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The Gaming Theatre Company: players, gameplay, performance and the law

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Abstract:

This article proposes arguments proving that the act of playing a video game may attract copyright protection in the context of European intellectual property law. This article explores this from a multidisciplinary perspective including performance studies and EU copyright law. The increasingly popular practice and industry of ‘public gaming’ is suggesting that playing video games is now enriched with elements belonging more to musical and recitative performances. However, while actors and musicians’ performances constitute undeniable bricks of the creative process in presentations to the public, there is no such thing called ‘video game performance’ or ‘gaming performance’. The article suggests that, under certain conditions, players’ agency is able to generate a multi-layered meaning among players, audiences and the game. Therefore, after building a theoretical framework where gameplays are featured by theatrical performance qualities, the article proposes a definition of ‘public gaming performance’. After that, it uses such a definition to suggest that certain public gameplays, as well as being public performances under the performative studies umbrella, have everything they need to enjoy copyright protection under EU copyright law. On the one hand, then, this article uses theatrical models to shape gaming as a performative activity. On the other hand, it analyses the legal structures and mechanisms preventing game stream from attracting copyright protection while providing the reader with observations on the main obstacles to the full empowerment of players as performers.

Keywords:

Introduction

Film and music industries are built on the performances of actors, musicians and singers. Specifically, the interaction between individual dramatic and musical works such as scripts, scores and lyrics is able to generate an aesthetic and cultural reaction that is entered into common parlance as ‘performance’. Based on this, actors’ and musicians’ performances were the components around which the recent success of the music and film industries has been established. However, the current creative industry scenario has changed in favour of a new form of entertainment: gaming. Despite the inevitable differences in terms of business, technology and audience, those creative industries have a cornerstone element in common: the interaction between an individual and a creative work. Nevertheless, society, social science and legal scholars still struggle to give a legal and commercial dimension to gaming performance as well as to its outcome: gameplays.

Playing a video game is something individuals do ‘outside’ their daily lives. Interacting with the video game medium also involves experimenting with cognitive, social, emotional and motivational effects that often are impossible to achieve in the real world. Players achieve previous effects within a separate dimension of play that game studies describe as a ‘magic circle’: a space where real-world rules and structures are suspended and replaced by game world rules and reality. When playing a video game, players interact with its text, moving images and in-game arts, or music. By doing so, players seem to perform and experience action, be it

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3 The intellectual property law definition of such works is useful because it hints at the legal context that Part 2 of the article will investigate.
6 R. Linser et al., The Magic Circle – Game Design Principles and Online Role-play Simulations (World Conference on Educational Multimedia, Hypermedia & Telecommunications, 2008).
play, work or something in-between.\textsuperscript{6} Additionally, video game is considered as a form of protected speech by the US Supreme Court which stated that video games ‘communicate ideas and social messages through characters, music, plots, and dialogues’\textsuperscript{7}. In this sense, it is possible to observe different types of speeches. One main distinction sees the contrast between speeches that describe things from speech acts that do things.\textsuperscript{8} Leaving aside speech acts that merely describe the world, speech acts characterized by a certain agency operate differently and offer a base for further performance discussions. ‘Performative’ indicates specific acts of speech that perform an action when they are declared.\textsuperscript{9} For instance, within the speech act condensed into the expression ‘You are Fired’, the act of speaking itself is able to cause an effect where it is uttered.\textsuperscript{10}

In the context of video games, players’ agency and actions make the game work: pressing ‘A’ to make Ori jump; moving the analogue stick to make Geralt dodge a spell attack; and replying to NPC’s questions in a nineteenth century London.\textsuperscript{11} These are examples of ‘gameplay action’ or, in a broader sense, interactivity. However, on a deeper level, the gameplay seems able to perform action both inside the game and outside of the ‘magic circle’. Indeed, performative acts of speech may offer a new perspective in understanding players’ in-game actions. In fact, players’ gameplay seems to be able to perform a certain type of action either within the magic circles and within the dimension known as the real world. Therefore, performativity in video games implies that players’ gameplay can impact the state of the world through play action.\textsuperscript{12}

This offers the momentum for the observation of gaming and subsequent gameplay under a performance studies lens. To juxtapose video games and performance is not inappropriate. On the contrary, performance and video games are deeply linked. While performances relate to cultural and social studies, video games are considered cultural artifacts\textsuperscript{13} and gameplay can be read as a litmus of players’ decision making and their enactment of choice.\textsuperscript{14} Again, while performance studies are deeply linked to the aesthetic understanding of its gestures, video games are aesthetic objects in the sense that players dance in response to games observed as choreographic scripts through which the gameplay is created.\textsuperscript{15} Furthermore, ‘play’ (the dimension where any game is located) is that element that shapes performance as a ritualized behaviour.\textsuperscript{16}

Under previous circumstances, the research question of this article is whether playing video games may count as a performance while being protected by European copyright law. With such an objective, the author undertook the following approach. On the one hand, performance studies are used to generate a definition of video game performance, and, on the other hand, such definition drives the intellectual property analysis of performative gaming. It is worth noticing that the legal analysis will be based on European copyright law. However, given the lack of CJEU’s judgments in relation to video game and performance, the presence of US case law provides the reader with the necessary background and understanding on this matter. Furthermore, since the author aims to identify a copyright-based solution of video game streaming, this article will not cover how contractual terms and conditions address the issue.

This article is divided into two main sections. In the first section, the essay investigates performance, its connection with play, game, gameplay, and how this may have relevance for video games. After that, the article investigates the performative features of theatre, hence interactive media, games and finally the gaming

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\textsuperscript{8} J.L. Austin, How to Do Things with Words (Oxford University Press, 1962).

\textsuperscript{9} Ibid.


\textsuperscript{11} See Ori and the will of the Wisp (Moon Studios, 2020); The Witcher III (CD Project Red, 2015); Vampyr (Dontnod Entertainment, 2018).

\textsuperscript{12} Bogost (fn 6).

\textsuperscript{13} P.M. Greenfield, ’Video Games as Cultural Artifacts’ (1994) 15 JADP 3–12.


\textsuperscript{15} G. Kirkpatrick, Aesthetic Theory And The Video Game (New Pub, 2021) 1–11.

\textsuperscript{16} Actions featured by pattern and repetition. See R. Schechner, Performance Studies, An Introduction, (Routledge, 2006).
performance. At the end of the section, the article provides the reader with a definition of public gaming performance. The second section takes such definition as a breeding ground for the forthcoming analysis where the article discusses performers and performance within the recent IP legal scenario highlighting their slow, but constant, socio-legal development. It then assesses whether public gaming performance is coherent with the definition of performance elaborated under the Beijing Treaty\(^\text{17}\) while using extracts of US case law\(^\text{18}\) involving gaming as performances. Based on this, the article proceeds with the analysis of gaming performance subject matter under the InfoSoc Directive\(^\text{19}\) rights of reproduction, adaptation and communication to the public. Then, the article observes two prototypes of gameplays seeking to highlight whether or not they may attract copyright protection under EU copyright law. Finally, it provides the reader with criticisms and observations on the hostile copyright landscape and players’ contribution.

1. Gaming performance and performance studies

Performance studies is an interdisciplinary field that looks at how human actions take place within the context of anthropology, sociology, cultural studies, speech communication and others. Performance studies observe whether certain activities or behaviours constitute performance.\(^\text{20}\) Given that ‘performance’ is a very complex term, here you observe performance as a process of creating meaning between the originator of the activity and the related audience.\(^\text{21}\) While the Latin root for the word ‘performance’ seems to indicate the ability of lending a shape to something,\(^\text{22}\) the term is usually referred to an entertainment event that is presented in front of an audience.\(^\text{23}\) In the context of this article, both aspects are relevant here. In fact, without a certain course of actions taking in place in front of an audience there might not be any performance to discuss. In other words, performance is a showing-doing operation process.\(^\text{24}\)

It is crucial to highlight that performance and gameplays are both rooted in the concept of ‘play’.\(^\text{25}\) It looks to be extremely difficult to frame the concept of play. To some extent, play can be observed as a mood, an activity or a state of mind.\(^\text{26}\) Even though it might be argued that the concept of play contains the game concept, they are not convergent concepts. Indeed, while play looks free and unconditional,\(^\text{27}\) game tends to be structured and rules-bound featuring definite outcomes and objectives. However, when assessing performance in relation to play, the following aspects also seem to belong to the game sphere. For instance, the structure involves the presence of a coherent sequence of play elements which, in turn, form the game.\(^\text{28}\) Again, the process concerns how the aforementioned elements affect the strategy and dynamics of the game.\(^\text{29}\) The experience relates to the feelings and mood experienced by both players and audience in the context of the game.\(^\text{30}\) The function

\(^{17}\) Beijing Treaty on Audiovisual Performance (2012), Article 2


\(^{23}\) D. Ben-Amos and others, Folklore: Performance and Communication, (De Gruyter Mouton, 1975)

\(^{24}\) Schechner (fn 16)

\(^{25}\) Ibid.


\(^{28}\) In Overwatch (Blizzard Entertainment, 2016), each character has a set of personalized abilities to be used during the game.

\(^{29}\) In Overwatch, each ability can be used together with other characters’ abilities, which in turn create various strategies and different outcomes.

