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Licensing & Law

Who Owns an Avatar?

TYLER T. OCHOA & JAIME BANKS

Leeroy Jenkins is a videogame character of wide internet and gamer culture fame. He first came to popular attention in 2005, in an iconic game scenario in which—while his cohort was diligently planning a complex dungeon battle—he suddenly sprang to life, let out the gravelly battle cry *Ah'Leerooooooy Ah'Jeeennnkiiiiinnns!*, and led his compatriots into a slaughter by dragon whelps. He subsequently noted: “At least I have chicken” (DBlow2003, 2005/2014). The ridiculousness of this event led first to the viral appropriation of the character—crafted into memes about everything from riots and warfare to politics and cinema—and this broader reception led to an increased presence in other videogames and game-related products, from the digital card deck-building game *Hearthstone* (2014) to third-party t-shirts and allusions in films like *Wreck-It Ralph* (Spencer & Moore, 2012). While it's not uncommon for game companies to carry characters from one property to another (e.g., the host of characters imported into *Super Smash Bros.* [1999]), Leeroy's case is different. He wasn't created by a game company. He was created by a *player*, Ben Schulz, as he played the MMO *World of Warcraft* (WoW; 2004).

As outlined in various chapters in this volume, both players and game developers have great influence over how avatars—via their assembled components—manifest in digital gameplay. Developers craft their foundational platforms and draw on those infrastructures to craft dynamic code that enables movements, appearances, and abilities. But those potentials call into question whether avatars are avatars until they are played—players click avatars into being, customize their bodies and attire, drive their actions and interactions, and sometimes bring them

outside the gameworld through physical representations. So, given avatars' joint reliance on developers and players, and given legal frameworks such as copyright law, who really "owns" a videogame avatar?

The answer was, perhaps, simpler at one point than it is now. Although early games offered little to no customization based on variations in rudimentary pixel combinations, many modern games afford players a range of creative potential, especially in the MMO genre. These more advanced systems generally offer customization along four dimensions: visual appearance (shape and features of the body; see chapters by Ahn, Nowak, Robinson, & Calvo, this volume), abilities (types of spells and strengths; see chapters by Paul & Milik, this volume), behavior (action of the avatar in the gameworld; see Popak, this volume), and dialogue (aural or textual speech conveyed as or by the avatar; see Wirman & Jones, this volume). Although the latter two dimensions are largely governed by the investment of the player (to the extent the player offers inputs to the avatar to engender its movement or speech), the former two dimensions are effectively governed by the game's designers, as the technical features offer the "raw ingredients" for players to use in customization play. These constraints, however, still often function only as a framework for players' engagement of the system. Take, for instance, the MMO *City of Heroes* (2004). In creating an avatar, users select a character archetype (hero or villain), an origin (e.g., mutant or magic), a primary and secondary power set, and a visual appearance varying by sex, body type, physique features, head (15 types with 26 features), skin color, gear and ornamentation, weapons, auras, animations, name, voice, and backstory. Accounting for all possible variations of these factors, players could quite literally craft *trillions* of unique character forms (see Ochoa, 2012). Because the game's potentials don't account for the unique contributions of players to how an avatar "lives" in a gameworld through enacted avatar behaviors and speech, a question emerges as to whether players' contributions to avatars as customized content warrant some or all of the legal rights associated with authorship and ownership.

THE LIMITED LOGIC OF LICENSE AGREEMENTS

In addressing this question, the first consideration is a given game's End-User License Agreement (EULA) or Terms of Use (ToU), which define a game developer's or publisher's ownership of the game code and of the copyrightable expressions that players may produce during gameplay. For instance, the WoW ToU states that "All rights and title in and to the Service (including without limitation any user accounts, titles, computer code, themes, objects, characters, character names, stories, dialogue, catch phrases, locations, concepts, artwork, animations, sounds, musical compositions, audio-visual effects, methods of operation, moral rights, any related documentation, 'applets,' transcripts of the chat rooms, character

profile information, recordings of games) are owned by Blizzard or its licensors” (Blizzard, 2012, para. 4). Many developers require players to agree to a EULA before they are permitted to access game content, to protect the company’s interests associated with original and derivative game content.

