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Kyle D. Stedman

## 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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Devon Fitzgerald Ralston

## “COCKYGATE”: TRADEMARK TROLLING, ROMANCE NOVELS, AND INTELLECTUAL PROPERTY

### OVERVIEW

In 2018, 162 million e-books were sold. Almost 40% of that was in the romance genre. Readers of romance were early adopters of reading on electronic devices; the e-book market favored independent publishers and authors. Even traditional publishers like Harlequin, Macmillan and Penguin created digital only presses like Carina, Swoon Reads, and Flirt. Many popular romance authors began self-publishing through Amazon Kindle Unlimited and iBooks in addition to traditional presses offering novellas, prequels and exclusive digital content for their readers. Additionally, niche genres like supernatural romance, African-American romance, LGBT romance, and erotica may have remained underrepresented in print publishing but flourished in e-publishing forms. The rising popularity of romance novels, specifically in e-book form, has brought copyright and intellectual property challenges especially for self-published authors. The use and speed of information via social media increases public awareness of such challenges, like in the case of what has come to be known as Cockygate<sup>1</sup>.

In the Summer of 2018, romance novelists Melissa Jane and T.L. Smith received a message from Audible, to whom they'd recently sold the rights to their book *Cocky Fiancé*, that informed them of a notice which alleged they were infringing on someone else's trademark. A few days later, they received notice from the author, Faleena Hopkins, explaining that she had trademarked the word "cocky," insisting Jane and Smith change their title. Further, Hopkins contacted Amazon directly and reported other romance novelists including popular author, Tara Crescent, who writes a series of menage romances that use "cocky" in some of its titles, for trademark violation. Amazon's policy (at the time) was to suspend sales of reported titles until receiving valid documentation to prove rights to the "trademarked" material. Amazon also began removing reviews for the suspended books, as well as others which used "cocky" in their titles. Tara Crescent's books were pulled from Amazon while other authors altered their titles or delayed release dates preemptively. Jane and Smith, for example, retitled their book to *Arrogant Fiancé* despite the thousands of dollars they had already spent on marketing and book swag with the previous title.

Authors who'd received letters from Amazon or directly from Hopkins herself took to social media in confusion and outrage using the hashtag "cockygate". They

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<sup>1</sup> Author's Note: I first learned of this issue via tweets from two of my college friends (who remain unnamed for privacy purposes) who co-author romance novels. They knew many of the authors involved in the case, though themselves were not targeted nor sued. They declined to be publicly interviewed but provided much of the details and timeline of the case as it is laid out here.

posted emails from Amazon and copies of the cease and desist letters from Hopkins. For self-published authors who had no legal representation, the possibility of having to prove ownership of content they write felt overwhelming enough to agree to Hopkins' demands to change their titles, even if they thought trademark was invalid. In this case, in particular, many authors like Jane and Smith buckled under the pressure because due to Amazon's policy they felt like they had no recourse. In a matter of days, Romance Writers of America, the trade association for romance authors, intervened, which halted the removal of books that had been reported as violating Hopkins' trademark and reinstated those that were removed, though it took much longer to get the reviews reposted. But for authors like Jane and Smith, the damage had been done. While the authors worked to change their title, Amazon contacted the paperback distributor regarding the infringement claim and the authors had to not only prove their identities but also that they owned the work they were publishing.

## **SO YOU WANT TO LEARN TRADEMARKS**

A trademark such as a brand, logo, or slogan identifies the source of a particular good or service to consumers and potential consumers. The purpose of the trademark is to protect consumers from being confused as to the source of a good bearing the mark. For example, the shape of the Coca-Cola bottle is trademarked and has been part of the company's trademarked logo throughout its history. This prevents any other soda company from using that particular bottle shape as part of their brand or logo and ensures that customers know that when they see that bottle shape, they're getting what they expect from the Coca-Cola brand. Trademarks identify particular goods you are *selling*. If you are not selling a specific good in association with the trademark, there would be no marketplace confusion and thus, no infringement. When a trademark is registered, a particular good with which it will be used must be identified.

