The Paradox of Piracy on the Nintendo Homebrew Discord Server: A Rebuttal to D. Holland

Lady Siobhan Clements, Ph.D, MRes, JP

Macquarie University

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Abstract

This paper will address, at least in part, a significant misunderstanding by Holland on the nature of homebrew and its supposed ‘relation’ to piracy. Holland appears to be falling victim to the classic Texan sharpshooter fallacy, whereby the shots are fired first and the target is painted second. Additionally, Holland’s assertion that NH is not already a ‘community of hackers and modders who share a passion for Nintendo products’ based solely on the existence of Rule 11 will be examined.

**Introduction**

The etymology of the word ‘homebrew’ as it relates to information and communication technology (ICT) can be very directly related back to Dungeons and Dragons, the popular tabletop role playing game. Even D&D’s current licensor, Wizards of the Coast LLC, has acknowledged the term[1] in relation to user-generated content, instead of their proprietary campaign offerings.

However, D&D is not the first to use the term; the Wiktionary suggests[2] that the term originated with beer enthusiasts who preferred to *brew* their own beer at *home*, rather than purchase commercial offerings. As a close adaptation of the term, the Wiktionary also offers that the term can be applied to “Anything created by enthusiasts rather than commercial entities (especially video games or amateur radio equipment)”[2].

Rather than the narrow definition found in Holland’s paper, it would be more sensible to consider ‘the homebrew community’ using this definition, as it is much closer to the heart of the concept: something done by enthusiasts, not by corporations, licensors, commercial entities etc.

In specific response to Holland’s assertion that it is “clear to see the intent and purpose of homebrew”, I offer the following summary response: [citation needed]. The overall concept of ‘homebrew’ is much too broad to fit into Holland’s very narrow box of ‘enabling piracy’, especially when things like ‘3ds\_hw\_test’ by @aspargas2 on GitHub[3] are brought into consideration.

The sole purpose of the ‘3ds\_hw\_test’ tool is to test for and diagnose hardware issues on the ‘3DS Family’ of game consoles. The tester can only function in an environment where custom firmware has been installed to the console, due in part to the fact that Nintendo is highly anti-consumer and would never allow end-users to poke at their hardware on such a basic level[4][5].

Given that the tester’s sole purpose is to enable the diagnosis of hardware issues, and functions at least partially in the interests of an eliminatory diagnosis (ie whether the problem with the user’s console is, or is not, hardware related), it is very difficult to make any kind of link between this tool and piracy.

This tool is not representative of every homebrew tool or service in existence, of course. Some tools and services do exist whose sole purpose is to facilitate piracy; these tools and services have always existed in various forms (hello Limewire) and probably always will. However, it is the author’s opinion that there is a sufficient body of evidence to suggest that ‘on the whole’, as it were, the homebrew community is far more interested in extending the useful life of your device than it is in piracy, whether it be through literally extending its life by making otherwise unfixable issues fixable or facilitating the use and development of new and interesting software which allows users to get more out of their devices[6].

Conceptually, Holland’s assertion that ‘installing CFW is already piracy therefore Rule 11 shouldn’t exist’ is way off the mark. The Merriam-Webster definition given emphasizes “especially in infringement of a copyright” for a good reason – (digital) piracy, in the modern age, is most commonly understood as the infringement of copyright rather than breaking a EULA. Copyright infringement can be defined as “the use or production of copyright-protected material without the permission of the copyright holder”[7]. In such a context, the most pertinent and significant example of copyright infringement common in the homebrew community would be the acquisition of copyrighted software such as games through unofficial distribution channels, and most commonly without payment. Nintendo has made[8] very[9] clear[10] that they take a very aggressive stance on the acquisition of media without paying, so with that and prior points in mind it is more relevant to ‘define’ piracy for the purposes of this discussion as ‘the acquisition of copyrighted media such as games through unofficial distribution channels and without payment to the licensor’.

