Computer Games – legal issues for creative designers

This information sheet addresses legal issues that can arise when creating computer games, including the copyright in the various elements that make up a computer game such as the artistic works and the computer programs that operate the game. The discussion of copyright covers the use of 'authoring' programs and the need for games developers to have appropriate contracts with employees, independent contractors or unpaid volunteers.

This information sheet also discusses copyright in 'user generated content' and how ownership of 'user generated content', 'End User Licence Agreements' (EULAs) and the 'terms of use' of a Massively Multiplayer Online Roleplaying Game (MMORG).

Arts Law has a suite of agreements suitable for games design and development here.

This information sheet addresses legal issues that can arise with artists creating computer games and artists that create work in Massively Multiplayer Online Roleplaying Games.

Computer games are no longer confined to offline 'static' programs accessible in a single location but commonly operate across several digital platforms and can involve multiple players connecting online in a dynamic gaming environment that allows players to create new gaming outcomes . For more information on see Arts Law's information sheet New Media – Issues For Creators Working With And Across Multiple Platforms.

Creating games

Copyright doesn't protect a computer game as a whole rather it protects various elements that make up a computer game. The production of a computer game involves the creation of different elements that fulfil the *Copyright Act 1968* (Cth) definitions of 'cinematographic film', 'sound recording', 'artistic work', 'musical work', 'dramatic work', 'literary work' and 'computer program'. The content of the game will encompass the script that describes the interactive pathways of game play that are the basis of the game (a 'literary work' or 'dramatic work'), and the images of the characters and the artwork that creates the world of the game ('artistic works'). The completed visual elements of the game will be regarded as a 'cinematographic film' as it can be seen as a series of moving pictures (*Sega v Galaxy* case (1996 & 1997)) however that doesn't include the code that governs the way in which the player interacts with the game which requires programming codes that are also separate copyright works.

The digital elements of the game may be produced using programmed tools created by the game makers. There are also third party games authoring programs that are licensed by the game makers from the developers of those authoring programs.

The game producer needs to make sure that it has secured the rights to all these different components before it can market the completed game. This can involve a series of contractual agreements and licences.

The use of authoring programs

The production of a computer game will usually involve the use of different authoring programs which provide the development platform on which the game will operate and provide the tools to create all elements of the game including the characters and the character animation and the interactive elements of the world of the game. These authoring programs allow creative designers to work on games development without having to be involved in computer programming. The terms of the licence to use the authoring program provide the scope of the permission to use the computer code of that authoring program.

A creative designer with programming skills may also be the author of specific routines or modules of code that augment or improve the operation of the authoring program. When the creative designer is contracting with the producer of the computer

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game, the designer may wish to claim proprietary rights in those routines or modules of code so that the designer can use those routines or modules of code in future projects. Care should be taken in defining exactly what is being assigned or licensed by the creative designer to the game producer. It would be appropriate for such a designer to licence the game developer the right to use the routines or modules of code that may be reproduced in the completed game while the creative designer retains copyright ownership of the routines or modules of code.

Copyright ownership in games development

If you are engaged in games development you should be aware of how the law determines ownership of intellectual property rights in what is created by an employee, independent contractor or volunteer. Generally, when an employee makes a creative work in the course and within the scope of the employment relationship, the employer is the copyright owner unless there is an agreement to the contrary. However, when the person creating the work is a contractor or a volunteer (not an employee), the contractor or volunteer generally retains copyright in the works created for the organisation. Thus, if you are a contractor or volunteer working for a game producer, the game producer requires a licence (written or oral) in order to use the work they have requested you to create. Alternatively, if the game producer wants to acquire full ownership of the work, you will be asked to sign a written assignment of copyright. If you want to maintain ownership of copyright, do not sign any agreement without fully understanding the consequences. You should contact Arts Law or your solicitor for more information.

Moral rights and computer games

If you make a creative work, you have certain 'moral rights' as the 'author' of that work whether you created it as an employee or a contractor. You retain those moral rights even where your employer owns the copyright in your work or you have assigned that copyright. Moral rights recognise your ongoing connection with your creative work, and there are 3 types:

- Right of attribution: you can make sure that you are named and acknowledged for your work.
- Right against false attribution: you can stop other people from claiming that they created your work.
- Right of integrity: you can stop your work being used in a way that harms your honour or reputation.

