A GROUNDED LEGAL STUDY OF THE BREAKDOWN OF MODDERS' RELATIONSHIPS WITH GAME COMPANIES OR LEGAL THREATS SHAKE MORAL BEDS

by

Roger Alan Altizer, Jr.

A dissertation submitted to the faculty of
The University of Utah
in partial fulfillment of the requirements for the degree of

Doctor of Philosophy

Department of Communication

The University of Utah

May 2013

The University of Utah Graduate School

STATEMENT OF DISSERTATION APPROVAL

The dissertation of **Roger Alan Altizer, Jr.**

has been approved by the following supervisory committee members:

David J. Vergobbi	, Chair	**12-26-2012** Date Approved
Robert R. Kessler	, Member	**12-26-2012** Date Approved
Joy Y. Pierce	, Member	**12-26-2012** Date Approved
Hector Postigo	, Member	**03-20-2013** Date Approved
Ronald A. Yaros	, Member	**03-28-2013** Date Approved

and by **Kent Ono**, Chair of the Department of **Communication**

and by Donna M. White, Interim Dean of The Graduate School.

ABSTRACT

This dissertation utilizes law and society research, as well as communication advocacy, to frame analysis and offer an extra-legal solution to conflicts between modders, fans who create new content from existing videogames, and game companies. It utilizes grounded theory and the traditional legal adversarial documentary method to abstract and analyze conflict caused by a cease and desist (C&D) letter sent to Kajar Laboratories concerning *Chrono Trigger: Crimson Echoes* – Kajar's mod to Square Enix's *Chrono Trigger*. Through qualitative analysis of websites, forum posts, and blog comments about the C&D this dissertation discovers the grounded theory Legal Threats Break Moral Communities. Utilizing the grounded theory and legal argumentation a critique is made of proposed legal solutions. A nonlegal solution to ameliorate future conflict is then suggested as a means to satisfy both the needs of modders and game companies.

In analyzing the conflict this dissertation illustrates how the threat of law stops modders, disrupts the community, and chills future mods. This dissertation reinforces a regulatory understanding of copyright law arguing limited monopolies on intellectual property serve to advance the arts and sciences. Modding, like many forms of participatory culture, promotes valuable science, technology, engineering, and math through self-learning. Mods promote the original games while also generating new art.

The dissertation also shows that both regulatory and proprietary interpretations of copyright law benefit from modding.

Through critique of status quo solutions and analysis of a Microsoft exemplar this dissertation suggests a generic game content usage guide as an extra-legal, feasible solution that advances the goals of all parties involved without requiring legal intervention.

TABLE OF CONTENTS

ACKNOWLEDGEMENTS

The list of good people I need to thank exceeds both the number of lines on this page and the capacity of my memory. If you read this and wonder why you were not mentioned then you probably should have been. I apologize in advance for omitting you.

First, I must thank my family. My parental units, Roger, Maria, and Cindy, have shown me the true meaning of support and love. My sisters, Deanna, Shannon, Melissa, Cheri, and Cassandra, have all tormented, teased, and tolerated me in ways that directly contributed to my success. My grandparents, both those who are still with us and the ones who are not, taught me more about being myself and chasing my dreams than anyone.

I am blessed to have numerous mentors who taught me to be a scholar and an academic: David Vergobbi, Robert Kessler, Hector Postigo, Ron Yaros, Joy Pierce, Ann Darling, Gary Gillespie, David Zemmels and Raymond Tymas-Jones. All of my academic accomplishments I owe to them. I also thank my fellow cofounders and the students of the #1 videogame program in the nation, Entertainment Arts & Engineering, for showing me grace and patience while I wrote about my research. This dissertation would not have happened without the efforts of Kajar Laboratories and Kagero Studios.

Finally, without Anne, Corrinne, James, Jason, and Samantha this dissertation would never have seen the light of day. Their food, friendship, schedules and scolding made this happen. Special thanks to Reno, Nevada and Progressive Insurance.

Hack the Planet!

CHAPTER 1

INTRODUCTION

When a group of college-aged students receives a letter from their favorite game company threatening them with financial ruin and possible incarceration, they know things are not going their way. Such is the case of Kajar Laboratories who, on May 9, 2009, received a cease and desist letter (C&D) from Square Enix, one of the largest game companies in the world.[1] In spite of the official sounding name, Kajar Laboratories was neither a pharmacy nor a photo-developing service. It was a small group of young people who so enjoyed a fourteen-year-old Super Nintendo (SNES) Game, *Chrono Trigger*, that they decided to create an unofficial, noncommercial, freely distributed, fan-made sequel to the game titled *Chrono Trigger: Crimson Echoes* (*CT:CE*).[2]

Commonly known as a mod, their game took code and assets from the original SNES cartridge to create the new game. It took five years, but in early May 2009 Kajar Laboratories was ready to release a completely new 35-hour long game, which

---

[1] Chapter 6 provides an overview of the conflict between Square Enix and Kajar Laboratories. Eric Franklin, "Square Enix Pulls Rug from Under Chrono Sequel | Crave - CNET" News and Tech, *CNET*, May 14, 2009, http://news.cnet.com/8301-17938_105-10240371-1.html.

[2] Square, *Chrono Trigger (Super Nintendo Entertainment System)*, 1995; ZeaLitY, "Crimson Echoes," July 8, 2011, http://web.archive.org/web/20110708204051/http://crimsonechoes.com/.

boasted ten possible endings.[3] Kajar suspected that some of its activities might not have been legal, even going as far as stating such in its read.me file. But being since several similar mods of Square Enix games existed online Kajar believed that it could distribute the game.[4] Given that Kajar's game was noncommercial, the modders felt they were helping, not hurting, Square Enix's property. Sadly, days before release, they received a C&D that would not only stop the game from being distributed, but also cause the disbandment of Kajar Labs, and so frighten the creators of an entirely different *Chrono Trigger* project that they too ceased development.

The C&D sent by Square Enix not only affected a variety of *Chrono Trigger* projects, it caused much debate and confusion in the modding community.[5] Hundreds of commenters spread across dozens of websites argued about the meaning of the C&D letter, what was right, and what was legal. This dissertation analyzes the debates, and illustrates how a solitary C&D from a game company can have a chilling effect upon an entire community.

Modders and game companies enjoy a unique relationship.[6] Through a variety of

---

[3] Dale North, "Square Enix Shuts down Chrono Fan Game Crimson Echoes -Destructoid" Games News and Tech, *Destructoid*, May 11, 2009, http://www.destructoid.com/square-enix-shuts-down-chrono-fan-game-crimson-echoes-131702.phtml?s=0#comments.

[4] ZeaLitY, "Crimson Echoes."

[5] Chapter 6 provides exemplars of fan reactions to the C&D Square Enix as well as detailed analysis of the reactions. Appendix A contains a copy of the actual C&D. It should be noted that the recipient blocked out their contact information.

[6] The modification of existing videogames is where we get the term "modder." Though contemporary usage expands "modder" to also include those who create entirely new games using pre-existing game content, as well as those who make tools to help in the process. "Modders" are those who modify videogames to create something new.

contracts and noncontractual norms and mores gamers access a wide variety of copyrighted content and tools that allow them to either modify existing games or create new games. This participatory culture benefits all parties involved.[7]

Modders can deeply engage media they cherish and treasure, learn new tech skills, creatively express themselves, gain notoriety and, occasionally, careers in the games community.[8] Game companies directly gain from the goodwill they create with fans and by selling additional copies of their games.[9] Additionally, by appropriating mods and making them commercial releases, and by treating the modding community as both a place for free creative/technical research and as a development/training ground for future employees, game companies accrue benefits extending above and beyond sales. The games community and society at large benefit from a population with increased tech skills, as well as simply having more art and technology developed, which is at the very heart of copyright law.[10]

In general, the relationships between game companies and modders work well. Game company's contractually establish rules and forums for modders to grow

---

[7] Henry Jenkins, Textual Poachers: Television Fans and Participatory Culture (Routledge, 1992); Henry Jenkins, Confronting the Challenges of Participatory Culture: Media Education for the 21st Century (The MIT Press, 2009).

[8] Olli Sotamaa, "When the Game Is Not Enough: Motivations and Practices Among Computer Game Modding Culture," *Games and Culture* 5, no. 3 (July 1, 2010): 239 –255, http://gac.sagepub.com/content/5/3/239.abstract; Jeri Freedman, *Career Building Through Skinning and Modding* (The Rosen Publishing Group, 2008).

[9] Most mods require an original copy of the game to play. For example, to play the popular mod *Defense of the Ancients* (*DoTA*) one must have a copy of *Warcraft III*, a game currently sold by Activision-Blizzard, installed on their computer.

[10] *The Constitution of the United States of America, Art. 1, Sec. 8*, 1998, http://www.senate.gov/civics/constitution_item/constitution.htm.

communities, provide tools to modify game content, and even help promote both the mods and modders. Modders in turn create content, share it, buy the games, and create a community that both educates itself, and to a limited extent, polices itself.[11] This symbiotic relationship has cultural, societal, and economic capital benefits for all involved.[12]

Of course, not all relationships work all the time, and modding is no exception. Sometimes modders run afoul of the modding community and/or game companies. This can happen in a number of ways, by violating the End User License Agreement (EULA) or Terms of Service (ToS) agreement or by violating community standards. This dissertation focuses on an additional category of violation: mods created without the express permission of a game company or intellectual property (IP) holder. Copyright holders do not usually state any guidelines about how the original game should be treated.[13] Modders use the content at their own risk, and some find themselves running afoul of the IP holder's wishes. This may result in legal action, usually in the form of a

---

[11] Modders police themselves in two different ways. They can complain about each other's work on forums, for perceived violations of rules or norms, or, in some instances, the games themselves have a reporting mechanism. For example, one popular game for console game modders, thanks to a robust toolset and sharing system, is LittleBigPlanet on the PlayStation 3, PlayStation Portable, and PlayStation Vita. A tool tbuilt into the game allows players to report a game not only for violating community standards, usually due to sexual or highly violent content, but also for violating Sony contracts or even perceived copyright violations. For example, if one were to create a Bugs Bunny mod, users could, and would, report it, as it is not intellectual property licensed for the game.

[12] Pierre Bourdieu, "The Forms of Capital," in *Readings in Economic Sociology*, ed. Nicole Woolsey Biggart (Blackwell Publishers Ltd, 2008), 280–291, http://onlinelibrary.wiley.com/doi/10.1002/9780470755679.ch15/summary.

[13] The majority of games do not have tools or contracts to support the modding of them.

cease and desist letter (C&D).[14]

This dissertation takes a provocative stance, arguing that when a relationship breakdown occurs between modders and game companies the legal system does not protect the aforementioned cultural, societal and economic benefits. Current copyright law, more specifically its interpretation and how it is enforced, has a negative effect on the communities involved. By utilizing grounded theory to understand and theorize about the modder/game company conflict this dissertation argues that current laws do not adequately address the situation. It then suggests a solution.

Thorough analysis and theorizing of the modder/game company conflict provides three benefits: First, it explicates the problem in such a way that both users and game companies see that a problem indeed exists and that the current legal system may be failing both parties and harming their interests. Second, it allows game companies and users to understand each other's positions and provide a method to move them away from traditional adversarial legal methods toward alternative resolution strategies. Third, by illustrating the inability of the law to neither provide ex-ante certainty or to truly forward the interests of either party, this dissertation could play a role in efforts to change current copyright law to be more amenable to participatory culture.

This dissertation defines a modder as someone who takes a commercially released videogame and changes either the content of the game or adds features to it.[15] This may be as simple as replacing the vehicles or characters from a popular WWII game with

---

[14] See Appendix A for a sample C&D.

[15] See Chapter 2: What is a Mod?

content from the GI Joe line of toys, or it may be a total-conversion where modders change a single-player science fiction game into a multiplayer game that focuses on present-day terrorists and antiterrorist groups.[16] This dissertation seeks to provide a nuanced understanding of the communities involved in modding, and the legal problems they face.

This dissertation uncovers why modders, who esteem the games they mod and the companies that created them, frequently find themselves on the wrong side of a cease-and-desist letter, or in the worst cases, litigation. As a scholar dedicated to affecting change, I am interested in providing research that can be used to help ameliorate some of the damages caused by this conflict. Such research extends to a wide variety of intellectual property conflicts that arise from participatory culture. Specifically, as a student of media law, I am interested in how people find themselves violating the law, particularly when their motivations are altruistic. Research shows that modders are very interested in the success of the games they mod; in some instances modders offer proof of their love for the company that created the game by offering to instantly sacrifice their mod if it offends the company.[17] While media law researchers have attempted to show possible strategies by which modders could legally defend themselves, for example utilizing the fair use doctrine, I believe we need to understand why the relationship

---

[16] Hector Postigo, "Video Game Appropriation Through Modifications," *Convergence: The International Journal of Research into New Media Technologies* 14, no. 1 (February 1, 2008): 59 –74, http://con.sagepub.com/content/14/1/59.abstract., Katie Salen and Eric Zimmerman, *Rules of Play: Game Design Fundamentals* (The MIT Press, 2003), Kindle loc. 14961–14980.

[17] See Apendix A: Square Enix Cease & Desist Letter

breaks down and explore ways in which both parties can avoid entering into a formal, adversarial legal system.[18]

Something is amiss with the law and the modding community. The failure of the U.S. legal system, in this case meaning the system of law that modders and game companies operate within to resolve conflicts, motivates this dissertation. Our system of law is adversarial in nature, and modders do not want to be the opponents of game companies nor do game companies want to be the adversaries of their fans. Thus, the failure here is not about justice, as previous work has explored, but rather about how current social, legal, and technical systems do not foster the modder/game company relationship.[19] While I explore the notion more thoroughly in the theory section, it might help to understand that law is much more than regulations, it is an interpreted system that provides a frame by which many establish what is legal, ethical, rational, etc.[20] Therefore, the law fails not only when it improperly regulates, but also when it fails to reflect the values of the community it attempts to represent.

This dissertation addresses that problem. Namely, why there *is* a problem between two groups that clearly enjoy a symbiotic relationship. This study provides data, analysis, theory and a legal argument to help understand the conflict's nature and to contribute to help resolve the problem. Three research questions drive this study:

---

[18] Phillip A. Jr Harris, "Mod Chips and Homebrew: A Recipe for Their Continued Use in the Wake of Sony V. Divineo," *North Carolina Journal of Law & Technology* 9 (2008 2007): 113, http://heinonline.org/HOL/Page?handle=hein.journals/ncjl9&id=117&div=&collection=journals.

[19] See Literature Review

[20] Zillah Eisenstein, "The Engendered Discourse(s) of Liberal Law(s)", 1998, 43–78.

RQ1: Why do some modders find themselves violating the copyrights of game companies?

RQ2: What understanding of copyright law do modders demonstrate when conflict arises, and how does it affect their relationship with game companies?

RQ3: How does copyright law influence the relationship between modders and game companies when no contract exists?

These three questions in turn drive two concepts: The first research question involves modders drawing the ire of the game companies they claim to love; the second and third research questions ask how copyright law factors into the conflict. Why put years of labor into something that you know violates the law and that the copyright holder might ask you to stop? More importantly, how does the modder community frame this action? Finally, considering the nonadversarial relationship of modders and game companies, are there less confrontational legal resolutions than copyright infringement lawsuits or cease-and-desist letters?

This dissertation fits squarely into the realm of legal research in mass communication. Gillmor and Dennis define five types of legal research performed in mass communication.[21] This study can be read in light of four.

"*Research that clarifies the law, and offers explanation through analysis of procedure, precedent, and doctrine.*" This dissertation explicates how game companies use copyright law and cease-and-desist letters in disputes with modders. At its core this

[21] Donald M. Gillmor and Everette E. Dennis, "Legal Research in Mass Communication," in *Research Methods in Mass Communication*, ed. Guido H. Stempel III and Bruce H. Westley, 2 Sub. (Prentice Hall College Div, 1989), 341–342.

dissertation makes sense of the various ways the law is utilized. By doing so, both parties have more agency to choose how they relate to the other.

"*Legal research that tries to reform old laws and suggests changes in the law*." This dissertation shows how current copyright law presently fails both parties. It also provides a theory to explain the conflict and uses the theory to suggest ways copyright law, or at least the execution of it, can be modified to better serve both parties' interests.

"*Research may be conducted to provide a better understanding of how law operates on society*." This is precisely the primary goal of this dissertation. Through the examination of the conflict, specifically how modders and fans attempt to understand the conflict, we have a better idea of how copyright law actually operates in society.

"*Research may analyze the political and social processes that shape our communication law*." How the law is formed and a formal critique of it was the topic of my master's thesis and is outside of the scope of this dissertation.[22]

"*Research may furnish materials for legal and journalistic education in mass communication*." This dissertation provides both a deep analysis of a communication problem, provides a theory to explain it, and tests the theory against existing laws. It is my hope this will prove useful to students of mass communication and digital media as they attempt to navigate a landscape in which the laws do not keep with current practices. In addition, I hope this will serve as a model for future mass communication law studies.

In short, this dissertation first utilizes grounded theory as a methodology to analyze a communication law problem. Second, the resultant theory is applied to

---

[22] Roger Altizer, Jr., "Hacking the DMCA" (Master's Thesis, University of Utah, 2006).

copyright jurisprudence using legal methodology to argue how current legal practices are hindering game companies and their most ardent fans.

The impact of this work is significant. The laws being used by game companies can have several negative effects. Legally threatening fans reflects negatively on a business. Additionally, we have seen in other areas that ambiguity in speech laws can cause a chilling effect. Essentially, if people are unsure of the legal line they tend to veer far from it, self-censoring, and society loses potentially beneficial speech.[23] Finally, contemporary society is in a state of cultural (r)evolution, driven by lowering production both in a technical and a content sense.[24] Present copyright laws interfere with both the commercial interests of companies and modders. Participatory culture lies at the heart of the current cultural shift.

In a report written for the McArthur Foundation, Henry Jenkins, defined participatory culture as a form of culture that has:

1. Relatively low barriers to artistic expression and civic engagement.

2. Strong support for creating and sharing creations with others.

3. Some type of informal mentorship whereby what is known by the most experienced is passed along to novices.

4. Members who believe that their contributions matter.

---

[23] Frederick Schauer, "Fear, Risk and the First Amendment: Unraveling the Chilling Effect," *Boston University Law Review* 58 (1978): 689–694, http://heinonline.org/HOL/Page?handle=hein.journals/bulr58&id=695&div=&collection=journals.

[24] Henry Jenkins, *Convergence Culture: Where Old and New Media Collide*, Revised (NYU Press, 2008), Kindle loc. 448.

5. Members who feel some degree of social connection with one another (at the least, they care what other people think about what they have created).[25]

Game modding exemplifies the five points Jenkins lists. There are thousands of mods and mod creators who use a variety of publically available software as well as tools provided by the game companies themselves. There are not only places on the Internet that keep track of the various mods, but some games, such as Media Molecule's *LittleBigPlanet* or Blendo Games' *Atom Zombie Smasher*, have the ability to browse for mods built into them.[26] To date, over seven million *LittleBigPlanet* levels have been published. The mod community shares knowledge and has a strong sense of mentorship. This takes place on websites dedicated to creating and sharing mods, such as *Mod DB*, as well as in public and private forums, some of which are run by companies that support modding, such as Valve.[27] Modders believe that their work matters, and care deeply about both their community and the reception of their work. This last point is at the heart of this dissertation. Chapter 6 analyzes the reactions of fans to a cease-and-desist letter sent to a modder group, Kajar Laboratories, which are both varied and intense. The literature and the analysis offered in this dissertation will show that I, and other scholars, see modding as an important activity in the spectrum of participatory culture.

---

[25] Jenkins, Confronting the Challenges of Participatory Culture, 5–6.

[26] "ModDB: Games and Mods Development for PC Linux and Mac - Mod DB," accessed May 9, 2011, http://www.moddb.com/; Media Molecule, "LittleBigPlanet (PlayStation 3)," October 21, 2008, http://www.littlebigplanet.com/en/; Blendo Games, "ATOM ZOMBIE SMASHER (Windows)," January 24, 2011, http://blendogames.com/atomzombiesmasher/.

[27] Valve, "Making a Mod - Valve Developer Community," July 13, 2001, https://developer.valvesoftware.com/wiki/Making_a_Mod.

I see participatory culture as a societal act where members reclaim and rework shared cultural artifacts in an attempt to appreciate and extend their narratives. It is important to note that this is an epistemological shift provided by digital media. While computers are by no means inexpensive, they have not only drastically reduced the cost of production so that a single user can create original work, they also allow the leveraging of expertise in a condensed, distributed and crowdsourced form and allow access to technology and media, both legally and illegally.[28] Changes in this digital world are pushing the boundaries of the law.

I thus emphasize three take-away points: First, participatory culture happens, and participants, in this case modders, can become legally liable, for their involvement with this cultural shift.[29] Second, companies are willing to take legal actions against fans for violating copyright. Third, the present system does not always work. Fans and modders want to venerate the games and companies they love and companies want to maintain their fan base and their intellectual properties. Usually, legal conflicts do not arise. Sometimes, though, they do, when fans cannot distinguish a bright line between which games can be modded, which cannot, and what restrictions apply to which games. Exploring the impasses provides a deeper understanding of the rights and issues involved.

Which returns us to significance – why it is important to study and understand the

---

[28] Daren C Brabham, "Crowdsourcing as a Model for Problem Solving An Introduction and Cases," *Convergence: The International Journal of Research into New Media Technologies* 14, no. 1 (February 1, 2008): 75–90, http://con.sagepub.com/content/14/1/75.

[29] It is important to remember that this is a minority case. The majority of modders do not find themselves in explicit legal conflict with game companies. However, the conflicts of these minority cases are very visible and illustrate the confusion caused by legal ambiguities.

conflict between modders and game companies. First, videogames are an invaluable part of our digital economy.[30] Game companies commercialize some fan-created mods, while litigating against others. These actions have negative economic impacts on the company. In addition, the actions negatively affect the company's image as will become apparent when we look at specific cases and the resulting public relations (PR) fallout. Second, as we are more and more engaged in participatory culture the boundaries of what is and is not permissible must be clarified so that modders may deliberately violate or obey the boundaries. When the boundaries are vague a chilling effect can occur and free speech, in this case artistic expression, is curtailed via self-censorship out of fear of litigation.[31] Third, modding represents an important artistic venue; as fans experiment with digital media they advance it. This copyright conundrum is not just about the right to express oneself, but also the advancement of an important field. Not only do modders create new content that game companies use to increase the value and longevity of their products, but they also design entirely new types of games, some of which spawn new market segments, as did *Counter Strike* and *Defense of the Ancients* (DotA).[32,] Modding is a type

---

[30] Stephen E. Siwek, *Video Games in the 21st Century: The 2010 Report*, Industry Report (The Entertainment Software Association, 2010), 5, http://www.theesa.com/facts/pdfs/VideoGames21stCentury_2010.pdf.

[31] E.g., see Schauer, "Fear, Risk and the First Amendment."

[32] Salen and Zimmerman, *Rules of Play*, Kindle loc. 14961–14980.

DotA is a mod of the popular Activision Blizzard game *Warcraft III*. Much like *Counter Strike* it uses the content of the game to create an entirely new game. It is so popular that it has inspired international competitions, songs and music videos, and countless knock-offs. It has created an entirely new genre of game, the MOBA, or multiplayer online battle arena. Presently, two commercial games are not only based on *DotA* but have hired the modders involved to consult; they are *Heroes of Newerth* and *League of Legends*. *DotA 2*, being created by Valve, the company that created *Half-Life*, under the supervision of the original modder. There is some controversy over who owns the name DotA, the modders

of activity that copyright law can be read to protect under article 1, section 8, of the U.S. Constitution, which gives Congress the ability to grant limited monopolies on intellectual property "to promote the Progress of Science and useful Arts."[33] I detail this regulatory interpretation of copyright law in the theory section of this dissertation. For now, note that, while many view copyrights as property, the Constitution's copyright clause focuses on the goal of advancing society.

The obvious harm of this conflict is financial. However, larger issues than commerce are at stake. The status quo has created confusion about what is and is not legal. Unlike music, videogames carry no compulsory licensing model, thus there is no ex-ante predictability, leaving modders confused as to whether or not they are violating laws.[34] In addition to the burden on creativity, and possible market expansion, modders learn about game development, and many, including myself, learned how to make videogames and also pursued careers in games based on the knowledge they learned by modding.[35]

---

who created it or the game company that owns the game, Activision Blizzard. That debate is beyond the scope of this dissertation, but shows the importance of modders as their work is being fought over by two of the biggest game companies in the world. - Wikipedia contributors, "Defense of the Ancients," *Wikipedia, the Free Encyclopedia* (Wikimedia Foundation, Inc., April 21, 2012), http://en.wikipedia.org/w/index.php?title=Defense_of_the_Ancients&oldid=488550763.

[33] "Transcript of the Constitution of the United States," sec. Article 1 Section 8.

[34] John Baldrica, "Cover Songs and Donkey Kong: The Rationale Behind Compulsory Licensing of Musical Compositions Can Inform a Fairer Treatment of User-Modified Videogames," *North Carolina Journal of Law & Technology* 11, no. 103 (Fall 2009): 35, http://www.lexisnexis.com/lnacui2api/api/version1/getDocCui?lni=4YDJ-PFH0-00SW-601V&csi=241400&hl=t&hv=t&hnsd=f&hns=t&hgn=t&oc=00240&perma=true.

[35] Hector Postigo, "Modding to the Big Leagues," Online Journal, *First Monday*, May 2010, http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2972/2530; Hector Postigo, "From Pong to Planet Quake: Post-Industrial Transitions from Leisure to Work," *Information, Communication &*

The effects of the chill could be significant, causing a loss not only of artistic expression, but also, as mentioned above, of tech skills learned through modding. These skills have a tangible benefit on our culture and economy.[36] While some may see it is a given, it is worth remembering that creative free speech is the cornerstone of a free and democratic society.[37] As we negotiate a shift towards participatory culture it must be a conversation between all parties, which cannot happen if one party is at the mercy of another. The impact goes well beyond property rights. Chilling modders not only violates free speech, but also mitigates the cultural and societal good that their hobby produces.

I address theory and method in two later chapters, but I want to clarify that this dissertation first uses grounded theory methodology to analyze the reactions of modders to the conflict they have with game companies in such a way as to understand and abstract the conflict. It next assesses law and society literature to understand how legal systems materially impact society. Then, using legal argumentation methodology, it applies the unearthed theory and legal/societal principles to existing jurisprudence to make a legal argument regarding the current state of copyright law. The following roadmap will clarify the structure of this dissertation.

Society 6, no. 4 (2003): 593–607.

[36] Olli Sotamaa, "When the Game Is Not Enough: Motivations and Practices Among Computer Game Modding Culture," *Games and Culture* 5, no. 3 (July 1, 2010): 5–9, doi:10.1177/1555412009359765; Postigo, "Of Mods and Modders: Chasing Down the Value of Fan-Based Digital Game Modifications," *Games and Culture* 2, no. 3 (2007): 302–310; J. Kücklich, "Precarious Playbour: Modders and the Digital Games Industry," December 1, 2005, http://five.fibreculturejournal.org/fcj-025-precarious-playbour-modders-and-the-digital-games-industry/.

[37] Matthew D. Bunker, Critiquing Free Speech: First Amendment Theory and the Challenge of Interdisciplinarity (Routledge, 2001).

Chapter 2 defines, illustrates, and speaks to the major issues surrounding mods. Chapter 3 is a literature that not only explores the current research on modding, but also contextualizes and delineates this dissertation. Chapter 4 introduces and explains the theoretical perspectives that guide the following analysis. Chapter 5 explains the qualitative and legal methods used to analyze fan reactions and create a grounded legal argument as well as offer a solution to the conflict described. Chapter 6 tells the story of *Chrono Trigger: Crimson Echoes*, which serves as a case study and the primary source of data. Chapter 7 is a grounded theory analysis of fan reactions to the news of the cease-and-desist letter sent to *Chrono Trigger: Crimson Echoes*, creators of Kajar Laboratories. Chapter 8 is a legal analysis of the issues brought forward in previous chapters and offers an extra-legal solution to the conflicts that sometimes arise between modders and game companies. This solution also serves to provide clarity and reduce the possibility of a chilling effect experienced by the fan community in the wake of legal threats against modders. Chapter 9 concludes with an overview of lessons learned and possibilities for further research.

CHAPTER 2

WHAT IS A MOD?

A funny thing happened on the way to the information age, something called "convergence." And we caused it, all of us. Someone realized that digital media was more than another way for large corporations – who were only getting larger thanks in no small part to copyright law – to grab more content and distribute it more readily to consumers. Due to digital media, and the accessibility of tools to create and edit it, as well as large-scale networks, such as the Internet, fans and consumers could create, edit, remix, and rework media content just as professionals could – in other words, modify the original to create a new work.[38] But this is not just about access, tools and laws. It is about the culture that evolved in conjunction with them, a participatory culture. It is this culture that allows modding to exist.

To clarify, mods are games or alterations to games made from parts of an existing game. Modders, the people who modify games, use a variety of tools to create new games, levels, or otherwise alter existing games. The act of changing a game is referred

---

[38] Salen and Zimmerman, *Rules of Play*.

to as modding. This chapter explores what mods are, what modders do, and the issues they face.

In a participatory culture consumers become co-producers who can work alone, or more frequently with others, to participate in cultural industries, making media a two-way street. For quite some time, the music industry was self-controlled. However, fans challenged the way distribution worked and began sharing files, some of which were direct copies of commercial releases, some of which were bootlegged recordings, some of which were remixes, and some of which were original. This is the era where *Entertainment Weekly* gave DJ Danger Mouse the album of the year award for his self-released *The Grey Album*, which mixed the Beatles *White Album* with Jay-Z's *Black Album*.[39] The resulting work was not only new, but perceived as an entertaining, superb cultural critique. It was also a thorn in the side of some copyright owners, many of whom were notorious in their vigorous defense of their property. In this sense it was also a political statement.

While the music industry fought file sharing, other cultural industries, in particular videogames, took a different approach. Videogame companies released the tools to play with, alter, and create new content for their games.[40] This took the form of map editors, access to the game's source code, animation tools, and even character lip synching tools. Here at the University of Utah we have created a class around making

---

[39] "Danger Mouse - Wikipedia, the Free Encyclopedia", February 20, 2012, http://en.wikipedia.org/wiki/Danger_Mouse.

[40] Postigo, "Video Game Appropriation Through Modifications"; Postigo, "Modding to the Big Leagues."

movies using these tools, a process called machinima. Our students have even won film festival awards with their machinima.[41] While videogames were never intended to be tools used to create festival-winning films, in a participatory culture, and in the hands of creative students, they can.

While consumers busily and happily released new content for existing games, they were not alone. One of the earliest groups heavily involved in modding was the U.S. Army, which wanted to mod commercial first-person shooters, such as *Doom* (modded by the military to be *Marine Doom*) for use as a training tool for soldiers. Some have argued that *Marine Doom* is one of the early examples of not only modding, but of serious games.[42]

Cultural industries evolved into a two-way street where companies commercialized consumer's work in addition to selling them products. Consumers became producers. Innovation was pouring in from everywhere, not just companies. Not all companies were pleased by this development. The problem with consumers having access to a business' content is that consumers are not on the payroll. Therefore, nothing prevents them from doing things disapproved by the copyright holder. And so they did. Mods that used one company's Internet provider in a different company's game created

---

[41] Sean P. Means, "U. of U. Student's Film Wins Prize at International Festival | The Cricket | The Salt Lake Tribune," *The Salt Lake Tribune*, December 9, 2011, http://www.sltrib.com/sltrib/blogsmoviecricket/52979416-66/film-student-virtual-course.html.csp.

[42] Serious games are games whose primary goal is other than entertainment. Examples include educational games (edutainment), training games, political games, and a variety of others. In this case the U.S. Military first used *Doom* to train soldiers the basic lessons in squad-based combat. Later they had the game modded to become *Marine Doom*, which fit more directly into the training of soldiers. Minhua Ma, Andreas Oikonomou, and Lakhmi C. Jain, eds., *Serious Games and Edutainment Applications*, 2011th ed. (Springer, 2011).

fear of potential copyright infringement. For example, one group of modders created a total conversion mod for *Battlefield 1942* in which they replaced the World War II content with characters and vehicles from Hasbro's G.I. Joe toy line.[43] In 2003, Hasbro sent the team a C&D requiring them to both cease development and distribution of the mod.[44]

Game companies also fear that users would create a situation in which they would be sued for providing tools that enabled users to violate another company's copyright. At first glance this seems far-fetched, one could hardly hold spray paint manufacturer Krylon responsible for urban graffiti. Yet, the notion has precedent in games. While not a mod, per se, Marvel Enterprises (now owned by Disney) sued NCsoft and Cryptic Studios for creating a game, *City of Heroes,* that allowed players to customize characters in such a way that they resembled Marvel's comic book characters, an empire copyrighted by Marvel.[45] Copyright holders had and continue to have problems with some of the content produced by consumers. Because user-created content is not negotiated with the copyright holder prior to release, many have serious reservations

---

[43] Hector Postigo, "Video Game Appropriation Through Modifications," *Convergence: The International Journal of Research into New Media Technologies* 14, no. 1 (February 1, 2008): 63–66, doi:10.1177/1354856507084419.

[44] Ironically, Electronic Arts, the company that published *Battlefield 1942*, is now the licensor responsible for creating video games from Hasbro properties. Though the company has yet to create a first-person shooter based on *G.I. Joe*. - Hasbro, "EA and Hasbro Partner to Bring Casual Games to Global Audience," August 10, 2007, http://investor.hasbro.com/social/releasedetail.cfm?ReleaseID=586451.

[45] Alex Veiga, "USATODAY.com - Marvel Sues Two Companies over Role-playing Game," *USA TODAY*, November 11, 2004, http://www.usatoday.com/tech/news/2004-11-11-marvel-sues-over-avatars_x.htm. - The case was settled out of court for an undisclosed sum.

about it.[46]

It is important to note that, more often than not, mods are created within the parameters established by game companies. Some companies not only encourage modding, but profit from it. Valve, a company that creates some of the most popular modern PC games, is an example of one such company. It has publicly released all the tools used to create its game *Half-Life*, as well as the content of the game. Students from the Redmond, WA, based Digipen Institute of Technology, a games college, used their content to make an innovative game where, instead of shooting others, a player shoots teleportation gates in an attempt to escape a complex maze. They called it *Narbacular Drop*. The game was so innovative that Valve hired the creators to engineer the hit game *Portal*, which won several awards and prompted a profitable sequel.[47]

Mods can take different shapes. In the most basic sense, a mod is a commercially released game that has somehow been modified by consumers. This can take several forms. A gameplay mod is a change that is designed to make a game "better." For example, the popular, massively multiplayer online role-playing game (MMO) "World of Warcraft" is a heavily modded game, though most of the mods tend to be gameplay ones,

---

[46] John Baldrica, "Mod as Heck: Frameworks for Examining Ownership Rights in User-Contributed Content to Videogames, and a More Principled Evaluation of Expressive Appropriation in User-Modified Videogame Projects," *Minnesota Journal of Law, Science & Technology* 8 (2007): 681, http://heinonline.org/HOL/Page?handle=hein.journals/mipr8&id=681&div=&collection=journals; Postigo, "Video Game Appropriation Through Modifications"; Andy Chalk, "The Escapist : News : Game Dev Faces Legal Hassle Over Fake Shatner Mod," *The Escapist*, August 20, 2009, http://www.escapistmagazine.com/news/view/94017-Game-Dev-Faces-Legal-Hassle-Over-Fake-Shatner-Mod. - It should be noticed that the Shatner Mod case is particularly unsettling, as the mod did not even exist. Thus, law firms are sending cease and desist letters without performing due diligence to see if a mod even exists or if it violates any of the intellectual property rights of its clients.

[47] "Narbacular Drop - Wikipedia, the Free Encyclopedia", February 2, 2012, http://en.wikipedia.org/wiki/Narbacular_Drop.

as opposed to content mods. One such mod, the "threat meter," allows groups of players to understand which player is drawing aggro, or which player a particular monster is targeting.[48] Understanding and managing threat is useful. If you can keep a monster focused on one player who is able to take a lot of punishment without dying, then the rest of the party can attack the monster without risking death.[49] This particular mod became so popular, and was so useful, that Blizzard, the company that created and owned WoW, made it a regular part of the game. Blizzard has done this with several gameplay mods, including quest helpers, which were designed to help players complete the game more efficiently.[50]

In both of these cases, companies benefited directly from the modding community. Valve not only recruited talent, but used the community to develop new games. Blizzard used the community as a free research and development lab (R&D), where it could test its game on a massive scale, and update it according to feedback prior

---

[48] Aggro is videogame jargon for the process by which a game controlled adversary, sometimes called a mob, decides which player character to attack. For example, if a mage and a warrior are attacking creatures in the game World of Warcraft they may attack the mage first, as he does more damage with magic than the warrior does with a sword. However, the warrior may be carrying a shield and wearing plate mail armor, making him much more durable than the mage, who is likely wearing a robe. The warrior will take actions to draw aggro in an attempt to reduce the damage the enemy does to the mage, allowing him or her to attack the mobs safely. In this example the warrior is acting as a tank, or is tanking, a term describing the act of drawing aggro for the benefit of the team. Generally, a tank does little damage, but can withstand much damage. This is a common, basic strategy in many games. One player draws aggro to allow the other to do damage. - "Aggro - WoWWiki - Your Guide to the World of Warcraft," September 11, 2010, http://www.wowwiki.com/Aggro.

[49] Mark Chen, Leet Noobs: The Life and Death of an Expert Player Group in World of Warcraft, First printing. (Peter Lang Publishing, 2011).

[50] Jill Diamond, "Participatory Design in World of Warcraft," *Blink - User Experience Consulting*, n.d., http://www.blinkux.com/insights/newsletter/participatory-design-in-world-of-warcraft/; Chen, *Leet Noobs*.

to general release. If fans created a mod and loved it, Blizzard reasoned why not incorporate it into the game?

