



**Use of Video Game Screenshots in Scholarly Publications:  
Recommendations from the Digital Games Research Association**

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**MEMORANDUM TO FILE****To: Prof. Greg Lastowka****From: Christopher Ogino, 2L Summer Research Assistant<sup>1</sup>****Date: July 5, 2013****Re: The Use of Video Game Screenshots in Scholarly Publications****Question Presented**

If a screenshot of a video game is used in a work of academic scholarship, will the author or publisher of the scholarly work be required by United States copyright law to obtain permission to include the screenshot in the publication?

**Short Answer**

Usually the answer should be “no,” unless the screenshot is being used solely for a commercial and non- educational purpose like promoting the sale of a book. In the majority of standard cases, including a screenshot of a video game in a scholarly article or monograph should be deemed a “fair use” under Section 107 of Title 17 of the United States Code. Courts are instructed to examine four non-exhaustive factors in determining whether fair use is allowed under United States law: (1) the purpose and character of the use, (2) the nature of the work that is used, (3) the amount and substantiality of the work used in relation to the copyright owner’s work as a whole, and (4) the effect of the use on the market for the work.

Applying these factors to the case of video game screenshots in academic publications, the following conclusions seem relatively straightforward. The first factor should favor fair use because screenshots serve the traditionally transformative purposes of scholarship, criticism, and commentary. The second factor may lean against fair use because videogames are a creative medium. The third factor should favor fair use because screenshots are inevitably a miniscule, static portion of a video game as a whole. The fourth factor should also favor fair use because there is no existing market for the use of video game screenshots in scholarly articles and the nature of the use is fundamentally transformative.

These conclusions are discussed in more detail below, with citations to appropriate controlling case law.

**Discussion**

Section 106 of Title 17 of the United States Code sets forth the exclusive rights of a

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<sup>1</sup> Revised slightly by Greg Lastowka, Fall 2013.

copyright holder. Notably, these rights include the right to reproduce a work and the right to mark derivative adaptations of a work into another medium. Publication of a screenshot of a video game would presumably constitute either a reproduction of the game or a derivative adaptation of the game into the medium of a visual image. Hence, reproduction of a screenshot of a video game is arguably a violation of Section 106. However, Section 107 of Title 17 of the United States Code states, in relevant part:

*Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—*

*(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.*

Thus, a party reproducing a screenshot taken from a video game should be excluded from liability for copyright infringement if their use of the screenshot is a “fair use” within the meaning of the statutory text above. Determining whether “fair use” exists in the case of screenshots requires not merely reading the above language as written, but understanding how courts have applied that language in specific cases.

### **1. Purpose and Character of the Use**

The first factor in the fair use analysis looks at the purpose and character of the use. This factor is likely to be decisive with regard to the issue presented, so it will be discussed at length below.

The preamble for Section 107, which contains the fair use factors, lists several traditional purposes that will support a finding of fair use: “criticism, comment, news reporting, teaching ..., scholarship, or research.” 17 U.S.C. § 107. The use of video game screenshots in academic publications is usually non-commercial in nature and should be seen to constitute “criticism, comment ..., scholarship, or research.” For these reasons, the first factor should weigh in favor of fair use.

The key contemporary inquiry with respect to the first factor is whether or not a given use is “transformative” as the case law defines that term. *See Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608 (2d Cir. 2006). When a given use of a work is deemed “transformative,” this will lead to a lesser role for the other three fair use factors.

*Campbell v Acuff-Rose Music*, 510 US 569, 579 (1994). A work is “transformative” if it supersedes the objects of the original or “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” *Id.* Transformative purposes include criticism, comment, and scholarship—all of which are mentioned in the preamble to section 107 and which seem to describe the use of video game screenshots in academic publications.

As the Federal Court of Appeals for the Second Circuit has noted,<sup>2</sup> courts are more willing to embrace the fair use defense for works that are intended for broader public purposes, including scholarship. In an opinion finding that a book’s use of quotations amounted to criticism and comment, the Second Circuit noted that the author had added “substantial intellectual labor to the verbatim quotations, continually offering his own insights and opinion.” *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1260-62 (2d Cir. 1986) (finding fair use despite denial of permission from copyright holder). In *Twin Peaks Prods. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1375 (2d Cir. 1993), the Second Circuit posited that briefly describing a plot in order to add significant criticism or comment on the author’s plotting technique would be an example of fair use. *Id.* Images, such as screenshots, may be used in transformative ways. *Bill Graham*, 448 F.3d at 609.

