

“A More Reliable Standard of Measurement”  
Creative Non-fiction Essay by Samara Wright

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Per Curiam

## SUPREME COURT OF THE UNITED STATES

Machinima v. Industry

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE  
ELEVENTH CIRCUIT

No. X-XXX

Decided December X, 20XX

PER CURIAM.

The prosecution, Machinima, (hereafter referred to as the petitioners) appealed to the eleventh circuit court for an exemption on behalf of Machinima as an art form, qualifying it for protection as a derivative work under U.S. Copyright Law, tentatively labeled Title VI of the Digital Millennium Copyright Act. The creation of such a provision would grant *sui generis*<sup>1</sup> protection to Machinima as a cinematic form of authorship. The Eleventh Circuit denied the application.

*Overtured:* This court has reversed the Eleventh Circuit’s decision based on (1) presentation of facts by the petitioners, (2) witness testimony entered into evidence on behalf of the petitioners and (3) the inability to refute claims made against Industry (hereafter referred to as the defense) by the defense’s council during this hearing.

I

Machinima is defined as a frankenword, or portmanteau, of machine and cinema – the practice or technique of producing animated films through the manipulation of video game graphics. It is ‘real-world filmmaking techniques applied within an interactive virtual space. Machinima makes for a very cost- and time-efficient way to produce

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<sup>1</sup> Of its (his, her, or their) own kind; in a class by itself; unique

films, with a large amount of creative control'.<sup>2</sup> Machinima took on its current form of animated films in 1996, although it did not 'transcend...the [hardcore] gamer'<sup>3</sup> audience until 2003 with *Red vs Blue*.

*Red vs Blue* utilized the *Halo* game engine, protected under copyright as the intellectual property of Microsoft and their subsidiary Bungie Studios.<sup>4</sup> Its creators Michael Burns, Geoff Ramsey, and Gustavo Sorola created a 'parody of the first-person shooter game genre in general and the Halo series in particular'.<sup>5</sup> The key lay in the gallows-humor commentary on the gamer experience and subjects included in the game genre itself, such as war. They created 'not only the longest running episodic web series of all time, but the longest running American science fiction series of all time',<sup>6</sup> which celebrated its thirteenth anniversary in 2016.

However, *Red vs Blue* is a Cinderella story. Bungie studios loved the videos, and allowed Burns to continue creating them without any licensing fees.<sup>7</sup> The defense has proven without a doubt that this is not the case for most Machinimists. The defense submitted into evidence End User License Agreements that Microsoft and Blizzard Entertainment have released, which limit the ability of Machinimists to legally create and share their work, whether ultimately for profit or merely as a labor of love.

*Red vs Blue* gave Microsoft something that all 'major corporations desperately crave but can never manufacture...a countercultural coolness [and a] grass-roots street cred'<sup>8</sup>, and Microsoft granted *Red vs Blue*'s creators an exemption. But this did

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<sup>2</sup> Long, G. (2009). Interview with Paul Marino. *Transformative Works and Cultures*, [online] 2(0). Available at: <http://journal.transformativeworks.org/index.php/twc/article/view/111/70> [Accessed 7 Apr. 2016].

<sup>3</sup> *Ibid.*

<sup>4</sup> Thompson, C. (2005). *The Xbox Auteurs*. [online] Nytimes.com. Available at: <http://www.nytimes.com/2005/08/07/magazine/the-xbox-auteurs.html> [Accessed 7 Apr. 2016].

<sup>5</sup> Reiger, S. (2015). *Complications in Machinima: Using Video Game Footage to Generate Cinematic Productions and Potential Conflicts with Copyright Law*. [online] MTTLR. Available at: <http://mttlr.org/2015/10/29/complications-in-machinima-using-video-game-footage-to-generate-cinematic-productions-and-potential-conflicts-with-copyright-law/> [Accessed 7 Apr. 2016].

<sup>6</sup> TV Tropes. (2016). *Red vs. Blue (Machinima) - TV Tropes*. [online] Available at: <http://tvtropes.org/pmwiki/pmwiki.php/Machinima/RedVsBlue> [Accessed 7 Apr. 2016].

<sup>7</sup> Thompson, *op. cit.*

<sup>8</sup> Thompson, *op. cit.*

nothing to further the average Machinimists struggle to gain that which they so desperately crave; a place at the cultural table, the title author.