Other types of mods include the creation of new maps, characters and stories. Sony's *LittleBigPlanet,* for example, provides game tools and content to make new levels and share them with the PlayStation community online. Users have created levels that cutely simulate the crashing of the Titanic, riding a giant skateboard, and wandering through a haunted house. One particularly ambitious and brave modder created a level to propose to his girlfriend. She walked through a well-decorated church to find an avatar dressed in a tuxedo asking for her hand in marriage. Her avatar then had to pull a lever to indicate yes or no. She chose yes. Fireworks went off and a banner dropped from the sky, much to the delight of netizens everywhere who watched the replay on YouTube.[51]

Tecmo's *Dead or Alive: Xtreme Beach Volleyball* (*DOAX*)*,* a mature-rated, voyeuristic island simulation that focuses on taking photos of bikini-clad female fighters on vacation, playing volleyball and water sports, Tecmo did not approve. As a result, Tecmo filed a lawsuit and shut down the mod website NinjaHacker.net for detailing how to mod the game to make female characters appear nude. While Tecmo acknowledged that it could not stop fans from modding its games, Tecmo could attempt to control distribution. John Inada, general manager of Tecmo at the time, offered the following comments on the mod community and his company's desire to protect its intellectual properties:

---

[51] Stuart Houghton, "A Proposal Of Marriage... via LBP," Blog, *Kotaku*, September 13, 2008, http://kotaku.com/5062772/a-proposal-of-marriage-via-lbp.

> When we filed complaints against them, the mod community wasn't very happy. They had their own argument that it was up to them to do whatever they wanted. If you're the agent of a superstar, you're not going to send her to an adult-film session. We treat them [the *DOAX* avatars] like living human beings. But if the name of the game is creating your own characters and customizing your own character, I can see why we wouldn't actively pursue legal action against people who do that.[52]

It is important to note, however, that the commercially released version of *Dead or Alive Xtreme Beach Volleyball* did not contain the mod content. It was something fans had to add to the game.

To play most mods of a game you generally must own the original, which has positive economic impacts on the copyright holder.[53] However, companies like Tecmo worry about the negative economic impact caused by confusion about its copyright. I argue that it is no different than modding a car. The activity is very similar to the gear-heads of the 1960s and 1970s making street rods, or the tuners of today modding Japanese imports. Fans like to customize and improve what they own. They create communities around this. And they generally hold deep affection for both their car/game and the motor/game company. The rabid fever with which a Ford fan will defend the badge is not dissimilar to the loyalty expressed by a Square Enix fan.

---

[52] Anthony Breznican, "Sex in games worries makers," *USA Today*, July 27, 2005, Final Edition edition, sec. Life, http://www.lexisnexis.com/lnacui2api/api/version1/getDocCui?lni=4GR9-BYG0-010F-K067&csi=8213&hl=t&hv=t&hnsd=f&hns=t&hgn=t&oc=00240&perma=true.

[53] Olli Sotamaa, "On Modder Labour, Commodification of Play, and Mod Competitions.", n.d., http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2006/1881.

CHAPTER 3

LITERATURE REVIEW

Digital media scholars understand that new means of production complicate current copyright law. Much research exists on how copyright deals with digital media and how society uses it for both noble and nefarious ends.[54] I, too, have written and presented on this work. My master's thesis analyzed how the Digital Millennium Copyright Act, DMCA, equated academic researchers with hackers, and how the law unnecessarily punished both.[55] The work on the shifting landscape of copyright, as influenced by digital media, serves as an umbrella for the research on the modder/game company conflict. However, this dissertation takes a different approach. Rather than arguing the law is not just, it abstracts the conflict, creates a theory grounded in the data explored, then asks how current law reads in light of this new theory. This dissertation is not interested in whether or not game companies are taking advantage of modders, or

---

[54] Lawrence Lessig, Code: And Other Laws of Cyberspace, Version 2.0 (Basic Books, 2006); Lawrence Lessig, Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity (Penguin Press HC, The, 2004); Siva Vaidhyanathan, Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity (NYU Press, 2003); Eduardo M. Penalver and Sonia Katyal, Property Outlaws: How Squatters, Pirates, and Protesters Improve the Law of Ownership (Yale University Press, 2010); Kembrew McLeod, Freedom of Expression (R): Overzealous Copyright Bozos and Other Enemies of Creativity, 1St ed. (Doubleday, 2005).Erik Guilfoyle, Half Life 2 Mods For Dummies (John Wiley & Sons, Inc., 2007).

[55] Altizer, Jr., "Hacking the DMCA."

vice versa. Its purpose is to provide all parties the information necessary to truly have agency in the modder/game company conflict.

Modding has already been studied at some depth. While books concerned with the technical intricacies and skills involved in mod production abound, this dissertation is more interested in the socio-legal aspects rather than the technical.[56] Work has been done to understand the communities, their motivations, and the problems they face.[57] On one hand, modders alter videogames for fun. Some do it to improve a game, and others do it to see what happens when they change content. Others do it out of affection and desire with hope to continue a story they simply cannot bear to see end.[58]

Game companies profit in several ways from the activities of modders and the resulting mods.[59] As a result, researchers have questioned what is play and what is labor. What happens when the product of one's hobby becomes a source of revenue for a

---

[56] Shawn Holmes, *Focus On Mod Programming in Quake III Arena*, 1st ed. (Course Technology PTR, 2002); Erik Guilfoyle, *Quake 4 Mods For Dummies* (John Wiley & Sons, Inc., 2006); Guilfoyle, *Half Life 2 Mods For Dummies*; Giovanni A. Cignoni, "Reporting About the Mod Software Process," in *Software Process Technology*, ed. Vincenzo Ambriola, vol. 2077 (Berlin, Heidelberg: Springer Berlin Heidelberg, 2001), 242–245, http://www.springerlink.com/content/aeb4fghvt4g0b1yx/

[57] David Nieborg, "Am I Mod or Not? - An Analysis of First Person Shooter Modification Culture", 2005, http://www.gamespace.nl/staticpages/index.php?page=Research; O. Sotamaa, "Playing It My Way? Mapping the Modder Agency," in *Internet Research Conference*, vol. 5, 2004; Sotamaa, "When the Game Is Not Enough" ; Postigo, "Video Game Appropriation Through Modifications"; O. Sotamaa, "'Have Fun Working with Our Product!': Critical Perspectives On Computer Game Mod Competitions," in *Proceedings of DiGRA 2005 Conference: Changing Views–Worlds in Play*, vol. 16, 2005.

[58] Jenkins, Textual Poachers.

[59] Reina Arakji and Karl Lang, "Digital Consumer Networks and Producer-Consumer Collaboration: Innovation and Product Development in the Video Game Industry," *Journal of Management Information Systems* 24, no. 2 (October 2007): 195–219, http://mesharpe.metapress.com/app/home/contribution.asp?referrer=parent&backto=issue,9,12;journal,15,44;linkingpublicationresults,1:106046,1.

corporation?[60] It gets even more interesting when one considers that game companies bring the force of law to bear against modders, on occasion, under the guise of lost revenue when at the same time other companies are clearly and explicitly profiting off of the work of unpaid modders.[61]

Playbour

Though the term "playbour" has yet to catch in academic circles, Julian Kücklich's research on the combination of play and labor (playbour) grounds much of the modding, as well as the participatory culture, literature.[62] It describes a scenario in which companies are able to capitalize on the play of clients. Essentially the play of users is turned into free or cheap labor for the game company. Kücklich illustrates that modders labor and take risks that the industry is unwilling to take, but is willing to profit from. Because modders create their games for social and cultural capital, game companies are able to monetize successful mods without taking the risk of investing in novel or unproven game concepts.

Due to the consolidation of companies, a growing dependence upon sequels, and rising production costs we see the games industry has experienced the same growing pains as the film industry and has become risk adverse. Kücklich clarified that modders

---

[60] H. Postigo, "Of Mods and Modders: Chasing Down the Value of Fan-Based Digital Game Modifications," *Games and Culture* 2 (October 2007): 300–313, http://gac.sagepub.com/content/vol2/issue4/.

[61] Julian Kücklich, "Precarious Playbour: Modders and the Digital Games Industry," *Fibreculture Journal*, no. 5 (2005), http://journal.fibreculture.org/issue5/kucklich.html.

[62] Ibid.

act as a free think-tank or test lab for companies (they have no commercial interest in the games they create so they are willing to take chances) and that modders extend the shelf life of a game (many purchased *Half-Life* years after its hey-day to play the *Counter Strike* mod).[63] Thus, Kücklich illustrated that game companies commoditize the play of modders as unpaid labor.[64] That modding is seen as leisure – a hobby – obfuscates the injustice of such commoditization. With the line between work and play becoming fuzzy, playbour becomes a way to frame what modders do and to ask questions about the relationship between users and producers and the changes caused by the collapsing of the two roles. Researchers have both attempted to quantify the value of the playbour undertaken by modders, as well as critique current theories and methods of analyzing labor.[65]

Arakji Lang considered this issue from the other side as he attempted to quantify

---

[63] The university of Utah Entertainment Arts and Engineering Program has been purchasing Half-Life 2 for students to modify in the Machinima class for six years. Most commercial games enjoy a retail release of three weeks. - Amitai Ziv, "Unleashing Your Inner Gamer, Without the Console - Israel News | Haaretz Daily Newspaper," October 26, 2012, http://www.haaretz.com/business/start-up-of-the-week-unleashing-your-inner-gamer-without-the-console.premium-1.472515.

[64] Most computer game mods require the original game to play, and are frequently built with tools released by the developers. Thus, to play the freely downloadable mod *Counter Strike*, one must own a copy of the game *Half-Life*. The popularity of *Counter Strike* helped *Half-Life* remain a huge seller years after its release, which is almost unheard of for a videogame. For perspective, when I was in Taiwan in 2001, there were cafés with banks of PCs that were constantly humming with *Counter Strike*, despite the fact that *Half-Life* was already three years old. In the end, Valve, the company that created *Half-Life* hired the modders who originated *Counter Strike* and made a commercial release out of the game and sequels based upon it.

While this seems like justice, the reality is that thousands in the community worked on *Counter-Strike* over the years. While it had 'creators,'the community at large mods most of the maps, many of the game mods, and constant adjustments.

[65] Postigo, "Of Mods and Modders: Chasing Down the Value of Fan-Based Digital Game Modifications"; J. Banks and M. Deuze, "Co-creative Labour," *International Journal of Cultural Studies* 12, no. 5 (September 2009): 419–431, http://ics.sagepub.com/cgi/doi/10.1177/1367877909337862.

whether or not outsourcing labor to consumers (modders) was economically beneficial.[66] First, he looked at digital consumer networks and noted that modding is only helpful to a copyright holder if it complements, rather than replaces, the original product. His formulas demonstrated that companies can profit from remunerating the most innovative modders and making public the tools necessary to create new content for their games. In the end, his study demonstrated that a controlled release of some tools encourages modders to create new content for a game, extending its shelf life and increasing sales. By paying the top modders, companies both secure the copyright of the best mods and provide a sense of equity to their fan community.

While refusing to take a side in the debate as to whether or not game companies exploit playbour, or if modding is labor at all, Banks and Dueze offered a thorough literature review on the myriad activities in which corporate economic interests, media professionals, and modders collide.[67] They argued that the traditional model of exploiting labor was insufficient in that, while consumers can generate commercial value through modding, they have yet to identify what that commercial value is in tangible means. While scholars are quick to point out injustice, the co-creators are still navigating uncharted waters. Banks and Dueze proposed a model, allowing modders to self-define the nature of their activities.

---

[66] Arakji and Lang, "Digital Consumer Networks and Producer-Consumer Collaboration."

[67] Banks and Deuze, "Co-creative Labour."

Legal Issues and Cases

It is clear that modding, and the issues surrounding it, fall within the appropriation literature. As digital media has made it even easier to copy and distribute, a culture of remixing, reworking, and reappropriating has emerged.[68] This complicates legal issues and definitions. John Baldrica pointed out that copyright lawyers tend to define mods by code, rather than content, as it is easier to demonstrate a lack of original work in the code than the actual expression in the mod.[69] He also argued that mods can and should be separated into four categories: content earned in game through labor; derivative media (such as screenshots); derivative games from altered content; and derivative nongames (such as machinima) from altered content. His arguments have more to do more with defending activities and expression than actually defining mods. However, Baldrica's work explicates the liminality of mods and mod research.[70] They exist in a legal and ethical gray area. I for one, find it exciting, as liminality tends to allow for great

---

[68] Lawrence Lessig, Remix: Making Art and Commerce Thrive in the Hybrid Economy (Penguin Press HC, The, 2008).

[69] Baldrica, "Mod a Heck."

[70] In Anthropology, liminality is the notion that in ritual, there is a time of being inbetwixt and inbetween in rituals. After one has given up pre-ritual status, but has yet to achieve post ritual status there is a time of ambiguity. During this time tradition and future outcomes are uncertain. The usage has been expanded to include all sorts of situations in which eroding order has not given way to a new system, yet. In this transitory time period rules are malleable and creative rules, institutions, and customs may emerge. In the case of modding, it is a challenge to existing rules, which do not precisely govern the activity. As a result, it finds itself in a liminal space, as participants wrestle to establish the proper rules, laws, and understandings. By definition it can be a confusing time. - A. Horvath, B. Thomassen, and H. Wydra, "Introduction: Liminality and Cultures of Change," *International Political Anthropology* 2, no. 1 (2009): 2–3; A. Szakolczai, "Liminality and Experience: Structuring Transitory Situations and Transformative Events," *International Political Anthropology* 2, no. 1 (2009): 141–172.

creativity.[71] The ambiguity motivated modders and game companies to work out a system that frequently succeeds. However, I would agree with Baldrica in that much ambiguity remains, and said ambiguity has negative effects on modders and threatens the nascent participatory culture that has evolved around modding.

Taking a different look at the issue of ambiguity, participatory culture, and games, Coleman and Dyer-Witherford argue that mods, alongside piracy, abandonware, and machinima, are part of a spectrum in a developing digital commons. [72] They argue that much like the collective land commons of pre-sixteenth century Europe, that games and other forms of digital media were created by the public, and in the case of games by hackers. From their origin to the necessity of the networks, in particular the Internet, the reliance upon 'common pool resources' to create games means that strict adherence to intellectual property rights can be questioned.[73] They continue to argue that the production of digital culture would be enhanced by recognition of a creative commons.[74] Coleman and Dyer-Witherford assert that mods show their usefulness in the good they do for game companies and the culture at large, illustrating the usefulness of a digital commons. This is not an argument regarding a specific law, though they point that the

---

[71] Victor Turner, The Ritual Process: Structure and Anti-Structure (Lewis Henry Morgan Lectures), Reprint. (Aldine Transaction, 1995).

[72] Sarah Coleman and Nick Dyer-Witheford, "Playing on the Digital Commons: Collectivities, Capital and Contestation in Videogame Culture.," *Media, Culture & Society* 29, no. 6 (November 2007): 941–943, doi:10.1177/0163443707081700.

[73] Howard Rheingold, *SMART MOB*, First Edition (Perseus, 2002), 35.

[74] Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World*, 1st ed. (Random House, 2001).

current legal system is not designed for such a commons.

The most prevalent, and strongest academic position taken in favor of modders has focused on fair use. Postigo convincingly argues that the moral economy of fans, thanks to digital media, has crept into mainstream conversations about digital rights.[75] This view of intellectual property seeks to use intellectual property in the act of creating new digital media. It attempts to strike a balance between what fans want to do with the content along while respecting the original authors.[76] However, Postigo notes that accessing and expanding fair use is difficult given the cost of going to court.[77] As Sotamaa also points out, modding is a tension between the ownership rights of the game company and the fair use of the game by modders.[78] This tension is complicated by contacts the game companies have gamers sign in order to play or mod many games. Fitzgerald *et al*. point out that many End User License Agreements (EULA) and Terms of Service (ToS) agreements have gamers click away any fair use rights by pressing "I agree" to the onscreen contract that appears the first time a user runs a game.[79] They case

---

[75] Hector Postigo, "Capturing Fair Use for the YouTube Generation: The Digital Rights Movement, the Electronic Frontier Foundation and the User-centered Framing of Fair Use," *Information, Communication & Society* 11, no. 7 (2008): 1008, doi:10.1080/13691180802109071; Postigo, "Video Game Appropriation Through Modifications"; Postigo, "Of Mods and Modders"; Hector Postigo, "Modding to the Big Leagues" Online Journal, *First Monday*, May 2010, http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2972/2530.

[76] Postigo, "CAPTURING - FAIR - USE - FOR - THE - YOUTUBE - GENERATION," 1016.

[77] Ibid., 1018. Ibid.

[78] O. Sotamaa, "Playing It My Way? Mapping the Modder Agency," in *Internet Research Conference*, vol. 5, 2004, 8.

[79] Brian F Fitzgerald et al., "Games and Law: History, Content, Practice and Law" Conference Paper, 2007, 216–225, http://eprints.qut.edu.au/8710/.

they cite is *Blizzard* v. *bnetd* in which the Eighth Circuit Court of Appeals determined that one could waive their fair use defense by agreeing to a ToS or EULA.[80]

Scholarship on mods and fair use is less about the multi-pronged test used as a defense, but rather how fair use may match participatory culture, and analysis of the notion that some game companies make it difficult to access fair use. This dissertation builds upon this work. Rather than look to fair use, and argue that it would be just to revise the law to better accommodate gamers utilizing the defense, this dissertation analyzes fans reactions and forwards an extra-legal solution. Instead of relying on a legal defense, this dissertation aims to create a sense of certainty and provide a method by which to avoid a legal dispute.

Game distribution is also in contention. Coleman and Dyer-Witherford frame mods as a method of distribution, alongside piracy and machinima, asserting that those engaged in participatory culture see copyrighted work as part of a cultural commons, rather than capital to be accrued.[81] The coauthors captured the debate about what postphysical capital ownership is. However, while they include mods alongside abandonware and other types of digital media that question ownership, I argue that modders do not claim that game companies do not own their games, and in earnest attempt to respect their rights. The problem is confusion over what the law governing those rights is.

The law is further complicated by the Digital Millennium Copyright Act

---

[80] Davidson & Associates v Jung, 422 F.3d 630 (8th Cir. 2005).

[82] U.S. Code Title 17 §1201

(DMCA), which contributes to the confusion modders experience in their conflicts with game companies.[82] Phillip Harris provided both an excellent overview of *Sony v. Divineo* (2006), a case in which Sony filed complaints against a company that produced physical mod chips, as well as the historical context that demonstrated how the DMCA complicates copyright law as it applies to mods.[83] While Sony won the case, with a three million dollar decision in its favor, Harris illustrated how the case centered entirely on the anti-circumvention section of the DMCA, and contrasted it against the fair use arguments that helped Sony beat Universal in the 1984 battle over home video cassette recording.[84]

In short, Sony won the case against Universal on the grounds of fair use. Not only could consumers use the VCR to duplicate copyrighted content, but they could also use it for noninfringing uses, such as playing home videos, or time-shifting broadcasted content. Galoob found itself in a similar predicament and achieved similar results. In the pre-DMCA case of *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.* (1991) Galoob successfully defended its Game Genie device, not on the grounds of derivative work, but as fair use.[85] The court decided that families have a right to noncommercial uses that extend beyond the intent of the copyright holder. Additionally, because the games are purchased and the owners (families) have the right to use the games they purchase if the use has no commercial impact, then it is fair use. Harris used these cases to point out that

---

[82] U.S. Code Title 17 §1201

[83] *Sony Computer Entertainment America V. Divineo, Inc.*, 457 F. Supp. 2d 957 (Dist. Court, ND California 2006); Harris, "Mod Chips and Homebrew."

[84] Sony Corporation v Universal City Studios, 464 U.S. 417 (1984)

[85] 780 F. Supp. 1283 (N.D. Cal. 1991)

the anti-circumvention subsection of the DMCA effectively pushes fair use to the side, as circumvention is a felony, and the question of fair use and copyright is a civil issue.

Design Research

Though little actual design research has been done in regards to modding, Salen and Zimmerman pointed out three different ways in which modders resist game design and work to make it their own.[86] They provide examples and analysis of how gamers change the design of a game through modding. Essentially, modders resist the design and message of the game company and modify its games to create an experience of their own. I would also say their work fits squarely in the realm of design research, meaning that it specifically offered a frame by which one could guide the design of new mods. Salen and Zimmerman looked at players who can interact with existing game software by creating their own software or modifying the original game. In essence, they become player-designers who transform the game by introducing new rules and elements. The earliest pre-commercial games themselves, such as *Spacewar!* came from a culture of tinkers, of player-designers who want to play with a system, to alter it to create something new.[87] The very first videogames were not commercially produced – they were homebrew projects.

Salen and Zimmerman studied three strategies modders use to resist existing

---

[86] Salen and Zimmerman, *Rules of Play*, Kindle loc. 14854.

[87] Salen and Zimmerman, *Rules of Play*.

game designs: alteration, juxtaposition, and reinvention.[88] Alteration is the act of reworking existing content or interaction. For example, the *Sailor Moon Wad* litters the iconic first person shooter *Doom* with cupcakes, roses, and other content from the popular anime *Sailor Moon*, both as homage to the cartoon and to raise awareness about efforts to keep the show on the air. [89] Salen and Zimmerman used "frag queens" to illustrate juxtaposition.[90] The game *Quake* only had male-player models in it, by changing the textures or reskinning the models with female art the juxtaposition of male bodies with female clothes and skin challenged traditional notions of gender and illustrated how the game was gendered. Finally, reinvention modifies the core structure of a game. *Counter-Strike*,[91] arguably one of the most popular mods ever created, transformed the sci-fi single player game *Half-Life* into a team-based multiplayer game that pitted terrorists against counter-terrorists in a series of fast-paced battles. While the core technology was the same, and both games are first person shooters, *Counter-Strike* is a completely different game. Here the resistance, or act of changing the meaning of the game, was a move away from fantastical settings to more a realistic, grittier, and violent game. As game critic Justin Hall noted:

Counter-Strike exists only in the world prepared for it by the war in Vietnam and COPS, where game-players grew up seeing footage of real men with real guns storming

---

[88] Ibid. Loc 14855

[89] Here the term wad is used to reference the type of file used in Doom for levels. It has become shorthand in the modder community for a mod that changes the content of a game level.

[90] Salen and Zimmerman, *Rules of Play*, 14905.

[91] Salen and Zimmerman, *Rules of Play*.

into houses and buildings and fields. Television made that veracity attractive. Minh Le [the modder behind Counter-Strike] made it interactive.[92]

Fandom

In his early work, *Textual Poachers*, Henry Jenkins illustrated how fans of pop culture, specifically comic books, TV programs, and popular film, promoted various media by creating their own new content based on it.[93] From fanfic and slash fic to cons and fan created cinema, a myriad of unofficial texts are produced by fans that esteem particular media.[94] In *Convergence Culture* and *Fans, Bloggers, and Gamers* Jenkins studied how digital media, specifically the Internet, affected and enhanced the culture of fandom.[95] Persistent, large online communities allowed more people to have more

---

[92] Ibid. Loc 14964 – quoting "Brave New Worlds: A Special Issue on Video Games, " Feed Magazine.

[93] Ibid.

[94] fanfic, short for fan fiction, is a type of story that uses characters, setting, and story arcs from a series to create new content, notably by a fan of the work. For example, one could write new adventures about Captain Kirk and the Starship Enterprise, following the format of the T.V. show, but with new characters and a new story. The Internet allowed large fanfic communities to evolve, and values, such as being consistent with the original universe, became important to the communities. It is important to note that, while people have always riffed off of popular stories, the technology of the web allowed a community to evolve, one not only with norms, but one that could influence the properties they are fans of.

A subset of fanfic, slash fic, or slash, is fan-created literature that revolves around unexplored romantic and sexual relationships between characters in a particular text. Media companies frequently express anger of slash fic and it gives rise to the notion of who really owns characters and story the copyright holder or the fans. For example both Kirk/Spock and Harry/Ron revolve around same sex relationships between key characters in the *Star Trek* and *Harry Potter* universes, respectively.

Cons, short for conventions, originally were fan-organized events where participants would gather to buy, sell, and trade items related to the texts they lauded as well as to dress up as characters (cosplay, short for costume play), play games, and mingle with members of the fan community. Over the years they have grown and many are large-scale commercial ventures. It has been argued that the *Star Trek* cons are one of the primary reasons that the show was re-launched with *Star Trek: The Next Generation. See, e.g.,*"Star Trek: Of Gods and Men (Video 2007) - IMDb", n.d., http://www.imdb.com/title/tt0835378/. - a fan created Star Trek feature length film starring Walter Koenig, Nichelle Nichols and Alan Ruck

[95] Henry Jenkins, *Convergence Culture: Where Old and New Media Collide*, Revised. (NYU

interaction with other fans of a media text. More importantly, it reduced the means of production while increasing collaboration so that fans could create more, and better quality, work than ever before. This gave rise to the contemporary notion of participatory culture.

Fandom literature is much more than simply saying that fans interact with media. They re-appropriate it. They remix it. They adore it. They keep it alive once its copyright holder has abandoned it. Fandom research argues that the actions of fans have an effect, and that who gets to control those actions and who gets to decide what affect fans will have is the central argument.[96]

Rather than critiquing game companies and arguing why the current system is unjust this dissertation starts with modders and their understanding of the law. Instead of tackling game companies, I argue that modders' understandings of the law are at the heart of this conflict. In doing so, I show how the system does not serve the modder/game company conflict well, and thus, new strategies for solving this problem should be developed. This dissertation positions itself uniquely in the literature, as it is not a critique of game companies, yet seeks a solution to the problems experienced by some modders. It does not frame the injustice as game companies abusing modders, but lays the blame at the feet of a legal system that fails all parties involved.

Press, 2008)., Henry Jenkins, *Fans, Bloggers, and Gamers* (NYU Press, 2006).

[96] Henry Jenkins, *Textual Poachers: Television Fans and Participatory Culture* (Routledge, 1992); Jenkins, *Convergence Culture*; Henry Jenkins, *Confronting the Challenges of Participatory Culture: Media Education for the 21st Century* (The MIT Press, 2009).

CHAPTER 4

THEORY

Before one can critique the tangled web of copyright law, with its nuanced standards and codes, it is important to look at the theory behind it. Why does copyright law exist? What thinking drives it? Regulatory and proprietary theories of copyright law provide an in-depth perspective on the issue. Whether or not an action is perceived as violating copyright depend on which of the two theoretical perspective one uses as a lens to interpret the act.

Copyright Theory

A proprietary theory of copyright is the most straightforward, and, insofar as anecdotes, the most common in mainstream discourse. For example, when you watch a Blu-ray movie and sit through the Motion Picture Association of America's warning that downloading a movie without the copyright holder's permission is the same as stealing a car or handbag, you are being taught the core principle behind the proprietary theory of copyright, that copyrighted materials are property that can and should be owned by the creator or the person who legally paid the creator.[97]

---

[97] Steve Westbrook, Composition & Copyright: Perspectives on Teaching, Text-Making, and Fair Use (SUNY Press, 2009), 21–22.

At its core, a proprietary perspective on copyright forwards the notion that we should simply treat intellectual property as real property.[98] Once you produce a creative work it belongs to you in the same way a chair would if you carved it from wood. You can do with it as you will, and nobody else may use it without your consent. A complex example of proprietary theory of copyright was Sonny Bono's argument that copyrights should never expire, just as real property rights never do.

> Actually, Sonny wanted the term of copyright protection to last forever. I am informed by staff that such a change would violate the Constitution. I invite all of you to work with me to strengthen our copyright laws in all of the ways available to us. As you know, there is also Jack Valenti's proposal for term [sic] to last forever less one day. Perhaps the Committee may look at that next Congress.[99]

It does not matter how old a chair is, it never enters the public domain, in all but few circumstances it will be owned. Treating intellectual property as analogous with real property also leads to laws like the Digital Millennium Copyright Act, DMCA, in which bypassing digital encryption (akin to breaking the lock on a safe) is a felony, whereas most intellectual property law exists in the civil, not criminal, court systems.[100]

Certainly a proprietary view of copyright law lends the most force to copyright holders.[101] Where on the other hand, a regulatory theory of copyright is more concerned

---

[98] L. Ray Patterson, "Free Speech, Copyright, and Fair Use," *Vanderbilt Law Review* 40 (1987): 1, http://heinonline.org/HOL/Page?handle=hein.journals/vanlr40&id=15&div=&collection=journals.

[99] Mary Bono, *SONNY BONO COPYRIGHT TERM EXTENSION ACT*, 144 vols. (Washington DC: Government Publishing Office, 1998).

[100] U.S.C. 17 §1204

[101] Kembrew McLeod, "Confessions of an Intellectual (Property): Danger Mouse, Mickey Mouse, Sonny Bono, and My Long and Winding Path as a Copyright Activist-Academic," *Popular Music and Society* 28, no. 1 (2005): 79–93, http://www.tandfonline.com/doi/abs/10.1080/0300776042000300981.

with the public, as opposed to private, good.[102] Succinctly, regulatory copyright argues that providing writers, artists, inventors, and even mimes a limited monopoly on their work will encourage them to create more.[103] The rationale behind this is societal progress. Simply put, regulatory copyright posits that by granting a limited monopoly to an individual over his scientific and artistic creations he will be encouraged to create more and the community's body of knowledge will increase. This view, unlike proprietary copyright theory, represents an interpretation of article I, section 8, of the U.S. Constitution, which provides Congress the power "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."[104]

The regulatory theory of copyright acknowledges that the expression of ideas cannot truly be owned, it is not only difficult to contain, but it is built upon the intellectual commons we all use. We use math, art, history, science, language, etc. when we create, which we all, or rather nobody, owns. Unlike physical goods, where the raw materials are owned to start with, copyrights are crafted from language and culture belonging to society at large.

This theory regulates who can and cannot use expressions of creativity and inventions with the express goal of furthering knowledge. Regulatory theory suggests

---

[102] Patterson, "Free Speech, Copyright, and Fair Use.", 5.

[103] Joseph P Liu, "Regulatory Copyright," *North Carolina Law Review* 83 (2005 2004): 88, http://heinonline.org/HOL/Page?handle=hein.journals/nclr83&id=102&div=&collection=journals.

[104] "Transcript of the Constitution of the United States." Article 1, Section 8.

rewarding those who create so that they not only create more, but also share all their creations with us, benefiting society and advancing knowledge.[105]

Perhaps at the heart of regulatory copyright theory is the notion that, in general, we oppose legislation that simply abridges our freedom, but legislation that enlarges and enriches our freedoms is the goal of a free government. So we allow for restrictions of speech and action if the payoff outweighs the cost.[106] When we hold to a proprietary view of copyright we limit freedom for the financial advancement of an individual. Regulatory copyright does restrict our freedom, as well, but in an effort to give society more human expression, more knowledge and culture.

As illustrated in Chapter 3, the literature review, many address fair use when examining mods and copyright. Codified in the 1976 Copyright Act, fair use is one of the primary tools used to resolve the conflict between free expression and copyrights.[107] It allows for a person to use a copyrighted work via transformative acts provided it meets the requirements of the fair use doctrine, or defense. The following four-pronged test is used by the courts to determine if the transformative use of a copyrighted work is fair use:

The purpose and character of the use

The nature of the copyrighted work

---

[105] Stephen S Zimmermann, "Regulatory Theory of Copyright: Avoiding a First Amendment Conflict, A," *Emory Law Journal* 35 (1986): 163, http://heinonline.org/HOL/Page?handle=hein.journals/emlj35&id=181&div=&collection=journals.

[106] Ibid. 168.

[107] Stephen S Zimmermann, "Regulatory Theory of Copyright: Avoiding a First Amendment Conflict, A," *Emory Law Journal* 35 (1986): 165.

The amount and substantiality of the portion taken, and

The effect of the use upon the potential market [108]

While there is jurisprudence to guide the application of the test, judges have a good deal of leeway in its application. It is important to remind the reader that this dissertation does not focus on fair use. While the research on fair use and mods illuminates this work, this dissertation focuses on extra-legal solutions. It does so first because of the chilling effect interacting with the law and courts can have on the modding community, as argued in Chapter 7 and throughout the dissertation. Additionally, as I am interested in communication activism, this work focuses on an extra-legal solution that can be utilized without having to change jurisprudence.[109] As I have no method by which to realistically alter the law, I put forward a solution in Chapter 8 that I believe may solve much of the conflict between game companies and modders without the courts. The DMCA has cast a chill over fair use arguments, as even if a court determines a use is fair, if one bypasses any sort of electronic copyright protection in the process then they may be charged with a felony.[110]

---

[108] Nolo, "Stanford Copyright & Fair Use - Measuring Fair Use: The Four Factors," accessed November 11, 2012, http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/9-b.html.

[109] Lawrence R. Frey and Kevin M. Carragee, *Communication Activism: Media and Performance Activism* (Hampton Press, 2007); Lawrence R. Frey and Kevin M. Carragee, *Communication Activism: Communication for Social Change* (Hampton Press, 2007).

[110] Derek J. Schaffner, "NOTE: THE DIGITAL MILLENNIUM COPYRIGHT ACT: OVEREXTENSION OF COPYRIGHT PROTECTION AND THE UNINTENDED CHILLING EFFECTS ON FAIR USE, FREE SPEECH, AND INNOVATION," *Cornell Journal of Law and Public Policy* (Fall 2004): 145–169.

Law and Society Theory

While traditional legal study is focuses on the system of law, and is largely governed by the notion of stare decisis and jurisprudence, this dissertation more closely aligns itself with the scholarship of law and society.[111] While law and society scholars use diverse analytical approaches, and its boundaries are "not well marked," its an interdisciplinary perspective of the law aligns with this dissertation.[112] As a movement, law and society scholars use empirical methods and theoretical analysis to study legal phenomena in social terms, to study the relationship between the legal and social phenomena. While the work may vary, the commonality is a tradition that legal and nonlegal scholars to utilize methods that come from outside of the law to explain and affect legal phenomena.[113] Law and society encourages the use of sociological and communication traditions to both analyze the law and how it operates in society. While legal realism acknowledged that politics and society could affect the outcome of law, law and society went a step further and both opened the doors of legal study to outside methods as well as providing the vision to study law as part of society.[114]

---

[111] Lawrence M. Friedman, "Law and Society Movement, The," *Stanford Law Review* 38 (1986 1985): 763; "What Is STARE DECISIS? Definition of STARE DECISIS (Black's Law Dictionary)," *Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.*, accessed November 11, 2012, http://thelawdictionary.org/stare-decisis/; "What Is JURISPRUDENCE? Definition of JURISPRUDENCE (Black's Law Dictionary)," *Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.*, accessed November 11, 2012, http://thelawdictionary.org/jurisprudence/.

[112] Kitty Calavita, *Invitation to Law and Society: An Introduction to the Study of Real Law*, 1st ed. (University Of Chicago Press, 2010), Kindle loc. 53.

[113] Friedman, "Law and Society Movement, The," 763.

[114] Bryant Garth and Joyce Sterling, "From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State," *Law & Society Review* 32, no. 2 (1998): 409, doi:10.2307/827768.

In traditional legal matters someone wins and someone loses. Our system, adversarial in nature, rigorously examines which party deserves victory. Robert Kagan used the term *adversarial legalism* to describe the American style of policy making and dispute-resolution via lawyer-dominated litigation.[115] Be it a civil or criminal suit, one party brings forth a complaint and one defends itself. The system does not seek an amicable solution for both parties. It seeks who is right and who is wrong.

Kagan theorized that adversarial legalism is unique in two distinct ways. *Formal legal contestation* evokes competing interests and disputants utilizing legal rights, duties, law enforcement and litigation. *Litigant activism* has disputants themselves, not officials, gather and submit evidence, usually through their lawyers.[116] In short, both the system itself and the participants in a dispute are adversaries seeking not to uncover a truth about a dispute, but rather to try to defeat their opponent using evidence, argument, procedures, and a myriad of other tools at their disposal.

The traditional legal approach itself may be a contributing factor to the current dispute. Modders care deeply about both the story and the technology they mod, as well as the companies that create them.[117] Those engaged in acts of participatory culture do not seek to harm it, but rather enhance it, and at the same time magnify their fun and even

---

[115] Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (Harvard University Press, 2003).

[116] Ibid.

[117] Sotamaa, "Playing It My Way?".

their portfolios.[118] The game companies also directly encourage this ethos, as it has a positive impact on their bottom line.[119] Winning litigation against a game company would be akin to someone suing for the right to sing their favorite artist's song in the shower. Even if the plaintiff wins, the plaintiff loses. People sing songs because they enjoy them, and possibly appreciate the artist. Causing the artists harm defeats the purpose.

Game companies also lack motivation to litigate against modders. Modders are super-fans. If the Recording Industry Association of America (RIAA) has proven anything, it is that suing fans is not a sustainable business strategy.[120] If fans believe that a company they thought they cared for bullies them, a public relations nightmare will envelop that company. A common music meme is that bands are "cool" and publishers are "evil."[121] In the case of videogames the companies are the bands. Few would run out to buy a Sony BMG tee shirt. However, it is not uncommon to see youth sporting Nintendo or Activision-Blizzard branded apparel. My Chapter 7 analysis of forum posts

---

[118] Sotamaa, "When the Game Is Not Enough."

[119] Sotamaa, "On Modder Labour, Commodification of Play, and Mod Competitions."

[120] Lessig, *Free Culture*, 296–304; Brett J Miller, "War Against Free Music: How the RIAA Should Stop Worrying and Learn to Love the MP3, The," *University of Detroit Mercy Law Review* 82 (2005 2004): 303, http://heinonline.org/HOL/Page?handle=hein.journals/udetmr82&id=321&div=&collection=journals.

[121] A meme is a unit of cultural transmission. Richard Dawkins developed the term to describe the spread of ideas and how it causses cultural evolution. Memes are thought to have an infectious life of their own, similar to a biological organism, and are spread through imitation, rather than rational thought. Ideas that compete for survival and propagate themselves are considered memes. From the idea "look before you leap" to urban legends, self propogation and influence on culture qualify ideas as memes. The meme that bands are cool untuk they are corrupted by a publisher is a central theme in the popular Scott Pilgrim series of graphic novels. - James Gleick, "What Defines a Meme?," *Smithsonian Magazine*, May 2011, http://www.smithsonianmag.com/arts-culture/What-Defines-a-Meme.html; Bryan Lee O'Malley, *Scott Pilgrim's Precious Little Boxset*, Pap/Pstr (Oni Press, 2010).

illustrates the attitudes fans hold about copyright law and about game companies that sue them. The analysis illustrates the affection they have for game companies, and the betrayal they feel when someone in the community is sent a C&D letter.

A different analytical framework than adversarial legalism is useful. The law and society perspective invites interdisciplinary scholars to utilize a variety of methods to analyze how law is lived in day-to-day society.[122] Whereas traditional legal theory operates under a jurisprudential view of the law, or it examines what happens *within* the realm of law, law and society research is also interested in the *extralegal*: what happens outside of court and how it both affects and is affected by the law.[123] Thus, it complements grounded theory methodology, as law and society research examines participants first, then how the law affects their lives, rather than exploring how jurisprudence applies to the given situation.