The meaning of an "author" with regard to moral rights extends to the creative work in all elements of the computer game including the work of computer programmers, script writers, graphic artists and animators. An author may be asked to give consent to changes to be made to the work created by that author. If such moral rights consent is given, it will not an infringement of the author's moral rights to the extent the changes made to the work are within the scope of the consent granted.

Technological protection measures – 'mod chips', game enhancers, custom firmware and boot disks

The *Copyright Act 1968* (Cth) allows copyright owners to use digital locks to stop their material being accessed or copied. These digital locks are defined as 'technological protection measures' (TPMs), which may be in the form of access codes or encryption software. An access control TPM prevents a person from being able to view or listen to the material, except when using the appropriate access code. A copy control TPM will allow a person to access material to view or listen to the material but prevents a person from making a copy of the material.

The sale and use of 'mod chips', game enhancers, custom firmware and boot disks, that allow video games systems to play backup or import versions of video games, will probably breach the TPM provisions of the Copyright Act. The *Sony v Stevens* case (2005) held that the Copyright Act permitted the supply of 'mod chips' for use in PlayStation consoles which allowed unauthorised copies of games to be played. However after that decision, the definition was changed to include an 'access control technological protection measure'. Section 116AN of the Act now prohibits the circumvention of an access control TPM, except with the permission of the copyright owner of the work to which the TPM is applied. Section 116AN provides for

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a number of exceptions for specific purposes e.g. achieving interoperability of an independently created computer program, encryption research and testing, computer security testing and achieving online privacy. There are also exceptions for law enforcement and national security purposes and purposes related to libraries, archives and cultural institutions.

Section 116AN(9) provides a regulation making power to create additional exceptions, which are listed in Schedule 10A of the Copyright Regulations. These exceptions include access where a TPM is not operating normally and a replacement TPM is not reasonably available and access where a TPM damages a product, or where circumvention is necessary to repair a product.

The Commonwealth Attorney General's department can, from time to time, review of the exceptions to TPMs. A public review is being conducted in 2012, which allows those with an interest in accessing material that is protected by a TPM to seek exemptions to cover a specific use of circumvention technology such as accessing material protected by a TPM to carry out a 'fair dealing' use of that material. The criteria being applied to the review of the exceptions to TPMs include: has the use of the TPM had an adverse impact on the non-infringing use by the person or body seeking the exception, or is it likely that it will have such an impact? And would the exception impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of the TPM?

End User Licence Agreements and user created content

An 'End User Licence Agreement' (EULA) and the 'terms of use' are the usual names for agreements that describe the relationship between the owner of a computer program and the user of the software. These types of agreements are used to create the agreement between the producer/operator of an online game such as a Massively Multiplayer Online Roleplaying Game (MMORG) and the purchaser/player of the game. The contents of the EULA, or the terms of use, set out the legal basis of the relationship between the producer/operator of the MMORG and the user. It is important to read the EULA, in particular to learn how the ownership of 'user created content' is described in the EULA. The terms of use of some MMORGs assert that copyright in all virtual assets used in the game, including user created content, is held by the operator of the MMORG. In contrast, the EULA of other MMORGs acknowledge that users own the copyright in the user created content and allow user to engage in transactions with other users of the MMPRG using the 'in world' currency. It may also be possible for users to convert the 'in world' currency to a 'real world' currency of as to generate income from the user's creativity as a designer of digital work.

The legal status of user created content will depend on whether such digital assets can be categorised as a 'work' or other material that is recognised as property under copyright legislation or whether such digital assets meet any categorisation of an interest in property that is recognised by law. Avatars and other virtual digital assets appear to be within the meaning of an 'artistic work' as defined in the Copyright Act. Animated virtual assets may fall within the Copyright Act definition of a 'cinematographic film'.

The protection of user created content may be achieved through a combination of contractual arrangements (such as the EULA), the use of TPMs and the application of criminal law. However it cannot be assumed that the criminal law will provide an appropriate mechanism to protect virtual assets. Criminal offences related to the unauthorised access to computer exist in a number of jurisdictions, although there can still be arguments as to whether existing legislation adequately addresses theft of virtual assets and other offences such as obtaining virtual assets by deceit.

Further information

- Australian Copyright Council information sheet
  - Games and Copyright
  - Software and Apps
- Arts Law information sheet Copyright

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- Arts Law information sheet Moral rights

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The information in this information sheet is general. It does not constitute, and should be not relied on as, legal advice. The Arts Law Centre of Australia (Arts Law) recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter.

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The Arts Law Centre of Australia has been assisted by the Commonwealth Government through the Australia Council, its arts funding and advisory body.