The Reproduction and Derivative Work Rights

Copyright Law – Professor Grimmelmann
Class 17 – October 30, 2008

six exclusive rights

- reproduction
- derivative / adaptation
- public distribution
- public performance
- public display
- (digital audio transmission)

the reproduction right

- "to reproduce the copyrighted work in copies or phonorecords"
- we know what this means
- what's a "copy?"
- paradigm case: you publish a literary work in book form; I make photocopies of it

a border case?

Yusuf Islam
(formerly Cat Stevens)

Wayne Coyne
(of the Flaming Lips)

a border case?

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what's the issue here?

- The chords and melody of "Fight Test" clearly come from "Father and Son"
  - But is this a *reproduction*? A literal *copy*?
  - Do they share a "total concept and feel?"
- The derivative works right codifies judicial precedent that changes in format or genre don't prevent a finding of infringement

reproduction and derivative rights

- *don't worry* about the line between the two
  - there's no gap in coverage
- reproduction clearly applies to photocopies
- derivative clearly applies to genre changes
- in between, one or both will apply
- if there's any doubt, plead both!

the derivative right

- similar overlap with public performance
- does the derivative right *ever* matter?
- what if the other rights are unavailable?
  - the cases for today involve scenarios when other rights "don't work" for some reason or another
  - not every use creates a derivative work!

Lee/Mirage v. A.R.T.

print

tile

A.R.T. setup

- what's A.R.T. doing? does it violate the . . .
  - reproduction right?
  - public distribution right?
  - public performance right?
  - public display right?
  - digital audio transmission right?

what's a "derivative work?"

- A "derivative work" is 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.

Mirage vs. *Lee*

- why does *Mirage* think that ART has "recast" or "transformed" the works?
  - what do *Mirage* and *Lee* think about museums that reframe paintings?
- is the card-on-a-tile *copyrightable* as such?
- ultimately, how does *Lee* read "recast, transformed, or adapted?"

hypos on recasting

- I buy a book and doodle in the margin
- Marcel Duchamp draws a moustache on the Mona Lisa
- Marcel Duchamp installs a urinal as an exhibition in an art museum
- I cut photographs from a magazine and use them in a collage

Galoob v. Nintendo

physically . . .

+

+

in the game . . .