While law and society, as a school of thought, may build upon many traditions, in particular legal realism, it differs in several ways, both in terms of community and method.[124] First, law and society research is largely conducted not by lawyers, but rather by scholars from other fields who see the law impacting them: psychologists, sociologists, historians, communication scholars, political scientists, and a variety of

---

[122] Calavita, Invitation to Law and Society.

[123] Ibid.

[124] William W. Fisher III, Morton J. Horwitz, and Thomas A. Reed, eds., *American Legal Realism* (Oxford University Press, USA, 1993).

academics from other fields.[125] While it is primarily interested in how law and legal institutions operate in society, it also allows for a variety of tools to be used to answer its questions.[126] Like legal realism, law and society largely rejects legal formalism and natural law, arguing that the truth is not waiting to be empirically discovered.[127] Rather, it is an interpretive act, and it is as fallible as the people who create, practice, and enforce it: lawyers, judges, politicians, police, presidents, and the like. While it is possible to see law in the abstract, omnipresent rather than tangible, the law and society perspective does not separate the law from the people at large, hence the "society" namesake. Simply put "'Real Law' is law as it is lived in society, and the abstract ideal is itself a human artifact."[128] It takes a stance that, even in the face of substantive anecdotal evidence, that law is still idealized.

Additionally, law and society scholars tend to reject the jurisprudence approach to law, as is taught in most law schools. Traditional jurisprudence legal study is a complex system of precedent that turns the law into a set of closed system rules, similar to the rules of baseball. Thus, judges become umpires of the world's most complicated game. Jurisprudence turns the law into a set of syllogisms, or if/then statements. Law and society evolved from legal realism, which acknowledges that legal decisions are made by

---

[125] Amy Reynolds and Brooke Barnett, Communication and Law: Multidisciplinary Approaches to Research (LEA, 2009), 15.

[126] Amy Reynolds, Brooke Barnett Ph. D, and NetLibrary Inc, *Communication and law multidisciplinary approaches to research* (Mahwah, N.J.: Lawrence Erlbaum Associates Publishers, 2006), 15.

[127] Calavita, Invitation to Law and Society.

[128] Ibid., Kindle loc. 84.

people and is not a perfect, abstract system. Law and society takes legal realism two steps further to look outside of the law to understand how it works in society and opens the door to nonlegal methods of study. [129]

Law and society scholars, then, look outside of the written code of law to examine the historical and societal contexts in which a law is created and/or enforced. Rather than looking to the law, it looks at the society and the law as a function of it. For example, while we may trace free speech to the First Amendment, our ideas of its praxis and the right we associate with the First Amendment stem from labor unions and the work they did to popularize the ideology in the early twentieth century.[130] Our current interpretation of free speech and the way we use the First Amendment to support it comes from the unions' work. Thus the notion of free speech is the product of social and political contexts, as opposed to jurisprudence. This illustrates the point that law is not separate from society and studying society can yield useful legal results. As Calavita wrote:

> … not only are law and society interconnected; they are not really separate entities at all. From the law and society perspective, law is everywhere, not just in Supreme Court pronouncements or congressional statutes. Every aspect of our lives is permeated with law, from the moment we rise in the morning from our certified mattresses…; to our fair-trade coffee and NAFTA (North American Free Trade Agreement) grapefruit; to our ride to school in the car-pool lane on state-regulated highways; to our copyrighted textbooks, and so on, for the rest of the day. But, in the form of legal consciousness, law is also found in less obvious places like the mental reasoning we engage in when we are pondering what to do

---

[129] Kitty Calavita, *Invitation to Law and Society: An Introduction to the Study of Real Law*, 1st ed. (University Of Chicago Press, 2010); Garth and Sterling, "From Legal Realism to Law and Society"; William W. Fisher III, Morton J. Horwitz, and Thomas A. Reed, eds., *American Legal Realism* (Oxford University Press, USA, 1993).

[130] David Kairys, *The Politics Of Law: A Progressive Critique, Third Edition*, ed. David Kairys, 3rd ed. (Basic Books, 1998).

about our neighbor's noisy dog.[131]

Law and society teaches that law is deeply intertwined with all we do. This is particularly true of modding. A fan enters into commerce to buy a game. She clicks "yes" to the clickwrap agreement, which contains the Terms of Service (ToS), and an End User License Agreement (EULA). Thus, before even playing a game, she has entered into a financial and contractual arrangement with the game company. Indeed, it is a requirement to play. These are not subtle interactions with the law. Additionally, as illustrated in Chapter 7's analysis of forum posts, modders are very interested in questions of ethics; right and wrong; the law; and copyright law. The activity itself is both a reaction to and a critique of law. Modding exists in a real world where laws have yet to catch up and serve it, the negotiation and failure to negotiate between game companies and modders illustrate the shortcomings of current copyright law.

Thus, while this dissertation explores the laws and the conflicts between modders and game companies, it never forgets that social context is at the very heart of it all. The question is not about whether or not copyrights have been violated, but what are the societal implications of such. What is the present impact and, if there are damages, what actions can be taken?

This dissertation also, then, is concerned with an ex-ante perspective on the law. There are two theoretical approaches to settling legal disputes, namely ex *post* and *ex-ante*. Briefly, an ex post perspective is one in which the goal of settling a legal dispute is an attempt to restore the state of things before the wrong, or to compensate wrongs if the

---

[131] Calavita, *Invitation to Law and Society*, Kindle loc 103.

damage cannot be repaired. On the other hand, an ex-ante view looks forward and asks what effects will a decision have on future parties, specifically trying to account for the choices parties will make given the decision.[132] If I water my yard and flood your basement, an ex post solution would be to compensate you for the damages. Passing a regulation to prevent it, or requiring that I am informed of the risk of flooding your basement when I purchase a new sprinkler system, is an ex-ante solution.

Baldrica made a compelling argument that modders face anxiety due to the lack of ex-ante certainty.[133] He argued that modders are very much in a similar position to where cover band artists used to be. Specifically, that interacting with, playing with, or modifying a copyrighted work placed users in a grey area, uncertain as to whether or not their actions were permissible. While compulsory licensing has largely solved the problem for cover bands, no such law exists for modders. Some games explicitly state that you can mod them, some do not. Imagine if every song or movie you watched had different rights. What would your music experience be like if you could legally copy Madonna's *Material Girl* to a computer or MP3 player, but were only allowed to listen to Michael Jackson's *Billy Jean* on the original vinyl? Thus, Baldrica argued that the marketplace lacks ex-ante certainty. Modders do not know what the legal outcome of creating a mod will be until they try. This creates anxiety and self-censorship. In short, the lack of ex-ante certainty of modders operating without an explicit agreement has a

---

[132] Ward Farnsworth, *The Legal Analyst: A Toolkit for Thinking About the Law* (University Of Chicago Press, 2007), Kindle loc. 105–256.

[133] Baldrica, "11 N.C. J.L. & Tech. 103."

chilling effect, which I will return to below.

When studying the law, it is important to focus on ex-ante. Yet, the parties involved in a dispute are concerned with the ex post question. They feel wronged, and they want their dispute settled. Modders feel like game companies are assaulting them and want relief. Game companies assert that modders violate the company's property rights and demand both compensation and protection. Both are less concerned with the complexities of the decision and what precedent it sets – not because they are selfish, but for two reasons: a) it really is not the question they are asking, and b) the ex-ante position is complicated and not always readily apparent. It requires contextualization and a bit of speculation. As a result, it is also not always the easiest perspective to take in the courtroom, where time is limited and the rules restrictive. Neither of these conditions are true here, allowing for exploration of this perspective.

The Prisoner's Dilemma

A classic game theory, zero-sum games, also provides theoretical context. Cutting a cake is a zero-sum game; if you add up all the pieces you will have the same amount of cake you started with, regardless how you slice it. *The Prisoner's Dilemma* is a useful example of a nonzero-sum game, meaning a game in which there can be a range of consequences.[134] I argue that one way to see the dispute between modders and game companies is as a nonzero-sum game. Doing so may help move the conversation from ex-post to ex-ante. It is also a useful tool in understanding media theories.

---

[134] Salen and Zimmerman, *Rules of Play*, Kindle loc. 6316–6356.

In the prisoner's dilemma two men are arrested and separated. Each is made an offer. If one accuses his partner, and his partner remains silent then he goes free and the partner spends a year in jail. If both remain silent they both only get one month in jail, as the evidence is circumstantial without a confession. If both choose to accuse each other then they both receive a three-month sentence. Each prisoner thus only has two choices, to sing or sit silent.

Assuming that both parties want to spend the least amount of time in prison possible the game is nonzero-sum. Logic dictates that they report each other, though they decide independently. It is the only way to ensure that they reduce their jail time. The individual prize would be best if they both stayed silent, but not knowing what the other will do requires them to "game" the system to ensure the maximum benefit for themselves. Regardless of the decision of the other prisoner, the other will always gain by accusing the other, assuming the other is also operating under self-interest.

The Modder's Dilemma

The modder's dilemma is similar. There is no actual pot of money that modders are contributing to or taking from when using a game company's copyrighted content. The consequences are far less drastic than the prisoner's dilemma. Communication and collaboration could, in theory, yield a result favorable to both parties. In the prisoner's dilemma, because the two sides cannot collude they must each serve three months instead of one. The same is true here. In the case of Kajar Laboratories and *CT:CE* they could not speak to Square Enix, therefore the modders, and arguably the game company, suffered more than necessary. Fear and communication have much further reaching implications than the prisoner's dilemma, however.

Chilling Effect Theory

Chilling effect theory is a notion popularized by U.S. Supreme Court Justice William J. Brennan and applies here.[135] In its early use it referred to a deterrent effect on free expression, essentially that someone does not commit a speech act for fear it might be self-harming, even if it is not. One could use the threat of prosecution to silence free speech, regardless of potential outcome.[136] Thus, another nonzero-sum game. If I am uncertain as to whether or not a speech act can harm me, but I believe the possibility exists, I will censor myself more heavily than if I was in a zero-sum game. For example, if speaking at a rally will land me a month in jail, I can determine if the cost is equal to or greater than the benefit. However, if I am led to believe that speaking at a rally might have no consequences, or it might cost me years in jail, I am unlikely to speak since I cannot calculate the cost; thus, I fear the worst.

Today the use of the chilling effect has been expanded to include any use of the law where fear of legal repercussion is used to silence speech. For example, when a lawsuit is brought against a person or people with the sole goal of intimidating them from speaking out it is called a SLAPP suit, or a strategic lawsuit against public participation.[137] As an example, conservative preacher and radio host Bradlee Dean sued MSNBC and its host Rachel Maddow for $50 million dollars for defamation of

---

[135] Salen and Zimmerman, *Rules of Play*.

[136] "Dombrowski V. Pfister - 380 U.S. 479 (1965) :: Justia US Supreme Court Center," accessed September 27, 2012, http://supreme.justia.com/cases/federal/us/380/479/case.html.

[137] Wayne Overbeck, *Major Principles of Media Law, 2008 Edition*, 1st ed. (Wadsworth, 2007).

character.[138] Dean is quoted as saying he wanted to punish the MSNBC host for espousing "leftist, socialist, activist 'gay rights,' pro-choice, pro-government and anti-religious ideals."[139] This could lead one to believe that Dean is not seeking damages for defamation, but rather trying to use the law to remove Maddow from public discourse because of her political beliefs. Anti-SLAPP legislation exists to prevent plaintiffs from intimidating defendants into silence through the burdensome threat of a lawsuit.[140] The law is meant to settle disputes. Yet fear of the law can be used to silence those who feel they cannot afford a lawsuit, much less lose one.

Games, and the tech skills required to play and create them, are at the very background of the tech industry. I argue that creating a hostile environment for modders threatens the industry. A chilling effect, one that reduces the number of people creating and playing with games, is a real threat to technological progress.

Shadow of the Law

Providing some insight into the chilling effect is the legal principle that most disputes do not go to court. Instead they are decided "in the shadow of the law."[141]

---

[138] "Rachel Maddow Demands Dismissal of $50 Million Defamation Lawsuit," *The Hollywood Reporter*, 04/19/12, sec. Television, http://www.hollywoodreporter.com/thr-esq/rachel-maddow-lawsuit-bradlee-dean-msnbc-314234.

[139] Ibid., 1.

[140] George Pring and Penelope Canan, *Slapps: Getting Sued For Speaking Out* (Temple University Press, 1996); Nazanin Rafsanjani, Brooke Gladstone, and Penelope Canan, "SLAPP Back Transcript," *Onthemedia*, April 2, 2010, http://www.onthemedia.org/2010/apr/02/slapp-back/transcript/?utm_source=sharedUrl&utm_media=metatag&utm_campaign=sharedUrl.

[141] Robert H Mnookin and Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce," *Yale Law Journal* 88 (1979 1978): 950, http://heinonline.org/HOL/Page?handle=hein.journals/ylr88&id=966&div=&collection=journals.

Mnookin and Kornhauser's 1979 work on how bargaining happens in divorce became an argument for the centrality of law. Namely, the notion that while most divorce agreements are a form of *private ordering*, or a contract reached without the need to litigate in a court, the way that the parties arrive at an agreement is by operating in the *shadow of the law*. The legal rules regarding alimony, child support, marital property, and custody claims have already been decided in court. Rather than going through an expensive court battle, most lawyers can help their clients reach an agreement based on what would be expected if it went to trial.[142] Their perspective is perhaps best explained by the oft-used quote, "we see the primary function of contemporary divorce law not as imposing order from above, but rather providing a framework within which divorcing couples can themselves determine their postdissolution rights and responsibilities."[143] In short, the law provides the rules and guidelines that govern both parties, but the parties themselves construct their arrangement outside of the courtroom.

Key to understanding is that divorce is a zero-sum game. There is only so much money to be split. Custody can only equal the amount of real time available to a child. Thus, many of the same concepts of risk management and aversion inherent in chilling effect theory can be found here, as well. It should be noted that courts apply shadow of the law theory to much more than divorce. Jacob argued that it applies to many bargaining scenarios where a court proceeding occurs if the negotiations fail.[144]

---

[142] Ibid.

[143] Ibid.

[144] Herbert Jacob, "The Elusive Shadow of the Law," *Law & Society Review* 26, no. 3 (January 1,

Divorce is a good metaphor for the conflict between modders and game companies. There is certainly a relationship. Modders practically gush about their favorite game companies, and game companies celebrate their fans by releasing mod tools to them. The game is like a child and the modder/game company conflict is nothing more than a battle over custody and how the game/child should be raised.

One of the key factors brought by Mnookin and Kornhauser is that counsel who serve several functions represent both sides. Under the shadow of the law, the lawyers act as a source of information; serve as counselors/advisers to their respective clients; act as clerks, filing paperwork and serve as negotiators.[145] All of these roles are important, as the financial and economic costs of dealing with the law are considerable.[146] The substantial cost of going to court keeps many negotiations in the shadow of the law. However, when one party threatens to go to court it can frequently chill the speech of the other.[147]

Shadow of the law theory can apply to the modder/game company conflict studied in this dissertation. The conflict is civil and, as such, it is not required to go to court. However, in general only one side has counsel, and that is where the relationship breaks down.[148] Imagine negotiating a divorce where one party, the modder, did not have

---

1992): 565–590, http://www.jstor.org/stable/3053738.

[145] Mnookin and Kornhauser, "Bargaining in the Shadow of the Law," 985.

[146] Ibid., 971.

[147] Overbeck, Major Principles of Media Law, 2008 Edition.

[148] "Rachel Maddow Demands Dismissal of $50 Million Defamation Lawsuit."

counsel and the other party, the game company, arrives with a small army of attorneys. This not only means that justice may not be served, but that the imbalance of power could serve to drive them even further apart. The modder is suddenly fearful and confused both about the law itself and how law governs her relationship with the game company. This dissertation seeks a solution that shadow of the law theory can assist.

Clearly the two parties care for each other. Excellent research on modder motivation and its relationship with game companies demonstrates such.[149] However, jumping straight into C&D letters where a game company essentially asks for a voluntary injunction or threatens to destroy the modder is not the most effective way to maintain a relationship. This dissertation argues that the modder/game company conflict is about relationships and law, which is why shadow of the law theory provides an excellent analytic framework to apply.

---

[149] Olli Sotamaa, *The Player's Game : Towards Understanding Player Production Among Computer Game Cultures* (Tampere: Tampere University Press ;Taju [jakaja], 2009); Sotamaa, "'Have Fun Working with Our Product!'"; Sotamaa, "When the Game Is Not Enough"; Sotamaa, "Playing It My Way?"; Olli Sotamaa, "Let Me Take You to The Movies," *Convergence: The International Journal of Research into New Media Technologies* 13, no. 4 (November 1, 2007): 383 –401, http://con.sagepub.com/content/13/4/383.abstract; Sotamaa, "On Modder Labour, Commodification of Play, and Mod Competitions."

CHAPTER 5

METHODS

Law and society is interdisciplinary in nature, which allows for a diverse set of practitioners and methods but not without complications:

> Many students and scholars experience what we would dub "MAS," or methodological anxiety syndrome. MAS is a pervasive and sometimes debilitating doubt about whether one has the necessary methodological skills to embark on empirical sociolegal work in the first place. It is important to recognize that not all the disciplines that contribute to the Law and Society field engage in the same kind of methodological training. In particular, those coming from law schools may have received no training whatsoever in social science research methods. Yet, sociolegal research has a particular appeal for lawyers who have become frustrated or bored with the limits of doctrinal scholarship….[150]

Aside from the peace of mind offered by being in solidarity with other scholars willing to recognize that methods can cause anxiety, the above paragraph offers some insights into law and society methods. It recognizes sociological, empirical, and sociolegal research as part of the domain of law and society. Additionally, it remarks that there are different types of scholars with different backgrounds, strengths and weaknesses who conduct research in the field. In short, it sets the tone for a communication scholar to perform qualitative and legal research under the heading of law and society.

---

[150] Simon Halliday and Patrick Schmidt, *Conducting Law and Society Research: Reflections on Methods and Practices*, 1st ed. (Cambridge University Press, 2009), Kindle loc 108.

Although the preceding theory chapter covers both salient topics and perspectives, I placed them aside as I conducted the first stage of my research using grounded theory. Though the former debater in me admits that it is not completely possible, it is important to attempt to be tabula rasa. The theory should emerge from the data. The previous theory discussion helps to interpret the data and to situate the theory. Grounded theory is useful in situations where there is no theory to explain the phenomenon at hand.[151] In this case, why modders create mods that push them into conflict with the game companies they admire.

Grounded theory derives a theory grounded in the relationships found in the data examined.[152] It is therefore inductive, in that one is not trying to prove a hypothesis, but rather genuinely attempting to explain a phenomenon without preconceived notions, usually because present theories are insufficient.[153]

Grounded Theory Method

For this dissertation I utilized a systematic form of grounded theory, as defined by Creswell working with Strauss and Corbin:

> Grounded theory provides a procedure for developing categories of information (open coding), interconnecting the categories (axial coding), building a 'story'

---

[151] John W. Creswell, Qualitative Inquiry and Research Design: Choosing Among Five Approaches, 2nd ed. (Sage Publications, Inc, 2006), 63.

[152] Juliet M. Corbin and Anselm C. Strauss, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory*, ed. Juliet M. Corbin and Anselm C. Strauss, 3rd ed. (Sage Publications, Inc, 1998), Kindle loc. 40–45.

[153] Kathy Charmaz and Frederick J. Wertz, Five Ways of Doing Qualitative Analysis: Phenomenological Psychology, Grounded Theory, Discourse Analysis, Narrative Research, and Intuitive, 1st ed. (Guilford Press, 2011), Kindle loc. 56–60.

> that connects the categories (selective coding), and ending with a discursive set of theoretical propositions…[154]

The goal of the open coding is to split the text into concepts that can act as blocks of compiled data.[155] I used a software package, MaxQDA, to assist with my open coding. I read through the data and started with descriptive and analytic categorization. Descriptive codes simply describe what happened, for example, "expressed disappointment" is what they did and is a descriptive code. "Confused about copyright," meanwhile, is my interpretation and therefore an analytic code. I simultaneously kept memos that served as longer forms of my analysis of both the data and codes. These codes began to make more sense when grouped together, which is when I moved on to axial coding.

Axial coding focuses on the core phenomenon and was useful in finding relationships between the codes I used in open coding. The relationships allowed me to collapse them into larger conceptual categories. These larger categories showed trends in the data that explained what was occurring. It should be noted that open and axial coding can be done at the same time, largely as a result of constant comparison.[156] Constant comparison allows researchers to examine the codes from their open coding sessions, the categories from axial coding and memos, or notes, against each other, allowing the codes and categories to develop naturally along the way:

---

[154] Creswell, Qualitative Inquiry and Research Design, 160.

[155] Corbin and Strauss, *Basics of Qualitative Research*, Kindle loc. 2661.

[156] Ibid., Kindle loc. 2706.

> The constant comparative method… includes that every part of data, i.e. emerging codes, categories, properties, and dimensions as well as different parts of the data, are constantly compared with all other parts of the data to explore variations, similarities and differences in data.[157]

Salient categories emerged in my final stage of selective coding and I collapsed them into core categories to develop a narrative of the modder's dilemma based on the themes of the core categories.[158] Throughout all three steps I wrote memos and compared the work to itself, looking for similarities that would reduce the data and clarify the dilemma. This allowed my explanation to emerge. I was able to develop a theory grounded in data.

The goal of a grounded theory study is to create a general theory that abstracts a situation so that it can be better understood. As an inductive approach, rather than starting with an established social theory, the researcher "allows the theory to emerge from the data."[159] Occasionally the theory grounded in data is useful beyond the study, and becomes a general theory.[160] It is important to note that both in the qualitative and rhetorical sense, the theory is a proposition, a reading that is argued for and based in data. It is the starting point that enables larger conversations. The goal of grounded theory is to

---

[157] Lillemor R-M. Hallberg, "The 'core Category' of Grounded Theory: Making Constant Comparisons," *International Journal of Qualitative Studies on Health and Well-being* 1, no. 3 (January 2006): 143, http://informahealthcare.com/doi/abs/10.1080/17482620600858399.

[158] Stephen P Banks, Esther Louie, and Martha Einerson, "Constructing Personal Identities in Holiday Letters," *Journal of Social and Personal Relationships* 17, no. 3 (June 1, 2000): 304, http://spr.sagepub.com/content/17/3/299.

[159] Juliet M. Corbin and Anselm C. Strauss, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory*, ed. Juliet M. Corbin and Anselm C. Strauss, 3rd ed. (Sage Publications, Inc, 1998), 12.

[160] Barney Glaser and Anselm Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine Transaction, 1967), 242–244.

build, rather than test, theory.

The data was rigorously examined, but the analysis is as much art as it is science. In fact, as Glaser mentioned when discussing classic grounded theory, the work is not in applying existing literature to the theory, but rather to let the data, and the researchers interpretation of the data, build the theory. The theory is later contextualized and refined using literature. Thus, the theory is discovered in the data, but then evolves as the researcher examines it again after doing a literature review.

This study does exactly that. Using classical grounded theory to analyze the reactions of fans, I developed a theory that explained the core phenomenon – Legal Threats Break Moral Communities – and then I used it in the next chapter to mount a legal argument.[161] In this manner the theory is shown to make sense of the situation and critique the laws that presently apply to it. Classical or Glaserian grounded theory method is an effort undertaken by some researchers to resist two trends in the field: the inclusion of theory prior to analysis and the jargon-ization of grounded theory research.[162] After conducting this study, I would agree with Glaser that many of the efforts to add theoretical complexity have muddled the method, and that many return to classical grounded theory as a result. I do believe, however, that theory is very useful after the grounded theory has been developed. To ignore literature seems both reckless and

---

[161] Vivian B. Martin and Astrid Gynnild, *Grounded Theory: The Philosophy, Method, and Work of Barney Glaser* (Universal-Publishers, 2011), 249.

[162] Martin and Gynnild, *Grounded Theory*; Barney G. Glaser, *Jargonizing: Using the Grounded Theory Vocabulary* (Sociology Press, 2009).

unscholarly.[163] While the building of a grounded theory is not a deductive exercise that requires literature and a hypothesis upfront, scholars are immersed in context before they start a study. While I did approach the study with the tabula rasa spirit of grounded theory, I also recognize the reality and usefulness of the literature I have read.

Qualitative research is subjective, which is one of its strengths. I feel confident that it combines well with legal research, as the law and society research acknowledges that legal research also is subjective.[164] Subjectivity does not mean arbitrary. Great efforts were made in this dissertation to be rigorous and avoid bias. In fact, more than once I found myself disagreeing with what a fan said, but since I was coding it using their words (in vivo) I related their meaning. Being that I did not interview them, my bias did not affect the data.

Tools and Rigor

For this study I used the qualitative research software *Dedoose.*[165] The program was mentioned in an article on the pros and cons of qualitative research software (QRS) and grounded theory method.[166] In the article, Thomas illustrated how the instant recall of all coded text and tools that compare texts, codes, categories, and memos against each

---

[163] Glaser, *Jargonizing*, 74.

[164] Ward Farnsworth, *The Legal Analyst: A Toolkit for Thinking About the Law* (University Of Chicago Press, 2007); Calavita, *Invitation to Law and Society*.

[165] Eli Lieber, *Dedoose* , version 4.2.81 Cloud (SocioCultural Research Consultants, LLC.), accessed August 8, 2012, https://www.dedoose.com/.

[166] Michael K. Thomas, "The Utility and Efficacy of Qualitative Research Software in Grounded Theory Research," in *Grounded Theory: The Philosophy, Method, and Work of Barney Glaser*, ed. Vivian B. Martin and Astrid Gynnild (Universal-Publishers, 2011).

other allow for both actual rigor and, just as important, the appearance of rigor.[167] All research has an element of rhetoric to it, and the use of computerized research methods imbues a study with a sense of good record keeping and complex analysis. Thomas also warned against making the research about the tool, forgetting the art of qualitative research and focusing on the scientism that the software affords, as well as the dangers of relying on auto coding (which I did not use) and focusing on coding over the creation of memos.[168]

Dedoose was useful both in terms of allowing me to explore links between excerpts and codes I may not have seen, as well as facilitating analysis and keeping me honest. By analyzing in *Dedoose*, I could always see the data and codes, which made it hard, if not impossible, to see what I wanted. Using this software means you cannot accidently hide data or codes from yourself. It certainly keeps researchers honest, thus giving more validity to their study.

I primarily relied on three tools to help with data management. I also took a personal leap of faith and used two tools located in the cloud.[169] Having a somewhat populist distrust of tools and data being stored on computers hundreds, if not thousands,

---

[167] Ibid., 137–138.

[168] Ibid., 138–142.

[169] The "cloud" refers to a growing trend in software to move applications and data from an individual's computer to a corporate computer system. This can improve the performance of an application, keep the data secure (personal computers are more prone to theft and failure than a computer bank at a corporate office), and enable easy sharing. As an example, *Dedoose* and all the codes I created using it are not located on any of my computers. Rather, I log into a website and run the program via a browser. The added convenience and security of using software in the cloud is tempered by fears of what happens if the company goes out of business or chooses to appropriate the data users submit. While the cloud may be the future of computing, it will also be the future site of digital privacy rights conflicts.

of miles from where I was, this was initially a challenge. However, after realizing the advantage of being able to perform analysis at any time, from any computer with Internet access, I quickly realized the value. For example, if I was in the library, and a thought occurred to me, I could easily access my data from a computer at the library, and see if it was a naturally occurring thought grounded in data or if it was an invention of my imagination.

For archiving and citation management I used *Zotero*.[170] The online service not only kept track of my books and articles, but also was a valuable tool for archiving and creating snapshots of the websites I was analyzing. *Dedoose* has already been discussed, but it is important to note that, like *Zotero*, it is cloud based. In my experience, having access to data and tools almost anywhere and anytime contributed to my analysis by allowing me to immediately work any time inspiration struck.

Finally, I used *Scrivener* to keep track of memos and to write sections of this dissertation.[171] Unlike a traditional word processor, which uses documents as its base unit, Scrivener uses sections and ideas. I was thus able to write memos, and small sections which I could grow into the analysis that became this dissertation. I should note that originally I tried *Dedoose* as a memo-ing tool, but found it more useful to have my memos alongside my drafting, rather than my coding.

---

[170] Dan Cohen and Sean Takats, *Zotero* , version 3.0.8 Cloud (Roy Rosenzweig Center for History and New Media, 2012), http://www.zotero.org/.

[171] Keith Blount, *Scrivener* , version 2.3.1 OSX (Litterature and Latte), accessed August 8, 2012, http://www.literatureandlatte.com/scrivener.php.

Ethical Considerations

There were no ethical dilemmas in gaining access to data because all data in this study, with the sole exception of the locked forums made available to me by Kagero Studios, was publically available. We can also assume the authors of both the articles and the comments on the websites intended their work to be read publically, both by virtue of the click-through agreement they agreed to for posting and because comments are visible to all visitors. Additionally, two steps were taken to ensure the anonymity of the fans. First, all of the fans used pseudonyms called handles in the comments, not their real names. Second, nowhere in this study do I refer to the handles. This is important as some fans, use the same handle in multiple places. It would only take a simple Google search, for example, to realize that "Rahjur" is, in fact, this author. The one exception to this is the members of Kajar Labs, as their handles are associated with *CT:CE* all over the Web and hiding them in this research would not offer them any anonymity.

For this dissertation I coded and analyzed the conversations and reactions of fans and modders to legal actions initiated by game companies that spanned twenty-four websites. The case I analyzed was *Chrono Trigger: Crimson Echoes* (*CT:CE*), a large mod created by a group of modders called Kajar Laboratories. Chapter 6 fully defines *CT:CE*. I analyzed 252 forum posts and blog/website comments made in reaction to the project being shut down by the game company Square Enix before achieving theoretical saturation. By the end I had the equivalent of a couple of hundred print pages of data comprised of fan reactions to the C&D. The enormous fan response to the C&D sent by Square Enix illustrates the impact it had on the community.

My initial reading of the reactions to Square Enix sending a cease and desist letter

to Kajar Laboratories to halt its production on *CT:CE* was that modders were confused at best. Analyzing the community reactions shed light on the problem. Through interpreting fans' and modders' discussions, complaints, and strategies about what to do, a theory emerged.[172] Initially, I assessed comments related to *CT:CE* on large gaming blogs, such as *Kotaku, Joystiq,* and *GameSpot*. I was later led by the data to examine other cases, as well.

Two important concepts govern my data collection: *theoretical sampling* and *theoretical saturation.* Theoretical sampling differs from conventional methods of sampling in that it is responsive. Rather than clearly defining the data to be analyzed, the researcher allows the data and their surfacing theory to direct them to more data.[173] I had a clear starting place, but as I coded the data and started to develop a theory the sites, games, people, and phenomena lead me down other roads. This provided a situated understanding of the modder's dilemma. In a sense, it is what journalists do; they allow one source to lead them to another to get a robust understanding of a story.

Theoretical saturation indicates when a researcher should stop gathering data, as well as cease coding. When new instances of the codes and categories no longer yield new analysis it is time to stop. At that point the new content is simply bringing up the same results.[174] After reaching theoretical saturation it is time to move to high-level

---

[172] Steve Jones, ed., Doing Internet Research: Critical Issues and Methods for Examining the Net, 1st ed. (Sage Publications, Inc, 1998), 35.

[173] Corbin and Strauss, Basics of Qualitative Research.

[174] T. R. Lindlof and B. C. Taylor, *Qualitative Communication Research Methods* (Sage Pubns, 2002), 222; Barney Glaser and Anselm Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine Transaction, 1967), 110. – As cited in Lindlof and Taylor.

interpretive theory building.

Archival data can and has been used both alone and in conjunction with other data when performing grounded theory research.[175] In this case, the archival data of blog comments and forum posts provided unfiltered statements from a wide variety of anonymous fans and modders. It would have been both difficult to identify these kinds of participants and have them speak freely "on record," as their activity may be seen as illegal. Remember, some modders suffer a chill from the potential of lawsuits. Getting them to speak about it would have probably proved difficult. Additionally, I believe there is great value in reading voluntary comments naturally made in reaction to an event. In a sense, it is not dissimilar from participant observation, with the exception that because the communication is asynchronous I will have little to no effect on the conversation.[176] Banks, et al., utilized grounded theory and exclusively archival data to explain how the authors of holiday letters handled dialectics of contradictions between the identity they wished to project and material reality.[177] Lindlof and Taylor used this as their example of a grounded theory study claiming, "although their study focused on documents (letters), the procedures they used do not differ much from those used in studies based on interviews or observations."[178] Archival material serves the same purpose, in this dissertation, as the equivalent of a collection of interviews or field notes

[175] Charmaz and Wertz, Five Ways of Doing Qualitative Analysis; Creswell, Qualitative Inquiry and Research Design.

[176] Creswell, Qualitative Inquiry and Research Design, 68–73.

[177] Banks, Louie, and Einerson, "Constructing Personal Identities in Holiday Letters."

[178] Lindlof and Taylor, Qualitative Communication Research Methods, 218.

and can be analyzed utilizing grounded theory.[179]

Legal Method

Theory is evaluated by not only its usefulness in explaining the data from which it evolved, but also its usefulness in assessing other phenomena.[180] Specifically, in this dissertation I used an emergent theory grounded in the reactions of fans and modders to look at the legal quagmire within which modders and game companies find themselves. I use the theory that emerged from the grounded theory to argue that current laws do not meet the needs of either parties and then to offer either party strategies of resistance or compromise. Grounded theory methodology provided a useful theory for making a legal argument about the current conflict between modders and game companies.[181]

Legal arguments are based upon possibility, not probability. A U.S. Supreme Court case, for example, shows a specific party fighting as a result of a specific harm. However, once the court rules, the principles of the case are abstracted and applied throughout the nation as precedent.[182] Qualitative research, in general, is ideally suited to this, as its purpose is to understand and abstract observed phenomena rather than to

---

[179] Corbin and Strauss, *Basics of Qualitative Research*, Kindle Loc. 2122; Glaser and Strauss, *The Discovery of Grounded Theory*, 61–61, 111–112.

[180] Creswell, Qualitative Inquiry and Research Design, 228.

[181] As discussed in Chapter 2, there is good, scholarly work on fair use and modding already. While I agree that modding does frequently qualify for the fair use defense, as they are transformative works, this dissertation argues that the fair use doctrine's lack of ex-ante certainty is one of the contributing factors that cause the chilling effect that C&D's carry. Therefore, rather than focusing on fair use, this dissertation explores the reactions of fans in an attempt to find an extralegal solution.

[182] Fred H. Cate, "Method in Our Madness: Legal Methodology in Communications Law Research," in *Communication and Law: Multidisciplinary Approaches to Research*, ed. Brooke Barnett and Amy Reynolds (LEA, 2009), Kindle loc. 724–750.

explain variables.[183]

The second method employed in this dissertation takes its cues from Frey and Carragee,[184] Buddenbuam and Novak,[185] and law and society research. Namely, this dissertation is both theoretical and applied. In it I examine a contemporary problem and offer a solution. Whether this is called communication activism or applied research does not matter. What does matter is that the work data were collected; a theory was constructed; and the work was delivered in a manner that attempts to help the problem at hand.

Rather than starting with the law, this dissertation starts with the conflict and then abstracts it so it can be studied in light of current jurisprudence. It then uses the theory derived from analyzing the conflict to make arguments about how well the current legal system serves the needs of modders and game companies. It will also argue for possible nonlegal solutions.

To arrive at this provocative proposition, this dissertation utilizes a traditional legal adversarial documentary method. Mass communication scholars Gillmor and Dennis define the method:

> Legal research of the traditional, documentary mode is largely adversarial. The legal researcher sets down a provocative proposition and marshals evidence to support its plausibility, and that evidence may come from opinions of the court,

---

[183] Steve Jones, ed., Doing Internet Research: Critical Issues and Methods for Examining the Net, 1st ed. (Sage Publications, Inc, 1998), 33–35.

[184] Lawrence R. Frey and Kevin M. Carragee, *Communication Activism: Communication for Social Change* (Hampton Press, 2007).

[185] Judith Mitchell Buddenbaum and Katherine B. Novak, *Applied Communication Research* (Wiley-Blackwell, 2001).

> dissenting opinions, legislative histories, constitutional interpretation, and legal commentaries.[186]

Incorporating the forms of evidence listed by Gillmor and Dennis, in concurrence to the theory developed through examination of mod cultures, allows legal critique that aligns with the practices of a communication scholar. Cohen and Gleason defined this type of research when they wrote about media law scholarship that came "from the perspective of the communication scholar, not in competition with the legal scholar, but in recognition of the objectives of communication research."[187] As a communication researcher it is important to have standards by which one makes arguments. To construct the legal adversarial argument I used two argumentation concepts: soundness (or good reasoning) and argument analysis, which relies on providing well-reasoned grounds to support conclusions.[188]

Theoretically, qualitative communication scholarship and legal research fit well together. Cohen and Gleason pointed out that law is not science, and it has historically resisted quantitative forms of research.[189] They also brought up that, in 1881, Oliver Wendell Holmes wrote about this very thought in *The Common Law*, and that not much has changed since then. Holmes stated:

---

[186] Gillmor and Dennis, "Legal Research in Mass Communication," 335.

[187] Jeremy Cohen and Timothy Gleason, *Social Research in Communication and Law* (Sage Publications, Inc, 1990), 8.

[188] John Shand, *Arguing Well*, 1st ed. (Routledge, 2000), 4; Alec Fisher, *The Logic of Real Arguments*, 2nd ed. (Cambridge University Press, 2004), 15–28.

[189] Jeremy Cohen and Timothy Gleason, "Charting the Future of Interdisciplinary Scholarship in Communication and Law," in *Communication and Law: Multidisciplinary Approaches to Research*, ed. Brooke Barnett and Amy Reynolds (LEA, 2009), 5.

