions from other Members.") (last visited Apr. 1, 2005).

because they involve the use of the game characters in a similar fashion to playing the game.⁹⁹

Overall, the above discussion demonstrates that the derivative works right will not necessarily protect the interests of game providers with respect to the activities of gamers in *out-of-game* auctions, the use of cheats or creating fan expression. Because it is not clear that gamer rights activities constitute an infringement of the derivative works right, it is unlikely that copyright would recognize and protect such gamer activity (even if authorized by the game provider to engage in such activities and thus able to attract copyright protection as a derivative work under section 103 of the Copyright Act). A final determination of the extent to which the derivative works right is implicated requires a more detailed analysis of the nature of the use made of the original, protected content, as well as of the impact of the activity on creating a new market or supplanting the existing market. However, given that certain gamer activities are unlikely to infringe game providers' derivative works right and, thus, not interfere with copyright's utilitarian purpose, such activities should be allowed to continue.

The above discussion, particularly with respect to creative fan expression, also illustrates that it is the gamer's highly participatory role in the development of characters which complicates traditional discussions about fan creative expression and makes it doubtful that it infringes the game providers' rights. This again reflects the gamer's role as a *conducer*, which, in turn, challenges the fundamentals of copyright law, as the next Part will discuss.

IV. THE CHALLENGES GAMER RIGHTS POSE.

The discussion in Part III illustrates the difficulty gamers are likely to face under the rubric of copyright law, the area of law which prominently features in any discussion of games, in clearly delineating and asserting their rights in and to elements of the game to which they have a sense of entitlement and attachment. These difficulties arise because the issue of online gamer rights challenges copyright's foundational rationales and assumptions. This is evident in three areas.

⁹⁹ Such performances, to the extent that they borrow developed characters or script from other programs, such as 'Friends' may, however, be at risk of infringing rights in those programs.

A. THE PROBLEM OF THE ORIGINAL AUTHOR.

As discussed in Part III(A) above, the concept of originality is a touchstone of copyright subsistence. Applying the concept of originality, this paper identified in Part III(A) that game providers are likely to be able to assert rights in the online games they release and that online gamers are unlikely to be able to claim any proprietary rights to those games. Part III(B) concluded that it was also unlikely that the contribution of gamers, an investment of time and decisions about a series of choices within a pre-determined '*possibility space*', would be considered by the courts to be the kind of original creativity which merits copyright protection.

This raises the question of why the law views the activities of the game provider to be sufficiently valuable to give game providers exclusive rights of control in their efforts but denies gamers similar rights? Consider the stated overriding utilitarian purpose of U.S. copyright law – to maximize the creation and dissemination of creative works – how is it that the grant of exclusive rights to game providers is deemed likely to achieve that purpose, but that the recognition of online gamer rights is not? Copyright's justification for this distinction comes from its originality requirement and the ideas/expression dichotomy. However, these distinctions make assumptions which involve a value-based assessment of the economic, social and cultural worth of particular contributions.

Consider the concept of originality. The contribution of game providers, so the logic goes, is 'original', but that of gamers is not because the former evidences a modicum of creativity, it represents independent creation and was not copied from another. The contribution of gamers, by contrast, is merely an investment of time and involves the selection and arrangement of pre-determined images and plotlines of game providers.

The originality concept serves many purposes in copyright law.¹⁰⁰ Most importantly in the context of online gamer rights, it provides a moral and philosophical justification for the grant of exclusive rights of control.¹⁰¹ Because a person creates new and original material, they have contributed to society's cultural

100 See generally JAMES BOYLE, SHAMANS, SOFTWARE AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY, 56-58 (1996).

101 *Id.* at 56.

supply and should, therefore be entitled to exclusive rights to their contribution.

The problem with this reasoning is that it assumes that the game providers devised the game “*ex nihilo* or, at least, with the minimum of cultural debts...”,¹⁰² that the material for the game simply occurred to the game providers without reference to existing material. As one noted commentator has observed: “[t]o say that every new work is in some sense based on the works that preceded it is such a truism that it has long been a cliché, invoked but not examined.”¹⁰³

Consider EverQuest which borrows heavily from various fantasy traditions, including by its use of the halflings and orcs characters.¹⁰⁴ Indeed, many *in-game* features of online games are similar, for example, three different classes of avatars and the presence of different worlds connected by portals/ stargates in both Asheron’s Call 2 and Earth&Beyond. Other games share features such as the ability to trade *in-game* and engage in player versus player combat. All games share the common overall objective of leveling up. The question is where to draw the line between protected and unprotected elements.

