**“A Counter-Friction to the Machine”: What Game Scholars, Librarians, and Archivists Can Learn from Machinimists about User Activism**

*Does machinima have the potential to make a tangible impact on the legal landscape in the sense that it gives anyone and everyone a voice through this new outlet for expression? How has machinima affected the domain of intellectual property thus far, and what are the implications for video game access and preservation?*

From my perspective as a scholar of new media who collaborates with researchers and archivists to preserve video games,[[1]](#endnote-0) one of the most provocative exchanges at the Play-Machinima-Law Conference in 2009 took place between two prominent lawyers participating in the “Rules of Play: Copyright and Fair Use in Machinima” panel moderated by Julie Ahrens:

* "We have the right to contract away fair-use." ~Shane McGee, lawyer for World of Warcraft developer Blizzard Entertainment, Inc., speaking at PML on game EULAs.
* "Let's have a debate in the courts." ~Fred von Lohmann of the Electronic Frontier Foundation to Shane McGee of Blizzard Entertainment, Inc., proposing to resolve the tension between copyright law and contract law through judicial rather than legislative or diplomatic channels.

What makes machinima as a cultural practice particularly interesting from a legal perspective is its ability to dramatize the tension between copyright law and contract law; public rights and private rights; and the right of reproduction versus the right of adaptation. Von Lohmann’s rejoinder to McGee points to one potential mechanism for resolving these conflicts, but there are others as well. The following list positions the judicial solution advanced by von Lohmann within the context of other approaches to user rights:[[2]](#endnote-1)

 \* Approach 1: Outreach to Stakeholders (Diplomacy, Negotiation, and Advocacy)

 \* Approach 2: Legislative Solutions

 \* Approach 3: Judicial Solutions

 \* Approach 4: Civil Disobedience

Because librarians and archivists have fought hard for strengthening the fair use doctrine and imposing appropriate limitations on the exclusive rights of copyright holders, they tend to look askance at the gradual usurpation of copyright law by contract law, whose governing documents include End User Licensing Agreements and Terms of Service Agreements, among others.[[3]](#endnote-2) McGee’s proclamation that video game publishers have the ability to unilaterally nullify fair use through licenses undercuts the decades-long advocacy efforts undertaken on behalf of the public interest by those who work in the cultural heritage sector. What I want to propose here, however, is not that archivists, librarians, and preservationists reflexively dig in their heels and redouble their efforts to reform copyright law in response to these challenges—adhering to the same techniques they always have--but rather that we use this occasion as an opportunity to learn from the successes of machinima creators in gaining concessions from the video game industry to legally pursue their art. Because archivists and machinimists share the common goal of expanding user rights in creative works, positing an alliance and drawing parallels between them can yield interesting insights.

Von Lohmann’s judicial strategy, which has much to recommend it, would presumably place the user in the role of plaintiff rather than defendant in a court of law to test and strengthen the fair use doctrine and empower it against some of the more draconian measures found in licensing schemes. For the purposes of this discussion, however, I want to set aside this strategy and instead adopt a comparative perspective on the differing styles of user activism practiced by archivists and machinimists. My primary observations and conclusions--previewed here and subsequently elaborated--are as follows:

* While archivists and librarians have for the most part targeted copyright law for reform, machinima creators have influenced the civil code documents that govern virtual worlds. Because this class of documents is frequently updated to reflect the evolving nature of the relationships among different stakeholders (Grimes et al, 2008), machinima artists have arguably had greater success than archivists and librarians in advancing their goals over a relatively short period of time.
* While archivists have tended to focus on advocacy and *legislative solutions* to reform, machinimists have frequently embraced advocacy and *civil disobedience*. The interesting result is that the practice of *unlawful* machinima has indisputably paved the way for the practice of *lawful* machinima. Meanwhile, archivists and librarians continue operating within the constraints of a permissions culture that has become largely anachronistic in the information age.
* Archivists and librarians have spent all their political capital in lobbying for legal exceptions to the exclusive authorial right of *reproduction*, largely ignoring the fact that they and their users also have a tremendous stake in limiting the exclusive authorial right of *adaptation*. Machinima creators, by contrast, have significantly expanded their rights to produce derivative works based on the creative assets of game publishers (Hayes, 2008). As Lawrence Lessig has argued, in a Remix Culture, the public right to create adaptations (such as machinima, game mods, or video mashups) is at least as consequential as the public right to create reproductions (Lessig, 2008). Archivists and librarians thus neglect this right to the detriment of themselves, their profession, and their constituents.