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.[190]

Throughout *The Common Law*, Holmes argued that experience, the interpretation of it, argument, and history has more to do with the law and its practice than did science. Cohen and Gleason extended the argument by pointing out that the bad science of the early nineteenth century espoused that blacks and women were inferior by nature and that the combination of bad science and legal logic led to the debacle that was the *Dred Scott* case.[191] For a more modern example they offered the Supreme Court case of *City of Renton v. Playtime Theaters, Inc.*[192]

The City of Renton, WA, had passed an ordinance preventing local theaters from showing adult entertainment within a thousand feet of a residential zone, single- or multiple-family dwelling, church, park, or school. The Ninth Circuit U.S. Court of Appeals reversed an earlier decision, effectively overturning the ordinance, claiming the city's ordinance violated the First Amendment interests of Playtime. More salient to this conversation, the court of appeals claimed that the city had improperly relied on the experiences of other cities. The court said that the city needed empirical evidence that the

---

[190] Oliver Wendell Holmes Jr, *The Common Law* (Quid Pro Law Books, 2010). It should be noted that there have been several poor reproductions of this book issued. Great pains were taken to restore the Kindle edition, I highly recommend it.

[191] Reynolds, D, and Inc, Communication and law multidisciplinary approaches to research, 5.

[192] City of Renton V. Playtime Theaters, 475 U.S. (Supreme Court 1986).

adult theaters were having an effect on Renton severe enough to restrict the rights of the Playtime theaters. In essence, the Ninth Circuit Court ruled that arguments based on analogy and precedent were not strong enough to trump the First Amendment. The Supreme Court reversed the Ninth Court's decision and supported the City of Renton.[193] Justice Rehnquist wrote:

> The First Amendment does not require a city… to conduct new studies or produce evidence independent of that already generated by other cities so long as whatever evidence the city relies upon is reasonably believed to be relevant. [194]

In short, Rehnquist supported the notion that arguments about reasonability and relevance are significant to the court. This is where communication law scholarship fits. This dissertation provides a deep understanding of a problem, and then argues how it and current law relate both to each other and to the communities in question. The law responds to experiences, history, and how they relate to both jurisprudence and the conditions of people. Thus, a good chance exists that this dissertation could provide research to either prep a legal brief or to help the involved parties resolve the dispute on their own.

---

[193] Ibid., 51.

[194] Ibid., 51.

CHAPTER 6

DATA: CHRONO TRIGGER: CRIMSON ECHOES

On May 9, 2009, one of the world's largest, oldest, and most venerated videogame companies, Square Enix, sent a cease & desist letter (C&D) to the creative team of the *Chrono Trigger: Crimson Echoes* (*CT:CE*) project days before its release to the public.[195] Kajar Laboratories complied with the request and did not release *CT:CE* to the public. It is important to note that Kajar Laboratories designed as a tribute to Square Enix, an homage of sorts.

In the C&D Square Enix claimed that the "ROM Hack Game," *CT:CE,* was based on (a.k.a. a derivative work of) Square Enix's copyrighted intellectual property.[196] The letter further stated that this was willful and deliberate copyright infringement. It also stated that the delivery method of the game, a tool known as "Temporal Flux," violated the Digital Millennium Copyright Act and that the creators of *CT:CE* intended to instruct others how to use it (see Appendix A).

---

[195] "Crimson Echoes Main Page", August 12, 2009, http://crimsonechoes.com/.

[196] R. Anthony Reese, "Transformativeness and the Derivative Work Right," *Columbia Journal of Law & the Arts* 31, no. 4 (2008): 101–104, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2071439.

Kajar Laboratories knew that ROM hacking was a violation of copyright law, and knew specifically that it was violating of Square Enix's copyright. The creators said as much in a "read.me" file contained within the game. The file stated the game was being made without the copyright holder's consent, and that both accessing the code necessary to make the game and distributing it was illegal (allegedly, the mod did violate §1201, the anti-circumvention section of the DMCA.)[197] The read.me file also stated that if Square Enix were to "perceive the project as a threat" then Kajar Laboratories would comply with the company's requests and take the game down from the Internet.

For context, Kajar Laboratories was an international team of hobbyists who worked as volunteers on the project for four-and-a-half years. *CT:CE* used much of the original art, music, and code from the copyrighted *Chrono Trigger* game to create an entirely new game. *CT:CE* was a fan-made sequel, set in Square Enix's *Chrono Trigger* universe. With an entirely new story, new encounters, new levels, it was clearly a new game, but also very clearly derivative. Imagine if you utilized all the pieces of *Monopoly* to create a new game called *Monopoly 2: Urban Decay*, for example. This example is closer to reality than you might think. Hand-drawn Monopoly boards, some with unique rules and features, are actually quite common. Alan Turing, computer science pioneer, is noted to have played on a hand-drawn Monopoly board, as he and his friend William Newman were rich in mind but poor in wallet in the 1950s.[198] In honor of Turing, and

---

[197] U.S. Code Title 17 §1201.

[198] "Alan Turing's Hand-drawn Monopoly Board" blog, *Boing Boing*, August 5, 2011, http://boingboing.net/2011/08/05/alan-turings-hand-drawn-monopoly-board.html.

board game modding, Bletchley Park Trust commissioned a commercial release of the hand-drawn Monopoly board and rules.[199]

Kajar Laboratories said that *CT:CE* would have featured thirty-five hours of gameplay, twenty-three different chapters and ten possible endings. It was a massive project.

It is also important to know that *Chrono Trigger* was a fourteen-year-old game. Originally created for the Super Nintendo System and released in 1995 by Square's "Dream Team": Hironobu Sakaguchi, the creator of Square Enix's *Final Fantasy* series; Yuji Horii, a freelance designer and creator of Square Enix's popular *Dragon Quest* series; and Akira Toriyama, a freelance manga artist famed for his work with *Dragon Quest* and *Dragon Ball*. Kazuhiko Aoki acted as producer. Masato Kato wrote the majority of the game. Hiroyuki Ito worked on design and animation. Yasunori Mitsuda wrote the score for most of the game before falling ill and famed *Final Fantasy* composer Nobuo Uematsu took over.[200] To the casual reader this may seem like a simple list of Japanese names, but to gamers this is the equivalent of seeing Hollywood's best all working together. *Chrono Trigger* was a highly appreciated game that sold over two million copies on the Super Nintendo Entertainment System, and was re-released on other systems, such as the PlayStation, PlayStation 3, Nintendo Wii and the Nintendo DS. Clearly the property had value during its original retail release, and retains it today.

---

[199] "Alan Turing Memorial Monopoly Set," *Boing Boing*, September 8, 2012, http://boingboing.net/2012/09/08/alan-turing-memorial-monopoly.html.

[200] Brad Shoemaker, "The Greatest Games of All Time: Chrono Trigger," *Gamespot*, April 17, 2006, http://l.gamespot.com/tYSpO1.

Kajar Laboratories created an interesting beast with *CT:CE*. It did not release the mod for sale. Kajar Laboratories planned to put it online for free. It was not releasing *CT:CE* for a videogame console; the ROM Hack was designed to play as a Super Nintendo game on a computer.[201] And, again, Kajar Laboratories was willfully and knowingly violating Square Enix's copyright for no commercial gain. It should be noted that, while all of the games created for the Super Nintendo are still protected under copyright, the patents on the hardware have expired. Thus "new" Super Nintendo compatible systems are being produced today, available for purchase at stores like Amazon.com.[202]

In a nutshell, a group of hobbyists decided to make a "mod," a noncommercial spin-off of a media product that they deeply enjoyed. This is common, but legally complex, in other media; such as fanfic (FF), or cosplay, where fans create costumes based on their favorite fictional characters and attend conventions. [203]

CT:CE creators intentionally ran afoul of Square Enix's copyright. They knew

---

[201] ZeaLitY, "Crimson Echoes"; Ian Bogost, "Guru Meditation" Blog, *Bogost.com*, accessed November 19, 2012, http://www.bogost.com/games/guru_meditation.shtml. The original *Chrono Trigger* was released in 1995 on a physical game cartridge for the Super Nintendo Entertainment System. The new mod *CT:CE* was going to be a free download on the Internet. Pressing a cartridge is an expensive process that is further complicated by the fact that the game companies they were designed for patented them. Retro-game cartridges have been created, for example Georgia Tech game scholar Ian Bogost had his game *Guru Meditation* pressed as a cartridge for the Atari VCS (2600).

[202] "Amazon.com: Retro-Bit Retro Duo Twin Video Game System NES & SNES Black/Red: Super NES;6306300: Video Games," *Amazon.com*, n.d., http://www.amazon.com/Retro-Bit-Retro-System-NES-Super-6306300/dp/B0012NZK8G/ref=sr_1_17?s=videogames&ie=UTF8&qid=1335089868&sr=1-17.

[203] Jenkins, Convergence Culture, 175–216., Jenkins, Fans, Bloggers, and Gamers, 37–60., Jenkins, Fans, Bloggers, and Gamers; Jenkins, Confronting the Challenges of Participatory Culture; Jenkins, Convergence Culture; Postigo, "Video Game Appropriation Through Modifications."

they were violating copyright law, and admitted it in advance, but they did not know what to do about it. They wanted to see the story continue, to participate in one of their favorite games. This point serves as a key motivating factor for this dissertation. Fans who wanted to interact with a game and a company could not navigate the current legal system, so they acted in a way they saw as ethical and public, hoping for the best, but experiencing the worst. Their good faith effort was insufficient, and a system intended to bring more useful art and tech to society turned on them.

In short, when Kajar Laboratories set out to create *CT:CE* it was extending its culture. The game had a place in a community; it was more than a product. Salen and Zimmerman put it best:

> Meaningful play in a game emerges from the relationship between player action and system outcome; it is the process by which a player takes action within the designed system of a game and the system responds to the action. The meaning of an action resides in the relationship between action and outcome.[204]

As Salen and Zimmerman pointed out, the player takes an action and the system responds, but it is the player who defines meaning for those actions. This emergence can take a narrative or ludic (from ludology, the study of games) form.[205] Games are interactive and we bring meaning to that interaction.

I argue that Kajar Laboratories took an action, anticipating an emergent meaning, but the system did not respond as expected. Instead of adoration from fellow fans and the

---

[204] Salen and Zimmerman, *Rules of Play*, Kindle loc. 937.

[205] Gonzalo Frasca, "Ludologists Love Stories, Too: Notes from a Debate That Never Took Place," in *Proceedings of International DiGRA Conference*, 2003, 93–95, http://ludology.org/articles/frasca_levelup2003.pdf.

creators of *Chrono Trigger*, Kajar experienced strategically timed retribution from Square Enix's attorneys. In a sense, the entire conflict can be read as bad game design. Modders (players) take action hoping for a certain result and instead are met with uncertainty and perhaps legal woes. Yet they keep playing the game, hoping for the desired outcome. By examining fan reactions to the legal troubles of Kajar Laboratories I illustrate why the system is broken why modders should understand the rules and how nonlegal solutions can arise.

While modder/company conflict has happened before, this case is particularly egregious as Kajar Laboratories had worked on the project for years, had invested countless hours, and yet did not receive the C&D until days before the scheduled release of *CT:CE*.

Modders and fans are not just confused. Even when they earnestly attempt to do the right thing, as Kajar Laboratories did in its read.me file, they still cannot stay within the boundaries of current copyright law. Thus, I define the modder's dilemma: the status quo confuses modders and fans, does not equip game companies to interact with their most valuable patrons without legal threats, and jeopardizes a societal shift towards participatory culture.

The case of *CT:CE* is a clear example of a group attempting to do what it believed was both morally and legally appropriate in its attempts to create a new piece of interactive art. Kajar Laboratories was explicit, while making the mod, that it would stop if the copyright holder cried foul, and that it had taken all actions possible, as it understood them, to operate in a legitimate manner. Additionally, it is not alone in its confusion.

After Square Enix sent Kajar Laboratories a cease and desist letter, the mod community was atwitter with people trying to make sense of what happened. The next chapter analyzes the forum posts and comments made by fan on blogs and news websites. It addresses both their reactions and provides analysis of the impact that the C&D sent by Square Enix had on the fan community.

CHAPTER 7

GROUNDED THEORY ANALYSIS

Sites of Study

Grounded theory is flexible enough to use many different types of text for analysis. In fact, Glaser and Strauss, as well as Lindlof and Taylor, offer examples of archival data for used in grounded study research projects; the sample study that Lindlof and Taylor use to illustrate the basics of grounded theory is an analysis of holiday letters.[206] For this study, I used three main sources focused on *CT:CE*: online writings made by modders, comments on website articles and blogs, and posts in online forums.

This study focused on the reactions and sense-making by fans of the, cease and desist letter issued by Square Enix. Rather than interviewing a dozen fans, and having them filter or over-think their answers, or having my questions or even mood affect their answers, I analyzed their responses captured in time in a natural setting. This allowed me to base my analysis on a conversation established by the *CT:CE* community itself.

---

[206] Glaser and Strauss, *The Discovery of Grounded Theory*, 161–183; T. R. Lindlof and B. C. Taylor, *Qualitative Communication Research Methods* (Sage Pubns, 2002), 218–225; Stephen P Banks, Esther Louie, and Martha Einerson, "Constructing Personal Identities in Holiday Letters," *Journal of Social and Personal Relationships* 17, no. 3 (June 1, 2000): 299–327, doi:10.1177/0265407500173001.

To select which blogs, websites, and forums to analyze, I turned to crimsonechoes.com and savecrimsonechoes.com. The former was the site where *Crimson Echoes* was going to be released, the latter a site documenting the fallout of the C&D, as well as hosting a petition that failed to save the project. Both sites contained an archive of links attempting to document all of the news websites, fan sites, blogs, and forums discussing *CT:CE*, It should be noted that, while I originally started studying *Crimson Echoes* the website was serving as an archive of the project and related media. However, in the summer of 2012, the website went down and, as of this printing, attempts to access both the domains crimsonechoes.com and savecrimsonechoes.com are met with server errors. A *WHOIS*[207] search identified a domain registration proxy service as the registrant of crimsonechoes.com since 2009. It did not respond to emails or phone calls. Savecrimsonechoes.com's registration had expired.[208] It was not a major problem that the sites are not currently working because they are both archived by The Internet Archive. I was also able to access several saved versions via The Way Back Machine.[209]

---

[207] WHOIS is a protocol designed to query databases, and finds its origins back in the early days of ARPANET. Presently it is used online to determine both the status and ownership of a domain name on the World Wide Web.

[208] After discovering savecrimsonechoes.com had expired, I purchased it and plan to use it to host this research after publication. This seems like an appropriate use of the site, keeping with the themes of the community.

[209] "Internet Archive: Wayback Machine," accessed August 8, 2012, http://archive.org/web/web.php. - The Internet Archive is a not-for-profit organization that is attempting to create an "Internet Library." Its explicit goal is to provide the public access specifically for researchers to an historical archive of the Internet. I used the Wayback Machine (an homage to the cartoon time machine Mr. Peabody and Sherman used in *The Rocky and Bullwinkle Show* from the early '60s) to access complete versions of both sites. I chose the latest available archived copy of each, as they contained the most links. While most of the websites are still live, I did have to rely on the Wayback Machine to access some.

The Analytical Process

Both crimsonechoes.com and savecrimsonechoes.com featured lists of the web and form coverage of the C&D and subsequent takedown of *CT:CE*. This included 24 English language websites and one Internet radio interview.[210] I also chose to include crimsonechoes.com and savecrimsonechoes.com in my analysis, as well as the comments from the memorial video play-through on YouTube.[211] I began analysis by coding crimsonechoes.com, as it was written by the modders, who also are fans. While the site was primarily an archive, it provided two valuable contributions. First, it allowed me to become intimately familiar with the major players in *Crimson Echoes* and it provided me with valuable context, affording me a deeper understanding of the fan comments from the websites and the *CT:CE* ROM mod itself. Second, there were some opinions from the modders themselves, and while sparse, they all aligned with the comments I would later see made by fans on the websites, allowing me to feel confident that the opinions of the modders affected directly by the C&D did not vary from the fans observing the conflict. In fact, it aligns well with the notion that modders are simply fans themselves. Fandom is the community.

I copied the pages from crimsonechoes.com, savecrimsonechoes.com and the 24 websites and forums into *Dedoose* as media objects. I then began splitting them into

---

[210] While websites in other languages did cover the *CT:CE* story, they were not included in this study. Aside from the prohibitive time commitment and financial cost of translation, the majority of sites were in English and provided enough data to achieve theoretical saturation.

[211] "CEMemorial - YouTube," accessed July 1, 2012, http://www.youtube.com/user/CEMemorial/feed?filter=1.

excerpts for analysis. At first, I coded everything on the pages. However, through constant comparison, I eventually realized I was nearing theoretical saturation. At this point I read everything, but only coded those salient to the conversation at hand. I coded the excerpts using open coding, writing memos along the way.

The open coding was both descriptive and analytic. As I coded the excerpts I simultaneously refined the codes, as well as the size of the excerpts. In the end, I found it most useful to code an entire news article as one excerpt, and each fan comment as an excerpt. These units of analysis allowed me to keep context. Yet, at the same time, they were small enough to consider deeply.

I analyzed twenty-four websites. Links to the *CT:CE* articles were located on crimsonechoes.com or savecrimsonechoes.com. Each page and the comments were imported into *Dedoose* for analysis. The list is as follows:

- CNET
- Desctructoid
- Digg (based on the Destructoid Article)
- Games Radar
- GameZone
- IGN
- Joystiq
- Kagero Studios Forum (which the moderator kindly gave me access to)
- KOEI Warriors Forum
- Kotaku
- Leak-Gossip

- OneUp Studios Forum
- QJ
- QJ Net Forums
- Reddit
- RomHacking.net
- Save Crimson Echoes
- Slashdot
- TechDirt
- The Escapist
- The Gamer Access
- TV Tropes
- Wired
- X-Cult Forum

The twenty-four websites yielded forty-two documents, as some of the websites covered *CT:CE* more than once, and sometimes the stories/comments spanned multiple pages. I coded 252 excerpts from the documents before reaching theoretical saturation. During open coding, in the spirit of constant comparison, I refined codes and collapsed similar ones into categories. Axial coding allowed me to look at the codes and turn them into larger categories of thought, which eventually became the impetus for the theory grounded in data. It should be noted that I did not create excerpts of every comment on all of the sites.

As the codes were refined, and as I coded additional excerpts, I reached a point where I was no longer refining or writing memos; I was simply applying codes to

excerpts. At this point I had reached theoretical saturation. The data kept saying the same thing. I read through all data again, with my codes and categories visible, and realized that further coding would not yield additional results. At this point I collected my memos, codes, and categories, all stored in *Dedoose* and *Scrivener*, my drafting tool, and attempted to distill a grounded theory

The use of excerpts allowed me to keep the full, vivid, and dense descriptions of the conflict provided by fans. Rich, whole, locally grounded data gets to the very core of people's lived experiences, which makes it appropriate for qualitative research.[212] When it came to collecting data, the program separated any bias I might have from the actual data. There were no transcription errors, and the data was entirely in the participants' words. I had to be careful during the analysis, however where no failsafe existed.

I also made great efforts to look at the data with "a concern with capturing the people's own way of interpreting significance as accurately as possible."[213] My analysis was not only concerned with making sure the theory was grounded in what fans were saying, but that it was capturing the major theme of their discussion.

While I refer to phases, grounded theory method allows data to lead to more data, and for constant comparison to allow for codes and process to evolve. While I started with crimsonechoes.com, it led me to savecrimsonechoes.com and twenty-four other websites. Additionally, while I refer to phase one as open coding, my axial coding, the

---

[212] Matthew B. Miles and A. Michael Huberman, *Qualitative Data Analysis: An Expanded Sourcebook*, 2nd ed. (Thousand Oaks, CA: Sage Publications, Inc, 1994), 10.

[213] Robert Bogdan and Sari Knopp Biklen, *Qualitative Research for Education: An Introduction to Theories and Methods*, 5th ed. (Allyn & Bacon, 1992), 32.

creation of core categories, began as soon as I had multiple open codes and continued to evolve until I was done coding. At that point, I reviewed my memos and codes and developed the final core categories that allowed me to discover the core phenomenon of legal and moral conflict. I then developed a theory to explain it: Legal Threats Break Moral Communities.

Grounded Theoretical Model

The theory Legal Threats Break Moral Communities explains the efforts that modders and fans performed to try to make their moral understanding align with legal issues.[214] The modders/fans made value judgments to rectify what happened to Kajar Laboratories with how they felt about modding and Square Enix. While the fallout of the discussion was economic (punish through boycott, etc.), the issues all lead to both conflation of and attempts to reconcile law and morality. The majority, who identified with the modders, performed philosophical gymnastics in an attempt to reconcile what they thought was moral with what Square Enix told them was legal. The minority of fans supported Square Enix's C&D struggled to make the exercise of legal rights sound moral. All sides, in some way, focused on the interplay of societal law and moral law.

The Legal Threats Break Moral Communities theory developed from the categories that emerged during axial coding. The goal was to find the core common story, and develop something rich enough to encompass the multiple viewpoints of fans, and, at

---

[214] While some fans set out to show how Square Enix was not only in the legal right, but in the moral right, these could be considered outliers. I read their efforts as confirming that the central issues at hand were law and morality.

the same time, concrete enough to represent the common thread. Six major categories emerged from the data and comprise the theory:

1. Trying to understand the motivation behind the threat
2. Value judgments
3. Conflicting law and morality
4. What actions should be taken
5. Fallout
6. Mitigating collateral damage

These categories represent most of the open codes, certainly all of the salient ones. They simultaneously represent a relationship. The theory Legal Threats Break Moral Communities can be read in terms of a relationship based on morals and values being destroyed by the threat of law. This is not a new tale. One of the classic articles in law and society research, Macaulay's "Non-Contractual Relations in Business," pointed out that, while many business arrangements start with a contract, they operate based on their relationship, not the terms of the contract.[215] This is especially true when one side either cannot meet the terms of the contract, or wants to conduct business not covered by it. When interviewed about his study, Macaulay shared that once a business must legally enforce a contract, it is usually a sign of the end of a good business relationship.[216]

Because of the value of the relationship, and affection felt toward the game

---

[215] Stewart Macaulay, "Non-Contractual Relations in Business: A Preliminary Study," *American Sociological Review* 28, no. 1 (February 1, 1963): 55–67, doi:10.2307/2090458.

[216] Simon Halliday and Patrick Schmidt, *Conducting Law and Society Research: Reflections on Methods and Practices*, 1st ed. (Cambridge University Press, 2009), 14–25.

Chrono Trigger and the company Square Enix, fans made great efforts trying to work through the C&D. In short, the grounded theory represents a situation where one party is operating under its moral system, but is forced to reconcile the break in a relationship when the other party makes legal threats.

The six categories that comprise the Legal Threats Break Moral Communities grounded theory are explained in detail below. It should be noted that all of the block quotes have been taken directly from the data. Any use of emoticons, spelling errors, or other irregularities remain intact to preserve the authenticity of the data.

Making Sense of Motives

The category I labeled making sense of motives emerged from the data and applied across the spectrum of fan experiences. Whether they supported Square Enix or Kajar Labs, and regardless of the judgments they made, fans worked on moral and legal analysis/solutions to the legal threat. The legal threat was always the most powerful variable on the table. No one tried to make the C&D meet moral standards, but fans frequently lamented the C&D's unfairness or tried to rationalize the moral stances modders took regarding the legal threat. In the end, modders and other fans took various positions in relation to the legal threat, but the legal threat was always the central theme.

In looking at the data, several codes emerged that fell under the Making Sense of Motivations category. Confusion was a code that came up time and time again. Fans were both confused about what the laws were and why Square Enix would shut down the project. The following two quotes, by two separate fans, illustrate the type of text that shows confusion and sense making:

> a) This is the first time I can ever remember something like this happening with a ROM hack of any kind. It's within their rights to go after the people, of course,

> but it's weird that no company ever has (as far as I know), and SE chose these projects now.
>
> b) I do believe in the right to protect ones intellectual property, however, I feel that the way that SE handled the situation was wrong and immoral. and I don't want to hear abunch of pro-Ip people yelling either. I feel that we have reached a time where people should be encouraged to make fan fiction with all tools available. Even SE gives the green light on Fan Fiction. The fan written story of what happened to Aerith from FFVII was praised by SE. So why not this.

Additionally, the fans tried to understand the motives of Square Enix, in an attempt to alleviate the confusion expressed in the community. It was an attempt, based on assumptions, to explain what was happening to them at the hands of a company they deeply cared for, a sort of community sense making. Codes (in vivo) assigned to Square Enix by the fans included: that this was its corporate culture; that this was a national culture issue because it is a Japanese company; that Square Enix was protecting the sanctity of intellectual property in general; that the game company felt malice towards those who modded its games without permission; and that it conspired to harm the modders by waiting until the last possible moment to send their C&D.[217]

In the following two excerpts the fans assume that the game company has a malicious, nefarious reason for its actions:

> a) Gotta love how they wait until the game is done to tell everyone they've wasted their time. Doesn't Sqeenix have better things to do, like continuing to ruin the Final Fantasy series?
>
> b) Clearly this is a conspiracy to ensure that the shit storyline of Chrono Cross remains cannon for all eternity for fear of the Dark God Zardoz awakening and saying the word that would end all existence and God. That's the only thing I can think of.

---

[217] Latin for "within the living." The use here refers to the names of codes crafted from the words of the participants, as opposed to constructs from this author.

The next two excerpts illustrate that, perhaps, Square Enix does not have full agency in its decision-making. The first fan blames corporate culture, while the second blames Japanese culture:

> a) Ugh if you want to take a good look at corporations I think SICKO or farenheit 911 explain it well enough. personally i still think the devs should keep copies of the game just for the hell of it I mean its four years of hard effort, just to have what can ultimately be surmised as a bully kicking your sandcastle just as you put the flag on top. I mean if SE doesnt even give them a job for this..
>
> b) Japanese companies are too oldthinking. Sorry, I will not buy FFXIII after that.

There were also attempts to understand the motivations of the modders themselves by other fans. One of the strengths of the Legal Threats Break Moral Communities theory is that all six of the categories apply to both the modders and the game company, as fans commented on both sides. It allows for a multifaceted or polyvalent interpretation of the situation. Fans were certainly confused by the actions of the modders, and they even thought that other fans might have conspired to bring the project down. Oddly, one commenter even attempted to take credit for masterminding a conspiracy in which Square Enix read the forum posts and was motivated by them to send the C&D. The following two excerpts demonstrate how fans attempted to make sense of the motivations of Kajar Labs. The first excerpt is a critique of its motives, while the second is a defense:

> a) I first read about this and had a similar thought: how could they not have realized they were going to get shut down? I'm only surprised it took as long as it did, but that might very well have been because Square Enix didn't find out until recently (but I have no idea). And it especially wasn't going to fly now, with Square Enix having re-released Chrono Trigger for the DS, and there's all the marketing going on. They are not going to let an unauthorized sequel out; no company would.
>
> b) Up until now, this had been a practice widely tolerated by Square Enix and other videogame companies. Literally thousands of mods for NES, SNES, and Genesis-era videogames are floating around in the modding community's various

> hubs, ranging from Final Fantasy to Mega Man to Sonic the Hedgehog, with plenty of Chrono sandwiched in there as well.

The C&D forced the community to explore questions relating to why Square Enix would send it and why Kajar Labs created a ROM mod of *Chrono Trigger*. Both sides of the issue were explored. Fans had comments and questions about both of the parties involved and they had few definitive answers. Speculation abounded. This confusion was caused by the legal threat. Responses ranged from fans asking why this was happening, to vilifying their perceived oppressor, to wondering what the modders could have done better. Making Sense of Motivations has emerged as the first and most common data category.

Value Judgments

Fans on both sides of the conflict applied value judgments to their interpretations of the conflict. They took sides. Some fans supported Square Enix while others supported Kajar Laboratories. Both sides made strong statements based upon what they perceived as right and wrong. The C&D caused a disruption in the community that caused them to debate their values. Fans felt strongly, both ways, about this conflict. This was not abstract to them; they felt personally involved. Their community had been affected. The following excerpts represent the types and depth of emotion and value claims made by the fans. Please note, more than the other sections, these excerpts contain language not safe for work.

> a) How fucking bullshit! These games are more of free propaganda to the series rather than ripoffs.

> b) God fucking damnit! What the fuck is up with Squeenix shutting down stuff linked to Chrono Trigger? I mean seriously guys, you see all of the fan shit about Chrono Trigger and yet you somehow arent getting the hint that the fans want a fucking Chrono Trigger sequel (Cross wasn't a sequel). This almost pisses me off

as much as when the[y] shut down the Chrono Ressurection project.

The following excerpt was on the *CT:CE* website and was, allegedly, written by ZeaLitY, who was serving as team lead when Square Enix sent the C&D. This excerpt illustrates the sympathy for the fans and anger towards the game company:

> We understand the frustration. I sincerely hope this action is a sign that Square Enix cares about the franchise and intends to produce future titles, and not merely a shortsighted legal exercise that will further alienate a tired, neglected fan-base.

ZeaLitY speaks for the *CT:CE* team, Kajar Labs. While he tries to spin it in a positive light, offering an interpretation that Square Enix may have noble goals in sending the C&D, the time illustrates the frustration he believes the fan's feel towards the game company and critiques their strategy.

It is normal for commenters to be more assertive and utilize hyperbole when commenting on websites and blogs.[218]

> a) Jist because you have a good lagal team dosen't mean you have to be a dick to everyone who says hi to you. Alas squeenix isnt the only company that would do this, in fact I really can't imagine a company that would let such a project happen. Maybe this is the lawyer in me speaking but Chrono has a special place in our hearts, what if this game sucked ass? It would ruin the game's reputation to potential fans, and trust me guys Squeenix is sure to follow the money and make a sequel lets just hope we're alive to see it.
>
> b) Guess that's what you get for ******* around with someone's IP, hope they learned their lesson now. Really, what did they think? "Hmm let's create a game made from their very own sourcecode and publicize it everywhere?"? Fools.
>
> c) Aww come on SE. Its like fanfiction packed into a game. Since when do you care for regular written fanficition?, there is a ton of it swarming the internet and you don t give a fuck.

---

[218] Kate Kenski, Kevin Coe, and Steve Rains, "Patterns and Determinants of Civility in Online Discussions: Final Report to the National Institute for Civil Discourse," *National Institute for Civil Discourse*, October 13, 2012, http://nicd.arizona.edu/research-report/patterns-and-determinants-civility.

Blizzard

d) Soulless corporation rises the finger to its fans. News at 11.
People should stop trying to make this kind of stuff, 99% of the times they will get a cease & desist and all their work go to the trash.

e) My reaction is:
If the mod team tried to contact Square Enix before, and Square simply didn't respond, SE are have committed a huge dickmove by stopping this at the last possible second.
If the mod team didn't even try, SE have committed a smaller dickmove. And the mod team are a tad stupid.
Basically, I don't see why SE were so afraid of it as to have it nuked - fan made versions of the game could actually increase their overall sales - at the very least, they won't have much/any impact on sales as only internet traveller will find it.
If anything, they might have hurt themselves with this - after all, why not have a bunch of people working for free on a similar thing to you and let them experiment with the formula for free - and then you can easily copy any good things created.

The above exemplars serve to demonstrate both the depth and range of emotions felt by the fans as well as their value judgments. Both Square Enix and Kajar Labs had comments directed at them. Both parties were accused of making mistakes and both of being in the wrong. This illustrates three points that emerged from the data, that there was passionate reaction to the C&D, that fans made judgments based on values, and that there is an effort by the community to explore those values. The comments serve as a public forum for discussion. The C&D is offered up and arguments are made on both sides as a way for the community to explore their values.

Conflicting Law and Morality

Comments in which fans debated distinctions between legal threats and moral law developed this category. While all the categories feed into the theory, it was the abundance of discussions of right and wrong, the law, and the conflict between these constructs that emerged as the most salient issue. A bevy of descriptive and analytic

codes collapsed to create this category. These focused on posts that focused on legal analysis and/or moral law.

> For years, the Cease & Desist has been used as a scare tactic against fan projects like this and nothing else. And most companies eventually learn that pursuing this sort of endeavor is costing them more money and effort than they would recoup from whatever potential lawsuits would come of it.
> Most notorious is FOX. There's a whole term out there - one that's long since died out - called being "FOXed". The term arose after FOX shut down an Aliens-themed Quake 1 mod. FOX was also notorious for shutting down any and all fansites for The Simpsons, regardless of content or context. Paramount was also guilty of this with regards to fansites for Star Trek.
> Eventually they gave up, because it just wasn't worth the effort. The amount of money gained from a lawsuit over something like a Chrono Trigger ROM hack would most likely not even be enough to cover court costs. Square-Enix would literally be throwing $15,000-$50,000 down the drain to stop something that was never really a threat to begin with. And I'm sure they know that - which is why the Cease & Desist is worthless. It's like some guy telling "Stop! I've got a gun!" when all he has is a toy that shoots foam darts. They're just trying to scare people away.
> Other companies are more progressive. Sega has turned a blind eye to fan projects for over ten years, which has blossomed in to a thriving community dedicated to hacking Sonic the Hedgehog ROMs and developing fangames made in C++. This sort of stuff is basically just fanart and fanfiction but applied to the space of gameplay, and wasting your time trying to stop it is telling your fandom to stop being fans.

The above comment illustrates the depth of thought that some fans have on the subject. It was comment reacting to an editorial article about the C&D. The commenter offers a critique in stating that C&D's have been used as "scare tactics" for some time. He backs this up with a brief history focusing on being "FOXed," which he correctly points out was the first C&D issued to modders to gain media attention. He then offers an argument from analogy, asserting that the C&D is essentially a toothless threat. Finally he ends with the insightful argument that when companies issue a C&D they are being of two minds when they punish fans for their fandom.

Discussion on fair use, legal jurisdiction, and copyright standards appeared time and time again, simultaneously accompanied by moral conversations.

a)… Fan-created content does not fall under the "fair use" umbrella. Content creators can (and should) choose to turn a blind eye to it, but they are also within full legal rights to take action (which is a dire and pathetic consequence of the current misuse of copyright).

b) Square have basically been really annoying recently. The whole series of delays for the Xbox 360 FF XIII release was bad enough, but now they're picking on the small developer too. What harm could this do provided the creators released it for free, which was intended anyway and all they could do by copyright? This isn't fair on the people who spent so long and worked so hard for something they believed in, as a tribute to Square Enix's product no less. Besides, haven't Square Enix ever heard of Fair Use?

c) …I don't think it's covered under fair use. It's a bit like fan fiction -- probably fine if you release it online, anonymously, but you probably wouldn't be able to sell it without a license. (Example: Star wars slash fic vs actual expanded universe.)

d) I'm getting fed up with these two concepts. There is only one kind of Plagarism… If you didn't do the work on your paper, then you're cheating.
plagiarism [reference.com] /pledrzm, -dirz-/-noun
1. the unauthorized use or close imitation of the language and thoughts of another author and the representation of them as one's own original work.
English? YOU FAIL IT!
Copyright is the idea that you control the copies of your creation. Obviously, nobody wants to spend thousands of hours creating something then letting someone else (a corporation) sell it without royalties.
I've spent hundreds of hours developing articles for Everything2. I shudder to think at the hours which have gone into Wikipedia.
Human Emotion? YOU FAIL IT!
However, Copyright has turned into this idea where as soon as you make a "Dark cloaked figure who kills people for a living" you can go bully anyone else for doing something like it.
The courts let you do that. They also provide a mechanism for recovering the costs of frivolous lawsuits.
Understanding Jurisprudence? YOU FAIL IT!
IP is not a failed idea. Our system is what's broken (or more likely, those who are in charge of the system).

The final comment (d) in this set may require explanation to read. The “YOU FAIL IT” is an Internet meme intended to insult people for attempting things they are bad at. Here it is used as a straw man. He is not responding to anyone in particular, but we are to imagine that someone else is the recipient of his retorts.

From the explicit desire to “do what’s right” to acknowledging that ROM modding is probably “illegal” but does no harm, several discussion arose concerning the morality of modding. Fans also explicitly discussed moral laws as they wondered if attribution was a legal defense and if progress, as used in regulatory copyright theory, justified their actions. Finally, strategies were discussed. Arguments over perceived loopholes in the law or the proper execution of a mod featured prominently as a way to avoid copyright violations. Additionally, fans critiqued modders for not doing “original work” and urged game companies to relinquish their intellectual property as modders were creating new content while the game companies were letting the franchises wither. In the end, many acknowledged that this system is broken. They alluded to the *good* that modding creates for technology, the economy, culture, and even the game companies. Commenters also discussed how the current system shows neither fans or game companies are getting what they want.

The following excerpts contain examples of those themes. They illustrate some of the legal analysis fans discussed regarding Square Eniz's C&D letter. The first exemplar mentions attempts to utilize fair use, derivative works, and other legal concepts to defend the mod. Perhaps even more interesting is the discussion over intellectual property and a critique of the law. It contains arguments based on natural law, on authority (her or his studies on new media at a university) and a book, where other fans are encouraged to learn more:

> One does not need permission to legally make derivative work as long as what one does qualifies as fair use. In the case of this game, they didn't actually steal anything--it's a mod that you patch onto the full game. It never actually takes anything out of their product and calls it new (and even if it did, it could still qualify for fair use). This isn't theft in any way. It merely gives the ideas of the game a different light.

> The idea that people deserve complete and total control over the very way their intellectual property is looked at is the very reason why our intellectual property laws have become abominable failures. They are unnatural and outdated. That, if anything, is what my years of studying new media at a university have taught me. If you want to read into it, The Economy of Ideas would be a good place to start.

Of course, not all fans were supportive. While I would argue thematically that most of the conversation centered on game companies violating modders rights or modders having the right to use copyrighted materials, there were also critiques of the modders:

> What I don't get is this: These groups have to know what they're doing violates copyright laws and such. Why do they announce their plans before they've actually finished and uploaded the patch? Has history taught us nothing?

The above critique asserts that Kajar Labs, and similar modding groups, are aware of their intentional infringement of game companies' copyrights. The critique, however, is strategic, relating to the failure to avoid getting caught, as opposed to having the legal right. One reading of the argument in the statement is that this action is, in some sense, permissible to the fan – that since the modders knew what they were doing was wrong, why not keep quiet about it and release it, so there will be no restraint prior to release?

The following example offers a legal critique, explanation of the violation, and a personal attack against Kajar Labs, and those who comply with C&D requests in general:

> The stupid thing about this is that this IS outside of their legal sphere of influence. This was a homebrew project that was being sold with no commercial benefit and with no risk to Square's properties. It was essentially the video game version of fan fiction.
> One of Square's idiotic lawyers took US (or maybe Japanese) copyright law, interpreted it ridiculously loosely and then applied it to a jurisdiction that the law may not even cover. And even if it did - chances are this would fall firmly under "fair use". What we have here is a large corporate entity bullying a few individuals who don't have the means to fight back. With a competent lawyer who's well versed in copyright law and fair use these guys could most definitely send SE packing (and probably force them to pay for their legal fees too).
> And that's it. All they did was send a cease and desist letter - a letter which could

> easily have been ignored. If SE wanted to sue them then they'd have to argue their position - which is a seriously weak one. See kids, this is how corporate bullies criminalize perfectly legal and harmless creativity. They scare people with C&D letters first because they know they'd have to be INCREDIBLY lucky to win most of these cases and they don't want to risk losing and then having their loss cited as a defense in further copyright cases.
> Disgusting. These guys should grow some balls, throw the letter away and release the game anyway. Then if SE's lawyers come calling stand up for themselves in court.

