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Online video gaming and user-generated content: what rights do users have?

Peter Moran and Brierly Broad PEER LEGAL

Introduction

This article explores the relationship between online video games and intellectual property (IP) rights regarding user-generated content (UGC), including an analysis of sources of law in Australia and then specifically looking to United States jurisprudence to consider the treatment of UGC in video games.

What is UGC?

UGC is a notion more traditionally associated with social media. The entire basis of content hosting sites such as Twitter, Facebook or Youtube is the creation of content by their users within their environment. The scope of Twitter's trademark registration in Australia explicitly includes "messages, comments, multimedia content, videos, movies, films, photos, audio content, animation, pictures, images, text, information, and other user-generated content"¹ which are transmitted via its software.

Whilst there has been some discussion in Australia on IP rights relating to UGC in the social media context,² less has been said regarding UGC in the video game context. In a video game context, the notion of UGC potentially takes on a much broader meaning than in social media because:

- the UGC is often much more inherently a part of the original game and is not able to be moved between different platforms, as in the case of social media
- users can also be "modders" who add to or modify elements of an existing game
- some games might explicitly allow the users to create their own substantial works within the game environment to the extent of possibly even being a new game
- users may choose to livestream their gameplay on social media and other online community platforms including Twitch, Steam and Youtube; this can also involve live commentary from the user and their followers as well as broadcasting (often without permissions from the game developer) live video and imagery from the game itself

A critical element in discussing UGC is that UGC is publicly available to others beyond the user that created it. In a video game context, the notion of making content the user has created available to others is what often gives rise to the need for that content to have some form of proprietary right because the demand for the content by others is what makes it valuable. UGC in video games operates on a spectrum from users wishing to create in-game elements such as:

- creating virtual goods like virtual jewellery or clothing ("skins")
- creating characters based on their favourite celebrity through modifying game levels and terrain
- completely altering the characters, storyline and gameplay whereby the user is creating a new modified version of the game (called "mods")

This kind of UGC gives rise to complex legal questions where users wish to exert rights over their UGC within the game itself, whether as against other users of the game or as against the game owners themselves. The users will have a contractual relationship with the owners of the game, such as via an end-user licence agreement (EULA). However, there is no such contractual relationship as between the users. That is where users may need to look at legal concepts outside of straight contract law to help support the value of their UGC.

The balance of this paper explores, looking first to Australia and then the US, the basis upon which proprietary rights to UGC in video games might be established outside of the EULA context.

Video game UGC and copyright law in Australia

Computer programs or compilations of computer programs are considered literary works for the purpose of the Copyright Act 1968 (Cth). The computer program element of a video game is the coding or algorithm that generates the interface for users to play the game: the "set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result."³

The end product of the game which a user interacts with, as distinct from the code itself, can also be

protected by a separate form of copyright, namely as a cinematographic film. In *Galaxy Electronics Pty Ltd & Gottlieb Enterprises Pty Ltd v Sega Enterprises Ltd*⁴(*Galaxy*), the Federal Court held that the images reflected to the player when interacting with the game constituted cinematographic films that had copyright protection separate to that afforded to the instructions as a computer program.

The fact that the player's actions might vary the images presented on the screen did not impact on the court's views in *Galaxy* that the audiovisual works were protected, citing the US Court of Appeal in *Stern Electronics Inc v Kaufman*⁵ (*Stern*). However, although important and longstanding authorities in copyright law, it is worth noting that both *Galaxy* and *Stern* involved assessments of much more primitive video games (being games from the 1990s and 1980s respectively). As games have become increasingly more complex, less linear and far more dependent on the decisions and interactions of the user for their experiences and outcomes, the point may be reached at which courts determine that many games, in part, become at some point the work of the player as much as they are the work of the creator of the game.⁶

However, until an authority is provided in Australia (or a related jurisdiction), copyright law may be of minimal assistance to gamers in Australia for establishing rights over UGC. *Acohs Pty Ltd V Ucorp Pty Ltd*⁷ is an authority for computer-generated source code which is being created by part of the process within the computer program as not being a separate copyright work. However, the court did leave the door open for a determination regarding UGC by holding, in obiter dicta, that:

In the context of literary works that are computer programs, it is possible that a routine, or perhaps even an information tag, if it is original, sufficiently substantial and functionally separate from the entirety of the program of which it forms a part, might constitute a separate copyright work[.]⁸

Whilst this lays down a basis upon which users in Australia may be able to assert the creation of new copyrighted works within an existing game, many of the things currently vexing gamers, such as loot boxes or profiles or collectibles, are unlikely to get over the threshold of being original, sufficiently substantial and functionally separate from the entirety of the original game such as to warrant a new copyright work.⁹

Other IP rights

Unlike the more simplistic views of video games a few decades ago during the time of the *Galaxy* and *Stern* decisions, video games are increasingly seen as comprising a multitude of different types of overlapping forms of IP. As noted above, they are not protected by

just one form of copyright: parts of games are literary works and parts are cinematographic films. They can also incorporate musical or artistic works that have their own separate copyright. Broader IP rights such as trade marks, integrated circuit rights and possibly even patent rights may also be applicable. All serve to provide proprietary protection to different elements of the game. None however are likely to be of much assistance in regard to UGC other than, perhaps, in games or applications where users are creating their own musical works such as in Garage Band, or artistic works or logos, such as in Canva.