One court has specifically found that book publications including screenshots of video games have amounted to fair use under Section 107. In *Publications Int’l, Ltd. v. Bally Mfg. Corp.*, the district court of Illinois ruled that the use of illustrations and diagrams contained in the book HOW TO WIN AT PAC-MAN were a fair use because they provided a helpful visual accompaniment to the educational instructions in the text. 1982 U.S. Dist. LEXIS 16219, 215 U.S.P.Q. (BNA) 861 (N.D. Ill. July 14, 1982). The court ruled that the use of illustrations and diagrams were “fair use because they illustrate in a very helpful way the text of the book.” 1982 U.S. Dist. LEXIS 16219, 215 U.S.P.Q. (BNA) 861 (N.D. Ill. July 14, 1982). Similar publications without illustrations were harder to follow. *Id.* at 1-2. The same district court further found that another book, PAC-MANIA, had “an even better claim to fair use protection...” *Id.* at 7. PAC-MANIA contained *Pac-Man* history, strategies, and discussions about bootleg versions of the game, and was protected because it was “both comment and criticism and maybe even review.” *Id.* The court found no excessive use of Midway’s work since the text engaged significantly in discussion of the included images. *Id.*

Based on this case, I conclude that when used to illustrate concepts contained in the text of academic publications and articles, video game screenshots are probably a form of transformative fair use unless they are being used solely to promote sales. Like the illustrations contained within HOW TO WIN AT PAC-MAN and PAC-MANIA, video game screenshots in scholarly publications can have instructional value and can be helpful in illustrating the text. For academic articles, the use of screenshots will almost certainly will resemble the use in *Maxtone-Graham*, where the author of the article or book adds substantial intellectual labor to the images. As in the case of PAC-MANIA, the

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<sup>2</sup> The Second Circuit presides over appeals from cases litigated in New York, making it especially influential in copyright law matters affecting the publishing industry.

screenshots would be used to complement and describe the ideas expressed in the text of the scholarly work. As long as the screenshots are utilized to illustrate the scholarly work of the author, their use should be found to have a transformative purpose.

However, it should be noted that if a screenshot were placed on the back cover of a book or were used in an advertisement, it is possible that a court would *not* find fair use. The same court found that the illustrations on the cover of the HOW TO WIN AT PAC-MAN were *not* fair use since they lacked instructional value and their sole purpose was marketing. *Id.* at 3 (dismissing argument that higher sales increase the instructional value of the publication). With regard to the PAC-MANIA book, the court noted that the characters on the cover of the book were suggestive, rather than verbatim copying, approving that verbatim images were not being used in a promotional matter.<sup>3</sup> *Id.*

When a screenshot is used to advertise or promote a book, this may be seen as a “commercial” use of the work. Generally speaking, under the first factor, non-commercial uses will weigh in favor of a finding of fair use while commercial uses will weigh against fair use. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985). However, even if scholarship is for profit, I believe that the use of screenshots should constitute fair use. The Supreme Court recognized that nearly all of the illustrated fair use purposes, including scholarship, comment, and research, “are generally conducted for profit.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994). Accordingly, the “crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.” *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

In *Bill Graham*, the Second Circuit found that the reproduction of certain Grateful Dead posters in a biographical book did not amount to an exploitation of the posters for profit, despite the book’s commercial nature. *Bill Graham Archives*, 448 F.3d at 612. They court found it significant that the disputed images were not used to advertise or promote sales, but were descriptive of the band’s life and therefore were only incidental to the book’s commercial value as a biographical work. *Id.*

In contrast, the federal district court in *Ty, Inc. v. Publ’ns Int’l Ltd.*, 333 F. Supp. 2d 705, 710 (N.D. Ill. 2004), found that photographs of Beanie Babies were commercial in nature because the photos were used to promote the sales of their books, which were not educational. 333 F. Supp. 2d 705, 710. The court also found that the defendants had exploited the material without paying the customary fee, because Ty had licensed other publishers to publish books similar to the defendants. This weighed against fair use. *Id.* at

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<sup>3</sup> For further information about PAC-MANIA, I found the following sources helpful. *See generally* Brian Taylor, Pac- Mania Is A Book About Pac-Man Things, Joystick Division (Aug. 7, 2011), <http://www.joystickdivision.com/2011/08/pac-mania-is-a-book-about-pac-php>; Consumer Guide: Pac-Mania, Museum of Computer Adventure Game History (last updated July 9, 2013), <http://www.mocagh.org/loadpage.php?getgame=pacmania> (displaying the cover and back cover of Pac-Mania).

711.

However, commerciality is of secondary importance to transformative use that benefits the public. In the case of *Sony Computer Entm't Am., Inc. v. Bleem, LLC*, 214 F.3d 1022 (9th Cir. Cal. 2000), the Ninth Circuit found that video game screenshots used in advertisements were fair use because the defendant's comparison of the outputs of the PlayStation and its emulator greatly benefited the public with little loss to the copyrighted material's integrity. *Id.* at 1027; *see also Publications Int'l*, 215 U.S.P.Q. (BNA) 861 at 4-5 (noting that the book covers were not fair use because they lacked any educational value).

