

Rights to User Generated Content in a VR World

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ABSTRACT

Virtual reality (VR) generally refers to an artificial environment, constructed using a computer and presented to the user in such a way that they feel they are inside an alternate world.

In 2016, VR – the experience of exploring 360 degree photos and videos and to interact with computer generated characters and objects inside virtual worlds – has finally (after years of development) shown mass market commercial promise.

While much of the VR revenue is currently being captured by hardware and software makers, it is not difficult to imagine value being captured by licensing access to user generated content (UGC) in VR. For example, as with videogames and professional sports, it might be possible to monetize the experience of watching players of exceptional ability as they play a VR game (e.g., gameplay by someone engaged in a VR eSport). Alternately, offering a global audience the opportunity to explore a work of art created by a master in VR (perhaps as the master is creating the work) could also present a source of revenue. Stakeholders, including VR app developers, gaming platforms and game production companies, will likely want to control revenue from UGC as it is in their commercial interest.

In this article, we explore the potential for right of publicity, performance rights, and copyright protection for UGC in VR. VR has only been commercialized very recently and there have not been court decisions concerning the ownership of user generated content in a VR world. Therefore, to consider some of the legal questions that we anticipate will arise around VR, this paper examines court cases regarding the next closest forms of entertainment – video gameplay and sporting events.

Having examined the court decisions and considering the room for creativity and performance given to VR users (in our view, significantly more

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authorship and protectable performance than that of video game players at the time of the court decisions), we conclude that in many circumstances UGC in VR could give rise to content that is protectable. In other words, at what appears to be the dawn of commercial VR, the question(s) at issue may not be whether UGC is protectable, but instead what rights exist and who has ownership of VR UGC.

Keywords: Virtual reality (VR), user generated content (UGC), copyright, right of publicity, performance rights

I. Introduction

Virtual reality (VR) is on course to have its first US billion dollar year in 2016. According to Deloitte Global, at least US \$700 million of that revenue will come from hardware sales and the remainder from content.¹ And some experts are predicting we are only at the beginning of an unprecedented global VR boom – with some saying that by 2020 VR revenue will hit US \$30 billion.²

Leaving that speculation aside, it is clear that questions will arise about who owns the user generated content (UGC) in a VR world. As consumers and enterprises begin to explore and develop content available through VR head-mounted displays (HMDs), and users interact in ways that create types of content which are arguably protectable under right of publicity, performance rights (sometimes identified as “neighbor rights” or as “rights neighbouring to copyright” - which in many jurisdictions protect people who are not technically authors, such as performing artists) and copyright, will open up these questions of ownership. In particular, it is in the realm of CGI (computer generated images) and UGC, where we see circumstances arising that are likely to raise thorny issues of ownership.

As the tools for creating original experiences inside VR spread widely, and users record and share their experiences inside VR, we are especially interested in the legal questions that will arise about who owns the rights necessary to distribute and commercialize that UGC. Note: While there are also 360 filmed experiences (non-interactive VR) – made with special cameras, or assemblages of cameras, that can capture a 360-degree field of view of the real world that can be played back inside a HMD - we are focused in this article on the potential for VR UGC which arguably has originality and authorship – perhaps implicating copyright, performance rights and right of publicity. In our view, CGI VR is where the inherent interactivity and potential for creating content by users seem to be the greatest.

¹ Paul Lee & Duncan Steward, *Virtual reality (VR): a billion dollar niche*, 2016 TMT PREDICTIONS, available at

<http://www2.deloitte.com/global/en/pages/technology-media-and-telecommunications/articles/tmt-pred16-media-virtual-reality-billion-dollar-niche.html>.

² Digi-Capital, *Augmented/Virtual Reality revenue forecast revised to hit \$120 billion by 2020*, <http://www.digi-capital.com/news/2016/01/augmentedvirtual-reality-revenue-forecast-revised-to-hit-120-billion-by-2020/#.V33hB5N96u4>.

II. VR at a Glance

A. VR Defined and its Current Commercial Applications

Using today's most effective VR systems, instead of simply viewing a screen and passively watching events unfold, users feel immersed in a 360 degree world where they are able to choose where to look, move and how to interact.