It may be the case that establishing moral rights over UGC is a richer vein helping users establishing proprietary rights over content they create.¹⁰ Whilst not giving users a right to exploit the content commercially or prevent reproduction of the content (provided attribution is made), the right to attribution when creating the content might be a useful first step in establishing rights for users that stand apart from the rights of the video game producers. As with UGC in the social media context (for example the licences granted by Creative Commons on Flickr, Vimeo and YouTube content¹¹), there may be opportunities for groups or collectives to create voluntary licence rights and utilising the legal notion of moral rights for sharing (and possibly even commercial trading) of UGC within video game environments.

Examples of IP protection for UGC outside Australia

The US has created some authority for the proposition that video game IP ownership is divisible within a game and can be protected in proportion to the original content created by each game developer.

Game modifications: Warcraft

In *Cavalier v Random House, Inc*¹² the court held that:

The mere fact that a work is copyrighted does not mean that every element of the work may be protected ... copyright protection may extend only to those components of a work that are original to the author.¹³

This kind of divisible protection in the US is characterised as "at most, a limited (sometimes called 'thin') scope of copyright ownership for the original expression that they add on top of the pre-existing public domain content."¹⁴ This thin scope of protection has extended to situations where game developers build upon or modify existing game content, as exemplified in the US case *Blizzard Entertainment, Inc v Lilith Games (Shanghai) Co Ltd*¹⁵ (*Blizzard*).

The *Blizzard* case involved Valve and Blizzard suing game publishers Lilith Games and uCool for copyright infringement in their mobile games "DotA Legends" and

“Heroes Charge” based on Warcraft III and the DotA mods. The court first had to determine what rights Valve had in the mod games, as Valve only acquired the IP rights from DotA mod game developers Eul (DotA) and IceFrog (DotA Allstars) not from Warcraft.

The court acknowledged that the gamers who modified the role player game Warcraft III were afforded a limited scope of copyright protection and that this “only encompassed the original expression that they added — either individually or as superintendents of the whole work.”¹⁶

Professors Ron Gard and Elizabeth Townsend Gard note that there is an “interplay between promotion and protection” as to whether infringing UGC is likely to be bought out, licensed or forcibly shutdown by the game owner.¹⁷ The streaming of video games by bloggers and Youtubers is an obvious example where game producers prefer the publicity and notoriety afforded by streaming to the strict enforcement of their copyright rights.

Abdul Ismail (“IceFrog”) and Steve Feak (“Guinsoo”), who made the IP-infringing DotA Allstars mod (and which became more popular than its inspiration source), were both hired by game developers. Valve hired IceFrog to create the sequel DotA 2 and Riot Games hired Guinsoo to create the Warcraft III and DotA-inspired “League of Legends”.¹⁸

The recognition of copyright authorship in the mods rested on who had creative control over the mod. Two other developers, Meian and Madcow, who made a version of DotA Allstars (preceding IceFrog and Guinsoo’s) did not lock their mods and were not seen as authors for copyright purposes.

Hence, it was in the interest of Blizzard Entertainment to allow this infringement and recognition of the user’s IP rights in their modifications as the modified version of Warcraft III and DotA commercially exceeded its predecessor. Blizzard Entertainment and gaming giant Valve both acquired IP rights in the modified versions and collectively own the IP rights which make up the Warcraft Universe (including the DotA mods).¹⁹

In-game UGC: Second Life

The case of *Evans v Linden Research, Inc*²⁰ (*Evans*) brought home to game developers the risks of game users bringing legal action to enforce proprietary rights within elements of a game. The game in this case was “Second Life”, an online avatar game in which players paid Linden monthly fees, including property taxes on their virtual land, which they could rent and resell, akin to real property. They believed, from Linden’s representations, that they owned their virtual land and other virtual property. Linden advertised Second Life as a virtual world created and owned by its users and did not change their EULA to reframe/clarify the IP ownership

as being one of an in-world user content licence until later.²¹ A group of users of Second Life brought a class action against Linden for claims of conversion, intentional interference with contractual relations and prospective economic advantage and unjust enrichment. This was due to Linden having unilaterally terminated or suspended their accounts and failing to compensate the users for the value of the virtual land, items and/or currency they had acquired whilst playing the game.