While such agreements may seem cut and dried, EULAs do not offer a definitive answer to the question of avatar ownership. For instance, even if a player consents, a EULA may be unenforceable or invalid if a court considers it unconscionable, a violation of public policy, or preempted by federal copyright law (see Lemley, 1999). Certain attributes of authorship and ownership cannot be assigned via contract (e.g., termination rights, see *Marvel Characters, Inc. v. Simon*, 2002). Moreover, “reliance on a EULA is intellectually unsatisfying and logically backwards”—in considering ownership, it is more prudent to consider “who owns what in the absence of an agreement to the contrary” (Ochoa, 2012, p. 965). This approach allows default ownership to be determined and, from that baseline, one can consider the validity and enforceability of contractual alterations to the default. Who, then, owns an avatar when there is no agreement to the contrary?

COPYRIGHT AND AVATARS AS “WORKS”

The issue of default avatar ownership comes in its potential status as a copyrightable “work of authorship,” and the extent to which developer and player creatively contribute to that authorship. “Copyright protection subsists ... in original works of authorship fixed in any tangible medium of expression” (Copyright Act of 1976, § 102(a)). *Original* denotes that a work is independently created and contains a minimal (even slight) amount of creativity (*Feist Publications, Inc. v. Rural Telephone Service Co.*, 1991). Copyright protection for original works, however, is limited to the unique expression of an idea and not the idea itself (Copyright Act, § 102(b)). For instance, the layout of controls for a golf videogame (e.g., on-screen arrows and ball flight path) are driven by minimal necessary functions and so are not sufficiently creative or original (*Incredible Technologies, Inc. v. Virtual Technologies, Inc.*, 2005). While early games did not exhibit a great deal of creativity, often relying on simple geometric shapes with predictable movement (e.g., *Pong*, 1972), modern games arguably afford a much greater array of creative potential.

A work is *fixed* “when its embodiment in a copy [a material object such as a computer disk] ... is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration” (Copyright Act, § 101). Although computer code driving a game’s audiovisual outputs is considered fixed in a permanent form (cf. *Stern Electronics, Inc. v. Kaufman*, 1982), one must consider whether the audiovisual outputs themselves are fixed. Because—in addition to the appearance and visibility dimensions

of customization—players can manipulate avatars as on-screen content toward highly variable behavior and speech, these aspects of avatars arguably are crafted in real time and so are not fixed in this fashion. “That makes playing a videogame a little like arranging words in a dictionary into sentences or paints on a palette into a painting. The question is whether the creative effort in playing a videogame is enough like writing or painting to make each performance of a videogame the work of the player and not the game’s inventor” (*Midway Manufacturing Co. v. Arctic Intl. Inc.*, 1983). Courts’ early answers to this question relied on early games’ repetitive nature, such that one could ostensibly replicate a player-created display by performing the same movements (Ochoa, 2012). As games have become more complex, more reliant on random events, and multiplayer-driven, however, this conclusion regarding fixation becomes less persuasive; on-screen events are perhaps more akin to live, improvised performances, which are not considered “fixed” unless they are simultaneously being recorded (Copyright Act, § 101).

Finally, the Copyright Act lists eight kinds of *works of authorship*—literary, dramatic, musical, pantomime/choreographic, pictorial/graphic/sculptural, audiovisual, sound recordings, and architectural (§ 102(a)). Videogames fit into two of these categories, as they comprise computer code (a copyrightable literary work) and that code, when run, generates audiovisual output. Despite this duality, Copyright Office regulations provide that a game need only be registered as one of these two types to protect both the code and its output (U.S. Copyright Office, 2014, § 721.10(A)).

