

**CHANGING THE RULES OF THE GAME: HOW VIDEO GAME
PUBLISHERS ARE EMBRACING USER-GENERATED
DERIVATIVE WORKS**

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I. INTRODUCTION

It was the kind of Cinderella success story of which most people can only dream. A group of friends turned their short, unfunded films into a genre phenomenon, with nearly one million viewers eager to watch each new installment as soon as it was released.¹ They received critical acclaim from sources such as the BBC and The Village Voice,² held sold out screenings at Lincoln Center,³ and were hired to create a series of broadcast commercials for Electronic Arts based on their films.⁴ They made enough money to quit their day jobs and support themselves as full-time artists doing what they loved.⁵ The

* Harvard Law School, Candidate for J.D., 2009. The author thanks Urska Velikonja, Richard L. Heppner, Jr., Sean N. Kass, M. Brent Byars, Steven J. Horowitz, Renee Lloyd, and Anthony M. Heckmann for their helpful feedback in the development of this Note.

1. Clive Thompson, *The Xbox Auteurs*, N.Y. TIMES, Aug. 7, 2005, § 6 (Magazine), at 21, available at <http://www.nytimes.com/2005/08/07/magazine/07MACHINI.html>.

2. *See id.*

3. Kevin J. Delaney, *When Art Imitates Videogames, You Have "Red vs. Blue,"* WALL ST. J., Apr. 9, 2004, at A1.

4. *Red vs. Blue: The Cash Is Always Greener*, FORBES.COM, Dec. 14, 2006, http://www.forbes.com/2006/12/10/red-vs-blue-tech-cx_de_games06_1212cash.html.

5. *See* Thompson, *supra* note 1, at 22.

group of friends, now known as Rooster Teeth Productions,⁶ became one of the first breakout stars in a relatively new art form called machinima — a portmanteau of machine and cinema, pronounced ma-SHEEN-i-ma — that re-imagines video games as a filmmaking medium.⁷

Rooster Teeth's breakthrough hit was a surrealist comedy series entitled *Red vs. Blue*, created using Microsoft's hugely successful⁸ first-person shooter video game, *Halo*. The main story of the *Halo* series features human soldiers with an array of weapons and transport vehicles battling their alien enemies.⁹ *Red vs. Blue* largely eschewed the dramatic interstellar storyline of the game in favor of an exploration of the relatively mundane interactions among the human soldiers during their down time.¹⁰ The episodes feature existential arguments and an absurd sensibility that drew comparisons to Samuel Beckett, the playwright of *Waiting for Godot*,¹¹ while simultaneously winning the approval and praise of soldiers deployed in Iraq.¹² Rooster Teeth developed episodes by first writing and recording dialogue, then animating the video by networking multiple Xbox game consoles, each running a copy of *Halo*.¹³ One actor simulated a camera, composing the shot by manipulating his game character's point of view and then recording what appeared on the screen.¹⁴ The other game characters were manipulated like puppets, moving in synchronization with the pre-recorded dialogue.¹⁵

By using an existing video game's graphics and characters, and sometimes its sounds and music, an amateur machinimist can create what looks like a reasonably high quality, computer-animated film at a relatively low cost. However, this powerful mechanism is also machinima's greatest liability: by incorporating existing copyrighted assets, machinimists are creating derivative works, and thereby possibly infringing the copyright holders' rights under the Copyright Act.¹⁶ While some machinima may be protected under the doctrine of

6. The Rooster Teeth home page can be found at <http://rvb.roosterteeth.com/home.php> (last visited May 12, 2008).

7. See Thompson, *supra* note 1, at 22.

8. See Press Release, Microsoft Corp., "Halo: Combat Evolved" for Xbox Tops 1 Million Mark in Record Time (Apr. 8, 2002), available at <http://www.microsoft.com/presspass/press/2002/Apr02/04-08HaloMillionPR.msp>.

9. See Xbox.com, Halo — Game Detail Page, <http://www.xbox.com/en-US/games/h/halo> (last visited May 12, 2008).

10. See Thompson, *supra* note 1, at 22, 24.

11. Delaney, *supra* note 3.

12. Thompson, *supra* note 1, at 24.

13. See *id.* at 22–23.

14. *Id.* at 23.

15. *Id.* at 23–24.

16. Section 101 of the Copyright Act provides the definition of a derivative work:

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization,

fair use¹⁷ (a highly fact-specific affirmative defense), the economic risk inherent in relying on the doctrine — not to mention the up-front costs of defending a lawsuit or seeking a declaratory judgment — would require most machinimists to yield to a cease and desist notification if a copyright holder objected.¹⁸ Alternatively, fear of liability could cause budding machinimists to abandon their work altogether.

Fortunately for machinima, video game publishers seem to have recognized that suppressing machinima would not be in their best interests. Microsoft even allowed Rooster Teeth to continue producing *Red vs. Blue* without paying licensing fees.¹⁹ However, the majority of machinimists — who had not negotiated individual licenses — continued to create under the specter of legal uncertainty. For many, this changed in August 2007,²⁰ when Microsoft issued the Game Content Usage Rules, which unilaterally licensed the limited use of copyrighted content from many of their video games to create new derivative works.²¹ Soon after Microsoft issued its new rules, Blizzard Entertainment followed suit with its Letter to the Machinimators of the World, which also licensed the limited use of their game *World of Warcraft* for the creation of machinima.²²

fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work.”

17 U.S.C. § 101 (2000 & Supp. V 2006). The copyright owner of the original work has the exclusive right to prepare derivative works. 17 U.S.C. § 106(2) (2000).

17. The fair use of a copyrighted work for certain purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not copyright infringement. *Id.* § 107. Several factors are considered in determining whether the use of a work is fair use. *See id.* (enumerating factors). For an analysis of the copyright liabilities of machinima creators beyond the scope of this Note, see generally Matthew Brett Freedman, Note, *Machinima and Copyright Law*, 13 J. INTELL. PROP. L. 235 (2005).

18. For an in-depth discussion of the practical limitations of fair use, see generally LAWRENCE LESSIG, *FREE CULTURE* (2004), available at <http://www.free-culture.cc/freeculture.pdf>; Michael W. Carroll, *Fixing Fair Use*, 85 N.C.L. REV. 1087 (2007).

19. Thompson, *supra* note 1, at 24.

20. *See* DonkeyXote Tells All, Game Content Usage Rules — I Kinda Make News, <http://donkeyxote.spaces.live.com/blog/cns!239CCA3F6918F4C1!323.entry> (Aug. 14, 2007, 6:04 PM) (“[T]he general rule is that if you’re doing a non-profit activity that’s not otherwise objectionable and doesn’t try to tell the ‘hidden story’ of one of our games, you’ll be allowed.”). The author of the blog DonkeyXote Tells All, Don McGowan, is legal counsel to Microsoft. Don McGowan, *Legal Doesn’t Think the Way You Do*, MSDN MAG., Mar. 2006, [http://msdn.microsoft.com/msdnmag/issues/06/03/EndBracket](http://msdn.microsoft.com/msdnmag/issues/06/03/EndBracket;); Monty Phan, *Machinima Licenses Spell out New Rules for Creators*, WIRED.COM, <http://www.wired.com/culture/art/news/2007/09/machinimalicenses> (Sept. 28, 2007, 12:00 AM).

