

‘Chaotic Lawful’: Teaching Videogames in a Licensing and Permissions Lacuna

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‘Chaotic Lawful’: Teaching Videogames in a Licensing and Permissions Lacuna

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This short essay explores how the present coronavirus crisis and the resulting shift towards online teaching are intensifying the urgency of copyright issues concerning the use of digital content in higher education teaching contexts. This shift arguably aggravates the existing lack of permissions and licensing models that can accommodate videogame-related teaching in higher education. Writing in the broad context of teaching game studies, game design, game programming, game development, and computer arts in the UK, we draw on personal experience and a small informal survey conducted among colleagues in the academic community in order to offer a snapshot of issues currently experienced by educators. Our focus is on issues stemming from the use of audiovisual in-game content in lectures that are either streamed live or stored online for asynchronous student access, as well as the making available of videogames in playable formats to students in teaching contexts. In theory, it is likely that such uses will be covered by fair dealing/fair use exceptions; in practice, however, they may be misidentified as infringing, or as contravening institutional policy regarding the use of copyright-protected materials. As we want to argue, this is due to a combination of two main factors: the first, regarding the use and sharing of playable games, is that there is a lacuna of educational

licenses and permissions models; the second, concerning the online storage and dissemination of in-game content, is that the monitoring of such content is now often relegated to algorithmic digital rights management (DRM) systems that are unable to distinguish between permissible and infringing material.

In the current pandemic situation, this means that in order to develop and maintain a sustainable online teaching practice, videogame educators may need to adopt what we call a ‘chaotic lawful’ stance on intellectual property (IP) regulations. Referring to the world of fantasy role-playing games, this *portmanteau* invokes a character with the ethical alignment of an anti-hero who would like to play by the rules – if only the rules could reasonably and fairly accommodate the tasks at hand.

We begin with general remarks on copyright restrictions and fair dealing/fair use exceptions as they pertain to higher education teaching in videogame contexts. We then discuss responses to our survey, offering an overview of issues experienced by videogame educators in the field, as well as approaches they have developed to overcome these. We conclude with some suggestions for how the issues outlined in this essay could be addressed. Ultimately, our view is that the COVID-19 crisis and the resulting shift to online teaching is triggering increased awareness of copyright issues among instructors, which, we hope, may lead towards more concerted efforts of alerting and attuning the videogame industry to the needs of educators and students.

Relevant legal issues

Videogames are spectacularly complex media artefacts. They tend to feature layers of composite elements that copyright law may recognise as dramatic works, literary works, visual art, design, cinematic works, musical compositions, or choreography. In the online teaching contexts we are addressing here, we are mainly concerned with the various exceptions to copyright law, designed to facilitate unsanctioned uses in educational

and research contexts. In theory, the uses outlined above are likely to be covered by fair dealing or fair use exceptions, such as they are provided, for example, in the UK Copyright, Designs and Patents Act 1988,^[11] and in the US Copyright Act of 1976^[12], as well as in various amendments and relevant case law.^[13] In the UK, section 29 of the Act specifies that the fair dealing defence applies in situations where the use occurs for the purpose of non-commercial research and study. Similarly, in the US legislation, paragraph 107 specifies that “teaching (including multiple copies for classroom use), scholarship, or research” do not infringe copyright. In practice however, such uses can easily fall prey to the algorithmic Digital Rights Management (DRM) tools now commonly used by popular online platforms to deal with the overwhelming task of monitoring ever-increasing amounts of user-generated content. Thus, by 2017 “platforms employing AI-driven, automated copyright enforcement schemes included Scribd, 4shared, Dropbox, YouTube, Facebook, SoundCloud, Twitch, TuneCore, Tumblr, Veoh, and Vimeo.”^[14] But, as numerous law and technology researchers have pointed out, algorithmic DRM systems are not currently capable of identifying uploads that may be covered by fair dealing or fair use exceptions.^[15] Consequently, permissible educational content may be flagged and removed along with all other materials identified by algorithmic copyright enforcement bots as presumptively infringing. For educators, this means that the use of popular platforms such as YouTube or Twitch, which offer a well-functioning and familiar experience that may boost student engagement, is not advisable, as it may lead to the blocking of teaching materials, which then require educators to go through complicated appeal processes to keep teaching materials available.^[16]