\(^{30}\) In the context of Call of Duty League, both players and spectators may feel affected by the ‘home field advantage’.
involves the purposes served by play elements. Finally, **ideology** refers to the possible political, social or personal values – knowingly or unconsciously – expressed during the game. Under these circumstances, whatever the type of game you encounter, performance approaches public gaming according to the same coordinates of play.

When assessing the performative nature of gaming you claim that gameplays are the outcome of that performance, or more accurately, that the performative nature and social contexts of public gaming transform gameplays into performances. Based on this, it is useful to establish what gameplay is. Broadly speaking, a gameplay does not involve how a certain game looks. On the contrary, gameplay reflects the interaction between the player and the game rules while showing players’ choices and experiences. In other words, in the context of this article, gameplay means those actions undertaken when players interact with a video game while generating audio-visual outputs.

2. Performance and public gaming

The idea of playing as a performance is not something new. This article benefits from the fact that performance has been already associated with activities that relate to video games such as play, game and sport. As already hinted at, the human-machine interaction produces a tangible result called *playthrough* or *gameplay*, which involve various and many different elements. Meanwhile, under certain circumstances, gameplay is communicated to a public who can interact both with the player and with the gameplay.

Current investigation of the performative nature of gaming has been encouraged by the ‘recent’ outbreak of video game streaming. Historically, playing video games was considered a secluded and self-contained activity with no strong element of sociability. However, gaming acquired new forms through the growing provenance of online games and online broadcasting technologies. On the one hand, gaming evolved in a competitive media activity known as eSports. On the other hand, gaming evolved by allowing players to share their live or recorded gameplay in front of interactive audiences. In other words, new gaming media practices transformed private play into a public entertainment. By doing so, gaming started to become a media practice that sees players as broadcasters/performers communicating with audience members.

Public gaming turned traditional gaming into a performative outlet with the purpose of amplifying players’ experience through a digital audio-visual performance enjoyed by an engaging audience. However, gaming performances are usually enriched with players’ emotions and feeling through what might be termed a ‘think-aloud’ approach. To elaborate, while interacting with the game system, players can express joy, frustration, or even anger which all become emotions to be conveyed and experienced together. This focus on conveying

31 In the context of live streaming of *Warzone* (Activision, 2020), spectators may learn from players’ rules of engagement with the enemy. Additionally, a win obtained by the player may ensure them an economic advantage through the audience’s donations.

32 Game of chances, game for competing etc.

33 The term ‘public gaming’ refers either to e-sports and live or pre-recorded gaming sessions.


38 Communication to the public may take place via the Internet or live


40 Ibid.

41 Ibid.

experiences generated by the gameplay through the players is strictly related to the embodiment of performance.43

With the purpose of observing the performative features of gaming communication process, theatre may offer a robust framework. The dialogue between video game and performance had already started at the end of twentieth century. For instance, the 1997 award-winning game, Final Fantasy VII, has been compared to Brecht’s Epic Theatre.44 Again, Multi-User Dungeons (MUDs) and Massively Multiplayer Games have already been observed in the light of their performative natures.45 Therefore, theatre has a lot in common with video games. They both show the double role of players both as a performer and audience, and how video game spectatorship may have an effect on gameplay.46

3. Qualities of gaming performance

As previously hinted, theatre, play, games, and sport have something in common. Specifically, they share a special order of time, a special value attached to objects, rules, and performance spaces.47

Time contains the performance, and thus it might be structured in various ways. Both theatre and gaming are characterized by the same temporality and temporal frames. A temporal frame is a set of events generating a certain temporality as a result of the relationships between those events. 48 For instance, the real world-time refers to the set of events taking place around the player or the actor while establishing a reference temporality outside the game.49 The game-world time entails a set of events taking place within the game or event and it is associated with players’ gameplay or actors’ actions within the fictional or simulated world.50 Symbolic time takes place when the video game or play compresses the events occurring over several days or maybe months into less than 20 hours.51

In performances, objects acquire specific meaning and value that they do not normally have outside the performative space. In this sense, a sword of painted wood has special value as the currency of Monopoly or the Pip-Boy52 in The Fallout Series (Bethesda, 2004). Performative activities are inevitably regulated. The rules not only design players’ actions but they also entail the final goal of a given performance activity. In the theatrical context, rules are part of the actual dramatic text.53 However, when rules refer to the act of ‘play’, these must be accepted by players in order to convert play into a game.54 Finally, when it comes to video games, those rules are both part of the code and inevitably accepted by players.

Performance shall also take place within a given ‘space’ that is designed to admit a given range of activities. For video games, the first performance space is represented on the screen. However, a second performative space for video games extends beyond the screen reaching the physical space the player is occupying when they play.55

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44 K.L. Whitlock, Theatre and the video game: beauty and the beast (Ph.D. Ohio State University, 2004).
49 Ibid.
50 Ibid.
51 Fernandez-Vara (fn 21).
52 A wearable computer device.
53 J. Culpeper et al., Exploring the Language of Drama: From Text to Context (Routledge, 1998).
54 Fernandez-Vara (fn 21).
Gaming performances are thus regulated activities, constrained by a given temporality where objects acquire new fictional value within either virtual or physical performative spaces. However, establishing a convincing performance-oriented model for gaming requires a further step.

3.1. Theatre and interactive media

Selecting the theatre to create a performance-oriented model for gaming entails certain steps. First, to select those components featuring theatrical performance that can be also identified in gaming. Secondly, to identify the domains that will serve as joining links between theatre and gaming. Thirdly, to build a multi-layered structure where those components are analysed according to the different contexts, and finally to observe how theatre and gaming are linked. In relation to the first point, it is possible to use Patrice Pavis’s model which lists three basic components for theatrical performance: the dramatic text, the enaction, and the mise en scène. In relation to the second point, the domains operating as joining links are interactive media and games. For the third step, the following Figures are the visual representation of a previous multi-layered structure depicting a performance-oriented model for gaming.

**Theatre**

**Figure 1**

The dramatic text is the script that is inevitably pre-set before the performance, the text of the play and the stage direction. The enaction phase aims to concretize the text allowing the generation of meaning between the performer and the audience during the mise en scène phase. Lastly, this is the confrontation of the dramatic text by the audience through the performer’s enaction of the very text. Within this context, the audience is obviously indispensable. In fact, with no audience, the performer’s enaction of the text is a mere rehearsal rather than a performance. With no audience the mise en scène is compromised and there is no meaning to generate from the performers’ action.

In the context of interactive media (such as video games), theatre performance components are obviously replaced by parallel elements such as the code, the execution, and interaction (see Figure 2). The code here works like a dramatic text of a play. The code, as a piece of software, is a set of instructions that a computer system must process. The code is thus embedded within the game engine; which represents gaming laws of physics and game architecture. The execution operates just like enaction does in theatre performance. Execution refers to the computer system that executes the code and it only takes place after player input (e.g., by typing the attack button). Last, interaction works similarly to the mise en scène. As theatrical performances do not take place without an audience, digital media performances need player input to trigger audience output and, therefore, generate meaning.

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57 Ibid.
58 Rozik (fn 1).
59 Fernandez-Vara (fn 21).
60 Rozik (fn 1).
After interactive media, the following section proposes the second domain: games. By doing so, the next figure shows how the components of theatre, interactive media, and game correspond to each other while operating in the same way.

3.2. Games as interactive media performance

In the context of games, the MDA framework constitutes a precious instrument that may bridge the gap between theatrical, interactive media, and game performances while also showing games as cultural and design artifacts. The MDA formal approach distinguishes games design components: mechanics, dynamics, and aesthetics. These three elements are also parallel to the ones previously featured for theatre and interactive media and they complete the performance structure for videogames (see Figure 3). The mechanics are those actions, conducts, and control mechanisms executed by the player within the gaming environment. Given that mechanics support the overall gameplay, they seem to operate as the computer code and the dramatic text: pre-set instructions that guide players’ actions and thus constitute the foundation of a performance. Dynamics entail the whole flow of game mechanics acting on player’s input and generating a certain kind of outputs. In other words, dynamics refers how the rule are performed and the events that take place when the game is played. Dynamics are then execution behaviour in interactive media and enaction behaviour in the performance theatre. Aesthetics refers to the sensorial dimension players encounter in the game, but it also entails the expression of the game experienced as emotion and pleasure. Aesthetics is then the result of the interaction between the performer and the game system.

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61 Greenfield (fn 13)
63 Since gaming is observed as an interactive media and a game, gaming performance structure will mirror their performative elements.
64 Ibid.
66 Taylor (fn 39).
67 Fernandez-Vara (fn 21).
68 Ibid.
Games implement certain mechanics that generate dynamic behaviours between the player and the game system, which create aesthetic experiences for the audience.\(^{70}\) This last tripartite division shows one more connection between theatre and video games; which regards the relationship between the performer and the playwright or game designer. As the playwright has no control over how the dramatic text is performed or perceived by the audience,\(^{71}\) even the game designer has no power over player’s game experience nor its impact over the audience; especially in multiplayer games.\(^{72}\) This last parallelism brings some implication in relation to the role of players and audience in video gaming. In fact, it looks like video game players may play a double role: performer and audience. In other words, it seems video game performance has a double-layered audience: the player that gives the input so that the game becomes a performance,\(^{73}\) and those who watch the player while observing the gameplay on the screen.

