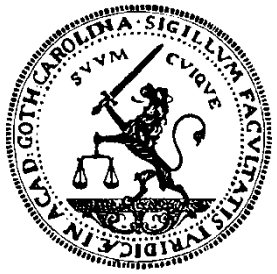

FACULTY OF LAW
Lund University

Alice Niamh Savage

Playing by the Rules:
Exploring the Challenges to Copyright Protection faced by Video Game Publishers

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Contents

Abstract

The intellectual property regime within the European Union is one which has a rich and lengthy history, encompassing a wealth of forms of expression. The harmonisation of copyright can be dated to the creation of the Berne Convention for the Protection of Literary and Artistic Works of 1886. Video games, in comparison, only joined the cultural zeitgeist in the mid-20th century. In the pursuing years their popularity has exploded, becoming one of the most widely consumed forms of digital media. As their popularity as grown, so too has the industry that surrounds their creation and production. For the publishers of these games the protection of their intellectual property rights in relation to these games is of the utmost importance.

Copyright within the EU has not developed as rapidly, however, and much of the legislation must be interpreted widely to encompass video games, as their nature as multimedia works comprised of computer works and artistic works places them both between the complete application of the current directives. Within the expanding digital landscape, there are a number of phenomena within the world of video games that have challenged the copyright held by publishers, notably the burgeoning eSports industry and the creation of user generated content.

This thesis will examine the difficulties that exist in an industry with few comprehensive legal definitions, which is in a constant state of advancement.

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Abbreviations

Computer Program Directive	Council Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs
EA	Electronic Arts
ECJ	European Court of Justice
EPO	European Patent Office
EPC	European Patent Convention
eSports	Electronic Sports
EU	European Union
EULA	End User License Agreement
InfoSoc Directive	Council Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society
IP	Intellectual Property
KeSPA	The Korean eSports Association
Mods	Modifications
TPMs	Technological Protection Measures
UGC	User Generated Content
USA	United States of America
WIPO	World Intellectual Property Office

1 Introduction

1.1 Background

The current regime for copyright within the European Union is one of great importance, yet despite attempts to create harmonisation it is a technically complex field when considering the rapid development of digital industries. One such industry which has been identified as both economically and culturally significant is that of video game creation, with the European Parliament suggesting a directed approach to ensure more ease for publishers in seeking protection, to attract investment and drive innovation in the European territory.[1] At present video games benefit under both Council Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, and Council Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.[2][3]

While these provide protection both for the software aspects of a video game, and the audio-visual presentation, publishers have to seek this protection for an amalgamation of individual elements. As such, publishers are relying on directives which not only predate the majority of technological developments- they do not even recognise video games as protectable subject matter in their own right.[4] With the rise of complex technology, and user interaction, publishers are of

[1] Resolution 2022/2027(INI) of the European Parliament of 10 November 2022 on esports and video games, P9_TA(2022)0388.
[2] Council Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJ L 111.
[3] Council Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167.
[4] Andy Ramos and others 'The Legal Status of Video Games: Comparative Analysis in National Approaches' (2013) World Intellectual Property Office, 1,11.

challenges to the obtaining and enforcement of the rights they hold for game that they produce.

1.2 Research Questions and Aims

The overarching question underlying this thesis, and which interacts with each chapter, is “with consideration of specific nature of video games, does the copyright regime within the European Union require reform?” As this is not only an incredibly complex question, and one with a multitude of hypothetical answers, I have chosen to address this through four more specific research questions.

Each chapter will address one of these questions, the first of which being, “what copyright protection is currently available to the publisher of a video game?”. After exploring the existing forms of protection, the second question which will be posed is “should video games be made into a wholly protected category?”. This will be achieved by exploring the existing regime, supplemented by case law from both the Court of Justice of the European Union, and from the domestic courts of member states. The third question will address the concept of professional video games, broadly, “how does the practice of eSports fit within the copyright regime?”. More specifically this will entail the search for a legal definition, as well as the specific roles of the authors and players of video games. The final question which will be consider is, “should the regulation of user generated content be brought under copyright or remain governed by contract?”. Once these questions are answered, the case, or lack thereof, for reform will be made.

1.3 Method

As the area of copyright protection for video games is one which is historically underdeveloped, a large portion of this thesis utilises the *de lege ferenda* approach, to attempt to establish what, if any, efforts

may be made by the European Union to further harmonise the approach. The current directives concerning copyright will be analysed, with commentary on the national intellectual property codes where pertinent to demonstrate the nuanced position that video games occupy.

In establishing the existing copyright regime, a legal doctrinal method will be employed, to examine the interaction between the existing legislation and case law to determine the "statement of the law on the matter at hand."[5] Where there is a limited amount of case law regarding video games that have been seen in the ECJ, cases from the national courts of member states and other jurisdictions, namely the United States of America, will be also analysed. A comparative method will also be employed with regards to the national schemes for the implementation of the copyright directives.

1.4 Delimitations

Where the functioning of the video game industry is a global endeavour, attention has been paid in this thesis to limit the scope of analysis, where possible, to that which is most relevant to the European Union.

The emerging role of Artificial Intelligence within the gaming industry may pose great importance in the future, however at present this concept remains in its infancy. As such, EU proposals regarding AI will not be discussed. Nor will the development of 3D technology, in part through the establishment of the 'metaverse'.

Interaction with fundamental rights will similarly not be discussed, though principles such as freedom of expression are relevant to the

[5] Terry Hutchinson, 'Doctrinal research: researching the jury' in D Watkins and M Burton (eds) *Research Methods in Law* (Routledge 2013), 9.

discussion of user generated content, as this paper is focused on the position of the publisher of video games.

The Digital Services Package, of the Digital Services Act and Digital Markets Act has been excluded from the scope of this thesis, as the impact of these acts has yet to demonstrate issues, although in future they may have effect on the activity of the online users of video games.

2 Which Elements of Video Games can be Protected by Copyright?

In a study of 2020, it was estimated that the video game industry produced revenue around $160B worldwide, a statistic which some have predicted could exceed $350B in 2023.[6][7] Due to several factors, notably the coronavirus pandemic, this is an area of digital development which has been highlighted as increasingly important and valuable, yet one which has had limited regulatory consideration or treatment.

Each year thousands of games, from both large and independent publishers are released across a multitude of platforms and consoles. In fact, in 2022 over ten thousand games were published to the digital platform *Steam* alone.[8] The protection of these products, particularly from an intellectual property lens, however, is fragmented and subject to inconsistent treatment from the member states of the European Union.[9] Additionally, a number of downstream industries and activities have come into existence pursuant to the mere creation of video games themselves. This includes the establishment of professional video game players and tournaments known as eSports, the use of video sharing platforms such as YouTube to post videos showing

[6] Tobias M. Scholz and Nepomuk Nothelfer, 'Research for CULT Committee: Esports' (2022) European Parliament, Policy Department for Structural and Cohesion Policies, 29.
[7] Statista, ' Video Games – Worldwide' (*Statista.com,* 2023) <https://www.statista.com/outlook/dmo/digital-media/video-games/worldwide> accessed 16 March 2023.
[8] Statista, 'Number of games released on Steam worldwide from 2004 to 2022' (*Statista.com,* 20 February 2023) <https://www.statista.com/statistics/552623/number-games-released-steam/> accessed 16 March 2023.
[9] F. Willem Grosheide, Herwin Roerdink and Karianne Thomas, 'Intellectual Property Protection for Video Games: A View from the European Union' (2014) 9 JICLT, 4.

gameplay, and the creation of additional content for video games by 3rd parties, known as User Generated Content, which will be discussed in greater detail in later chapters.

Where the video game industry is one which has experienced rapid growth in the advancing digital age, it is crucial to first outline the existing protection of video games within the European Union.

2.1 Computer Code

At present there is no singular protection of a video game as a complex product, rather protection is offered piecemeal to individual elements.

The current treatment of video games within the IP regime is divided into two domains of copyright, the first being as computer programs, and the second as audio-visual works. While there is no specific definition of computer programs given in legislation of the EU, video games can be considered as they are reliant on the underlying computer code contained within the software for operation.[10] This coding contains the source and object coding that lie at the heart of any game, as the core functioning components which dictate how a game is run or played on a device. Source coding is here taken to mean the 'programming statements' written by a programmer which are contained in files within the game.[11] Object code is that which "contains a sequence of machine-readable instructions that is processed by the CPU [central processing unit] in a computer", as such it is the output created when the source code interacts with compiling elements within a computer or console.[12]

Having identified the program or software element of video games, it is important to establish that at the European Union level the protection

[10] Karolina Sztobryn, 'In Search of Answers to Questions about Esports and Copyright' (2021) 0 GRUR International 1, 4.
[11] University of Washington Office of Research, 'Source Code and Object Code' (*Washington.edu)* <https://www.washington.edu/research/glossary/source-code-and-object-code/> accessed 27 April 2023.
[12] Ibid.

of this computer code has been harmonised in the Computer Program Directive.[13] Article 1 of the Directive states that computer programs are to be considered as "literary works within the meaning of the Berne Convention", as an expression of an author's intellectual creation, with the exclusion of the underlying ideas and principles.[14] Thus, the 'language' and written coding produced, despite its technological format, is considered to be the unique and creative expression of the programmer or developer as the author. As such, the protection offered by the Computer Program directive is not merely for the hidden code contained within the product, it extends to the features of the game that are administered by the software. This includes the code in its "entirety or function-specific parts, the graphical user interface, the artwork, the music score, the spoken words."[15]

Where copyright is obtained with regards to the software, it is only enforceable with regard to specific expression created, the exact sequence of coding that a developer has presented.[16] While this can prevent the direct copying of a video game, it may make it easier to overcome or avoid any potential infringement for others. By making changes in the sequence of program instructions so that it does not exactly resemble the copyrighted material a developer can generate the same, or a very similar, output.[17]

The historical importance of the software element in the enforcement of IP rights at the earlier stages of games creation cannot be understated. Where video games, or interactive electronic forms of games, have existed in some form since the mid-20th century, it follows that the technology and stylistic capabilities of these games have

[13] Computer Programs Directive 2009/24/EC (n2).
[14] Ibid.
[15] Grosheide, Roerdink and Thomas, (n9), 9.
[16] Ibid.
[17] Ibid.

rapidly advanced.[18] For the purpose of this thesis the earliest widespread forms of video games used by the public are taken to be the arcade style games popularised in the 1970s. These games produced "only included graphics with basic form; shortly thereafter, developers were able to incorporate rudimentary sounds."[19] At this time the developers of games were limited in the forms of visual expression they were capable of producing, primarily 2D shapes, without additional texture or artistic input, which were often dictated by the game rules or functions.[20] With these restricted capabilities to produce unique audio-visual experiences, it can be seen that ensuring protection of the video code would be most effective to prevent unlawful copying.