These issues are familiar from the related context of ‘Let’s Play’ or ‘LP’ videos (a hugely popular video format consisting mainly of in-game footage with added commentary). While such videos are likely to be covered by fair dealing/fair use exceptions that cover review and criticism, their legal status is far from settled.^[17] Just like teaching materials, LP videos are thus subject to automatic flagging and/or removal for

presumptive copyright infringement. A recent controversy involving the Twitch streaming platform, which is popular among gamers, encapsulates this well.^[8] In late October 2020, Twitch undertook a copyright ‘crackdown’ and informed thousands of users that DMCA takedown notices had been issued regarding their content, which was now subject to deletion or had already been deleted.^[9] Problematically, the company refrained from declaring which specific videos were subject to the claims, and did not outline how users could initiate appeals processes. Instead, Twitch directed affected users to a ‘mass deletion tool’ and recommended that in future uploads, they should mute game audio to avoid further legal complaints. Clearly, this approach cannot accommodate uploads that fairly use videogame content for legitimate purposes such as research, study, review, or criticism. Generally, educational content relating to videogames has relatively restricted circulation, which means that it may have skirted such issues – but with the increasing move to online instruction during the pandemic, more points of conflict with platforms and rights holders may arise.

Survey and discussion

Some initial impetus behind this paper came from an attempt by Abertay University lecturers and a librarian with subject-area expertise to utilise the Steam PC Café (SPCC) program, which is designed to offer multi-user access to videogames available through the popular Steam platform.^[10] While the SPCC program is commercial in nature, educational institutions such as schools and libraries are included in its list of eligible organisations. At Abertay University, the goal was to create a resource that would enable students to play assigned PC games, thereby facilitating a more robust and consolidated approach to the syllabus across two contextual courses of study. But the effort was soon put on hold when a number of issues arose: hardware requirements were difficult to balance with available resources; the platform’s frequent updates would require oversight by IT staff; it was not clear how the data collection protocols of

the platform would align with the university's data protection policies; and, perhaps most importantly, it was discovered that licenses for many of the games slated for inclusion in the syllabus (such as *Return of the Obra Dinn*, *Dear Esther*, *What Remains of Edith Finch* and *Hellblade: Senua's Sacrifice*) were not available through the program.

For those teaching game production, there are ever-advancing technical requirements for subjects dealing with game development, game programming, computer arts and game audio. Access to software such as Unreal, Unity, Blender, or 3DS Max can itself be an issue – while some of these are free to use for students, others follow subscription models or are prohibitively expensive, increasing the need for provision by universities. Including videogames in analytic and contextual studies modules also presents difficulties. Disciplines such as game studies, media studies, cultural studies and increasingly, literary and cinema studies may involve engagement with videogame texts.^[11] But hardware and software requirements and a lack of educational licenses mean that a 'ludography' can be difficult to arrange.

To gain preliminary insight about these and related issues, we surveyed a small group of game educators (14 respondents) recruited through the Gamesnetwork mailing list and personal networks. The intention was to explore what methods instructors are developing for navigating copyright restrictions in videogame pedagogy, particularly in the context of the increase in online teaching during the pandemic.^[12] Most of the anonymous respondents (8) identified as teaching game studies or contextual studies, with slightly fewer teaching game development (4) and design (2) respectively. We recorded responses from anglophone contexts such as the UK, North America, and Australia, as well as from Germany, South Africa and Malta. Only about a third of respondents (5) indicated that their home institution employs a librarian with expertise in videogames licensing issues. Asked whether their institutions had licensing agreements or subscription services with game developers that would be the equivalent of educational licenses for audio-visual content, most instructors (7) replied in the negative; only 3 replied yes, and 4 did

not know. The majority of respondents noted that streaming platforms are important to their online teaching practice, with 11 instructors indicating that they use YouTube and Twitch, despite the issues we outlined above. Qualitative responses to additional survey questions suggested that with little time and resources, educators are identifying issues as they arise, and are developing a variety of emergent tactics and solutions in response, depending on their area of teaching and differing levels of professional support available at their institution. Many agreed that the shift to online teaching strongly impacted their teaching practice. For example, one respondent noted that while they had previously allowed students to play games on the instructor's own laptop in order to compensate for the lack of institutional/educational licenses, this was no longer possible in online teaching contexts. Another instructor noted that to make up for the lack of remote access to games, they now run livestreams in which they themselves play the games and provide commentary, with the result that what once had been a student-led seminar now felt more one-sided. One instructor also noted that their online teaching practice has led to copyright 'strikes' on YouTube.