21. *See* Xbox.com, Game Content Usage Rules, <http://www.xbox.com/en-US/community/developer/rules.htm> (last visited May 12, 2008).

22. WorldofWarcraft.com, Letter to the Machinimators of the World, <http://www.worldofwarcraft.com/community/machinima/letter.html> (last visited May 12, 2008).

This Note describes and analyzes these new rules. Part II introduces Microsoft's and Blizzard's new rules for the creation of machinima and concludes with a comparison of the two documents. Part III offers an analysis of the new rules. Part III.A considers the effect of the rules on creators of new works, arguing that while the new rules may be beneficial to new creators from a legal standpoint, they may not have a substantial effect on the creation of new works as a practical matter. Part III.B considers the effect of the new rules on current owners of copyrighted works, arguing that the new rules benefit current rights holders by entrenching, and perhaps extending, the owner's control over her works. Part III.C concludes that the new rules are ultimately imperfect, and proposes the creation of a more universal licensing system.

II. THE NEW RULES

A. Microsoft's Game Content Usage Rules

In August 2007, Microsoft released the first version of the *Game Content Usage Rules* ("Microsoft Rules").²³ Some members of the machinimist community initially misunderstood the legal significance of the original Microsoft Rules and responded with anger and frustration.²⁴ Microsoft then chose to redraft and clarify the rules; the company posted a revised version later that year after consulting with Hugh Hancock, co-author of *Machinima for Dummies*, and Fred von Lohmann, a senior staff attorney at the Electronic Frontier Foundation.²⁵ The current version of the Microsoft Rules is available at Xbox.com.²⁶

23. See Xbox.com, *supra* note 21.

24. One popular machinima group described the Microsoft Rules as "strangl[ing] the infant in its crib" when explaining why they would no longer be producing their series based on *Halo 2*. Apparently, they interpreted the Microsoft Rules to prohibit their series. See Edgeworks Entm't, Microsoft 1, Community 0, <http://www.thecodexseries.com/forum/index.php?showtopic=7735> (Aug. 15, 2007, 12:26 PM). Some machinimists did not understand that the Microsoft Rules benefited them; they did not realize that the Microsoft Rules did not (and, as a unilateral license, legally could not) reduce any preexisting rights, but instead expanded machinimists' rights by explicitly allowing limited uses of Microsoft's intellectual property.

25. See DonkeyXote Tells All, Game Content Usage Rules — Discussion This Morning, <http://donkeyxote.spaces.live.com/blog/cns!239CCA3F6918F4C1!332.entry> (Aug. 30, 2007, 11:45 AM); Posting of Hugh "Nomad" Hancock to Machinima for Dummies: Blogging the Book, Game Content Usage Rules from Microsoft — the HUUUUGE but Calming Post, <http://www.machinimafordummies.com/articles/2007/08/31/game-content-usage-rules-from-microsoft-the-huuuuge-but-calming-post> (Aug. 31, 2007); DonkeyXote Tells All, Game Content Usage Rules Updated, <http://donkeyxote.spaces.live.com/blog/cns!239CCA3F6918F4C1!348.entry> (Oct. 8, 2007, 4:59 PM).

26. Xbox.com, *supra* note 21.

The Microsoft Rules purport to make it easier for fans to make “Items,” which is loosely defined as “things like machinima, videos, and other cool things,” from “gameplay footage, screenshots, music, and other elements of our games (‘Game Content’).”²⁷ Under the Microsoft Rules, Microsoft grants a “personal, non-exclusive, non-transferable license to use and display Game Content and to create derivative works based upon Game Content,” so long as the use is noncommercial.²⁸ Microsoft has reserved the right to revoke this limited use license at any time, for any reason.²⁹ Licensees must include with their works a Microsoft copyright notice that explains that the Item was created under the terms of the Microsoft Rules.³⁰ The license extends beyond the *Halo* games to include many other Microsoft games, although the Microsoft Rules carefully note that the license does not include non-Microsoft intellectual property. For instance, the Microsoft Rules note that the individual vehicle designs in *Forza Motorsport*, a racing simulation that features models of real cars, do not belong to Microsoft and require “permission from their manufacturer.” Similarly, they caution that soundtracks and audio effects from some games may not be owned by Microsoft and are therefore not covered under the license.³¹

Other restrictions on the license include: prohibitions against “reverse engineer[ing] our games to access the assets or otherwise do[ing] things that the games don’t normally permit in order to create your Items”;³² infringing any entity’s intellectual property rights in the Item, including Microsoft’s own trademarks; and using Game Content to create pornographic, obscene, “vulgar, racist, hateful, or otherwise objectionable content.”³³ The Microsoft Rules also contain a clever solution to the “fan fiction problem.”³⁴ They include a provision that

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* “[Licensees] can put [the notice] 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 [the licensee’s] Item will also find this notice.” *Id.* The complete language that must be included is “[The title of your Item] was created under Microsoft’s ‘Game Content Usage Rules’ using assets from GAMENAME, © Microsoft Corporation.” *Id.*

31. *Id.* Microsoft does note that music from *Halo 3* is available thanks to an arrangement with the composers. *Id.*

32. Reverse engineering of encrypted game disks to access copyrighted content is generally prohibited by the Digital Millennium Copyright Act (“DMCA”). See 17 U.S.C. § 1201(a)(1) (2000) (prohibiting the circumvention of a technological measure that controls access to a protected work). However, certain applications of reverse engineering are still permitted under the DMCA. See, e.g., *id.* § 1201(f)(1) (allowing reverse engineering where necessary for the purposes of achieving interoperability). The Microsoft Rules, therefore, do not license works created in violation of the DMCA.