Due to the prominent position that the United States of America has held within both the technology and entertainment industries, much of the earliest case law concerning issues of video game copyright originate under the jurisdiction of USA courts, such as the case involving the arcade games 'Asteroids' and 'Meteors'.[21] The defendant, a publisher named *Amusement World,* admitted that they had, in fact, 'copied' the plaintiff's idea for a game involving shooting spaceships and rocks. Despite this, it was held that this did not amount to a copyright infringement as the mere idea of the game does not amount to the expression, thus is outside of the remit of protection. The computer coding employed in the two games was found to be distinct, despite producing visually similar results.[22] The ruling of this

[18] Andy Ramos Gil de la Haza ' Video Games: Computer Programs or Creative Works?' (*Wipo.int,* August 2014) <https://www.wipo.int/wipo_magazine/en/2014/04/article_0006.html> accessed 27 April 2023.
[19] Ramos and others (n4) 8.
[20] Maic Masuch and Niklas Röber, 'Game Graphics Beyond Realism:Then, Now, and Tomorrow' (*Digra.org*, 2005) <http://www.digra.org/wp-content/uploads/digital-library/05150.48223.pdf> accessed 28 April 2023.
[21] *Atari Inc. v. Amusement World Inc.,* 547 F.Supp. 222 (District of Maryland, Nov. 27, 1981).
[22] Ibid.

case can also be seen as concretely creating the basis for the 'idea-expression' distinction within the copyright system of the United States.[23] This approach is similarly held in the European IP system, though not as a formal principle it is evident in the language used surrounding the right of an author being dependant on a work in some mode, some identifiable form.[24] As such, where the limited capacity to translate ideas into visual form can be recognised, it follows that courts would have accepted a higher degree of visual similarity. Where programmers would have had more freedom in the development process than designers, the differences within the computer code as being the unique identifiers of expression were key in the provision of protection to works.

2.2 Visual Effects and Audio

As mentioned above, the advances made within the computer and technology industries have had a direct effect in the creation of video games. Where the processing units and output displays have become more sophisticated there has been an increase in the ability to create unique visual interfaces and visual effects of games.[25] Where the Computer Programs directive protects the programming elements of a game, Directive 2001/29/EC on Copyright and Related Rights in the Information Society, the 'InfoSoc' directive, concerns the audio-visual characteristics.[26] The two directives work in tandem to offer protection to publishers of games, as it is specified within the preamble of InfoSoc directive that it shall not include nor have any effect on the protection

[23] Amaury Cruz, ' What's the Big Idea behind the Idea-Expression Dichotomy? -- Modern Ramifications of the Tree of Porphyry in Copyright Law' (1990) 18 FSU Law Rev., 221, 231.
[24] Ned T. Himmelrich, 'Copyright Protects the Expression, Not the Idea', (*Gfrlaw.com,* 17 November 2022) <https://www.gfrlaw.com/what-we-do/insights/copyright-protects-expression-not-idea> accessed 27 April 2023.
[25] Andy Ramos Gil de la Haza (n18).
[26] InfoSoc Directive 2001/29/EC (n3).

of computer programs, thus creating a multi layered approach to protection of a product.[27]

The InfoSoc directive includes the conditions for protection and the actions available to a right holder in the instance of infringement. Article 2 establishes that there is an "exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part" that can be awarded to authors, performers, producers or broadcasters of a certain work.[28]

The inclusion of elements of video games under this directive can be extrapolated from the *'InfoPaq'* ruling of the Court of Justice of the European Union.[29] At paragraph 37 the ECJ affirms that provisions relating to copyright can be applied to any subject matter which is original and an author's own intellectual creation.[30] Therefore, it encompasses any aspect of a video game which can be aligned with this idea of 'originality', such as a unique character design or the arrangement of sound effects. At paragraphs 38 and 39 of *InfoPaq* the ECJ further determined that the 'parts' of work are not to be treated 'differently from the work as a whole', where they contain elements of original expression, they benefit from protection under the InfoSoc directive.[31] The comprehensive protection of video games under this classification however is complicated, as despite the expansive approach, at present copyright is decidedly *not* available to the work as a whole, but through the individual elements of musical composition, artistic or cinematographic works or as literary works.[32]

[27] Ibid, paragraph 50.
[28] Ibid.
[29] Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECLI:EU:C:2009:465.
[30] Ibid.
[31] Ibid.
[32] Grosheide, Roerdink and Thomas, (n9), 10.

2.3 Additional Protections Available

For a publisher with a wide catalogue of video games, having an extensive portfolio of IP rights is essential, as the resulting profit of a game recoups the investments into the many departments involved within the process.

Outside of the scope of computer program protection and the audio-visual effects there are other aspects of video game production which can benefit from protection under various intellectual property schemes. The design of the box containing the game or for promotional uses is one such instance, invoking design right protection, and naturally the use of a trademarked name or phrase, both registered and unregistered offer the rightsholder action against infringement.[33] The intersection of copyright with design rights, patent, and trademark is crucial for rightsholders, due to the distinct but complementary purposes they serve. Trademark, for example, offers protection to the commercial identity of the video game, and the branding that is created around it. This includes the name or logo, and other distinctive marks which are employed to distinguish a product from others, from the perspective of a consumer. [34]

Publishers can also seek protection for specific functions under patent. The proprietary consoles and controllers developed are the most obvious beneficiaries for patent, as they are products that are typically unique to the specific game catalogues of a publisher.[35] Patentability of the software, however, is a more complicated matter. Article 52(c) of the EPC states that “programs for computers” cannot be considered

[33] Grosheide, Roerdink and Thomas, (n9), 12.
[34] European Commission, ’Europe - IP Specials - IP in the Videogames Industry’ <https://intellectual-property-helpdesk.ec.europa.eu/regional-helpdesks/european-ip-helpdesk/europe-ip-specials/europe-ip-specials-ip-videogames-industry_en> accessed 16 March 2023.
[35] Grosheide, Roerdink and Thomas, (n9), 11.

patentable inventions.[36] While the software of a video game as a whole is thus incapable of attracting patent, there are elements within which can be considered a 'technical contribution' or solution.[37] This was confirmed in Case T 0012/08 - 3.2.04 of the European Patent Office Boards of Appeal.[38] The filing of a patent for the game *Pokémon* was rejected for the lack of an inventive step. However, it was established that the game, in which a player collects and trains characters, was governed by a so-called *appearance probability*. The random appearance of these characters was determined by the internal program storage of the game, in response to the specific time zone set. Where this was found to be a modification of the game program "such that it generates encounters in a less predictable manner", with a clear technical character, the corresponding software was granted registration. [39]

As each application is subject to individual review, obtaining a patent for elements within a video game is less straightforward than seeking copyright. It does, however, create stronger IP protection where a game has been extensively developed with intricate technical contributions to govern the internal mechanics.

2.4 Unprotectable Elements

Having considered the intellectual property protection that is available for the different aspects of video game creation, it is now prudent to turn to that which cannot be protected. As has been previously mentioned, the mere idea or principles of a game are unprotectable, in line with both the directives and the Berne Convention, wherein it is

[36] Convention on the Grant of European Patents (European Patent Convention) of 5 October 1973 as Revised by the Act Revising Article 63 EPC of 17 December 1991 and the Act Revising the EPC of 29 November 2000, Article 52(2)(c).
[37] European Commission, 'Europe - IP Specials - IP in the Videogames Industry' (n28).
[38] European Patent Office Boards of Appeal *T 0012/08 - 3.2.04* [2009] ECLI:EP:BA:2009:T001208.20090206.
[39] Ibid.

the expression of that idea, the product created, that vests rights in the author or performer.

A prominent example of this is the rules that underlie a game. This is addressed in the IP regime concerning exclusions to patent rather than copyright. From the European Patent Convention, it is established that "aesthetic creations, schemes, rules and performing mental acts, playing of games" are expressly prohibited where an invention arises from one of these areas in itself.[40]

It can also be seen that where the playing of a game is dictated wholly by a system of rule it is not the free creation or expression of an original idea. This was confirmed in a decision of the Court of Appeals of England and Wales, *'Nova Productions Ltd. v Mazooma Games Ltd. & Others'*.[41] Any 'performance' created through a system of rules could not be deemed to be artistic, despite the potential for different outcomes due to player interaction, as these were not performed intentionally by said player but scripted by the underlying game rules.[42] This was aptly expressed in the phrasing of a key question from this judgement; "how much artistry and creativity can be attached to an activity that takes place in the context of a larger system that is constrained by rules and limitations?"[43]

Similarities have been drawn between video game players and traditional athletes, where the actions they undertake during a game may differ wildly due to skill or talent level, but it cannot be said that

[40] European Patent Concention (n19), Art. 52(2)(c).
[41] Nova Productions Ltd. v Mazooma Games Ltd. & Others [2007] EWCA Civ 219, [2007] EMLR 427.
[42] Amy Thomas, 'A question of (e)Sports: an answer from copyright' (2020) 15 Journal of Intellectual Property Law & Practice, 960, 967.
[43] Ibid.

they make free or creative decisions when they are still confined by the structure of play.[44]

2.5 Interim Conclusion

The purpose of this chapter was to establish the level and form of copyright protection that is currently afforded to video games in the European IP regime. As we have seen, it is not a straightforward or unified process, but one which has several facets, making a complicated system for publishers to navigate when seeking to enforce the rights that they hold.

The narrow scope of the Computer Program directive, and the ease of circumventing the specificity of the code expression, does not give adequate protection for a publisher. However, having to determine the eligibility of a multitude of elements under the InfoSoc directive appears to create a cumbersome task, particularly where a publisher makes multiple games a year.

Video games by their nature are a multimedia digital product, although fragmented, through the numerous avenues that copyright can be obtained this can provide a high level of protection, particularly considering the interaction of copyright with other forms of IP, notably trademark for the commercial exploitation of video games as a product.

[44] Case C-403/08 *Football Association Premier League and Others* [2011] ECLI:EU:C:2011:631.

3 The Legal Classification of Video Games

Having laid out the aspects of video games which benefit from protection within the IP regime, it must now be considered how a publisher may navigate this system of separate but overlapping elements. It could be argued that there is a need to make changes to the classification of video games, to ensure a more effective copyright regime, without confusion or the need of a balancing act when considering the appropriate directive for the enforcement of rights. Within the European Union, and globally, the development of new technology and software has tested the limits of the existing system. It has been said that the increasing move to a digital world "challenges traditional concepts of copyright law such as the categorisation of works into different classes. Multimedia works defy classification."[45] A question has arisen, in line with judgements from the ECJ and national courts, as to the potential of extending copyright protection to the product as a whole, rather than through distinct contributions.

That the area of copyright is legislated by EU directives has also caused divergences, due to the national implementation, as they establish only the minimum level of harmonisation expected. As will be seen, this has created a degree of legal uncertainty where member states have different attitudes towards the necessity of protection for video games. For the benefit of publishers within the European market, and those who may wish to expand their operations, the complications entailed with the current approach must be explored.

[45] Tana Pistorius and Odirachukwu S. Mwim, 'The impact of digital copyright law and policy on access to knowledge and learning' (2019) 10 *Reading & Writing - Journal of the Reading Association of South Africa,* 1.

3.1 The 'Unique Creative Value' of Video Games

A pivotal case in the consideration of the legal status and classification of video games in the copyright system of the European Union is that of C-355/12 '*Nintendo and Others'*, referred from the Tribunale di Milano.[46]

The plaintiff, Nintendo Co. Ltd., is one of the largest and most recognisable producers of both video games and consoles worldwide, with an expansive portfolio of intellectual property rights covering their numerous game titles and accessories. The action brought was of infringement for products created that were designed to allow third party use of Nintendo consoles and game cartridges. The handheld and console systems created by the plaintiff utilise code encryption with an internal recognition system to ensure the use of their proprietary game cartridges for proper use and to prevent misuse. The use of these tools was presented as a tactic to prevent the creation, distribution and use of illegal copies of games which amounted to an 'effective technological measure', as permitted in the InfoSoc directive;

> *"any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright."*[47]

The plaintiff, PC Box Srl., developed, marketed, and distributed equipment which allowed users to circumnavigate these restrictions, deactivating the measures put in place by Nintendo, allowing the use of non-approved games on Nintendo consoles.