### 3.3. The video game performance structure

Given the audio-visual outputs they receive after the interaction with the game, players are the first video game audience.\(^{74}\) Nevertheless, it is also undeniable that gaming spectatorship is not only limited to players.\(^{75}\) In fact, since electronic sports (eSports) and public digital gaming became a substantial part of the gaming industry and culture, the traditional boundaries of spectatorship started to erode.\(^{76}\)

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\(^{70}\) Bogost (fn 6).

\(^{71}\) M. Seton, ‘The theatrical text as a misrecognised technological practice: Shape-shifting interventions between words and bodies’ (2006) 3(3) JMAC 1–7.


\(^{73}\) Bogost (fn 6).


In the context of this article, spectatorship refers to how a spectator interprets a media text. Modern public gaming constitutes the newest breeding grounds for new types of audiences that are active and capable of interpreting a media text in their own way. In other words, public gaming and e-sports audiences are active interpreters of media texts and contents. There are video games that suggest new audiences’ agency because of their inner link to performance activities such as dancing and playing music. At present, you experience the existence of various gaming streaming platforms that feature live broadcasts of individuals uploading their real-time playthrough and talent performances. In this context, audience members (using an online text-based chat room) can interact with each other as mutual spectators with or without interacting with the broadcaster. In such a manner, spectators are more than just a number or a username. This is true to such an extent that audiences of video game live streaming may have an active role in deciding the events of gameplay. For instance, viewers suggest to the player how to approach an enemy or how to solve a certain puzzle. The extreme point of this circumstance is reached when spectators act either as audience or performer of the game. The phenomenon known as ‘Twitch play Pokémon’ sees the audience playing the game by using a chatbot system that allow users to input game commands via chat.

Given previous circumstances, the dual-layered structure of the gaming audience involves two different entities: the player and spectators. Subsequently, when it comes to video games, the tripartite structure shall embrace such double spectatorship nature (see Figure 4). For instance, the text is thus interpreted not once but twice. While the first interpretation is achieved by the player who interacts with the code and related game mechanics, the second one is performed by the audience on the basis of the first player’s interpretation. Again, the execution phase sees two different meaning production processes. The first one is achieved by the execution of player inputs and game system outputs. The second one is given by the audience that generates its own meaning based on video game dynamics generated by player inputs. Lastly, the aesthetics refers to either player and audience’s emotional and sensorial dimensions. Then, in video games, audience aesthetics is generated by the interaction between the player performer and the game system.

Figure 4

Figure 4 depicts the outcome of the investigation regarding the performative nature of gaming. As sections 8.2(a) and 8.2(b) will show, live streamers engage with the game code and game mechanics as actors engage with the text of the script. Streamers generate meaning for themselves and spectators while interacting with the game system. Then, they produce aesthetic outcomes for themselves and the audience.

4. Performing a video game

Performance studies highlighted the transition of the transformation from gameplay and watching gameplay to performing and watching performance. This shift takes place through the actions of both players and audiences. Within the performative context, performance is not able to change the parameters of the game –

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77 S. Hall, ‘Encoding and decoding in the television discourse’ (1973) 2 CCCS 386–98.
80 Rock Band (Harmonix, 2007) is a band simulator reproducing the experience of being a rock star while Just Dance (Ubisoft, 2009) is a motion-based dancing game where players mirror a dance performance.
84 D. Ramirez and J. Saucerman, Twitch Plays Pokémon: A Case Study in Big G Games, (2014) 1–10
85 Huuhka (fn 34)
text – such as codes or rules. However, it alters the way actions are perceived and performed by changing the rules of the social context of the gameplay. In such a manner, a live streamer broadcasting a gameplay of Valheim (Iron Gate AB, 2021) for their audience triggers this shift. On the one hand, once the streamers play the game under performative purposes, the game play is transformed into a performance. On the other hand, the audience is now watching a performance, rather than a mere gameplay.

The term ‘performative purpose’ means that streamers are consciously making choices to turn ‘gameplay watching’ into a performance. For instance, streamers set up their streaming accounts with tools and extensions that allow streamers and audience to engage and connect. These include tools such as CrowdControl, SnapCamera and StreamElements to design a more visually appealing and functional performance for viewers. Indeed, streamers do not just play games, they consciously play a game for an audience which, in turn, is there to watch a game being performed by their favourite streamers. This also explains why gameplay is not always the epicentre of gaming performance. In fact, streamers may choose to play the game not as it was intended to be played and thus not focusing on the storyline or game mechanics. Indeed, streamers may opt to use the game as a performance prop or stage set to deliver a different type of performance. For instance, it is not unusual to play the game just to unveil game design flaws, bugs or glitches.

Two possible layers of gaming performance can also be revealed. First, gaming performance means the execution and fulfilment of in-game tasks, which are required by game rules, and presented to the player by game design and game mechanics. Secondly, gaming performance might be seen as the pleasure of assuming and experimenting with alternative identities in those games that mimic social environments such as GTA Online (Rockstar North, 2013).

Performative studies helped build current theoretical framework where gaming may be observed as a performance. Based on that, a performance studies-oriented definition of gaming performances might be the act of showing-doing digital games involving text in the form of code, enaction in the form of execution, and mise en scene in the form of interactivity. However, under a legal-oriented definition, gaming performance is the protected speech act of showing-doing digital games. Then, in the context of public gaming, performance becomes a protected speech act of showing-doing digital games in front of an audience.

5. The ‘performance’ problem

The protected speech act of showing-doing digital games in front of an audience is thus the starting point of the EU copyright law-oriented analysis of video game and performance. With such a purpose, previous coordinates such as text, embodiment, mechanics and aesthetics will leave space for copyright law concepts such as originality, adaptation, performance and reproduction.

Claiming that game streaming may attract copyright protection within the European Union revives the traditional debate around theories that justify the existence of copyright law. On the one hand, the current copyright law system reflects the utilitarian approach that aims to attain the optimal balance between the creation of inventions or works of art and their availability for the public enjoyment. In this sense, the balance is achieved by recognizing a certain degree of control (through exclusive rights) for the copyright owner. On the other hand, copyright protection of video games mirrors the instances of the social planning theory, which

86 Ibid.
88 Anderson (fn 83).
89 This does not apply to eSport because the only way to enjoy a competitive performance is by watching gameplay; which always reflects the game played as it was first intended. In this sense, eSport performances never use game as a stage set; the stage set is the game itself.
promotes a participatory and democratic society where the ‘public domain’ is available for creative manipulations, and copyright owners’ control over their works is reduced. However, copyright law seems not to be concerned with whether or not public gameplays are actual performances. In fact, copyright law is concerned more with their infringing nature.

Early copyright laws did not provide the author with any faculty or right to control derivative works. The law was silent about adaptations, and courts determined infringement not by observing what the defendant has taken, but rather by what he added or contributed. However, Romantic ideals started to glorify authors and the whole creative process. The author became a creator that was able to internalize the surrounding world, adding something to it through their creative genius, and redelivering the new work to the society. In the Romantic view, the essence of creativity exists prior to its fixation into the physical form of a work. Subsequently, copyright law started allowing authors to control this sort of metaphysical essence; in any form that it might take. This changed how the law reacted to derivative works and adaptations. The secondary author was thus judged not by what they contributed to, but rather to what they took from the first author’s genius. Subsequently, the cornerstone of infringement became the capacity of adaptations to substitute the original work in the market. The Romantic copyright then affected translations, then abridgements, dramatizations, performances and, a few hundred years later, gameplays.

Even though the flexibility of adaptation rights depends on the jurisdiction, modern international copyright law inherited the Romantic hostility towards adaptations. Such hostility constitutes the inhospitable breeding ground where the protected speech act of showing-doing digital games in front of an audience is flourishing.

6. The ascent of performers

As already affirmed, the performances of actors, singers and musicians are a substantial part of the creative system involved in the communication and promotion of certain works to the public. However, performances are not what they used to be. In fact, when a century ago the Berne Convention on Literary and Artistic Works entered into force, a performer was considered as the mouthpiece of an author. In other words, performers’ sole raison d’être was the dissemination of the work of the real author or creator. Sometime later, the first technological changes in recording technology highlighted the role that performers had in the field of art and creativity. Indeed, the Rome Convention provided the first definition of performer, which was identified as actors, singers, musicians, dancers and other persons performing literary or artistic works.

The protection granted to performers by the Rome Convention was in some ways uneven. In fact, while performers were provided with a mere possibility of preventing certain acts, phonogram producers were provided with the right to authorize or prohibit certain acts. However, international protection for performers has increased since the adoption of the WIPO Performers and Phonograms Treaty (WPPT); which extended again the role of performer. In fact, while the WPPT adds ‘expression of folklore’ to performer definition, it

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93 Ibid.
94 M. Rose, Authors and Owners: The Invention of Copyright, (Harvard University Press, 1995).
95 B. Kaplan, An Unhurried View of Copyright (The Lawbook Exchange, 2008).
97 P.R. Goold, ‘Why the UK adaptation right is superior to the US Derivative work right’ (2014) 92(4) Nebraska Law Rev. 849–78.
98 Ibid.
99 For instance, the US adopted a standard-based approach while the UK adopted a rule-based approach.
103 Rome Convention, Article 7.
recognizes its cultural role. In addition, the performer could thus benefit from exclusive rights such as fixation and reproduction, broadcasting and public communication, making them available to the public, and moral rights of attribution and integrity.