33. Xbox.com, *supra* note 21. Microsoft adds the interpretive aid “you know it when you see it.” *Id.*

34. The “fan fiction problem” refers to the entertainment industry’s concern that an author of derivative works will independently create a plot that the original author later

distribution of a derivative work that adds to the game universe or the story constitutes a “royalty-free, non-exclusive, worldwide, license to Microsoft” and its partners.³⁵ Licensees may grant other people the right to build on their Items, but the Microsoft Rules cover anything built by such third parties.³⁶

Microsoft clarifies its noncommercial limitation by stating that licensees cannot “sell or otherwise earn anything from [their] Items,” which includes: using an Item to solicit donations, using it to enter a contest or sweepstakes, and placing the Item on the same web page as other, unrelated items that are for sale.³⁷ However, pursuant to the Microsoft Rules, licensees may post their works on web pages with advertising, or enter their works into film festivals for prize consideration.³⁸ Licensees may also store their Items on third-party sites,³⁹ which, according to Microsoft legal counsel Don McGowan’s personal blog, would include video-sharing websites such as YouTube or the Microsoft-owned Soapbox.⁴⁰ The Microsoft Rules inform creators that activities they currently do not cover can be negotiated in a commercial license, and provide a dedicated e-mail account by which to contact Microsoft for that purpose.⁴¹ The Rules end with the comment that Microsoft is also willing to negotiate with festival organizers who create and distribute festival DVDs.⁴²

B. Blizzard Entertainment’s Letter to the Machinimators of the World

Within a few weeks, Blizzard Entertainment (“Blizzard”) joined Microsoft in authorizing some machinima with its Letter to the Machinimists of the World (“Blizzard Letter”),⁴³ which is posted online on WorldofWarcraft.com.⁴⁴ The Blizzard Letter begins by stating that Blizzard “strongly supports the efforts [of] its *World of Warcraft* community members who produce ‘Machinima[]’ movies . . . using video images, footage, music, sounds, speech, or

chooses to implement, prompting the derivative author to file suit against the original author for stealing its fan-created work. See DonkeyXote Tells All, Game Content Usage Rules — People Hate Me!, <http://donkeyxote.spaces.live.com/blog/cns!239CCA3F6918F4C1!328>.entry (Aug. 26, 2007, 1:46 PM).

35. Xbox.com, *supra* note 21.

36. *See id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. DonkeyXote Tells All, Game Content Usage Rules Updated, <http://donkeyxote.spaces.live.com/blog/cns!239CCA3F6918F4C1!348>.entry (Oct. 8, 2007, 4:59 PM).

41. Xbox.com, *supra* note 21.

42. *See id.*

43. *See* Phan, *supra* note 20.

44. Blizzard Entm’t, Letter to the Machinimators of the World, <http://www.worldofwarcraft.com/community/machinima/letter.html> (last visited May 12, 2008).

other assets from its copyrighted products.”⁴⁵ The Blizzard Letter then sets out “The Fundamental Rule,” specifying that “Blizzard Entertainment requires that the use of *World of Warcraft* and other Blizzard products must be limited to noncommercial purposes.”⁴⁶

Under the Blizzard Letter, the creation and distribution of machinima is permitted so long as “viewers can freely view” the work without being forced to pay a fee.⁴⁷ This requirement is somewhat fluid, as Blizzard does allow websites that host the work to offer “premium access” membership service plans for a fee, so long as there is a free method that also allows viewers to see a version of the work.⁴⁸ The work may not be licensed or sold for any form of compensation without specific written permission from Blizzard.⁴⁹ However, Blizzard does permit the display of artist or contest sponsors’ logos at the beginning of a production, as well as “verbal mentioning” of sponsors’ names, so long as sponsor promotion does not total more than ten seconds per work, and the text “sponsored by” appears during the display of logos.⁵⁰ Blizzard also encourages use of its game assets for educational purposes, subject to all of the same limitations.⁵¹ Blizzard provides a dedicated e-mail address to handle questions relating to the machinima guidelines in the Blizzard Letter.⁵²

Blizzard also restricts their license to works that maintain the standard encompassed by the Entertainment Software Review Board (“ESRB”) “T” rating.⁵³ Somewhat ambiguously, the Blizzard Letter states that if a machinimist is “required to prove to the contest organizer, festival committee, or television broadcaster that [he or she has] Blizzard Entertainment’s permission to use the images or video from *World of Warcraft* that appear in [the] Production, a content use license is provided.”⁵⁴ The passive voice, “a content use license is provided,” makes it unclear exactly how the license is provided, but the language preceding and following the phrase indicate that such a license probably would be limited to the specific event and methods

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* The T (Teen) ESRB rating indicates content that “may contain violence, suggestive themes, crude humor, minimal blood, simulated gambling, and/or infrequent use of strong language.” ESRB, Game Ratings & Descriptor Guide, http://www.esrb.org/ratings/ratings_guide.jsp (last visited May 12, 2008).

54. Blizzard Entm’t, *supra* note 44.

for which the license was issued; if so, machinimists would have to request a different license from Blizzard for each individual event.⁵⁵

C. Comparison of the Rules

Microsoft's and Blizzard's game users have different sets of background rights. Unlike Microsoft, Blizzard issues an End User License Agreement ("EULA") for some of its games, including the massively popular, multiplayer online role-playing game *World of Warcraft*.⁵⁶ Section 4.A of the EULA states that users "may not, in whole or in part, copy, photocopy, reproduce . . . or create derivative works based on the Game."⁵⁷ Since the Seventh Circuit held in *ProCD, Inc. v. Zeidenberg*⁵⁸ that shrink-wrap licenses are not preempted by the Copyright Act and are enforceable contracts under the Uniform Commercial Code,⁵⁹ such EULAs have generally been considered enforceable even when they reduce the rights extended to users under the Copyright Act.⁶⁰ Therefore, Blizzard's EULA appears to preclude any claim of fair use protection for creating derivative works such as machinima,⁶¹ requiring machinimists using Blizzard assets to closely follow the contours of any license in order to avoid creating an infringing work.

While Blizzard game users have arguably given up their fair use rights to some Blizzard content by agreeing to the Blizzard EULA, Microsoft's game users retain fair use rights to Microsoft content.⁶² The Microsoft Rules also seem to anticipate user-generated works beyond just machinima and video (described as "other cool things"),⁶³ while Blizzard's Letter only explicitly addresses machinima, with no mention of other types of derivative works.⁶⁴ Aside from these differences, the Microsoft Rules and Blizzard Letter are similar in what they do and do not permit. Works under either license must be noncommercial and both licenses subject works to content restrictions

55. *See id.*

56. *See* Phan, *supra* note 20.

57. Blizzard Entm't, World of Warcraft End User License Agreement (Mar. 2, 2007), <http://www.worldofwarcraft.com/legal/eula.html>.

58. 86 F.3d 1447 (7th Cir. 1996).

59. *Id.* at 1455.

60. *See* Davidson & Assocs. v. Jung, 422 F.3d 630, 639 (8th Cir. 2005) (enforcing Blizzard's EULA where it restricted all reverse engineering); Bowers v. Baystate Techs., Inc., 320 F.3d 1317, 1327 (Fed. Cir. 2003) (enforcing a shrinkwrap license that prohibited "all reverse engineering of [the licensor's] software, protection encompassing but more extensive than copyright protection"). *But see* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.01 (2007) ("[T]he rule safeguarding contract causes of action against copyright pre-emption is less than categorical.").

61. *See* Phan, *supra* note 20.

62. *See id.*; *supra* notes 57–60 and accompanying text.

63. Xbox.com, *supra* note 21.

64. Blizzard Entm't, *supra* note 44.

designed to keep the derivative works relatively inoffensive. However, each company defines commercial use and content restrictions slightly differently.