The respondents also reported a wide range of workarounds concerning directly experienced and potential copyright issues. However, many of these workarounds place instructors in a grey area of IP law, where they may be in violation of institutional IP rules and protocols. For example, one respondent described that instead of publishing material publicly, they only make it available to their students in closed-access form. Another respondent reported their use of emulator software through which students can freely access ROM (read-only memory) copies of games, but recognised that such use was "sometimes dubious" (emulating hardware and software may be used for piracy, but it also has considerable potential value in game education and preservation). Other respondents noted that they are now trying to resort to assigning only freely available game texts, or to direct students to Twitch streaming channels showcasing relevant games.

Overall, our respondents revealed a wide range of approaches, but this variety also reflected underlying issues. Many respondents voiced concerns regarding the status quo, and expressed various requests to the games industry and policymakers. One educator noted that without equitable access to relevant materials in educational contexts, game literacy suffers considerably, and asked that “sharing licenses for education were made a core feature of all platform-holder policies going forward.” This request resonates through a number of responses, with several noting that fair dealing/fair use exceptions need to be extended and clarified for pedagogical scenarios. In this context, another, related concern became apparent, namely that in the current situation, institutional administrators (enforcing institution-specific regulation) are perceived as a potentially bigger issue than legal complaints from rightsholders.

Conclusion

Based on the feedback received from respondents, we perceive an urgent need, first and foremost, for more accessible and relatable information to be made formally available, so that educators can become better informed about their rights, potential legal issues, and the general lack of appropriate licensing and permissions models. As noted, a considerable number of respondents indicated that they were not well informed concerning existing rules, exceptions, or institutional support to deal with licensing issues. Educators cannot be expected to mount fair dealing/fair use defences and confidently implement best practices if they (and their institutions) lack vital information. But unfortunately, tools such as the *Code of Best Practices in Fair Use for the Visual Arts* (2015) or the *Documentary Filmmakers’ Statement of Best Practices in Fair Use* (2005) do not exist for videogame contexts.^[13]

Several tendencies became apparent from the feedback we received from respondents. In order to avoid potential infringement issues, educators now appear increasingly to point students to existing streaming sources (which could be described as a kind of relegation of liability); to increase their

focus on assigning open-access, free-to-use game texts (so that no IP issues can arise in the first place); and to share copyright-protected materials only in private, closed-access environments. These approaches are not solutions but compromises. What most of our respondents therefore call for in addition to better information being made available is, firstly, more robust fair dealing/fair use legislation that clarifies permissions for educational uses; and secondly, a much wider adoption of viable licensing solutions that accommodate educational uses.

In the US, exemptions to the DMCA (most recently in October 2018, lobbied for in part by the Museum of Art and Digital Entertainment) are first steps in the right direction.^[14] Specifically, exemptions to section 1201, which details anti-circumvention provisions, are making it easier (though by no means easy) to archive videogames and share them in certain contexts. However, these exemptions are framed in the explicit context of cultural preservation, and do not directly address the needs of educators. It can be expected that in the long term, the conceptualisation of videogames as cultural heritage will aid efforts to legalise educational uses of videogames. But for the moment, educators can hardly be expected to adapt insights from the intersections of legal theory, museum studies, history, and science and technology studies for classroom use.^[15] Similar exemptions have not been explicitly carved out in UK legislation, although there could, in theory, be accommodation by current formulations in the CDPA. In this sense, the fact that there is no statutory definition of fair dealing could work in favour of educators, but since detailed guidance tailored to specific teaching contexts is not available, it will be left to educators and their support staff to consider the legality and weigh the risks of their intended uses of videogame materials in teaching contexts. Officially government guidance, as far as it is available, tends to be offered in a logocentric register that intimates ignorance of the diversity of media formats potentially at play in contemporary classrooms, which will likely only further frustrate videogame educators.^[16] Much work remains to be done, therefore, to assemble guidance that can give educators the

confidence to embrace uses that are, as far as they can tell, of uncertain legal status.