Finally, the Beijing Treaty confirmed the cultural role of performers in the digital society while granting them economic rights for performances in audio-visual fixation such as the right of reproduction, the right of distribution, the right of rental, and the right of making available. Doing so, the treaty implicitly recognizes the magnitude of audio-visual productions and performances which now go beyond the traditional TV broadcasting and pay-tv channels. In addition, while the Treaty recognizes performers as artists and cultural workers, it also acknowledges that audio-visual performances can bring a certain work closer to other audiences in very effective ways. In this way, audio-visual performances are a carrier and multiplier of other creative expressions which not only has a tremendous economic significance but is also extremely relevant to furthering cultural diversity.

The socio-legal path through which performers and performances achieved legal certainty discloses useful elements for this article. First, performers were considered only as second-class subjects involved in the dissemination of the work of a real artist. In this sense, players suffered from the same poor perception of performers during the early stage of their activity. Specifically, from being regarded as mere consumers they are now developing performative inspirations. Secondly, the clear and wide definition of ‘audio-visual fixation’ opens the doors to new works. In this context, gameplays can be now described as ‘audio-visual fixation’ through which video games can be perceived. Thirdly, both performers and audio-visual fixation are the results of new cultural development reflecting video games as cultural artifacts.

7. Playing video games as audio-visual performance?

Starting as a standalone and self-contained media practice, gaming embraced its public dimension where an increasing number of players started to play video games before virtual audiences by broadcasting their gameplays through streaming platforms. Within this new public dimension, streamers and e-athletes seem to be proposing a new gaming model: interacting with an audio-visual work in front of an audience while broadcasting the outcome of such interaction. To what extent is the protected speech act of showing-doing digital games in front of an audience an audio-visual performance according to copyright law?

The Beijing Treaty does not define audio-visual performances. However, it is possible to find four main coordinates that can help to frame public gaming as an audio-visual performance; namely performer, broadcasting, and communication to the public. Specifically, it is possible to observe

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106 Ibid Articles 4–10.
107 Ibid Article 5.
108 R. Towse, Copyright in the Cultural Industries (Edward Elgar, 2002).
109 Beijing Treaty 2012, Articles 7–10/
112 Berne Convention, Article 3(3).
113 WIPO Performance Treaty, Article 2(b).
115 Beijing Treaty, Article 2(a): ‘performers’ are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore.
116 Ibid (b): ‘audiovisual fixation’ means the embodiment of moving images, whether or not accompanied by sounds or by the representations thereof, from which they can be perceived, reproduced or communicated through a device.
117 Ibid (c): ‘broadcasting’ means the transmission by wireless means for public reception of sounds or of images or of images and sounds or of the representations thereof […].
118 Ibid (d): ‘communication to the public’ of a performance means the transmission to the public by any medium, otherwise than by broadcasting, of an unfixed performance, or of a performance fixed in an audiovisual fixation. […].
how the Beijing Treaty’s legal coordinates address the sphere of public gaming performance (as identified in Part 1 of this article). For instance, the term ‘performing’ informs the play\(^{119}\) dimension in relation to literary work such as video games. The ‘audio-visual fixation’ refers to the recording of gameplays; the embodiment of moving images that can be perceived, reproduced and communicated through a device.\(^{120}\) Again, ‘broadcasting’ refers to the technical transmission tools used by players to transmit their gameplays. Then, ‘communication to the public’ refers to the transmission of the act of showing-doing\(^{121}\) to the audience. Under these circumstances, it seems there are enough arguments at least for the suggestion that game streams may count as audio-visual performances. This conclusion is not the end of this investigation. Also, claiming that game streams are performance does not seem a relevant objective for current IP law. Additionally, the Court of Justice of the European Union (CJEU) never addressed whether the act of playing video games counts as a public performance. For this reason, this investigation benefits from the US case law on this matter.

In 2017, Epic Games sued three different individuals for the development, use and distribution of a software cheat that exploited *Fortnite*,\(^{122}\) infringed Epic’s copyright, and breached Epic’s End-User License Agreement (EULA).\(^{123}\) Additionally, with the purpose of advertising the software cheat, the defendants posted a video on YouTube featuring *Fortnite* gameplays and how the cheat worked. Therefore, Epic alleged copyright infringement by accusing the defendants of performing *Fortnite* publicly\(^{124}\) without Epic’s permission.\(^{125}\) Unfortunately, Epic Games voluntarily dismissed the case. Therefore, the fundamental question of whether playing a video game and posting the playthrough on YouTube constitutes the performance of a copyrighted work is still unanswered.

In 1989, the Fourth Circuit Court of Appeals in *Red Baron-Franklin Park, Inc. v. Taito Corp* established that an arcade\(^{126}\) infringed Taito’s copyright when the business purchased the *Double Dragon* circuit board without Taito’s consent for its use in its amusement arcade.\(^{127}\) In the present case, video games have been qualified as audio-visual work as defined by 17 U.S.C. § 101. After that, both definitions of ‘performance’ and ‘public’ have been successfully applied to the case.\(^{128}\) Subsequently, the court concluded that playing video games in an arcade constitutes public performance.\(^{129}\)

In *Allen v. Academic Games League of America, Inc* a game publisher sued a non-profit organizer of a tournament for students publicly playing, and thus performing, the board game. Contrarily to *Red Baron*, the Ninth Circuit Court of Appeals refused to extend the term ‘play’ of 17 U.S.C. § 101\(^{130}\) to ‘play a video game’. While the Court admitted that the interpretation of play has been generally limited to playing music or records, it also affirmed that this Court would never allow a copyright owner to control where purchasers of the games may play the games.\(^{131}\) Again, in *Valve Corp. v. Sierra Entertainment, Inc* the Court addressed the question of

\(^{119}\) Part I, section 1

\(^{120}\) Beijing Treaty (fn 109).


\(^{122}\) Epic’s most famous video game.

\(^{123}\) *Epic Games, Inc. v. Mendes*, Case Number 3:17-cv-06223-LB.


\(^{125}\) Ibid pp. 10, 91.

\(^{126}\) An arcade game is a coin-operated machine that is normally installed in public businesses such as bars and amusement arcades.

\(^{127}\) *Red Baron-Franklin Park, Inc. v. Taito Corp.*, 883 F.2d 275 (4th Cir. 1989).


\(^{129}\) Shen (fn 82).

\(^{130}\) ‘To “perform” a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audio-visual work, to show its images in any sequence or to make the sounds accompanying it audible’ 17 U.S.C. § 101.

\(^{131}\) *Allen v. Academic Games League of Am., Inc.*, 89 F.3d 614 (9th Cir. 1996).
the right to publicly perform a video game within a cyber-café. Once more, the Court refused to rule on whether
or not playing video games constitutes a public performance.

Two more cases took a step forward. In *Midway Mfg. Co. v. Artic Intern., Inc.*, the Court questioned ‘whether
the creative effort in playing a video game is enough like writing or painting to make each performance of a
video game the work of the player and not the game’s author’.132 In *Nova Productions Ltd v. Mazooma Games
Ltd*133 it was held that the graphics, frames and sounds (gameplay) generated by a player’s interaction with the
game system were computer-generated works, and therefore the programmer – who made all the arrangements
– was the author of the audio-visual work.134 Both cases share a crucial point: is the player creatively
responsible for the audio-visual outcome generated from their interaction with the game system? Unfortunately, the answers to this question were not given or negative. Indeed, given the poor sophistication
of game technology and game design at that time, it was not surprising. In fact, both *Galaxian* (Midway
Manufacturing, 1979) and *Pocket Money* (Nova Production, 2002) were not worthy of inspiring any authorship
or creative claim. However, the strength of this conclusion may decline over time because current gaming
technologies and game design allow players to create what would – in a non-virtual context – be viewed as an
original work.135

8. Copyright protection of video games in the EU

In copyright law terms, the *protected speech act of showing-doing digital games in front of an audience* implies
an audio-visual fixation communicated to the public.136 In order to discuss the alleged copyright protection of
such media practice, however, it is first necessary to observe how video games are protected by EU copyright
law and then to analyse whether public gaming infringes those rights.

Video games represent an intricate subject matter under copyright law. As a complex work of authorship, they
include a vast amount of creative and artistic components such as storyline, graphics, music, sounds, voice
acting, interfaces and motion-captures, which are all protected by copyright. In addition to these components,
another crucial element is the source code, namely the instructions that the programmer gives to the computer
in order to run the game. The code, insofar as the audio-visual elements, is protected by copyright.137 However,
the featuring element of video games is interactivity; which refers to game capacity to read players’ inputs and
change its material substance as a result of players’ actions and according to a predetermined set of rules.138 In
other words, it is the code, or software, which translates players’ inputs, such as the press of button X, to certain
outputs, such as video game images and sounds.139 Based on this, it is not surprising that many jurisdictions
consider video games to be computer programs.140 However, video games also include a whole set of elements
that find copyright protection in themselves. Therefore, a pertinent question would be whether a video game
shall be protected as a whole, or through its different elements, or only through the game underlying software.