Blizzard's content restriction is somewhat stricter than Microsoft's: while works licensed under Blizzard's license are limited to "suggestive themes" and "minimal blood,"⁶⁵ Microsoft's license potentially allows a broader range of content, so long as it is not pornographic, obscene, vulgar, racist, hateful, or otherwise objectionable.⁶⁶ This difference in content restrictions may be partly explained by the difference in the publishers' own games: while *World of Warcraft* carries a T (Teen) ESRB rating, the *Halo* series is rated M (Mature).⁶⁷

Microsoft's requirements for the noncommercial nature of the derivative work are much stricter than Blizzard's. Microsoft specifically forbids placement of the work on a website that requires a subscription or other fees; Blizzard allows this as long as the website provides a free viewing option.⁶⁸ Microsoft does not permit the use of the work to solicit donations; Blizzard does not address this issue. Blizzard also expressly allows for inclusion of sponsor names and logos. The Microsoft Rules do not directly address sponsorship, although sponsorship may be prohibited by their basic restrictions, which do not permit posting the work on a web page used to sell even unrelated items.⁶⁹ Despite these restrictions, both Microsoft and Blizzard appear to anticipate a desire for commercial licenses, with each publisher noting the possibility for individuals to negotiate commercial licenses.⁷⁰

The two documents also differ in their treatment of media embedded within the games. While Microsoft clearly states that sound effects and music are usually not licensed by the Microsoft Rules since Microsoft often licenses these works itself, Blizzard allows the use of "video images, footage, music, sounds, speech, or other assets from its copyrighted products,"⁷¹ language which appears to license

65. *Id.*

66. Xbox.com, *supra* note 21.

67. Blizzard Entm't, *supra* note 44; Microsoft.com, Halo: Combat Evolved, <http://www.microsoft.com/games/halo> (last visited May 12, 2008). M rated titles "may contain intense violence, blood and gore, sexual content and/or strong language." ESRB, *supra* note 53.

68. Blizzard Entm't, *supra* note 44 (explaining that "as long as the website that hosts your Production provides a free method to allow viewers to see the Production, Blizzard Entertainment will not object to your Production being hosted on that site, regardless of the site's 'for pay' premium service plans"), Xbox.com, *supra* note 21 (restricting licensees from "post[ing] [Items] on a site that requires subscription or other fees").

69. Xbox.com, *supra* note 21 (restricting licensees from "post[ing] [Items] on a page [the licensee] use[s] to sell other items (even if those other items have nothing to do with Game Content or Microsoft)").

70. See Blizzard Entm't, *supra* note 44; Xbox.com, *supra* note 21.

71. Blizzard Entm't, *supra* note 44.

music, sounds and speech, so long as Blizzard itself also has the right to license these assets. Unlike Microsoft, Blizzard also does not explicitly limit the machinimists' freedom to use, remix, and expand on their existing plots and storylines.⁷²

III. ANALYSIS OF THE NEW RULES

A. *The New Rules and Creators of New Works*

It is unclear exactly how these new licenses will affect machinimists. From a licensing perspective, they represent a positive development for user-generated derivative works. Machinimists benefit by obtaining permissions they did not previously have, and because they have not lost any rights that they had before the publication of the new licenses.⁷³ Even if many of the uses permitted by the new rules are not truly "new," either because they were protected under the doctrine of fair use or because of copyright under-enforcement, the new rules' clear statement of permitted uses is a significant benefit to machinimists concerned about legal liability.

These clear rules reduce the need to rely on fair use and may encourage machinimists to produce derivative works. Fair use is a risky affirmative defense — it is a fact-intensive inquiry that requires a case-by-case analysis⁷⁴ — and this risk, combined with the high cost of litigation, deters at least some potential fair-users from engaging in such activity in the first place.⁷⁵ Pat Aufderheide and Peter Jaszi responded to an analogous fair use problem in documentary filmmaking by publishing a statement of fair use best practices for documentary filmmakers.⁷⁶ The authors reported that within two years

72. Compare Xbox.com, *supra* note 21, with Blizzard Entm't, *supra* note 44.

73. A unilateral permissive license like the Microsoft Rules or the Blizzard Letter could not, as a contractual matter, limit users' preexisting rights under the Copyright Act, such as fair use. Since these licenses were posted by the publishers on their websites, without notice, and with no requirement that users agree to them, there can be no consideration or acceptance, which would limit users' legal rights. See generally BLACK'S LAW DICTIONARY 349 (8th ed. 2004) (discussing unilateral contracts). This is in contrast to a EULA or a shrinkwrap license, which require the user to agree to their terms, thereby contractually binding the user and restricting her rights. See *supra* notes 59–60 and accompanying text. It should be noted that, in practice, the distinction may become blurred. For example, users of the online environment in the *World of Warcraft* could be asked to agree to the new terms of the EULA when they log on, and then the EULA would limit their pre-existing rights, regardless of the permissive Blizzard Letter.

74. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 581 (1994).

75. See Carroll, *supra* note 18, at 1096 ("As one might expect, potential fair users who seek to make public use of another's work often are deterred from engaging in a desired use by the uncertain scope of the fair use doctrine coupled with the high costs of litigation and the potentially enormous statutory damages that a court could award if it disagreed with the user's fair use judgment.")

76. Pat Aufderheide & Peter Jaszi, *Fair Use and Best Practices: Surprising Success*, INTELL. PROP. TODAY, Oct. 2007, at 26.

the statement had a profound effect on the documentary marketplace: filmmakers found clearance negotiations easier, and gatekeepers such as the Sundance Film Festival — which traditionally would have been wary of accepting a film without complete copyright clearances — were convinced by the statement to accept films that relied on fair use.⁷⁷ Similarly, some potential machinima creators may not have wanted to invest time and energy into creating a work without an explicit license, because they were concerned about the risk of receiving a cease and desist notice.

The optimistic view of these licenses is as follows: by explicitly stating what user-generated derivative works they will permit, these video game publishers could be writing the new norms of legal machinima, carving out and — one hopes — enlarging a legal sphere in which all creators, even the risk-averse, will feel welcome to participate. Furthermore, by clarifying the rights in machinima, Microsoft and Blizzard may be enabling machinimists to gain greater credibility in the larger artistic community by allowing machinimists to make it past gatekeepers, such as film festivals or other major media outlets, which might have been wary of accepting works of dubious legal status. Ideally, other video game publishers, or publishers of other media, will join Microsoft and Blizzard in explicitly allowing uses of their products in ways that encourage the development of new creative works.