Before the Eleventh Circuit, the petitioners called Paul Marino, an expert and author in the field to the stand as a witness for the sustainability of Machinima as a cinematic art form. He states: 'most [Machinimists] see [their work] as independent works...because they look at the machinima produced as art that stands on its own'<sup>9</sup> shedding the label of user-generated content 'inextricably bound to the game in which they were created. The rise of gaming as mainstream entertainment, the accessibility of powerful creative software, the seemingly insatiable desire for self-expression'<sup>10</sup> has all contributed to the popularity of Machinima and the artists that create these works. This was the argument put forth by the petitioners. The defense responded to Marino's testimony by stating that 'authors were not necessarily artists'.<sup>11</sup> The defense submitted into evidence the etymology for the word author, derived from the Old French *auctor* meaning 'author, originator, creator, instigator'.<sup>12</sup> The defense pointed out that nowhere is the word artist listed, and by claiming themselves to be artists, they therefore hold no inherent right to the title author.

The defense further claimed that *Red vs Blue* operates clearly under a recognized affirmative defense of fair use<sup>13</sup> as set forth in *Campbell v. Acuff-Rose Music Inc.*<sup>14</sup> Even when done for profit, the existence of parody in a work, significantly transforms the original. Even the Eleventh Circuit has sat and recognized several Fair Use cases (see *Suntrust Bank v. Houghton Mifflin Co.*<sup>15</sup>), and therefore deemed the use of *Red vs Blue* inadmissible as precedent for Machinima in obtaining sui generis protection.

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<sup>9</sup> Long, *op. cit.*

<sup>10</sup> Long, *op. cit.*

<sup>11</sup> Nesbit, M. (1987). *What Was an Author?*. 1st ed. [pdf] Yale University Press, pp. 233. Available at: <http://www.jstor.org/stable/pdf/2930205.pdf?acceptTC=true> [Accessed 7 Apr. 2016].

<sup>12</sup> Etymonline.com. (2016). *Online Etymology Dictionary*. [online] Available at: [http://www.etymonline.com/index.php?term=author&allowed\\_in\\_frame=0](http://www.etymonline.com/index.php?term=author&allowed_in_frame=0) [Accessed 8 Apr. 2016].

<sup>13</sup> 17 U.S.C. § 106 and 17 U.S.C. § 106A

<sup>14</sup> *Campbell v. Acuff-Rose Music, Inc* [1994] 510 U.S. 569 (Sixth Circuit), p.92.

<sup>15</sup> *Suntrust v. Houghton Mifflin Co.* [2001] 268 F.3d 1257 (United States Court of Appeals, Eleventh Circuit), p.01.

The Eleventh Circuit Court stated that the petition submitted by the prosecution failed to sufficiently address the claims made by the defense that 'machinima is [simply] a fan created art form...much like fanfiction or mash-ups'.<sup>16</sup> The Eleventh Circuit relied on the definition of author<sup>1718</sup> and the current laws under Title 17 of the United States Code (Copyright and related) when reviewing Machinima's claims to Authorship.

Machinima appealed, and this court has overturned the Eleventh Circuit's decision.

## II

Several factors of the petitioners' argument have been included in our approval of the appeal.

The Eleventh Court found that the 'cultural object can be seen as the sum of so many interests and so much labor, a sum that busily pedals about the marketplace in search of reception'.<sup>19</sup> But this alone is not just cause for a provision to the Digital Millennium Copyright Act. Though Machinima may be an act of creation, without further proof of authorship, it can only hope to be included into the class action suit currently being heard in the Court of Appeals for the Sixth Circuit (see *The Organization for Transformative Works v. District of Columbia*).

A: Due to the compromises technological advancements have forced out of the law, 'the legal distinction between culture, the cultural industry, and industry [has become] even more arbitrary than before.'<sup>20</sup> Previously, Industry banned authors from its ranks, desiring to remain in control of every phase of production of the cultural object; thereby preventing culture and industry from inhabiting the same economic space. In 1985, Industry decided that it did 'want authors in its ranks'.<sup>21</sup> The resulting extension

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<sup>16</sup> Thompson, *op. cit.*

<sup>17</sup> '1. a: one that originates or creates... 2: the writer of a literary work'

<sup>18</sup> Merriam-webster.com. (2016). *Definition of AUTHOR*. [online] Available at: <http://www.merriam-webster.com/dictionary/author> [Accessed 7 Apr. 2016].