The idea/expression distinction is intended to serve this role. By only protecting expression, and not ideas, the idea/expression doctrine aims to enable sufficient building blocks (ideas) to remain for subsequent creators to use for future productive purposes.¹⁰⁵ The *scenes à faire* doctrine is an example of this distinction. Abstract backgrounds, storylines and characters are unprotectible ideas. Particularized characters and plot intricacies are protectable expression. However, even applying the idea/ expression distinction begs the question of where to draw the line. What level of abstraction is too general and what level of particularity is sufficiently detailed to merit protection? The issue of online gamer rights requires this question to be answered with exactitude.

It is here that the ideal of the Romantic author will typically be invoked. The comparison of the video gamer to a

102 *Id.* at 132.

103 Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 966 (1990) (citations omitted).

104 *See* Taylor, *supra* note 39.

105 *See* 1 PAUL GOLDSTEIN, COPYRIGHT §§ 2.2.2 and 2.3 (2d ed. 2003).

passive television viewer, rather than an active writer or painter in *Midway* is a prime example of this invocation. Copyright law, it seems, rewards and values only some authors and not others.¹⁰⁶ It rewards and values those whose contributions are most easily seen as original and transformative,¹⁰⁷ those authors who most closely fits the “picture of an author struggling to avoid abandoning his calling in order to feed his family.”¹⁰⁸

This has been described as the blindness of the author-centered system by James Boyle, who comments that such blindness:

[M]inimizes the importance of the public domain, and conceives of information issues predominantly from the incentives point of view . . . these blindnesses also result in the *undervaluation of nonauthorial contributions* to the production process, often in a way that curtails the possibility of future production or the suppression of the interests of the audience or market for the product.”¹⁰⁹ (emphasis added).

Online gamers are ignored, and their contribution left, not just undervalued but unvalued, precisely because they are not perceived as equivalent to the Romantic author, for whom creativity occurs independently. When compared with the Romantic author, online gamers who commercialize or rely on the content of games for creative expression will be deemed to be ‘free riding’, even ‘pirating’, on the hard labor and genius of these more genuine authors, adding nothing which society considers worthy of reward and encouragement.

This critique of copyright’s reliance on the Romantic author has been challenged by Jane Ginsburg who argues that artistic merit has never been a pretext to copyright.¹¹⁰ Ginsburg

106 See David Lange, *At Play in the Field of the Word: Copyright and the Construction of Authorship in the Post-Literature Millennium*, 55 SPG LAW & CONTEMP. PROBS. 139, 143 (Spring 1992).

107 See BOYLE, *supra* note 102, at [author?].

108 Stewart E. Sterk, *Rhetoric and Realty in Copyright Law*, 94 MICH. L. REV. 1197, 1197 (1996).

109 See BOYLE, *supra* note 102, at 169.

110 Jane Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, Columbia Law School, Public Law & Legal Theory Research

conducts a comparative review of several common and civil law jurisdictions and concludes that these legal regimes agree that, at its core, copyright recognizes as the author one who has engaged in human, subject creativity in conceiving a work and controlling its execution.¹¹¹ Nevertheless, Ginsburg acknowledges that additional authorship criteria are applied by some courts in the form of a consequentialist approach – “Were we to find authorship in this instance, then the consequence would be X, and as X is an undesirable result, plaintiff cannot be the author . . .” – and that this approach most often arises when a derivative work is involved and the court is concerned with economic factors.¹¹² Although Ginsburg criticizes the consequentialist approach, her findings of the prevalence of this approach supports the view that the concept of author can be arbitrarily applied to achieve a desired result.

One reason for the low regard in which the contribution of gamers is held may be the public perception of online gamers. Although the industry and numerous commentators loudly protest that 60% of PC gamers are over 19 years of age and 15% are female,¹¹³ these protestations have not yet successfully shaken the overwhelming public perception of gamers. Overwhelmingly online gamers are generally assumed to be anti-social, emotionally immature teenage boys. The contrast between the image of the anti-social, emotionally immature teenage boy gamer and the notion of the original, Romantic author who is struggling to feed his family could not be starker.

Another factor may be that games are not considered to be socially useful. They are just for fun; it is not serious or for real because it is *‘just a game’*. Thus, recognition of proprietary rights as a result of participation in such a pastime seems societally meritless.

B. THE DERIVATIVE WORKS PARADOX.

The problematic nature of the concept of the original author is brought into sharper relief when the derivative works

Paper Group, Paper Number 03-51, 4 (Jan. 10, 2003), *available at* http://ssrn.com/abstract_id=368481 (last visited Apr. 1, 2005).

¹¹¹ *Id.*

¹¹² *Id.* at 6.