The fan argues that Square Enix has no legal right because, the fan asserted, there is no commercial impact. Indeed this is one of the four prongs of the test that courts use when evaluating: the effect of the use on the potential market or value of the copyrighted work.[219] However, it is important to note that fair use is a legal defense, not a right. This means that whether Kajar Labs has a fair use right has no bearing on either the legal jurisdiction of Square Enix or the validity of its copyright. Finally, the example reveals two more important arguments that consistently arise in the data: first, that Square Enix's attorneys did this because they are Japanese (in fact, the law firm that sent the C&D is an American office, not Japanese) and, second, that the modders should have ignored the C&D because the fan believed Square Enix likely would not win in court. The comment ends with another common occurrence in the data: an emasculating insult to Kajar Labs for not standing up to the game company.

The discussion of morality and moral law frequently took the form of a critique of existing law, meaning that commenters interpreted the law as immoral. Attribution frequently came up and it appears that there is genuine confusion over it.

---

[219] *Copyright Act of 1976*, *17 U.S.C. § 107*, accessed November 27, 2012, http://www.copyright.gov/title17/92chap1.html#107; Don Pember and Clay Calvert, *Mass Media Law*, 17th ed. (McGraw-Hill Humanities/Social Sciences/Languages, 2010), 518.

> a) I don't really agree. I feel that it's a moral principle that creators of creative works shouldn't have credit given to others for their works. And similarly, I think it isn't right that the public should be stuck under a permanent monopoly given to creators over their ideas when the natural human instinct is to remix, adjust, and change art into new and unique forms.
> I definitely consider the area of copyright to be heavily influenced by moral (or, I suppose, philosophical) concerns, I just don't think the existing laws line up well with the principles that they should be seeking to embody.
>
> b) Square isn't going to shut it down >.>
> Most (if not all) video gaming companies don't care if you're making a fan made game of it, as long as you give credit where credit is due (like cite that all characters are property of the specific people) and not make any money off of it. It's the reason why there have been so many fan made Pokemon, Metroid, and Mario games. Hell, there have also been so many Final Fantasy hacks out there, yet not one of them received a C&D letter.

The fan who wrote the above comment was not only wrong about games not being "shut down" or receiving a C&D the point it best illustrates is the notion that proper attribution protects mods. While moral law, specifically attribution, may be an additional requirement in the United States, it is neither a legal right nor a legal defense. In fact attribution, and the way the fans apply it defines the very heart of this category. Attribution is so important in so many communities, that many assume it is law, but in the U.S. it is not. Attribution is a defense against plagiarism, and in the States, it is immoral, but not illegal as Judge Richard Posner explained:

> Plagiarism could probably be attacked in a civil lawsuit as fraud, by analogy to the tort of false advertising, if it diverted sales from competing publishers, though I am not aware of such a suit. In addition, the European doctrine of "moral rights," now gaining a foothold in U.S. law (mainly in relation to visual art), entitles a writer or other artist to be credited for his original work, and this "attribution right," as it is called, would give him a legal claim against a plagiarist. (Clumsy paraphrasing, which defaced the original, would violate another of the "moral rights"—the artist's right to insist that the integrity of his work be respected.) Attribution is important to creators of intellectual work even when there is no direct financial benefit. Authors who grant free "Creative Commons" copyright licenses for nonprofit uses often condition the grant on the licensees' acknowledging their licensors' authorship. By far the most common punishments for plagiarism outside the school setting have nothing to do with law. They are disgrace, humiliation, ostracism, and other shaming penalties

> imposed by public opinion on people who violate social norms whether or not they are also legal norms.[220]

For students, faculty, and media professionals, being caught not giving proper attribution is the moral equivalent of intellectual theft. At plagiarism's core is deception – taking credit for work that is not yours. In fact, ignorance frequently, but not always, tempers the punishment handed down by academic faculty when they catch students plagiarizing. As Posner deftly pointed out, there is no law against plagiarism, and attribution has more to do with the moral code of a community.[221] He also pointed out that in Europe content creators have a moral right that can be defended in courts. This is the struggle represented by this category that fans face: the separation of what is moral and what is legal.

The following four excerpts comprise a discussion that illustrates the debate over and confusion related to moral rights and law. The first quote also, perhaps unknowingly, is a critique of proprietary interpretations of copyright law, as the author laments the loss of labor and creativity:

> In the end, I simply wonder why the people at Kajar didn't spend four years creating their own project instead of standing on the shoulders of someone else's work.

---

[220] Richard A. Posner, *The Little Book of Plagiarism* (Pantheon, Kindle Edition, 2009), 34–36.

[221] As Posner pointed out, plagiarism could be addressed under fraud, especially if one company published another's work as their own for profit. Pember and Calvert come to a similar conclusion when they discussed misappropriation. They argue that unfair competition has common and case law support. The news, for example, cannot be copyrighted but pirating it could still be prosecutable. If there is a "*likliehood* that an appreciable number of ordinary prudent purchasers" would be confused about the origination of something then misappropriation could come into play. In these instance fans, however, do not attempt to pass off the original games they mod as their own. Modding is an expression of fandom, not piracy. - Pember and Calvert, *Mass Media Law*, 514–515.

The response argued that all work is derivative and that the desire to produce truly original work is part of the values of the new “post-Bob Dylan era” that values creativity over iteration. Note the transition from legal critique to moral/philosophical debate:

> That's like saying 'gee, I wonder why Aretha Franklin didn't write her own song and just re-recorded Otis Redding's "Respect".' We've come in the post-Bob Dylan era to fetishize the creation of entirely new works. We've become obsessed with the singer being the songwriter. It doesn't always work like that. Heck, William Shakespeare's _Romeo and Juliet_ is a rip-off of the myth of Pyramus and Thisbe; James Joyce's Ulysses is...well the title alone says it.
> Some people are great at creating things ex nihilo; however, some people are not. By insisting on 'original' everything, we lose many creative voices that are not gifted as inventors, but are gifted as interpreters and mosaic builders.

The next entry demonstrates a value judgement critical of Kajar Labs. Essentially, the fan argued that modders assume the risk when they mod:

> I feel basically as much sympathy as I would for a wounded lion tamer or NASCAR driver. It's sad that you got bitten in the face or set on fire, but what exactly did you think was going to happen?

By using NASCAR drivers and lion tamers in her analogy the fan asserted that the activity is dangerous and that Kajar Laboratories knew it was dangerous (the read.me file it wrote indicates this is true). The fan argued the old adage, “If you play with fire, you get burned.”

The final excerpt in the discussion thread calls for sympathy:

> Well, I don't think any animal cruelty issues apply here, but, you *don't* feel much sympathy for a NASCAR driver? Why not? Sure it's a risk, but shouldn't we dole out the amount of sympathy based not only on the knowledge of the danger faced, but also on the basis of what the person is trying to achieve?
> Either way it's not really relevant because each company gets to interpret for themselves their relationship with their fans, and ultimately they hold all the cards on that decision.

The fan brings back regulatory copyright ideas, that the danger could yield results. The argument could be read as a legal critique based on moral rights: Kajar Labs was right to risk illegal action in light of the cultural good it could achieve. The excerpt ends

with an interesting thought; game companies are in control. Because they control the copyrights they get to decide whether or not fans mod.

The next excerpt illustrates two interesting points. It reads:

> If this was some form of machinima, I think it might be a different story (Then again, it is Square-Enix, so maybe not). The fan-company was working on this game for 4 years though, and if they failed to get Square-Enix's permission to use their property to make another game (why a game, anyways?) then they shouldn't make it or release it. If they do release it, I'm looking forward to Square-Enix taking some hard legal action.

The first point shows that fans believe some forms of media are more accepted than others. The commenter asserted that if this had been machinima instead of a game, that Kajar Labs might not have been issued a C&D. The commenter argued that whether or not there will be conflict depends on the whim of the copyright owner. As an aside, at the University of Utah a student team received an attorney's request to not distribute or publically screen a machinima based on Orson Scott Card's *Ender's Game*. While the idea floats around the modding community that some derivative works are less likely to receive a C&D than others, I could find no such supporting evidence. The second point of interest in this quote is that, while most commenters used the amount of work lost by Kajar Labs as an argument to support the modders, this fan argued that without prior consent Square Enix not only has the legal right to shut down the mod, but the fan hoped the company would take legal action if Kajar Labs ignored the order.

The final group of excerpts comes from an article critical of ROM Mods, and all mods that did not obtain prior consent. The article generated sixty-five comments, but the following group illustrates the three major themes of the conversation. Commenters first attempted to find a reason for the material/code/whatever-it-is to be copyrighted, explored its traditions and effects, and ended by applying thoughts on how modding

currently works and, concerning copyright, what the material implications are. The following excerpt exemplifies this theme:

> I suggest we take a step back and look at reasons copyright law exists. My understanding is that copyright law exists to encourage the creation of new content by giving creators a way to profit from their work. Therefore copyright laws should be measured by how well they promote the creation of new content.

Second, commenters argued for a living version of the law. They claimed that while the legality and value of an activity might have been questioned in the past, its usefulness eventually wins the day. In addition to different forms of media earning legal standing, fans argued that when companies collaborate with fans they can make more money. The following quote captures the argument:

> This article is wrong, wrong, wrong. The idea that IP is somehow sacred and must be protected by the owner at all costs is not only false; it is quite recent development in the realm of copyrights. Things were not always perceived this way. Every major creative industry today (movies, music, and software) was built on the backs of piracy. Furthermore, when a company tries to encourage this kind of behavior by giving the fans the tools to tailor the product to their own tastes (Elder Scrolls, Neverwinter Nights) everybody wins.

Third, commenters argued that mods have historically been good for companies and that if fans are modding the game company should take advantage of it. However, it does not differentiate between mods made using tools the companies distributed (which requires the fan to purchase a copy of the game to play the mod) and ROM modding, in which the fan cannot use the original cartridge the game came on and must download a copy of the game. ROM mods are played on PCs and, since the original software was distributed on a console, there is no purchase required for the game company to profit from. Such a theme arises in the following excerpt:

> Half-Life was popular because of mods. Thief was popular because of mods (an entire expansion/sequel was released). Elder Scrolls are popular because of mods. These are not bad things. People will always take old stories and creations and build on them to make their own contributions, creating new ways for people to

> enjoy these works. This has always been the way things are, only very recently has this somehow become *Wrong.* The fact that fans want another Chrono Trigger sequel so bad they are willing to make it themselves should tell Square something. These people should not be punished any more than all the other talented artists out there who have been inspired by other works.

Fans had open, and confusing discussions about the law and moral principles. It became clear they did not have a complete understanding of copyright law or the legal system. Some fans believed that attribution was a legal defense. Their comments illustrate the community's tension between what is legal and what is moral.

What Should Be Done

The "What Should Be Done" category covers the actions fans think should be taken regarding the C&D. Some of the codes include strategies of resistance: boycotting Square Enix as a community, hiring a lawyer and going to court, starting a petition (which happened on savecrimsonechoes.com and was unsuccessful), or pirating Square Enix games to deny the game company revenue, and releasing it in spite of the C&D.[222] On the other side, there were also cooperative suggestions: calling for Square Enix to hire the key members of Kajar Labs, asking Square Enix to collaborate with Kajar Labs on releasing *CT:CE*, and asking both parties to increase communication with one another to resolve the conflict.

The fan community was not only interested in commenting on the justice of the issue, but in actively promoting solutions and responses. This acknowledges that the relationship is broken and, while some fans called for vengeance, others encouraged both

---

[222] "Petition," *Save Crimson Echoes*, June 29, 2009, http://web.archive.org/web/20090629111309/http://savecrimsonechoes.com/phpPETITION/.

parties to metaphorically “work it out.” These responses are similar to the types experienced when sharing the dissolution of a personal relationship with a peer community.

Much discussion revolved around what should be done, but the important factor is not as much the content of the suggestions, but that they exist. If fans did not see this as an issue of right and wrong, one with consequences for their community and games in general, then they would not attempt to solve it. No reason exists to fix what is not broken, and the fan community certainly had plenty of fixes for this broken relationship. The resistant strategies also took on solidarity. The fans showed both their support for Kajar Labs and their new distrust of Square Enix. In short, they took sides in a fight. For example:

> If it turns out that SE was aware of this project from the beginning, and didn't send the cease and desist order right away, then they really are the jerks here. Just be cause you have the right to do something, doesn't make it right to do. If they only just became aware of it (say, in the last 6 months to a year), then I'm fine with what they did. But deliberately waiting until near the end of production? That's a cheap move calculated to not just protect their property, but hurt the people (all fans) working on the project. If I were actually a purchaser of any Squenix games (I'm not, I hate JRPG's), I'd have to reconsider any purchases from them in the near future.

In this excerpt, a fan asserted that he would not be angry with Square Enix as long as it had behaved in a certain fashion. Essentially, the fan established a criterion to determine whether or not sending the C&D was just. If the criterion was not met, then the fan would both pass moral judgment on the character of Square Enix and call for action in the form of a boycott.

In addition to expressing displeasure, the commenter's use of the familiar nickname “Squeenix” and argument for collaboration on *CT:CE*, demonstrated several other key codes, including maligning the game company, and expressing frustration.

Additionally, the commenter knew that moving from adoring Square Enix to maligning it might be unpopular with those who still cared about the company. As a result, the fan ended his comment with a statement informing others in the fan community to brace themselves for any flak they may receive for taking sides in the conflict. Again, this is similar to a personal relationship breakup. Friends take sides, and they let their community know they are doing so. Such comments were common:

> ARGH! NO! Not again!! I was really looking forward to this! D:<
> Squeenix could've easily brought this under their wing to see if it was something they could release. Oh no, they have to kill it before even looking at what they're destroying this time. It would've been hundred times better than that bullshit attached to the DS Chrono Trigger port. Ooh, I'm pretty angry.
> Frankly, Squeenix hasn't released anything good besides The World Ends With You since their god-damn merger. Flame me for all I care, but the quality simply isn't there anymore.

The next excerpt illustrates both the notion that collaboration was a possibility and since the game company opted not to collaborate, that Kajar Labs should resist:

> I agree with the dude who said that Square should have just bought it and released it. What would it take? 60 hours or so for a few people to play it though and make sure it was up to scratch? If not, hey release your crummy game for free and call it something else. If it is, how does a share of the profits sound?
> I say, finish it, and release it anyway. If they can't stop people pirating their own games, they sure as hell can't stop people downloading fan games.

The fan is asserting that if Square Enix will not collaborate, then Kajar Labs has the moral high ground and should still release its mod, assuring the fan community that the game company does not have the power to stop it.

The fan community was full of ideas involving resistance and collaboration. It expressed an affiliation with the relationship between Kajar Labs and Square Enix. It took sides and offered solutions. The solutions ranged from piracy to ignoring the C&D on one side to trying to work things out with the game company or simply complying on the other. Sides were taken, and decisions were made to take action one way or the other

based on values. The schism in the fans is a result of the C&D. Until one party in a relationship cries foul, there is no need to take sides. The legal threat split the community.

Fallout

The fans speculated on the consequences of the conflict and any actions taken. They wrote of what would happen to Kajar Labs, Square Enix, *CT:CE*, the mod community, and to the gaming community at large. The four prominent codes under this category were loss of labor and skill, as a result of four years of work going unreleased; Square Enix hurting its fan base; Square Enix hurting the modder community; Square Enix harming itself through loss of fans and the free advertising and goodwill that would have been generated by the *CT:CE* mod.

This is an interesting category that helped build the notion that Legal Threats Break Moral Communities. The discussion of fallout from the C&D and subsequent dissolution of the project illustrates that not only was there consequence, but that the community wanted to illustrate it as a means of showing its displeasure. Fans are moving beyond a value claim and attempting to demonstrate consequence.

Many of the fans expressed that sending a C&D and halting the distribution of *CT:CE* was abusing an already tired fan base, and a hope that, despite this action harming fans, they hoped that somehow Square Enix was going to make it right, or that this was part of a larger plan to bring the fans what they wanted:

> I was always under the impression that fan-based work is part of what keeps the spirit of franchises alive... especially with a series' that have very few iterations ("...and it’s not like Square Enix is offering fans of the series any sort of viable extension of the tale.").
> I'd say that the dialogue was somewhat poor in my opinion, but the project did seem to have some heart in it, and by no means do I support the action that Square-Enix took against a non-profit, fan-organized effort that Square-Enix had little to lose and much to gain from.

> In the end, I can only repeat what the project team had already said themselves: "I sincerely hope this action is a sign that Square Enix cares about the franchise and intends to produce future titles, and not merely a shortsighted legal exercise that will further alienate a tired, neglected fan-base."

In the next particularly sarcastic excerpt, a fan illustrated how the fallout from the C&D does not serve Square Enix. In fact, it harms itself by reducing its own fan base. The idea of a fan bringing this to light is ironic. The fallout from the broken relationship harms the party that initiated the schism:

> The smartest part about the Cease and Desist is that Square Enix not only loses existing fans, but any new fans who would have been made aware of Chrono through blogs, fansites, and forums creating positive interest in their IP. Think of all the money they've saved.

The discussion of fallout moves this from fans having a theoretical discussion to trying to sort out the cost to their beloved games, community, and game company, Square Enix. In a sense, it is an act of taking stock of the C&D costs.

Mitigating Collateral Damage

The fan community, and the modders, realized this dispute affected more than the two parties involved; it affected the community. As a result they undertook efforts to mitigate the fallout from the C&D. Kajar Labs issued statements offering apologies to the community and Square Enix. It also offered what it could to the fans without violating the C&D. This included releasing concept art, original music, and a several-hour-long series of YouTube videos showing a complete play through of *Crimson Echoes*. Additionally, it issued statements attempting to maintain its reputation on its website.[223] Both the modders

---

[223] ZeaLitY, "Crimson Echoes."

and the community felt that speech was one of the best tools, and both sought to archive as much as they could of both the *CT:CE* mod, as well as the ensuing discussion and even the C&D itself, which was copied onto several websites. The activity and community are largely organized online, so the web and social media became the primary tools the company used. Education was the final puzzle piece behind mitigating damage. One of the leads, ZeaLitY, who was in charge of story and design on *CT:CE* spread the work quickly on relevant websites and modder forums. In addition to posting the letter on his Chrono Trigger wiki, and the OneUp Studios forum, ZeaLitY posted a link to the C&D on Reddit.com which received 300 comments.[224] The fan community also participated in education through sharing what legal knowledge they had, facts about the events, and hoping that their commentary and advice would help direct future modders.

The following exemplifies a fan trying to explain modder culture to the larger community:

> People make these things at their own risk, hoping not to be noticed by the publishers who own the IP. Unfortunately, if a project gains a certain level of notice, then they get shut down. They do these things for the love of the project, they don't care about the consequences when they start.

Additionally, a fan on one site attempted to alert others:

> I heard about this yesterday from an acquaintance who's part of the ROM hacking

---

[224] ZeaLitY, "Cease & Desist Letter" Wiki, *Chrono Compendium*, May 9, 2009, http://www.chronocompendium.com/Forums/index.php/topic,7396.0.html; "Fuck Square Enix: Chrono Trigger Crimson Echoes C&Ded at 98% Completion," *OneUp Studios*, May 10, 2009, http://www.oneupstudios.com/boards/showthread.php?5684-Fuck-Square-Enix-Chrono-Trigger-Crimson-Echoes-C-amp-Ded-at-98-completion&s=5a8682278fd1e4530854b22f5b7b5b51; ZeaLitY, "98% complete Chrono Trigger fan sequel ROM mod. receives C&D : gaming" Aggregator, Ranked - User Comments, *Reddit.com*, May 10, 2009, http://www.reddit.com/r/gaming/comments/8je53/98_complete_chrono_trigger_fan_sequel_rom_mod/?sort=old.

> scene. As the Destructoid article implies, Chrono Compendium was also contacted, and as a result, several other projects were affected: http://www.chronocompendium.com

Some of the attempts to educate were also direct. For example, in the following exchange one fan attempts to inform another about copyright law:

> A) This is a non profit group. They are not going to be selling it. It would have been a fee to download rom. My have a shirt that I hot stamped the Zelda triforce to. I didn't have permission to do that, should I destroy my shirt?
>
> B) Blazenhozen they were still intending to distribute which falls under something not allowed by copyright laws, even if not for money. Now if you start giving out the t-shirt you made then they might have some issues, even though I don't know if the triforce symbol is really copyrighted at least not by Nintendo... . A made up chrono-trigger game using their sprites is potentially dangerous to sales of any future games they may end up producing, so they do have some justification no matter how you feel about SE they are just following the law with their intellectual property. http://www.copyright.gov/circs/

There were also attempts to educate the community at large about the law:

> One does not need permission to legally make derivative work as long as what one does qualifies as fair use. In the case of this game, they didn't actually steal anything--it's a mod that you patch onto the full game. It never actually takes anything out of their product and calls it new (and even if it did, it could still qualify for fair use). This isn't theft in any way. It merely gives the ideas of the game a different light.
> The idea that people deserve complete and total control over the very way their intellectual property is looked at is the very reason why our intellectual property laws have become abominable failures. They are unnatural and outdated. That, if anything, is what my years of studying new media at a university have taught me. If you want to read into it, The Economy of Ideas (http://www.wired.com/wired /archive/2.03/economy.ideas_pr.html) would be a good place to start.

In the end, the community realized that a legal threat, regardless of whether it is carried out, can and did hurt it. Therefore, the community worked to mitigate the damage. From apologies and the sharing of work product relating to the mod, to spreading the news and educating each other about copyright conflicts, the modders and fans took actions to try to soften the blow of the C&D and the cancelation of *CT:CE* to the community. The breadth and depth of these activities show the community's desire to

mitigate collateral damage.

Summary of the Theoretical Model

The grounded theory that developed from analyzing fan reactions to the C&D sent to Kajar Labs by Square Enix, Legal Threats Break Moral Communities, is based on, but not limited to, the six categories that emerged through axial coding of the data and open codes. The C&D left the fan community a) trying to understand the motives behind breaking what it thought was a noble effort, b) making value declarations and choosing sides, c) actively discussing law, morality, and the relationship of the two, d) deciding how to respond to the legal threat, e) accounting for the fallout of the threat, and finally, f) mitigating the damage done by the C&D. The theory Legal Threats Break Moral Communities goes beyond thick description, it analyzes what happened, abstracts it, and allows readers of the theory to apply it to other situations.[225] In doing so it aids in understanding and in making decisions about the phenomenon to which it applies.

The grounded theory itself, in the spirit of law and society research, is used in the next chapter to form a legal argument. The theory demonstrates that the current system is broken. If a C&D can cause the kinds of reactions in a community, and the immediate

---

[225] Clifford Geertz first popularized the term thick description when he introduced it to anthropology as a method. His notion that since ethnography was an interpretive method, the researcher needed to provide readers with a thick description of what was observed in order to deliver a credible interpretation. Norman Denizen brought the term to Communication and other fields by describing thick description as more than just facts, but providing the history, context, and meanings so that a reader can understand what is happening in the culture being described. Ponterotto addresses the fact that there are multiple interpretations of thick description, but that the term usually refers to accurately describing and interpreting social actions within context and providing readers a compelling sense of what is happening. - Joseph G. Ponterotto, "Brief Note on the Origins, Evolution, and Meaning of the Qualitative Research Concept 'Thick Description'," *The Qualitative Report* 11, no. 3 (September 2006): 538–549; Norman K. Denzin, *Interpretive Interactionism* (SAGE, 2001); Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (Basic Books, 1973).

cease of four years worth of creative and technical labor, then it, by definition, has cast a chill on the community. There was no court order, the mere threat of legal action silenced a major creative speech act and the community cried out against it. A provocative claim regarding education and attribution utilizing the theory will be developed in the next chapter. Finally, I believe that this theory not only applies to the modder community, but may also contribute to discussions on chilling effects and SLAPP suits.[226] These same categories are generic and open to interpretation, allowing them to be applied to any community that is shaken and damaged by a C&D or threat of lawsuit.

[226] Pember and Calvert, *Mass Media Law*, 139–140.

CHAPTER 8

LEGAL ANALYSIS

"We do not accept the validity of Square Enix's claims, nor the legal rationale underpinning their position. Nonetheless, we are complying with their demands so as to avoid the expenses and burdens of litigation, because, frankly, they can afford a frivolous lawsuit more than we can." – ZeaLitY, on the *Chrono Trigger: Crimson Echoes* cease and desist letter (C&D). [227]

In the spirit of law and society research, this chapter builds on the grounded theory that Legal Threats Break Moral Communities. Modder communities are ethical and self-governed. Above all, they creatively contribute to culture. They are inspired, informed, and use as part of their art the intellectual property of others. This is a clear example of the "useful arts and sciences" that motivated Congress to issue limited monopolies to expression, also known as copyrights.[228] Yet, legal threats cast a chill on

---

[227] ZeaLitY, "Cease & Desist Letter." - ZeaLitY is the team lead and writer of *Chrono Trigger: Crimson Echoes*. He also founded and runs the *Chrono Compendium* website.

C&D letters have been viewed as an effective tool for chilling free speech. - Rachael Braswell, "Consumer Gripe Sites, Intellectual Property Law, and the Use of Cease-and-Desist Letters to Chill Protected Speech on the Internet," *Fordham Intellectual Property, Media & Entertainment Law Journal* 17 (2007): 1280–1283.

[228] "Transcript of the Constitution of the United States - Official Text," Article 1, Section 8, accessed April 22, 2012, http://www.archives.gov/exhibits/charters/constitution_transcript.html.

this community. They halt works in progress, they can prevent others from attempting new work, and they collapse the community by both restraining speech about the work and causing fans to choose between creative members of their own community (modders) and the companies that create the content they enjoy.

Crimson Scare

Damage is not restricted to those who receive a C&D – collateral damage occurs. Kajar Laboratories received a C&D for its ROM mod *Chrono Trigger: Crimson Echoes*. Another modder group, Kagero Studios, was working on another mod of *Chrono Trigger* known as *Chrono Ark* (*Ark*). Unlike *CT:CE, Ark* not only was based in the universe of *Chrono Trigger*, it used a different engine (RPG Maker). It was not a ROM mod; meaning modders were not using the same code that Square Enix had written.[229] After Kajar Laboratories received its C&D ZeaLitY posted on several websites and forums, informing other fans. This started the Crimson Scare, the massive debate analyzed in Chapter 7 and described by the Legal Threats Break Moral Communities grounded theory.[230]

ZeaLitY started the following thread on Kagero Studio's closed forums, of which he was a member.[231] While he intended to warn them, the post spread the chilling effect

---

[229] Alex Roe, "Chrono Ark - Time to Fight (Battle Arc's Team)," *YouTube*, accessed November 29, 2012, http://www.youtube.com/watch?v=q0rUJHDdyg8.

[230] Lena Andreia, "Crimson Scare - Arki," accessed November 29, 2012, http://ark.luxatom.com/wiki/Crimson_Scare#Effects_on_Ark.

[231] "Private Forum Post," *Kagero Studios*, May 2009, http://kagerostudios.b1.jcink.com/. - Some modders opt to have closed forums, to allow them to work in private. However, well regarded members of the community frequently are on many forums, as ZeaLitY was. This forum post and permission to use it

of the C&D to another team.

> ZeaLitY:
> Either change Ark to a non-Chrono game or take it underground right now. If 2D works are also going to be scrutinized, then you're going to get a C&D sooner or later. http://www.chronocompendium.com/Forums/ind...pic,7396.0.html
>
> Chumbawumba:
> Wait, weren't those other listed projects all rom hacks/edits? If so, we ought to still be pseudo-in-the-clear.
>
> ZeaLitY:
> You weren't scrutinized to begin with since you aren't on the Chrono Compendium. Doesn't mean SE won't get you here once you become a credible "threat". The stuff about ROM hacking was a second charge in addition to the primary one of copyright, which includes creating derivative works. So Ark and Crisis and every other fan project is still screwed.

What followed in the forums was a long, passionate discussion about Square Enix and what Kagero Studios should do next. The team decided to “de-Chrono-fy” its game. Rather than abandon the project, Kagero Studios would create all new sprites (the unit of graphic elements in many 2D games), and alter the story so the game would no longer reference any of Square Enix’s copyrighted content. In a sense, it would be as if someone wrote a fanfic for Winnie the Pooh, but changed it to Toby the Goat out of fear inspired by another fan-author receiving a C&D from Disney. You may still keep the themes, but the characters, the details, which inspired the work in the first place, would need to be changed. Out of fear of what happened to its comrades at Kajar Laboratories Kagero Studios would not jettison the project it so passionately pursued, only the parts it cared for the most. The compromise would prove to be too much for the team to bear.

---

was provided by the current chief administrator of the Kagero Studios forum, Corona!01

Kajar Laboratories had not lost any sort of legal case; it had merely received a letter, a C&D, from attorneys representing Square Enix. Additionally, Kagero Studios had not received a letter at all. It did, however, reluctantly change its game in light of the threats against other modders. This shows the pervasiveness of the Legal Threats Break Moral Communities theory. Square Enix threatened Kajar Labs, but effectively neutered Kagero Studios, as well.

Members of the modding community read this as a chilling effect and labeled it as such, shown by the following comment from a fan called FaustWolf on the website *Final Fantasy Hacktics*:

> This created one heck of a PR nightmare (or at least a veritable minor dilemma) for SE for sure. I'm still holding out hope that a dialogue with Square might convince them to modify their original stance. If not, it certainly will have a chilling effect on interactive fan projects; at least one other major Chrono project - Chrono Ark - de-Chrono-fied itself over this, and it's a shame… I always looked to Crimson Echoes to set the standard for how to handle release of fan modifications in the future, and it's horrible it had to happen in this way. But don't let that chill you to the point of giving up the art of game modification, and all the other arts that go along with it. If the Intellectual Property holder lets his or her world rot with no indication of further treatment, I say that world is fair game for a fan game. [232]

---

[232] FaustWolf, "Chrono Compendium Hacking Projects Go Down" Wiki, *Final Fantasy Hacktics*, May 15, 2009, http://ffhacktics.com/smf/index.php?topic=2962.100. - Note that the fan not only uses the legal term, but seeks to mitigate the damage by using *CT:CE* as an object lesson, encouraging other modders to continue in spite of it. The section edited by the ellipsis was a series of tips for hiding from your work from game companies. It was edited for length. *Final Fantasy Hacktics* is a website dedicated to the "hacking" of the game *Final Fantasy Tactics*, which was released for the Sony PlayStation in June of 1997. It is important to note that their use of the term "hacking" refers to the creation of homebrew tools or mods to alter the experience of playing the original game. Though the term may have fallen into ill favor with the general population, "hacking" dates all the way back to the MIT model railroad club of the 1960s and was used to describe the process of finding creative solutions to modeling problems not through instruction or research, but inductive analysis and experimentation. MIT has a long, proud, tradition of "hacking" and the creators of the very first video game, *Spacewar!* on the PDP-1, were referred to as "hackers." Ironically, the very first arcade game, Atari's *Computer Space*, was a clone of *Spacewar!* Without hackers and modders, we may never have had a games industry.

The fight over how to proceed split Kagero Studios into two splinter groups. Between changes to the game and fracturing of its community, *Chrono Ark* was abandoned. One of the project musicians posted on YouTube that the original team had passed the game content to the community at large in hopes that it would one day be resurrected.[233]

The heart of Square Enix's Crimson Scare is that the chill burned deep. Fans considered the modding an act of desire and devotion for both the property and the game company that created it. Square Enix's C&D tactic, though, pitted the game company fans admired, and sometimes fellow fans, against each other, as we saw in the disagreements and schisms in the previous chapter. News travels fast and far in Internet communities; fans react quickly to bad news and with great vitriol. Not only is this bad for the mod community, but for the game companies, as well. As the quote from FaustWolf illustrated, it is bad for a game company's public relations to a) have news articles and editorials on serving customers a C&D, and b) having fans write hundreds, if not thousands, of comments maligning the company.

Fans and modders alike clearly suffered, as they both worked through the fallout publically, in forums and comments. The modders doing the work lost their labor, fans lost two games they were anticipating, and both felt the tragic sting of betrayal from a company they once admired. Everyone lost due to the chilling effect. Aside from the cultural loss of having a story not told, society lost out on valuable, self-taught science, technology, engineering, and math (STEM) learning that occurred through modding,

---

[233] Roe, "Chrono Ark - Time to Fight (Battle Arc's Team)."

what has been referred to as decontextualized learning.[234] Society lost both the opportunity to educate and advance our culture by stopping art and discouraging what is learned through modding. In the end, nobody truly wins. As a result, academics have addressed this problem, but have approached it through the lens of critique rather than actionable solution.[235]

This chapter explores, critiques, and builds upon previous resolution efforts. It first establishes that the Legal Threats Break Moral Communities theory operates akin to the legally defined chilling effect construct. Second, it argues that two leading actionable legal resolutions to the modder/game company conflict – copyright fair use parody and compulsory licensing in music – side-step the actual issue of legal *threat* and do not provide modders the promised legal protection or certainty needed to resolve the conflict. Based on this legal analysis, I argue in the next and concluding chapter that a nonbinding, best-practices document might be the answer. One game company, Microsoft, is already utilizing this extra-legal solution. This keeps with the spirit of law and society research by studying extra-legal, feasible solutions to legal problems. This is not the only solution, however. It is also not the only extra-legal solution proffered. Other organizations employ completely different tactics.

---

[234] Constance Steinkuehler and Barbara Z. Johnson, "Computational Literacy in Online Games," *International Journal of Gaming and Computer-Mediated Simulations* 1, no. 1 (2009): 53–65, doi:10.4018/jgcms.2009010104.

[235] See, e.g.: Schaffner, "14 Cornell J. L. & Pub. Pol'y 145"; Phillip A. Jr. Harris, "Mod Chips and Homebrew: A Recipe for Their Continued Use in the Wake of Sony v. Divineo," *North Carolina Journal of Law & Technology* 9 (2008 2007): 113.

The Big Chill

I am not the first person to believe that a cease and desist letter (C&D) can chill speech. The Chilling Effects Clearinghouse, an online collaboration between university law clinics and the Electronic Frontier Foundation (EFF), collects and analyzes Internet-related C&Ds sent to it by individuals and Internet service providers (ISP) that sometimes receive C&Ds because a law firm either could not track the alleged infringing party or are perceived as deeper pockets that legal threats can motivate.[236]

The notion of a C&D causing a chill in free speech garnered worldwide public attention when Google received a C&D from the Church of Scientology for providing links to a site that allegedly violated the church's copyrights. Citing the Digital Millennium Copyright Act (DMCA), the letter quoted subsection 512, which allows copyright holders to complain to an ISP and have the company remove a site that allegedly violates copyright, with no trial required.[237] Google, in response to the letter, deleted the links to pages allegedly violating the church's copyrights and severed all links to the offending website, Operation Clambake. Complicating matters, Operation Clambake and its website are located in Norway, arguably beyond the reach of the

---

[236] "Chilling Effects Clearinghouse," *Chilling Effects Clearinghouse*, accessed September 4, 2012, http://www.chillingeffects.org/.

[237] Moxon & Korbin (Law Firm), "Scientology Complaint to Google (#2) -- Chilling Effects Clearinghouse" Database, *Chilling Effects*, April 9, 2002, http://www.chillingeffects.org/dmca512/notice.cgi?NoticeID=252. - This is a link to the C&D in question. However the Chilling Effects Clearinghouse has links to several C&Ds sent by the Church of Scientology to Google requesting that they hide allegedly church-owned materials from public view in Google's search engine.

DMCA.[238]

Eventually, Google restored the link to the page, and created a policy where it shares every C&D it receives with ChillingEffects.org.[239] In a bit of irony, as a result of the publicity, the previously little-known webpage critical of the church shot to the number two spot of Google's search rankings, right behind the official Church of Scientology page. Some anti-DMCA webmasters created a link from the word Scientology to Operation Clambake's website (www.xenu.net) to increase its ranking and to protest the law, a method endorsed by Andreas Heldal-Lund, the founder of Operation Clambake.[240] Ten years later the site is still ranked number three, right behind the Wikipedia entry on Scientology and the church's official page.[241] This perhaps twists the oft-cited quote by Supreme Court Justice Louis Brandeis from his famous *Whitney* v. *California* opinion in 1927: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is

---

[238] David F. Gallagher, "New Economy; A Copyright Dispute with the Church of Scientology Is Forcing Google to Do Some Creative Linking. - New York Times" News, *New York Times*, April 22, 2002, http://www.nytimes.com/2002/04/22/business/new-economy-copyright-dispute-with-church-scientology-forcing-google-some.html?src=pm.

[239] Gallagher, "New Economy; A Copyright Dispute with the Church of Scientology Is Forcing Google to Do Some Creative Linking. - New York Times."

[240] Andreas Heldal-Lund, "Operation Clambake :: How to Support the Fight Against the Church of Scientology," *Operation Clambake: How to Support the Fight Against the Church of Scientology*, accessed September 26, 2012, http://www.xenu.net/support.html.

[241] "Scientology - Google Search," September 27, 2012, http://www.google.com/#hl=en&sugexp=les%3Bepsugrpq2&gs_nf=1&cp=4&gs_id=1r&xhr=t&q=scientology&pf=p&output=search&sclient=psy-ab&oq=scie&gs_l=&pbx=1&bav=on.2,or.r_gc.r_pw.r_qf.&fp=cacdae0a7374697e&biw=1920&bih=956.

more speech, not enforced silence."[242] In this case, the answer to enforced silence is more speech.

The idea of a chilling effect is fairly simple. It is the discouragement or halting of the exercise of a legitimate Constitutional right through the threat of law. [243] This can either be a law that casts a chill on Constitutional rights or it can be the abuse of a law or the legal system prohibiting someone to use said rights. It is important to note this refers to the *threat* of law, not actual legal outcomes. For example, when a land developer sues a protester, knowing that the lawsuit would most likely not succeed, but with the intent to scare off or at least temporarily silence the protesters, the developer has engaged a SLAPP suit, a strategic lawsuit against public participation.[244] In essence, the developer does not desire justice, quite the contrary, it knows the legal system is so burdensome and expensive that many people will stop protesting just to avoid a lawsuit, regardless of whether the protester believes she will win or lose. This exactly opposes the legal system's intended uses. It was built to settle disputes, not to be used as a tool to silence them. SLAPP suits thus exemplify the undue or extreme burden that defines chilling effect complaints. Case law addresses the chilling effect.