However, it is possible to view the licenses with a more critical eye. Machinimists did not wait for licenses before they began creating, either because they were unaware of copyright liability, or because they were savvy enough to realize that regardless of the state of the copyright law, video game publishers were unlikely to prohibit these works for a number of reasons. First, it is practically impossible to enforce all copyright laws on the Internet. Not only are there too many offenders in too many places, but even sending a cease and desist notice is not economical when the copyright violation in question is noncommercial and unlikely to harm the market for the copyrighted work. In fact, machinima have proven much more likely to increase the market for the original game than to harm it.⁷⁸ Second, many content owners actually like machinima, recognize its marketing potential,⁷⁹ and actively encourage its growth by providing some machinimists (such as Rooster Teeth) with free commercial

77. *Id.*

78. For an in-depth discussion of the benefit of machinima to current content owners, see *infra* Part III.B.

79. Brian Jarrard, an employee of the Microsoft subsidiary that produces *Halo*, has said, “[t]here are people out there who would never have heard about *Halo* without ‘Red vs. Blue.’ It’s getting an audience outside the hardcore gaming crowd.” Thompson, *supra* note 1, at 24.

licenses.⁸⁰ Content owners have also added game features that make it easier to create machinima⁸¹ and even sponsored machinima contests.⁸² Third, the potential public relations backlash discourages most content owners from seeking legal action against machinimists, most of whom are members of the content owners' fan base.⁸³

As for the possibility that machinimists were simply unaware that they may have been exposing themselves to legal liability, a recent publication by American University's Center for Social Media suggests that many of the creators of user-generated content are "universally under-informed and misinformed about the law."⁸⁴

B. The New Rules and Current Content Owners

Content owners stand to benefit greatly from fan-created derivative works. Any video posted on YouTube could become a viral hit, which would bring an enormous amount of publicity to the underlying work at virtually no cost to the work's publisher.⁸⁵ As an added benefit, the type of advertising machinima provides is the kind one cannot buy, "a whiff of countercultural coolness, the sort of grassroots street cred that major corporations desperately crave but can never manufacture."⁸⁶ Major brands actively court user-generated content because of its perceived authenticity and creativity.⁸⁷ Fan communities are often a crucial part of strategic marketing campaigns, creating buzz and product awareness.⁸⁸ A large and healthy fan

80. *Id.*

81. *See id.* ("Microsoft has been so strangely solicitous that when it was developing the sequel to *Halo* last year, the designers actually inserted a special command — a joystick button that makes a soldier lower his weapon — designed solely to make it easier for Rooster Teeth to do dialogue.")

82. For example, in late 2007 Microsoft sponsored a *Halo 3* machinima contest, giving away a home theater system as a prize. Xbox.com, *Halo 3: A Call to Arms Machinima Contest* (Nov. 19, 2007), <http://www.xbox.com/en-US/games/h/halo3/news/20071119-machinimacontest.htm>. Similarly, in 2005, game designer Electronic Arts co-sponsored a machinima contest with the Southern California School of Cinema-Television based on its game *Sims 2*, with a grand prize of \$5,000 or a 4-week internship at Electronic Arts headquarters. GameSpot Staff, *EA, USC Staging 'Sims 2' Movie Contest*, CNET NEWS.COM, Apr. 26, 2005, http://www.news.com/EA,-USC-staging-Sims-2-movie-contest/2110-1043_3-5685096.html.

83. *See* Hugh "Nomad" Hancock, *supra* note 25.

84. PAT AUFDERHEIDE & PETER JASZI, *THE GOOD, THE BAD, AND THE CONFUSING: USER-GENERATED VIDEO CREATORS ON COPYRIGHT 1* (2007), available at http://www.centerforsocialmedia.org/files/pdf/good_bad_confusing.pdf.

85. In response to a search query of "machinima" on YouTube, six machinima boasted over four million views. YouTube, Search Results for Machinima, http://www.youtube.com/results?search_query=machinima&search_sort=video_view_count (last visited May 12, 2008).

86. Thompson, *supra* note 1, at 24.

87. *See generally* Trendwatching.com, Customer-made, <http://www.trendwatching.com/trends/CUSTOMER-MADE.htm> (last visited May 12, 2008).

88. *See, e.g.*, Affinitive, Case Study: Square Enix/Dragon Quest "Slime Knights," http://www.beaffinitive.com/clients/casestudy_dqviii.html (last visited May 12, 2008).

community can create and maintain an ongoing interest that can benefit publishers over time.⁸⁹ Consider the fan community at RoosterTeeth.com, which is composed of more than half a million registered users who have posted over twenty-five million messages since October 2004.⁹⁰

Video game publishers are aware of the marketing potential of machinima. Many game developers have designed their game architecture to facilitate video making and editing.⁹¹ Bungie Studios, the developer of the *Halo* series, recognized that *Red vs. Blue* was generating free exposure for *Halo* and reached out to Rooster Teeth to ensure the project's success.⁹² Microsoft, the owner of Bungie Studios at the time,⁹³ allowed Rooster Teeth to use *Halo* game content without paying licensing fees.⁹⁴ Microsoft later commissioned Rooster Teeth to create a series of *Red vs. Blue* episodes to play as advertisements for *Halo* on screens in game stores.⁹⁵ Rooster Teeth has also been commissioned by Electronic Arts⁹⁶ and Vivendi Universal Games⁹⁷ to create new machinima series based on their respective games: *The Sims 2* and *F.E.A.R.* The popularity of machinima reduced the incentive for publishers to assert their exclusive rights and shut down user-created productions.

Licensing the use of game content is unlikely to harm the publishers' existing business models. Machinima films will probably not hurt the market for interactive video games, particularly multiplayer games such as *Halo* and *World of Warcraft*. While it is possible that machinima could reveal a gameplay flaw or some other characteristic that would make the game less desirable, such information would undoubtedly be revealed in written reviews or by word of mouth, even without machinima.⁹⁸ Both Microsoft and

(describing the development of fan community as part of a marketing campaign for game publisher Square Enix's *Dragon Quest* series).

89. *See id.*

90. Rooster Teeth, Community Stats, <http://www.roosterteeth.com/members/stats> (last visited May 12, 2008).

91. *See* Thompson, *supra* note 1, at 24.

92. Greg Allen, *Virtual Warriors Have Feelings Too*, N.Y. TIMES, Nov. 14, 2004, § 2, at 27, available at <http://www.nytimes.com/2004/11/14/arts/14alle.html>.

93. Press Release, Microsoft Corp., Microsoft to Acquire Bungie Software (June 19, 2000), available at <http://www.microsoft.com/presspass/press/2000/Jun00/BungiePR.msp>.

94. Thompson, *supra* note 1, at 24.

95. *Id.*

96. *Id.* at 25.

97. Press Release, Games Press, To Promote F.E.A.R., Vivendi Universal Games Selects BeSeen Communications and Rooster Teeth Productions for Online Viral Campaign — Widespread P.A.N.I.C.S. Ensues (Nov. 17, 2005), available at http://www.machinimatedstudios.com/news_111705b.html.