¹¹³ Brady Haran, *Fantasy Games ‘Not for Geeks’*, BBC NEWS ONLINE, (Apr. 14, 2003), *at* <http://news.bbc.co.uk/1/hi/england/nottinghamshire/2939175.stm> (last visited Apr. 1, 2005).

right is considered. The derivative works right presents a paradox that every infringer of the derivative works right is itself a potential copyright owner, namely of a derivative work.¹¹⁴ In addition, nearly every creative work relies on and borrows, in some sense from existing works. Thus, extending copyright's monopoly to include derivative works potentially impedes the creative process of the original author because all original authors are, in a sense, derivative authors as well.¹¹⁵

The concept of the original, Romantic author is, therefore, a theoretical justification for copyright's broad rights. Because the original author created their work independently and without reference to any earlier work, later works which borrow from their original work are indebted to them. This argument loses its persuasiveness if all original authors are acknowledged to rely on the works of previous authors. The choice of one author as an original author in this context is therefore arbitrary and reflects a value-based assessment of the worth of an author's contribution.

As a practical matter, however, when considered against copyright's overarching objective of maximizing the creation and dissemination of works generally (both original and derivative), this presents a dilemma in determining when a particular derivative work infringes an original work.¹¹⁶

Attempts to explain the derivative works right and identify its boundaries are frequently analyzed and justified with reference to economic theory.¹¹⁷ Thus, as discussed in Part III(B) above, the derivative works right is applicable where the later work does not reproduce the original work but creates a new market for it. The derivative works right therefore provides an original works owner with the ability to proportion their investment in their original work to include the returns *expected* from the original and derivative works markets.¹¹⁸

This reasoning relies heavily on the prophetic capabilities of the copyright owner. Prior to their development, it seems

114 See generally Goldstein, *supra* note 82.

115 See LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 108 (2001) (“[C]reative works are both an input and an output in the creative process, if you raise the cost of the input, you get less output.”).

116 See generally Goldstein, *supra* note 82.

117 *Id.*

118 *Id.*

unlikely to be expected of game providers that they could have foreseen the development of auctions for *in-game* items or gamer fan expression. Consequently, they would be unable to set their investment levels and price for their online games, at the time they developed and released their games, proportionate to online auctions for *in-game* products or fan fiction.

Such reasoning may also be circular. As was evident in *Midway*, it is easy, once a market has been established, to argue that a copyright owner is entitled to control it.

In recognition of this limitation, it has been suggested that the courts consider whether the derivative use is a customary or reasonably expected use of the original work.¹¹⁹ If a use is customary or reasonably expected, then the original works owner should have been able to calculate the potential value of their original works contribution to the derivative work and priced their work accordingly. If not, then the law should hold the derivative creator liable for infringement.

The difficulty with this approach is identifying when it represents an innovative, new and unexpected use and when it becomes customary. This is particularly difficult given the ever-evolving nature of the technology and relationships involved in the online gaming industry. Imprecise delineation between innovation and infringement decreases the incentive to create derivative (original) works, thereby interfering with copyright's overriding objective.

Enforcing the derivative works right can position an original works owner as the decision-maker who determines what other works are created. In this sense the right acts as a form of censorship, protecting the reputational concerns of original works owner. It interferes with copyright's economic justification of incentivizing the creation of works. The derivative works right allows an original works rightsholder to shut down another's initiative, without requiring the original works rightsholder to enter the derivative works market themselves.

Consider the example of Sony's action to force a third-party online service provider to remove *Mystere's* fan fiction

119 Amy B. Cohen, *When Does a Work Infringe the Derivative Works Right of a Copyright Owner?*, 17 *CARDOZO ARTS & ENT. L.J.* 623, 657-658 (1999).

posting. Sony did not itself create fan fiction based on its game; it left the apparent market for fan fiction uninhabited. On the one hand, it could be argued, as Sony did, that stories such as *Mystere's* damage the popular appeal of the game and, consequently, Sony's potential earnings from its original work, the game. On the other hand, Sony is clearly exercising a right of veto over the content of gamer expression about elements of the game. This is not consistent with copyright's broader utilitarian aim of maximizing the creation and dissemination of creative works.

C. THE PROBLEM OF CULTURAL SIGNIFICATION OF COPYRIGHTED MATERIALS.

Finally, online gamer rights highlight the clash of copyright law with new forms of cultural signification, identification and meaning. The discussion in Part III(A) showed that copyright law is unlikely to countenance the gamer as an original author because of the nature of their contribution, much of which involved the investment of time, relationships and emotions. Similarly, the discussion in Part III(B) of the derivative works right as applied to gamer rights showed that copyright law is unsure whether the kinds of activity, which the passions of gamers engender, is a threat to the incentive paradigm for original works. This is also because copyright law is unable to recognize the very real feeling of entitlement which gamers feel in and to online games.

