

M. Strano, H. Hrachovec, F. Sudweeks and C. Ess (eds). *Proceedings Cultural Attitudes Towards Technology and Communication 2012*, Murdoch University, Australia, 469-477.

COPYRIGHT, CULTURE, AND COMMUNITY IN VIRTUAL WORLDS

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Abstract. Communities that interact on-line through computer games and other virtual worlds are mediated by the audiovisual content of the game interface. Much of this content is subject to copyright law, which confers on the copyright owner the legal right to prevent certain unauthorized uses of the content. Such exclusive rights impose a limiting factor on the development of communities that are situated around the interface content, because the rights, privileges, and exceptions associated with copyright generally tend to disregard the cultural significance of copyrighted content. This limiting effect of copyright is well illustrated by examination of the copied content appropriated by virtual diaspora communities from the game *Uru: Ages of Myst*. Reconsideration of current copyright law would be required in order to accommodate the cohesion of on-line communities and related cultural uses of copyrighted content.

1. Introduction

Copyright law is intimately bound up with culture and community. The express purpose of copyright is to foster the development of art, music, literature, movies, and other cultural creations. Successful copyrighted works add to the fund of cultural content and practice, but generally do so through the mechanism of commodification. Ownership and sale of copyrighted content is intended to provide a monetary reward to spur cultural creation. Indeed, copyright holders frequently target their creative and distributive efforts toward cultural adoption, and profit from the promulgation of their works as part of popular culture.

Consequently, the copyright system has been criticized with increasing frequency for somewhat paradoxically failing to make allowances for access and re-interpretation of cultural materials (Lessig, 2004, Vaidhyathan, 2004). Graphical, musical, audiovisual, and literary works constitute key components of shared culture. Full participation in society is impossible without access to such works, but access is controlled by an unsympathetic copyright regime. Some types of participation, such as criticism, commentary, and parody, are privileged under user privileges or exceptions, the American fair use doctrine. But many, indeed most, types of participatory recreation of copyrighted works are not contemplated within either fair use or other legal exemptions.

This failure of the copyright system holds as true for participation in virtual communities as for society generally; indeed, given that virtual communities are largely mediated by copyrighted works, it poses a particular problem for such communities. In this paper I illuminate this problem by means of a case study, following the migration of copyrighted content away from the defunct on-line game *Uru: Ages of Myst* to Second Life to other venues. Graphics from the *Uru* game were reproduced on new servers by departing players attempting to maintain their distinctive virtual community and culture through shared iconic images. The unauthorized appropriation of content from the *Uru* game was crucial to maintenance of the virtual community but, as I show here, almost certainly constituted copyright infringement.

2. The *Uru* Diaspora

Digital communication technologies may be the object of existing culture, or may be the subject of new emergent culture. Virtual worlds are increasingly recognized as focal points for complex social interactions, leading to the development of distinct communities (Taylor, 2006). Such communities in turn give rise to the development of distinctive cultures (Boellstorff, 2008; Nardi, 2010). Among the more striking examples of on-line community and culture is that of the *Uru* diaspora, which has been studied in detail by Celia Pearce (2010).

Pearce describes the unique gaming community that formed around the virtual environment of the *Uru: Ages Beyond Myst* game, an on-line extension of the popular *Myst* and *Riven* computer games. The on-line game proved unprofitable and was shut down by the provider. Although not a financial success, the game attracted a highly devoted cadre of players, who, in the face of the game's imminent closure, determined to retain and foster the community they had developed during their virtual association. In advance of the game closure, they identified and eventually colonized other virtual worlds where they could continue their community, importing with them into the alternative computer venues the distinctive design motifs of the architecture and artifacts from the *Uru* game interface.

As a result, a number of other on-line environments acquired regions of virtual territory, constructed by *Uru* migrants, that to a greater or lesser extent resembled the design of the *Uru* graphical interface. *Uru* look-alike images comprising buildings, fountains, and other distinctive architectural icons began to appear in the virtual worlds of Second Life, There.com, and elsewhere. For example, Figure 1 shows a distinctive fountain that was copied from the *Uru* game and reappeared in diaspora communities in Second Life and There.com.