We can now reformulate the contents of this list as a set of recommendations for archivists and librarians—inspired by the example of machinimists--and expand on their significance:

**Recommendation #1**: *Archivists and librarians should devote more effort to the reform of contract law and its associated document genres*. To the extent that IP is becoming a matter of private policy rather than public policy, managed through licensing and contractual agreements as opposed to federal copyright law, then our advocacy efforts increasingly need to be directed at the commercial industry rather than the copyright office or the legislative branch. In many respects—and perhaps somewhat counter-intuitively--the game industry is better positioned than Congress or the courts to respond in a progressive and timely fashion to emerging social, cultural, and technological forces that are radically restructuring the relationship between content creators and users. For example, within the last few years Microsoft and Blizzard have published Game Content Usage Rules that relax the exclusive authorial right of adaptation in order to permit players to generate and distribute machinima, video, and other derivative works of art (2004-2010). These rules in turn provide a nascent legal environment in which remix culture and Web 2.0 can flourish. That such an environment is the product of contract law rather than copyright law bears emphasis: the protracted processes through which copyright law has traditionally been emended increasingly provide inadequate grounds for meeting the challenges of our current cultural milieu, a milieu characterized by rapid technological upheavals that in turn redefine social attitudes toward concepts such as originality, copyright, and creativity. Case in point: the Section 108 Study Group, charged with re-examining the Copyright Act with an eye to updating it for the digital age, took nearly three years to reach agreement on a set of non-binding and comparatively tepid recommendations, which may or may not eventually result in actual policy change upon legislative review (2008). By contrast, the example of Microsoft, in particular, demonstrates how contract law can help legitimate player innovation by rapidly legalizing and codifying it—“rapidly” here being an admittedly relative term.

It is crucial to note, however, that the fluid state of contractual agreements is a double-edged sword: EULAs can just as easily be used to constrict or rescind rights as to expand or confer them. As Microsoft states in its content usage rules, the company may choose to revoke a license “at any time and for any reason” (2004-2010). Although subject to some statutory constraints, it may act self-interestedly, magnanimously, or capriciously as it sees fit.

Caveat aside, it remains the case that civil code documents, such as EULAs, are more dynamic in nature than the US Copyright Act.[[4]](#endnote-3) Between 2002 and 2007, for example, Second Life, the popular 3D virtual world developed by Linden Lab, published at least 19 different versions of its EULA (Fitz, 2008). Just as revealingly, Microsoft published revisions to its Content Usage Rules less than two months after their initial release based on feedback from the machinima community (Hayes, 2008: 570). By contrast, Section 108 of the Copyright Act has been amended a mere four times since it was first published in 1976. The opportunities for citizen intervention into the machinery of contract law is therefore much greater than comparable opportunities for intervention into copyright law.[[5]](#endnote-4)

**Recommendation #2**: *Archivists, librarians, and game scholars should stop appeasing copyright maximalists by asking permission to use content when it is not legally necessary*. As Christina Hayes notes, machinimists are accustomed to creating “under the specter of legal uncertainty” (Hayes, 2008: 569):

Machinimists did not wait for licenses before they began creating, either because they were unaware of copyright liability, or because they were savvy enough to realize that regardless of the state of the copyright law, video game publishers were unlikely to prohibit these works for a number of reasons. (Hayes, 2008: 577)

By such acts of civil disobedience, machinimists generate “counter-friction in the machine,” to use Henry David Thoreau’s resonant phrase,[[6]](#endnote-5) forcing game publishers to negotiate with them about the production and dissemination of their art.[[7]](#endnote-6) Ultimately, of course, the lesson isn’t fully transferable to publicly accountable archivists and librarians, who must abide by the law. Nevertheless, they can still learn something from the moxie of machinimists, or else risk becoming complicit in the abuses of the very system they wish to reform. Perhaps nowhere is the danger of excessive deference to copyright holders more ominously expressed than in Susan Bielstein’s *Permissions, A Survival Guide: Blunt Talk about Art as Intellectual Property*:

Asking permission [of a rights holder] zealously and unnecessarily also catches you up in a mentality of acquiescence. Acquiescence is a wasting disease rooted in anxiety and ignorance, and it helps propel the all-consuming permissions culture . . . in the quotidian world of intellectual property, acquiescence operates far beneath the beacon eye of statute or treaty, and capitalizing on it is not good for anyone’s health. It wastes time, it wastes money, and it produces a compliant society vulnerable to abuse and wholesale ideological shifts in the law. (2006: 10-11)