As we have suggested, more inclusive educational licenses and permission models could also improve the situation. But the SPCC, as briefly discussed above, is currently of limited usefulness, both because it does not specifically accommodate the needs of digital classroom use, and because its catalogue of available games is limited. Given that educators are feeling pushed to develop alternative approaches, which may mean the exclusion of large swathes of difficult-to-access mainstream games from their syllabi, it strikes us as advisable for the videogame industry to take a proactive stance, and to join forces with educators in developing more useful licenses. A coordinated effort that includes the voices of policymakers, digital platforms, educators, and industry stakeholders could go a long way towards increasing copyright literacy and developing permissions models that can work to everyone's benefit.

The media available for instruction have always had important influence over the form and contents of media studies (broadly construed). Something like a 'reading list' is commonplace in literary studies, screenings are long-established pedagogical tools in cinema studies, and photography has been important in art history instruction. The seeming self-evidence of a screening schedule forming a critical part of a North American or European cinema studies class, however, masks considerable complexities and variegations across historical and regional contexts. This has been discussed in terms of 'shadow economies' of access to and distribution of film and video, whose legal status is often less than certain;^[17] additional research on techniques employed by educators in regions beyond our limited survey would be valuable.

The range of approaches and issues found in our small-scale survey of digital games educators indicates similar processes, which appear to be due in part to resourcing of their work, and partly due to the messy state of existing legal frameworks and automated infringement-detection systems. In practice, our snapshot indicates that educators teaching in the wide

landscape of videogame-related fields approach their work like Lévi-Straussian *bricoleurs*. The general move to online instruction during the COVID pandemic is bringing this into sharp relief, and renders educators as what we have called, in our introduction, ‘chaotic lawful’ actors. They increase their use of and reliance on alternative materials that are freely available; they slyly circumnavigate legal pitfalls by referring students to useful materials that are potentially infringing copyright laws, but were uploaded by someone else and are available outside university websites; they erect digital access restrictions so that uses which they consider fair, but which may be (mis-)identified as copyright violations can be kept from detection through DRM bots. But all the while, they also call for clarification of legal uncertainties, and for the development and larger-scale adoption of educational licensing and permissions models that support education rather than pushing it into the grey areas of legality. There are, perhaps, some silver linings to these developments: for example, in the absence of education-friendly formal frameworks, educators’ use of alternative materials boosts the popularity of open-source, community-oriented game development and digital storytelling tools such as Twine, RenPy, or Bitsy, as well as open access indie games.^[18] It has been our experience that this can widen students’ focus beyond the mainstream videogame industry and heavily marketed texts. This does not mean, however, that reform of restrictive licensing conventions and overzealous DRM enforcement isn’t urgently needed. At this time of social distancing, when videogames and the diverse ways of remote interactions they offer are becoming more important than ever, equitable access to games is crucially important for increasing videogame literacy in and beyond educational contexts.

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intellectual property issues. Martin is co-editor (with Rosemary J. Coombe and Darren Wershler) of *Dynamic Fair Dealing: Creating Canadian Culture Online* (Univ. of Toronto Press 2014). His work has also appeared in publications including *Philosophy & Technology*, *Culture Machine*, *Computer Music Journal*, *Artists Re:Thinking the Blockchain* (Liverpool Univ. Press 2017), or the *MoneyLab Reader 2* (Institute for Network Culture 2018). Martin will be a plenary speaker at the Critical Legal Conference 2021 in Dundee, Scotland. A topical monograph, *Portrait of the Artist Without Agency: AI Art and the Limits of IP*, is forthcoming with meson press in early 2021.

Darshana Jayemanne is Lecturer in Art, Media and Computer Games at Abertay University and the author of *Performativity in Art, Literature and Videogames* (Palgrave MacMillan 2017). This book's title names many of his main research interests, and develops a media studies approach to performance in digital space and time. He was Co-Investigator on the AHRC-funded "Reality Remix" project. He has served as a jurist on the Independent Games Festival's Award for Narrative Excellence, was convenor of the *Game Engines Beyond Games* symposium with Babycastles Gallery in New York City and organiser of *Keywords in Play*, an interview series highlighting diverse games research.

