

CINE-GT 1804: Copyright, Legal Issues, and Policy
Instructor: Greg Cram
Caroline Oliveira

Assignment 2 – Fair Use

Part 1:

In early August of 2016, developers publicly known as ~JV~ and Twitch released after nine years in the making, a free game called *Pokémon: Uranium* online. The game, described as a fan-game inspired by Nintendo's popular Pokémon series, "takes place in the Tandor region, where the player must collect [eight] Gym Badges in order to compete in the Tandor Regional Championship [and] along the way, (...) fill up their PokéDex with entries of more than 190 different species of Pokémon."¹ In other words, essentially the same type of game Nintendo would make in its Pokémon series. A week after its debut, the game had already been downloaded 1.5 million times.²

Soon, Nintendo of America issued a cease and desist order and the developers removed the game from all official websites. Although little has been commented on the situation, one can easily predict some of the arguments for both parties involved.

The only known argument in this situation comes from the developers, who stated "this (...) game [is a] derivative work made for fun [and] we do not seek to

¹ "Pokémon Uranium Wiki." Accessed October 29, 2016. http://pokemon-uranium.wikia.com/wiki/Main_Page.

² Good, Owen S. "Fan-Made Pokémon Uranium Is Shelved by Its Creators after Nintendo Notices." *Polygon*, August 14, 2016. <http://www.polygon.com/2016/8/14/12472616/pokemon-uranium-taken-down-nintendo>.

earn a profit off other people's intellectual property, we just love this series and are making this game as a tribute to it.”³ This argument alone has problems, since only the rights holder (Nintendo) has the power to create derivative works based on the original (in this case, the original being the official Pokémon games.)

Aside from that detail, ~JV~ and Twitch claim their project was not made to earn profit and in fact all 1.5 million downloads were free of charge, so the pair did not make any money out of it. Another point they could argue is that their game, just like other fan-made games and videos (like the several Star Trek fan-films made by Axanar), are made all the time and tend to generate buzz around the original, bringing more people to buy the official product. Finally, they created their own Pokémon monsters and characters in their game so they could argue they transformed the original work by adding a new expression and aesthetic. In other words, they allege fair use.

When it comes to Nintendo, they could point out that *Pokémon: Uranium* was an unauthorized copy of their official games, borrowing too many elements from the original to be considered a simple tribute. The gameplay is simply identical. In addition to that, they could also argue that since the downloads were free and easily accessible, *Uranium* could potentially keep costumers from buying the official games, affecting their market.

In order to decide if ~JV~ and Twitch could get away by alleging fair use, one must relate the facts surrounding this dispute to the four factors of the law. The purpose and character of *Pokémon: Uranium* were not commercial. The game was

³ “Pokémon Uranium Wiki.”

intended to be a tribute, just like other fan-made productions and as mentioned previously, the developers did not make any money from it.

Nintendo's *Pokémon* is a highly creative game series. The only fact in it is the idea that evolution creates better-adapted individuals, so it is safe to say the games are closer to novels in nature than a scientific production. *Pokémon: Uranium* copied several creative elements from Nintendo's games, such as the main storyline (youngster leaves his hometown to compete in Pokémon gymnasiums, while trying to capture as many monsters as possible), the monsters characteristics (monsters are divided into types and have special abilities), graphic designs, character design, specific locations and items, which are considered staples in the official Nintendo games and not anywhere else. The visuals are so similar that to a misinformed player, *Uranium* could easily be a sequel to Nintendo's games.

Regarding the effect of *Uranium* on Nintendo's potential market, one can only speculate. No concrete information has been made public on this matter, but it is highly unlikely that *Uranium* created any dent on Nintendo's faithful Pokémon market. Customers have been playing the official games since their original release in the late 90s and to this day their popularity has only increased. Fans are anxiously waiting for Pokémon's newest releases, which are slated to happen on November of this year and doubtfully those who downloaded *Uranium* will keep from buying the game.

Based on all this information, I believe the creation and distribution of *Pokémon: Uranium* was not protected by fair use. Though its creators did not set up to make any money off of it, they did copy (verbatim) most elements from the

original game, including its trademarked name, and they did not change their version enough to claim they were creating new work. In fact, in the developers' own words, the game was supposed to be a tribute, an imitation of the original.

Furthermore, *Uranium* was not created to be educational and it copied a fictional work, not a factual one.

Part 2:

Fair use could protect an archive that uses small, low quality screen grabs of films and video as thumbnails in its search engine. The thumbnails could help researchers and archivists locate a certain work and even fix possible cataloging issues by being able to compare the image to the available metadata.

By analyzing this case under the four factors of fair use, one can determine that the archive in question probably would not get sued. The purpose of the thumbnails is not to generate commerce of any kind. Instead, it is to facilitate research and stimulate education. The images would be of a single frame, possibly the title screen, and would not represent the production as a whole or the "heart" of the work. No substantial portion of the work would be copied.

In addition, the thumbnails would be so small and of low quality that it would be impractical to use them for anything else other than to help in research. In other words, the images would not be for sale and would not impact negatively the

potential market for the original films and videos. If anything, it would most likely inspire others to watch the complete work.