[46] Case C-355/12 *Nintendo Co. Ltd and Others v PC Box Srl and 9Net Srl* [2014] ECLI:EU:C:2014:25.
[47] InfoSoc Directive 2001/29/EC (n3), Article 6(3).

A number of questions were referred to the ECJ, regarding the level of action allowed to a publisher to use 'effective technological measures' to prevent misuse of their property. Article 6(1) of the InfoSoc directive obligates that a Member State must provide "adequate legal protection" where said measures are used and provide remedy where there is an attempted circumvention.[48] The Tribunale di Milano requested clarification on the extent to which a rightsholder may rely on the directive for protection. The Court of Justice was asked to clarify the scope of protection granted by Article 6 of the InfoSoc directive, and the criteria to which this was assessed. In this regard they considered the multipart use of the games alongside the housing console in which it is inserted, and the nature of devices used to overcome technological measures to prevent exploitation.

It was held that the actions of PC Box were intentionally developed to circumvent the protections put in place by Nintendo, and that this was akin to a new communication to the public of the property. Crucially, there was no other justification for the action, as they were solely to overcome the technological measures utilised, which were not prohibited by any existing law.

A key statement of this judgement, relevant when considering the nuance of copyright protection for video games specifically, comes from paragraph 23 where the court concluded that;

> *"video games, such as those at issue in the main proceedings, constitute complex matter comprising not only a computer program but also graphic and sound elements, which, although encrypted in computer language, have a unique creative value which cannot be reduced to that encryption"*[49]

[48] Ibid, Article 6(1).
[49] *Nintendo and Others* (n39).

From this judgement it can be said that ECJ recognised the tenuous position, somewhat of a legal 'grey space', that video games occupy within the IP regime. It is correct to say that they are complex products, which should not be reduced to the sum of any part. In spite of this, no suggestion was made as to how a video game should be categorised, meaning the potential for legal uncertainty was identified, with no current solution offered.

3.2 Complex Works

As it has already been alluded to, one of the greatest difficulties facing a publisher when enforcing copyright protection, is the nature of overlapping rights contained under different directives.

While many jurisdictions in the European Union have yet to give direct attention to the status of video games, France has not only addressed concerns regarding the copyright status of video games have been raised through judicial proceedings, but included the professional players of video games within their domestic labour laws.[50] As such there are two cases from the French courts which are prudent to consider, as they are an example of the current legal attitude towards the copyright protection offered for video games in the Union.

The first case which will be discussed is that of *Cryo v Sesam,* which arose out the liquidation proceedings of the defendant.[51] This invoked analysis from a copyright perspective due to the motion by the claimant seeking compensation as a creditor of Cryo, due to the inclusion of music owned by Sesam in video games which had been produced.

[50] Sébastien Lachaussée & Elisa Martin-Winkel, ' Video Games and French labour law' (*Avocatl.com*, 1 September 2014) < https://avocatl.com/news/video-games-and-french-labour-law/> accessed 24 April 2023.
[51] R.G Nº 07-20387*Cryo v Sesam,* Cour de Cassation, Chambre Civile 1, 25 juin 2009, Publié au Bulletin 2009, I, n° 140 [translated].

One key concern in the judgement of these claims was the contentious position that video games hold, being ultimately both software and also a greater sum of other elements, and the choice of which system to apply in the case would greatly influence any resulting compensation. In the judgement it was noted that;

> *"A video game is a complex work which cannot be reduced to its software dimension alone, regardless of the importance of this. ci, so that each of its components is subject to the regime applicable to it according to its nature."*[52]

The argument presented by the defendant was, that through their ownership of the copyright of the game, they held copyright in the music that was included as an element of the whole. However, it was found that due to the ability to recognise and separate the music used from the overall creation, that where *"the music does not blend into the whole that constitutes the video game"* it was possible to assign copyright to the composer of the music, ensuring compensation.[53] Despite the court's recognition that video games occupy a unique position which invokes multiple directives, no decision was made to influence the legal classification. It is important to note also that this judgement appears to mirror the sentiment of *'Nintendo v Pc Box Srl',* wherein the complexities of overlapping protection created a fragmentation of rights within a single property, rather than providing complete protection for a publisher.

3.3 Collaborative Rights

In a more recent case, another issue was raised regarding the awarding of copyright where there are multiple authors. The creation of a video game is rarely done by a single person, rather publishers

[52] Ibid.
[53] Ibid.

have a number of employees engaged in different aspects of production, for example programmers and art designers.

This was highlighted in the Tribunal de Grande Instance of Lyon in 2016, concerning the publisher Atari, of similar status as Nintendo.

The plaintiff, a programmer hired by Atatri to develop essential background software programmes, sought sole ownership of the property, objecting to the exploitation and marketing of the video game that had taken place. Here the court was not asked to provided clarification on the classification of the game itself, but of the nature of ownership, as Atari's response to the claim of infringement was that they owned the entire copyright of the game, being a collaborative work produced by authors under their employment.[54]

Where the concept of a 'collaborative work' has arisen it must be noted that this is not a title or form of authorship that derives from either the InfoSoc or Computer Program directives, but from the national implementation.

The general attitude within Member States is that where there is a collective work, the rights to the whole are granted to the publisher, as "the person who took the initiative and coordinated the work is the holder of the copyrights."[55] This allows for the creation of independent copyright for authors of different elements, for their individual contributions alongside the product as a whole in countries such as Italy, France and Spain. Some member states include more specification, for example in the Nordic countries the assignment of authorship, and thus rights of exploitation, must be vested in a natural person in line with national copyright law, thus it is standard for a studio to obtain said rights from the authors prior to any exploitation.[56]

[54] R.G Nº 05/08070 *Raynal v Atari,* Tribunal de Grande Instance de Lyon, Troisième Chambre, 08 Septembre 2016 [translated], 6.
[55] Ramos and others (n 4) 80.
[56] Ibid, 33.

Within France this is contained in the *Code de la propriété intellectuelle*, Article 113-3.[57] It is said to arise where "several natural persons have contributed to a creation, it belongs to all joint authors who will jointly exercise their rights by commun accord".[58] Under the French code, an essential component in proving a role of co-authorship of a collaborative work is holding a management position, which the defendant was unable to establish.[59][60] Similarly, the developer, as claimant, was also found to be lacking sole ownership, as the game was deemed to be a collaborative work with a common inspiration, thus the ownership was divided between all authors identifiable.[61]

The court concluded the claimant did, own specific copyright in the gameplay, due to the necessity of the software produced by the developer in the running of the game.[62] Despite this, due to the existence of an employer relationship between the claimant and defendant at the time of production, there was a presumption of transfer of ownership rights under this relationship, and thus this copyright was vested in the defendant.[63] Interestingly, the development, marketing and distribution of sequential games *were* found to have infringed upon the developer's copyright as, having left the company following the completion of the first game, the presumption of transfer could not be relied upon.[64]

[57] Law No. 92-597 of July 1, 1992 relating to the Intellectual Property Code (Legislative Part) (1) of the French National Assembly and the Senate, JORF n°0153 1 July 1992, Art. L.113-3.
[58] Société des Auteurs et Compositeurs Dramatiques, 'Author's Rights Under French law' (*Sacd.fr*) <https://www.sacd.fr/en/under-french-law> accessed 18 April 2023.
[59] Raynal v Atari (n) 16.
[60] Law No. 92-597 (n) Article L113-9-1.
[61] Raynal v Atari (n) 21.
[62] Ibid, 22.
[63] Ibid, 18.
[64] Ibid, 22.

3.4 National Approaches to the Protection of the Publisher

Another challenge faced by a publisher in the protection of a video game under copyright within the European Union are the nuanced differences which exist in the Member States implementation of the relevant directives.

In 2013 these differences were explored in a study published by the World Intellectual Property Office entitled 'The Legal Status of Video Games: Comparative Analysis in National Approaches', which concerned the classification of video games and relevant protection across multiple countries worldwide.[65] In total the study analysed almost twenty regimes, but for the purpose of this thesis focus will be drawn to the seven member states of the European Union that were included. The purpose of this is the establish similarities and differences that exist in the European context regarding certain issues of copyright concerning video games and publisher rights. While there have been advances in the following decade, it illustrates the differences that have existed that will have to be overcome in order to create a cohesive union-wide regime.

The first thing to note is that across the seven jurisdictions- being Belgium, Denmark, France, Germany, Italy, Spain, and Sweden- none at the time of publishing had explicit mention of video games in their national copyright acts.[66] Herein lies the first issue when considering how protection is to be awarded or enforced, as each case remains subject to the nuances of the individual member state regimes, despite the harmonisation attempts of European directives. It must also be noted that the protection, though overlapping, the application of directives is mutually exclusive, where a dispute arises only one may

[65] Ramos and others (n4).
[66] Ibid, 11.

be applied.[67] The lack of a singular classification for video games, being that they are considered *both* as computer programs and audio-visual works, is a challenge highlighted. Thus, there is a need to examine how prominent the role of the underlying software is, or if the literary and design aspects are more influential, which can exclude elements of protection from consideration.

Where video games are then considered by the individual elements, they can accrue a number of different rights under national law. In addition to the obvious artistic elements of the game design and music, ”when the video game is running, that of itself is protected as an audiovisual or cinematographic work.”[68] The scripted nature of a game and the output of the storyline as a sequence of image frames may amount to a work that can obtain further rights.[69] Without a unified approach across member states, with uncertainty on the classification and status of video games, there can be an infinite number of hypothetical scenarios of protection for a publisher to navigate.

In situations in which the audio-visual elements are deemed to take precedence, this designation can noted with criticism however, as it downplays the role of the user.[70] The player of a game is not merely passively consuming as though it were a piece of media such as a film or musical track, they often have an active role in determining aspects of the game outcome in every specific play through that they engage in.[71] The role of the user, their additional contributions and potential for performance or derivative rights will be addressed in more detail in the next chapter of this thesis.

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[67] Ramos and others (n4) 10.
[68] Grosheide, Roerdink and Thomas, (n9), 10.
[69] Ibid.
[70] Ramos and others (n4), 10.
[71] Dan L. Burk, ‘Owning eSports: Proprietary Rights in Professional Computer Gaming’ (2013) 161 University of Pennsylvania Law Review 1535, 1537.

The WIPO study first establishes that there are a wide variety of styles of games available on the market, with different levels of player interaction and objectives, but they all share one essential thing; they are dependent on whichever computer code is developed to make them run.[72] This follows from the earliest approaches to video games in judicial cases, whilst also acknowledging that modern forms have much more creativity and expression in the output.

Concerning the role of the software, each country, due largely to the implementation of the Computer Programs directive, presented the same stipulations for the authorship of works and ownership of works. Particular attention is made to the creation of works under an employer-employee relationship, with a presumption of transfer of commercial exploitation rights to the employer.[73] The assignment of rights with regards to a freelance relationship differed, however, not due to the copyright codes of a state but due to particularities of national labour laws.

3.5 A New Classification?

Where it is evident that the video game industry is one which will only continue to grow, being that there is no comprehensive measure for judgement there is potential for an increased number of disputes. As such, the question presents, *should video games be wholly protectable as a complex product under one classification?*

The existing approach to copyright concerning video games has proven to be difficult to navigate, requiring the piecing together of

[72] Ibid, 7.
[73] Ibid, 10.

aspects of overlapping protections much like the arcade game Tetris. A logical progression for this would be an attempt to unify these elements under one comprehensive regime, specifically dealing with the nuance of video games, where cases will not have to be individually scrutinised to ascertain which directive has precedence, boiling down issues to those which are software relevant or more generally under the InfoSoc directive. The European Video Games Society, commissioned by the European Parliament, has also suggested a need for change; “IP reform is an important step to magnify this impact. Europe has a semi-harmonized copyright system which makes navigation unnecessarily complex.”[74]

Where there is desire to foster innovation and development of the video game industry, one conclusion is that the current regime is simply not adept to provide the protection that publishers desire.