The U.S. Supreme Court case *Lamont v. Postmaster General* struck down a post office statute that required the post office to hold foreign communist political propaganda

---

[242] Whitney v. California, 274 U.S. 357 (U.S. Supreme Court 1927).

[243] Bryan A. Garner, "Chill," *A Dictionary of Modern Legal Usage* (Oxford University Press, Inc., 1990), LexisNexis Academic, http://www.lexisnexis.com.ezproxy.lib.utah.edu/hottopics/lnacademic/.

[244] Jesse J. O'Neill, "LEARNING FROM DISASTER: LESSONS FOR THE FUTURE FROM THE GULF OF MEXICO: NOTE: THE CITIZEN PARTICIPATION ACT OF 2009: FEDERAL LEGISLATION AS AN EFFECTIVE DEFENSE AGAINST SLAPPS," *Boston College Environmental Affairs Law Review* 38 (2011): 477–504.

unless the intended recipient filled out a card indicating he wished to receive such materials.[245] In his concurrence, Justice William Brennan wrote that the contested statute "as construed and applied, is unconstitutional, since it imposes on the addressee an affirmative obligation which amounts to an unconstitutional limitation of his rights under the First Amendment."[246]

In essence, the Court stated that the addressee should not have to indicate when he wanted information, that he should have full access to it and the freedom to deny it. In a sense it is like water, it is always in your home, you simply turn it off when you no longer want to use it. Having to call your municipal water company and tell it when you want water is burdensome. Filling out a form stating that you want to receive communist propaganda and having it kept on file at the post office is not only burdensome, it is terrifying. Americans had witnessed what happened to people under McCarthyism.[247] Having your name on a sheet of paper associated with communism could end your career or worse. Hence, having to formally request, in writing, that the post office be allowed to send you communist literature, even if you want to read it solely to disagree with it, could be viewed as dangerous, if not traitorous, during the 1960s. Out of fear, people would not participate in free speech. This reveals the chilling effect's core, the legal system should protect rights, not be so burdensome as to limit them. When we restrict our own speech out of fear of the burdensome nature of the law, we have been chilled.

---

[245] Lamont v. Postmaster General, 381 U.S. 301 (U.S. Supreme Court 1965).

[246] Ibid.

[247] Ellen Schrecker, *Many Are the Crimes: McCarthyism in America*, 1st ed. (Little, Brown and Company, 1998).

Essentially, the postal statute could, as a side effect, prevent Dr. Corliss Lamont from reading something not because the law prevented it, but because it cast a chill on his free speech by making it dangerous and burdensome for him to read it. As a socialist and humanist philosopher, publisher, and educator, Lamont's unfettered access to information was vital to his work. However, the contested law was blind to why citizens use or need Constitutional rights, and the case serves, to this day, as precedent for free speech cases.

The landmark case for the chilling effect, however, is *Dombrowski v. Pfister*.[248] Dr. James Dombrowski, head of the Southern Conference Educational Fund, a civil rights organization, alleged that he and members of his organization were the victims of repeated harassment by law enforcement who were acting under the guise of Louisiana's Subversive Activities and Communist Control Law. Dombrowski alleged that police arrested members and seized documents necessary to the organization without the intention to prosecute, but rather to harass. This defines chilling effect – the use of law not to settle a legal matter, but to restrict other rights through abusing the burden of the legal system.

The high court overturned a lower court's ruling, finding for Dombrowski. Justice Brennan wrote:

> By permitting determination of the invalidity of these statutes without regard to the permissibility of some regulation on the facts of particular cases, we have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not thought that the improbability of successful prosecution makes the case different. The *chilling effect* upon the exercise of First Amendment rights may derive from the fact of the prosecution,

---

[248] "Dombrowski v. Pfister - 380 U.S. 479 (1965) :: Justia US Supreme Court Center."

unaffected by the prospects of its success or failure. [249]

Brennan illustrated that the prosecution itself can cast a chill on free speech rights. Being arrested, and having important documents seized, would certainly both physically and practically affect one's ability to utilize the free speech right. More important is the intimidation factor, the emotional impact. If someone *fears* she will be arrested then she may not act. Of course, both of these are necessary conditions of our legal system. Police officers must be able to perform arrests and gather evidence. Fear of being arrested may prevent people from breaking laws. However, the chilling effect describes situations that abuse the legal system, as Brennan exemplified:

> Appellants' allegations and offers of proof outline the *chilling effect* on free expression of prosecutions initiated and threatened in this case. Early in October 1963 appellant Dombrowski and intervenors Smith and Waltzer were arrested by Louisiana state and local police and charged with violations of the two statutes. Their offices were raided, and their files and records seized. Later in October, a state judge quashed the arrest warrants as not based on probable cause, and discharged the appellants. Subsequently, the court granted a motion to suppress the seized evidence on the ground that the raid was illegal. Louisiana officials continued, however, to threaten prosecution of the appellants, who thereupon filed this action in November.[250]

After the raid and arrests, the state court threw out the warrants, as there was no probable cause and declared that the raid itself was illegal. Still, Louisiana officials continued to use the force of law against Dombrowski and his compatriots, even though it had been declared an illegitimate use of the law. The state was not going to convict Dombrowski for a crime; it was going to silence him through harassment. This chilling

---

[249] Ibid. – 487. Author's emphasis.

[250] Ibid., 487–488. Author's emphasis.

effect of the law, silencing without a legitimate legal claim, is exactly what *Dombrowski* v. *Pfister* prohibited.

The government is not alone in its ability to abuse the law to cast a chill on free expression. SLAPP (strategic lawsuits against public participation) is an acronym coined by University of Denver professors Penelope Canan and George W. Pring to describe legal actions intended to intimidate people into silence, not because they feel they are violating the law, but rather because they *fear* the cost burden of a legal defense.[251] SLAPP suits are not a good faith effort to acquire compensation damages, but are designed to prevent the defendant from utilizing his free speech – to censor him. It is difficult for a court to address whether a lawsuit is an earnest effort to right a wrong, or if it exists merely to harass the defendant into submission. Even if a judge throws out a lawsuit as frivolous, the time, labor, and capital required to mount a defense is enough for many to abandon their cause rather than go to court. To protect the right of the people to petition their government and to be involved with public affairs, twenty-eight states, the District of Columbia, and Guam have passed some form of law restricting SLAPP suits.[252] I now revisit the quote that began this chapter:

> We do not accept the validity of Square Enix's claims, nor the legal rationale underpinning their position. Nonetheless, we are complying with their demands so as to avoid the expenses and burdens of litigation, because, frankly, they can afford a frivolous lawsuit more than we can. [253]

---

[251] Pring and Canan, *Slapps*, 8–9; Rafsanjani, Gladstone, and Canan, "SLAPP Back Transcript."

[252] "State Anti-SLAPP Laws," accessed September 27, 2012, http://www.anti-slapp.org/your-states-free-speech-protection/.

[253] ZeaLitY, "Cease & Desist Letter." - When one openly admits he believes he is correct, but stops a speech act out of fear of a law suit he is exemplifying the chilling effect.

As ZeaLitY expressed, Kajar Laboratories did not believe that Square Enix had a legitimate complaint, yet Kajar ceased production. We also know that Square Enix was not seeking reparations, rather it wanted to stop the speech act. The letter does not address the damages done to Square Enix, only the fines imposed for violating its copyrights. The chill then spread to Kagero Studios, which "de-chrono-fied" its game.

Chilling Modders

Based on my grounded theory analysis, Square Enix's C&D can be read as casting a chill on Kajar Laboratories and the modding community in three ways. First, it caused Kajar Laboratories to cease production on *CT:CE* and desist distribution. Kajar Laboratories admitted in its Read.me file that it believed ROM hacking might have been illegal, and Square Enix certainly asserted it was. But as the case did not actually go to court, illegality was not determined.

Second, Kajar Laboratories and many members of the community believed what Kajar did was just, as it was good for the fans, Square Enix, and the property itself. Kajar Laboratories also made a good faith effort to inform Square Enix and obtain its permission. Kajar had spent years working on the game. It was only when Square Enix threatened it with the force of law that Kajar stopped. It did not stop because Kajar believed it was doing wrong. Kajar did not give up years of work because it believed *CT:CE* had no value. Kajar Laboratories gave it all up, almost overnight, because it feared the force of law. Quite literally, it was the threat that caused Kajar Laboratories to stop engaging in its creative speech act. This is the very definition of chilling free speech.

Third, while the courts did not decide the copyright issues, many fans believed Kajar Laboratories would have been vindicated. Fans perceived the actions of Square

Enix as chilling free speech. Many lamented it, yet resigned themselves to it, saying it was the way of the world. Many saw the C&D as a moral wrong, and called out for vengeance. Others vowed to not mod again. This did not just chill Kajar Laboratories; it chilled the entire community. The situation cultivated a fear for the legal system that discouraged the community from engaging in acts of speech. [254] The grounded theory Legal Threats Break Moral Communities holds on a legal basis. It not only explains their actions, but is used to contextualize and offer insight into future conflicts.

---

[254] I have witnessed the ripple in the community that the chilling effect of game copyrights and patents has on progress. A former student of mine was making a completely new Android/iPhone game with a small group of friends. It was to be a racing game and was iterative of the classic Nintendo game *Excite Bike*. Unfortunately, they ran into a snag.

One of them came across an article on the gaming website Gamasutra that detailed four patents owned by Midway regarding ghost racing. Midway is the company at issue. Ghost racing is a common feature in race games where, on the second and subsequent laps, you can race against a "ghost" version of your previous lap. As you see your previous performance on screen, you can learn to best it. The students had fully programmed this ability into their racing game when they called me. I had a conversation with the student about both intellectual property law and how it is "usually" used and enforced.

After my discussion about the scope of the patents work, and the expense of possible litigation, the team decided not to implement what it considered a core feature of its game. The team had already programmed it, but between the article, my warnings, and their inability to get a reply from the patent holder they abandoned what they believed was a unique aspect to their game.

> We've decided not to include ghost mode in the release despite the fact that the code is written and it's fully operational. [image of a "sad face"] We'd rather make a few bucks without ghost mode than risk being plundered by a AAA studio.

The team believed that what it was doing was not only different from the patents listed in the Gamastura article, but also that so many games have used this concept that the patent could not hold up in court. However, the team decided it was too costly to find out. It opted to be less innovative because of the culture of fear that has been instilled in the mod and homebrew community. In a way, I feel partly responsible. If we had not covered cases where modders had received C&Ds in my classes then the student would likely have not worried. However, the real blame lies in the ambiguity, coupled with severe consequences, that exists in current copyright and patent culture.

Roger Altizer, Jr., "Private Conversation via Facebook.com," September 23, 2012, https://www.facebook.com/messages/.; Kyle Orland, "Hard Drivin', Hard Bargainin': Investigating Midway's 'Ghost Racer' Patent," Gamasutra, July 18, 2007, http://www.gamasutra.com/view/feature/1489/hard_drivin_hard_bargainin_.php.

Two Status Quo Solutions Critiqued

Chapter 7's grounded theory analysis showed that while a cease and desist letter is not a court order, recipients treat it as such. Therein lies the problem. Two solutions have been proposed in law journals in an effort to ameliorate the conflict between modders and game companies. The first extends the trademark and copyright fair use defenses used in *Mattel v. MCA* and *Mattel v. Walking Mountain Productions* to mods.[255] The spectrum allows for differentiating claims and contributions made by fans, and could help legal professionals determine if a mod qualifies as a fair use of a game company's copyrighted content. The second proposal forwards an argument that games and music are closer than one may think and, as a result, games could be covered by the same mechanical, compulsory licensing model as music.[256] Both solutions were written by John Baldrica, an attorney representing the Screen Actors Guild (SAG). Unfortunately, both are fraught with complications, which prevent them from being viable solutions for groups like Kajar Laboratories.

Parody as Panacea

Baldrica's legal framework provided a method to examine ownership rights in regards to mods. He began by critiquing the status quo jurisprudence, arguing that artists have had to fight for their fair use rights before, citing two cases: the Danish techno-pop

---

[255] John Baldrica, "Mod as Heck: Frameworks for Examining Ownership Rights in User-Contributed Content to Videogames, and a More Principled Evaluation of Expressive Appropriation in User-Modified Videogame Projects," *Minnesota Journal of Law, Science & Technology* 8 (2007): 681.

[256] John Baldrica, "Cover Songs and Donkey Kong: The Rationale Behind Compulsory Licensing of Musical Compositions Can Inform a Fairer Treatment of User-Modified Videogames," *North Carolina Journal of Law & Technology* 11, no. 103 (Fall 2009): 35.

band Aqua, which successfully defended its use of one of Mattel's most iconic dolls in its song, *Barbie Girl*, and Utah "Artsurdist" photographer Tom Forsythe's use of the same property in his *Food Chain Barbie* series.[257] On the surface, the analogy could be made that just as artists use Barbie to create their art under fair use, so should modders. They are using game content to create new games, and the act is similar, Baldrica argued.

Unfortunately, two key elements distinguish mods from these legal cases. First, the 9th Circuit U.S. Court of Appeals found both artistic creations to be protected under the First Amendment as parodies.[258] While some mods might be parodies, others are not. Second, as the *Mattel* cases illustrate, fair use is a legal defense. The Legal Threats Breaks Moral Communities theory demonstrates that modders are reluctant to go to court both out of fear of the cost and because it does not align with their admiration of the game and the game company. To use Baldrica's analysis, a modder would have to go to court. A C&D is not a court order, or even a legal action. Even if Baldrica's fair use arguments could be used to successfully defend a mod, they do not solve the problem detailed in Chapter 7. C&Ds confuse, frighten, and effectively stop modders, preventing them from going to court and using a fair use defense.

In *Mattel v. MCA* the toy company argued that the band, Aqua, had both infringed and diluted the trademark held on the iconic doll.[259] The 9th Circuit found that the use of

---

[257] Mattel v. MCA, 296 F.3d 894 (9th Cir. 2000); Mattel v. Walking Mountain Productions, 353 F.3d 792 (9th Cir. 2003).

[258] Mattel v. MCA, 296 F.3d 894 (9th Cir. 2000); Mattel v. Walking Mountain Productions, 353 F.3d 792 (9th Cir. 2003).

[259] Mattel v. MCA, 296 F.3d 894 (9th Cir. 2000).

Mattel's trademark in the song *Barbie Girl* did not qualify as infringement.[260] The court relied upon a decision made in *Rogers v. Grimaldi*, in which Ginger Rogers' infringement claim against the film *Ginger and Fred* was unsuccessful.[261] In *Rogers*, the court concluded that trademarks "should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression."[262] The court dismissed the infringement claim finding *Barbie Girl* to be a parody, making it worthy of protection as free expression. The court declared it unlikely to cause consumer confusion.[263]

Trademarks identify businesses, and few would assume that Aqua's *Barbie Girl* was a song produced by Mattel. A company rarely disparages its own product. Thus, by using Barbie to critique Barbie, it is a parody and unlikely to be identified as a message created by Mattel, as the court argued:

> There is no doubt that MCA uses Mattel's mark: Barbie is one half of Barbie Girl. But Barbie Girl is the title of a song about Barbie and Ken, a reference that -- at least today -- can only be to Mattel's famous couple. We expect a title to describe the underlying work, not to identify the producer, and Barbie Girl does just that. The Barbie Girl title presages a song about Barbie, or at least a girl like Barbie. The title conveys a message to consumers about what they can expect to discover in the song itself; it's a quick glimpse of Aqua's take on their own song. The lyrics confirm this: The female singer, who calls herself Barbie, is "a Barbie girl, in [her] Barbie world." She tells her male counterpart (named Ken), "Life in plastic, it's fantastic. You can brush my hair, undress me everywhere/Imagination, life is your creation." And off they go to "party." The song pokes fun at Barbie and the values that Aqua contends she represents. *See Cliffs Notes, Inc. v. Bantam*

---

[260] Ibid., para. 23.

[261] Ibid., 17–23; Rogers v. Grimaldi, 875 F.2d 994 (2nd Cir. 1989).

[262] Rogers v. Grimaldi, 875 F.2d 994, 999 (2nd Cir. 1989), 999.

[263] Mattel v. MCA, 296 F.3d 894, 23 (9th Cir. 2000), para. 23.

> *Double-day Dell Publ'g Group,* 886 F.2d 490, 495-96 (2d Cir.1989). The female singer explains, "I'm a blond bimbo girl, in a fantasy world/Dress me up, make it tight, I'm your dolly."
> The song does not rely on the Barbie mark to poke fun at another subject but targets Barbie herself. *See Campbell v. Acuff-Rose Music, Inc.,* 510 U.S. 569, 580, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994); *see also Dr. Seuss Ents., L.P. v. Penguin Books USA, Inc.,* 109 F.3d 1394, 1400 (9th Cir.1997). This case is therefore distinguishable from *Dr. Seuss,* where we held that the book *The Cat NOT in the Hat!* borrowed Dr. Seuss's trademarks and lyrics to get attention rather than to mock *The Cat in the Hat!* The defendant's use of the Dr. Seuss trademarks and copyrighted works had "no critical bearing on the substance or style of" *The Cat in the Hat!,* and therefore could not claim First Amendment protection. *Id.* at 1401. *Dr. Seuss* recognized that, where an artistic work targets the original and does not merely borrow another's property to get attention, First Amendment interests weigh more heavily in the balance. *See id.* at 1400-02; *see also Harley-Davidson, Inc. v. Grottanelli,* 164 F.3d 806, 812-13 (2d Cir.1999) (a parodist whose expressive work aims its parodic commentary at a trademark is given considerable leeway, but a claimed parodic use that makes no comment on the mark is not a permitted trademark parody use).

In the above passage the court argued that using a trademark as a tool to make a point about a subject other than the trademarked item, without at least in part targeting the original work, is not parody. But, since Aqua used Barbie in a song to comment *on* Barbie and her alleged effect on culture it is parody, and therefore it is protected speech. The court distinguished this use from *Dr. Seuss Ents., L.P. v. Penguin Books USA, Inc.* where the use of *The Cat in the Hat* was found to be satire, not parody since the work in question, *The Cat NOT in the Hat!,* was not a critique of the famous book, but rather was a commentary on the O.J. Simpson murder case.[264] In short, to qualify as a protected parody the content in question must be at least in part a critique of the trademarked work itself.[265] Legally defined satire, which does not target the original work, does not qualify

---

[264] Dr. Seuss Ents, L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1400 (9th Cir. 1997).

[265] Ibid., 1400–01: "[U]nless the plaintiff's copyrighted work is at least in part the target of the defendant's satire, then the defendant's work is not a 'parody' in the *legal sense*…." (Author's emphasis).

for intellectual property protection.

Mattel argued that, in addition to infringing on its trademark, *Barbie Girl* diluted the value of its trademark by diminishing Barbie's capacity to be identified as a Mattel product and tarnishing the trademark, as it deemed the song inappropriate for young girls.[266] MCA, the defendant, did not dispute that its use of the Barbie trademark was dilutive, but that it was legally permissible.[267] Therefore, the court turned to the three statutory exemptions of the Federal Trademark Dilution Act to determine if the use was permitted:

- Comparative advertising
- News reporting and commentary
- Noncommercial use[268]

While *Barbie Girl* did not qualify for either of the first two prongs, the court found that the song was not purely commercial speech and, as a parody, it qualified for the noncommercial speech exemption.[269] The court's finding of *Barbie Girl* as parody protected it from Mattel's claims that *Barbie Girl* infringed upon and diluted its trademark.

Qualifying as parody would also protect Tom Forsythe's *Food Chain Barbie* from

---

[266] Mattel v. MCA, 296 F.3d 894, 25 (9th Cir. 2000), para. 25.

[267] Ibid., para. 30.

[268] Mattel v. MCA, 296 F.3d 894, 30–31 (9th Cir. 2000), 30–31; The FTDA protects the "owner of a famous mark... against another person's commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark." *Federal Trademark Dilution Act*, *15 U.S.C. § 1125(c)(4)(B)*, 1995.

[269] Mattel v. MCA, 296 F.3d 894, 43 (9th Cir. 2000), para. 43.

Mattel's copyright infringement claim.[270] While Tom Forsythe might have found the juxtaposition of Barbie and vintage kitchen appliances compelling material for his artsurdist photo series *Food Chain Barbie*, Mattel saw it as copyright infringement and took him to court.[271] Forsythe sold postcards and prints of art photos he had taken depicting Barbie as enchiladas, in a champagne glass, and in a variety of other culinary-related/compromising positions.[272] He described his photographs as a…

> …critique [of] the objectification of women associated with [Barbie], and [to] lambast the conventional beauty myth and the societal acceptance of women as objects because this is what Barbie embodies. Barbie is the most enduring of those products that feed on the insecurities of our beauty and perfection-obsessed consumer culture.[273]

When examining Mattel's case against Walking Mountain Productions, the court applied the four-pronged fair use test, and reiterated that it is not an all or nothing test, that case by case different prongs may be considered more important than others.

> To determine whether a work constitutes fair use, we engage in a case-by-case analysis and a flexible balancing of relevant factors. *Campbell,* 510 U.S. at 577-78, 114 S.Ct. 1164. The factors are "to be explored, and the results weighed together, in light of the purposes of copyright." *Id.* at 578, 114 S.Ct. 1164. Depending on the particular facts, some factors may weigh more heavily than others. *Id.* at 577-79, 114 S.Ct. 1164. The four factors we consider are: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. *Dr. Seuss,* 109 F.3d at 1399-1404

---

[270] Mattel v. Walking Mountain Productions, 353 F.3d 792 (9th Cir. 2003).

[271] Ibid.

[272] Ibid., para. 3–5.

[273] Ibid., para. 4.

(analyzing and applying 17 U.S.C. § 107).[274]

The court worked through each of the four prongs in finding *Food Chain Barbie* to be protected expression under fair use.

Purpose and Character of the Use

Forsythe argued that his work was parody, and Mattel disagreed. To prove its point

> Mattel offered into evidence a survey in which they presented individuals from the general public in a shopping mall with color photocopies of Forsythe's photographs and asked them what meaning they perceived. Relying on this survey, Mattel asserts that only some individuals may perceive parodic character.[275]

The question of law is whether the use targeted, at least in part, the original copyrighted work.[276] The court rejected Mattel's survey as "[t]he issue of whether a work is a parody is a question of law, not a matter of public majority opinion."[277] The court then explained why Forsythe's work was considered parody:

> Mattel, through impressive marketing, has established Barbie as "the ideal American woman" and a "symbol of American girlhood" for many. *Mattel, Inc. v. MCA Records, Inc.* ("*MCA*"), 296 F.3d 894, 898 (9th Cir.2002), *cert. denied,* 537 U.S. 1171, 123 S.Ct. 993, 154 L.Ed.2d 912 (2003). As abundantly evidenced in the record, Mattel's advertisements show these plastic dolls dressed in various

---

[274] Ibid., para. 23.

[275] Ibid., para. 29.

[276] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994), 580–581, 583, accessed December 10, 2012: "For the purposes of copyright law, a parodist may claim fair use where he or she uses some of the "elements of a prior author's composition to create a new one that, at least in part, comments on that author's works." The original work need not be the sole subject of the parody; the parody "may loosely target an original" as long as the parody "reasonably could be" perceived as commenting on the original or criticizing it, to some degree."

[277] Mattel v. Walking Mountain Productions, 353 F.3d 792, 30 (9th Cir. 2003), para. 30.

> outfits, leading glamorous lifestyles and engaged in exciting activities. To sell its product, Mattel uses associations of beauty, wealth, and glamour.
> Forsythe turns this image on its head, so to speak, by displaying carefully positioned, nude, and sometimes frazzled looking Barbies in often ridiculous and apparently dangerous situations. His lighting, background, props, and camera angles all serve to create a context for Mattel's copyrighted work that transform Barbie's meaning. Forsythe presents the viewer with a different set of associations and a different context for this plastic figure. In some of Forsythe's photos, Barbie is about to be destroyed or harmed by domestic life in the form of kitchen appliances, yet continues displaying her well known smile, disturbingly oblivious to her predicament. As portrayed in some of Forsythe's photographs, the appliances are substantial and overwhelming, while Barbie looks defenseless. In other photographs, Forsythe conveys a sexualized perspective of Barbie by showing the nude doll in sexually suggestive contexts. It is not difficult to see the commentary that Forsythe intended or the harm that he perceived in Barbie's influence on gender roles and the position of women in society.
> However one may feel about his message -- whether he is wrong or right, whether his methods are powerful or banal -- his photographs parody Barbie and everything Mattel's doll has come to signify. Undoubtedly, one could make similar statements through other means about society, gender roles, sexuality, and perhaps even social class. But Barbie, and all the associations she has acquired through Mattel's impressive marketing success, conveys these messages in a particular way that is ripe for social comment.
> Parody emerges from this "joinder of reference and ridicule." *Campbell,* 510 U.S. at 583, 114 S.Ct. 1164; *cf. Dr. Seuss,* 109 F.3d at 1401 (holding that defendants who wrote a poem titled "Cat NOT in the HAT" about the O.J. Simpson trial were not parodying Dr. Suess' original work because the stanzas had "no critical bearing on the substance or style of" the original). By developing and transforming associations with Mattel's Barbie doll, Forsythe has created the sort of social criticism and parodic speech protected by the First Amendment and promoted by the Copyright Act. We find that this factor weighs heavily in favor of Forsythe.[278]

An additional aspect of the first fair use prong is whether or not the use was commercial. Forsythe did not deny having a commercial intent for his use, as he offered the photos for sale. Regardless, the court found that "[g]iven the extremely transformative nature and parodic quality of Forsythe's work, its commercial qualities become less

---

[278] Ibid., para. 34–37.

important."[279]

The Nature of the Copyrighted Work

The validity of Mattel's copyright was not disputed. The court offered, "Mattel's copyrighted Barbie figure and face can fairly be said to be a creative work."[280] The court also noted that this prong of the fair use test is generally not a significant factor, though it could "weigh slightly against Forsythe."[281] Although not all of the prongs are equally impactful, all are considered.

Amount and Substantiality of the Portion Used

Mattel argued that Forsythe both used the entirety of its copyrighted work and "that Forsythe could have used less of the Barbie figure by, for example, limiting his photos to the Barbie heads."[282] The court found that Forsythe did not use Barbie verbatim, that would require a three dimensional reproduction, and that parts of the doll were obscured in the photographs.[283] In addition to finding Forsythe's use of the doll no different than using a passage from a book or melody of a song, the court stated that it does "not require parodic works to take the absolute minimum amount of the copyrighted work possible," and concluded that Forsythe's use of Barbie was justified in his

---

[279] Ibid., para. 38.

[280] Ibid., para. 39. The Barbie face is protected via illustrative design. The Barbie figure is protected via statutory. Both "fix" the creative works in "a tangible medium of expression."

[281] Ibid.

[282] Ibid., para. 42.

[283] Ibid., para. 43.

parody.[284]

The Effect of the Use upon the Potential Market

for or Value of the Copyrighted Work

The court found that "[b]ecause of the parodic nature of Forsythe's work, […]it is highly unlikely that it will substitute for products in Mattel's markets or the markets of Mattel's licensees."[285] In essence, the court argued it is highly unlikely that a person would gift one of Forsythe's *Food Chain Barbie* photographs in lieu of an actual Barbie as a child's Christmas gift. It also ruled that *Food Chain Barbie* did not threaten future markets:

> Given the nature of Forsythe's photographs, we decline Mattel's invitation to look to the licensing market for art in general. Forsythe's photographs depict nude and often sexualized figures, a category of artistic photography that Mattel is highly unlikely to license.[286]

The court found that *Food Chain Barbie* was parody and qualified as fair use of Mattel's copyrighted material. The court ordered the toy company to pay Forsythe's attorney's fees and all related court costs.[287]

Both *Mattel* cases Baldrica cited can be related to modding. They both concern artists appropriating something sold as entertainment by a company and having legal action brought against them. Just as Aqua and Forsythe had the force of law brought

---

[284] Ibid., para. 44–45.

[285] Ibid., para. 48.

[286] Ibid., para. 49.

[287] Ibid., para. 109–111.

against them for using Barbie, modders sometimes see companies take legal action against them for using their games. However, the 9th Circuit dismissed the *Mattel* cases because it found the art protected speech/parodies.

To use either Mattel case to defend a mod, a court would have to legally declare the mod a parody. While some mods may, in fact, be parodies, *CT:CE* is not. Unlike *Barbie Girl* and *Food Chain Barbie*, *CT:CE* does not use the original trademarked and copyrighted work, *Chrono Trigger*, in a critical manner. *CT:CE* expands the universe of *Chrono Trigger* by offering new adventures for the existing characters. It is an extension of the *Chrono Trigger* story, not a parody of it. A good number of mods face this same difficulty; they do not qualify as parodies.

Baldrica's proposed solution to the modder/game company conflict using the two cases *Mattel v. MCA* and *Mattel v. Walking Mountain Productions* is based in protected parody. *Chrono Trigger: Crimson Echoes* was not a humorous critique that targeted the original *Chrono Trigger* game. It was a sequel. Grounded theory analysis revealed it as an homage. Thus, Baldrica's argument would not hold under the first prong of the fair use test. Also, *Mattel v. MCA* concerned trademarks, not copyrights, which was Square Enix's focus for its cease and desist letter. Kajar Labs would fail the second prong because the Square Enix copyrights are valid. In the third prong, Forsythe used just enough of Barbie to accomplish his speech act. *CT:CE* used *Chrono Trigger's* codes and assets almost in their entirety. *CT:CE* would also struggle with the fourth prong. In *Mattel v. Walking Mountain Productions* the court cited the fair use/parody case *Acuff-*

Rose v. Campbell: "[T]he market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop."[288] The court decided Forsythe's use was *not* a derivative work because it was highly unlikely Mattel would develop or license such a product. Square Enix creates sequels to its games, which are derivative works, such as *Chrono Cross*. *CT:CE* would legally qualify as a derivative work developed without the copyright holder's permission. It is thus unlikely *CT:CE* would receive the same protected speech status as Forsythe's parody.

To clarify, this chapter does not argue that a mod would never be protected under fair use. The arguments Baldrica forwarded in his law review articles represent both the need for and an attempt to solve the problems some modders face. I argue that the *Mattel* cases are not a universal solution nor would they apply to mods that are not parodies, *CT:CE*, for example.

One of the core arguments of this dissertation is that the lack of ex-ante certainty casts a chill upon modders. The Ninth Circuit was clear in *Mattel v. Walking Mountain Productions* that it is the law and not popular opinion that determines whether or not a work qualifies as parody and, by extension, fair use.[289] Thus, a modder would not know if his work is a parody until he goes to trial. It is this lack of ex-ante certainty that causes the chilling effect.

While some mods could qualify for fair use protection from a trademark or copyright suit, the grounded theory Legal Threats Break Moral Communities illustrates

---

[288] Ibid., para. 53; Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994), 592.

[289] Mattel v. Walking Mountain Productions, 353 F.3d 792, 30 (9th Cir. 2003), para. 30.

one of the key problems – the cost of a lawsuit, and the fear of losing one, causes a chilling effect. The C&D sent to Kajar Labs, as the quote that began this chapter demonstrates, scared Kajar into compliance. Kagero Studios did not receive a C&D, but the news of what happened to Kajar Labs caused it to abandon its mod. Legal Threats Break Moral Communities illustrates the confusion and fear that a C&D causes. It explains why going to court to determine if a mod qualifies as fair use is not a practical solution for modders – modders quit long before they would ever reach the courtroom. Legal Threats Break Moral Communities demonstrates that regardless of the model, modders are unlikely to take the risk of entering into litigation with a game company. The lack of ex-ante certainty makes the proposition too risky.

Compulsory Licensing

Baldrica's second argument that mods should be extended to a compulsory licensing model, similar to the sort that cover bands enjoy, also sheds an interesting light on the legality of and a solution to the modder's dilemma.[290] Essentially, Baldrica offered ex-ante predictability to the modder/game company conflict.[291] As detailed in the theory chapter, ex-ante allows a population to have some reasonable sense of predictability of how the law works. This reduces ambiguity and the related anxiety that can cast a chill on free speech and expression.

Musicians can presently publically perform and record the published music of

---

[290] Baldrica, "11 N.C. J.L. & Tech. 103."

[291] Baldrica, "Mod a Heck," 2.

other artists without seeking direct permission. The compulsory license provision of the U.S. copyright code states:

> When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. A person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use, including by means of a digital phonorecord delivery.[292]

Baldrica used this statute, and its socio-legal system, to show how compulsory licensing removes the uncertainty of copyright by allowing performers and companies to know up front that covering music is legal. In fact, through a delicate combination of copyright code and regulations provided by the American Society of Composers, Authors and Publishers (ASCAP) it is fairly straightforward to know what one will pay, in advance, to license music. For example, according to documents from the U.S. Copyright office, it costs 24 cents per ringtone to license, reinterpret, and sell a computer chip, tune-rendition of Michael Jackson's *Beat It*.[293]

At first glance, this seems like a reasonable solution to the modder/game companies conflict. The statutes are in place, and compulsory licensing would allow

---

[292] 17 U.S.C.S. § 115(a)(1) (2009) this is the statute that not only covers reproduction, but also cover songs. The notion of "mechanical licensing" refers to the history of player pianos and being able to reinterpret music for their use. A player piano does not play a recording, rather it "reads" scrolls of music and plays the interpretation of the original song as created by the author of the player piano scroll. In a similar fashion, while a mechanical music box may play a familiar tune, it is creating the music new each time by spinning a disc through a metal comb that acts as a sort of tiny mechanical xylophone or harp. These technologies predated sound recording, and so the ability to interpret music for public or private performance has a long, protected history.

[293] "U.S. Copyright Office - Licensing | Section 115," 115, accessed September 16, 2012, http://www.copyright.gov/licensing/sec_115.html.

users to pay to mod games, both decreasing the ambiguity of whether or not they will receive a C&D for their work and allowing game companies to profit from the creation and distribution of mods. However, three issues prevent this from being viable.

First, Baldrica asserted that the current anti-videogame political climate combined with game companies' reluctance to change the status quo greatly reduce the likelihood of a compulsory licensing model for games occurring in the near future.[294] There are, unfortunately, bigger hurdles for his framework.

Second, while the expressive reinterpretation of videogames and music seem analogous, they are, in fact, quite different. While rights can be handled in any number of ways, musical recordings generally represent two separate copyrighted works: the written musical work and the sound recording.[295] The written musical work consists of the music (normally sheet music), notes, and lyrics.[296] Sound recordings are carefully and explicitly defined in the U.S. copyright code so as not to cause confusion with the other expressions of music. The code reads:

> "Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.[297]

---

[294] Baldrica, "11 N.C. J.L. & Tech. 103," 5–9.

[295] *The Coptyright Act of 1976: Subject Matter of Copyright in General*, *17 USC § 102*, accessed November 29, 2012, http://www.copyright.gov/title17/92chap1.html#101.

[296] Bruce E. Colfin and Jeffery E. Jacobson, "Music And The Internet," in *Real Law@ Virtual Space: Communication Regulation in Cyberspace* (Cresskill, N.J.: Hampton Press, Inc., 2005), 204–205.

[297] *U.S. Copyright Office - Copyright Law: Chapter 1 § 101 . Definitions*, *17 USC § 101*, accessed November 29, 2012, http://www.copyright.gov/title17/92chap1.html#101.

Creating a new song generates two copyrights: the first for the music, the second for the recording. As copyrights can be bought and sold as property, any number of arrangements can be reached in terms of licensing and ownership. It is not uncommon for the copyright owner of the written music to be different from the owner of a sound recording.[298]

While compulsory licensing appears to be straightforward it can become quite complicated. Compulsory licensing is very expensive and time consuming for Hip Hop artists and other musicians, for example, who utilize samples from sound recordings. Gaining clearance takes months and can cost upwards of 50 percent of the total album production costs.[299]

Much like Hip Hop, videogames are frequently a collection of licenses and copyrights. For example, in the game *Lego: Indiana Jones: The Original Adventures,* the blocks, movie, music, game, game console and middleware all have separate copyrights, trademarks, and patents.[300] To arrange a compulsory licensing system one would have to compensate all of the game's intellectual property holders and gain their permission.

---

[298] Colfin and Jacobson, "Music And The Internet," 204–205.

[299] Josh Norek, "You Can't Sing Without the Bling: The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need for a Compulsory Sound Recording Sample License System," *UCLA Entertainment Law Review* 11 (2004): 89–91.

[300] Each game console requires its own license and proprietary software to run the game. Thus, the Xbox 360 version of the game is different from the PlayStation 3 release. Middleware is software licensed by the game developer to assist with a specific task, such as playing video clips or simulating gravity.

LucasArts, *LEGO Indiana Jones: The Original Adventures* Nintendo DS, Wii, Xbox 360, PlayStation 3, Windows (San Francisco: LucasArts, 2012), http://www.lucasarts.com/games/legoindianajones/.

While music has clearing houses, such as ASCAP, which can provide licensing for over 8.5 million songs with a variety of pre-established contracts and rate structures, no such equivalent organization exists for games.[301] Establishing one would be a monumental task.

The current compulsory licensing copyright code contains a clause that illustrates the intention of the law and why, in its current form, it would not serve modders:

> (2) A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.[302]

This subsection allows for interpretation, but not alteration of the musical work. It would allow one to "jazz-up" a song or play it on a ukulele instead of an accordion, but not change the melody or create a derivative work. Many mods change games rules and characters, or even use the assets of a game to create an entirely new game.[303] Compulsory licensing was designed in 1909 for a culture of performance, not for a participatory culture.[304]

---

[301] "Do You Need An ASCAP License?," *www.ascap.com*, accessed November 29, 2012, http://www.ascap.com/licensing.aspx.

[302] *U.S. Copyright Office - Copyright Law: § 115 . Scope of Exclusive Rights in Nondramatic Musical Works: Compulsory License for Making and Distributing Phonorecords50*, *17 USC § 115 (a)(2)*, accessed November 29, 2012, http://www.copyright.gov/title17/92chap1.html#115.

[303] See Chapter 2 for a discussion on types of mods.

[304] Kembrew McLeod, "Confessions of an Intellectual (Property): Danger Mouse, Mickey Mouse, Sonny Bono, and My Long and Winding Path as a Copyright Activist-Academic," *Popular Music and Society* 28, no. 1 (2005): 80, doi:10.1080/0300776042000300981.