**Recommendation #3**: *Archivists, librarians, and game scholars should work to expand user rights in the area of adaptation, following the example of machinimists*. Section 108 of US copyright law privileges librarians and archivists as a special class of users for whom reproduction is the single most valuable non-exclusive right that may be accorded to them for purposes of preserving the media objects in their care.[[8]](#endnote-7) Conversely, game content usage rules privilege players and the commercialization of primary content, which is potentially supported by the production of derivative works, such as machinima, that boost brand value. Granting the user the right to prepare derivative works is therefore fundamental to realizing what Lawrence Lessig calls a "Read-Write" (RW) culture (2008: 28-31). Defined in opposition to a “Read-Only” (RO) culture, which assumes a clear division between creators and consumers, a RW culture sees the two as deeply intertwined: RW creativity is one in which a society's "ordinary citizens" not only passively "read" their culture, but also actively transform it, producing content such as fan fiction, game mods, machinima, and audio remixes.

Within the RW context, it is the right of adaptation, not reproduction, that achieves preeminence among the five established and inter-related pillars of the copyright code (the reproduction, adaptation, distribution, performance, or display of the original work). Moreover, the model of creativity that underwrites RW culture shades almost imperceptibly into an emergent model of preservation. Because players are already an integral part of the preservation network for video games, any adaptation rights they acquire as content *creators* also helps them in their capacity as content *preservers* (Kraus, Donahue, Winget, 2009). This crossover advantage stems from the fact that the player as modder and the player as preservationist both produce a transformed digital object. Consider, for example, the case of *Mystery House*, the first graphical work of interactive fiction ever created. Released into the public domain in 1987, *Mystery House* was recently reimplemented in the Inform programming language by the Mystery House Taken Over Occupation Force, comprised of Nick Montfort, Dan Shiovitz, and Emily Short (2004). The project team also commissioned ten contemporary digital artists to mod the game using a specially designed kit for the purpose. The end result is that MHTO oscillates between a preservation project and a remix project. As Jon Ippolito has remarked, new media art “can survive only by multiplying and mutating . . . fixity is death” (2008: 106). Consequently, there is an argument to be made in favor of preservation strategies that involve reprogramming, reimplementation, and recreation—strategies that operate under the sign of adaptation, *not* reproduction. In short, because preservation methods that transmit culture via “version streams” are becoming increasingly prevalent,[[9]](#endnote-8) it is essential that archivists, librarians, and curators advocate strongly for the right to prepare derivative works.

**Conclusion**

While lawyers and players have expressed ambivalence about the degree to which recently published Game Content Usage Rules will benefit or hurt the art of machinima over the long term (Hayes, 2008; Play-Machinima-Law, 2009), from my vantage point as a researcher involved with the Preserving Virtual Worlds Project, machinimists are planted firmly in the catbird seat. Game scholars, curators, librarians, and archivists should therefore take a page from the playbook of machinima creators when developing their own professional approaches to user activism and digital access & preservation.

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1. See Preserving Virtual Worlds, Preserving Creative America Initiative under the National Digital Information Infrastructure Preservation Program (NDIIPP), administered by the Library of Congress, Directed by Jerome McDonough (PI): http://pvw.illinois.edu/pvw/ [↑](#endnote-ref-0)
2. I have elaborated on the role of judicial approaches to user rights in an earlier paper (See Kraus, 2008). [↑](#endnote-ref-1)
3. For a typology and detailed analysis of the governing (or civil code) documents of virtual worlds, see Grimes et al, 2008. [↑](#endnote-ref-2)
4. On the dynamism of civil code documents, such as EULAs, see Grimes et al, 2008. [↑](#endnote-ref-3)
5. Such intervention is a function of the dynamism of the documents, and is by no means due to their being collaboratively authored by different communities of practice. Machinimists and players influence the content of the documents indirectly rather than directly. [↑](#endnote-ref-4)
6. Thoreau’s exact phrasing was “Let your life be a counter-friction to stop the machine” (1849). [↑](#endnote-ref-5)
7. Henry Lowood expertly discusses how machinima can “function as a medium for negotiation of issues important to the player community” in his recent essay, ‘Found Technology: Players as Innovators in the Making of Machinima’ (2008: 191). [↑](#endnote-ref-6)
8. The word “reproduce” and its cognates (e.g., “reproducing”) appear no less than 24 times in Section 108 of the US Copyright Act. Conversely, the word “derivative” never appears at all, nor does any related terminology (such as “adaptation”). Additionally, the executive summary report issued by the Section 108 Study Group makes no recommendations regarding the right of adaptation. [↑](#endnote-ref-7)
9. “Version stream” is a concept defined by Jon Ippolito, et al in the context of *The Pool*, an online collaborative environment for designing, sharing, and disseminating variable media art: http://bit.ly/57hhE0 [↑](#endnote-ref-8)