98. Furthermore, such a video could likely be considered criticism and commentary, well within a traditionally robust and explicitly codified fair use. *See* 17 U.S.C. § 107 (2000). However, it is possible that Blizzard's EULA undermines a user's ability to use their assets even in a way traditionally protected by fair use. *See* *Bowers v. Baystate Techs., Inc.*, 320

Blizzard have employed content restrictions in their licensing rules, thus preserving their ability to take legal action against machinima that tarnish their trademarks or associate them with obscene or otherwise objectionable content.⁹⁹

Furthermore, licensing machinima may actually serve to protect Microsoft and Blizzard's existing rights. Had Microsoft and Blizzard not issued their licenses and instead tried to limit the use of their works, they might have been met with a defense of estoppel or implied license because they had allowed unauthorized infringement to continue over a prolonged period of time.¹⁰⁰ An analogy can be drawn to a current lawsuit involving a print version of the Harry Potter Lexicon, a popular fan website that provides an exhaustive guide to the *Harry Potter* series of books and movies.¹⁰¹ In their complaint, the intellectual property holders of the *Harry Potter* works attempt to preempt a possible defense based on implied license, distinguishing the permitted fan website from the printed book.¹⁰² In a declaration filed with the court, J.K. Rowling, the author of the *Harry Potter* series, maintained that the support she had previously shown to the noncommercial website was never meant to endorse unauthorized commercial use of her works.¹⁰³ Rowling expressed her concern that a judgment in favor of the defendant might cause authors, who fear losing their right to prohibit unauthorized works, to attempt to restrict materials made available on websites, which would ultimately hurt the fan community.¹⁰⁴ In another case, Linden Lab, creator of the virtual world *Second Life*, issued an "uncease and desist letter" to the parody website GetAFirstLife.com. Commentators cheered them for

F.3d 1317, 1335 (Fed. Cir. 2003) (Dyk, J., dissenting) (characterizing the majority's opinion as "holding that shrinkwrap licenses that override the fair use defense are not preempted by the Copyright Act"); *supra* notes 57–60 and accompanying text.

99. *See supra* Part II.C.

100. Nonexclusive licenses may be implied from the parties' conduct when the totality of the conduct indicates intent to grant such permission. 3 NIMMER & NIMMER, *supra* note 60, § 10.03[A][7]. Machinimists could argue that since publishers had known about their actions for so long and had done nothing to stop them, instead sponsoring contests and taking other actions to encourage them, that it would be reasonable to imply that the publishers were permitting machinimists to use the publishers' works. By creating explicit, limited licenses, the publishers have undermined any reasonable inference that they intend to grant permission for conduct prohibited by their licenses.

101. The Harry Potter Lexicon website is located at <http://hp-lexicon.org> (last visited May 12, 2008).

102. *See* Complaint at 15, Warner Bros. Entm't Inc. v. RDR Books, No. 07-CIV-9667 (S.D.N.Y. Oct. 31, 2007), available at <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2007cv09667/315790/1>.

103. *See* Declaration of J.K. Rowling in Support of Plaintiffs' Motion for Preliminary Injunction at 2, Warner Bros. Entm't Inc. v. RDR Books, No. 07-CIV-9667 (S.D.N.Y. Jan. 15, 2008), available at <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2007cv09667/315790/24>.

104. *Id.* at 4.

their un-lawyerly response.¹⁰⁵ Largely unmentioned were the motivations behind the last paragraph of the letter, wherein Linden Lab granted a license for the parody use of their trademarked logo.¹⁰⁶ This letter was not merely an act of apparent generosity, considering that the parody mark was used to sell goods; it was also a smart strategy that protected the strength of Linden Lab's trademark¹⁰⁷ and simultaneously enhanced their public relations.

As explained in Part III.A, game publishers do not want to stop machinima for a variety of reasons: (1) machinima provides free marketing; (2) game publishers want to avoid negative publicity resulting from shutting down popular machinimists; and (3) game publishers do not want to incur the costs of trying to shut down a large, decentralized community of anonymous noncommercial copyright infringers. By issuing licenses to machinimists, game publishers protect their copyrighted assets while benefiting from a happy machinima community.

Furthermore, companies such as Microsoft and Blizzard have preserved their control over meaningful licensing revenues by preserving their commercial licensing rights. The new rules grant machinimists licenses for noncommercial usages and encourage them to contact Microsoft and Blizzard directly to negotiate a commercial license. In this way, the game publishers have preserved the potential to generate revenue from particularly successful machinima without incurring the cost of negotiating with the creator until the work has established an audience and demonstrated a potential for commercial success. Not only does this reduce transaction costs to the game publisher, but it places the game publisher in a better bargaining position than the machinimist. While both parties can evaluate the commercial feasibility of the work, only the machinimist will have invested the resources required to create and develop it. While

105. *See, e.g.*, LostInaFog.com, GetAFirstLife.com Told to Uncease and Undesist (Feb. 1, 2007), <http://lostinafog.com/blog/2007/02/01/getafirstlifecom-told-to-uncease-and-undesist/print>.

106. *See id.*

107. "A trademark owner may find his trademark abandoned [due to the loss of trademark significance] where he fails to take legal action against infringers of his trademark." 2 ANNE GILSON LALONDE & JEROME GILSON, *GILSON ON TRADEMARKS* § 3.05[9][a] (2007). "Where the trademark owner has acted with reasonable diligence, however, no abandonment will occur." *Id.* at n. 34. Linden Lab probably did not have a strong claim against the parody site's use of its mark. It is unlikely that Linden Lab would have been able to bring a claim under the Federal Trademark Dilution Act, which protects only "famous" marks. *See id.* § 5A.01[4]. Furthermore, had they instead attempted to sue the parody website for infringing use of their mark, they might not have been able to establish likelihood of confusion, the statutory standard for trademark infringement under the Lanham Act. *See Anheuser-Busch, Inc. v. L & L Wings, Inc.*, 962 F.2d 316, 321–22 (4th Cir. 1992) (recognizing that effective parody "diminishes any risk of consumer confusion"). However, licensing the parody site's unauthorized use allowed Linden Lab to police the use of their mark by converting a possible infringement into a permitted use.

Microsoft was willing to license rights in *Halo* to Rooster Teeth for free,¹⁰⁸ the success of that series and other machinima proves that there exists a viable commercial market for machinima,¹⁰⁹ which game publishers could exploit.

In addition to reinforcing content owners' current rights in their works, the new licenses may extend those rights by discouraging works that fall outside the limitations of the license. Some machinima may be protected under fair use, which limits the copyright owner's rights to control the use of its work.¹¹⁰ For example, a commercial machinima that was a strict parody of *Halo* would have a very strong claim for protection under fair use,¹¹¹ even though it would not qualify for a license under the MS Rules.¹¹² However, many fair use cases are not so clear-cut. Since proving a case of fair use is costly, many potential fair users cannot afford to defend against an infringement action.¹¹³ The new licenses put machinimists on notice that there is a class of machinima that the publishers do not want to permit. Even if their machinima might be permitted under fair use, this exception may be of little consolation to a machinimist worried about receiving a cease and desist notice.

