

Law of the Level

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Machinima: Machine + Cinema

If you've ever seen clips of *Halo* avatars discussing how they are stuck in a canyon with the enemy camp,[\[1\]](#) or watched the *South Park* episode where the main characters play *World of Warcraft*,[\[2\]](#) then you've experienced a genre of film called "machinima." The term "machinima" (machine + cinema) generally refers to animated filmmaking within a real-time virtual 3-D environment.[\[3\]](#) To accomplish this, a "machinimator" (machinima + animator) pieces together video game footage to create an independent production that is distinct from the video game itself. Essentially, the machinimator is a digital puppet master who utilizes the environment, design, and characters of a video game to create a separate story. Machinimators normally record their productions in real-time using a capture card (hardware) or video capture program (software). Additionally, many video games now provide an in-game video capture ability, which allows users to easily record their own game footage.

Given the creative avenues available, machinima can vary from simple run-throughs of particular quests to sophisticated films involving elaborate plots and detailed character development. Some of the very first examples of machinima lacked any narrative and were straightforward recordings of multiplayer battles in *Doom* and *Quake*. These early forms of machinima went largely unnoticed by the public. Today, however, the genre has advanced in style and creativity sufficiently that both ongoing series and feature film-type machinima have steady followings. As machinima becomes more widespread, fans and new viewers can find films online, at convention and festival contests, and even on television.

For video game publishers, the growing popularity of machinima is both beneficial and troublesome. One benefit of machinima is the potential for advertising. If a particular machinima production becomes popular enough, it is essentially a source of free promotion for the video game on which it is based. On the other hand, if publishers allow users to create machinima, they have to address additional contract and licensing issues. Moreover, publishers may encounter machinima that is offensive or reflects poorly on the video game.

By creating a settled policy on game content usage and following up with the enforcement, video game publishers can benefit from the many advantages of machinima while minimizing its potential problems. At present, however, approaches to policies and enforcement vary widely. Some publishers create specific rules for users establishing rights and limitations for the use of copyrighted game content in machinima. Other publishers adopt blanket prohibitions on

derivative works and grant exceptions for specific productions. Finally, many publishers maintain an official stance against machinima but tacitly allow the existence of derivative works by not enforcing restrictions.

Welcoming Machinima with Open Arms... and Strict Guidelines

As explained in the [previous article on microtransactions](#), when someone purchases a video game, an end-user license agreement (EULA) details the rights the purchaser has to play and use the game. If publishers wish to encourage machinima, the EULA itself can permit derivative works, or the EULA can direct users to a separate document governing derivative works. As part of a user's license to create machinima, publishers typically carve out certain exceptions. Publishers often restrict commercial use of machinima, prohibit profane or obscene content, and require that users grant to the publisher an unrestricted, royalty-free license to exploit the machinima. Additionally, because some artists create machinima that utilize game content from multiple video games, publishers often forbid users from infringing third-party IP rights when creating derivative works. This limitation is particularly important for publishers who may exploit user-created machinima, and who could be held responsible for infringement of third-party IP rights. Thus, by specifically allocating what a user can and cannot do with derivative works, through either the EULA or a separate document, a video game publisher can take advantage of the public attention that machinima may attract and at the same time help protect its rights in derivative works.

Prophylactic Bans Against Machinima – With Exceptions

Not all video game publishers permit machinima based on their game content. Among other restrictions, a publisher can use its EULA to impose a general prohibition against all derivative works based on its video game. As a result, anyone creating machinima without a license to create derivative works will violate the EULA. To add some flexibility, the EULA can contain a “waiver of restrictions clause,” which will allow a video game publisher to lift the restriction on derivative works for certain users upon request. With this approach, publishers may face additional contracting costs for reviewing license requests on an item-by-item basis. However, by creating a general ban against machinima, video game publishers can limit the creation and distribution of improper or infringing machinima, while still reserving the right to authorize machinima that they deem acceptable.

Under-Enforcement (Implied License)

Some publishers adopt EULAs that prohibit users from creating derivative works, then under-enforce this restriction. However, this approach leaves users in limbo, unsure of the legal status surrounding their creations. Furthermore, under-enforcement may lead users to believe that a publisher has implicitly authorized existing machinima. This may create problems for publishers if they later seek to enforce their restrictions on derivative works. If, after a sustained period of under-enforcement, publishers identify problematic machinima, estoppel^[4] defenses or the doctrine of implied license may prevent publishers from enforcing their restrictions. Thus, to avoid losing the ability to protect their rights in derivative works, video game publishers (regardless of their position on machinima) may need to enforce their policies on game content

usage from the start.

Machinima and Copyright: The Crossroads of Infringement and Fair Use

Due to its use of a video game's engine, characters, and footage, machinima is a "derivative work" and may infringe upon a publisher's copyright in its game content. In the United States, copyright holders have certain exclusive rights in their work. This means only the copyright holder (and his/her licensees) may reproduce the work, perform it publicly, and distribute copies. In addition, only the copyright holder may create and own derivative works. Absent EULA guidelines addressing machinima or individual licenses from the copyright holder for the online environment, machinimators can face liability if their creations infringe on publishers' copyrights.

Machinimators may avoid this liability if their works constitute "fair use." The fair use doctrine allows limited use of copyrighted material without the permission of the copyright holder for certain purposes, such as commentary, criticism, news reporting, research, teaching, or scholarship. To determine whether a derivative work constitutes fair use, a court balances at least the following four factors:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

Machinima does not necessarily constitute fair use. The application of the fair use doctrine to any particular machinima will depend on the specific circumstances, which courts analyze on a case-by-case basis by balancing these factors. If the machinima does not negatively affect a video game's profits, or relies more on independent creativity than another copyrighted work, there is a better chance that it constitutes fair use. On the other hand, if the machinima significantly reduces the video game's potential profits, or relies too heavily on other copyrighted work, there is a strong possibility that it will be found to infringe. In any event, the fair use doctrine is unpredictable. Rather than relying on the the fair use defense and risking infringement liability for a specific machinima production, a cautious machinimator may want to seek a license to create derivative works from the video game publisher.

Final Thoughts

As video games continue to increase in popularity, the continued growth of machinima is likely to follow. Only time will tell if publishers decide to embrace or discourage

machinima. Regardless of how publishers handle machinima, under-enforcement of content usage policies can lead to user confusion and difficulty in enforcing those policies at a later time. To help protect their rights in game content and to ensure that users understand the legal boundaries for machinima, it can be beneficial for publishers to not only address derivative works through a EULA or separate document, but to also enforce those policies. For machinimators, creating derivative works without a license may infringe upon a publisher's copyright and draw liability. Since there is no guarantee that a specific machinima production will constitute fair use, machinimators may want to protect themselves by obtaining a license for their creations.

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[1] The cult favorite *Red v. Blue*, created by Rooster Teeth Productions.

[2] “Make Love, Not Warcraft.”

[3] As defined by The Academy of Machinima Arts and Sciences (AMAS). Yes, they have their own academy.

[4] Legal jargon that essentially means one cannot assert something contrary to an established stance, as proven by past conduct.

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