In the context of scholarly articles, screenshots do not exploit the copyrighted material without paying the customary price. I believe that in the context of a scholarly article, a video game screenshot derives its commercial appeal solely from the transformative use in the context of scholarship, criticism, and commentary. Screenshots that are used to give context to the ideas expressed in the text should not be found to be exploiting the copyrighted work for profit. Similar to the *Pac-Man* illustrations in *Publications Int'l*, they help illuminate scholarship on the audiovisual medium in ways that text alone cannot.

As a matter of sound policy, scholarship on video games benefits greatly from the use of screenshots. For example, in the article *A Study of User Interface Modifications in World of Warcraft*, screenshots from *World of Warcraft* screenshots are used to compare the default user interface of *World of Warcraft* with a modified user interface.<sup>4</sup> By using these screenshots, the author is able to demonstrate how much more complex a modified user interface is versus the default one. Descriptions alone would not be nearly as helpful, since the bases for the scholarship are modifications that affect what the user can visually perceive on the screen. Like the illustrations of PAC-MAN, the absence of screenshots would be detrimental to the scholarship in that article (and to many others).

Another factor to consider with regard to "transformative use" is the extent to which the copyrighted material is used. This is distinct from the third factor of fair use, as this inquiry looks at the amount it is used in relation to the accused work (as opposed to the copyrighted work). Where the work used constitutes an inconsequential portion of the defendant's work, this supports weighing the first factor towards fair use. *Bill Graham*, 448 F.3d at 611. In *Bill Graham*, the court found the use transformative in part because it was an insignificant part of the total work: the reduced size images of posters comprised less than one-fifth of one percent of the book. *Id.* (noting that the court was unaware of any case where such an insignificant taking was not a fair use).

A screenshot's in a scholarly work on video games will generally constitute a small proportion of the overall work. This also supports finding transformative use. Screenshots used in publications are likely to be similar to the reduced size thumbnails of the Grateful

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<sup>4</sup> This article can be found at: Sean Targett, Victoria Verlysdonk, Howard J. Hamilton, & Daryl Hepting, *A Study of User Interface Modifications in World of Warcraft*, *Game Studies* (Dec. 2012), [http://gamestudies.org/1202/articles/ui\\_mod\\_in\\_wow](http://gamestudies.org/1202/articles/ui_mod_in_wow) .

Dead posters in *Bill Graham*. They are also not likely to comprise a significant portion of the article or publication, which weighs in favor of finding them transformative.

Finally, with respect to the first factor, courts have found that minimizing the expressive value of the copyrighted work to the level necessary to achieve a transformative purpose further strengthens the argument for fair use. In *Bill Graham*, the court found that the posters' expressive value was minimized by not only the reduced size, but also by combining them with a timeline and text. 448 F.3d at 611. On the other hand, courts are less likely to find fair use for new works that take more than is necessary for the purpose of comment or criticism. *Twin Peaks Prods.*, 996 F.2d at 1375.

Screenshots of video game are significantly less expressive than the video game itself. Like the thumbnail images in *Bill Graham*, they are reduced in size. (This may be less true for screenshots of mobile games.) However, as explained further below, screenshots are a fraction one user's experience of a game that may contain hours upon hours of visual imagery. While some popular games do have static or repetitive visuals (e.g. *Tetris* or *Temple Run*), it should be noted that *Pac-Man*'s visuals are also largely static, yet their use in the context of two books was found to be fair use. *Publications Int'l*, 215 U.S.P.Q. (BNA) 861 at 1-2, 7.

## 2. Nature of the Copyrighted Work

The second factor of a fair use analysis is the nature of the copyrighted work. Works of a creative nature typically provide stronger rights to the copyright holder, but courts have limited the weight of this fair use factor when a defendant's use is transformative. *Campbell*, 510 U.S. at 586. The Ninth Circuit found that video game screenshots were not necessarily creative, given that they constitute "merely an inanimate sliver of the game." *Sony Computer Entm't Am., Inc. v. Bleem, LLC*, 214 F.3d 1022, 1028 (9th Cir. Cal. 2000). I believe this factor should support neither the copyright holder nor the scholarly author. While video games are creative works, screenshots may not be accorded the same weight. Additionally, where transformative use exists in video game cases, courts have generally found the second factor unhelpful. *Id.* (referencing a similar conclusion on the second factor in *Micro Star v. FormGen, Inc.*, 154 F.3d 1107, 1111 (9th Cir. 1998)).

## 3. Amount and substantiality used in relation to the copyrighted work as a whole

The third fair use factor examines the amount and substantiality of the plaintiff's work used by the accused work. To be clear, this analysis should focus on the proportion of the allegedly infringed work used, not the additional content added by accused work. An analysis of this factor requires an examination of the quantitative and qualitative aspects of the portions used. *Campbell*, 510 U.S. at 586.