In the interim, the *Uru* game itself has undergone a series of incarnations under a variety of proprietors. The game has reopened under a new sponsor on new servers, subsequently closed again, been hosted on player-maintained servers, and the game code has been promised to its users for maintenance as an open source project. Additionally, during this period, some of the venues to which the *Uru* diaspora migrated, such as There.com, have themselves encountered financial difficulty and closed their servers.

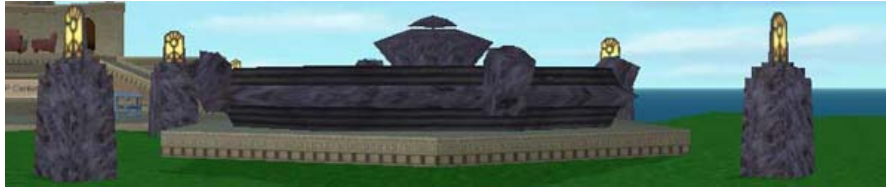


Figure 1. Uruvian Diaspora Fountain

This saga of the *Uru* diaspora makes for provocative social and cultural study, but it hinges to a large extent on the appropriation of intellectual property. The culture carried by migrants from the initial *Uru* game ultimately revolves around intellectual property, in the form of distinctive images and audiovisual works that they encountered on the initial server; their culture is in some sense owned by the developer of the game where the community first formed. The reproduction of images from the *Uru* game in Second Life, There.com and elsewhere implicates copyright in the original game. The original images – and despite the spatial façade of the game interface, at the end of the day, the virtual world “structures” are indeed images – were part of the *Uru: Ages Beyond Myst* game, both as the software of game and the audiovisual output of that software, and so subject to copyright by the developers of that game. The disappearance of the original game does not change the property status of the images; such intellectual property is transferable and devisable, and presumably passed via sale or bankruptcy to the new owners of the *Uru* game properties.

3. The Copyright System

Much of the creative material that constitutes computer games is subject to copyright law (Burk, 2006; Lastowka, 2010). Both individual components of the game and the overall combination of those components may constitute copyrightable works. Graphics, music, and sufficiently original sound effects all fall within copyrightable subject matter. The animated combination of sound and graphics constitutes a copyrightable audiovisual work. The underlying software that records and controls the audiovisual output also falls within the ambit of copyright. The libraries of game components, as well as databases of character information that undergird virtual environments, may constitute sufficiently original compilations for copyright to attach to them as well (Burk, 2010a).

Copyright vests in the copyright holder the right to legally exclude others from engaging in certain activities vis a vis the protected work. In the United States, these activities include the unauthorized reproduction, distribution, adaptation, public performance, and public display of the work (17 U.S.C. § 103, 2006). Other jurisdictions grant similar exclusive rights. The exclusivity of the copyright holder does not extend to the idea instantiated in a protected work, but to the particular expression of that idea in the protected work. Infringement of the exclusive rights renders the perpetrator liable for monetary damages, and usually subjects the perpetrator to a court order enjoining further such activity.

Thus, reproduction of the *Uru* images – indeed, conscious and wilful reproduction of the images – is rather clearly a violation of the copyright owner’s exclusive right of reproduction, the “copy right.” Some of the re-created images are literal copies of content from the *Uru* game, some are substantially similar or derivative of the content from the *Uru* game, and some have the “look and feel” of *Uru* content. And, liability for the infringement might not be limited to the subscribers who create potentially infringing images in the new server locales of the *Uru* diaspora. A credible argument could be made that the proprietors of Second Life and There.com are liable for contributory or vicarious infringement, “aiding and abetting” a copyright violation by hosting the images on their servers. As the operators of e-Bay, YouTube, various file-sharing services, and some ISPs have discovered, simply providing a forum for copyright violation, without directly participating in the infringing activity, can sometimes create liability for infringement (Yen, 2006).