VR places the user in the center of the action. This can be as simple as donning a headset to watch documentary footage, with the user at the heart of a recorded or live event that can be viewed in 360 degrees as the user turns their head. But with CGI, VR promises more than a spectator's perspective. Building on today's powerful computers and various clever technologies for sensing user movement and rendering images, CGI VR now allows users to interact with objects in a virtual world. Unlike existing media, VR experiences that respond to user's movements can create a unique visceral feeling for the user of immersion sometimes referred to as "presence."

A VR device's most recognizable component is the head-mounted display (HMD). Even an inexpensive HMD (like Google Cardboard or Samsung Gear VR, that are both little more than mounts for a smartphone) will collect motion-tracking information from the user's movement to create the illusion that the user is looking around inside a virtual environment. In more sophisticated systems (like the HTC Vive), there are handheld controllers and the ability to move around within a space - allowing a user to experience even more of the illusion of presence inside a virtual world. And enhancements to existing VR experiences, like better audio and haptics (also known as touch feedback or kinesthetics), promise even greater levels of immersion.

At present, Google Cardboard is the least expensive way to begin to explore virtual reality (a million NY Times subscribers received a Google cardboard for free with their Sunday newspapers in Nov. of 2015). Slightly more expensive is the Samsung Gear VR (US \$99), which uses certain Samsung smartphones as its processor and display. While Google Cardboard and Samsung's Gear VR do enable smartphone owners to view photos that have been captured using 360 degree cameras or to watch some 360 degree YouTube videos or to play certain basic apps, these smartphone-based devices can only hint at what VR is capable of achieving. More expensive devices (like the Oculus Rift, HTC's Vive and PlayStation VR) that have been custom-built to track user motion, while offering better screens and access to much better apps, promise much deeper dives into VR.

What current apps suggest the power of VR and where VR might be headed?

Tilt Brush, a virtual reality program where the HTC Vive controllers become tools for painting and sculpting in a virtual 3D space, is a remarkable portal into how VR can encourage creativity.

Ghostbusters: Dimension is a multiplayer virtual reality experience that transports users into the world of the film franchise. It can currently be played (using a HMD, a handheld controller and a haptic vest) at Madame Tussaud's in NYC.

The above are two examples of VR applications that are available today. They demonstrate VR's potential – both aesthetically and commercially. However, as mentioned earlier, we are still in the early days, before VR devices have been sampled and adopted by a large-scale audience.

B. VR Takes User Generated Content to Another Level

If you've ever been immersed in the world of a good book, movie, play or videogame – you understand one of the core attractions of VR. Putting on a HMD can be seen as a shortcut to immersion. But it is not just this sense of visiting another world that has attracted so much attention to the aesthetics of the VR experience. What makes VR special is the depth of immersion and the sense of being able to interact that can be experienced in VR.

To understand the excitement over VR, it is necessary to explore the levels of immersion offered by VR – to see how head-tracking, CGI, HMDs, haptics, etc. can potentially offer a new medium that is more than an enhancement of old forms.

Movies, books and plays are designed for users as *spectators*. Videogames and VR are different. As in some 2D videogames (e.g., *The Sims* and *Minecraft*), it is possible for a VR user to build and to undertake their own actions inside a virtual world. And, as in some videogames, user actions in VR can affect narrative – changing how events will unfold. In other words, as in some videogames, VR computer generated worlds can promise experiences that are not simply narrated (like a book, movie or traditional play) but are rather enacted. With CGI and VR, a user is not limited to merely functioning as a spectator, but can act as a *participant*.

This experience of interactivity with consequences inside the VR world (sometimes described as “agency”) is perhaps the most promising element of CGI VR. But traditional videogame players also have agency. What makes VR unique? By placing the user at the center of a virtual world with space to explore in all directions – and then making the user's body motions part of the experience, blurring the lines between *user* and *experience* – a VR user can actually feel like they have become part of the virtual world.