International and European legislations provide for copyright protection of computer programs as literary
works.141 In the context of EU law, it is crucial to assess if video games fall within the scope of the Software

133 The sole UK case about the applicability of section 9(3) (authorship of computer-generated work) of the Copyright
136 Beijing Treaty, Article 2(a), (d).
137 The code is protected as a literary work.
139 E. Jungar, ‘Streaming Video Games: Copyright infringement or protected speech?’ (2016) 3(2) Press Start 23–47.
140 Argentina, Canada, Israel. See A. Ramos et al., The legal status of Video Games: Comparative Analysis in National
Approaches (2013).
141 Trade-Related Aspects of Intellectual Property Rights (TRIPS) Article 10; World Intellectual Property Organization
Copyright Treaty (WCT) Article 2; Software Directive, Article 1.
Directive or under the InfoSoc Directive. The Software Directive is *lex specialis* in relation to the InfoSoc Directive; taking precedence where applicable. In this sense, the Software Directive applies to computer programs and their expression in any form. Therefore defining ‘computer program’ is a crucial aspect. Computer programs can be defined as a set of instructions capable, when incorporated in a machine-readable medium, of causing a machine having information processing capabilities to indicate, perform or achieve a particular function, task or result. This means that a video game code, or software, is a computer program that converts players’ inputs to outputs, but not the type of output equivalent to video or audio. This is confirmed by the CJEU stating that the Software Directive only protects expressions of computer programs that allow their reproduction. Subsequently, the graphical and sound outputs are not within this scope since they are not considered as an expression in any form of a computer language. Again, the CJEU observed video games as being a complex subject matter comprising not only the computer program but also the graphic and sound element, which together have a unique creative element that falls under the copyright protection offered by the InfoSoc Directive. In other words, the Software Directive only takes precedence over the InfoSoc Directive where the protected material falls entirely within the scope of the former. As players only broadcast the audio-visual elements of the creative expression covering video games, they are not able to infringe the copyright owner’s right to the software and underlying as identified by the Software Directive. Therefore, it is clear that the infringing nature of the protected speech act of showing-doing digital games in front of an audience shall be assessed under the InfoSoc Directive.


Under copyright law lenses, the audio-visual fixation of the protected speech act of showing-doing digital games in front of an audience can be described as a user-generated content (UGC). This term refers to various types of re-elaborated information that are created and uploaded by average Internet users with the purpose of creating something new. Specifically, UGCs refer to video, comments, images and posts that are made available over the Internet, which reflect a certain degree of creativity. Depending on how creative material is combined and the user’s creativity, the resulting material can be an original work of authorship and be protected by copyright.

In the context of this analysis, the emphasis shall be placed on the term ‘perform’. In general, the subject that creates a work is designated as its author. On the contrary, the subject that performs a work is its performer, and performance constitutes the subject matter of protection. Even though the international legal framework defines ‘performer’ and not ‘performance’, you can infer that a performance is the activity of a performer. Therefore, ‘performance’ includes a process of communication that requires two individuals: the individual who communicates (the performer) and its recipient (the audience). A gaming performance is thus an activity undertaken by a subject (player) and perceived by others (audience) as some form of communication (play) of a work of authorship (video game) between the player and the audience.

Looking beyond the UGC-oriented framework, the recorded or live gaming performance constitute the transmission of sounds and images for public reception; namely a broadcast. Broadcasts were deemed to be

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147 Case C-355/12 Nintendo Co. Ltd v. PC Box Srl, EU:C:2014:25.
148 Ibid. Opinion of AG Sharpston, para 34.
150 Ibid.
suitable subject matter for protection as a neighbouring right in the Rome Convention in 1961. Contrary to literary or artistic works, and films, the subject matter of protection for broadcasts is not the creation of a thing, but an action. This is because broadcasts are acts of communication. In other words, copyright law acknowledges the value in the act of communication itself as different from the content that is being transmitted and communicated. Legal discussions concerning performances tend to present the just mentioned dual model of performance as a work. First, performance is protected because of its inner characteristics: the things that make it a material object, such as camera angles, sounds and visual effects during the gameplay, visual overlays, and so on. Secondly, the performance is protected because of its content; the audio-visual fixation of a game’s sounds and images.

It might be argued that certain gaming performances — similarly to sporting events — have a unique original character that can transform them into a subject matter that is worthy of the same protection given to works. This means that the audio-visual fragments of gaming performance together with players’ activity might be protected as a work. However, the same fragments likely contain elements which are the expression of the authors’ own intellectual creation and therefore, infringing their exclusive rights. Therefore, the protected speech act of showing-doing digital games in front of an audience falls into the category of UGC also implying an act of communication that was broadcast. Even though such an act of communication may find valid protection according to EU copyright law, it is likely that this would be deemed to be an infringing act of communication. Under these circumstances, the following paragraphs aim to explore the intricate and multi-layered infringing nature of gaming performance under the InfoSoc Directive.

a. Gaming performance as a reproduction

The first exclusive right threatened by gaming performance is the right of reproduction. First introduced by the Berne Convention and then followed by the InfoSoc Directive, the right gives the author the power to control the reproduction of their work, in any manner or form. In the context of the InfoSoc Directive, the copyright owner is entitled to prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part. The already wide scope of the right is in turn reinforced by the same Directive that states that broad definition of these acts is needed to ensure legal certainty within the internal market. Such broad scope seems to impact the protected speech act of showing-doing digital games in front of an audience. Specifically, the audio-visual outputs triggered by the interaction of the player with the game system generate the appearance of the game; which is a reproduction of the work. In other words, the act of showing-doing inevitably implies an act of reproduction within the scope of the InfoSoc Directive.

A further critical point for gaming performances is CJEU’s decision to coincide the right of reproduction within the scope of originality. In Infopaq the Court stated that to constitute a ‘reproduction in part’, a work must include elements of another protected work that reflect the author’s intellectual creation. Therefore, as soon as original elements of the first work (video game) are present in the second work (gaming performance), the video game author’s reproduction right is infringed. Subsequently, the act of showing-doing amounts to an

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154 Rome Convention, Articles 3(f), 6, 13, 14, 16(1)(b).
158 The parameter for originality under EU copyright law.
159 Berne Convention for the Protection of Literary and Artistic Works 1971, Article 9(1).
161 Ibid recital 21.
162 Part I, section 3.3.
163 See fn 121.
infringement of the reproduction right because players’ performance shows game graphics and sound; which are the first author’s own intellectual creation.\(^\text{166}\)

b. Gaming performance as an adaptation

It is possible to observe gaming performances as ‘unauthorized’ derivative works, mere adaptations of a video game. The reproduction right in the field of EU copyright is not harmonized but is governed by Article 12 of the Berne Convention.\(^\text{167}\) Indeed, contrarily to Software and Database Directives,\(^\text{168}\) the InfoSoc Directive does not contain any reference to the right of adaptation. Therefore, it may be argued that the right of reproduction and the right to adaptation have different scopes. However, the broad reproduction right in Article 2 of the Directive has been formulated and the CJEU jurisprudence on the scope of reproduction rights\(^\text{169}\) seems to frame adaptations as a further reproduction within the meaning of Article 2.\(^\text{170}\) This overlapping mainly depends on the broad definition of what is an ‘expression’. If one interprets expression in a broad manner so that this includes similar wording, depicting or playing, then the right of reproduction includes any adaptations.\(^\text{171}\) Subsequently, taking creative elements lying beyond the exact expression of a work would fall within the scope of right of reproduction when they are the author’s own intellectual creation.

Adaptations imply the creative use of pre-existing material with the purpose of creating something new. In fact, there will always be a ‘reproduction in part’ in any UGC because the user will start from a pre-existing work to produce a modified version of that work.\(^\text{172}\) In this context, depending on how the creative material is assembled and how much of the users’ creativity is present, the resulting work might be protected by copyright. In fact, an adaptation is usually interpreted as the transformation of a work into another form of expression.\(^\text{173}\) This means that, once again, the right of reproduction interpreted as the direct and indirect, temporary or permanent reproduction of a work by any means and in any form, in whole or in part\(^\text{174}\) makes adaptations out to be infringing works.

c. Gaming performance as communication to the public

Gaming performances are linked to the act of showing-doing digital games in front of an audience. This means that the ‘showing-doing’ media practice inevitably implies a form of communication to a certain public. In EU copyright law, the right of communication to the public is the prevalent form of legal protection provided to authors and right owners for the online dissemination of their work.\(^\text{175}\) In this context, authors shall enjoy the right to authorise or prohibit any communication to the public of their works […] including the making available to the public of their works […]\(^\text{176}\)

Even though ‘communication to the public’ has not been defined yet, this should be interpreted broadly in the same way as previous reproduction and adaptation rights.\(^\text{177}\) In recent CJEU jurisprudence, ‘communication to the public’ includes three criteria: an ‘act of communication’ to a ‘new public’ by ‘specific technical means

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\(^\text{167}\) Case C-419/13 Art & Allposters International BV v Stichting Pictoright EU:C:2015:27; Berne Convention, Article 12.

\(^\text{168}\) Software Directive, Article 4(b); Database Directive, Article 5(b).


\(^\text{170}\) Irish Copyright Review Committee, Modernising Copyright (2013).

\(^\text{171}\) Part I, section 3.3.

\(^\text{172}\) Irish Copyright Review Committee (fn 170).


\(^\text{176}\) InfoSoc Directive, Article 3.

\(^\text{177}\) Ibid. recital 23.
different from that of the original communication.” Under these circumstances, it seems that previous criteria are fulfilled by gaming performances. Specifically, ‘showing-doing’ is an act of communication because it represents a process by which a work is made available. Thus, ‘showing-doing’ means making video game audio-visual elements available for people to watch.