Of course, copyright liability attaches only to unauthorized uses of a work. One solution to the threat of liability is to seek permission or authorization for use of the work; but this is often not simple, practical or even feasible. An example related to this paper illustrates the point: the argument of this paper benefits from inclusion of an example of the kind of graphic material reproduced in the *Uru* diaspora, specifically the image of the iconic fountain that appears in Figure 1. Use of the image in a scholarly work is permissible under the copyright laws of many – although by no means all – countries. Any uncertainty as to the use of the image could be clarified by obtaining the permission of the copyright owner. But it is entirely unclear who one would even begin to approach to gain permission – the original image has been modified by largely anonymous players, and moved from server to server; control of the content has been transferred multiple times, and several of the entities that might own or control the content have gone into bankruptcy. The difficulty of determining whom one would approach to clear the rights for inclusion of an *Uru* diaspora image in a CaTaC paper indicates the similar difficulty that a user community would have in obtaining permission for their use of an iconic cultural image or motif.

4. Failing Fair Use

Like other property rights, copyright is not absolute, but is subject to a variety of privileges, exceptions, and exemptions that limit or curtail the exclusive rights of the copyright holder, often in particular contexts or situations (Burk, 2004). The copyright exemptions differ from nation to nation, but the majority of jurisdictions offer only a discrete list of limited uses, such as news reporting, educational use, or private use, that qualify as legally permissible without authorization of the copyright holder. Such uses are typically narrow and specific and unlikely to apply to cultural appropriations such as those considered here, or for that matter to other takings for purposes of cultural or communal meaning.

Virtual community poses a particular challenge for the application of such exemptions. Certain copyright exemptions might accommodate cultural uses of tangible objects, but often the fit of the exemptions to digital objects is poor. For example, most countries include in their copyright law some form of “first sale” doctrine that exhausts

the control of the copyright holder over a particular copy after it has been lawfully transferred (17 U.S.C. § 109, 2006). The owner of a copy thus has the right to gift, resell, or even publicly display that particular copy of the work. But this right extends only to the transfer of a particular copy, and not to the generation of additional copies. Digitized materials are peculiar in that transfer of bits is affected by the generation of new copies – in RAM, on magnetic media, and elsewhere over multiple networked machines. Thus, it is unclear how or whether first sale might apply to the transfer of bits (Lemley, 1997). The first sale doctrine may accommodate the distribution or display of tangible cultural items, but not the digital cultural items on which virtual communities rely.

In the United States, the best known of the copyright user privileges or exemptions is likely the statutory fair use provision, which allows context specific uses of the protected work without authorization of the copyright owner (17 U.S.C. § 107, 2006). The applicability of fair use is highly flexible, rather than constrained in the manner of most copyright exemptions. Often the first instinct when an unauthorized use seems compelling is to rely on the “fair use” provision to justify the use, as for example in the case of unauthorized cultural appropriation of copyrighted works (Tushnet, 2007). However, the fair use provisions were not necessarily intended to accommodate such takings, and have not necessarily been interpreted in a manner that would justify them.

The U.S. copyright statute indicates four factors that are to be weighed in deciding whether a given use is fair: first, the purpose for which the material is being taken; second, the type of work from which the material is taken; third, the extent of the material taken; and fourth, the impact of the taking on the market for the work from which the material is taken. Courts have at times given extra weight to the final factor. The Supreme Court has also suggested that fair use is one of the statutory features necessary to mediate between the constitutional demands of free speech and the exclusive rights to expression granted by copyright: although copyright constitutes a governmental constraint on speech, fair use provides a measure of activity free from the constraint (*Harper & Row v. Nation Enterprises*, 1985). Consequently, uses of copyrighted material for purposes of public discourse, such as criticism, commentary, and parody, are given particular preference when considering whether the use is fair.