A registered trademark is simply a trademark that has been registered with the United States Patent and Trademark Office. The process requires filling out a form, paying a fee, and completing registration. Once the process is complete, the filer receives a certificate that provides a presumption of validity and the right to sue alleged infringers. However, a registered trademark is not required to sue someone for trademark infringement. You only have to allege and prove that consumer confusion was caused or that the likelihood of confusion will occur. Registering a trademark does not mean you will automatically win a trademark case because a) trademarks can be attacked and b) infringement has to be proven (USPTO).

In the United States two kinds of marks can be registered: 1) standard character marks which are marks that constitute a word or words in one or more languages, an arbitrary string of characters or a made-up word as long as it is made up of standard characters. Legal experts suggest that made-up words are the best kind of trademarks. 2) Non-standard character marks or wordmarks including logos, pictograms, symbols,

colors, sounds, or even smells (Whipple). Faleena Hopkins registered both “ the wording ‘cocky’ in stylized form” as a non-standard character mark and a standard character mark (USPTO).

The word "cocky" is written in a fluid, cursive script. The letters are connected, with a prominent loop on the 'y' and a sharp hook on the 'c'. The overall style is elegant and handwritten.

The “stylized form” represented here uses a font Hopkins purchased from Creative Market, a community-generated design site, whose FAQs expressly state “you may not register as a trademark the item or the end product incorporating the item--not even logos. If you use the item to create a logo for yourself or a client, keep in mind that third parties can use the item too, even in another logo” (“Creative Market”). The creator of the font, Set Sail Studios, explained on Twitter that he had not given anyone permission to trademark a design using his font. This alone would seem to void Hopkins’ claims to trademark.



Furthermore, those seeking trademarks must identify the mark so particularly in order for competitors to know what they are to avoid and simply “do not use the word cocky” is insufficient. Remember, the point of trademark is to avoid marketplace confusion for consumers. As such, you typically cannot claim something as a trademark when others are already using it for similar goods because an association may very well have already formed between the goods and that mark. Hopkins’ registration of a trademark suggested that her “The Cocky Series” was the only association of consumer to good being offered; in this case, a romance novel with a cocky protagonist. As one can imagine, there are many romance novels using the word “cocky,” to describe such characters, Tara Crescent’s included, that were published before Hopkins’ first claimed use of the trademark. As such, the merit of Hopkins trademark is iffy at best, perhaps verging on deceptive, which is why Kevin Knuepper, a retired lawyer and romance novelist, filed a formal opposition to Hopkins’ trademark. He challenged the original trademark but also argued that Hopkins committed fraud on the United States Patent

and Trademark Office because Hopkins did not use the “cocky mark” on the published versions of the books in the Cocker Brother series, only the ebook versions. Kneupper alleges that this discrepancy was not disclosed during the registration process and thus constitutes fraud (King).

Hopkins filed a lawsuit against Kneupper and Tara Crescent and sought an injunction against Jennifer Watson for her *Cocktales Anthology*, the proceeds of which were earmarked for legal defense funds of authors accused of trademark infringement. Representing Kneupper, Crescent and Watson, the Authors Guild and Romance Writers of America filed a countersuit challenging Hopkins’ trademark. In their court filings, the organizations wrote “cockiness (in all its permutations) remains as prevalent in romance novels as the use of stunning, scantily-clad models on their covers” (Hopkins v. Kneupper, Crescent, Watson). The judge agreed and ruled in their favor, stating that Hopkins’ injunction was “unwarranted and unfounded” (Hopkins v. Kneupper, Crescent, Watson). Hopkins surrendered her trademark registrations and #cockygate essentially, ended. However, because of Amazon’s “suspend first, prove validity later” policy Hopkins was able to wreak havoc within the romance novel ebook publishing industry and cause significant issues for many authors over months that the cases were pending.