<sup>19</sup> Nesbit, *op. cit.*, 257

<sup>20</sup> *Ibid.*, 239

<sup>21</sup> *Ibid.*, 252

of rights to the cultural industry has allowed corporations (i.e. the software company or the publishing company) to control copyright over their products and open the cultural field up to wholesale industrial exploitation. 'The privileged entrepreneur can now become an author'.<sup>22</sup>

If, by merely wishing to keep these new authors out of the cultural industry in mirroring the means by which the defense was once kept separate (pre-1985), this court sees no reason to uphold claims of infringement. The defense has no right to close off culture from its creators, and should not be gatekeepers of what is considered a work of authorship. 'Authors of all kinds have for a long time been flatly equated in the law...all authors share the same cultural space; they are defined by their presence there as well as by their rights to it'.<sup>23</sup>

The defense presented a deposition from Fredric Jameson as expert testimony on behalf of Industry occupying culture. Jameson argued that 'culture, rather than submit to invasion, escapes'.<sup>24</sup> However, because the defense sanctions Jameson's statement and their claims that 'no governing model for culture is available, only slippery categories and an absence of borders'<sup>25</sup> can be seen in direct opposition to this proceeding as a legal case, the petitioners' council has since lobbied the court to remove the evidence from consideration. The court has sustained this objection.

This court believes that Machinima meets this basic criteria for admission into the cultural industry. Machinima is certainly a product of creation and 'the law protects and rewards all work developing from an effort of the human mind and relating to the fine arts. It does not consider its importance nor does the beauty of a work matter, only the fact of creation'.<sup>26</sup>

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<sup>22</sup> *Ibid.*, 252

<sup>23</sup> *Ibid.*, 230

<sup>24</sup> *Ibid.*, 253

<sup>25</sup> *Ibid.*, 253

<sup>26</sup> Pouillet, E. (1908). *Traité théorique et pratique de la propriété littéraire et artistique et du droit de représentation*. 3rd ed. Paris: Marchal et Billard, p.97.

The statement for the petitioners made by Paul Marino draws an interesting connection between Machinima and its filmmaking roots; 'It [is] very easy to see [Machinima's] animation and remix lineage. However as machinima matures, the parallels to live-action filmmaking will become much more evident and gain acceptance as an evolved medium'.<sup>27</sup>

The petitioners stated in their appeal that the cultural object has 'more often than not [become] the work of a team of authors...by dissecting the authorial parts of the work, it is possible to cut into the illusion of seamlessness, so powerful in the rhetoric around the new technologies and to propose roles for the individual subject'.<sup>28</sup> If we grant authors rights to other audiovisual works, such as filmmaking, which are without a doubt a product of collaboration, why then do we condemn Machinima as infringement? This court has no answer to this question at present, though future litigation will surely clear up this subject. As such, the court is inclined to weigh this point in favor of the petitioners, at least for this case. We cannot in good conscience grant that films can 'be worked up into forms of high culture' while ignoring Machinima entirely; the law does not 'try to draw the lines between good and bad work, [nor] presume to erect criteria for aesthetic quality'.<sup>29</sup>

B: In response to the defense's claims that '...much like fanfiction or mash-ups, machinima is a fan created art form,<sup>30</sup> the petitioners called an anonymous witness, M, to present evidence drawing parallels to the introduction of photography, phonography and into French copyright law. The Eleventh Circuit failed to hear this evidence, discounting it due to a factual error in the previously submitted written account. This was corrected in between appeals, and this court has allowed the

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<sup>27</sup> Long, *op. cit.*

<sup>28</sup> Nesbit, *op. cit.*, 257

<sup>29</sup> *Ibid.*, 233

<sup>30</sup> Thompson, *op. cit.*

witness. Due to intimidation claims by the petitioners, the testimony was written out and submitted to the judges of this court.

Owing to M's testimony, this court finds that the parallels between French copyright law and this case are the petitioner's answer to the defense's assertion that Machinima is only user-generated work. We have decided to allow this testimony to stand. It is as follows:

The producers of photographs, phonographs and cinematography 'all became candidates for copyright... [But] to give these producers the status of authors involved granting the technologies (...associate[d] with mass culture) the status of the materials of aristocratic culture. The problem lay not with the low order of culture but with the nature of the labor involved, a labor integrally connected to machines...Those who made photographs, records, and movie were obliged to devise justifications for the value of their materials, their medium, and for their rights to use the title author'.<sup>31</sup> It took them nearly a hundred years.

The petitioners not need justify their materials. We already grant copyright protection to authors of software and graphic design (these rights are in most cases held by the defense). Likewise, their medium has already been established in this court as a descendent of the filmmaking industry. It would only remain for the petitioners to justify their rights to use the title author. In the same French law from which M's testimony arises, '*droits d'auteur* were applied to any work done in...those media that could be...forms of high culture'<sup>32</sup>. We have previously stated in this opinion that we intend to give the petitioners the benefit on this point.