In considering default ownership of avatars, one must also determine whether or not an avatar is a separate work of authorship, apart from its game. The Copyright Act fails to provide a definition of “work,” but one can draw an analogy to a literary or graphic character that is protected by copyright if it features identifiable, persistent traits that make it original and distinctive (e.g., *Gaiman v. McFarlane*, 2004). Although many graphic media characters meet this criterion quite easily, it is nonetheless difficult to determine whether an avatar constitutes a work distinct from the game in which it is embedded. In implementing the “minimum size principle” (Hughes, 2005, p. 609), however, the Copyright Office forbids registration of words or short phrases (U.S. Copyright Office, 2014, § 313.4(C)), but it allows registration of literary, dramatic, or visual works that describe or depict a character (U.S. Copyright Office, 2014, §§ 911, 912). Therefore, an audiovisual work that features an avatar’s distinctive appearance and attributes could be copyrighted, and that copyright would protect that avatar as an aspect of the work.

Assuming an avatar qualifies as a “work of authorship,” is it fixed? While discrete, coded visual properties and algorithms that underlie avatars’ abilities may be considered fixed by virtue of their permanent storage on a material object such as a hard drive (a game provider’s or a player’s), the dynamic features of an avatar (i.e., the enactment of those abilities, and behaviors and speech) may be too fleeting or fluid to be deemed fixed. Indeed, *because* of this fluidity, the engagement and

conveyance of these potentials may be considered a public performance, the live transmission of which can be fixed if it is permanently recorded (e.g., via machinima recordings; Copyright Act, § 101).

As to whether an avatar is original, it must be (a) distinctive and detailed enough to be distinguished from generic, similar characters, which are treated as unprotectable ideas (*Gaiman v. McFarlane*, 2004) and (b) sufficiently different from previous copyrightable characters, unless the derivative character was created with authorization (Copyright Act, § 103(a)). It must be acknowledged that many avatars (say, in an MMO where avatars are often quite similar) are not sufficiently different from preexisting characters and not distinct from avatarial tropes in a given game. Nonetheless, it is likely that some (perhaps many) user-crafted avatars are imbued with the minimal “creative spark” required for originality (cf. *Feist Publications, Inc. v. Rural Telephone Service Co.*, 1991).

But who is the font of this creativity—who is the creative author? From a deterministic perspective, a game developer may claim to be the author, because the avatar cannot be anything that the game’s designers and programmers do not allow it to be. This view, however, overlooks the fact that the avatar is much more than just code—the program *constrains* but does not *dictate* the avatar’s customizable expressions. Depending on the degree to which players can influence the form and function of on-screen content (Steuer, 1992), games necessarily give players some degree of freedom that *may* warrant copyrightable authorship in avatar appearance and behavior within the program’s constraints. If a game offers a sufficient range of interactivity and player choice such that the productive gameplay can no longer be said to be solely authored by the developer, the player must be considered to have some degree of original authorship (Ochoa, 2012). By analogy, a word-processing program or paint program is copyrightable, but the literary and artistic works produced with those tools are not owned by the program’s copyright holder (*Berkla v. Corel Corp*, 1999). Thus, in a game that offers only a limited range of customization options and limited interactivity (e.g., moving left or right and jumping only), the developer could be said to be the sole author of any avatars, since any player customization is limited and all avatars are derivative of the basic template. However, given that most games today afford a wide range of options for avatar customization by appearance, abilities, behavior, and speech, it cannot be said that a game developer is the sole author of such an avatar—at a minimum, the player must be considered a joint author of the avatar.

ON JOINT AUTHORSHIP AND OWNERSHIP

Let us return now to the question of who owns an avatar. The Copyright Act accounts for four types of collaborative authorship: works of joint authorship,

derivative works as successive authorship, works made for hire, and collective works (§§ 101, 103, 201). These forms of authorship depend on the relationship among collaborators and on the nature of their contributions, and these forms in turn determine ownership. Notably, however, none of these four frameworks account for the collaborative dynamics between MMO developers and players. While it is beyond the scope of this short chapter to delve into the nuances of fit (for this, see Ochoa, 2012), suffice it to say that each disadvantages one or both parties without fully addressing the contributions of both.