## **WHAT NOW?**

In the wake of #cockygate, romance authors are thinking strategically about how to protect themselves from future accusations of infringement, but also how to protect their own creative work. Romance Writers of America hosted a series of talks on branding and copyright at their yearly conference and a series of webinars are planned throughout this year. A group of authors including Watson calling themselves “The Cocky Collective” continue to raise money for RWA’s legal advocacy efforts and contributed over \$100,000 of their royalties of *The Cocktales Anthology* to the fund in 2018. In a press release thanking the contributors and readers, RWA says they will continue “to fight against obstruction of creative expression” (“RWA Receives Donation from the Cocky Collective”).

In an attempt to prevent such cases from going as far as cockygate, a twitter bot called “cockybot” automatically finds and tweets fiction-related trademark applications filed with the US Trademark and Patent Office. The tweet includes the phrase being trademarked, the documents filed, and an Amazon search link of associated products. While inspired by #cockygate, the bot looks beyond romance novels and includes other genres as well. Notably, the bot’s twitter profile includes an image of a robot with the stylized font Hopkins initially trademarked reading “cocky” over it.



Cockybot is an attempt at a technological solution for trademark bullying. The sheer number of romance authors publishing today makes it challenging for one editor or one author to track trademarks related to their genres. Cockybot automates part of that process, though one still has to read through the linked documents to determine whether or not to oppose the trademark and then fill out paperwork to do so. Writing and publishing is becoming increasingly complex for independent authors. Because today's consumers have a significant range of choices when it comes to what and how to consume romance novels, in order to stay competitive, authors must be not only be well-versed in search engine optimization, Amazon policies, marketing, branding, and networking, but also understand trademark and copyright laws and practices.

Ultimately, Faleena Hopkins created a dangerous precedent even if her trademark did not hold up. It is clear that Hopkins used Amazon policies against the authors she targeted. While there is an appeals process in place, the texts in question were suspended or removed while an investigation was pending, at least until Romance Writers of America intervened. Thus, Amazon policies can be weaponized; the algorithms can be employed in such a way to return results for whoever has trademarked a particular term or series of terms to determine what titles are associated with that term and which might be a target for trademark bullying. While this kind of scam, or trolling (registering a trademark only for the purpose of reporting infringement to Amazon) would not hold up in court, it could potentially boost sales for a trademark holder while damaging the marketplace association of consumer to goods, the very thing trademark is meant to protect. There is an obvious weakness in Amazon practice and policy that seems easily exploited and manipulated and that should concern readers and authors of all genres.

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**Kim Gainer** is Professor of English and Associate Dean of the College of Humanities and Behavioral Sciences at Radford University in Radford, Virginia. Professor Gainer became interested in the subject of intellectual property when she began writing fan fiction inspired by the stories of J.R.R. Tolkien and became aware of the fair-use issues related to that hobby.

**T J Geiger II** is Assistant Professor of English in the Department of English at Baylor University in Waco, TX. He teaches classes in writing studies, rhetoric, and technical writing. He has published on religious rhetoric, composition pedagogy, undergraduate writing majors, and feminist rhetoric. His publications include articles in *Rhetoric Society Quarterly*, *College English*, *Composition Studies*, *CCTE Studies*, and *Peitho*.

**Devon Fitzgerald Ralston** directs the Writing Center at Winthrop University where she also teaches composition, professional writing, and digital rhetoric courses. Much of her research focuses on the tensions between the private and the public, particularly in online spaces. Her recent co-authored article, "(Re) Locating Queerness: Techne, Identity, and the Hegemonic Fantasy," interrogating the impact of digital apps, websites, and the circulation of gifs on the visibility and invisibility of queer sexuality was published in a special issue of *Pre/Text: A Journal of Rhetorical Theory*. Her current research is an archival project, examining emotional labor through the history of what she calls "the expectation of care" in writing center directorship.

**Kyle Stedman** is Associate Professor of English at Rockford University, where he directs the Writing Center and teaches rhetoric and creative writing. His work on sound, intellectual property, and pedagogy has recently appeared in *Technoculture; The Routledge Companion on Media Education, Copyright, and Fair Use*; and his born-digital collection (co-edited with Courtney S. Danforth and Michael J. Faris) *Soundwriting Pedagogies* (Computers and Composition Digital Press / Utah State University Press). As a child, he played so much *Dr. Mario* that he wore out one of his original NES controllers.