It is difficult to describe the experience with words, but this merging of

body movement and 360 virtual worlds makes immersion in VR unique:

“In VR, the sense of immersion is given by image, sound and tactile sensations. Interactivity is added to the experience by coordinating the display with the movements of the user’s body. The physical presence of the body in the virtual environment reinforces the sense of the physical presence of the virtual world. [...] It is therefore through the mediation of the body that VR developers envision the reconciliation of immersion and interactivity.” (Ryan 1999: 133).³

In other words, a key feature of CGI VR – a feature that separates VR from videogames - is the integration of the player and the experience. In many traditional videogames, the user is represented by an avatar (often with great attention paid to how the avatar looks and will behave). By way of contrast, in VR the user *is the avatar*. In traditional videogame play there has always been an element of spectatorship – for example, a player and fans both are watching an avatar. In recent years, that interest in spectatorship has led to professional eSports organizations, monetizing fan interest in live and online videogame competitions. In some of the more popular spectator multiplayer online battle arena (MOBA) videogames, like *Dota 2* and *League of Legends*, spectators and players watch gameplay from an aerial perspective. It remains to be seen whether gameplay in VR, where players typically have a first person perspective, will also serve as the basis for professional eSports. (One promising blending of overhead spectatorship and first person gameplay can be seen in the VR game *Ruckus Ridge*, where one protagonist wears a HMD but the other competitors watch a TV screen that has an aerial view as they are battling – using game controllers - as a team against the player in the HMD who lacks their bird’s eye view.) The unique experience offered by tracking the user’s actual head and body in 360 degree virtual spaces, and then integrating the user’s movements and choices into immersive experiences, are what makes VR so exciting and potentially a new medium for the player – and perhaps for fans. Could it be that professional VR sporting events, where fans affiliate inside VR to watch what a player is (or a team of players are) achieving in VR might one day rival older forms of entertainment?

Compared with video games, VR has the potential for users to exercise greater creativity in shaping the elements in the worlds. And, once VR hardware is widely in use, it is likely that some users will want to experience cultural events in VR, including sporting events, performances and arguably “new” works created by other users inside a virtual world.

What are some legal questions concerning ownership of elements created by user actions inside a virtual world? Because there is also interactivity and

³ Ryan & Marie-Laure, *Immersion vs. Interactivity: Virtual Reality and Literary Theory*, 28 SUBSTANCE 110, 110-137 (1999).

agency in games, and gamers have been recording their actions and the consequences of their action inside game worlds for years now, games seem to offer a productive starting point for a legal analysis.

III. Prior Cases

VR has only been commercialized very recently and there have not been court decisions over the ownership of user generated content in a VR world. Therefore, to consider some of the legal questions that we anticipate will arise around VR, this paper examines court cases regarding the next closest forms of entertainment – video gameplay and sports events. No dispute over rights in gameplay or eSports gameplay has been adjudicated by the courts in Taiwan (where the authors are located), so this paper takes cases in the United States as reference points.

A. Video Gameplay Cases

While video games are subjected to copyright protection, so far there is no established case under Taiwan law or U.S. law that recognizes a copyright interest in gameplay itself.

Allen v. Academic Games League of America, Inc.⁴

Robert W. Allen owns copyright interest in many academic video games. Such games have been employed in many school districts. Allen formed the National Academic Games Project (NAGP) and hosted national tournaments with a high number (800) of students attending in 1991.

Later, some members of the NAGP left and formed a non-profit corporation, Academic Games League of America (AGLOA), which also held national tournaments parallel to NAGP tournaments. Some of Allen's copyrighted games were used in the NAGP tournaments, although NAGP had legally purchased those games.

Allen sought to enjoin AGLOA from using his games in their tournament, under the theory that the AGLOA students made unauthorized public performance of his work.

In the Allen case, the court cited 17 U.S.C. §106(4)⁵ of the Copyright Act: “‘Perform’ and ‘publicly’ are defined in the Copyright Act as, respectively, ‘to recite, render, play dance, or act it, either directly or by means of any device or

⁴ *Allen v. Academic Games League of America, Inc.*, 89 F.3d 614 (9th Cir. 1996).

⁵ The Copyright Act, 17 U.S.C § 106(4) (1994).

progress...’ and ‘to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered...’ In applying these statutory definitions to the playing of Allen’s games in a tournament setting, **we conclude that the playing of a game is not a “performance within the meaning of the Copyright Act.”**

Micro Star v. FormGen, Inc.⁶

FormGen Inc. owns the rights to Duke Nukem 3D (D/N-3D), a popular computer game. The game D/N-3D allows players to explore a futuristic city with the goal of zapping the evils. The game also includes a “Build Editor,” which enables players to create their own new levels. Meanwhile, FormGen encourages players to post levels they have created on the Internet, allow these new levels to be downloaded by other players freely. Micro Star downloaded the levels created by 300 players and stamped them on to the CD which later become their product Nuke It (N/I). N/I even contains several screen shots of gameplay - pictures of what the level looks like.

