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SUE FOR MARIO BROS.: NINTENDO VS. EMULATION

INTRODUCTION: ACCESSING THE PAST

At the heart of many conversations about sharing copyrighted work is a question of access. That is, when there is no legal way to access a work, to what extent can users feel ethically free to download and distribute that work, even when sharing technically breaks copyright law?

To many, the answer is simple: if we can't find an easy-to-access, legal version of the book we're trying to read, or the article we're trying to cite, or the out-of-print software we're trying to test, or the movie we're trying to watch--we know we can find someone online who has digitized the content and is happy to share. Perhaps begrudgingly, perhaps with embarrassment, many of us nevertheless steal the things that are hard or impossible to buy in an updated, accessible format.

Of course, content owners know this is happening. And while these companies are within their rights to send cease-and-desist letters to try to stop infringement, another choice is simply to look the other way. After all, the argument goes, infringing users are often still fans who are worth keeping on your side.

Yes, I'm talking about Nintendo--a company that I suspect faces this tension between access and piracy often for two overlapping reasons: 1) they're one of the most beloved companies in the world, especially to nostalgia-loving children of the 80s and 90s, and 2) their early, popular content--the games released on the Nintendo Entertainment System (NES), Super Nintendo Entertainment System (SNES), Game Boy, and Nintendo 64--can be shared and played easily and accurately on computers. It's instant nostalgia, and all for free, as long as you're willing to download from ethically shady sites. All you need is a free emulator program and a collection of ROMs (which stands for read-only-memory, the term that has become the shortcut for "a single digital file that includes an entire game").

ROMs have been shared widely for years; I remember how in high school, circa 1997, I downloaded a fan-translated version of the SNES game *Final Fantasy V*--then released only in Japan!--and tried to play it on my very old, very slow family desktop computer. And Nintendo has of course known about ROM-sharing for years as well; according to archive.org, its page on "Legal Information (Copyrights, Emulators, ROMs, etc.)" has been up at its current web address since 2003, where amid other threats about the illegality of playing ROMs, we can read the unchanged-since-then warning that emulators and ROMs are "the greatest threat to date to the intellectual property rights of video game developers."

But in 2018, Nintendo powered up its warnings.

WHAT HAPPENED: BOWSER'S ATTACK

On July 17, 2018, Nintendo filed suit against two major sites that hosted ROMs for free: LoveROMs and LoveRetro. Their suit claims copyright infringement, trademark infringement, and unfair competition and requests up to \$150,000 for each copyright infringement plus another \$2,000,000 for each trademark infringement (United States District Court 23). Since the sites hosted, according to the suit, "thousands of games" (2), the sites' owners could be liable for literally *billions* of dollars, according to that metric. (If we assume that "thousands of games" means a minimum of 2,000 infringements, the owners would be facing \$300 million in copyright infringements plus another \$4 billion in trademark payments--ridiculous numbers that that bring to mind Mario jumping through seas of uncountable coins.)

The married couple who owned the sites chose to settle. According to a November 2018 article on *TorrentFreak*, they paid over \$12 million to Nintendo to avoid further litigation, and of course the content came down. The sites no longer function, though the Facebook page for LoveROMs is still up; it's headed by a November 8 post stating that the site "acknowledges that it caused harm to Nintendo, its partners, and customers by offering infringing copies of Nintendo games and has agreed to cease all such activities" (LoveROMs).

According to *Wired* (Onanuga) and *Ars Technica* (Machkovech), this move represented a clear escalation of Nintendo's previous attempts to shut down ROM sites: sending cease-and-desist letters. Apparently, those previous moves were just small-Koopa; they needed the spikes and hammers of Bowser to really shut down this infringement.