Depending on the factual context of these criteria, it may be permissible to use some, all, or none of a copyrighted work in a given situation without authorization. The determination of fair use has both the virtue and the vice of being highly fact-specific. Such context specificity makes the provisions highly plastic, adaptable to a wide range of situations, including new and unforeseen situations; but at the same time, because the outcome varies with the context, the application of the provisions is often unpredictable. But however flexible it may be, fair use is like a rubber band: you can only stretch it so far before it snaps. Whether or not a use will be judged fair in a given situation is frequently a matter of some doubt until a court renders a verdict on the question. But certainly maintaining the cultural integrity of a virtual diaspora is not a use that courts would immediately recognize as fair.

4.1. PURPOSE AND CHARACTER OF THE USE

In assessing the first factor, courts will tend to ask whether the unauthorized use is “transformative,” that is, whether the appropriated material is the basis for a new or altered work (*Campbell v. Acuff-Rose Music, Inc.*, 1994). The transformativity test essentially constitutes an inquiry into whether the unauthorized use is a socially valuable use, at least in the dimension of originality. Uses that produce new works are favored; presumably if the goal of the use is simply to re-cycle or re-use the existing work, society is gaining little, and the courts assume that the appropriator could just as well seek the owner’s permission.

It is unclear how often the use of cultural icons, in a situation such as the *Uru* diaspora, will fit the transformativity test, as the test makes assumptions about unauthorized uses that are orthogonal to cultural or community uses. In some cases an image or motif will be incorporated into a new design or graphic representation, but just as often it will reproduce the initial image from which it was drawn. Indeed the diaspora uses may be intended to reproduce the previous image as faithfully as possible. Novelty is not at all the point of such takings, but fidelity. The goal in appropriation of a cultural icon is frequently not to transform it into something new, but rather to preserve its existing social meaning, even in a new context.

4.2. NATURE OF THE COPYRIGHTED WORK

Neither is the second fair use factor likely to favor diaspora uses. Certain types of works receive “thin” or minimal copyright protection if the expressive content is sparse, and the majority of the content is unprotectable under copyright. For example, the copyright protection for factual compilations is typically “thin,” as the facts themselves cannot be protected by copyright, but only their original selection and arrangement. Unauthorized use of minimally expressive works is more likely to be fair, as there is less protectable expression. More creative, expressive works receive more robust copyright protection, and so are reciprocally less amenable to fair uses.

The images taken in the *Uru* situation are not factual or minimally expressive; quite the contrary, they are likely to be creative and original in the sense of copyright law – that is, they originate with their authors. The images are not factual; they do not depict or collect indicia about the state of the world (Durham, 2001). They are largely the product of the originator’s imagination. Consequently, they are likely to receive full copyright protection, militating against a determination of fair use.

4.3. AMOUNT AND SUBSTANTIALITY USED

Assessing the weight of the portion taken from the copyrighted work presents a problem in defining the work in question. As indicated above, an audiovisual work like a computer game comprises a constellation of individual copyrighted works, as well as constituting a copyrighted work in total. Thus, it is difficult to assess what the work at issue may be for purposes of fair use; the appropriation may be fractional or total, depending on the quantum chosen for analysis. For the most part, players in the *Uru* diaspora did not take the entire audiovisual work – although eventually they ran the full game on private servers, this was done with the acquiescence, and perhaps the formal

permission, of the game publisher. Rather, players tended to appropriate particular images from the game for replication in other virtual worlds. One might argue that the relevant work is the game as a whole, and lifting a discrete image out of the entire game constitutes a minimal taking. On the other hand, the image itself may be considered a copyrighted work, and taking that image could constitute taking that work in its entirety.

Courts have also taken into account the qualitative dimension, rather than the quantitative dimension, of unauthorized takings for fair use. This type of scrutiny recognizes that different portions of a work have different degrees of significance, regardless of the amount of material. Even if the quantum of material taken from the copyrighted work is small, it may be that the material taken constitutes the “heart” or essential aspect of the work (*Harper & Row v. Nation Enterprises*, 1985). Unauthorized taking of essential material may be more intrusive on the rights of the copyright holder than would be a more extensive unauthorized taking of nonessential material. In such cases, even a relatively small taking may disfavor fair use.