According to 17 U.S.C. § 106(2) (1994),⁷ FormGen (copyright holder) enjoys the exclusive right to derivative work. Therefore, the main issue before the court was whether N/I constituted a derivative work of D/N-3D.

The court looked to *Galoob*, 964 F.2d⁸ and *Litchfield v. Spielberg*, 736 F.2d 1352, 1357 (9th Cir.1984)⁹ for the standard of “derivative work” and found that two conditions must be fulfilled: 1) a derivative work must exist in a “concrete or permanent form,” *Galoob*, at 967 and must substantially incorporate protected material from the preexisting work. The court decided that the first condition was met as the N/I’s MAP files, which used D/N-3D’s art library directly - burned onto a CD-ROM and undoubtedly existing in a concrete form. Regarding the second requirement, the court saw that FormGen will “doubtless succeed”¹⁰ as the displays generated when the player chooses the N/I levels come entirely from D/N-3D’s source art library.

Micro Star counter argued that it was the beneficiary of the implicit license that FormGen gave to its customers by allowing them to create new levels and encouraging them to post their new levels on the Internet. Section 204 of the Copyright Act requires the transfer of the exclusive rights granted to copyright owners to be in writing while non-exclusive ones are permitted to be in oral or

⁶ *Micro Star v. FormGen, Inc.*, 154 F.3d 1107 (9th Cir. 1998).

⁷ The Copyright Act, 17 U.S.C § 106(2) (1994).

⁸ *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*, 964 F.2d 965 (9th Cir. 1992).

⁹ *Litchfield v. Spielberg*, 736 F.2d 1352, 1357 (9th Cir. 1984).

¹⁰ *Micro Star v. FormGen*, 154 F.3d 1107, 1112 (9th Cir. 1998).

implied conduct manner. The court found that FormGen did not grant any license to Micro Star while the licenses granted to players (to create their own new levels) contained the significant restriction that the new works created must be free of charge. The encouragement by FormGen, even though it might be deemed as the abandonment of some rights by implied conduct, was not abandonment of the right to profit commercially. The court concluded that the right to commercial profit of FormGen was infringed by Micro Star and its product (derivative work) N/I.

B. Sport Cases (Including eSports – i.e, sporting events where the gameplay is facilitated by human-computer interfaces)

Another line of precedent, that might be applied to the ownership of user movement and gameplay in VR, concerns ownership of physical sports performances. Court decisions regarding physical performance might in some respects anticipate disputes over virtual performance.¹¹

Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n¹²

The case arose out of a long-standing dispute between the Major League Baseball Clubs and the Major League Baseball Players Association. Club owners and players were at odds over the control of player performances in broadcast games.

After years of negotiating with the clubs for revenue sharing in telecasts, the players sent cease and desist letters to the clubs and the cable companies contracted by the clubs arguing that baseball game telecasts were made without the players’ consent and thus constituted violation of their rights of publicity and proprietary right in their performances. However, as the court noted, “the players never claimed that the performance of baseball before televised audiences was not within the scope of their employment. Indeed, the only issue as to which Players argued that there was a genuine issue of material fact concerning the parties’ written agreement respecting ownership of the telecasts’ copyright.”

The court ruled that performance of baseball games is within the scope of players’ employment, and the players failed to rebut the presumption that baseball clubs own copyright in telecast. Further, the court held that the baseball clubs’ copyright in telecasts of major league baseball games preempted the

¹¹ Dan L. Burk, *Owning E-Sports: Proprietary Rights in Professional Computer Gaming*, 161 U. Pa. L. Rev. 1535, 1550 (2014).

¹² *Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663 (7th Cir. 1986).

players' rights of publicity in their baseball game performances. The question of whether physical gameplay constituted performance (of the type protected in some jurisdictions by performance rights, such as those that will be protected in the U.S. should the Beijing Treaty on Audiovisual Performances be ratified) was not adjudicated.

National Basketball Ass'n v. Sports Team Analysis and Motorola¹³

SportsTrax was a portable electronic beeper device created and marketed by Sports Team Analysis and Tracking Systems, Inc. and Motorola, Inc. ("Motorola") which provided real-time information about National Basketball Association ("NBA") games. The NBA brought action against Sports Team Analysis and Motorola on the basis of copyright infringement, misappropriation, unfair competition and other claims.