It's not entirely clear why Nintendo chose these sites from the many sites hosting ROMs they could have chosen, though an *Ars Technica* article speculates:

The lawsuit makes a point of describing the named defendants as "not casual gamers," but "sophisticated parties with extensive knowledge of Nintendo's intellectual property and the video game industry more generally." It is possible that the suit uses this language to explain why some ROM sites' operators may not draw the same legal fire. (Additional, alleged paths to revenue may not help matters for the named defendants, as Nintendo alleges that the operators "enrich themselves through, among other things, donation requests and the sale of advertising space.") (Machkovech)

Regardless of the reason, Nintendo won the legal victory. Fans disagree, however, on whether or not they won the moral victory as well.

CRITIQUES FROM THE MUSHROOM KINGDOM

As one might expect, this lawsuit has had a chilling effect on other sites hosting ROMs. The owner of popular site EmuParadise wrote, "I started EmuParadise 18 years ago because I never got to play many of these amazing retro games while growing up in India and I wanted other people to be able to experience them" (qtd. in Onanuga).

Another article interviews Serbian videogame developer Miodrag Kovačević, who also describes ROMs as the only way he could access top-quality games while growing up, a habit that later led to a successful career (Maiberg). The same article also makes the case for ROMs as an important archival tool, and as an important source for teaching students game history and development; it quotes NYU professor Bennett Foddy, who says, "If I was teaching poetry, I could send a student to read nearly any poem written since the invention of the printing press, but in games my legal options limit me to, I would guess, less than 1 percent of the important games from history." And *PCWorld* describes the ROM community as "a community that's almost singlehandedly kept game preservation efforts alive" (Dingman).

And in the bigger picture, there's mounting evidence that, as one article title puts it, "Online Piracy Can Be Good for Business" (Bode). Others are responding by praising creative approaches, like "an online lending library [that] temporarily loan[s] out copies of ROMs tied to individual original cartridges" (Orland). And of course, the fight isn't over: software engineer and game designer Brianna Wu even suggests that expanding copyright law at the federal level may be the answer; in January 2019, she tweeted, "If I am elected to Congress in 2020, I will draft a bill expanding fair use to games sold on digital services that have been discontinued" (@BriannaWu).

Still, all these articles include a common refrain, even from those most against Nintendo's lawsuit: Nintendo was of course acting within its legal rights. Even when its fans disagree, a company gets to protect its intellectual property, even when that protection can feel like a fireball cascading against a dungeon's bridge.

CONCLUSION: IT COMES DOWN TO ACCESS

One possible reason for Nintendo's decision to sue LoveROMs and LoveRetro might be its present and future plans to capitalize on its popular, retro intellectual property; in other words, perhaps the company is planning to give fans the access that they want. After all, their release of official mini-consoles, the NES and SNES Classic Editions--which update the playing experience for modern TVs with HDMI inputs, crisp displays, and the ability to save wherever you want--was marked by notorious shortages as fans rushed to buy official access to the games of their childhoods. And the current flagship Nintendo system, the Switch, is slowly giving Switch Online customers access to more and more original NES games, which it trickles out to great acclaim. (A journalist at

Motherboard asked Nintendo if the Switch Online releases affected Nintendo's decision to sue when it did, but at the time of his article, he hadn't heard a response [Maiberg].)

Yet consider the numbers, focusing for now just on NES games. The NES Classic comes with 30 built-in games (and no sanctioned, easy way to download or add more). The Switch Online service currently offers 35 NES games and will add more, but many of the games currently available are already available on the NES Classic. To be fair, there was more generosity in the past: the now-discontinued Wii Virtual Console did indeed make 94 NES games available ("List of Virtual")--but compare those numbers to the 680 officially licensed NES games released in North America ("List of Nintendo"). Or compare the 20 games on the SNES Classic to the 721 licensed North American games for the SNES ("List of Super"). That's a lot of unplayable, un-archived content. According to NYU professor Foddy, "they make their most popular titles available and let the rest disappear" (qtd. in Maiberg).

With such a small slice of Nintendo's retro offerings available legally (and the prices of physical cartridges soaring on eBay), it seems likely that despite Nintendo's legitimate efforts to protect its intellectual property, fans will continue to find ways to download and share ROMs. And perhaps they'll continue to love the Nintendo of the past, even as they live in fear of the Nintendo of the present.

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