While it may be tempting to laud Microsoft and Blizzard for permitting some uses of their works, it is worth considering exactly what they have given up and what user-creators have gained. Microsoft and Blizzard have merely given up the opportunity to sue their own fan base, which might cause them to lose a vibrant stream of free marketing. Machinimists have gained a limited space in which they are explicitly permitted to create certain kinds of derivative works. Ultimately, these licenses benefit the drafters more than the licensees, regardless of their stated purpose.

C. Expanding the Role of Machinima Licenses

So far, there is little evidence that other publishers are willing to join Microsoft and Blizzard in licensing their game content. Part of this may be due to cost: thus far each publisher has chosen to absorb the cost of drafting its own license with its own legal team, instead of adopting an existing license. For a software giant like Microsoft, the relative cost of drafting the Microsoft Rules was low; for smaller game publishers, the cost of drafting their own licenses might be

108. See Thompson, *supra* note 1, at 24

109. See, e.g., *supra* notes 1–12 and accompanying text.

110. See Freedman, *supra* note 17 (presenting a fair use analysis of machinima).

111. See *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994) (holding that a commercial parody of Roy Orbison's song *Pretty Woman* was entitled to fair use protection under the Copyright Act).

112. See Xbox.com, *supra* note 21.

113. See Carroll, *supra* note 18, at 1096 (discussing limitations of fair use).

prohibitive. Because they gain much of the benefit of derivative works without having to license, small publishers have little incentive to draft their own rules.¹¹⁴ Some publishers might be content with the status quo, leaving in place the balance struck by the Copyright Act and choosing not to enforce their exclusive rights against machinimists.

For instance, extremely successful video game publisher Electronic Arts¹¹⁵ has not issued general licenses for derivative works such as machinima, but has sponsored machinima contests¹¹⁶ and commissioned Rooster Teeth to create machinima commercials.¹¹⁷ Electronic Arts also worked with Rooster Teeth to produce a machinima series based on *The Sims 2*, thus promoting the game's "in-game movie making" capabilities.¹¹⁸ Arguably, Electronic Arts is extending an implied license to the users of *The Sims 2* to create machinima. It is unclear how much an implied license defense would protect a defendant, particularly one that chose to make offensive or commercial machinima. This leaves machinimists making derivative works based on Electronic Arts games in an uncertain legal position, much like the creators of Microsoft- and Blizzard-based machinima prior to the release of their respective machinima licenses.

By under-enforcing its own copyrights, Electronic Arts benefits from machinima without worrying about the details of licensing. Under-enforcement of copyright law seems increasingly common on the Internet, perhaps due to the failure of copyright owners and user-creators to negotiate an appropriate copyright balance that benefits both parties.¹¹⁹ However, relying on copyright under-enforcement leaves user-creators vulnerable to legal uncertainty, which might discourage the creation of some new works, as well as inhibit the

114. See *supra* Part III.A. Of course, as argued in Part III.B, there are reasons why licensing benefits publishers beyond simply ensuring the creation of machinima.

115. See Info.EA.com, Company: Background, http://www.info.ea.com/company/company_background.php (last visited May 12, 2008) (reporting revenues of \$3.091 billion for fiscal year 2007).

116. See, e.g., *EA Partners with Top Art Schools to Put "the Sims: In the Hands of Artists" [sic]*, EA.COM, Mar. 22, 2007, <http://www.ea.com/article.jsp?id=simshoa> (last visited May 12, 2008); Gamespot Staff, *supra* note 82.

117. See *Red vs. Blue*, *supra* note 4.

118. Ranier Van Autrijve, *Rooster Teeth Productions Sets Its Humorous Sights on The Sims 2 (PC)*, PC.GAMESPY.COM, Sept. 30, 2004, <http://pc.gamespy.com/pc/the-sims-2/552713p1.html>.

119. See Tim Wu, *Tolerated Use: The Copyright Problem*, SLATE.COM, Oct. 16, 2007, <http://www.slate.com/id/2175730/entry/2175731/>. Professor Tim Wu illustrates how copyright enforcement practices have shifted to tolerate infringement on the Internet in exchange for free exposure with a real life case: 20th Century Fox originally sent a takedown notice from their legal department to YouTube, asking them to remove a music video composed of clips of their copyrighted content; however, their marketing department soon afterwards sent a solicitation to the creators of the video, offering to pay them to put it back on the Web. *Id.*

growth and acceptance of machinima in the larger artistic community.¹²⁰

The Copyright Act is notoriously complex, leaving many potential creators of new works in the dark about the legality of different activities. The Constitution grants Congress the power to grant exclusive rights to authors as an incentive intended to “promote the Progress of Science and useful Arts.”¹²¹ In practice, the legislative process has been a near total delegation of law-making power to representatives of the industries that benefit from copyright, allowing them to negotiate compromises among themselves.¹²² Unfortunately, these compromises and negotiations have not usually included the interests of emerging technologies or the general public.¹²³ Given that “many copyright professionals agree that the current statutory framework is akin to an obese Frankensteinian monster,”¹²⁴ it is not hard to understand why so few creators of user-generated works really understand the Copyright Act or their rights and obligations under the current copyright scheme.¹²⁵ This problem has been exacerbated and brought to the forefront of current copyright reform debates as “[a]dvances in digital technologies have, moreover, democratized the creation and dissemination of new works of authorship and brought ordinary persons into the copyright realm, not only as creators, but also as users of others’ works.”¹²⁶

The licensing schemes offered by Microsoft and Blizzard are imperfect, but they do offer a partial solution to the problematic relationship between publishers and user-creators under the Copyright Act.¹²⁷ Microsoft and Blizzard should be applauded for recognizing and supporting the machinima community. They could have tried

120. Cf. Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 582–86 (2004) (making the further point that “random, infrequent enforcement can too easily become discriminatory enforcement”).

121. U.S. CONST. art. 1, § 8, cl. 8.

122. See JESSICA LITMAN, DIGITAL COPYRIGHT 22–23, 35–69 (2000) (“About one hundred years ago, Congress got into the habit of revising copyright law by encouraging representatives of the industries affected by copyright to hash out among themselves what changes needed to be made and then present Congress with the text of appropriate legislation The pattern has continued to this day.”).

123. See *id.* at 25; see also Wu, *supra* note 119.

124. Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 557.

125. See generally AUFDERHEIDE & JASZI, *supra* note 84.

126. Samuelson, *supra* note 124, at 555 (citing LESSIG, *supra* note 18, at 9).

127. Another solution, of course, would be large-scale reform of the Copyright Act and the fair use doctrine in particular. See, e.g., LESSIG, *supra* note 18, at 287–306 (proposing five reforms of copyright law and practice); Carroll, *supra* note 18, at 1122–48 (offering several proposed reforms of fair use); Samuelson, *supra* note 124, at 556–69 (setting out a proposed “model copyright law” along the lines of the American Law Institute model laws). The details and merits of these reforms are outside the scope of this Note.

myopically to suppress all unauthorized works,¹²⁸ which would have benefited no one. Instead of choosing not to enforce their exclusive rights against machinimists, Microsoft and Blizzard explicitly encouraged and licensed the use of their works. However, these licenses are ultimately imperfect. As argued in Parts III.A and III.B, the licenses may not truly benefit machinimists as much as might be hoped — in fact, they may even work to benefit game publishers by extending the perceived control copyright owners have over their works. Moreover, the idiosyncratic nature of these licenses imposes a cost on machinimists who want to comply with the new rules.