The court held, "[w]ith respect to the NBA games, NBA is not seeking to protect a written book of NBA rules or coaches' plays or a tangible recording of an NBA game. Instead, it seeks to protect the NBA games themselves—the culmination of interaction of these NBA rules and coaches' plays, the referees, the players, and perhaps even the announcers, members of the press, vendors, patrons, security guards, ticket takers, and the like who are present at the arena during an NBA game and whose interaction comprises an NBA game. **I hold, however, that NBA games do not constitute 'original works of authorship' and thus do not fall within the subject matter of copyright protection under 17 U.S.C. §§ 102, 103.**"

In reaching the conclusion that NBA games do not constitute 'original works of authorship, the court's relied heavily on the statutory text of the Copyright Act, "[w]orks of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works." "Noticeably absent from this illustrative list of works of authorship, however, is a category for sports events or other analogous organized events."

The court granted the NBA permanent injunctive relief against Sports Team Analysis and Motorola on the misappropriation and unfair competition claims.

¹³ *National Basketball Ass'n v. Sports Team Analysis and Motorola*, 939 F.Supp. 1071 (S.D.N.Y. 1996).

Blizzard vs. KeSPA, OGN and MBC¹⁴

The Korea eSports Association (KeSPA) is a South Korean body in charge of managing eSports in South Korea, established by the country's Ministry of Culture, Sports and Tourism. The eSports it manages in South Korea included *Starcraft II: Legacy of the Void*, *League of Legends*, *Dota 2*, and *Counter-Strike: Global Offensive*.

KeSPA is an important force in South Korean eSports, taking the lead in organizing tournaments, providing career guidance for professional videogame players, and handling aspects of marketing and public relations, and, most importantly for this discussion, negotiating broadcast agreements with cable and television outlets. KeSPA functions within the two broadcasting networks: OGN and MBC. Both are represented within KeSPA ruling body and are in fact a broadcasting platform for all the events.¹⁵

The copyright in the Starcraft video game is owned by the U.S. company, Blizzard Entertainment, one of the largest video game developers. However, KeSPA is the main contributor for the popularity of Starcraft series on a competitive level.¹⁶ The conflict between Blizzard and KeSPA arose when Blizzard tried to take control and collect royalties from every possible future application of StarCraft II, which includes promotion, players, tournaments, leagues and broadcasts.¹⁷

Blizzard appointed Gretech Corporation as its license agent and licensed broadcasting right of Star Craft Brood War to Gretech's GOM platform. As towards KeSPA, Blizzard argued that Blizzard owned 100% of the right in derivative works. Blizzard brought lawsuits against MBC and OGN, arguing they did not have rights in any "derivative" work.¹⁸

According to Il-Gan Sports, the parties eventually settled. The general terms were for Blizzard to recognize the rights of KeSPA, MBC and OGN with respect to running Starcraft 1 Tournaments and ownership rights of derivative works. That is, KeSPA and the broadcasting stations can run tournaments as

¹⁴ The lawsuits were brought in the courts in South Korea, and the parties have reportedly settled in 2011.

¹⁵ Simon "Go0g3n", *Blizzard VS. Kespa, the Ultimate fight*, July 31, 2009, <http://www.gosugamers.net/starcraft/news/10265-blizzard-vs-KeSPA-the-ultimate-fight>.

¹⁶ Seaky, *Blizzard v Kespa General Discussion*, Nov. 2, 2010, <http://us.battle.net/forums/en/sc2/topic/933034276>.

¹⁷ Simon "Go0g3n", *Blizzard VS. KeSPA, the Ultimate fight*, July 31, 2009, <http://www.gosugamers.net/starcraft/news/10265-blizzard-vs-KeSPA-the-ultimate-fight>.