In the context of gaming performance, the ‘new public’ element is also important. By ‘new public’, the CJEU intends a public that is not considered by the copyright owner when they authorize the first communication. For gaming performances, however, there is no transmission of or communication by the copyright owner. Subsequently, ‘showing-doing’ communicates audio-visual components of a game to a public which have not yet been made available by the right owner. Then, the ‘different technical mean’ is applicable. In fact, broadcasting audio-visual elements of a game constitutes a different technical mean to communicate a work compared to making copy available to play. Under these circumstances, gaming performances again fall within prohibited legal territory.

8.2. Copyright analysis of gaming performance: speedruns and recitative gameplays

The next paragraphs will show how the two selected approaches to gaming, namely speedruns and recitative gameplay, follow the video game performance structure in section 3.3.

A ‘speedrun’ is the attempt by the player to finish the game as fast as possible and under various conditions. Speedrunning has a strong competitive component, as players try to break their speed records depending on what type of category they are playing. Speedrunners often stream their performances on Twitch while accepting donations and monetizing their videos on YouTube. Depending on the type of competition, players are allowed to use glitches and other exploits not intended by the game designer in order to improve their clear time. Speedruns are thus stages where the audience may witness players’ skills and capacity to master and exploit glitches while spectacular and bizarre game events are displayed on the screen.

A ‘recitative gameplay’ is nothing more than a conventional gameplay where the player plays in front of an audience. However, these are subject to wide variability depending on the player’s gaming approach. In recitative gameplays, players play the game while providing the audience with a commentary that narrates a parallel storyline that follows gameplay events. Players speak and act as if they were the avatar of the game they are playing. In other words, players become the storyteller of their own plot while playing a game as a virtual stage for their narrative. In this sense, recitative gameplays best adapt to those games with non-existing narratives or storylines such as Minecraft (Mojang, 2008) or No Man Sky (Hello Games, 2016).

What is the legal status of previous gameplay styles? Are they the original work of authorship while being also an audio-visual performance of the game? In other words, is the audio-visual fixation of the protected speech act of showing-doing digital games in front of an audience an audio-visual performance and original work of authorship?

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178 See Case C-466/12 Svensson v. Retriever Sverige AB EU:C:2014:76; Case C-607/11 ITV Broadcasting Ltd and Others v. TV Catch Up Ltd EU:C:2013:147.
179 Case C-466/12 Svensson (fn 178).
180 E. Rosati, ‘When does a communication to the public under EU copyright law need to be to a “new public”?’ (2020) 45(6) European Law Review 802–23.
182 Ibid.
a. Speedrun audio-visual performance

The streamer and speedrunner with the nametag Firedragon specialized in delivering speedruns of Nintendo games such as Mario Kart 64 (Nintendo, 1996).\textsuperscript{185} In his streams of Mario Kart 64, he broadcasts himself while playing games with the purpose of beating a record (see Figure 5).

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{firedragon.jpg}
\caption{Figure 5}
\end{figure}

Source: https://www.twitch.tv/firedragon/videos

What is the legal status of the just depicted media instance? Is it a performance which can attract copyright protection? In order to reply, this copyright analysis needs to assess whether speedruns are original works of authorship.

First, it is paramount to observe whether or not speedrun gameplays are considered a ‘work’ under EU copyright law. In this sense, Directives say very little about what constitutes a work. Similarly, the Berne Convention does not define the term ‘work’, although it clarifies that ‘work’ expression shall include every

\textsuperscript{185} See https://www.twitch.tv/firedragon (accessed 11 November 2022)
production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression.\textsuperscript{186} Additionally, the WIPO confirmed that a work must be an intellectual creation.\textsuperscript{187} However, given the lack of a clear definition, CJEU jurisprudence may help in framing the meaning of the term ‘work’. The CJEU stated that copyright protection is reserved for those subject matters that are intellectual creations of their authors.\textsuperscript{188} This implies that copyright protection covers only original subject matter; in the sense that it is the author’s intellectual creation.\textsuperscript{189} By doing so, the Court set the same standard – authors’ intellectual creation – either for originality and for copyright subject matter other than computer programs, database and photographs.\textsuperscript{190} The Court further clarified whether graphic user interfaces might receive copyright protection. However, in the context of the Software Directive, graphic user interfaces do not constitute a form of expression of a computer program because they do not enable the reproduction of the computer program itself.\textsuperscript{191} However, in the context of the InfoSoc Directive, graphic user interfaces may attract copyright protection as a work if they are their author’s intellectual creation.\textsuperscript{192} What appears evident is that the CJEU identified ‘work’ with ‘original’, rather than with the requirement that a work is a ‘production in the literary, scientific, and artistic domain’.\textsuperscript{193} Therefore, it looks sufficient for certain subject-matters to be original in order to be eligible for copyright protection under the InfoSoc Directive.\textsuperscript{194}

As already hinted, ‘originality’ is the further requirement for a work to be eligible for copyright protection. In Infopaq, the Court was asked to decide a case of possible copyright infringement. In this context, the Court coined the current generalized\textsuperscript{195} paradigm of originality under EU copyright law: namely ‘authors own intellectual creation’.\textsuperscript{196} This means that, in the event speedrun performances are the author’s own intellectual creation, they are deemed to be original work and therefore eligible for copyright protection. The last element to examine is ‘authorship’; namely the connection between a work and its author. For instance, in the context of cinematographic or audio-visual works, the principal director is the author.\textsuperscript{197} Therefore, the author is the one that brought contributions to the making of the work.\textsuperscript{198} Equally, in the context of speedruns, is it possible to claim the same? In other words, is it possible to claim that audio-visual outputs of a video game are the player’s contribution?

This being the case, let us attempt to tackle these aspects while revealing the intellectual property nature of speedruns performance. It is highly improbable that the media instance depicted in Figure 1 is being considered an original work of authorship under EU copyright law. In other words, speedruns do not seem to be players’ own intellectual creations. The main reason for that is the type of content displayed by the proposed audio-visual work. Speedruns events, as well as sporting events like football, depict a game which does have rules. Rules can be observed as formal schema, which refers to the concept of ‘formalization’; the idea that games are methodical formal systems. In this sense, rules are the structures of the game while defining it.\textsuperscript{199} This must also have been CJEU’s position about games. In fact, it was affirmed that sporting events, as such, have a unique and, to that extent, original character which can transform them into subject-matter that is worthy of protection comparable to the protection of works.\textsuperscript{200} However, sporting events – especially football matches – cannot be regarded as work within the meaning of the Copyright Directive because they are subject to rules of the game, leaving no room for creative freedom for the purpose of copyright.\textsuperscript{201} Given this context, speedruns

\textsuperscript{186} Berne Convention, Article 2(1).
\textsuperscript{188} Case C-5/08 Infopaq (fn 164), paras 33–35.
\textsuperscript{189} Ibid para 37.
\textsuperscript{191} Case C-5/08 Infopaq (fn 164), para 44.
\textsuperscript{192} Ibid para 46.
\textsuperscript{193} Berne Convention, Article 2(1).
\textsuperscript{194} Rosati (fn 190).
\textsuperscript{195} Meaning that this standard applies to computer program, photographs, database and all authorial works.
\textsuperscript{196} Case C-5/08 Infopaq (fn 164), para 37.
\textsuperscript{197} Case C-277/10 Martin Luksan v. Petrus van der Let EU:C:2012:65.
\textsuperscript{198} Ibid para 3b.
\textsuperscript{199} K. Salen and E. Zimmerman, Rules of Play: Game Design Fundamentals (The MIT Press, 2004)
\textsuperscript{200} Joined Cases C-403/08 and C-429/08 (fn 157), para 4.
\textsuperscript{201} Ibid para 98.
and football matches share this crucial point: they are subject to rules. In a game context, either digital or analogic, rules determine how the game proceeds while setting the space for players’ agency. In this sense, rules appear as methods of operations or systems; which are not within the scope of copyright protection. Additionally, the game played by Firedragon is a racing game, where rules are more stringent and do not leave any room for a player’s own intellectual creativity.

The last aspect to be assessed is whether the player is the author of speedrun audio-visual production. In other words, are the graphics, frames and sounds displayed on a screen human-generated or computer-generated productions? It has been observed that players’ inputs are not artistic in nature, there is no artistic or skilful contribution from the player and all the player does is play the game. In this view, a software-generated work represents the programme’s intellectual creation because the audio-visual outputs are generated within the creative space designed by the programmer. Subsequently, the creative elements of the audio-visual outputs are the programmer’s contributions and not the player’s ones.

Is it possible to affirm the same for Firedragon’s speedrun of Mario Kart 64? Again, as mentioned, since Mario Kart 64 belongs to the category of racing games, there might not be substantial space for players’ creative intervention. In fact, racing games feature a straightforward game design and architecture where the rules prevail. On top of that, speedruns are focused on the best technical execution/performance of the game where only players’ skills apply. However, skills or labour have proven to be irrelevant in relation to European originality.