Licenses such as the GNU Public License (“GPL”),¹²⁹ the Creative Commons licenses,¹³⁰ and now the licenses offered by Microsoft and Blizzard create a layer of private regulation on top of the Copyright Act. These particular licenses shift the balance of rights to allow more public uses of copyrighted materials, encouraging the creation of new creative works that remix preexisting works. Microsoft and Blizzard were presumably motivated to draft these licenses because they wanted to strike a balance encouraging fan-generated derivative works while simultaneously retaining control of their copyrighted assets, protecting their current business structure and preserving potential revenue streams from licensing.

In his blog post on the Microsoft Rules, Fred von Lohmann, a senior staff attorney at the Electronic Frontier Foundation, compared the Microsoft Rules to the GPL, noting that both offered a limited license to create derivative works.¹³¹ However, one very significant difference between the machinima licenses and the GPL is that the GPL and Creative Commons licenses are standardized licenses that many copyright owners use to share the rights to their works, while Microsoft and Blizzard’s licenses are idiosyncratic.

This decision to create unique licenses for machinima is easy to understand when viewed from the perspective of the game publishers: Microsoft and Blizzard want to extend certain permissions to the

128. The Chilling Effects project has documented many instances of copyright holders choosing this strategy. *See generally* Chilling Effects Clearinghouse, <http://www.chillingeffects.org> (last visited May 12, 2008).

129. The GPL is a free software license that allows copyright owners to share their work in a way that allows others to copy, distribute, and modify it, so long as they agree to the “copyleft” restrictions of the license, which require other users of the work to extend the same permissions to everyone else. *See* GNU Project, The GNU General Public License (June 29, 2007), *available at* <http://www.gnu.org/copyleft/gpl.html>.

130. The Creative Commons licenses, like the GPL, allow the copyright holder to retain copyright ownership over the work, while licensing it for certain allowable uses. The Creative Commons terms this “a ‘some rights reserved’ copyright.” *See* Creative Commons, About, <http://creativecommons.org/about> (last visited May 12, 2008).

131. Posting of Fred von Lohmann to Deeplinks Blog, Microsoft Embraces Machinima . . . and Maybe the GPL?, <http://www.eff.org/deeplinks/2007/08/microsoft-embraces-machinima-and-maybe-gpl> (Aug. 30, 2007) (Deeplinks Blog is hosted by the Electronic Frontier Foundation).

public while also retaining control over their works to ensure that the permitted machinima will not harm any existing or potential market. To do so, they had to create new licenses, as neither the GPL nor the Creative Commons licenses allow the licensor to retain the desired amount of control over their licensed work.¹³² By creating one license that addresses all would-be users of their works, each publisher avoids the extremely high transaction costs of negotiating each license separately, while leaving open the option of offering more extensive rights to anyone willing to negotiate for a commercial license.

However, from the licensees' perspective, the different licenses offer unique bundles of rights that are incompatible with each other.¹³³ Conscientious machinimists must read carefully and consider what they can and cannot do within the game platform in which they are working. In contrast, the GPL is a uniform license, and although modifications are permitted, they are discouraged due to the concern that a modified license would be incompatible with the standard GPL.¹³⁴ Developers seeking to use software licensed under the GPL need only familiarize themselves with one document. While Creative Commons offers a number of licenses, the only real variables are whether commercial uses or modifications are allowed or not.¹³⁵ The distinction between commercial and noncommercial in a Creative Commons license is the same for all users of the license, and not as nuanced as the differences between the Microsoft and Blizzard commercial and noncommercial licenses. Similarly, neither the GPL nor the Creative Commons licenses have a provision restricting content, such as Blizzard's ESRB T rating requirement or Microsoft's content restrictions.¹³⁶

The ability to control derivative works with this amount of precision very likely motivated the publishers' decisions to develop their own licenses as opposed to adopting a preexisting license. For machinimists, the result is that complying with a different license may increase the cost of creating a new work and thus discourage the creation of new works. Compounding this problem, both documents offer room for interpretation, requiring machinimists to contact the publishers for further clarification.¹³⁷ This may lead to misunderstandings and frustration, and have a chilling effect on the

132. See *supra* notes 129–130.

133. See *supra* Part II.C.

134. See GNU Project, Frequently Asked Questions About the GNU Licenses, <http://www.gnu.org/licenses/gpl-faq.html#ModifyGPL> (last visited May 12, 2008).

135. See Creative Commons, License Your Work, <http://creativecommons.org/license> (last visited May 12, 2008).

136. See Blizzard Entm't, *supra* note 57; Xbox.com, *supra* note 21.

137. For example, the Microsoft Rules employ the standard-like “you know it when you see it” instead of an explicit rule in reference to content restrictions, while Blizzard refers to the ESRB's somewhat opaque rating criteria when requiring licensees to restrict their productions to a T rating. See Blizzard Entm't, *supra* note 57; Xbox.com, *supra* note 21.

creation of new works by those concerned about staying strictly within the license boundaries.

It is unclear exactly how much machinimists truly benefit under the current licenses. By explicitly permitting a set of uses under the machinima licenses, the publishers have aided machinimists who want to create works legally, and hopefully have encouraged the creation of derivative works. However, the current licenses have been crafted with the publishers' interests in mind, leaving machinimists with the burden of sorting out exactly what permissions they have under each license. Moreover, the lack of machinima licenses from publishers other than Microsoft and Blizzard potentially limits the freedom of machinimists to develop machinima using other game platforms.

Short of copyright reform or an overhaul of the fair use doctrine, however, licenses such as these are the best way to encourage user-generated works, because they contain an explicit grant of rights to use and remix copyrighted content. A better solution might be a more universal license, negotiated between publishers and users, and adopted by the entire video game industry. By having more user-creators at the negotiating table, as well as more participants from the industry, industry-wide norms could be developed that would be easier for user-creators such as machinimists to understand and for game publishers to enforce, encouraging the development and proliferation of user-generated derivative works.

IV. CONCLUSION

Machinima is a relatively new art form that uses video games to create professional-grade audiovisual works at a relatively low cost. With the advent of new licenses of video game content, machinimists have been granted the legal permission to work within a narrow scope of this medium. These imperfect licenses are a step toward balancing the rights of publishers and user-creators and encouraging the creation of new derivative works. One should be skeptical as to how much benefit these licenses actually provide; it seems that their only true beneficiaries are the publishers themselves. However, short of legislative or judicial reform, these licenses are the most significant and practical way for rights to be shared between content owners and user-creators. Therefore, we should encourage the adoption of a universal license for derivative works throughout the industry.