With the heightened role of more artistic elements in video game development, such as the dedicated creation of soundtracks, employing unique art styles and character profiles, it is clear that the early approach of reducing games to the software or technological element is no longer appropriate. Moreover, video games are seldom created by one person, they require teams of developers, departments of creatives and large management boards, where the question of ownership can become multifaceted, for example where there is a lack of an employee relationship.

One concern which arises when presenting this approach is the rapid development of technological and online properties, where it cannot be reasonably suggested that every new platform or invention should have tailored legislation. The sheer amount of legislative time and

[74] European Video Games Society 5th Workshop ’ Regulatory framework for video games’, <https://digital-strategy.ec.europa.eu/en/library/regulatory-framework-video-games> accessed 20 February 2023, 2.

effort that this would entail could cause a backlog for the maintenance of other areas within copyright law, which would have the opposite effect, making the dispute process cumbersome.

The results of studies and workshops by the European Video Games Society identified the lack of specification for video game IP protection and that this lack of clarity should be addressed. Where there was little guidance as to how this should be achieved, it was stated that; “A clear understanding of the definition of video games is vital for developing a proper regulatory framework.”[75]

As of 2022, the European Union has demonstrated commitment to the analysis of the role of the video game industry and its impact on different sectors within union policy areas.[76] Without a clear understanding of how video games can definitively be classified under copyright law this may allow confusion to prevail, which will cause ineffective protection. The question that arises, as such, is whether there is a need, or even a foundation, to create a separate classification to allow video games to be protected in whole, similar to that which is offered to other artistic products.

3.6 Interim Conclusion

The world of video game production straddles the realms of creativity and technology, where the creation of fantastical and immersive environments is only limited in the technological capabilities and the imagination of publishers.

[75] Ibid, 3
[76] Ibid.

The industry is characterised by the speed with which it pushes the limits of existing software and hardware. As such, that the IP protection of video games is constrained by the interpretation of legislation that predates

The legislative approach to this protection is one which can be viewed as distributive, favouring the identification of specific elements, and where they meet the national requirements granting copyright in these to the author. This is complicated by the fact that the ECJ, and national courts, have indicated that the need to consider the protection of a video game as unitary and encompassing the product as a whole. In *Nintendo* the ECJ was tasked with questions specific to the nature of TPMs, thus it is unclear if they intended to extend the scope of the InfoSoc directive regarding the general classification of video games. It has been noted, however, that these TPMs play a central role in the overall protection of games to prevent piracy.[77]

The complicated relationship to authorship where these are projects with numerous employer and freelance relationships, where presumptions of transfer, or the lack thereof can muddy the waters of the designation of copyright.

For the ease of future development, it is evident that first there must be consensus on the treatment of video games, to allow the EU and its member states to provide comprehensive and equivalent protection across the territory.

[77] European Commission, *Understanding the Value of a European Games Society* <https://digital-strategy.ec.europa.eu/en/policies/value-gaming> accessed 19 February 2023, 1.

4 The Copyright Implications of eSports

Video games as a complex product have, as discussed above, a complicated relationship with the IP sphere. The same can be said for activities that fall into the wider ecosystem that surround video games. Playing these video games is no longer merely an amateur hobby, as with many acts, where there is interest and passion, there is the potential for commercialization of these skills. This chapter will explore the concept of electronic sports, or eSports, which has seen a meteoric rise across the world in the last decade. This is an industry which is reliant upon products which are entirely owned by an author, intrinsically linked to the world of IP protection.

4.1 What are eSports?

Having quickly established themselves as a popular form of entertainment, eSports have been defined in a number of ways from many different sources. They can generally be described as the "competitive playing of video games".[78] Much like sporting events, such as rugby matches, eSports events allow for both the broadcasting of a game to viewers online who support individual 'athletes' or teams, and in person tournaments with spectators.[79] The viewership of these competitions has increased drastically in the last 5 years, partially due to the Covid-19 pandemic, as the digital element of eSports allowed competitors to play whilst maintaining distance from each other;

> *"With mainstream sports around the world on hold, people are increasingly turning to gaming to fill the empty hours of lockdown and isolation.*

[78] Amy Thomas, 'A question of (e)Sports: an answer from copyright' (n42) 962.
[79] Ibid.

> *The playing of video games is up – Verizon reported that US domestic peak-hour usage was up 75% in the first week of quarantine – but tellingly gaming as a spectator sport is also through the roof."*[80]

Thus, audiences began to seek out these online tournaments in far greater numbers as an avenue for entertainment, and interest has remained high even after the removal of restrictions worldwide. Indeed, in the European context the European Parliament called for the Commission and the Council to develop a strategy targeted at video games, recognising that they constitute a market share of over €23 billion in the territory.[81] Coupled with the economic benefits, the drive for innovation and cross border cooperation involved places video games in the position to become an avenue to 'promote European culture and values'.[82] Crucially, paragraph 9 of the Parliament resolution can be taken as relevant with consideration of eSports and tournaments, as it stressed the importance that "cross-border enforcement of the IP rights of game developers and artists must be adequately protected and that fair remuneration must be ensured."[83]

When analysing the role and status of eSports in the context of intellectual property the primary hindrance has repeatedly presented itself in one simple form; there is no singularly satisfactory legal definition of this concept.[84] While video games have at least been identified as multimedia works which require additional concern for full protection, eSports have eluded categorisation thus far. This becomes

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[80] Scott Heinrich, 'Esports ride crest of a wave as figures rocket during Covid-19 crisis' (London, 10 April 2020) <https://www.theguardian.com/sport/2020/apr/11/esports-ride-crest-of-a-wave-as-figures-rocket-during-covid-19-crisis> accessed 15 April 2023.
[81] Resolution 2022/2027(INI) (n).
[82] Ibid.
[83] Ibid.
[84] Tobias M. Scholz and Nepomuk Nothelfer (n6) 11.

troublesome where, despite being recognised as an area requiring policy focus, eSports at all levels are currently wholly subject to terms of contractual relationships with publishers; *"the private corporation which holds the sole intellectual property rights to the game is also the sole entity organizing its professional competition; in other words, the creators of the game have ultimate control over how their game is played."*[85]

When viewing the landscape of esports from a wide lens, criticisms of overarching control on the part of a publisher may appear to be fair, as there are a multitude of actors throughout the industry and restrictive approaches have the potential to negatively impact the enjoyment and success of the activity. However, it is worrisome from an intellectual property focus, that there may be attempts to challenge the enforcement of rights that are held, and the ability of publishers to enforce these legal protections.

Thus, the intention of this chapter is to first explore the difficulties facing the institutions and member states of the European Union in establishing a definition for this phenomenon. Then attention will be placed upon the further complications facing eSports as a developing digital activity, namely the disproportionately powerful position of publishers. Whilst there are a plethora of additional concerns which arise when considering the creation of a legal regime applicable to video games and eSports, it has been recognised that these are the two most pressing issues, most notably in a study for the European Parliament which will be discussed further below.

[85] Marc Leroux-Parra, 'Esports Part 1: What are Esports?' (*hir.harvard.edu*, 24 April 2020<https://hir.harvard.edu/esports-part-1-what-are-esports/> accessed 18 April 2023.

4.2 Towards a Legal Definition

Where there are many questions surrounding the operation and regulation of the eSports industry, it would be an impossible task to address these without first considering the absence of a legal definition that institutions and member states may use for the creation of a regime. The study commissioned by the European Parliament's Committee on Culture and Education in 2022 is important here, both in the content developed within it, and also in setting the intention for EU institutions that there is a real need for action in this area.[86]

The complex environment surrounding the competitive playing of video games forms the basis of the study, regarding the similarities and differences of digital from 'traditional' sports. The benefits of eSports- both economic and cultural- are explored, as are the legal challenges of an industry built upon protected titles and if this can be navigated in establishing a regulatory regime to further all interests.

Where some of games used in eSports tournaments are designed to mimic traditional sports, such as football, basketball, or race car driving, it could be suggested that they be subject to a similar categorisation. It is considered that under the broader heading of *sports* there has been the creation of a number of factions underneath to differentiate different styles or definitions, which includes disciplines which are classed as *mental* rather than *physical*, for example chess.[87] The existing terms of sports and esports have a clear overlap, and without drawing distinction the interests and aims of each may become obfuscated.[88] There are existing federations and stakeholders of prominent sports organisations that oppose the inclusion of esports

[86] Tobias M. Scholz and Nepomuk Nothelfer (n6).
[87] Ibid, 12.
[88] Ibid, 8.

into the general conceptualisation of ‘sports’, particularly where state funding is concerned.[89]

Additionally, complications with this approach also arise with existing case law, notably that the attachment of intellectual property rights to the actions of an athlete within a sport has been previously rejected. This stems from the Court of Justice case C-403/08 *‘Premier League’*.[90] Despite the potential to play in exciting and new manners, akin to performing, athletes are confined in their ability to make free or creative choices where even through complex and unique plays, they make these within the framework of the system of rules of the game. From this judgement it can be seen that, for traditional sports, there may be a high level of skill but no free creativity or expression, fundamental elements for the creation of intellectual property rights.[91] This judgement set the precedence that under European Union law sporting events, thus, are not protectable under existing copyright law. There is a clear divergence from eSports here, where they are already situated within the scheme of copyright due to the subject matter.

It is this reliance on a product that is owned wholly by the rightsholder that inherently separates eSports from traditional sports. There is no form of universal access to video games. To begin playing a traditional sport an individual may purchase or borrow generic equipment from any number of sources. [92] Access to a specific video game is provided only by the rightsholder, which may entail further proprietary equipment, entrenching the position of complete legal control that they currently exercise over the industry.[93]

[89] Ibid, 48.
[90] *Premier League and Others* (n44).
[91] Amy Thomas, ‘A question of (e)Sports: an answer from copyright’ (n42) 967.
[92] Karolina Sztobryn (n10), 3.
[93] Tobias M. Scholz and Nepomuk Nothelfer (n6), 19.

Traditional sports and eSports share two of the same foundational elements, in the necessity of a human element and a form of competition.[94] The desire to compete is characterised as inherently human, thus there is no acceptance of AI tools within eSports, despite there being a permissible degree of "computerised assistance" through mechanisms in the game.[95]The element of competition is also what differentiates eSports from other methods of video game playing, as it is predicated on the comparison of performance, both mental and physical.[96] Despite these shared aspects, the digital element that underpins the entire discipline of eSports is what fundamentally cleaves it from traditional sports.[97] The similarities can be discussed ad nauseum, but these will never overcome the implicit existence of copyright in the discipline of eSports.

4.3 The Role of the Author

Video games, unlike traditional sports, have a sole stakeholder.[98] Where there is no regime for video games or eSports the terms of these activities are governed by contracts created by these rightsholders. The infrastructure that has developed surrounding eSports are reliant on agreements which are not uniform, creating "gaps and ambiguities" for those seeking to become professional players, or involved as a tournament organiser, team manager or sponsor, for example.[99] The navigation of this is hampered due to the *"significant uncertainties in the law needed to define the formal relationships among the various actors."*[100]

[94] Ibid, 12.
[95] Ibid, 13.
[96] Ibid, 16.
[97] Ibid, 12.
[98] Ibid, 19.
[99] Burk (n71), 1536.
[100] Ibid.