In the form of speedruns, the protected speech act of showing-doing digital games in front of an audience cannot be regarded as an original work of authorship. On the one hand, the inherent structure of speedruns is not compatible with the ‘author’s intellectual creation’ EU legal framework. On the other hand, in the event a speedrun would have been an original work of authorship, it would have counted as an infringing derivative work in breach of the author’s rights of reproduction, adaptation and communication to the public. However, this does not prevent claims to the performative nature of such a gaming approach and thus affirming that speedruns are actual public audio-visual performances. Indeed, while Firedragon plays the literary work, he engages with its code/mechanics. Again, when triggering the inputs-outputs moment, Firedragon enters into the execution phase where the game system executes the code and the player performs the game according to the encoded rules (dynamics). Then, when Firedragon transmits audio-visual outputs on Twitch, he also generates the aesthetic of the game. Lastly, Firedragon’s transmission of such performances to the public counts as a ‘communication to the public’ while allowing for the audience interacting and generating its own meaning. Under these circumstances, it can be argued that speedruns are audio visual performances of video game works.

b. Recitative gameplay audio visual performance

The YouTuber known as Synergo produced the YouTube series named ‘No Man’s Sky – Captain’s Diaries’. In this series, Synergo plays No Man Sky: an action-adventure survival game where the player takes the role of a humanoid planetary explorer – ‘the traveller’ – in the exploration of the universe procedurally generated by deterministic algorithms. In his series, Synergo plays the game while providing the audience with a

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202 WIPO, Copyright Treaty 1996, Article 2.
205 Case C-604/10 Football Dataco Ltd v. Yahoo! Uk Ltd EU:C:2012:115.
206 Beijing Treaty, Article 2(a).
207 Ibid Article 2(b).
208 Ibid Article 2(c).
209 Ibid Article 2(d).
210 See https://www.youtube.com/playlist?list=PLkjetvDN3k22QeXbNEXE8Lt8XaprF-u54 (accessed 11 November 2022).
commentary from the perspective of the traveller: the playing character of No Man Sky (see Figure 6). When commenting on his gameplay, Synergo becomes the traveller and offers a parodistic and original narrative of the events displayed on the screen. By doing so, gameplays and the first-person narrative become a unique and new audio-visual expression that uses videogame graphics and sounds as a tool for further creativity.

![Figure 6](https://rb.gy/6e7vvp)

Similar to Firedragon’s speedrun production, it does not seem possible that ‘Captain’s Diaries’ may attract copyright protection. In fact, it seems unlikely that recitative gameplay may be regarded as players’ own intellectual creation. In this sense, the same argument that denied speedrun production to count as a work is still applicable. Specifically, No Man’s Sky and Mario Kart 64 are games and since games are bound by rules and objectives, they do not offer the creative space for works to be created. However, even though No Man’s Sky and Mario Kart 64 are both games, their features are deeply different. As a representative of procedural action-adventure games, No Man’s Sky offers to players a wide range of activities that may reveal a creative momentum. On top of that, the original narrative that Synergo used to wrap the audio-visual elements of the game into a convincing first-person diary reinforces the creative space for players. In other words, what looks relevant for gameplay-related works to be created is not the mere fact that games are bound by rules, but, on the contrary, the actual players’ creative freedom. Under these circumstances, it might be argued that ‘No Man’s Sky – Captain’s diaries’ has an original character through which it may attract copyright protection.

Is Synergo the author of ‘Captain’s Diaries’? In this case, the fact that No Man Sky gives the player a creative freedom is no use. In fact, given that game creative outputs are programmer contributions, there would not have been space for Synergo’s authorship. However, in the right gaming context where rules do not overlap with the way a game is played, to argue in favour of player’s authorship seems possible. For instance, it might be claimed that programmers only create the potential for creativity, and not its actuality. Therefore,

212 Narrative-driven games, First Person Shooter, and Fighting games do not offer a real in-game creative freedom to players. On the contrary, sandbox games give players an entire space where they can express their creativity. Game genre is a relevant parameter that shall be assessed on a case by case basis in order to observe whether or not players have a certain freedom to create.

213 Case C-604/10 Football (fn 205).


programs, software and machines look like more useful tools for the creation of works by final users. Therefore, it may be argued that Synergo is the author of ‘Captain’s Diaries’ because he used the game’s graphics and sounds to deliver a new type of production reflecting his choices and personality.

It is true that ‘No Man’s Sky – Captain’s Diaries’ seems to be offering more opportunities to claim that recitative gameplays productions are their author’s intellectual creations. Indeed, ‘No Man’s Sky – Captain’s Diaries’ also allows for further observations in relation to its infringing nature. Regardless of whether Synergo’s recitative gameplays prove copyright protection as the author’s own intellectual creation, the gameplay will always infringe the programmer’s right to reproduction and communication to the public. However, in the context of the InfoSoc Directive, parody constitutes one of the limitations and exceptions to copyright. In EU copyright law, ‘parody’ is an autonomous concept along with other fundamental concepts such as originality. In this sense, the CJEU suggested that parody should evoke an existing work, while being noticeably different from it, and secondly, to constitute an expression of humour or mockery. Does Synergo’s production reflect CJEU’s parody legal coordinates? ‘Captain’s Diaries’ reconsiders the space exploration context into a daily life scenario showing expressions of humour and mockery. Additionally, the display of graphics and audio inevitably evokes No Man’s Sky work while also being noticeably different from it. Particularly as far as the latter are concerned, the Court may point out that ‘Captain’s Diaries’ is not noticeably different because it only revisits No Man’s Sky under a different humouristic narrative while showing game images and sound.

In the context of ‘Captain’s Diaries’, the protected speech act of showing-doing digital games in front of an audience – even though with more uncertainty – cannot attract copyright protection. Therefore, as well as for speedruns, ‘Captain’s Diaries’ is an infringing derivative work in breach of the authors’ rights to reproduction, adaptation and communication to the public. However, as well as for speedruns, ‘Captain’s Diaries’ may count as an audio-visual performance of No Man’s Sky. In fact, as with Firedragon’s speedrun performance, Synergo’s production shows the performer playing a literary work by interacting with its code/mechanics. Again, the audio-visual outputs of ‘Captain’s Diaries’ are the result of the game-system executing the code while Synergo plays the game according to its rules, produces its dynamics and transmits the graphics and the sound of No Man’s Sky on YouTube, which again is a means for public reception of sounds and images. Finally, Synergo’s transmission counts as communication to the public, generates the game aesthetic and allows audience’s interaction and meaning generation. Therefore, ‘Captain’s Diaries’ is a public performance of No Man’s Sky. Just as in theatre, where people want to see that actor’s Hamlet or this actress’s Hamlet, ‘Captain’s Diaries’ is just Synergo’s No Man’s Sky.

The intricate legal landscape where the protected speech act of showing-doing digital games in front of an audience exists demonstrates a fundamental aspect. Even though certain gameplays created under certain gaming conditions might even count as audio-visual performances under the Beijing Treaty, EU copyright law does not leave any normative space for players to be recognized — and empowered — as other traditional audio-visual performers. Claiming that public gaming counts as a public performance is counterproductive because publicly performing copyrighted works is a prerogative of the copyright owner.

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216 Ibid.
219 Case C-201/13 Johan Deckmy (in 218) para 33.
221 Beijing Treaty, Preamble
9. Critics and observation

9.1. The economic irrationality of copyright

Among the key objectives of the InfoSoc Directive, ensuring an adequate remuneration and compensation of authors and performers is crucial. This is in line with the efforts undertaken to promote investments in creativity and innovations while creating the conditions for growth and competitiveness of European Industry. In other words, insufficient economic incentives for commercial entities and authors to create works may result in an unwanted under-production eventuality. This, in turn, would lead to a chronic underinvestment in the creation of knowledge that prevents the generation of new works. The consequential position arising from such economic momentum is the already hinted at utilitarian approach. For this very reason, rights of reproduction, distribution, public performance, or adaptation take the name of "economic rights"; which allow copyright owners financial reward from the use of their works by others. In other words, the control over the use of their works by others is the cornerstone of current International and European copyright law.

In economics terms, a complement is a good whose appeal increases with the popularity of its complement. Contrary to a substitute, which reduces the demand for the original work, a complement increases it. Under copyright law, a complement seems nothing more than a further use of an existing work. In the context of this article, video game streams are a complement based on the reworking of pre-existing work; adaptations that operate as economic complements of a video game. Under these circumstances, you would expect that authors’ control over adaptation responds to market and economic logics. However, this is not the case.

It has been argued that an adaptation right is superfluous. In fact, either the infringing work contains enough of the original work so that an infringement of the right of reproduction, public performance, or communication to the public is established, or it is not an infringement. In this second case, the adaptation right seems irrelevant. In economic terms, a video game based on another video game would likely compete or substitute the original video game. On the contrary, game streams based on a video game, regardless of its technical infringing nature, do not compete or substitute the original video game. In other words, game streams – as mentioned – are complements, not substitutes. That being the case, why should a copyright owner have the power to control the production of complements such as video game streams? The obvious answer to this question is that such control would increase licensing opportunities for copyright holders, expanding their financial reward, as utilitarian copyright craves. However, is this the case? In other words, does the right to control complementary use correspond to the increase of a copyright owner’s revenues? Probably not. In fact, given that the derivative use of video games has a strong complementary effect, there is almost no need to recognize a copyright owner’s right to control such complementary adaptation.