Given a choice of four imperfect options, an MMO is perhaps best considered a collective work (an option that provides some protection to both player and developer contributions), and individual avatars perhaps are best viewed as separately copyrightable contributions to that collective work (because many games afford customization systems requiring considerable player creativity). If so, it must still be determined who owns the copyright to those avatars as contributions. Should a specific avatar be counted as a joint work of the game provider (providing the template) and the player (fleshing out that template)?

It may be useful to consider each avatar as a compilation—a work in which “preexisting materials ... are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship” (Copyright Act, § 101). An avatar can be viewed as a selection and arrangement of components provided by the game developer, in which case the player would be considered the author through his or her lawful selection and arrangement and may claim copyright (Copyright Act, § 201(c)). Thus, the game developer owns the program and audiovisual content copyrights (created by employee-programmers as work made for hire), while the program delivers to players the raw materials for avatar creation. A player selects from these materials, arranging them in an original, creative way to form an avatar (a compilation) that is then contributed to the MMO (a collective work). Viewed in this way, developers would enjoy a default statutory privilege to use the avatar in certain ways, but players could arguably enforce their avatar copyrights outside of the game.

THE VALUE AND FUTURE OF AVATAR OWNERSHIP

The previous discussion begs a question: *should* copyright law provide rights to players? Consider the question in light of the two principal rationales for copyright protection: the utilitarian model (predominant in common-law countries) and the natural-rights model (predominant in civil-law countries). On one hand, the utilitarian perspective posits that copyright exists to benefit the public by encouraging (through rights and economic protections) the creation and distribution of new literary and artistic works (e.g., *Harper & Row Publishers, Inc. v. Nation Enterprises*,

1985). Copyrights and patents may be granted to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive right to their respective Writings and Discoveries” (U.S. Constitution, Art. I, § 8, cl.8). This view suggests that only game developers should be owners of avatars, since the creation of MMOs is the type of capital-intensive endeavor which most heavily relies on the financial incentive provided by copyright ownership. The game engine, the character-creation system, and the avatar’s integration with the gameworld all require significant investment to create. Developers often rely on monetization of these properties through other media forms to cover development and maintenance costs, and the development of such derivative works could be inhibited if players could assert copyright claims to avatars. Conversely, players do not require monetary incentives to create avatars—they do it for entertainment, and often pay for the right to do it.

On the other hand, the natural-rights perspective suggests that one has a natural right to profit from the products of one’s artistic labors (Locke, 1690). In this vein, the Universal Declaration of Human Rights (1948) states that “[e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author” (Article 27). From this perspective, players should indeed own their avatars, as they have invested time, money, and creative effort into the avatar through customization and gameplay, and so deserve to be compensated if that investment is exploited by another. In other words, it would be unfair for game companies to benefit from player labor without compensation. In tandem, however, both perspectives advise against considering MMOs as joint works and avatars as derivative works, because these framings would not accurately reflect both companies’ and individuals interests and would disrupt commercial dealings relative to those interests. Instead, each avatar should be considered a joint work (jointly owned by the player and the game provider) that is a contribution to a collective work, the MMO (Ochoa, 2012). The fact that this proposed solution is an imperfect fit, however, highlights how the theoretical and practical dimensions of interactive media content ownership are not easily and neatly aligned.

It is likely that as videogame play and other forms of interactive media use become more complex—through technological advances like virtual reality, social evolutions such as user literacies, and industry shifts toward specific content and sales models—so too will issues of authorship and ownership become more complex. For instance, as game programming becomes a mainstream skill set, how does one parse out the integration of platform-delivered code with player-created code, as with the complex compilations of game-native and user-crafted items composing avatars in *Second Life* (2003) and *High Fidelity* (2013)? And how might we untangle authorship and ownership of fixed works like Twitch gameplay streams, that draw on content from game companies, engaged creatively by players, but

are fixed by streaming companies? And might avatars themselves at some point deserve authorship credit, given impending advances in artificial intelligence? These and other unexpected collaborative authorship and ownership dilemmas will undoubtedly arise, requiring both theoretical and practical evaluations of these dynamics in ways that protect the interests of players, developers, and avatars alike.

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