Since 1979 computer programs have been defined and protected as literary works.[305] Computer code, much like sheet music, is protected in and of itself. The sound recordings artists make with sheet music are also protected.[306] When cover bands perform or record a copyrighted song under a compulsory license they do not distribute the sheet music with it. Modders must distribute the computer code to run their games. Essentially, if songs were mods, then cover bands would have to send the sheet music and the entire original artist's sound recording along with their song, or the song would not work. That is a very different proposition.

A subgroup of modders actually does create covers of classic videogames. Such modders essentially remake an older videogame with all new code, graphics, and music. The result is not a mod because the gamers are not modifying an existing game. Instead, they create a game consisting of new code and graphics, but the design is the same. It should be noted that these projects also presently receive C&Ds. The fan-made *Streets of Rage Remake* project developed over the course of a decade. Days after its release Sega, which made the original 1994 game, sent a C&D to Spanish modder "Bomber Link" demanding the game be taken down. The developer believed that, because he had informed Sega years earlier and because it was all original code and art being released for free, he was not violating Sega's copyrights. He offered, "It does not use reverse

---

[305] Arthur R. Miller, "Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU," *Harvard Law Review* 106 (1993 1992): 979–980. In 1980, and again in 1998; 17 USC § 117: "Limitations on exclusive rights: Computer programs" was amended to address evolving concerns, such as selling used software and creating copies of programs for computer maintence. Pub. L. No. 96-517, 94 Stat. 3015, 3028 (1980). Pub. L. No. 105-304, 112 Stat. 2860, 2887 (1998).

[306] *U.S. Copyright Office - Copyright Law: Chapter 1 § 101 . Definitions*.

engineering nor a single line of code from the original games. It's all based on visual interpretation."[307] If there was, as Baldrica suggested, a compulsory licensing model for games, "cover games" could qualify. However, creating such a system seems unlikely, as both Baldrica admitted and I point out.[308]

Finally, Baldrica's suggestion of a compulsory licensing model would not have served *CT:CE*. The prohibitive cost of licensing samples, and the fact no ASCAP exists for games, creates enormous barriers to the execution of a compulsory licensing model. Because compulsory licensing prohibits derivative work and requires that the user maintain the "fundamental character" of the original copyrighted material, it would not apply to *CT:CE*. The mod is not a retelling of *Chrono Trigger*, it is a new game in the series, a derivative work.[309] Compulsory licensing was designed to support covers of musical works, not new, derivative creations. *CT:CE* featured new content totaling thirty-five hours of gameplay and featuring ten alternate endings.[310] It was a fan-made sequel, not a cover. Creating a compulsory licensing arrangement to cover derivative works would be a complex task that would extend well beyond the realm of mods and affect many aspects of copyright laws.

---

[307] "Fan-Made Streets Of Rage Remake Pulled After Request From Sega | Kotaku Australia," accessed May 23, 2011, http://www.kotaku.com.au/2011/04/fan-made-streets-of-rage-remake-pulled-after-request-from-sega/; Mark Brown, "Sega Shuts down Monster Streets of Rage Remake Project (Wired UK)," *Wired UK*, November 4, 1913, http://www.wired.co.uk/news/archive/2011-04/13/sega-shuts-down-streets-of-rage-remake.

[308] Baldrica, "11 N.C. J.L. & Tech. 103," 5–9.

[309] Supra note 282

[310] ZeaLitY, "Crimson Echoes."

Summary

The central argument, however, is that even if some form of parodic fair use or compulsory licensing did apply, it would not have saved the project. Legal Threats Break Moral Communities points out that fear of the law and confusion about it prevent modders from challenging C&Ds. The lack of ex-ante certainty, bolstered by passionate debate in the community, creates a chilling effect that causes modders to censor themselves. ZeaLitY did not halt production *on CT:CE* because he thought he was legally or morally wrong. He stopped because he was afraid of going to court. He was afraid of the cost. Even if he had won, the victory would have been hollow. Modders work on the games they care about. ZeaLitY cared so much about *Chrono Trigger* that he spent years running the *Chrono Compendium* and creating *CT:CE*.[311] Defeating Square Enix in court would not have been a victory for Kajar Labs.

[311] "ZeaLitY 1Up Interview - Chrono Compendium," accessed November 27, 2012, http://www.chronocompendium.com/Term/ZeaLitY_1Up_Interview.html.

ZeaLitY's uneditied interview by the gaming website 1Up.com reveals his passion for *Chrono Trigger*, and how he kept a fan community alive, even though they believed the franchise was dead.

CHAPTER 9

CONCLUSION

Introduction

This chapter concludes the events of the *CT:CE* conflict then summarizes and evaluates the findings and arguments made in previous chapters. Based on the findings and arguments it offers conclusions to the three research questions asked in Chapter 1. It then recommends an extra-legal solution to the modder/game company conflict. This chapter ends with recommendations to extend the lines of inquiry addressed in previous chapters and a discussion of the study's implications for games research.

Epilogue

Some readers of this dissertation might be interested in the story of Kajar Labs, ZeaLitY, Kagero Studios and Square Enix. Sadly, beyond the details already listed, the story does not go much further. As mentioned earlier, the *CT:CE* website is no longer running. The last version stated that Kajar Labs complied with Square Enix and had stopped work on *CT:CE*. After complying with the cease and desist letter, ZeaLitY made several forum posts spreading the news of the mod's demise, which appears to be the end of the story for *CT:CE* and Kajar Labs.[312] As outlined in the legal analysis chapter, in the

wake of the *CT:CE* controversy, Kagero Studios abandoned its mod, *Chrono Ark*. Square Enix remains a dominant force in the games industry.

Findings

This work studied a problem that modders and fans sometimes face with game companies. It does claim the conflict is the norm. However, we do not legislate based upon frequency, but upon rights. Most of the time we drive without incident, but occasionally, we get into accidents. We create laws to help us define the ideal normal driving environment, and we create laws to handle the rare incident. Modders normally get along with game companies. However, we need to look at what happens when they do not, and the effect of the law when the conflict arises.

On May 8, 2009, Square Enix sent a Cease and Desist letter to a small group of modders, Kajar Laboratories, working on a new version of Square Enix's game *Chrono Trigger*. This was discussed thoroughly in Chapter 6. The threat of a C&D letter was enough to halt the production of another *Chrono Trigger* mod by a different group of modders – Kagero Studios.[313] The threat of law was enough for both Kajar Labs and Kagero Studios to abandon their mods. Fear of going to court was not the only motivation. Both groups of modders cared deeply for *Chrono Trigger* and *Square Enix*. While the C&D cast a chill on the work of both teams, they also faced a moral dilemma in that a company they adored was threatening them. Hypothetically, I argue that even if

---

[312] See the Crimson Scare section of Chapter 7 for a discussion on the forum posts made by ZeaLitY in the wake of the C&D.

[313] Andreia, "Crimson Scare - Arki"; Roe, "Chrono Ark - Time to Fight (Battle Arc's Team)."

they did not fear the financial burden of a lawsuit, or possible incarceration, they still would have complied with the C&D, as they had no desire to harm Square Enix.

Kajar Lab's cancellation of *Chrono Trigger: Crimson Echoes*, in compliance with the C&D issued by Square Enix, was a major news story. Over two-dozen news outlets covered the story. In addition, fan response was enormous. On news websites, blogs, and in forums, gamers wrote a flood of comments expressing their thoughts on Square Enix's C&D. A grounded theory analysis of their reactions yielded the theory Legal Threats Break Moral Communities.

In Chapter 7 the gaming community's reactions to the *CT:CE*'s takedown illustrated the disruptive effect of a C&D. Analysis yielded themes illustrating that fans believed modding was a moral and legal question. The community recognized that the C&D was disruptive and attempted to address the problems created by the letter. The six categories that led to the Legal Threats Break Moral Communities theory serve as separate findings or themes in the research.

First, fans debated motivations. Some argued that, by sending the C&D, Square Enix did not care for its fans. Others argued Square Enix did not know what was best for its game. Fans also argued that Square Enix was shortsighted, alleging that *CT:CE* could have been a financial boon for the Japanese game company. Many fans supported Kajar Labs, arguing it was trying to help both the original version of *Chrono Trigger* and the company that made it. On the other side of the discourse, fans argued that Kajar Laboratories either should not have made *CT:CE* or that it made mistakes in its approach to the project. Analysis of discussions centered on motivations showed that the C&D had caused confusion in the community.

Second, the community made value-based judgments about conflict. A wide range of emotional responses surfaced. Fans expressed their beliefs and made judgments based on their values. This was more than news, the C&D was more than news, it disrupted the community, and the fans revealed their community's value system.

Third, fans had conflicting thoughts about whether modding was a legal or moral issue. Some fans recognized the C&D as a legal action, providing conjecture on a number of legal issues. Some wondered if Square Enix had jurisdiction in the United States, assuming it was exclusively a Japanese corporation.[314] Fans debated the legality of copyrights and fair use. Others contended the mod/C&D was a moral issue. They argued that creators should be given credit, and that attribution, not copyright infringement, is the problem. Others still argued that game companies had a moral debt to fans and modders who add value to games.

Fourth, some reactionaries confused moral law and copyright law, asserting that attribution was a legal substitute for permission and that modders needed to avoid plagiarizing games. Others made arguments about the justice and injustice of intellectual property. Many argued that it was unfair that some companies allowed modding of their games, while other companies did not. Topics ranging from derivative works to Creative Commons were publically debated. The community, as a whole, had no common (or correct) understanding about what was and was not permissible under fair use. Commenters were confused about the law and believed morality was the issue.

---

[314] Square Enix is an international corporation. Additionally, a C&D is not a legally binding document.

Arguments arose on both sides as to which modders had a moral right to alter game content and distribute it. The cancellation of *CT:CE* spurred a debate about the merits of a participatory culture.

Fifth, the community debated the fallout of the C&D. All of the work put into *CT:CE* was futile in that fans would never get the chance to play the game. Fans lamented this fact. Modders mourned the fruitless labor they had put into the game. The community recognized that not only would Square Enix lose fans, it also lost free R&D, market research, and possibly, a very inexpensive sequel. Fans understood that Kajar Laboratories added value to Square Enix. The Chrono Trigger franchise had not released a new game in years. A new game might have brought liveliness to an otherwise fading franchise.

ZeaLitY mentioned that one of the ways to keep a flagging franchise alive was modding, as modding keeps core fans involved and puts the game in the front of gamers' minds.[315] He said this in an interview with 1Up.com, a popular games website, and reprinted it on the *Chrono Trigger* fansite.

Sixth, the community debated how to mitigate the damage done by the C&D and it took action. Kajar Labs decided the C&D did not prevent it from releasing a start-to-finish, Thirty-five hour long, video play-through of *CT:CE*.[316] The video served as a memorial and an attempt to rescue some of the labor lost. Others attempted to educate the

---

[315] "ZeaLitY 1Up Interview - Chrono Compendium."

[316] *Crimson Echoes Playthrough Part 001*, 2009, http://www.youtube.com/watch?v=YSTpkMB9kNk&feature=youtube_gdata_player.

community about how to avoid a C&D in the future. The community realized that a C&D from a game company hurt the fans, the community, the game and, ultimately, the company itself. Some fans took it upon themselves to punish Square Enix by protesting and boycotting the company.

These six themes led to the discovery of the grounded theory Legal Threats Break Moral Communities. The theory collapses the ideas found in the data into one abstraction that describes, explains, and offers a solution to the problem. Additionally, Legal Threats Break Moral Communities has general use beyond analyzing the C&D sent to Kajar Laboratories in response to *CT:CE*.

Legal Threats Break Moral Communities

Legal Threats Break Moral Communities illustrates notions similar to chilling effect theory and strategic lawsuits against public participation, but with a few key differences. The differentiators revolve around the threat and the moral community. A legal threat, such as a C&D, does not need to be a statute or a lawsuit. A C&D is a letter, usually sent by a law firm, that threatens legal action. It is nothing more than a written notice telling the recipient that the sender would like him to stop a particular activity. The purpose of the C&D sent to Kajar Labs was to eradicate *CT:CE*. Square Enix wanted Kajar to halt production, cancel distribution, and destroy all *CT:CE* files – as if *CT:CE* had never existed. But this was just a letter. The problem was, it was a letter with a threat embedded in it. The mere threat of law causes significant reactions. After receiving the C&D from Square Enix it took just one day for Kajar Laboratories to abandon a project years in the making. The threat also caused collateral damage, affecting modders who did not receive a C&D. Square Enix never threatened Kagero Studios. But the possibility of

being threatened, after witnessing what happened to Kajar Labs, was enough for Kagero to censor itself and cease production on *Chrono Ark*.

We usually speak about the chilling effect in terms of persons or discrete organizations. Legal Threats Break Moral Communities addresses the impact on groups engaged in a participatory culture. The threat disrupts an entire community. In regards to *CT:CE*, the threat became news and threw fans into a debate over the core values of modding. They decided allegiances, with some supporting the game company and others supporting the modding company. Traditionally, parties involved in a chilling effect are adversaries. Here the fans were invested in the success and promotion of the game *Chrono Trigger* and its creators, Square Enix, not the success of one over the other. When it became public knowledge, the C&D threw the community into a state of confusion, as the community believed *CT:CE* was helping keep *Chrono Trigger* alive. The community also considered *CT:CE* an act of appreciation for Square Enix, as well as the fans of the game.

Legal Threats Break Moral Communities extends and builds upon the chilling effect. It also provides its own solution: A moral community benefits the subject of its concern, as demonstrated by the dedication of modders to game companies and their willingness to comply with a C&D. The answer, then, is to not make a legal threat. The reason the legal threat works is because the community fears the law and simultaneously wants to support the wishes of the game company. I assert that if a moral community has been built around a game, then the company would merely have to tell the fans what to do. The community would debate and comply, just as it did with the *CT:CE* cease and desist letter, but without the fear, betrayal and rancor such a legal threat produces.

Status Quo Does Not Solve

In collegiate parliamentary debate, two notions help participants clarify their roles: inherency and presumption.[317] The government (affirmative) team carries the burden of inherency – status quo prevents the team's proposal. The negative team enjoys presumption – the status quo exists and the government must persuade the judges to change it. Thus, to win a round, the government must persuade the judges that its proposal is better than the current state of affairs. It is not much different from the role of Congress. To change the status quo, parties must persuade each other to vote. The negative team, enjoying presumption, does not have to propose anything.

In light of the Legal Threats Break Moral Communities theory, I argue against presumption – the status quo does not meet the needs of modders or game companies. What modders want is to create mods. Game companies want to sell games for profit. Square Enix wanted to shut down *CT:CE* because it believed, in some way, that *CT:CE* negatively affected its business. At the same time, the loss of fans, dozens of websites spouting negative op-ed pieces, and hundreds of fans publically disparaging the game company shows that following the status quo C&D action might not be the most beneficial course. Modders certainly do not want to receive a C&D. They want to mod, not to stop modding. They believe they are helping move the game, the company, and their culture forward.

The current legal solution is fair use copyright laws. If modders want to alter a

---

[317] Skip Rutledge and G. L. Forward, "Presumption and Defending the Status Quo in Intercollegiate Debate: An Exploratory Survey of Judge Perceptions in Parliamentary & CEDA/NDT Debate Formats," *Journal of the National Parliamentary Debate Association* 10 (2004): 24–48.

game, they may, provided it meets the standards of fair use. But fair use fails for many reasons. Chapter 7 showed 1) the community fears the force of law; 2) the community was confused about what is and is not fair use; 3) game companies are not interested in fair use. Square Enix did not tell Kajar Labs how to become compliant, it simply told Kajar to cease and desist working on *CT:CE*. The status quo served neither party. New legal solutions also fall flat, as Legal Threats Break Moral Communities. Chapter 8 showed 1) parody would not offer a fair use defense for *CT:CE* and other mods; 2) the court, not the creator, determines whether or not a mod qualifies as parody or any fair use, thus there is little or no ex-ante certainty for modders; 3) a government-endorsed contract, like compulsory licensing, is both a complex system to develop, and would not likely extend to derivative works; 4) the complexity of videogame intellectual property and the numerous copyright owners involved make licensing prohibitive; 5) companies could still cast a chill by issuing a threat, making any current legal solution ineffective.

Conclusions

This study explored a specific, localized case. It did so under the law and society perspective, with the belief that a deep understanding of a situated problem would yield a useful theory: Legal Threats Break Moral Communities. This theory was then used to analyze current law to address why the status quo was not working. Each of the research questions sought to evaluate the modder's dilemma and use qualitative methods to understand a social construct that has a relationship with the law.

Rq1: Why do Some Modders Find Themselves Violating the Copyrights of Game Companies?

The answer is ex-ante uncertainty. As illustrated by *Chrono Trigger: Crimson Echoes*, when modders (Kajar Labs) receive a C&D they oftentimes do not understand why. ZeaLitY, the lead modder on *CT:CE*, stated that he did not believe Kajar Labs was in the wrong and that the claims in the Square Enix's C&D were unfounded.[318] He complied nonetheless.

Chapter 7's analysis revealed the theory Legal Threats Break Moral Communities was discovered. The reason the legal threats are so effective is that modders lack ex-ante certainty. Many of the fans debated why *Final Fantasy* mods did not receive C&D letters but *CT:CE* did. Modders believe they are acting morally, for the good of all parties involved. Thus, to receive a C&D from a game company they thought they were helping illustrates the lack of ex-ante certainty.

Additionally, as addressed in Chapter 2, some game companies are explicit about what can and cannot be modded. Companies may utilize a terms of service (ToS) or end user license agreement (EULA) to define what it will and will not allow. Some games come with mod tools. This all adds to the lack of ex-ante certainty, as it is inconsistent. It would be as if you could repaint (mod) certain models of cars but not others.

---

[318] "We do not accept the validity of Square Enix's claims, nor the legal rationale underpinning their position. Nonetheless, we are complying with their demands so as to avoid the expenses and burdens of litigation, because, frankly, they can afford a frivolous lawsuit more than we can." – ZeaLitY, "Cease & Desist Letter."

Rq2: What Understanding of Copyright Law do Modders Demonstrate when Conflict Arises, and How Does it Affect Their Relationship with Game Companies?

Legal Threats Break Moral Communities also helps answer this question. The theory illustrates a fractured understanding of copyright that is also linked to morality. Thus, when a game company sends a C&D to a group of modders, it throws the entire community into a state of disarray, as fans not only argue the facts of what has happened, but also its morality. The community itself suffers as it debates law and morality. While some fans and modders seem to have an understating of fair use, others do not. Additionally, even if a modder understood the law he still might not avoid the intimidation caused by a C&D. Game makers had not contacted Kagero Studios, but when Kajar Labs received a C&D both modding groups shut down their mods. How much a modder understands about copyright is, to an extent, a moot point. A game company could issue a C&D and a modder could stop his work, regardless of his level of understanding.

Rq3: How Does Copyright Law Influence the Relationship Between Modders and Game Companies when No Contract Exists?

Copyright laws negatively impact the relationship. When modders do not have explicit permission in the form of an end-user license agreement or terms of service they have no ex-ante certainty. Some modders try to contact the game company; some do not. Regardless, as it stands now, modders have no way of knowing what the company wants. As a result they might or might not run afoul of the game company's desires. When modders have contracts, they know what to expect. Despite their moral imperative to help

the games, each other and the game companies, modders operate in fear of the law. Whether or not they have a fair use defense is irrelevant to modders as they cannot afford and have no desire to sue a company they want to help.

Chapter 7 demonstrated that fans are confused about copyright. The community proffered a variety of arguments on copyright, fair use, and moral law (attribution) were. The community's lack of knowledge led it to fear the unknown, namely the legal status of some mods. Chapter 8 addressed that in order to utilize fair use one must go to court. The lack of knowledge about copyright law, combined with the need to go to court to utilize fair use strains the relationship between modders and game companies. Entering into an adversarial legal relationship is a necessary requirement for accessing fair use. Modders, generally, have no desire to be adversaries with game companies. Fans do not want to fight the object of their fandom in court. They want to participate with its creations and help it. At best copyright law confuses fans, and at worst it pits them against game companies. Without a contract to guide them, copyright leaves fans and game companies with an inadequate framework to build a meaningful relationship upon. They may, as the case of *CT:CE* illustrates, find themselves in conflict that benefits neither party. Fans want to adore game companies, but may need help in knowing how.

Research Questions Revisited

The three research questions served as a lens to guide this study. All three focused on modders, game companies, and the influence copyright law has upon them. In hindsight, RQ2 and RQ3 functioned with such similarity they could have been collapsed into one question exploring modders, game companies, and how copyright influences their relationships.

Two areas missing from the research questions could inform this work. First, a question regarding the morals and norms of the modder community might have shed additional light upon the grounded theory analysis. Presently, the questions conflate modders and fans who commented on the websites and blogs covering Square Enix's C&D. While I believe the comments do represent an ad hoc community, an examination of how each subgroup (modders and fans) perceived and organized itself might have yielded a deeper reading of the data analyzed in Chapter 7.

Second, while I believe this dissertation establishes that ex-ante uncertainty causes considerable problems for modders, contrasting *CT:CE* against another mod could be useful. Specifically, a research question that explored a mod that thrived without a contract or court verdict would have provided additional concepts to compare with *CT:CE*. I do not believe that successful cases ameliorate the problem, but they could serve as exemplars and offer additional strategies for reducing ex-ante uncertainty, in addition to the recommendations that follow. I will further address these points in the future research section.

Revisiting the Five Types of Legal Research

In the introductory chapter I argued that this dissertation qualifies as four of the five types of legal research in mass communication listed by Gillmor and Dennis.[319] The impact is that it positions the work in a larger community of scholarship, and helps frame

---

[319] Donald M. Gillmor and Everette E. Dennis, "Legal Research in Mass Communication," in *Research Methods in Mass Communication*, ed. Guido H. Stempel III and Bruce H. Westley, 2 Sub. (Prentice Hall College Div, 1989), 341–342.

ways to read it. Here are the categories.

Research that clarifies the law, and offers explanation through analysis of procedure, precedent, and doctrine. The arguments contained in both the grounded theory and legal analysis chapter show that current legal precedent does not solve the problems modders and game companies face. This dissertation argued that the legal tradition of sending cease and desist letters does not serve either party. Additionally, the legal analysis chapter looked at solutions proposed in the literature and critiqued them as not feasible.

Legal research that tries to reform old laws and suggests changes in the law. While this dissertation did not specifically argue that the current laws should be changed, it does offer extra legal solutions and suggests moving away from the law to solve this problem.

Research may be conducted to provide a better understanding of how law operates on society. One of the primary functions of this dissertation is to utilize qualitative methods to provide a deep, rich picture of exactly how C&D's work in the modder community. Confusion and frustration do not capture all of the nuances, but they express the types of emotions caused by the conflict. The law, as used by Square Enix, had an effect on modders from which neither party benefitt.

Research may analyze the political and social processes that shape our communication law. As stated in the introduction, this dissertation does not within this category of research.

Research may furnish materials for legal and journalistic education in mass communication. This dissertation achieves this goals in two ways. First, it can be used to

educate readers about the chilling effect caused by uncertainty and to provide a deeper understanding of how C&D letters operate. Second, it can be used to educate law and journalism students on the potential of extra-legal solutions.

Mass communication provided context for this dissertation. This work is not only guided by mass communication, it contributes to its body of research and can be used as a foundation for future research or as a model for practitioners.

Application to Media Beyond Mods

Readers may ask if this work applies to areas beyond mods. The answer is an emphatic "yes!" The analysis of the chilling effect of C&D letters can extend to other instances in which they are used. The theory *Legal Threats Break Moral Communities* might have found its origin in the analysis of fan comments to the *CT:CE* controversy, but it can logically be applied elsewhere, supporting an argument made via analogy. Chillingeffects.org, as mentioned previously, focuses on the chilling effect of C&D letters. The grounded theory discovered in this work can be useful in reading other conflicts like the ones found on the aforementioned website.

Recommendations

As a Communication Activism and law and society study, this work suggests a solution to the modder/game company problem. The proposition is grounded in law but, if conflict arose, would operate outside of the court system as an extra-legal solution.[320]

---

[320] Frey and Carragee, *Communication Activism*; Friedman, "Law and Society Movement, The."

Game Content Usage Rules

Confusion about what is and is not legal, or moral, restricts the modder's ability to participate in his hobby with confidence. The lack of ex-ante certainty lies at the heart of the chilling effect. If one is uncertain about the law, and fears it, then he is unlikely to proceed with what he was doing. It is as if someone set a "warning, minefield ahead!" sign in your path. Having no way to verify its truth you will probably alter your course. The effect doubles in the modder/game company conflict. Not only do C&D letters scare off modders, but the game companies themselves face backlash from the community. In the end, fear rules the day – game companies' fear what modders will do with their games and modders fear the costs of even waging a legal battle, much less the loss of one. The result is that of a zero-sum game. However, it does not need to be this way.

Business/client relationships have long produced what I call, *noncontractual conditions*. Businesses establish noncontractual conditions to inform customers how to interact with the business. By complying with noncontractual conditions a customer can expect, but not demand, to interact with the business. The conditions are noncontractual, as neither side enters into the legal burden of a contract.

The perfect example of this is the "No shirt, no shoes, no service" sign hung in restaurants, bars, and shops across the United States. These are not necessary contractual conditions, meaning that a business could opt to ignore the sign and service someone who was shirtless and/or shoeless and, at the same time, one wearing a shirt and shoes could not demand service based upon meeting the conditions of the sign. The sign is merely instructions on how the business would prefer its patrons dress. There may be safety or decency concerns, but those are almost always secondary. The truth is that most

businesses can choose whom they do and do not serve based on any variety of conditions or preferences.[321] As long as the choice to serve is not discriminatory, based on race, sex, or age, for example, they can serve whomever they please.[322] However, an ice-cream shop that routinely evicts potential customers randomly will likely not be in business for long.

There are two examples of the modder community operating under noncontractual conditions and working with game companies. The first is the use of C&Ds. A cease and desist letter is not a legally binding document, but rather a request with a warning of intent. It states what the issuing party wants to have happen, and what it will do if the letter receiver does not comply. While I have used the C&D as a negative example of companies threatening modders, it does illustrate that modders are willing to follow the directions of game companies. This, of course, is a direction accompanied with a threat.

The second example is Microsoft's Game Content Usage Rules, a set of noncontractual conditions that acknowledges the fan community re-appropriates Microsoft's commercial copyrighted content and creates new content with it.[323] The usage

---

[321] "No Shirt, No Shoes, No Service.," *LegalMatch*, October 18, 2007, http://legalmatch.typepad.com/businesslaw/2007/10/no-shirt-no-sho.html.

[322] *Civil Rights Act of 1964*, *Pub.L. 88-352, 78 Stat. 241*, 1964, http://ssa.gov/OP_Home/comp2/F088-352.html.

[323] Microsoft, "Xbox.com | Game Content Usage Rules," April 28, 2009; Valve, "Source Filmmaker FAQ," *Source Filmmaker*, 2012, http://www.sourcefilmmaker.com/faq/. – Microsoft's Game Content Usage Rules represent a robust solution to modding its games. Other companies, such as Valve, supply cursory advice. For example, in the Source Filmmaker FAQ, Valve addresses whether or not a modder can make money from films made using the tool.

"'Q. Can I make money with this tool?' Yes, but not if you're using Valve's assets in your movie. The tool is free for noncommercial use. You can use Valve's game assets (things like characters, props, particles, textures, and sounds) to create movies and images to share with the game community, as long as what you create is free. We're not giving you a license to commercialize our assets. However, if you do not include any of Valve's assets in the movies and images that you make, then there are no restrictions on what you do with your content and you can make money with it."

rules offer advice from Microsoft's lawyers that guide fans' activities in a way that Microsoft does not deem a violation of its copyrights. The document explicitly states that a modder may still "hear from" attorneys working for Microsoft and that Microsoft reserves all rights, as it is both difficult to tell what fans will do with copyrighted content and what lawyers will deem as a violation of copyright. The document is written casually, if not humorously, and does not act as a contract but as advice to guide fans towards activities that do not offend the company. The following excerpt explains the spirit of the Game Content Usage Rules:

> Here's the magic words from our lawyers: so long as you respect these rules, Microsoft grants you a personal, non-exclusive, non-transferable license to use and display Game Content and to create derivative works based upon Game Content, strictly for noncommercial and personal use. We can revoke this limited use license at any time and for any reason.
> If you share your Items with your friends or post them on your web site, then we'd also like you to include the following notice about the Game Content. You can put it in a README file, or on the web page from where it's downloaded, or anywhere else that makes sense so long as anyone who sees your Item will also find this notice.[324]

It is important to note the casual tone of the writing; most important is the fact the document is referred to as "rules" and not an "End User License Agreement, Terms of Service" or any other phrase that might imply a legally binding contract. But also of note, especially in light of the grounded theory chapter that uncovered the confusion modders face, is the tone of the writing. Rather than "legalese," the Game Content Usage Rules is written in plain, if not casual, language. It reads more like a letter than a legal document. Helping modders and other fans understand the spirit of the document, helps protect

---

[324] Microsoft, "Xbox.com | Game Content Usage Rules," May 23, 2011, http://www.xbox.com/en-US/community/developer/rules.htm.

Microsoft. This is not a legally binding contract, and by avoiding the appearance of a legally binding contract Microsoft lessens the capacity of litigators to sue it on grounds as such.

Microsoft has a long history, like most game companies, of fans using its content. However, it has seen the benefit of embracing user-generated content. The fan-created film series *Red vs. Blue* (*RvB*), is a testament to its flexibility. *RvB* started as fan-made machinima using Microsoft's flagship Xbox game *Halo*, to create a series of short sci-fi spoofs. It has since grown into an award-winning franchise with a website funded by paid subscribers, episodes for sale on Xbox Live, special features distributed with *Halo 3: Legendary Edition*, and even commercially distributed DVDs at stores ranging from the nation's largest game store chain, GameStop, to mall-based apparel stores like Hot Topic. Rather than shutting down *RvB* with a cease and desist letter, Microsoft embraced it and capitalized on it: "DeBevoise [editor of machinima.com] says that Rooster Teeth's relationship with Microsoft has 'inspired a new generation of filmmakers,' giving them the hope that 'they too could work with the biggest publishers if they create something truly compelling.'"[325] The Game Content Usage Rules paves a path through the forest of legal ambiguity so that other fans may create the next *RvB*.

Modding Microsoft's Game Content Usage Rules For General Use

This dissertation offers Microsoft's Game Content Usage Rules as a model to solve the conflict between game companies and modders. Whether or not the document

---

[325] Chris Kohler, "Machinima Series Red vs. Blue Ends Tour of Duty," *WIRED*, June 26, 2007, http://www.wired.com/entertainment/theweb/news/2007/06/redversusblue.

itself is the correct one matters not. It shows that fans could actually benefit from the lack of ambiguity caused by the lack of ex-ante certainty offered by the status quo system of sending C&Ds after a perceived violation. Rather than chilling the community by threatening legal and financial ruin, a document that guides them allows for creativity and the benefits accrued by technical and creative efforts, the exact type encouraged by article 1, section 8, of the U.S. Constitution.[326] Additionally, game companies accrue several advantages. By guiding fans towards mods and other uses not deemed dangerous to the company nor its intellectual property, companies can take advantage of both the training ground for future talent that modding provides, as well as providing free, fertile research and development (R&D) for both projects and future products.[327] Most importantly to the game companies, they lose no rights. Nothing stops companies from pursuing the status quo and sending a C&D to whomever it likes. However, companies are, most likely, going to send fewer C&Ds, as the culture of fans tends to comply with the requests of the game companies they admire.

Rather than suggesting utopian changes to the law, which would require either a statute to be written or modified, or a major court case, a new document requires much less hopefulness on the part of the community. While we can write about how we wish

---

[326] "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States; …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;" - [Article] U.S. Const. art. 1. sec. 8.

[327] Constance Steinkuehler and Johnson, "Computational Literacy in Online Games"; Olli Sotamaa, "On Modder Labour, Commodification of Play, and Mod Competitions.," September 3, 2007, http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2006/1881.

the law would be, it is difficult to change. However, when the world's largest software company creates a document that clarifies how to mod without receiving a C&D, it gives reasonable hope that others can, and may do so, as well. The industry already has a history of extra-legal solutions to ward off the meddling of lawmakers.

The Entertainment Software Ratings Board (ESRB) is a games industry, self-regulating organization created, much like the Motion Picture Association of America (MPAA), to keep government regulation at bay by providing ratings and enforcement of ratings based on videogame content. The Interactive Digital Software Association, the game industry's largest advocacy group, created the ESRB in 1994.[328] The rating system and enforcement board were created in direct response to Senators Joe Lieberman and Herb Kohl's 1992 Congressional hearings on offensive game content.[329] Disturbed by the violence of *Mortal Kombat* and the voyeurism of *Night Trap*, Congress gave the industry a year to create a workable system, otherwise the government would.

Presently, no game can be published on a console without an ESRB rating, and no Adults Only (AO) rated game can be published in the United States. Additionally, the ESRB requires that all retailers check the ID of anyone purchasing a Mature (M) rated game. Failure to do so results in a hefty fine, and repeated failure can lead to the ESRB banning a retail outlet from selling games. Industry self-regulation is presently the only

---

[328] "Entertainment Software Rating Board," accessed October 11, 2012, http://www.esrb.org/about/chronology.jsp., The Interactive Digital Software Association was renamed "Entertainment Software Association" (ESA) in 2004.

[329] Andy Chalk, "Inappropriate Content: A Brief History of Videogame Ratings and the ESRB," *The Escapist*, accessed October 11, 2012, http://www.escapistmagazine.com/articles/view/columns/the-needles/1300-Inappropriate-Content-A-Brief-History-of-Videogame-Ratings-and-the-ESRB.

active means of making sure minors do not gain access to M-rated videogames, after the U.S. Supreme Court overturned a California ban on the sale of violent videogames to minors in 2011 to establish a First Amendment protection for videogames.[330] The industry has a history of using extra-legal, yet standardized, practice to protect itself from legal harm.

The videogame industry uses the ESRB to not only rate games, but also to regulate advertising content, and to punish retailers and developers who do not obey the rules. In fact, the industry has regulated itself with such great zeal, that is has cost itself tens of millions of dollars, on one game alone. In October of 2004, Rockstar Games released the much-anticipated *Grand Theft Auto: San Andreas*. The game was gritty, violent, and an exploration of gang culture in Southern California. Fans and critics alike had high praise for the game.[331] That was until they all had a healthy dose of *Hot Coffee*.

Hot Coffee was a sex mini-game contained in the game.[332] Despite all the hype, in reality it was a simple rhythm game that featured two low-resolution avatars assuming sexual positions. It was as titillating to watch as rubbing two Barbie dolls against each other. It certainly was not as erotic as the sex mini-games in other titles, such as the scene in God of War III where players control the protagonist, Kratos, as he attempts to

---

[330] Brown v. Entertainment Merchants Assn., 556 F. 3d 950 (U.S. Supreme Court 2011).

[331] "Grand Theft Auto: San Andreas," *Metacritic*, accessed October 11, 2012, http://www.metacritic.com/game/playstation-2/grand-theft-auto-san-andreas.

[332] B. DeVane and K. D. Squire, "The Meaning of Race and Violence in Grand Theft Auto: San Andreas," *Games and Culture* 3, no. 3–4 (July 1, 2008): 264–285, doi:10.1177/1555412008317308.

"please" the Greek goddess Aphrodite.[333] The problem with *Hot Coffee* was that the ESRB had not been made aware of its existence. It had rated the game M for mature based on the content it had seen. The ESRB argued that *Hot Coffee* would have changed that rating to AO. At first, Rockstar tried to blame it on modders, claiming it was a sex mod with which Rockstar had nothing to do.[334]

Rockstar argued that modders had taken its game, and, as modders do, added extra content to it. Unfortunately for Rockstar, it underestimated both the technical prowess and media savvy of modders. Modders demonstrated that Rockstar, and not the fan community the company wanted to blame, in fact, had written the code. Modders proved the sex mini-game was contained, in its entirety, on the PlayStation 2 *GTA: San Andreas* disc.[335] The mod, however, was inaccessible in normal gameplay. Rather than deleting it, Rockstar disabled it. Modders did not create *Hot Coffee*; rather they uncovered and unlocked it.[336] In a sense it is a more complex version of finding a hidden track on a record, or a hidden scene in a movie.

In the end, the ESRB would re-rate the game AO for Adults Only. It also required that retailers put a sticker on each box with the new rating, and then, subsequently, take it off store shelves, as retail outlets are not permitted by the ESRB to sell AO games.

---

[333] Anthony John Agnello, "Sex in Games, Five Years After 'Hot Coffee' from 1UP.com," *1Up.com*, August 30, 2010, http://www.1up.com/features/sex-games-years-hot-coffee.

[334] Eric Bangerman, "Rockstar Breaks Silence on 'Hot Coffee' GTA: San Andreas Mod," *Ars Technica*, July 13, 2005, http://arstechnica.com/uncategorized/2005/07/5088-2/.

[335] "Gamepolitics: Did Rockstar Circumvent the ESRB Rating System?," accessed October 14, 2012, http://gamepolitics.livejournal.com/35003.html.

[336] Agnello, "Sex in Games, Five Years After 'Hot Coffee' from 1UP.com."

Furthermore, none of the major console manufactures – Sony, Microsoft, and Nintendo – allow for AO games on their North American systems. Rockstar offered to replace the game with a fresh, mature-rated copy for anyone who had bought the first edition. In the end, Rockstar both angered the ESRB and the modding community by trying to pin *Hot Coffee* on fans. In light of the fallout, Take-Two Interactive, the game's publisher, would pay 20 million dollars in a settlement to investors for deceiving them, the ESRB, and the community.[337] It is estimated that the scandal cost the industry 50 million dollars.[338]

All this to say that the industry has proven it *can* self-regulate, and that it is willing to sacrifice considerable amounts of money to keep the public trust, and to avoid government regulation. It is time for the industry to regain its trust with modders.

I raise the Hot Coffee mod to illustrate the potential of a usage guide proposal. The games industry already self-regulates and it has a body by which to enact self-regulation, the Entertainment Software Association. While individual game companies could follow in Microsoft's shadow and offer their own version of the Game Content Usage Rules, the ESA could offer a generic version, or even require that game companies adopt the use of some version, in the same way game companies are required to participate with the ESRB.[339] Even if the ESA did not want to issue or require the use of a

---

[337] "Reheating Hot Coffee: Take-Two Reaches $20M Settlement with Investors | GamePolitics," September 2, 2009, http://www.gamepolitics.com/2009/09/02/reheating-hot-coffee-take-two-reaches-20m-settlement-investors#.UHaigFR0QkU.