MARIO
000000
×00
WORLD
1-1
TIME
SUPER
MARIO BROS.
©1985 NINTENDO
1 PLAYER GAME
2 PLAYER GAME
TOP- 000000

MARIO
000000
×00
WORLD
1-1
TIME
SUPER
MARIO BROS.
©1985 NINTENDO
1 PLAYER GAME
2 PLAYER GAME
TOP- 000000

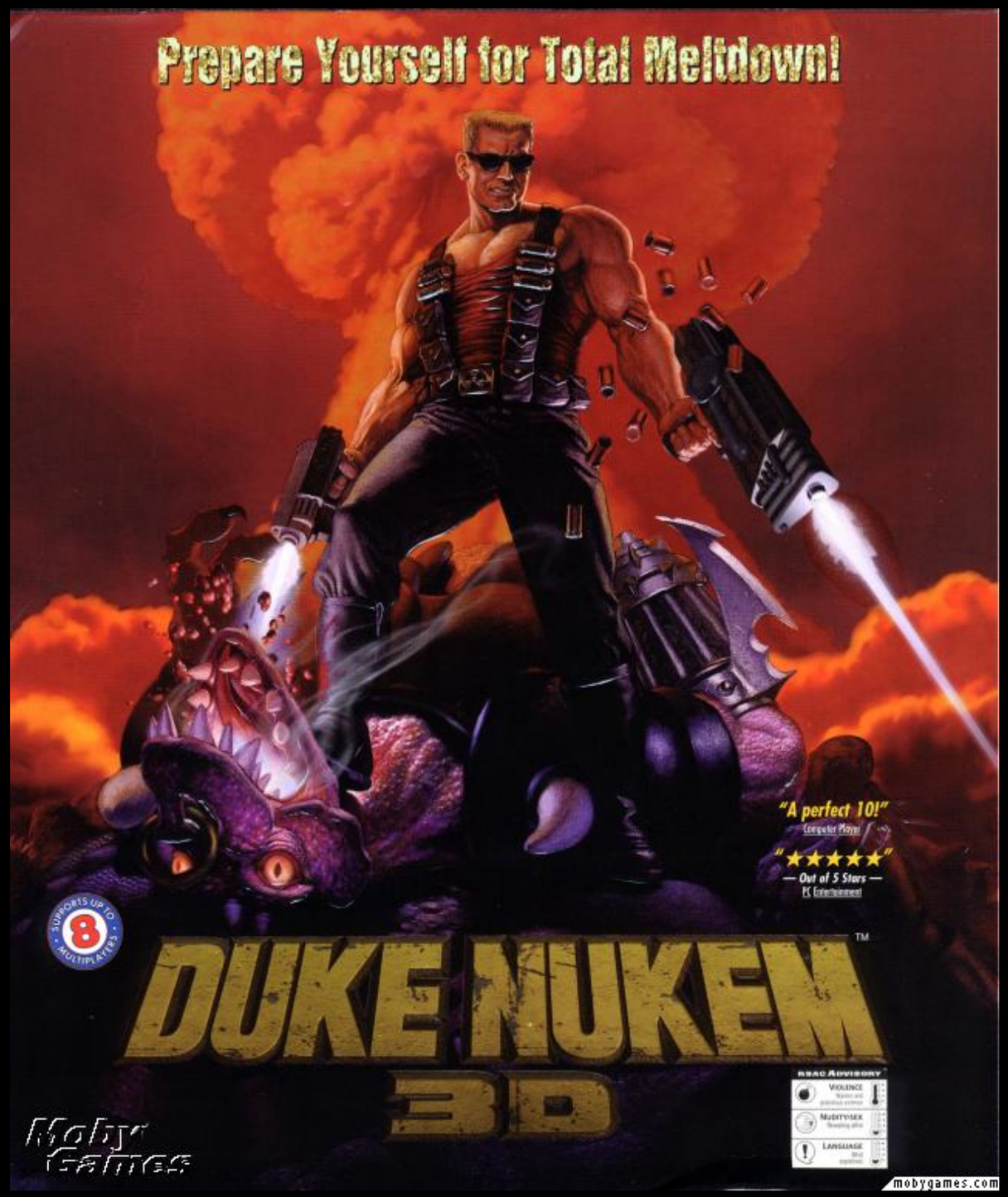
Galoob setup

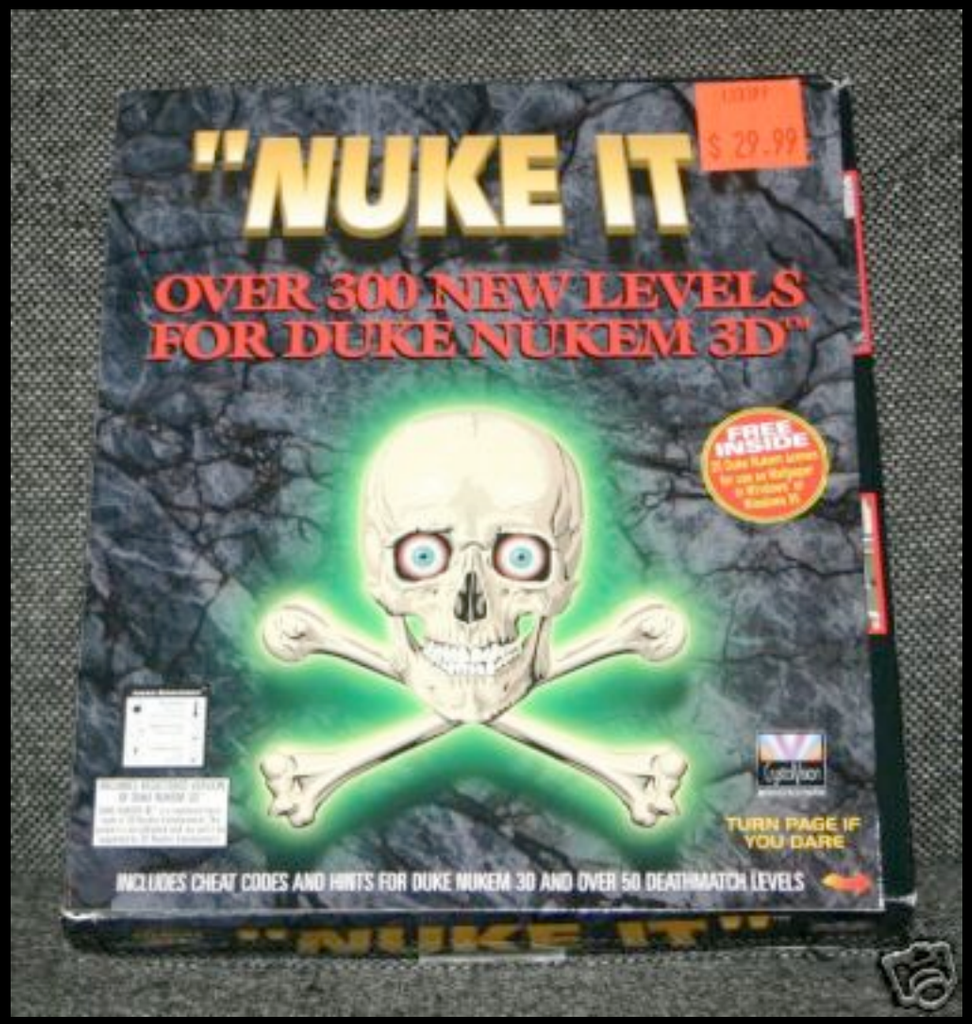
- what does a Game Genie do?
  - does the Game Genie *contain* a reproduction of any Nintendo games?
  - is the Game Genie *itself* a derivative works of any Nintendo games
- what, then, is Nintendo's argument?

what's *Galoob* about?