If we return to M's testimony we find that the 'human factor overrode the mechanical process; [that] upon close inspection, a human mark, the trace of a cultural act, could

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<sup>31</sup> Nesbit, *op. cit.*, 236

<sup>32</sup> *Ibid.*, 233

be discerned'<sup>33</sup> in an author's work. This human factor is the reflection of the author's personality in the work, which was one of the distinguishing elements in separating culture from industry. This court finds that the defense, in creating and then overturning this separation, has become the precedent for the petitioners to enter the cultural field, as authors. By changing the laws concerning what is and what is not industry to exploit technological advances, this court finds that Industry has unwittingly paved the way for Machinima.

C: At this point, the court would like to address the petitioners' claims that the form itself qualifies for rights as a derivative work.

This court finds that our laws are not unlike the early definition of an author in French law, as given in M's testimony; 'the term author...was only meant to distinguish a particular kind of labor from another, the cultural from the industrial. [The] labor exhibited certain qualities... [taking] shape only in the certified media [and having] a presence of human intelligence, imagination, and labor that were legible in the work, meaning that such work...reflect[ed] the author's personality'.<sup>34</sup>

In current U.S. law, a derivative work is defined as 'a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted'.<sup>35</sup> Specifically, to qualify for the transformative aspect of a derivative work, the 'transformation...of the work must be substantial and bear its authors personality'.<sup>36</sup> If we can agree on such requirements for author's rights in both original and derivative works, all that remains is to prove that the petitioners, in creating their work, are sufficiently adhering to these.

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<sup>33</sup> *Ibid.*, 236

<sup>34</sup> Nesbit *op. cit.*, 234

<sup>35</sup> Wikipedia. (2016). *Derivative work*. [online] Available at: [https://en.wikipedia.org/wiki/Derivative\\_work#United\\_States\\_of\\_America](https://en.wikipedia.org/wiki/Derivative_work#United_States_of_America) [Accessed 8 Apr. 2016].

<sup>36</sup> *Ibid.*

There has recently been some modification of thinking in the laws surrounding derivative works, particularly when appealing for an affirmative defense under Fair Use.<sup>37</sup> Our colleague the Honorable Pierre N. Leval's article '*Toward a Fair Use Standard*' has been the doctrinal fair use jurisprudence for decades<sup>38</sup>. We turn to his words on the subject:

'The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. [Uses] may include criticizing the quoted work, exposing the character of the original author, proving a fact, or summarizing an idea argued in the original in order to defend or rebut it'.<sup>39</sup>

Using Judge Leval's thinking, the Ninth Circuit found that the 'more transformative the new work, the less will be the significance of the other factors, like commercialism, that may weigh against a finding of fair use'.<sup>40</sup> We agree that the originality of the new work is of particular importance in fair use cases, and cannot be disregarded in this appeal.

### III

We find that turning a video game, an interactive experience, into a movie or show – something that is watched and consumed, but not participated in – is employing the quoted matter for a different purpose, especially when criticizing the quoted work, in the eyes of the law.

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<sup>37</sup> 17 U.S.C. § 106 and 17 U.S.C. § 106A

<sup>38</sup> Friedman, P. (2008). Judge Pierre Leval on what constitutes a transformative use. [Blog] *What is Fair Use?*. Available at: <http://whatisfairuse.blogspot.co.uk/2008/03/judge-pierre-leval-on-what-constitutes.html> [Accessed 8 Apr. 2016].

<sup>39</sup> Docs.law.gwu.edu. (2016). *Leval on Fair Use*. [online] Available at: <http://docs.law.gwu.edu/facweb/claw/levalfrustd.htm> [Accessed 8 Apr. 2016].

<sup>40</sup> Wikipedia. (2016). *Perfect 10, Inc. v. Amazon.com, Inc.*. [online] Available at: [https://en.wikipedia.org/wiki/Perfect\\_10,\\_Inc.\\_v.\\_Amazon.com,\\_Inc.](https://en.wikipedia.org/wiki/Perfect_10,_Inc._v._Amazon.com,_Inc.) [Accessed 8 Apr. 2016].

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We recommend that the appeal for exemption rights presented by the petitioners to the Register of Copyrights be resubmitted, while the draft of the Digital Millennium Copyright Act Provision Title VII awaits a hearing in Congress.

The court would also highly recommends that Congress pass Title VII, if asked.

NESBIT, M., delivered the opinion for a unanimous Court.

[word count: 2819]

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