Here again, when considering the qualitative aspects of this fair use factor in the *Uru* diaspora, the analysis may turn on the definition of the work under consideration. If the work at issue is the *Uru* game as a whole, then the copying of certain culturally evocative images or motifs hardly seems to go to the heart of the work. Certainly the players who were relocating to new servers were consciously trying to reproduce the “essence” of the game they had left, but this is probably not the kind of core feature that the fair use test is intended to assay; it is looking rather for the unauthorized taking of some feature that gives the copyrighted work its value. The images of buildings or architectural motifs that migrated with the *Uru* diaspora are probably not core features of the *Uru* game in this sense.

However, the analysis likely changes if the focus moves from the audiovisual work of the game to the individual components of the game, which constitute copyrightable works in their own right. If the works at issue are the particular images that comprise the visual features of the game, not only does the scale of the fair use comparison change, but perhaps also the level of significance for a given taking. A particular motif from an *Uru* image, copied to *Second Life* or elsewhere, might well constitute the “heart” or gist of that particular image, even if it were not the “heart” of the game as a whole.

4.4. EFFECT ON THE MARKET

The final statutory factor in the fair use analysis is the impact of the unauthorized taking on the market for the copyrighted work. Here again, the definition of the work at issue is critical, as is the definition of the market. Courts have in some cases tended -- somewhat tautologically -- to define the market in question for this factor as the market for licensing the portion taken (*American Geophysical Union v. Texaco, Inc.*, 1994). And, of course, it follows from this definition that an unauthorized taking of material necessarily displaces sales in the market for licensing of that particular material, making damage to the market something of a foregone conclusion. This seemingly inevitable outcome is somewhat ameliorated by consideration of whether a mechanism exists to facilitate licensing in such a market -- whether there exists a clearing house or intermediary or set of commercial practices that would allow potential licensees to find

and negotiate with the copyright holder (Princeton University Press v. Michigan Document Services, Inc., 1996).

On the one hand, it might be argued that the appropriation of content from the *Uru* game is likely to have minimal impact on the market for the game. In the diaspora, there seems to be no market for the game; players appropriated the images because the market failed. Players would clearly have preferred to continue playing the original game were it available; images from the game were transferred to other venues only because the original was unavailable. No real mechanism is apparent by which former players could instead have licensed the game or its contents.

At the same time, one can imagine scenarios in which the migration of the *Uru* content could be said to damage the actual or potential market for subscriptions to the game. As described above, ownership and control of the game passed through several different hands, with repeated attempts to re-launch the authorized version of the game. This is not particularly unusual; game providers come and go; they sometimes experience bankruptcies, and the assets of the company, including its content may well be acquired by a new owner. When a new owner attempts to re-launch a defunct game, or to attract players to refurbished content, the presence of copied alternates in other venues might prove a deterrent to success of the re-launch. Removal of copied content from Second Life or similar diaspora sites, perhaps under threat of legal liability, might encourage former players to return to the authorized version of the game if it becomes available once more.

5. Conclusion

In the actual *Uru* diaspora, the game publisher who holds the copyright to the appropriated content has been surprisingly indifferent to the unauthorized uses by former players (Pearce, 2010). But it need not have been, and other copyright owners in other situations likely would not be, as has been demonstrated in the case of on-line appropriation of copyrighted film and broadcast media content by fan communities (Consalvo, 2003). Additionally, the Terms of Service for most virtual worlds forbids infringing activity; to the extent that the unauthorized uses of *Uru* graphics in Second Life and other diaspora communities constitute infringement, the *Uru* migrants could be barred from their new places of residence for ToS violations (Burk, 2010b).