The most influential of these actors is the publisher, having the sole right to enforce their copyright, and thus how the video game is played and promoted. It can be identified here that there is a need to balance the interests of users to prevent unnecessary blockages to the enjoyment of the game, and access for spectators in tournaments through broadcasting, for example. There is also a need to ensure that any agreements or concessions made do not impede on the fundamental right of ownership, including the power to limit and prohibit uses of a property.

Within traditional sports, for example, where an athlete commits an action against the rules or laws of their sport, they are typically cited by an independent board or tribunal. [101] The outcome of a decision can be a fine or sanction preventing them from playing a number of games or weeks. Where a player is permanently banned from competing in professional competitions, they remain able to play or train at a lower level, or often in a different country due to differences in national union rules.[102]

For an eSports athlete, the outcome of a ban from playing may be absolute, at the discretion of the publisher; “justifications for such drastic actions are reliant upon the gamemaker’s authority as a copyright holder, who is entitled by law to deny access to their works (or in this case eSport) by, eg technical means.”[103] For the average player of a video game, a so called ’lifetime ban’ would certainly be an annoyance, but it would have little effect on their lives outside of gaming. For a professional eSports player, having vested time, energy and money into the practice of their craft, it would mark the end of their

[101] World Rugby, 'Regulation 20 Disciplinary and Judicial Matters’ (*World.rugby*) <https://www.world.rugby/organisation/governance/regulations/reg-20> accessed 16 May 2023.
[102] Amy Thomas, ‘A question of (e)Sports: an answer from copyright’ (n42) 961.
[103] Ibid.

career, and even their casual enjoyment of the game. This is merely one example which displays the extreme level of control that publishers may exert against all use of their game, where there is no form of indepedent arbitration.

If eSports were to be officially recognised in some capacity, be that as a branch of regular sports or some new category, this would prompt greater interest in the creation of regulatory bodies or federations. At this point the question also arises of how much power they may have, or is the copyright holder entitled to total control overall all usage of their game, even where this interferes with the management of the eSports industry? Here it seems a balance must be found, where there is conflict between the interests of the copyright holder, and those of the wider video gaming community with a desire to interact with, build upon and potentially carve a career out of copyrighted material.[104] Where it is suggested that a central feature of eSports is a ”desire to connect with others” there is a suggestion for a degree of latitude in the enforcement of copyright.[105]

4.4 Players as Performers

A key component one of the earliest pieces of scholarship regarding esports was exploring the effect of the role of the player as a performer, which can give rise to a number of neighbouring rights to an existing copyright. These are relevant for consideration given both the undeniable presence of copyright in the eSports world, and the potential for a player to produce a characteristic expression of a game when they are playing through interaction with the game, and other players for example.[106]

[104] Jennifer E. Rothman, ’E-Sports As a Prism for the Role of Evolving Technology in Intellectual Property’, (2013) 161 U. Pa. L. Rev. Online, 317, 326.
[105] Ibid, 327.
[106] Amy Thomas, ‘A question of (e)Sports: an answer from copyright’ (n42) 967.

Video games, unlike cinematographic or audio-visual works, not only invite but rely upon the user to make contributions to the work.[107] Even if merely to complete predetermined levels, the user does not occupy a passive role but is active and engaged. The choices that a user makes within a game influence the output; creating “suites of graphic composition somehow controlled by the player.”[108] Players, particularly those who have dedicated significant time to practice, have a high degree of creative freedom to make choices that may exceed the expectation of the developers. Using their personal talents they make ”inspired and spontaneous” additions to their individual performance which exceed mere interaction with game mechanics.[109] That eSports athletes are valued for their playing *and* as personalities, they may use methods to influence the game that contradicts what even the designers intended.[110] However, within the realm of audiovisual copyright it must be argued that regardless of the specific combination, all the display elements have been provided by the developer within the software, and do not generate additional rights for the player, particularly where they are subject to an end user license agreement.

The playing of eSports is not merely the act of the video game though, it is also the spectacle of the tournament. The broadcasting of these events includes both the screens depicting the gameplay, and footage of the athletes as they play.[111] Where it is evident that this will not give rise to ownership under copyright to the player, the numerous neighbouring rights that exist within European Union law become relevant. Per the Beijing Treaty on Audiovisual Performances, a number of economic and moral rights can be attributed to perfomers

[107] Burk (n71) 1537.
[108] Ibid, 1548.
[109] Ibid, 1568.
[110] Ibid, 1549.
[111] Karolina Sztobryn (n10), 7.

in an audiovisual fixation, both live and recorded.[112] For unfixed perfomances, such as the live streaming of a tournament, performers benefit from exclusive rights of authorising the broadcast, communication to the public and fixation of their performances.[113]

When considering the ability to classify eSports competitors as perfomers case C-403/08 *'Premier League'* must once again be discussed. As has been established already, the judgment of this case concluded that athetic performances cannot give rise to copyright, as all creative freedom is constrained by the parameters of the rules of the game.[114] For the 'in game' performance of electronic athletes it seems appropriate to conclude along the same reasoning, thus they would not benefit from performance rights. In a tournament setting, where the real time actions and reactions of individuals is also broadcast as they play, a possibility arises that this may be beyond the contraints of software, but it is difficult to ascertain how someone would be able to play a video game in such a way that this would become a unique and creative expression. While in future there is a possibility to re-examine the role of an eSports athlete as a performer within a broadcast, at the present time it is unlikely that this could be successfully established.

4.5 An International Approach to Regulating eSports: The Korea e-Sports Association

As has been previously mentioned, the European Parliament has identified the role of video games and eSports as valuable to European society and thus deserving of targeted treatment. Where the approach

[112] Beijing Treaty on Audiovisual Performances (adopted by the Diplomatic Conference on the Protection of Audiovisual Performances in Beijing, on June 24, 2012) (TRT/BEIJING/001) Article 6.
[113] Ibid.
[114] *Premier League and Others* (n44).

to these industries, and the creation of any regime addressing them is still theoretical, it is beneficial to expand the scope of consideration. At present Republic of Korea is at the forefront of the legal treatment for eSports, and the existing legislation and policy that has been enacted may form the inspiration for the European approach, thus will be explored within this chapter.

In 2000 the Korean eSports Association was established, with the approval of the Ministry of Culture, Sports, and Tourism of South Korea to regulate the operation of professional eSports.[115] In the 23 years since founding it has not only managed the playing and broadcasting of tournamnets in 25 different titles but has also been included in the Korean Olympic Committee and the International eSports Federation.[116]

While eSports have gained popularity across the world for fans of video games and technology, within South Korea they are regarded not as a niche interest, but part of mainstream culture.[117] This is driven, in part, by the national attitude towards video games, which were legally recognized as a forms of 'culture and art' by the National Assembly, allowing developers to benefit from state funded projects.[118] Tournaments for eSports in the country are often held in

[115] Peichi Chung, 'South Korea's Esports Industry in Northeast Asia: History, Ecosystem and Digital Labour' in Micky Lee and Peichi Chung (eds), *Media Technologies for Work and Play in East Asia Critical Perspectives on Japan and the Two Koreas* (Bristol University Press 2021) 229.
[116] Olympic Council of Asia, ' Korea hosts first official launch of esports' Road to Asian Games campaign' (*Ocasia.org,* 25 November 2021) <https://ocasia.org/news/2513-korea-hosts-first-official-launch-of-esports-road-to-asian-games-campaign.html> accessed 3 May 2023.
[117] Paul Mozur 'For South Korea, E-Sports Is A National Pastime' (New York, 19 October 2014) < https://www.nytimes.com/2014/10/20/technology/league-of-legends-south-korea-epicenter-esports.html> accessed 16 April 2023.
[118] Evgeny Obedkov, 'South Korea legally recognises video games as form of culture and art' (*GameWorldObserver.com,* 9 September 2022) <https://gameworldobserver.com/2022/09/09/south-korea-recognizes-video-games-as-culture-and-art> accessed 29 March 2023.

stadiums designed for World Cup events in other sports, attracting tens of thousands of spectators to the spectacle.[119]

As such, where they are regarded as one of the largest actors in the field of eSports, it is unsurprising that South Korea would be amongst the first countries to implement legislation in this area. Professional players of eSports in South Korea are estimated to have earned over $20M in the game 'StarCraft 2' alone, with individual athletes earning up to $1M each.[120] Moreover, video game spectatorship has long been a part of the South Korean entertainment industry, with tournaments having been broadcast on cable and public television channels in the country for around twenty years.[121]

In 2012 the government of South Korea published legislation which explicitly concerned eSports. Entitled the "Act on Promotion of E-Sports", this was intended to create a legal regime surrounding the activities of eSports within the country.[122] South Korea, having recognized the growing role eSports play, not only globally but specifically within their internet driven society, created several rules to ensure the healthy development of these activities, and to promote the phenomenon under the Ministry of Culture, Sports, and Tourism. The articles of this act included the creation of funding, specifically for the creation of eSports facilities and organization under local government operation.[123]

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[119] Ibid.
[120] Statista, ' Overall leading eSports players from South Korea as of March 2023, by total prize money earned' (*Statista.com,* 3 March 2023*)* <https://www.statista.com/statistics/963557/south-korea-top-players-by-total-prize-money/> accessed 29 March 2023.
[121] Stephen C. Rea, 'Crafting Stars: South Korean E-sports and the Emergence of a Digital Gaming Culture' (2016) 21 Education About Asia 22, 23.
[122] Act No. 11315 of The National Assembly of the Republic of Korea of 17 February 2012 on the Promotion of eSports (Electronic Sports).
[123] Ibid, Article 8(1).

The drive within South Korea for a specific regime to regulate eSports has also been driven by previous disputes between tournament organizers and publishers. The most influential of these conflicts occurred in 2010, concerning the Korean eSports Association and Blizzard Games, regarding the broadcast of the game StarCraft.[124] Where tournaments are played, there are several elements which are made available through video streams to viewers outside of the arena in which the game in being played. KeSPA, without consultation with Blizzard, negotiated agreements to broadcast tournaments on media channels. Blizzard objected to the creation of these broadcasting, stating that this was a clear use of copyrighted materials without prior authorization of the rightsholder.[125] KeSPA responded that the agreements were a commonly accepted 'industry standard' and that while Blizzard was 'entitled to deference', the broadcast in question was related to the performances of the participants, rather than of the game itself.[126] This resulted in the eventual severing of the relationship between Blizzard and KeSPA, with the video game publisher prohibiting the broadcast of the game by those other than specific licensees.

The situation has been described as a "harbinger of disputes to come", relating to the clash between the rights of the author with the rights of the player.[127] Without confirmation or denial of the status of a player as a performer, there is the potential for to have multiple vested rights in the broadcast of a tournament.

[124] Burk (n71), 1543.
[125] Burk (n71), 1543.
[126] Ibid.
[127] Ibid.

4.6 Interim Conclusion

The rising popularity of eSports, particularly the organisation of tournaments, offers a lucrative avenue for publishers. The creation of broadcasting agreements where protected video games are used will increase the recognition of publishers, but also gives rise to the potential for a number of derivative or neighbouring rights to the other actors. The uncertainty of the legal position for players, which may impede certain rights, such as that of the broadcasting of a game, is yet another impediment to the full exercise of the rights owned by the publisher.

5 User Generated Content

The purpose of this chapter is to analyse the phenomenon of *user generated content* (UGC), its copyright implications and the current methods publishers employ with regards to this activity. This includes instances where the contribution of the user is permitted, conditional to licensing agreements, and those in which it has been prohibited. These will be examined in the form of specific instances in which publishers have made clarifications and adjustments to these agreements. The role of user generated content is currently wholly governed by these user contracts, however for the European Union's future approach it will be suggested that this should be considered when addressing the features of video games under copyright.