¹⁸ Team Liquid, *Community News and Headlines*, May 9, 2011, <http://www.teamliquid.net/forum/community-news-archive/221245-kespa-and-blizzard-near-an-agreement>.

they please, and Blizzard will not restrict the sales of any derivative works that are created from tournaments. Meanwhile, KeSPA and the broadcasting stations will pay Blizzard a licensing fee for Starcraft 1, as well as putting in Blizzard's logo during the contests. The license fee will be a yearly fee paid to Blizzard by KeSPA, OGN, and MBC Game separately.¹⁹

***In re* NCAA Student-Athlete Name & Likeness Licensing Litigation²⁰**

Samuel Keller was the starting quarterback for Arizona State University in 2005 before he transferred to the University of Nebraska, where he played during the 2007 season. EA is the producer of the NCAA Football series of video games, which allow users to control avatars representing college football players as those avatars participate in simulated games.

In the 2005 edition of the game, the virtual starting quarterback for Arizona State wears number 9, as did Keller, and has the same height, weight, skin tone, hair color, hair style, handedness, home state, play style (pocket passer), visor preference, facial features, and school year as Keller. In the 2008 edition, the virtual quarterback for Nebraska has these same characteristics, though the jersey number does not match, presumably because Keller changed his number right before the season started.

Keller filed a putative class-action complaint in the Northern District of California asserting that EA violated his right of publicity under California law. EA's main defense theory was that the NCAA Football video game is "transformative use" protected under the First Amendment.

In determining whether the video game was transformative, the District Court inquired, "[w]hether the celebrity likeness is one of the 'raw materials' from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question. We ask, in other words, whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness. And when we use the word 'expression,' we mean expression of something other than the likeness of the celebrity."

The District Court concluded that EA's use of Keller's likeness does not contain significant transformative elements such that EA is entitled to the defense as a matter of law. On appeal by EA, the 9th Circuit affirmed the holding of the District Court.

¹⁹ Daily Sports, *Blizzard StarCraft and E-Sport Solve Conflicts*, May 9, 2011, http://isplus.live.joins.com/news/article/article.asp?total_id=5465743&cloc=.

²⁰ *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, 724 F.3d 1268 (2013).

The SpectateFaker Case²¹

The Korean eSport team SKTelecom T1's player Lee Sang-Hyeok (Faker) is one of the top-ranking eSport players of the online game *League of Legends* (*LoL*). In September 2014, Korean E-sport Association (KeSPA) signed a contract under which all SKTelecom T1's gameplay would be exclusively streamed on the Azubu platform. The contractual obligation extended to all the players of the SKTelecom T1 team, including Faker.²² However, a *LoL* player and Faker fan (StarLordLucian) was able to obtain - from another source - the spectator mode (a bird's eye view of the gameplay) of Faker's solo queue *LoL* games (solo queue refers to online *LoL* games where Faker played without his teammates, simply joining a queue to be assigned random teammates). StarLordLucian established a channel to rebroadcast the Faker solo queue games to another online platform, Twitch, and named the channel SpectateFaker.²³

Later on, Azubu sent Twitch a takedown notice per the Digital Millennium Copyright Act (DMCA), alleging that the streaming channel SpectateFaker had infringed their exclusive right to stream the gameplay of Faker. Twitch responded by shutting down the channel.

Twitch might have swiftly shut down the channel due to the safe harbor provision of the DMCA (17 U.S. Code § 512). That statute protects an online streaming platform (like Twitch) from the civil liability for copyright infringement, as long as the platform acts "expeditiously to remove or disable access to the infringing material" once identified. However, whether the SpectateFaker channel actually infringed anyone's right is worth giving a second thought. This paper considers the rights of Riot Games and Azubu in turn.

The Copyright Act (17 USC § 106) provides that the copyright holders have the exclusive right to "publicly perform the work and to reproduce copies of the work" while they can also grant licenses to others to use the protected work.

It is unquestionable that the video game *LoL* is a copyrightable work. However, its copyright holder Riot Games had publicly issued and maintained a policy that allowed all players to "use League of Legends IP as the basis for a

²¹ No lawsuit was filed after the DMCA takedown notice, and there are no known development of this case after the public announcement made by LoL in 2015.

²² YeBai, *E-Sport King—Right Infringement Controversy of League of Legends; player rebroadcasted through spectator mode which Azubu threatens to sue*, Feb. 24, 2015, http://www.esranking.com/news/news_content.php?NewsNo=2613.