The analysis offered here suggests that even the most flexible exception to copyright, the American fair use provisions, offers little hope of validation for unauthorized cultural uses of virtual world materials. Thus, adoption of iconic graphic elements by on-line gaming communities presents something of a “Catch-22” situation. To the extent that the success of multiplayer games depends upon social networking, that network is necessarily built upon the sounds, graphics, and software that constitute the game, all of which are the subject of copyright. Yet this detailed analysis of the disposition of cultural icons in the *Uru* diaspora demonstrates the antipathy of copyright law to such unauthorized uses of material found in MMORPGs and similar virtual environments. The use of the iconic components of the game by the communities that are built upon those elements is restricted under the current copyright regime. Commentators have argued in favor of recognition of such communal and cultural uses

of copyrighted works (Chander and Sunder 2007) but the legal system has yet to adopt such arguments.

References

17. U.S.C. § 103 (2006).
 17. U.S.C. § 107 (2006).
 American Geophysical Union v. Texaco, Inc., 60F.3d 319 (2d Cir. 1994).
 Boellstorff, T. (2008). *Coming of Age in Second Life: An Anthropologist Explores the Virtually Human*. Princeton, NJ: Princeton University Press.
 Burk, D. L. (2010a). Copyright and Paratext in On-Line Gaming. In C. Wankel and S. Malleck (Eds.), *Emerging Ethical Issues of Life In Virtual Worlds* (pp.33-53). Information Age Publishing.
 Burk, D. L. (2010b). Authorization and Governance in Virtual Worlds, *First Monday*, 15(5) <http://www.uic.edu/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2967/2527>.
 Burk, D. L. (2005). Electronic Gaming and the Ethics of Information Ownership. *International Review of Information Ethics* 4, 39-45 <http://www.i-r-i-e.net/inhalt/004/burk.pdf>
 Burk, D. L. (2004). Legal Consequences of the Cyberspatial Metaphor. In M, Consalvo et. al., *Internet Research Annual: Selected Papers from the Association of Internet Researchers Conference, 2000- 2002 Vol. I.* (pp.17-24). New York: Peter Lang.
 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).
 Chander A. and Sunder M., (2007). Everyone's a Superhero: A Cultural Theory of 'Mary Sue' Fan Fiction as Fair Use, *California Law Review* 95, 597-625.
 Consalvo, M. (2003) Cyber-Slaying Media Fans: Code, Digital Poaching, and Corporate Control of the Internet. *Journal of Communication Inquiry*, 27, 67-86.
 Durham, A. (2001) Speaking of the World: Fact, Opinion, and the Originality Standard in Copyright, *Arizona State Law Journal*, 33, 791.
 Harper & Row v. Nation Enterprises, 471 U.S. 539 (1985).
 Lastowka, G. (2010). *Virtual Justice: The New Laws of Online Worlds*. New Haven: Yale University Press.
 Lemley, M. (1997). Dealing With Overlapping Copyrights on the Internet. *University of Dayton Law Review*, 22, 547-86.
 Lessig, L. (2004). *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*. New York: Penguin Press.
 Nardi, B.A. (2010). *My Life As A Night Elf Priest: An Anthropological Account of World of Warcraft*. Ann Arbor, MI: University of Michigan Press.
 Pearce, C. (2009). *Communities of Play, Emergent Cultures in MultiPlayer Games and Virtual Worlds*. Boston: MIT Press.
 Princeton University Press v. Michigan Document Services, Inc., 99 F.3d 1381 (6th Cir. 1996).
 Taylor, T. L. (2006). *Play Between Worlds: Exploring Online Game Culture*. Cambridge, MA: MIT Press.
 Tushnet, R. (2007). Copyright Law, Fan Practices, and the Rights of the Author. In J. Gray, C. Sandvoss, & C.L. Harrington (eds.) *Fandom: Identities and Communities in a Mediated World*. (pp.60-71). New York: New York University Press.
 Vaidhyanathan, S. (2004). *The Anarchist in the Library: how the clash between freedom and control is hacking the real world and crashing the system*. New York: Basic Books.
 Yen, A.C. (2006). Third-Party Copyright Liability After Grokster. *Minnesota Law Review* 91, 184-240.