No doubt because of their passionate involvement in an online game, discussed in Part I above, online gamers feel a sense of identity with elements of the game and those game elements therefore become a symbol for explaining or valuing that identity. Just as we can sell our time in *real world* employment, paint a self-portrait or write an autobiography, so online gamers feel a sense of entitlement to engage in similar activity as it relates to a *virtual world*. Gamers' appropriation of game items and images are highlights: "the ways that bits and pieces of culture are quite malleable, open to multiple interpretations, and in some ways "made real" only through engagement with the audience."¹²⁰

Online games require an involved and participatory community (and derive their financial and reputational success

120 See Taylor, *supra* note 39, at 236.

from that community). Thus, it seems unfair that attempts are made to ensure that such participation and community are controlled and channeled in ways that benefit only game providers.

For copyright law, the notion of the individual Romantic author is controlling and thus, it is ill-equipped to realize the sense of entitlement and attachment in works which have community-based meaning. The gamer as a *conducer* does not fit easily with the notions of the original author and derivative works markets and, in fact, highlight the weakness in the logic of such notions.

V. CONCLUSION

It remains to briefly conclude with a consideration of the two main implications evident from the above exploratory discussion.

The first implication is apparent within the framework of copyright law. Game providers are responding to these assertions of *gamer rights* by seeking to control and, in some instances, stop gamer activities on the basis that these are antithetical to the game providers' business objectives. As the discussion in Part II(B), (C) and (D) showed, game providers have achieved this through technological tools, by changing game architecture to prevent behavior they consider to be undesirable, and legal tools, by relying on their derivative works right. While these responses may shore up the market for their online games—the original works—these responses are not necessarily consistent with the norms of all gamers and certainly not necessarily consistent with copyright's stated objective of maximizing the creation and dissemination of creative material. As Part III(B) demonstrated, infringement of a game provider's derivative works right can involve a more complicated analysis than simply protecting the game provider's economic and reputational interests in its original work. Some cheats and fan creative expression may not infringe the derivative works right. Moreover, whether a gamer sale of *in-game* items infringes relies on a very broad interpretation of the concept of 'substantial similarity' which ignores the lack of substitutability for the original work.

Nevertheless, game providers are preventing or seeking to control these activities, even if copyright law's support for this is absent or, at best, vague. This conduct therefore potentially interferes with copyright and society's broader objective of maximizing the creation and dissemination of creative works, both 'original' and 'derivative'. Particularly given the derivative works paradox, discussed in Part IV(B), the effect of this interference may be more profound than just preventing the creation of 'derivative' works. It may also impede the creation of 'original' works. The issue of *gamer rights* would therefore benefit from a clarification by the courts which was sensitive to the derivative works paradox and the overall purpose of copyright law.

The second implication is more fundamental and challenges the very basis of copyright law. The key characteristic of gamer rights which complicates any copyright analysis of gamer rights is the persistent, high level of gamer contribution. As the discussion in Part IV(A) and (B) above explored, the effect of the problem of the original author in combination with the derivative works paradox is likely cause this contribution to be ignored. The consequence of this is more than just the obstruction of the ability of gamers to refer to and express themselves using culturally and personally significant references, located in online games, which was highlighted in Part IV(C). The harm is potentially much greater when gamer rights are viewed as symptomatic of the broader challenge to our laws which digital technologies have ushered in, namely the rise of the *conducer* phenomenon. As Larry Lessig has observed:

[W]hen the world of creativity shifts outside the largish corporation – when individuals and smaller groups are much more enabled to do this creative activity – then this system of exclusive licenses for every derivative use of a creative work begins to tax the creative process significantly. The opportunity cost, as economists would describe it, of this system of control is higher when, without this system of control, much more creative activity would go on.

Thus, when we have a massive opportunity, we should be reevaluating how necessary these systems of control are. We should be asking

whether control is necessary, or at least how far control is required.¹²¹

This reevaluation will not happen if game providers steadily adopt technological and legal measures to silence and remove such *conducer* creativity before the challenges which the *conducer* phenomenon poses to existing legal frameworks can be analyzed and assessed. If the trend of private control and suppression of the rise of a *conducer* is established in relation to gamer rights, it may not be capable of being halted when it occurs in relation to digital technologies more generally. Thus, the challenge which gamer rights pose to copyright law should be more closely considered by the emerging band of *conducers*, copyright scholars, and legislatures to ensure that the legal frameworks continue to meet the broader economic and cultural objectives which form its rationale.

121 See LESSIG, *supra* note 117, at 216.