In the scope of this new definition, it becomes immediately apparent that the homebrew community and ‘piracy’ are not irrefutably linked, as insinuated by Holland. Furthermore, and without intent to get any more than ankle-deep in an already murky topic, whether breaking a EULA is a violation of copyright is a topic which is still up for considerable debate[11][12] and minds much greater than those available on NH still can’t come to an agreement on what classifies as copyright infringement and when.

Nintendo’s addendum in the EULA of “unless otherwise permitted by law” raises an interesting case for exception. We do know for sure that rights holders pursue piracy as defined herein much more aggressively than they pursue EULA violations and ‘hacking’ as a whole, due in part to how murky the matter has become. Consider also the Galoob case[13], which Nintendo expected to win but lost, *Green v. Department of Justice*[14] which is a constitutional challenge to the anti-circumvention provisions of the DMCA and *Sony Computer Entertainment America, Inc. v. Hotz*[15]in which Sony took George Hotz (geohot) to court for facilitating the hacking of the PlayStation 3, but had to settle out of court.

While the landscape of digital rights, fair use, and individual rights vs commercial protections is constantly changing, one thing remains clear: rights holders protect their commercial interests regarding the sale of their products much more closely than they do for ‘unlicensed’ use of operating/system software. This was, and will remain, the primary basis for the existence of Rule 11. NH makes no implicit moral or ethical judgements on the nature of piracy, NH does not require that you sign a contract stating that you do not intend to use homebrew for piracy. NH simply does not wish to *facilitate the use or distribution of pirated media*.

The staff of NH (and the homebrew community at large) are aware that rights holders look very unkindly on piracy, and want to safeguard the community against consequences brought about by rights holders, ranging from deletion of the NH server to legal consequences brought by rights holders against individuals. This is, at its core, the function and purpose of Rule 11.

This also addresses the comment that Rule 11 does nothing to stop users “discussing or accessing pirated content elsewhere”. NH is not, nor does it want to be, the internet police. Rule 11 is not intended to stop users doing things outside of NH. Problems arise when NH could be seen as *facilitating the commission of piracy*. For example, if a user from NH commonly offers to send, and then does send, private messages to other users in the interest of assisting with acquiring pirated content, NH could then be seen as ‘facilitating’ that act of piracy. This could bring NH into hot water with rights holders, because it can be easier and more desirable to prosecute a company or community than it is an individual.

Homebrew, at least in the concept of an end-user enthusiast/hobbyist community, has existed since at least 1995[16], and in relevance to NH has facilitated the existence of a skilled, intelligent community of enthusiasts working together with the common interest of exploring the possibilities presented by full system access. This community of enthusiasts has together released a number of 3DS Family related ‘exploits’ designed to allow access to homebrew/CFW, developed a number of tools such as 3ds\_hw\_test and written, and developed and maintained resources needed to use these tools such as Seedminer/Bruteforce Movable and the \*.hacks.guide resources. In the author’s opinion, this is sufficient evidence to assert that the server *has* embraced its “role as a community of hackers and modders who share a passion for Nintendo products”.

Finally, and importantly, NH has no obligation to ‘respect’ the “diverse opinions and preferences of its users”. The statement itself is problematic, as it implies that the motives of people who wish to acquire media without paying for it must be ‘respected’. While I have no desire to crack open the complicated argument around whether or not piracy harms commercial revenues, game developers certainly have data to say it does: *Game Dev Tycoon*’s developers have said that soon after release, their metrics tell them 93.6% of active players were running pirated copies. They also included a feature whereby users running pirated copies would have their in-game game development studios fail due to in-game users pirating their in-game games; the irony of the ensuing complaints was apparently lost on said pirating users[17].

In conclusion, I sincerely hope that you, Mr Holland, do not produce work of this caliber at Kennesaw State University. You could not agree even with yourself what point you were trying to make, you made baseless assertions without proper evidence, your grammar and sentence structure were roughly on par with my 13 year old brother’s skills, you pulled in sources that were hardly even relevant in an attempt to support your point, you skirted dangerously close to strawmanning definitions to support your point and you failed to apply even the slightest hint of nuance in a discussion about a highly specialized topic, in a highly specialized community.

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