5.1 The Forms of User Generated Content

A general definition of user generated content is that it is "'amateur' creative content published on online platforms".[128]When it comes to the user generated content created for video games this can range from tutorial videos produced and uploaded to content sharing platforms such as YouTube, to programmers creating additional content which is produced by accessing the underlying software.[129] Despite the fact that this content is produced from the protected work, the publisher of the property is generally neither involved, nor aware, of the production. Generally, it can be understood which actions are permissible or forbidden by the different end user agreements, produced by each publisher, which govern how a user may interact with a property they have purchased access to.

[128] Amy Thomas, 'Can You Play? An Analysis of Video Game User-Generated Content Policies' (2022) CREATe Working Paper 2022/6, <https://www.create.ac.uk/blog/2022/05/24/new-working-paper-can-you-play-an-analysis-of-video-game-user-generated-content-policies/> accessed 21 February 2023, 1.
[129] Ibid, 1.

When discussing the interplay of elements of video games with the copyright regime, the role of user generated content must also be mentioned. As the video game industry has developed throughout the 21st century more and more games have come to rely on the ability of users to make adaptations in order to retain the interest, and thus the business, of these consumers.[130] Were there to be a new classification for the protection of video games, it is reasonable to suggest that it should indicate the position of this additional content in some form. For publishers and players across the European Union, and worldwide this would provide a form of legislative clarity in an area currently governed by numerous contracts.

For a publisher, the allowance of user generated content can ensure continued interaction with a property, as new content in or concerning a video game may retain interaction, or even encourage new users. The nature or volume of content that may be generated thus falls within the scope of the copyright protection where a publisher has the "exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction" of a work.[131]

From the view of the consumer, the creation of user generated content allows for a rich experience of a video game that "gives players both control and opportunity; by nature, [it's] a version of play that is more dynamic and engaging than a game without creation capabilities."[132]

The rise of community engagement, in part through UGC, has become an increasingly large part of the video game landscape, and the role

[130] Ibid, 1.
[131] InfoSoc Directive 2001/29/EC (n3), Article 2.
[132] Matt Gardner, 'Game Modding Offers 'Huge Financial Opportunities' For Studios In 2022' (*Forbes.com,* 7 April 2022) <https://www.forbes.com/sites/mattgardner1/2022/04/07/game-modding-offers-huge-financial-opportunities-for-studios-in-2022> accessed 5 March 2023.

of these ‘amateur’ creators is at the precipice of revolutionising the industry.[133]

5.1.1 ‘In Game’ User Generated Content

This thesis will draw upon the *In Game* and *Out of Game* distinctions put forward in a paper by Amy Thomas of the University of Glasgow, published by the UK Copyright & Creative Economy Centre.[134] Prior to the advent of video sharing platforms, the majority of user generated content was what can be described as ‘in game’ content. This creation is “self-contained within the constraints of the game’s world [...] e.g., playable maps, skins, music, or characters.”[135] This is easier to categorise than its ‘out of game’ counterpart, which due to the lack of limitations, can encompass any form of creation by the user. The most utilised forms of in-game user generated content include customisation tools which are already built into a game, such as the creation of unique characters or avatars by the player. So called ‘sandbox’ games, or levels within games, are also included in this category, such games rely on the player interacting with the game environment and creating and modifying elements with high levels of creativity. An example of this type of game, driven by user interaction and creation rather than by a storyline is that of the *Minecraft* series.[136] The game itself is a creative tool- there is no objective, and a player cannot ‘win’, instead the value of the game is the enjoyment of expressing a player’s creativity through building the environment around them.[137]

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[133] Katherine Manuel, ‘The Dawn of The User-Generated Content Era: Four Trends You Should Know’ (*Forbes.com*, 19 January 2023) <https://www.forbes.com/sites/forbestechcouncil/2023/01/19/the-dawn-of-the-user-generated-content-era-four-trends-you-should-know/> accessed 21 February 2023.
[134] Amy Thomas, Can You Play?’ (n128).
[135] Ibid, 3.
[136] Greg Lastowka, ’Minecraft as Web 2.0: Amateur Creativity & Digital Games’ (2011) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1939241> accessed 23 February 2023, 1, 9.
[137] Ibid, 10.

It can also be seen that the general acceptance by a publisher for the creation of in-game user generated content comes simply in the ability for a user to create it; "*de facto* sanctioned by the game creator by merit of it being made technically possible."[138] Where there is a lack of comprehensive copyright legislation which governs many aspects of the video game system, this is governed primarily by contract law, notably in the agreements between publishers and users.

5.1.2 'Out of Game' User Generated Content

While *in-game* user generated content can be clearly identified and categorised by its existence within the confines of the playing and enjoyment of a specific video game, its *out of game* counterpart is much more abstract. This term can cover almost any content created by a user that directly relates to the protected property, with no defined parameters as of yet. With the popularity of file sharing platforms, such as the so called 'gatekeeper' platform of YouTube, it has become increasingly common for 3rd parties to record and upload videos of themselves playing a game, often referred to as 'Let's Play' video tutorials.[139] These videos are generally accepted by publishers, despite their potential to constitute an infringement of copyright by operating as an unauthorised reproduction of content.[140]

To establish the existence of an infringement we should first establish the exceptions provided by existing law. The InfoSoc directive contains an exhaustive list of exceptions to the reproduction right, the relevant provisions here being Article 5(d) and (k).[141] Said provisions establish exceptions regarding the use of "quotations" for criticism and review,

[138] Amy Thomas, 'Can You Play?' (n128) 3.
[139] Ibid, 3.
[140] Ibid, 9.
[141] InfoSoc Directive 2001/29/EC (n3), Article 5.

or for statistical purposes of caricature, parody, or pastiche.[142] The general purpose of 'Let's Play' videos is for the creator to demonstrate their play style, give reactions to game content, or advice to others on how to complete specific levels or areas of a game.[143] On that account, for the most part they do not appear to fall under the scope of allowed exceptions from the InfoSoc directive, save for the purpose of review. In that case, they are permitted at the discretion of the publisher, potentially due to the volume produced exceeding what could be reasonably monitored and assessed. It could also be said that these videos are consumed by the public not merely for the game content, but due to the personality of the video creator or streamer, valuing their individual observations and skills as a form of entertainment in their own right.[144] The monetisation of this content is also considered to be 'passive', through advertisements or donation based systems, thus the creator does not produce them with the sole expectation of generating revenue.[145]

Thus, for the developer of a game this form of UGC does not compete with or impede the commercial nature of the copyrighted material, and it in fact operates almost as a form of free advertisement.[146] In that respect, the rationale for a rightsholder to hold a stance of "tolerated infringement" towards these videos is explained by their ability to benefit from this 3rd party content.[147] This is reflected in the policies of many publishers, some of which stipulate that videos include a form of original contribution, or that they should match the 'spirit and tone' of games.[148] Such conditions are largely open to interpretation, but generally insofar as a video is not overtly offensive, nor does it have

[142] Ibid.
[143] Brianna K. Loder, 'Public Performance? How Let's Plays and Livestreams May Be Escaping the Reach of Traditional Copyright Law', (2020) 15 Wash. J. L. Tech. & Arts, 86.
[144] Amy Thomas, 'Can You Play?' (n128) 5.
[145] Ibid, 10.
[146] Loder, (n 142), 87.
[147] Ibid, 6.
[148] Ibid, 9.

‘spoilers’ or previously unreleased materials, they benefit from a general attitude of authorisation.[149]

Within the EU the area of video game streaming has faced recent uncertainty, due to the implementation of the Directive on Copyright in the Digital Single Market, known as the ‘EU Copyright Directive’ which came into force on the 7th of June 2021.[150] Article 17 of the directive in particular has drawn criticism from the streaming and online content creation industry, due to the significant implications it creates. Under Article 17, an online content sharing platform is now required to gain authorisation from a rightsholder where the use of any copyrighted material is identified.[151] For a platform that hosts user generated content, this entails a complex system of detection, and the blocking of any material which has not been granted appropriate permissions.[152]

For streamers, the impact of Article 17 would restrict their ability to create in a number of ways, such as incorporating music or visual elements like game artwork or logos. Despite the general acceptance from publishers that creators currently benefit from, they may now face difficulties not from rightsholders, but the platforms themselves, who may automatically filter and block their content to ensure compliance with the directive. The ContentID system of YouTube is an example of this, as an automated takedown system which facilitates the removal of content even where this may “ignore user’s rights”.[153]

[149] Ibid.
[150] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.
[151] Ibid, Article 17(1).
[152] Ibid.
[153] Kristofer Erickson, ‘User illusion: ideological construction of ‘user generated content; in the EC consultation on copyright’ (2014) Internet Policy Review Journal on Internet Regulation, 11.

5.2 Can Copyright Arise from User Contributions?

The potential role of the player as an author through the generation of additional and unique contributions has been identified within the legal systems of member states of the European Union. In the study conducted by the World Intellectual Property Office- examined in chapter 3 of this thesis- it was seen that the potential of vesting authorship as a form of derivative work was possible in each jurisdiction. For example, the Spanish and Belgian systems affirmed that where players use tools to create customised characters or new levels or locations and "where these new elements can be considered original and creative", authorship is hypothetically possible.[154] Here, the lack of a comprehensive approach to video games across the EU creates conflict, as the generally accepted approach to UGC is that the user is a creator "but not the kind of creator that is awarded an exclusive right.[155]

Other member states of the EU, such as Germany, have demonstrated a stricter approach to user creation that aligns with this attitude. German law on copyright stipulates that "the user needs authorization from the producer or owner to alter the computer program or to create derivative works based on the original video game".[156] It allows for the possibility that, where the contribution meets the conditions for a personal intellectual creation, a player could obtain copyright as an editor.[157]

As such, on a surface level where it is clear that the creation of user generated content *may* amount to authorship, this is constrained

[154] Ramos and others (n4), 17.
[155] Amy Thomas, 'Can You Play' (n128) 3.
[156] Ramos and others (n4) 43.
[157] Ibid.

through the employment of user agreements, within the scope of contract rather than copyright. These agreements commonly contain statements which specify that a publisher, as the holder of copyright, has the ability to determine the ownership of any copyright, and what type of licence is granted to a user.[158]

5.3 Current Management of User Generated Content: End User License Agreements

As has been extensively mentioned, the role of user generated content is currently regulated privately between the publisher and consumer in the form of an agreement known as the End User License Agreement (EULA). The user of a piece of software is commonly presented with a digital form which requires the "reading and agreeing to an end user license agreement before being allowed to install it".[159] As the name of the agreement suggests, they outline the terms to which the user is licensed to interact with a copyrighted piece of software and uses which are prohibited.

Though each EULA can differ slightly in the specific provisions relative to the type or style of game that it covers, each typically begins with the acceptance that by purchasing, downloading, or installing a game, the user agrees to the terms of the licence.[160] This is limited to personal usage, and the distribution of the game to other people or devices is constrained.