Within the EU law context, copyright irrationality also involves the right of reproduction and the right of communication to the public. It seems that functional similar acts of searching, communicating, distributing, and copying information have a different copyright status, depending on the technological scenario in which they take place. For instance, it was affirmed that, under the Berne Convention, the right of reproduction was neither right seems to compete or substitute the original video game. In other words, game streams based on a video game, regardless of its technical condition. The consequential generation of new works. The consequential position arising from such economic momentum is the already hinted at utilitarian approach. For this very reason, rights of reproduction, distribution, public performance, or adaptation take the name of "economic rights"; which allow copyright owners financial reward from the use of their works by others. In other words, the control over the use of their works by others is the cornerstone of current International and European copyright law.

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222 European Parliamentary Research Service (EPRS), *Review of the EU copyright framework European Implementation Assessment*, (2105)

223 InfoSoc Directive, recital 2


226 Ibid.

227 InfoSoc Directive


work based on reproduction. In other words, the right of reproduction offered protection for an author’s ability to get financial reward from their works and, within the then technological context, this was represented by making tangible copies of the work. Then, in the digital world, the reproduction right became sufficiently vast to cover the normal use of a software work. Therefore, a reproduction right no longer corresponds to an exploitation of the work. This means that current exploitation of the work is no longer relevant to find infringement of the right to reproduction. As far as the communication to the public is concerned, the requirement of a ‘public’ required a court’s analysis to examine what was protected by this economic right. The ‘public’ requirement was a tool to cover all forms of exploitation while other interpretations that did not affect work exploitation were not within the scope of copyright protection.

Provided that utilitarian copyright aims to achieve the optimal production of work of authorship by ensuring authors’ financial reward, to what extent does the artificial infringing nature of protected speech act of showing-doing digital games in front of an audience help to accomplish such an objective? Not only does public gaming have no substantial economic incidence over video game selling but, on the contrary, game streams have proven to have positive effects on the selling of games that were broadcast. Therefore, it is crucial to weigh the – if any – economic incidence when assessing the scope of either right to reproduction or communication to the public. These rights shall have boundaries and if their scopes must be defined by the economic impacts of complements, this shall be rational and not just focused on mere and counterproductive control.

9.2. Players’ contributions

Undoubtedly, the most relevant obstacle for claiming copyright protection over game streams is to be found in the Infopaq decision about originality, understood as ‘authors’ own intellectual creation’. Such a vague and open interpretation seems to make room for a certain understanding: originality does not seem to be a particularly difficult condition to satisfy. This is true to the extent that the originality requirement has been defined a non-requirement. However, even though authors may assume that copyright protection is everywhere, originality is still a requirement to be achieved. Is this standard easy to satisfy? Not necessarily.

Starting from the notion of ‘author’s own intellectual creation’, the CJEU elaborated further coordinates of originality. For instance, in the context of a photographic work, originality was linked to the author’s capacity to express his creative abilities in the production of the work by making free and creative choices. Furthermore, the work is an intellectual creation of the author reflecting his personality and expressing [again] his free and creative choices. Again, the author, by making those various choices brings their personal touch to the work. Additionally, copyright protection is conditional upon [the work] being characterised by a ‘creative’ aspect, and it is not sufficient that the creation of the [the work] required labour and skill. With this in mind, is it feasible to claim that certain gameplays are players’ own intellectual creations? In other words, are gameplays the result of a player’s free creative choices and personality?

In order to reply to previous question, it is crucial to assess players’ creative contributions in the context of gameplays. Whether gameplays are productions of the programmer or players, there is no doubt that players choose from a finite number of responses provided by the programmer while the combinations of responses

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231 Loading, displaying, running, transmission and storage are acts that take place within the traditional use of software.
234 Case C-145/10 Eva-Maria Painer (fn 169), para 89.
235 Ibid para 94.
236 Ibid para 92.
237 Case C-604/10 Football (fn 205) Opinion of AG Megozzi, para 35.
are totally governed by players’ choices.\textsuperscript{238} Even the most limited gaming environments such as racing games, sport games, fighting games or puzzle games contain a certain degree of player’s choices. Admittedly, players contribute with in-game responses, and a combination of game elements always within the general parameter of the game. Gameplays are different from each other, and it is not feasible to watch the same gaming performance twice, in the same way it is not possible to watch the same \textit{Othello} performance twice.

Nevertheless, whatever the type of gaming environment, the CJEU will never recognize a space for \textit{creative choices} because game rules – allegedly – prevent players’ free choices to exist.\textsuperscript{239} This statement, however, is not totally true. The complexity of digital games makes it impossible for game designers to anticipate any possible alteration of game structures.\textsuperscript{240} These examples\textsuperscript{241} clearly show that CJEU’s position involving the antithetic relation between rules and free choices is superficial. However, even though the exploitation of game design flaws has no chance of attracting copyright protection, it demonstrates that rules\textsuperscript{242} do not prevent a player’s in-game freedom of choice. Even though this might be true, this does not imply that such freedom allows for creative choices. In order to make \textit{free and creative choices}, the gaming environment shall not be limited in its mechanics and system. In this sense, sandbox games\textsuperscript{243} provide players with a gameplay that encourages \textit{free and creative choices}. This is true to the extent that the very players play these games knowing that they can inject their gameplays with their \textit{personalities}. In this sense, Synergo confirms this by saying that ‘Games such as No Man’s Sky allow the player/creator to put his personal touch’.\textsuperscript{244}

Even though the creative process generating performative gaming may slightly differ from live or pre-recorded gameplays, such a process highlights something relevant. In the context of pre-recorded gameplays, for instance, players play the game while arranging frames of creatures, characters or landscapes that will be used to convey their personal narrative. After that, players start the video editing through which they select the visual elements that will form their story. Then, players begin the script playing session according to the selected frames and record their storyline merging video game graphics and their scripts. Finally, they upload their gameplays for their audience. Such creative audio-visual fixation of the \textit{protected speech act of showing-doing digital games in front of an audience} process almost certainly should be deemed ‘author’s own intellectual creation’ and then would be original.

10. Conclusion

This article introduced logics and ideas that may inform future governmental discussions around the nature of audio-visual performance in the context of the digital economy and the digital society. With such purpose, this article first identifies performance studies as the interdisciplinary field that can evaluate whether certain activities may constitute performance. In this sense, the article starts drawing the first general connection between performance and gaming by mentioning aspects such as structure, process and experience of performance. After that, the article discusses how gaming evolved from a self-contained experience to a public activity undertaken to engage the audience and make a profit. Based on this, the article suggests the idea that public gaming might count as a performance. The article also mentions gameplays as the outcome of gaming performance and how the performance context can transform a mere gameplay into an actual performance.


\textsuperscript{239} See 4.2.1


\textsuperscript{242} Mechanics and systems, which are the rules and object in the game. See R. Zubek, Elements of Game Design (The MIT Press, 2020).

\textsuperscript{243} Video games featuring a gameplay that provides players with a great degree of creativity without a predetermined goal to achieve, e.g. \textit{Minecraft} (Mojang, 2008), \textit{Dreams} (Media Molecule, 2020) \textit{Grand Theft Auto Online} (Rockstar North, 2013) \textit{The Sims} (\textit{Electronic Arts, 2000}) and \textit{No Man’s Sky} (Hello Games, 2016).

\textsuperscript{244} See https://www.youtube.com/watch?v=48oyiMHc3VM&list=PLkJevtDN3k2QeXbNEXE8Lt8XaprF-u54&index=6 Minute 1:20–1:37 (Translated from Italian by the author) (accessed 11 November 2022).
The article thus establishes the theoretical framework through which gaming is observed as a performance. It first identifies the special order of time, a special value attached to objects, rules, and spaces as common elements with gaming. The article uses the theatrical performance as a reference model for gaming. By doing so, it analyses theatrical performance through the text, the enaction and the mise en scène. After that, it proceeds by comparing theatre performance, interactive media, games and video games where previous coordinates acquire different names and functions according to the selected activity. Then, the article connects the performative structure of public gaming with real life examples of live streaming and eSports providing the reader with a definition of public gaming performance.

From here, the article brings the definition of gaming performance under the European copyright law umbrella trying to show its legal status. With such purpose, the article first highlights the ascent of performers and audio-visual performances pointing out that such socio-legal empowerment shall consider the performative nature of gaming. After that, the article uses the Beijing Treaty coordinates to draw a parallel with the protected speech act of showing-doing digital games in front of an audience to be legally re-paraphrased in the context of the InfoSoc Directive. By doing so, the article proceeds with the observation of gaming performance in the light of the main economic rights a copyright owner enjoys; namely the right of reproduction, adaptation and communication to the public. The outcome of this analysis shows the infringing nature of gaming performance.

The article then discusses two subject matters of gaming performance with the purpose of showing their (hypothetical) capacity to attract copyright protection, whether they might be recognized as audio-visual performances or not. This scrutiny in turn shows that – even with some substantial differences – either speedruns or recitative gameplay not only infringe authors’ economic rights, but also that they seem unable to be protected by copyright. This is because of their uncertain nature of an original work of authorship, which means that gameplays do not seem to be the players’ own intellectual creation.

Finally, the article observes the reason why it is not feasible to create a valid legal argument that may save gaming performances and their subject matter from their inevitable infringing nature. In this sense, the article tackles the (irrational) economic reason for current utilitarian copyright, and the lack of understanding of creative contributions that players make in the context of their gameplays. However, it is also made clear that under certain creative conditions, a gaming performance includes all the requirements to be deemed as an original work of authorship.