Fair use is supported when the portion of the work used is quantitatively small. In *Monster Communs. v. Turner Broadcasting Sys.*, 935 F. Supp. 490 (S.D.N.Y. 1996), a district court found that clips aggregating a maximum of one to two minutes, or 0.7 to 2.1 percent, of a documentary were quantitatively insignificant. *Id.* at 495.

With regard to video game screenshots, the third factor should normally weigh against the copyright owner, since a screen shot is an insignificant portion the work as a whole. *Bleem*, 214 F.3d at 1028. Screenshots, the *Bleem* court reasoned, constitute 1/30th of a second of a game. *Id.* Because video games can last “over several hours,” the court found that a screenshot is of little substance to the overall copyrighted work. *Id.*

The third factor therefore supports finding the use of screenshots in scholarly articles and publications a fair use. Screenshots are quantitatively and qualitatively insignificant portions of video games. Today, game plots can last much longer than the several hours described in *Bleem*. For example, *The Elder Scrolls: Skyrim* contains hundreds of hours of content without repeating a mission. Any screenshot should be found quantitatively insignificant when compared to the whole of a video game.

Even if the amount taken is quantitatively insignificant, this factor may still weigh against fair use if the material used is qualitatively the “heart” of the work. *Harper & Row*, 471 U.S. at 565. In *Harper & Row*, the court found that the quotations taken by the magazine were the most interesting and powerful parts of the book. Though they were not a large portion of the book, they were qualitatively significant enough to weigh the third factor against fair use. *Id.* However, it should be noted that in some case, copying the entire work does not necessarily tip the third factor against fair use. *Kelly v. Arriba Soft. Corp.*, 336 F.3d 811, 821 (9th Cir. 2003). Courts have taken the purpose and character of the use into account when considering this third factor. In *Bill Graham*, the court found this factor supported fair use, even when the entirety of the posters were copied, because the images were used in a transformative manner by reducing them to thumbnails and mixing them with art and text. *Bill Graham*, 448 F.3d at 613.

Some screenshots of a video game may be more qualitatively significant to the work as a whole than others. A screenshot of *Tetris* arguably captures more of that game than a screenshot of *The Elder Scrolls: Skyrim*. Screenshots from a game like *Skyrim* can have immense variations. A screenshot in a game like *Skyrim* is more analogous to single photo within a collage; it is only a minor piece within a larger body of work. Two screenshots by different users of the same location in *Skyrim* can contain dozens of differences, depending on character customization, the enemies the game generated, what the in-game weather is like, the angle of the camera, etc.

Screenshots of *Tetris*, even at different levels and on different gaming platforms, will look very similar. However, considering the Ninth Circuit’s strong language regarding the quantitative insignificance of the screenshots in *Bleem*, it is unlikely that a court would consider any screenshot to be the heart of a work. This is also not likely to be dispositive, as indicated by the district court of Illinois’s willingness to find the *Pac-Man* illustrations in *Publications Int’l* a fair use.

#### **4. Effect on the potential market for the copyrighted work**

The final factor also supports finding fair use. In determining this factor for screenshots, the Ninth Circuit found that the relevant inquiry is how the market for screenshots is affected. *Bleem*, 214 F.3d at 1029. In determining the fourth factor, the relevant concern



is whether the new work substitutes the original in the market or its derivatives. *Castle Rock Entertainment v. Carol Publ'g Group*, 150 F.3d 132, 145 (2d Cir. 1998). Higher degrees of transformation result in less likelihood of usurpation of the original. *Id.* Copyright owners cannot prevent secondary users from entering transformative use markets “by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work.” *Bill Graham*, 448 F.3d at 615 (citing *Castle Rock*, 150 F.3d at 146 n.11). Just because a publisher is willing to pay licensing fees for images, does not mean that they barred from making fair use of them in the alternative. *Bill Graham*, 448 F.3d at 615.

Screenshots used to illustrate concepts contained in scholarly articles and publications are not substitutes for the original in the market. Even if there is a market for licensing screenshots, it is not affected by the use of screenshots in scholarly works because such works are transformative. The video game copyright holder cannot preempt the use of their works in such transformative markets. Although publishers of game scholarship, criticism, or commentary may have sought licenses in the past, that will not prevent them from instead using the screenshots according to fair use principles. As such, this final factor should weigh towards fair use.

### **Conclusion**

Based on my research, I conclude that when a screenshot of a video game is used in the text of a work of academic scholarship, the author or publisher of the work should not generally be required by United States copyright law to obtain permission to include the screenshot in the publication. In the majority cases, including a screenshot of a video game in a scholarly article or monograph should be deemed a “fair use” under Section 107 of Title 17 of the United States Code.