The ownership of all game content and customisation that is solely reliant on the copyrighted code is also GENERALLY reserved by the

[158] Ibid, 80.
[159] Margaret Rose, 'End-User License Agreement' (*Techopedia.com*, 11 March 2022) <https://www.techopedia.com/definition/4272/end-user-license-agreement-eula> accessed 23 March 2023.
[160] Ibid.

publisher. It is clearly demonstrated that a user can only gain rights of ownership for something they created where it can be determined that said creation “does not contain a substantial part of our code or content”.[161] By these terms, it is usually concluded that, where the creation of UGC is permitted, any rights which may arise are reverted back to the original author.[162]

5.3.1 Electronic Arts

As should be clear, the existence of user generated content occupies an incredibly complex and under-regulated space within the video game industry. The increasing existence of tech capable users adapting games for entertainment and usability has great benefits to the game, and has been embraced by many publishers, however the position of these users remains tenuous and at the mercy of the rights holder.

This was seen in 2022 in a situation concerning Electronic Arts Inc, the publisher of a popular life simulation ‘The Sims’, which has had a longstanding UGC community throughout multiple iterations of the game, which was first published in 2000. An announcement was made by EA, constituting an update to their policy regarding the production of ‘mods and custom content’. These terms relate to the variety of UGC additions to the game, in the form of items such as furniture and clothing, as well as functional elements which affect existing gameplay.

EA identified that they supported the continuation of a framework which allowed the creation and installation of UGC, as these user

[161] Minecraft ’End User License Agreement’, (*Minecraft.net)* <https://www.minecraft.net/en-us/eula> accessed 29 March 2023.
[162] Amy Thomas, ‘Can You Play’ (n128) 4.

creators have been credited with identifying and solving issues within the game and deepening the experience of many users.[163] It was clarified that user generated content was not to be marketed in any way which implied a direct endorsement from EA, and third-party content could not be promoted or displayed online with any use of logos, trademarks, or other related protected designs.[164]

Furthermore, the creation of user generated content for commercial purposes was expressly prohibited;

> *"Mods must be non-commercial and distributed free-of-charge. Mods cannot be sold, licensed, or rented for a fee, nor can Mods contain features which would support monetary transactions of any type."*[165]

Alternative methods for remuneration for the effort, time and resources expended in the creation of this user generated content were suggested by EA, including the allowance of passive advertising on distribution websites, and 'early access' incentives on a donation basis, provided that any paywall was temporary, and the content become completely free to access and use after a period of time.[166]

It can also be noted that despite not holding any rights in the property, the user base of the game still held considerable influence alongside the publisher in the creation of the policy. The earliest announcement on the issue held no mention of the 'early access' feature, however the producers of UCG were vocal in opposition to a total ban on remuneration. They promoted the temporary period of access as a

[163] Amy Thomas, 'Can You Play' (n128) 13.
[164] EA Help 'The Sims 4- Mods and game updates' (*Help.ea.com,* 19 December 2022) < https://help.ea.com/en-gb/help/the-sims/the-sims-4/mods-and-the-sims-4-game-updates/> accessed 5 April 2023.
[165] Ibid.
[166] Ibid.

form of beta testing of the additional content, in which users who paid helped to test for any issues, and at the point that these were all solved the content was to be posted for free.[167]

Due to the popularity of the Sims franchise, which has 4 ‘generations’ and hundreds of ‘expansion’ and ‘game’ packs, this can be shown as an influential example of a publisher defining the allowed forms of exploitation of their protected work. The complete prohibition of user generated content in this context would have incredibly negative effects on the user base of the game, thus this highlights the compromise between the complete protection of the work, and allowing users to create within the game.

5.3.2 Rockstar Games

As each publisher has their own policy regarding said content, another example which may be highlighted is that of Rockstar Games, owned by the holding company Take-Two.

The general EULA for Rockstar Games properties holds that the agreement;

> *“grants you a nonexclusive, non-transferable, limited, and revocable right and license to use one copy of the Software for your personal, non-commercial use for gameplay on a single Game Platform.”*[168]

Regarding the creation of user generated content specifically, Rockstar policy states that where the software allows you to create content “and to the extent that your contributions through use of the

[167] Jessica Howard, ’EA Says The Sims 4 Modders Can Still Run Early-Access Period For Custom Content’ (*Gamespot.com*, 2 August 2022) <https://www.gamespot.com/articles/ea-says-the-sims-4-modders-can-still-run-early-access-period-for-custom-content/1100-6506092/> accessed 5 April 2023.
[168] Rockstar Games ’End User License Agreement’ (*Rockstargames.com,* 11 July 2019) <https://www.rockstargames.com/eula> accessed 10 February 2023.

Software give rise to any copyright interest" the user agrees to grant the licensor (the publisher) the right to use this content in any way.[169]

The creation of user generated content was directly addressed in 2017 when Take-Two delivered a 'cease and desist' notification to the creator of a 'modding' tool used to enhance one of their popular titles, *Grand Theft Auto*. After concern from the players of the game, Take-Two later clarified that they would "generally" not take action against the creators of third party projects related to Rockstar games that are "single-player, non-commercial, and respect the intellectual property (IP) rights of third parties."[170] Their action was for the prohibition of interference with multiplayer and online formats of the game, to ensure that these additions did not negatively affect "other players' use and enjoyment of such assets" when playing.[171] Further, they emphasised this was "not a license, and it does not constitute endorsement, approval, or authorization of any third-party project" and they retained the right to object to the creation of 3rd party content at any time.[172] From this it can be seen that, relative to the copyrighted materials, where publishers generally tend to take a laissez faire stance where there is no significant effect to the overall functioning of the game, this is not a blanket acceptance for the modification of their protected properties.

[169] Ibid.
[170] Rockstar Games Support 'PC Single-Player Mods' (*Support.rockstargames.com,* 23 November 2022) '<https://support.rockstargames.com/articles/115009494848/PC-Single-Player-Mods> accessed 10 February 2023.
[171] Rockstar Games 'End User License Agreement' (n 167).
[172] Ibid.

5.4 Contract or Copyright: Should User Generated Content be protected?

Having shown the complications which have arisen from the regulation of UGC under contracts, it should be considered if this would be better managed within the copyright scope.

It should be considered that there are infinite numbers of platforms through which UGC can be created and distributed on, from the 'gatekeepers' such as YouTube, to fan generated sites. Each of these have their own terms of service and use, which leads to an environment which is difficult for users to navigate, full of ambiguity regarding permissible use of copyrighted materials.

The current system is designed to protect the rights of the author, but in the context of UGC, it could be said that this impedes the sharing, collaboration, and transformative use of existing works, curtailing innovation. Publishers themselves have identified that the content created by users often improves the longevity and enjoyment of their products. The discretionary permissions given in EULAs allow publishers to benefit, financially, from 3rd party work, and to rescind permission at will. This creates a tenuous situation, even for amateur UGC creators who do not seek to profit in any way, even passively, in that projects that they have extensively worked on may be made unavailable, even where they have abided by the agreed terms.

Were this to be included within the scope of video game copyright, the EU may take inspiration from the "fair use" approach of the USA.[173] Rather than the burdensome task of creating a new category of exceptions to copyright, this could be a more flexible framework,

[173] Darerca Tupponi, ' Transformative User-Generated Content: fair use in U.S. Copyright' (*Cyberlaws.it*, 11 May 2022) <https://www.cyberlaws.it/en/2022/transformative-user-generated-content/> accessed 7 April 2023.

allowing limited transformative uses of copyrighted materials, defined by law rather than at the whim of the publishers. Thus, users would be able to engage with existing works whilst expressing their creativity, and ultimately contribute to the cultural discourse while still respecting the rights of the original author. Under the fair use exception, the copyright system of the USA allows for the legitimate transformative use of limited portions of protected materials.[174] This approach has not been without criticism, however, due to the 'unpredictability' of the application of the doctrine.[175] The USA has adopted a common law approach, which allows for flexibility in the interpretation by the courts. With the exception of Ireland, the member states of the EU subscribe to the civil legal system, as such creating a provision of fair use under statute may become redundant as the video game industry develops and new forms of UGC are presented.

While the EU has yet to determine how, or if, additions to the IP sphere should be made to strengthen the landscape for video game production, to completely exclude the role of UGC would be egregious.

5.5 Interim Conclusion

User generated content constitutes a significant element to the experience of video games for a user. For a publisher this can create a variety of benefits, prolonging the enjoyment and commercial viability of a title. It can, as has been discussed, become problematic for the enforcement of copyright. The communities surrounding video games are full of passionate users, who contribute time and effort to the creation of additional content without the expectation of

[174]U.S. Copyright Office, ' Can I Use Someone Else's Work? Can Someone Else Use Mine?' (*Copyright.gov*) < https://www.copyright.gov/help/faq/faq-fairuse.html> accessed 7 April 2023.
[175] Bernt Hugenholtz and Martin R.F. Senftleben, "Fair Use in European. In search of Flexibilities", (2011) Institute for Information Law/VU Centre for Law and Governance, 9.

renumeration. These communities also wield great power in the decision making of a publisher, able to create outcry in response to a publisher enforcing the terms contained within EULAs.

At present the system of governing UGC through contract agreements allows a publisher a high level of discretion, and they have demonstrated a willingness to allow user interaction where it does not overtly prevent enjoyment, or commercialisation, of a video game. It has also created a situation in which a publisher has to contend with the response of the user base in order to maintain their relationship. The exercise of copyright protection for a publisher can be curtailed where there is a negative response, which is especially pertinent to the authors of incredibly popular games.

Where it has been argued that there should be a specific classification for video games within legislation, it should be considered that the rights of publishers with regards to 3rd party work should similarly be included, or expressly excluded.

6 Conclusion

The world of video games, like the regime of intellectual property protection, is dynamic and subject to continual development and adaptation. While this has allowed for a high degree of innovation, it has also suffered due to the lack of specific legal attention to protect the interests of both creators and players of games. Throughout this thesis a number of the conflicting situations which have arisen due to this degree of legal uncertainty have been explored. In recent years the EU has both expressed a desire to become a centre of innovation to promote the industry, and identified the lack of a robust scheme of IP protection that is specifically tailored to video games.

The immersive world of games is constantly producing new technology and software, and it would be unreasonable to expect the EU to try and legislate in every area. That there is lack of clear and comprehensive copyright protection for video games, however, will hamper the industry's ability to grow and innovate. First and foremost, it is appropriate to conclude that an essential action for the protection that is offered to a video game is to create a form of specific protection. The potential burden of costs to enforce these protections, and the inconsistency in legal outcomes of disputes may dissuade investment into the territory. Thus, there cannot be continued reliance on the approach of piecemeal protection, and the creation of a separate legal category under statute which recognises the unique characteristics of games as complex products is essential.

The establishment of clear guidelines that account for the unique aspects of video games will require cooperation from not only the Union legislators, but also developers and organisations within the industry. The encouragement of development and creativity in the ever-expanding video game industry must balance the interests of

authors, to ensure that there is motivation to enter and stay in the industry.

An overarching theme with regards to the difficulties publishers face in the execution of copyright regarding to a video game is the lack of clear guidelines for the defining of said games and subsequent uses by users. The additional activities of the user base in the fields of eSports and user generated content suffer from the absence of a framework. Where contract is used to manage the activity of the user, publishers might benefit from a high degree of discretion, but they also can also fall victim to the power of the user base, as seen in the case study of EA Games.

The primary question of this thesis was presented as whether or not the copyright scheme should be reformed, to allow the specific inclusion of video games. It has become evident to throughout this thesis that this should be answered in the affirmative. For an industry with the economic and cultural power that video games have, there is a woeful lack of dedicated legislation at an EU or national level. Even where member states have made some form of reference, the absence of comparative provisions in other jurisdictions creates a blockage to publishers with cross-border intentions.

The prospect of the creation of a dedicated strategy for video games within the EU is still in its infancy. Where the European Video Games Society has recommended the need to ‘optimise’ the legal framework, video game publishers must yet wait to see what methods are employed.