²³ Bryce Blum, *An esports lawyer breaks down everything you need to know in the SpectateFaker case*, Feb. 22, 2015, <http://www.dailydot.com/esports/dmca-faker-azubu-twitch-riot/>.

fan project that you're giving away for free or that's only generating ad revenue."²⁴ In other words, a fan who rebroadcast legally obtained gameplay might argue that they had a license and that they could hardly infringe the copyright of Riot Games (if there was no revenue, or only ad revenue). Apparently, Lucian's SpectateFaker channel was a labor of love that was not being re-sold and did not generate significant ad revenue.

Additionally, one might look to the Beijing Treaty on Audiovisual Performances (BTAP), which has not yet entered into force (adopted in 2012, it must first be ratified by at least 30 eligible parties) but which grants performers economic rights in performances fixed in audiovisual media. Those rights include (i) the right of reproduction; (ii) the right of distribution; (iii) the right of rental; and (iv) the right of making available.

Arguably, Azubu's rights to make Faker's performance available originated from Faker. In other words, if there was a license for others to distribute the copyright elements of *LoL* as long as only ad revenue was collected, Faker might still have asserted a performance right. And Azubu might have argued they had obtained that performance right. The question then might become – especially after the ratification of BTAP - does Faker have performance rights over his *LoL* gameplay? Were his performance rights over all his gameplay (including solo queue play) transferred to SKTelecom T1 by contract and then assigned to the Korean E-sport Association (KeSPA) and on to Azubu?

The whole incident concluded with an announcement by Riot Games on *LoL*'s official website. They reclaimed their IP rights and intervened - shutting down SpectateFaker on their own. The reason they claimed for the shutdown was their philosophy of closing any fan stream "where we perceive that it's causing harm to individual players."²⁵

C. Emerging Treatment of Gameplay Cases

1. Copyright in the Traditional Sense

As the holdings in the *Baltimore Orioles* and the *NBA* sports broadcast cases indicate, in the U.S., copyright in fixed performances tends to vest in the individual capturing or recording the event, not in those who are engaged in the

²⁴ Riot Games, *FAQ and Guidelines for the Community's Use of Our Intellectual Property*, <http://www.riotgames.com/legal-jibber-jabber>.

²⁵ Tryndamere, *Spectatefaker—What We Learned and What We'll Do*, <http://na.leagueoflegends.com/en/news/riot-games/announcements/spectatefaker-what-we-learned-and-what-well-do>.

event.²⁶ In the U.S., the players of sporting events that have been distributed via television have occasionally tried to assert - based on their common law and statutory rights of publicity - an interest in revenue earned from distribution of that fixation. The US courts have not had a history of siding with players in those cases where physical sports have been recorded by camera operators hired by the clubs or their designees (and not by the individual players). In other words, in jurisdictions where performance rights are not recognized, disputes over the ownership of a performance in traditional sporting events (e.g., *Baltimore Orioles* and the *NBA*) have been decided primarily on copyright theory. And, because the players of traditional sports are not typically the ones who are fixing their performance in a tangible medium of expression, and copyright analysis favors the author who fixed the performance, players have found copyright law a tough field to compete on. Should courts begin to recognize the original expression within gameplay, VR gameplay where the individual player has recorded his or her original expression, could, in theory, lead to different results. In those cases where the player is the one who has recorded screenshots or spectator views of videogame play, the player could arguably assert an author's copyright interest in the gameplay they have recorded.

2. Performance Right

Even if the player has not been the one to fix the gameplay, the fact that a videogame player did not author fixation may be overcome using performance rights. The idea of visual performance rights is not currently part of U.S. law. So it was not at issue when the *Baltimore Orioles* and *NBA* cases were adjudicated. This may change. While the WIPO Beijing Treaty on Audio Visual Performances is not yet in force in the U.S. or elsewhere (and its impact on the state of gameplay in the U.S. is yet to be seen) performance rights (like those contemplated under the BTAP) have been clearly recognized in Taiwan since 1998. Not only are performance rights recognized, they are recognized as a form of copyright under the Taiwan Copyright Act. In Taiwan, there is no question that the "fixation" element (i.e., who has fixed the performance in a tangible medium of expression) would not be an obstacle for players asserting that they have a copyrightable interest in their gameplay. In Taiwan, the player's performance rights should be protected even if someone other than the player had contracted for the recording to be made.