His academic work has appeared in *Games & Culture*, *The Journal of Broadcasting and Electronic Media*, *ToDiGRA*, *Fibreculture Journal*, and *Westminster Papers in Communication and Culture*. His work also encompasses issues of youth safeguarding in digital games which is the subject of ongoing research supported by the Carnegie Trust. He has spoken on this topic for the BBC and co-authored *Why Game Designers need to engage with parents to keep their communities healthy*, a white paper with Roblox and the Fair Play Alliance.

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1. [Copyright, Designs and Patents Act 1988](#). (UK) Accessed 9 December, 2020. [↑]
 2. [Copyright Act of 1976](#). (US) Accessed 9 December, 2020. [↑]

3. Since we are based in Scotland, we are writing within the context of UK law; it must be kept in mind, however, that given the 'online' nature of many of the uses under discussion, the IP regulations of other jurisdictions will often override those valid at the teaching location. [↑](#)
4. Sag, Matthew. 2017. "Internet Safe Harbors and the Transformation of Copyright Law." *Notre Dame Law Review* 93(2), 499–564: 539. [↑](#)
5. Zeilinger, Martin. 2021. *Portrait of the Artist Without Agency: AI Art and the Limits of IP*. Lüneburg: Meson Press. [↑](#)
6. See Edwards, Dustin W. 2018. "Circulation Gatekeepers: Unbundling the Platform Politics of YouTube's Content ID." *Computers and Composition* 47: 61–74. Also see Longo and Solomon, this issue. [↑](#)
7. See Taylor, Ivan. 2015. "Video Games, Fair Use and the Internet: The Plight of the Let's Play." *University of Illinois Journal of Law Technology and Policy* 1: 247-270. [↑](#)
8. See Stephen, Bijan. 2020. "[Twitch streamers are getting DMCA takedown notices \(again\)](#)." Accessed 9 December, 2020; and Brodtkin, Jon. 2020. "[Twitch explains confusing copyright crackdown, urges users to delete videos](#)." *ArsTechnica.com*. Accessed 9 December, 2020. [↑](#)
9. The [Digital Millennium Copyright Act](#) (DMCA) is a copyright statute from 1998, designed to align U.S. legislation with World Intellectual Property Organization (WIPO) treaties from 1996. Widely applicable to materials uploaded to the Internet from around the world, it regulates direct and indirect liabilities of intermediaries such as Internet Service Providers (ISPs). [↑](#)
10. Steam, n.d. "[Steam PC Café Program](#)." Accessed 9 December, 2020. [↑](#)
11. See Fernandez-Vara, Clara. 2014. *Introduction to Game Analysis*. New York, NY: Routledge; Payne, Matthew and Jennifer Malkowski. 2019. *Playing With Game Studies: A Pedagogy Workshop*. SCMS 2019. [↑](#)
12. Zeilinger, Martin, and Darshana Jayemanne. 2020. *Copyright and Game Education Questionnaire*. Available upon request. [↑](#)
13. [Code of Best Practices in Fair Use for the Visual Arts](#). 2015. Accessed 9 December, 2020; [Documentary Filmmakers' Statement of Best Practices in Fair Use](#). 2005. Accessed 9 December, 2020. [↑](#)
14. Hansraj, Keton. 2018. *Electronic Frontier Foundation*. "[The Expanded DMCA Exemption for Video Game Preservation Grants a Small Victory Amidst the Seventh Triennial Rulemaking](#)." Accessed 12 December 2020. [↑](#)
15. A good survey of the key stakes in this discussion is offered in Guay-Bélanger, Dany. 2018. "[Deadplay: a Methodology for the Preservation and Study of Videogames as Cultural Heritage Artifacts](#)." Accessed 12 December 2020. [↑](#)
16. UK Intellectual Property Office. 2014. "[Guidance: Exceptions to copyright](#)." Accessed 12 December 2020. [↑](#)
17. Lobato, Roman. 2012. *Shadow Economies of Cinema: Mapping Informal Film Distribution*. London: British Film Institute. [↑](#)
18. [Bitsy Game Maker](#); [RenPy Visual Novel Engine](#); [Twine](#). All accessed 9 December, 2020. [↑](#)