Bibliography

Conventions and Treaties

Convention on the Grant of European Patents (European Patent Convention) of 5 October 1973 as Revised by the Act Revising Article 63 EPC of 17 December 1991 and the Act Revising the EPC of 29 November 2000

Beijing Treaty on Audiovisual Performances (adopted by the Diplomatic Conference on the Protection of Audiovisual Performances in Beijing, on June 24, 2012) (TRT/BEIJING/001)

EU Legislation

Council Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167

Council Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJ L 111

Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC

French Legislation

Law No. 92-597 of July 1, 1992 relating to the Intellectual Property Code (Legislative Part) (1) of the French National Assembly and the Senate JORF n°0153 1 July 1992

South Korean Legislation

Act No. 11315 of The National Assembly of the Republic of Korea of 17 February 2012 on the Promotion of eSports (Electronic Sports)

European Commission documents and websites

European Commission, ’Europe - IP Specials - IP in the Videogames Industry’ <https://intellectual-property-helpdesk.ec.europa.eu/regional-helpdesks/european-ip-

helpdesk/europe-ip-specials/europe-ip-specials-ip-videogames-industry_en> accessed 16 March 2023

European Commission, Understanding the Value of a European Games Society <https://digital-strategy.ec.europa.eu/en/policies/value-gaming> accessed 19 February 2023

European Video Games Society 5th Workshop' Regulatory framework for video games', <https://digital-strategy.ec.europa.eu/en/library/regulatory-framework-video-games> accessed 20 February 2023

European Parliament Documents

Resolution 2022/2027(INI) of the European Parliament of 10 November 2022 on esports and video games, P9_TA(2022)0388

World Intellectual Property Office Documents

Ramos A, A Rodríguez, L López, S Abrams and T Meng 'The Legal Status of Video Games: Comparative Analysis in National Approaches' (2013) World Intellectual Property Office

Journal Articles

Burk, DL, 'Owning eSports: Proprietary Rights in Professional Computer Gaming' (2013) 161 University of Pennsylvania Law Review

Cruz A, 'What's the Big Idea behind the Idea-Expression Dichotomy? Modern Ramifications of the Tree of Porphyry in Copyright Law' (1990) 18 FSU Law Rev.

Erickson K, 'User illusion: ideological construction of 'user generated content; in the EC consultation on copyright' (2014) Internet Policy Review Journal on Internet Regulation

Grosheide FW, H Roerdink and K Thomas, 'Intellectual Property Protection for Video Games: A View from the European Union' (2014) 9 JICLT

Hugenholtz B and MRF Senftleben, "Fair Use in European. In search of Flexibilities", (2011) Institute for Information Law/VU Centre for Law and Governance

Loder BK, ’Public Performance? How Let's Plays and Livestreams May Be Escaping the Reach of Traditional Copyright Law’, (2020) 15 Wash. J. L. Tech. & Arts

Pistorius T and OS Mwim, ’The impact of digital copyright law and policy on access to knowledge and learning’ (2019) 10 Reading & Writing - Journal of the Reading Association of South Africa

Rea SC, ‘Crafting Stars: South Korean E-sports and the Emergence of a Digital Gaming Culture’ (2016) 21 Education About Asia

Rothman JE, ’E-Sports As a Prism for the Role of Evolving Technology in Intellectual Property’, (2013) 161 U. Pa. L. Rev. Online

Sztobryn K, ‘In Search of Answers to Questions about Esports and Copyright’ (2021) 0 GRUR International

Thomas A, ‘A question of (e)Sports: an answer from copyright’ (2020) 15 Journal of Intellectual Property Law & Practice

Online Articles

Lastowka G, ’Minecraft as Web 2.0: Amateur Creativity & Digital Games’ (2011) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1939241> accessed 23 February 2023

Thomas A, ‘Can You Play? An Analysis of Video Game User-Generated Content Policies’ (2022) CREATe Working Paper 2022/6 <https://www.create.ac.uk/blog/2022/05/24/new-working-paper-can-you-play-an-analysis-of-video-game-user-generated-content-policies/> accessed 21 February 2023

Chapters in Books

Chung P, ‘South Korea’s Esports Industry in Northeast Asia: History, Ecosystem and Digital Labour’ in Micky Lee and Peichi Chung (eds), Media Technologies for Work and Play in East Asia Critical Perspectives on Japan and the Two Koreas (Bristol University Press 2021)

Hutchinson T, ‘Doctrinal research: researching the jury’ in D Watkins and M Burton (eds) Research Methods in Law (Routledge 2013)

Webpages

- EA Help ’The Sims 4- Mods and game updates’ (*Help.ea.com,* 19 December 2022) <https://help.ea.com/en-gb/help/the-sims/the-sims-4/mods-and-the-sims-4-game-updates/> accessed 5 April 2023

- Minecraft ‘End User License Agreement’, (*Minecraft.net)* <https://www.minecraft.net/en-us/eula> accessed 29 March 2023

- Rockstar Games ’End User License Agreement’ (*Rockstargames.com,* 11 July 2019) <https://www.rockstargames.com/eula> accessed 10 February 2023

- Rockstar Games Support ‘PC Single-Player Mods’ (*Support.rockstargames.com,* 23 November 2022) <https://support.rockstargames.com/articles/115009494848/PC-Single-Player-Mods> accessed 10 February 2023

- Olympic Council of Asia,’ Korea hosts first official launch of esports’ Road to Asian Games campaign’ (*Ocasia.org,* 25 November 2021) <https://ocasia.org/news/2513-korea-hosts-first-official-launch-of-esports-road-to-asian-games-campaign.html> accessed 3 May 2023

- Société des Auteurs et Compositeurs Dramatiques, ’Author’s Rights Under French law’ (*Sacd.fr*) <https://www.sacd.fr/en/under-french-law> accessed 18 April 2023

- Statista, ’Video Games – Worldwide’ (*Statista.com,* 2023) <https://www.statista.com/outlook/dmo/digital-media/video-games/worldwide> accessed 16 March 2023

- Statista, ‘Number of games released on Steam worldwide from 2004 to 2022’ (*Statista.com,* 20 February 2023) <https://www.statista.com/statistics/552623/number-games-released-steam/> accessed 16 March 2023

- Statista, ‘Overall leading eSports players from South Korea as of March 2023, by total prize money earned’ (*Statista.com,* 3 March 2023*)* <https://www.statista.com/statistics/963557/south-korea-top-players-by-total-prize-money/> accessed 29 March 2023

- University of Washington Office of Research, ‘Source Code and Object Code’ (*Washington.edu)* <https://www.washington.edu/research/glossary/source-code-and-object-code/> accessed 27 April 2023

- U.S. Copyright Office, ’Can I Use Someone Else's Work? Can Someone Else Use Mine?’ (*Copyright.gov*)

<https://www.copyright.gov/help/faq/faq-fairuse.html> accessed 7 April 2023

- World Rugby, 'Regulation 20 Disciplinary and Judicial Matters' (*World.rugby*) <https://www.world.rugby/organisation/governance/regulations/reg-20> accessed 16 May 2023

Gardner M, 'Game Modding Offers 'Huge Financial Opportunities' For Studios In 2022' (*Forbes.com,* 7 April 2022) <https://www.forbes.com/sites/mattgardner1/2022/04/07/game-modding-offers-huge-financial-opportunities-for-studios-in-2022> accessed 5 March 2023

Haza ARGdl,' Video Games: Computer Programs or Creative Works?' (*Wipo.int,* August 2014) <https://www.wipo.int/wipo_magazine/en/2014/04/article_0006.html> accessed 27 April 2023

Himmelrich NT, 'Copyright Protects the Expression, Not the Idea', (*Gfrlaw.com,* 17 November 2022) <https://www.gfrlaw.com/what-we-do/insights/copyright-protects-expression-not-idea> accessed 27 April 2023

Howard J, 'EA Says The Sims 4 Modders Can Still Run Early-Access Period For Custom Content' (*Gamespot.com*, 2 August 2022) <https://www.gamespot.com/articles/ea-says-the-sims-4-modders-can-still-run-early-access-period-for-custom-content/1100-6506092/> accessed 5 April 2023

Lachaussée S and E Martin-Winkel, 'Video Games and French labour law' (*Avocatl.com*, 1 September 2014) <https://avocatl.com/news/video-games-and-french-labour-law/> accessed 24 April 2023

Leroux-Parra M, 'Esports Part 1: What are Esports?' (*hir.harvard.edu*, 24 April 2020) <https://hir.harvard.edu/esports-part-1-what-are-esports/> accessed 18 April 2023

Manuel K, 'The Dawn of The User-Generated Content Era: Four Trends You Should Know' (*Forbes.com*, 19 January 2023) <https://www.forbes.com/sites/forbestechcouncil/2023/01/19/the-dawn-of-the-user-generated-content-era-four-trends-you-should-know/> accessed 21 February 2023

Masuch M, and N Röber, 'Game Graphics Beyond Realism:Then, Now, and Tomorrow' (*Digra.org,* 2005) <http://www.digra.org/wp-content/uploads/digital-library/05150.48223.pdf> accessed 28 April 2023

Obedkov E, ’South Korea legally recognises video games as form of culture and art’ (*GameWorldObserver.com,* 9 September 2022) <https://gameworldobserver.com/2022/09/09/south-korea-recognizes-video-games-as-culture-and-art> accessed 29 March 2023

Rose M, ’End-User License Agreement’ (*Techopedia.com*, 11 March 2022) <https://www.techopedia.com/definition/4272/end-user-license-agreement-eula> accessed 23 March 2023

Tupponi D, ’Transformative User-Generated Content: fair use in U.S. Copyright’ (*Cyberlaws.it*, 11 May 2022) <https://www.cyberlaws.it/en/2022/transformative-user-generated-content/> accessed 7 April 2023

Newspapers

Heinrich, Scott, ‘Esports ride crest of a wave as figures rocket during Covid-19 crisis’ (London, 10 April 2020) <https://www.theguardian.com/sport/2020/apr/11/esports-ride-crest-of-a-wave-as-figures-rocket-during-covid-19-crisis> accessed 15 April 2023

Mozur, Paul, ‘For South Korea, E-Sports Is A National Pastime’ (New York, 19 October 2014) <https://www.nytimes.com/2014/10/20/technology/league-of-legends-south-korea-epicenter-esports.html> accessed 16 April 2023

Table of Cases

Court of Justice of the European Union

C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECLI:EU:C:2009:465

Case C-403/08 *Football Association Premier League and Others* [2011] ECLI:EU:C:2011:631

Case C-355/12 *Nintendo Co. Ltd and Others v PC Box Srl and 9Net Srl* [2014] ECLI:EU:C:2014:25

Cases from England & Wales

Nova Productions Ltd. v Mazooma Games Ltd. & Others [2007] EWCA Civ 219, [2007] EMLR 427

Cases from France

R.G Nº 07-20387*Cryo v Sesam,* Cour de Cassation, Chambre Civile 1, 25 juin 2009, Publié au Bulletin 2009, I, n° 140 [translated from French]

R.G Nº 05/08070 *Raynal v Atari,* Tribunal de Grande Instance de Lyon, Troisième Chambre, 08 Septembre 2016 [translated from French]

European Patent Office Boards of Appeal

Case T 0012/08 - 3.2.04 [2009] ECLI:EP:BA:2009:T001208.20090206

Cases from the United States of America

Atari Inc. v. Amusement World Inc., 547 F.Supp. 222 (District of Maryland, Nov. 27, 1981)