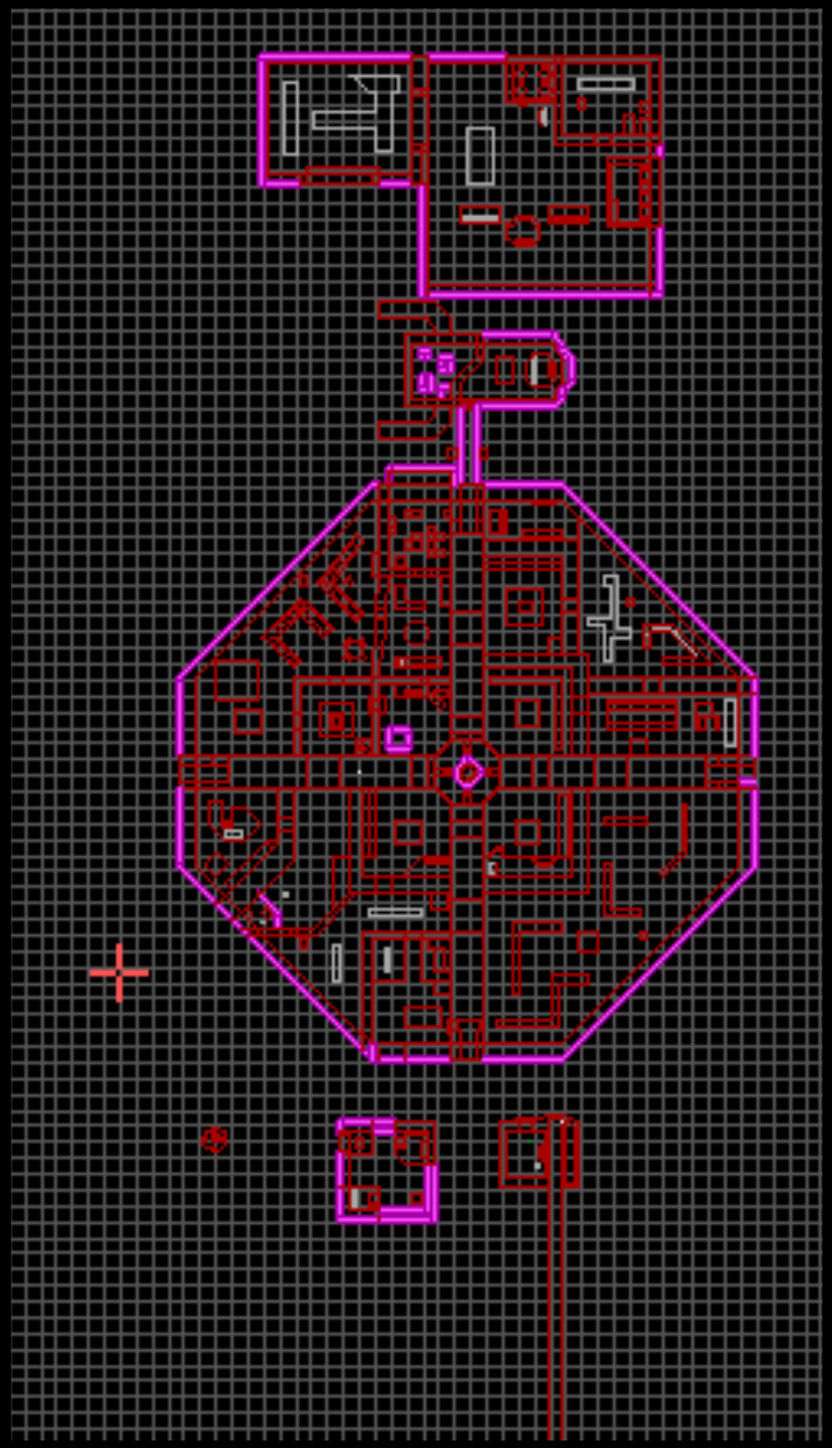
- if I created and sold Nintendo cartridges that played exactly like Waterworld Mario, would I infringe the derivative works right?
  - (would I infringe anything else, BTW?)
- what's the relevant difference between that and what the Game Genie does?
  - should that difference matter?

Micro Star v. Formgen





.MAP files and gameplay



FormGen

- what's a .MAP file?
  - does it *contain* any of the DN3D art?
  - how does it turn into a playable level?
- what do you think of these arguments?
  - infringement b/c it refers to the art
  - infringement b/c it's a sequel

derivative works takeaway

- most of the time, the right is unimportant
- it really comes into play only when the "real" rights aren't available
- issue one: what's the minimum quantum of originality to infringe this right?
- issue two: how do we figure out what authorship is present in the derivative?

next time

public distribution