With regards to the "creative expression" element, the *NBA* case clearly

²⁶ Dan L Burk, *Owning E-Sports: Proprietary Rights In Professional Computer Gaming*, 161 U. Pa. L. Rev. 1535, 1535 (2013).

articulated that NBA games do not constitute original works of authorship. Whether the holding of this case would bar players from having performance right interests in their gameplay even after the Beijing Treaty comes into force in the U.S. remains to be seen.

On the other hand, in practice, Taiwan's courts have set a low standard for the creative expression requirement: As long as the moves in a game are not strictly dictated by the game itself, it seems likely that players could assert that their gameplay was original expression and deserving of protection under Taiwan's copyright law.

III. VR “Gameplay”

A. A Comparison between Various Expressions

Technology has come a long way from the days when the *Allen* court ruled that **the playing of a game was not a “performance within the meaning of the Copyright Act.”**²⁷ Paradoxically, as games have become more complex and the technology of VR incorporates unique behaviors and user choice into virtual worlds, the “rules” have enabled more unique player performances. The potential for unique creativity inside games is growing – and VR which blends unique players into games and virtual worlds – along with a regulatory scheme that seems intent on recognizing increased performers' rights – may push old assumptions to the breaking point.

B. Rights in User Generated Content in VR

VR is just one platform for next generation gameplay. And, as we have suggested elsewhere in this article, VR offers much more than gameplay and passive viewing of 360 entertainment. It can be a tool for artistic expression.

When Tilt Brush was introduced on the HTC Vive VR, Glen Keane, a former Disney animator who worked on *Beauty and the Beast*, *The Little Mermaid* and *Aladdin*, appeared in a promotional video where he sketched his most famous characters in 3 dimensions and walked around them, declaring: “Today, all the rules have changed.” Although he probably didn't intend it, Glen Keane could have been announcing that we are “in” a different world from that of *Allen*.

If the judges in *Allen* had experienced Tilt Brush, it would be difficult to imagine them declaring that “the playing of a game is not performance within the meaning of the Copyright Act.” Tilt Brush is actually more akin to brush

²⁷ *Allen*, 89 F.3d at 616.

and paint in the physical world than a simple arcade game. Is there any question that a Tilt Brush drawing would be protected under either copyright, performance rights or both?

As we move away from the traditional world of video games and into VR, the question at issue should not be whether UGC is protectable or not, but instead determining the copyright ownership of UGC. Can the platform or game production companies be able to strip users of their rights in works that the users create in VR by a simple end-user license agreement (EULA)? Or should the app developers and platforms be treated as producers of tools capable of artistic expression (such as a paint brush or camera)?

In some circumstances, the creativity expressed by the VR user may well surpass that of the game production company. There is no question that Riot Games owns the copyright to the various elements (e.g., the supplied elements of the avatars, the supplied buildings and objects, etc.) of the *LoL* games. Thus, Riot Games has a claim for copyright infringement for unauthorized copying when those elements are copied and/or distributed without permission. But what about Tilt Brush? Are the basic elements of red-blue-yellow “ink” in the game protected by copyright as well? Or should they be in the commons? If the end user license agreement of the platform claims all rights in the VR gameplay, is it conscionable? Is it enforceable?

IV. Conclusion

UGC today is markedly different from the days of *Allen*. Long gone are the days when scholars debated whether gameplay was copyrightable. Or so we would hope. But now at the beginning of what seems to be a new era of VR gameplay, questions seem likely to arise about ownership of performances in VR and UGC.

VR gameplay UGC could rapidly evolve into a commodity of great commercial value. The social element has become increasingly important in interactive forms of entertainment including games, and UGC is gaining commercial value. Just as Faker’s gameplay can attract thousands of fans, a popular VR player’s gameplay could potentially outstrip those numbers.

Stakeholders, including gaming platforms and game production companies, will likely want to control UGC. But will VR players, whose performances will inevitably capture more of their identity than a traditional videogame player’s gameplay, want to assert that they have rights?

A future line of VR copyright, performance rights and right of publicity cases, we expect, might arise from disputes between exceptional VR players, VR game production companies and game platforms. Will a platform or game production company argue that the user clicked “agree” in the EULA – and

therefore gave up all rights to UGC and their performance within the game? When the users *are the avatars*, and every tilt of the head and gesture matters in gameplay? When gameplay is inherently intertwined with personality of the players? Will VR gameplay create some form of moral right? As we go deeper into the VR world, we hope to see these legal issues explicitly resolved by courts or authorities.