The legal issues in dispute in the proceeding, which the court described as “novel and inherently risky”, were never actually determined by the court as the matter was settled prior to a trial. However, the fact that the court allowed the class action to proceed based, in part, on the wrongful conversion of the users’ virtual property, suggests the court saw at least some merit in the users’ arguments.

In another case, *Amaretto Ranch Breedables, LLC v Ozimals, Inc*,²² a Second Life user who had developed Ozimals, which sold breedable digital animals to other Second Life players, sued the creator of another type of breedable animal, namely a virtual horse created by Amaretto. In both cases, the creations were 3D objects coded by the parties to operate within the Second Life virtual world. Neither the 2012 nor the 2013 decisions provided authority as to copyright principles because the claim for copyright infringement was struck out for a lack of standing due to Ozimals assigning away any such rights. Subsequently, the 2013 decision saw Amaretto’s claims for defamation, trade libel and intentional interference with prospect business advantage all being struck out. However, as with *Evans*, the case demonstrates users seeking to enforce proprietary rights over intangible elements they have created inside a broader game that they did not create.

Conclusion

It remains to be seen how UGC in video games will be protected in Australian courts, and what rights (other than moral rights and fair dealing exceptions) users will have with respect to UGC, if any is granted. If users are attempting to acquire a commercial benefit from the UGC, moral rights and fair dealing exceptions are unlikely to be of assistance.

As in the US, it is likely for the foreseeable future that governance of user rights in UGC will be controlled largely by the EULAs and any rights ceded by the game owner will rest upon whether any EULA or IP-infringing content is of significant value to their market.

However, as online video game popularity increases exponentially, especially livestreaming and e-sports tournaments where players compete for millions of dollars in livestreamed video games (including mods like DotA and League of Legends), commercial imperatives will

inevitably dictate that Australian courts (and maybe even the legislature) will at some point soon be forced to consider the complex IP interactions of users, game developers and their co-creations.



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Footnotes

1. See IP Australia, Trade mark 1206941: Twitter, <https://search.ipaustralia.gov.au/trademarks/search/view/1206941?q=twitter>.
2. See for example, S Christou and A Maurushat “‘Waltzing Matilda’ or ‘Advance Australia Fair’? User-generated content and fair dealing in Australian copyright law” (2009) 14 *MALR* 46; S Christou and A Paramaguru “User-generated content, copyright and fair dealing” (2009) 12(4) *INTLB* 57.
3. Copyright Act, s 10.
4. *Galaxy Electronics Pty Ltd & Gottlieb Enterprises Pty Ltd v Sega Enterprises Ltd* (1997) 75 FCR 8; 145 ALR 21; 37 IPR 462; BC9702028.
5. *Stern Electronics Inc v Kaufman* (1982) 669 F 2d 852 (1982).
6. For example, the court’s analogy in *Midway Manufacturing Co v Artic International Inc* 704 F 2d 1009 (1983) that playing a video game is more like changing the channels on a television than it is like writing a novel or painting a picture may have to, at some point in the evolution of video games law in Australia, become longer be applicable.
7. *Acohs Pty Ltd v Ucorp Pty Ltd* (2012) 201 FCR 173; 287 ALR 403; [2012] FCAFC 16; BC201201060.
8. Above, at [56].
9. See also the threshold requirements for originality, input of labour and skill sufficient to create a new original work set down in *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458; 254 ALR 386; [2009] HCA 14; BC200902942.
10. See Copyright Act, ss 193 (right of attribution), 195AC (right not to be falsely attributed) and 195AI (right of integrity of authorship).
11. Creative Commons’ information available at www.creativecommons.org/about.
12. *Cavalier v Random House, Inc* 297 F 3d 815 (9th Cir, 2002).
13. Above, at 822.
14. D D Nabel and B Chang, *Video Game Law in a Nutshell*, West Academic, 2018, p 83.
15. *Blizzard Entertainment, Inc v Lilith Games (Shanghai) Co Ltd* No 3:15-cv-04084-CRB (ND Cal, 2017).
16. Above n 14, p 89.
17. R Gard and E Townsend Gard, *Video Games and the Law*, Routledge/Taylor & Francis, 2017, p 52.
18. Above n 15; see above n 14.
19. Above n 15.
20. *Evans v Linden Research, Inc* No C-11-01078 DMR (ND Cal, 2012).
21. Above n 14, pp 225–26.
22. *Amaretto Ranch Breedables, LLC v Ozimals, Inc* No C 10-05696 CRB (ND Cal, 2013); see also *Amaretto Ranch Breedables v Ozimals, Inc* 907 F Supp 2d 1080 (2012).