[338] Curt Feldman, "The Price of Hot Coffee: >$50 Million - GameSpot.com," July 22, 2005, http://www.gamespot.com/news/the-price-of-hot-coffee-50-million-6129661.

[339] "ESRB Rating Enforcement System," *Entertainment Software Rating Board*, accessed December 1, 2012, http://www.esrb.org/ratings/enforcement.jsp.

generic Game Content Usage Rules, a near same effect could be achieved if the other two game console manufactures, Sony and Nintendo, adopted similar guides.

Rather than suggesting legal change, this dissertation frames itself in the law and society perspective. While legal change is encouraged, I argue that extra-legal solutions can solve the problem, are possible, and have already been modeled by an extremely powerful game company – a solution grounded in reality to a problem grounded in user experiences. Additionally, as demonstrated in the conclusions section of this chapter, Legal Threats Break Moral Communities illustrates that the law chills modders. A new legal solution would offer no more protection than the status quo.

What follows is an easily modified/adapted Generic Game Content Usage Guide. As a dissertation also situated in communication advocacy, it is freely available for use and modification without any need for compensation. While I request some form of attribution, as it is the currency of the academic realm, I by no means require it.

Generic Game Content Usage Guide

Informed by the Legal Threats Break Moral Communities theory and motivated by the legal analysis that an extra-legal solution would not only address the modder/game company conflict, but could be implemented, as demonstrated by the game industry's history of self-regulation, this Generic Game Content Usage Guide serves as a tool to help solve the modder/game company conflict. This work began independently in 2009. In 2010 I came across Microsoft's Game Content Usage Rules, a document intended to

help fans use content found in Xbox games.[340] It was a relief to see a similar notion implemented. It demonstrated the feasibility of the work.

At the heart of the Legal Threats Break Moral Communities theory lies the observation that a cease and desist (C&D) letter may be an attempt by a game company to maintain control of intellectual property (IP), but that it confuses and chills modders. Additionally, it can cause ill will and bad press for the game company. Clearly it is a gamble. Game companies cannot quantify the impact of uncontrolled use of their IP and so they may assume that it could be greater than bad public relations and loss of potential market created by allowing games to exist.

This Generic Game Content Usage Guide is built upon the law and society perspective and seeks to find a solution that works for both parties. As demonstrated by Microsoft's document, by providing guidelines for modders, game companies can control what gets made. Modders, at the same time, get to mod and also get insight into what the game company would like to see made. Unlike the first prong of the Legal Threats Break Moral Communities theory, modders do not have to assume game company motivations. The motives are explicit. By knowing what is and is not permissible, modders gain ex-ante certainty, while game companies maintain control. Because this is not a contract, game companies relinquish no rights. Companies can still issue a C&D or sue whomever they wish. However, as demonstrated in the grounded theory chapter, modders make great efforts to attempt to do the right thing, and are often surprised when they receive a C&D. This document solves that problem.

---

[340] Microsoft, "Xbox.com | Game Content Usage Rules."

This Generic Game Content Usage Guide addresses all six aspects of the Legal Threats Break Moral Communities theory:

Trying to Understand the Motivation Behind the Threat

Modders no longer guess the motivations of game companies and what they deem permissible, as it is made explicit in the document.

Value Judgments

Rather than having to evaluate an uncertain situation and negotiate value judgments, the community knows upfront what is permissible and can reduce hostile attitudes caused by a sense of betrayal or violation of expectancy.

Conflicting Law and Morality

The document alleviates the conflict modders face between what is moral and what is legal. This document moves the conversation away from law and into a relationship where game companies instruct modders in how they would like their property used, rather than relying on modders interpretations of copyright law and C&Ds.

What Actions Should be Taken

Ideally, a Generic Game Content Usage Guide prevents the conflict from happening. Additionally, it spells out methods of recourse if the fan wants to create something beyond the scope of the document. Thus, even if the document fails to provide ex-ante certainty, in itself, it provides an option to find it.

Fallout

The sense of certainty reduces the concerns about what happens to the modders, the community, and the game company. It is a document that will have fallout, but the discussion will be about a document extended to the community as a whole, not one extrapolating on a C&D sent to one group of modders.

Mitigating Collateral Damage

As this guide is an effort to minimize the need for a C&D it allows for modders to shift from mitigating the damage of the legal threat to establishing new norms based on a guide that provides clarity. Rather than collateral damage, the focus is ancillary benefits. A sample generic game content usage guide is provided in Appendix B.

Reading The Generic Game Content Usage Gules

The Generic Game Content Usage Gules found in Appendix B attempt to solve the problem Legal Threats Break Moral Communities by offering game companies an alternative to C&Ds and providing modders with ex-ante certainty. They are extra-legal, in the spirit of law and society research, are feasible, as demonstrated by Microsoft's Game Content Usage Rules, and address the issues modders face, as detailed in the Legal Threats Break Moral Communities Theory. The rules are a suggested model that either a game advocacy group, such as the Entertainment Software Association, or individual game companies could adopt.

Promoting The Useful Arts And Sciences

While courts and lawmakers fall on both sides of the regulatory versus proprietary views of the intellectual property debate, article 1, section 8 of the U.S. Constitution still

reads that Congress has the power "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 … ." This dissertation reinforces a regulatory understanding of copyright law arguing limited monopolies on intellectual property serve to advance the arts and sciences. Modding, like many forms of participatory culture, promotes valuable science, technology, engineering, and math through self-taught, decontextualized learning. Mods promote the original games while also generating new art.

However, whether or not the point of copyrights and patents is to protect some form of natural property right or the advantage of progress to society is somewhat moot here. Both views are better served by allowing fans to create by utilizing copyrighted materials. Those who fall on the proprietary side of the spectrum benefit from having new innovations, content, and employees they can capitalize on, and those on the regulatory side benefit from a population who is both more creative and more technically competent as a result of modding. Of course, companies want to protect themselves and what they perceive as their property. The Game Content Usage Rules approach does not erode any company rights. It merely allows them to tell their patrons, "No shoes, no shirt, no service." The grounded theory analysis showed that most fans are happy to oblige, and game companies still maintain the right to sue modders if they do not oblige. All can be happier, however, if they can engage without fear of legal or perceived legal recourse with no explanation as to why.

Future Research

Opportunities arise for future research in all three research question outcomes of this study. For example, additional studies about modders and their interactions with game companies could yield additional theories. Specifically, a grounded theory study of successful modder relationships and how they speak about them should yield a complementary theory to Legal Threats Break Moral Communities. As suggested in the findings section, research into the mod community and modders who have not received C&Ds could extend and refine this study. RQ1: "Why do some modders find themselves violating the copyrights of game companies?" would be well served by exploring cases in which modders did not receive C&Ds. This could either expand or complicate the grounded theory discovered in Chapter 7. RQ2 & RQ3 both examine the influence of copyright law on modder and game company relationships. Further research into the effect of uncertainty and the law on interpersonal relationships could yield interesting analogies. Under the umbrella of fandom, modders represent a level of dedication that may separate them from those who do not create mods. Contrasting fans who create (modders) against fans who play mods could yield different interpretations of C&Ds, different attitudes towards game companies, different understandings of the law, and differentiate values within the community. All of which could alter the Legal Threats Break Moral Communities theory.

Chapter 8 argued that statutory solutions, such as fair use or compulsory licensing, are problematic in light of the Legal Threats Break Moral Communities theory. The legal system is confusing, expensive, and intimidating. Because it is adversarial, it is at direct odds with modders who wish to further the interests of the games and game

companies they admire. This study suggests an extra-legal solution. Designing a study to explore modder reactions to a game content usage guide would establish whether or not it has the same impact as legal solutions, namely breaking the moral community.

Implications

As a scholar involved in the production of games and an advocate of communication activism, I plan to write a brief white-paper based upon this research for distribution within the games industry. I also intend to resurrect savecrimsonechoes.com as both a clearinghouse for this dissertation, the white paper, and any related content that may be developed in the future. Game companies want happy customers and modders want to behave in a moral fashion in relationship to the games and companies they admire. The modder's dilemma is a problem that can be solved. I hereby grant permission to mod this study if it can help.

APPENDIX A

SQUARE ENIX CEASE AND DESIST LETTER

SQUARE ENIX®

May 8, 2009

Personal information removed.

Re: Cease and Desist: Chrono Compendium, Crimson Echoes

Dear Messrs. [redacted]

It has come to our attention that you, along with other members of Kajar Laboratories, have been developing a ROM hack game called *Chrono Trigger: Crimson Echoes* ("***CT:CE***") based on Square Enix's copyrighted intellectual property. We understand that you claim a copyright to CT:CE and intend to distribute it online imminently.

Your act of copyright infringement is deliberate and willful, as demonstrated by the "readme" file to the CT:CE demo, which states:

> ROM altering and modification is illegal, and the demo has been made without the consent of Square Enix… Should Square Enix perceive the project as a threat… Kajar Laboratories will immediately cease operation on the project and comply with Square Enix's orders.

The statutory damages for willful copyright infringement are up to $150,000 per work. (See 17 U.S.C. § 504(c)(2).)

We hereby request and demand that you immediately remove, take down, delete and destroy all work product on CT:CE, as well as all other Square Enix-related ROM hacks currently on your sites (including, but not limited to, *Prophet's Guile*).

We understand that you intend to instruct others how to circumvent our copy protection using Temporal Flux in violation of the Digital Millennium Copyright Act, 17 U.S.C. § 1201. We demand that you cease and desist any and all efforts to rip, hack or circumvent our copyright protection measures or to teach others to do so.

If any of these unlawful products are ever distributed, or if you fail to remove all infringing material immediately, then we will have no choice but to turn this matter over to our litigation counsel and appropriate authorities.

Please contact us by May 13th to confirm that you have complied with all of our demands.

Sincerely,

SQUARE ENIX LEGAL DEPARTMENT

SQUARE ENIX, INC. 999 N. Sepulveda Blvd. 3rd Floor, El Segundo CA 90245 t: 310.846.0400 f: 310.321.6095

APPENDIX B

SAMPLE GENERIC GAME CONTENT USAGE GUIDE

Thank you for your interest in working with our game. We appreciate the support and interest you show in our games and our company. We understand that our game is part of a community of players and a library of games and we are happy to be a contributor to them.

We would like to help you in your effort to not only play, but create, as well. We know you would like to use some of the ideas, assets, and code from our game. We would like to assist you in doing so.

Please understand we spend money, sometimes a lot of money, producing games. From the designers, artists, and programmers to the person who boxes and sells the games, a lot of people earn a living from our work. We want to respect them, as well as provide you with a way to express yourself using our games.

That's the point of this Game Content Usage Guide. This is not a legally binding contract. Rather it is a guide, letting you know the types of things that we'd like to see you create. We know you have questions about what content you can and cannot use to make mods, machinima, fan videos, and other types of media. Hopefully, this Game Content Usage Guide will help.

Remember, this is not a Terms of Service Agreement, an End User License Agreement, or any other type of contract. This is not a legally binding document. This is simply a set of guidelines that will help keep you out of legal trouble and help us keep creating the games you are so fond of.

User Generated Content

We provide the following rules to clarify what you can use to create **noncommercial** media that you can distribute for free to others. We also reserve the right

to rescind and modify these rules at any time.

Guidelines

Please remember, this is not a legally binding contract. It is a set of guidelines. While we still reserve all of our legal rights to the copyrights, patents, and trademarks we own, we want to accommodate your desire to be creative with them. At the heart of all of these guidelines is a desire to protect our intellectual property and respect you as fans and creative individuals.

To make mods, machinima, game videos, and other creative content, we suggest you follow these guidelines:

- You should not sell, or otherwise earn compensation, from your creations. We want you to have fun with our games, and we realize you may want to do more than play them. We have responsibilities to our employees and shareholders that prevent us from letting others make money off of our games. If you are making money off of anything originating from our games, then you are denying us the fair compensation we are trying to earn by making them.

- You can make and freely distribute noncommercial mods, derivative games, videos, and machinima as long as the method does not compensate you. For example, you may put a video of a play-through with commentary of a game on YouTube, but not if you are a partner who is compensated by page views. You may post your work on a page that has advertising, but not if you earn money from it.

- Your work should be original and transformative. We want to encourage your creativity. But we do not want you to freely redistribute our original, nonmodded games, in whole or part. We support your efforts to make new mods, games, machinima, and original videos, not duplicate the work we've already done.

- You may not use the music contained in our games. Frequently, we license those ourselves and cannot extend that right to you. You may replace the music with content that you have the right to use.

- You may not use our content to make obscene or pornographic content. The Entertainment Software Rating Board and other groups are very particular about obscene content in games. We would like content to be created with the

idea of good, clean fun.

Finally, please follow the spirit of these guidelines, and do not try to find loopholes. We are trying to keep things out of the courts, but reserve all rights to take cases there if necessary. Chances are, however, you will receive a cease and desist letter before we get to that point and we suggest you respect that order and contact us to find out how specifically you violated our terms and how to avoid it in the future. These guidelines are not contractual terms, these are simply guidelines to help you have fun with our products and to appease our own lawyers.

Finally, if you want to create content commercially, either using our game content or a derivative of it, please email us at: sample_email@sample_email.com

REFERENCES

"Aggro - WoWWiki - Your Guide to the World of Warcraft," September 11, 2010. http://www.wowwiki.com/Aggro.

Agnello, Anthony John. "Sex in Games, Five Years After 'Hot Coffee' from 1UP.com." *1Up.com*, August 30, 2010. http://www.1up.com/features/sex-games-years-hot-coffee.

"Alan Turing Memorial Monopoly Set." *Boing Boing*, September 8, 2012. http://boingboing.net/2012/09/08/alan-turing-memorial-monopoly.html.

"Alan Turing's Hand-drawn Monopoly Board" Blog. *Boing Boing*, August 5, 2011. http://boingboing.net/2011/08/05/alan-turings-hand-drawn-monopoly-board.html.

Altizer, Jr., Roger. "Private Conversation via Facebook.com," September 23, 2012. https://www.facebook.com/messages/.

Andreia, Lena. "Crimson Scare - Arki." Accessed November 29, 2012. http://ark.luxatom.com/wiki/Crimson_Scare#Effects_on_Ark.

Baldrica, John. "Cover Songs and Donkey Kong: The Rationale Behind Compulsory Licensing of Musical Compositions Can Inform a Fairer Treatment of User-Modified Videogames." *North Carolina Journal of Law & Technology* 11, no. 103 (Fall 2009): 35.

———. "Mod as Heck: Frameworks for Examining Ownership Rights in User-Contributed Content to Videogames, and a More Principled Evaluation of Expressive Appropriation in User-Modified Videogame Projects." *Minnesota Journal of Law, Science & Technology* 8 (2007): 681.

Bangerman, Eric. "Rockstar Breaks Silence on 'Hot Coffee' GTA: San Andreas Mod." *Ars Technica*, July 13, 2005. http://arstechnica.com/uncategorized/2005/07/5088-2/.

Banks, Stephen P, Esther Louie, and Martha Einerson. "Constructing Personal Identities in Holiday Letters." *Journal of Social and Personal Relationships* 17, no. 3 (June 1, 2000): 299–327. doi:10.1177/0265407500173001.

Blendo Games. "ATOM ZOMBIE SMASHER (Windows)," January 24, 2011. http://blendogames.com/atomzombiesmasher/.

Blount, Keith. *Scrivener* (version 2.3.1) OSX. Litterature and Latte. Accessed August 8, 2012. http://www.literatureandlatte.com/scrivener.php.

Bogdan, Robert, and Sari Knopp Biklen. *Qualitative Research for Education: An Introduction to Theories and Methods*. 5th ed. Allyn & Bacon, 1992.

Bogost, Ian. "Guru Meditation" Blog. *Bogost.com*. Accessed November 19, 2012. http://www.bogost.com/games/guru_meditation.shtml.

Braswell, Rachael. "Consumer Gripe Sites, Intellectual Property Law, and the Use of Cease-and-Desist Letters to Chill Protected Speech on the Internet." *Fordham Intellectual Property, Media & Entertainment Law Journal* 17 (2007): 1280–1283.

Brown v. Entertainment Merchants Assn., 556 F. 3d 950 (U.S. Supreme Court 2011).

Brown, Mark. "Sega Shuts down Monster Streets of Rage Remake Project (Wired UK)." *Wired UK*, November 4, 1913. http://www.wired.co.uk/news/archive/2011-04/13/sega-shuts-down-streets-of-rage-remake.

Calavita, Kitty. *Invitation to Law and Society: An Introduction to the Study of Real Law*. 1st ed. University Of Chicago Press, 2010.

Campbell v Acuff-Rose Music, Inc., 510 U.S. 569 (1994). Accessed December 10, 2012.

"CEMemorial - YouTube." Accessed July 1, 2012. http://www.youtube.com/user/CEMemorial/feed?filter=1.

Chalk, Andy. "Inappropriate Content: A Brief History of Videogame Ratings and the ESRB." *The Escapist*. Accessed October 11, 2012. http://www.escapistmagazine.com/articles/view/columns/the-needles/1300-Inappropriate-Content-A-Brief-History-of-Videogame-Ratings-and-the-ESRB.

"Chilling Effects Clearinghouse." *Chilling Effects Clearinghouse*. Accessed September 4, 2012. http://www.chillingeffects.org/.

Cohen, Dan, and Sean Takats. *Zotero* (version 3.0.8) Cloud. Roy Rosenzweig Center for History and New Media, 2012. http://www.zotero.org/.

Coleman, Sarah, and Nick Dyer-Witheford. "Playing on the Digital Commons: Collectivities, Capital and Contestation in Videogame Culture." *Media, Culture & Society* 29, no. 6 (November 2007): 934–953. doi:10.1177/0163443707081700.

Colfin, Bruce E., and Jeffery E. Jacobson. "Music And The Internet." In *Real Law@ Virtual Space: Communication Regulation in Cyberspace*, 201. Cresskill, N.J.: Hampton Press, Inc., 2005.

Constance Steinkuehler, Constance, and Barbara Z. Johnson. "Computational Literacy in

Online Games." *International Journal of Gaming and Computer-Mediated Simulations* 1, no. 1 (2009): 53–65. doi:10.4018/jgcms.2009010104.

Civil Rights Act of 1964. *Pub.L. 88-352, 78 Stat. 241*, 1964. http://ssa.gov/OP_Home/comp2/F088-352.html.

Constitution of the United States of America, Art. 1, Sec. 8, 1998. http://www.senate.gov/civics/constitution_item/constitution.htm.

Copyright Act of 1976. *17 U.S.C. § 107*. Accessed November 27, 2012. http://www.copyright.gov/title17/92chap1.html#107.

Copyright Act of 1976: Subject Matter of Copyright in General. *17 USC § 102*. Accessed November 29, 2012. http://www.copyright.gov/title17/92chap1.html#101.

Corbin, Juliet M., and Anselm C. Strauss. *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory*. Edited by Juliet M. Corbin and Anselm C. Strauss. 3rd ed. Sage Publications, Inc, 1998.

Crimson Echoes Playthrough Part 001, 2009. http://www.youtube.com/watch?v=YSTpkMB9kNk&feature=youtube_gdata_player.

Davidson & Associates v. Jung, 422 F.3d 630 (8th Cir. 2005).

Denzin, Norman K. *Interpretive Interactionism*. SAGE, 2001.

DeVane, B., and K. D. Squire. "The Meaning of Race and Violence in Grand Theft Auto: San Andreas." *Games and Culture* 3, no. 3–4 (July 1, 2008): 264–285. doi:10.1177/1555412008317308.

"Do You Need An ASCAP License?" *Www.ascap.com*. Accessed November 29, 2012. http://www.ascap.com/licensing.aspx.

"Dombrowski v. Pfister - 380 U.S. 479 (1965) : Justia US Supreme Court Center." Accessed September 27, 2012. http://supreme.justia.com/cases/federal/us/380/479/case.html.

Dr. Seuss Ents, L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1400 (9th Cir. 1997).

"Entertainment Software Rating Board." Accessed October 11, 2012. http://www.esrb.org/about/chronology.jsp.

"ESRB Rating Enforcement System." *Entertainment Software Rating Board*. Accessed December 1, 2012. http://www.esrb.org/ratings/enforcement.jsp.

"Fan-Made Streets Of Rage Remake Pulled After Request From Sega | Kotaku Australia." Accessed May 23, 2011. http://www.kotaku.com.au/2011/04/fan-

made-streets-of-rage-remake-pulled-after-request-from-sega/.

Farnsworth, Ward. *The Legal Analyst: A Toolkit for Thinking About the Law*. University Of Chicago Press, 2007.

FaustWolf. "Chrono Compendium Hacking Projects Go Down" Wiki. *Final Fantasy Hacktics*, May 15, 2009. http://ffhacktics.com/smf/index.php?topic=2962.100.

Federal Trademark Dillution Act. *15 U.S.C. § 1125(c)(4)(B)*, 1995.

Feldman, Curt. "The Price of Hot Coffee: >$50 Million - GameSpot.com," July 22, 2005. http://www.gamespot.com/news/the-price-of-hot-coffee-50-million-6129661.

Fisher III, William W., Morton J. Horwitz, and Thomas A. Reed, eds. *American Legal Realism*. Oxford University Press, USA, 1993.

Fitzgerald, Brian F, Sal Humphreys, John A Banks, Keith Done, and Nicolas P Suzor. "Games and Law: History, Content, Practice and Law" Conference Paper, 2007. http://eprints.qut.edu.au/8710/.

Franklin, Eric. "Square Enix Pulls Rug from Under Chrono Sequel | Crave - CNET" News and Tech. *CNET*, May 14, 2009. http://news.cnet.com/8301-17938_105-10240371-1.html.

Frasca, Gonzalo. "Ludologists Love Stories, Too: Notes from a Debate That Never Took Place." In *Proceedings of International DiGRA Conference*, 92–99, 2003. http://ludology.org/articles/frasca_levelup2003.pdf.

Frey, Lawrence R., and Kevin M. Carragee. *Communication Activism: Communication for Social Change*. Hampton Press, 2007.

———. *Communication Activism: Media and Performance Activism*. Hampton Press, 2007.

Friedman, Lawrence M. "Law and Society Movement, The." *Stanford Law Review* 38 (1986 1985): 763.

"Fuck Square Enix: Chrono Trigger Crimson Echoes C&Ded at 98% Completion." *OneUp Studios*, May 10, 2009. http://www.oneupstudios.com/boards/showthread.php?5684-Fuck-Square-Enix-Chrono-Trigger-Crimson-Echoes-C-amp-Ded-at-98-completion&s=5a8682278fd1e4530854b22f5b7b5b51.

Gallagher, David F. "New Economy; A Copyright Dispute with the Church of Scientology Is Forcing Google to Do Some Creative Linking. - New York Times" News. *New York Times*, April 22, 2002. http://www.nytimes.com/2002/04/22/business/new-economy-copyright-dispute-with-church-scientology-forcing-google-some.html?src=pm.

"Gamepolitics: Did Rockstar Circumvent the ESRB Rating System?" Accessed October 14, 2012. http://gamepolitics.livejournal.com/35003.html.

Garner, Bryan A. "Chill." *A Dictionary of Modern Legal Usage*. Oxford University Press, Inc., 1990. LexisNexis Academic. http://www.lexisnexis.com.ezproxy.lib.utah.edu/hottopics/lnacademic/.

Garth, Bryant, and Joyce Sterling. "From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State." *Law & Society Review* 32, no. 2 (1998): 409. doi:10.2307/827768.

Geertz, Clifford. *The Interpretation of Cultures: Selected Essays*. Basic Books, 1973.

Glaser, Barney G. *Jargonizing: Using the Grounded Theory Vocabulary*. Sociology Press, 2009.

Glaser, Barney, and Anselm Strauss. *The Discovery of Grounded Theory: Strategies for Qualitative Research*. Aldine Transaction, 1967.

Gleick, James. "What Defines a Meme?" *Smithsonian Magazine*, May 2011. http://www.smithsonianmag.com/arts-culture/What-Defines-a-Meme.html.

"Grand Theft Auto: San Andreas." *Metacritic*. Accessed October 11, 2012. http://www.metacritic.com/game/playstation-2/grand-theft-auto-san-andreas.

Halliday, Simon, and Patrick Schmidt. *Conducting Law and Society Research: Reflections on Methods and Practices*. 1st ed. Cambridge University Press, 2009.

Harris, Phillip A. Jr. "Mod Chips and Homebrew: A Recipe for Their Continued Use in the Wake of Sony V. Divineo." *North Carolina Journal of Law & Technology* 9 (2008 2007): 113.

Hasbro. "EA and Hasbro Partner to Bring Casual Games to Global Audience," August 10, 2007. http://investor.hasbro.com/social/releasedetail.cfm?ReleaseID=586451.

Heldal-Lund, Andreas. "Operation Clambake :: How to Support the Fight Against the Church of Scientology." *Operation Clambake: How to Support the Fight Against the Church of Scientology*. Accessed September 26, 2012. http://www.xenu.net/support.html.

Horvath, A., B. Thomassen, and H. Wydra. "Introduction: Liminality and Cultures of Change." *International Political Anthropology* 2, no. 1 (2009): 2–3.

"Internet Archive: Wayback Machine." Accessed August 8, 2012. http://archive.org/web/web.php.

Jenkins, Henry. *Confronting the Challenges of Participatory Culture: Media Education for the 21st Century*. The MIT Press, 2009.

———. *Convergence Culture: Where Old and New Media Collide*. Revised. NYU Press, 2008.

———. *Textual Poachers: Television Fans and Participatory Culture*. Routledge, 1992.

Kenski, Kate, Kevin Coe, and Steve Rains. "Patterns and Determinants of Civility in Online Discussions: Final Report to the National Institute for Civil Discourse." *National Institute for Civil Discourse*, October 13, 2012. http://nicd.arizona.edu/research-report/patterns-and-determinants-civility.

Kohler, Chris. "Machinima Series Red Vs. Blue Ends Tour of Duty." *WIRED*, June 26, 2007. http://www.wired.com/entertainment/theweb/news/2007/06/redversusblue.

Kücklich, J. "Precarious Playbour: Modders and the Digital Games Industry," December 1, 2005. http://five.fibreculturejournal.org/fcj-025-precarious-playbour-modders-and-the-digital-games-industry/.

Lamont v. Postmaster General, 381 U.S. 301 (U.S. Supreme Court 1965).

Lessig, Lawrence. *The Future of Ideas: The Fate of the Commons in a Connected World*. 1st ed. Random House, 2001.

Lieber, Eli. *Dedoose* (version 4.2.81) Cloud. SocioCultural Research Consultants, LLC. Accessed August 8, 2012. https://www.dedoose.com/.

Lindlof, T. R., and B. C. Taylor. *Qualitative Communication Research Methods*. Sage Pubns, 2002.

LucasArts. *LEGO Indiana Jones: The Original Adventures* Nintendo DS, Wii, Xbox 360, PlayStation 3, Windows. San Francisco: LucasArts, 2012. http://www.lucasarts.com/games/legoindianajones/.

Macaulay, Stewart. "Non-Contractual Relations in Business: A Preliminary Study." *American Sociological Review* 28, no. 1 (February 1, 1963): 55–67. doi:10.2307/2090458.

Martin, Vivian B., and Astrid Gynnild. *Grounded Theory: The Philosophy, Method, and Work of Barney Glaser*. Universal-Publishers, 2011.

Mattel v. MCA, 296 F.3d 894 (9th Cir. 2000).

Mattel v. Walking Mountain Productions, 353 F.3d 792 (9th Cir. 2003).

McLeod, Kembrew. "Confessions of an Intellectual (Property): Danger Mouse, Mickey Mouse, Sonny Bono, and My Long and Winding Path as a Copyright Activist-Academic." *Popular Music and Society* 28, no. 1 (2005): 79–93. doi:10.1080/0300776042000300981.

Media Molecule. “LittleBigPlanet (PlayStation 3),” October 21, 2008. http://www.littlebigplanet.com/en/.

Microsoft. “Xbox.com | Game Content Usage Rules,” April 28, 2009.

———. “Xbox.com | Game Content Usage Rules,” May 23, 2011. http://www.xbox.com/en-US/community/developer/rules.htm.

Miles, Matthew B., and A. Michael Huberman. *Qualitative Data Analysis: An Expanded Sourcebook*. 2nd ed. Thousand Oaks, CA: Sage Publications, Inc, 1994.

“ModDB: Games and Mods Development for PC Linux and Mac - Mod DB.” Accessed May 9, 2011. http://www.moddb.com/.

Miller, Arthur R. “Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU.” *Harvard Law Review* 106 (1993, 1992): 977.

Moxon & Korbin (Law Firm). “Scientology Complaint to Google (#2) -- Chilling Effects Clearinghouse” Database. *Chilling Effects*, April 9, 2002. http://www.chillingeffects.org/dmca512/notice.cgi?NoticeID=252.

“No Shirt, No Shoes, No Service.” *LegalMatch*, October 18, 2007. http://legalmatch.typepad.com/businesslaw/2007/10/no-shirt-no-sho.html.

Nolo. “Stanford Copyright & Fair Use - Measuring Fair Use: The Four Factors.” Accessed November 11, 2012. http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/9-b.html.

Norek, Josh. “You Can’t Sing Without the Bling: The Toll of Excessive Sample License Fees on Creativity in Hip-Hop Music and the Need for a Compulsory Sound Recording Sample License System.” *UCLA Entertainment Law Review* 11 (2004): 88.

North, Dale. “Square Enix Shuts down Chrono Fan Game Crimson Echoes -Destructoid” Games News and Tech. *Destructoid*, May 11, 2009. http://www.destructoid.com/square-enix-shuts-down-chrono-fan-game-crimson-echoes-131702.phtml?s=0#comments.

O’Malley, Bryan Lee. *Scott Pilgrim’s Precious Little Boxset*. Pap/Pstr. Oni Press, 2010.

O’Neill, Jesse J. “Learning from Disaster: Lessons for the Future From the Gulf of Mexico: Note: the Citizen Participation Act of 2009: Federal Legislation as an Effective Defense Against SLAPPS.” *Boston College Environmental Affairs Law Review* 38 (2011): 477–504.

Orland, Kyle. “Hard Drivin’, Hard Bargainin’: Investigating Midway’s ‘Ghost Racer’ Patent.” *Gamasutra*, July 18, 2007.

http://www.gamasutra.com/view/feature/1489/hard_drivin_hard_bargainin_.php.

Pember, Don, and Clay Calvert. *Mass Media Law*. 17th ed. McGraw-Hill Humanities/Social Sciences/Languages, 2010.

"Petition." *Save Crimson Echoes*, June 29, 2009. http://web.archive.org/web/20090629111309/http://savecrimsonechoes.com/phpPETITION/.

Ponterotto, Joseph G. "Brief Note on the Origins, Evolution, and Meaning of the Qualitative Research Concept 'Thick Description'." *The Qualitative Report* 11, no. 3 (September 2006): 538–549.

Posner, Richard A. *The Little Book of Plagiarism*. Pantheon, Kindle Edition, 2009.

Postigo, Hector. "Of Mods and Modders: Chasing Down the Value of Fan-Based Digital Game Modifications." *Games and Culture* 2, no. 3 (2007): 300–313.

———. "Capturing Fair Use for the YouTube Generation: The Digital Rights Movement, the Electronic Frontier Foundation and the User-centered Framing of Fair Use." *Information, Communication & Society* 11, no. 7 (2008): 1008. doi:10.1080/13691180802109071.

———. "Modding to the Big Leagues" Online Journal. *First Monday*, May 2010. http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2972/2530.

———. "Video Game Appropriation Through Modifications." *Convergence: The International Journal of Research into New Media Technologies* 14, no. 1 (February 1, 2008): 59 –74. doi:10.1177/1354856507084419.

Pring, George, and Penelope Canan. *Slapps: Getting Sued For Speaking Out*. Temple University Press, 1996.

"Private Forum Post." *Kagero Studios*, May 2009. http://kagerostudios.b1.jcink.com/.

Rafsanjani, Nazanin, Brooke Gladstone, and Penelope Canan. "SLAPP Back Transcript." *Onthemedia*, April 2, 2010. http://www.onthemedia.org/2010/apr/02/slapp-back/transcript/?utm_source=sharedUrl&utm_media=metatag&utm_campaign=sharedUrl.

Reese, R. Anthony. "Transformativeness and the Derivative Work Right." *Columbia Journal of Law & the Arts* 31, no. 4 (2008). http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2071439.

"Reheating Hot Coffee: Take-Two Reaches $20M Settlement with Investors | GamePolitics," September 2, 2009.

http://www.gamepolitics.com/2009/09/02/reheating-hot-coffee-take-two-reaches-20m-settlement-investors#.UHaigFR0QkU.

Rheingold, Howard. *SMART MOB*. First Edition. Perseus, 2002.

Roe, Alex. "Chrono Ark - Time to Fight (Battle Arc's Team)." *YouTube*. Accessed November 29, 2012. http://www.youtube.com/watch?v=q0rUJHDdyg8.

Rogers v. Grimaldi, 875 F.2d 994 (2nd Cir. 1989).

Rutledge, Skip, and G. L. Forward. "Presumption and Defending the Status Quo in Intercollegiate Debate: An Exploratory Survey of Judge Perceptions in Parliamentary & CEDA/NDT Debate Formats." *Journal of the National Parliamentary Debate Association* 10 (2004): 24–48.

"Scientology - Google Search," September 27, 2012. http://www.google.com/#hl=en&sugexp=les%3Bepsugrpq2&gs_nf=1&cp=4&gs_id=1r&xhr=t&q=scientology&pf=p&output=search&sclient=psy-ab&oq=scie&gs_l=&pbx=1&bav=on.2,or.r_gc.r_pw.r_qf.&fp=cacdae0a7374697e&biw=1920&bih=956.

Schaffner, Derek J. "Note: the Digital Millennium Copyright Act: Overextension of Copyright Protection and the Unintended Chilling Effects on Fair Use, Free Speech, and Innovation." *Cornell Journal of Law and Public Policy* (Fall 2004): 145–169.

Schrecker, Ellen. *Many Are the Crimes: McCarthyism in America*. 1st ed. Little, Brown and Company, 1998.

Shoemaker, Brad. "The Greatest Games of All Time: Chrono Trigger." *Gamespot*, April 17, 2006. http://l.gamespot.com/tYSpO1.

Sotamaa, O. "Playing It My Way? Mapping the Modder Agency." In *Internet Research Conference*. Vol. 5, 2004.

Sotamaa, Olli. "On Modder Labour, Commodification of Play, and Mod Competitions.," September 3, 2007. http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2006/1881.

———. "When the Game Is Not Enough: Motivations and Practices Among Computer Game Modding Culture." *Games and Culture* 5, no. 3 (July 1, 2010): 239 –255. doi:10.1177/1555412009359765.

Square. *Chrono Trigger (Super Nintendo Entertainment System)*, 1995.

"State Anti-SLAPP Laws." Accessed September 27, 2012. http://www.anti-slapp.org/your-states-free-speech-protection/.

Szakolczai, A. “Liminality and Experience: Structuring Transitory Situations and Transformative Events.” *International Political Anthropology* 2, no. 1 (2009): 141–172.

Thomas, Michael K. “The Utility and Efficacy of Qualitative Research Software in Grounded Theory Research.” In *Grounded Theory: The Philosophy, Method, and Work of Barney Glaser*, edited by Vivian B. Martin and Astrid Gynnild. Universal-Publishers, 2011.

“Transcript of the Constitution of the United States - Official Text.” Accessed April 22, 2012. http://www.archives.gov/exhibits/charters/constitution_transcript.html.

U.S. Copyright Office - Copyright Law: § 115 . Scope of Exclusive Rights in Nondramatic Musical Works: Compulsory License for Making and Distributing Phonorecords50. 17 USC § 115 (a)(2). Accessed November 29, 2012. http://www.copyright.gov/title17/92chap1.html#115.

U.S. Copyright Office - Copyright Law: Chapter 1 § 101 . Definitions. *17 USC § 101*. Accessed November 29, 2012. http://www.copyright.gov/title17/92chap1.html#101.

“U.S. Copyright Office - Licensing | Section 115.” Accessed September 16, 2012. http://www.copyright.gov/licensing/sec_115.html.

Valve. “Making a Mod - Valve Developer Community,” July 13, 2001. https://developer.valvesoftware.com/wiki/Making_a_Mod.

———. “Source Filmmaker FAQ.” *Source Filmmaker*, 2012. http://www.sourcefilmmaker.com/faq/.

“What Is Jurisprudence? Definition of Jurisprudence (Black’s Law Dictionary).” *Black’s Law Dictionary Free Online Legal Dictionary 2nd Ed.* Accessed November 11, 2012. http://thelawdictionary.org/jurisprudence/.

“What Is Stare Decisis? Definition of Stare Decisis (Black’s Law Dictionary).” *Black’s Law Dictionary Free Online Legal Dictionary 2nd Ed.* Accessed November 11, 2012. http://thelawdictionary.org/stare-decisis/.

Whitney v. California, 274 U.S. 357 (U.S. Supreme Court 1927).

ZeaLitY. “98% Complete Chrono Trigger Fan Sequel ROM Mod. Receives C&D: Gaming” Aggregator, Ranked - User Comments. *Reddit.com*, May, 2009. http://www.reddit.com/r/gaming/comments/8je53/98_complete_chrono_trigger_fan_sequel_rom_mod/?sort=old.

———. “Cease & Desist Letter” Wiki. *Chrono Compendium*, May 9, 2009. http://www.chronocompendium.com/Forums/index.php/topic,7396.0.html.

———. “Crimson Echoes,” July 8, 2011. http://web.archive.org/web/20110708204051/http://crimsonechoes.com/.

“ZeaLitY 1Up Interview - Chrono Compendium.” Accessed November 27, 2012. http://www.chronocompendium.com/Term/ZeaLitY_1Up_Interview.html.

Zimmermann, Stephen S. “Regulatory Theory of Copyright: Avoiding a First Amendment Conflict, A.” *Emory Law Journal* 35 (1986): 163.

Ziv, Amitai. “Unleashing Your Inner Gamer, Without the Console - Israel News | Haaretz Daily Newspaper,” October 26, 2012. http://www.haaretz.com/business/start-up-of-the-week-unleashing-your-inner-gamer-without-the-console.premium-1.472515.