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OWNERSHIP OF CREATIVE WORKS UNDER EU COPYRIGHT LAW: THE CASE OF THE VIDEO GAME INDUSTRY

Dissertation to obtain a Master's Degree in Law, in the specialization track of Business Law and Technology

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I hereby declare that this master thesis is the result of my own original work. All sources and references used have been appropriately credited. I fully understand that the use of uncredited materials and sources constitutes a serious ethical and disciplinary violation.

Aline Garcia Arenque

Lisbon, September 2024

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Quoting and other conventions

In this dissertation, quoting other academic works will be done in footnotes as well as in the Bibliography section. When applicable, a hyperlink to the document will be provided. All hyperlinks were last accessed on 6th September 2024.

The quoting style that is used throughout the work is based on OSCOLA (Oxford University Standard for the Citation of Legal Authorities).

Table of abbreviations

CDSMD	Copyright and related rights in the Digital Single Market Directive
CJEU	Court of Justice of the European Union
EC	European Commission
EU	European Union
IP	Intellectual Property
OECD	Organisation for Economic Co-operation and Development
TPM	Technological Protection Measure
UGC	User Generated Content
UNESCO	United Nations Educational, Scientific and Cultural Organization
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization

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Statement regarding the length of the Dissertation

The body of this dissertation, including spaces and notes consists in a total of 152.117 characters.

Abstract

Intellectual Property (IP) rights play a crucial role in cultural and creative industries by protecting their outputs and incentivizing innovation, especially when it comes to copyrights. However, the video game industry appears to diverge from these patterns. This research dissects how copyright issues are managed in the video game industry by analysing the interplay between EU copyright law, international treaties, and national legislation, providing a comprehensive understanding of how copyright ownership can be more appropriately attributed within this rapidly evolving industry.

One of the key focuses of this research is on video games as stand-alone works protected under copyright, while recognizing that the individual elements composing a video game—such as music, graphics, and software code—are also protected by IP rights. Moreover, when analysing the structure of the video game industry, the critical aspect of the role of license agreements emerges, in the sense that these agreements often favour the economically dominant stakeholder, typically the video game publisher, who is usually recognized as the owner of the video game when it comes to copyrights. The research explains the implications of this dynamic on the distribution of copyright ownership and the how other contributors, such as developers and artists, access their copyrights.

Additionally, the thesis explores the role of user-generated content (UGC) within the video game industry. UGC, often considered fan work, adds a creative layer to the original video game, contributing to the development of new genres, promoting the original game, and extending its lifecycle. These practices are frequently encouraged, tolerated or even expressly permitted by the industry, particularly within End User License Agreements. While UGC could be seen as potential copyright infringement, the video game industry often rejects this perspective. The research argues that the pastiche exception would offer a legal avenue that goes beyond the traditional binary of copyright exceptions and infringements, demonstrating that there should be a more structured approach to compensating creators of UGC, offering alternative legal solutions beyond the current reliance on private agreements.

Resumo

Os direitos de Propriedade Intelectual (PI) desempenham um papel crucial nas indústrias culturais e criativas ao proteger suas produções e incentivar a inovação, especialmente no que diz respeito aos direitos autorais. No entanto, a indústria de videogames parece divergir desses padrões. Esta pesquisa examina como as questões de direitos autorais são gerenciadas na indústria de videogames, analisando a interação entre a legislação de direitos autorais da União Europeia, tratados internacionais e legislações nacionais, proporcionando uma compreensão abrangente de como a titularidade dos direitos autorais pode ser mais adequadamente atribuída dentro do contexto dessa indústria em rápida evolução.

Um dos focos desta pesquisa está na proteção de videogames como obras individuais autônomas por direitos autorais, ao mesmo tempo em que se reconhece que cada elemento que compõem um videogame—como música, gráficos e código-fonte—é protegido por PI. Além disso, ao analisar a estrutura da indústria, surge o aspecto crítico da função dos contratos de licença, no sentido de que esses acordos geralmente favorecem a parte economicamente dominante, tipicamente o editor (*publisher*) do videogame, que é normalmente reconhecido como o proprietário dos direitos autorais do jogo. A tese elucida as implicações dessa dinâmica na distribuição da titularidade dos direitos autorais e como outros colaboradores, como desenvolvedores e artistas, têm acesso a seus próprios direitos autorais.

Adicionalmente, a tese explora o papel do conteúdo gerado por usuários (CGU) dentro da indústria de videogames. O CGU, considerado como *fan work*, adiciona uma camada criativa ao videogame original, contribuindo para o desenvolvimento de novos gêneros, promovendo o jogo original e estendendo seu ciclo de vida. Essas práticas são frequentemente encorajadas, toleradas ou até expressamente permitidas pela indústria, particularmente nos Acordos de Licença de Usuário Final. Embora o CGU possa ser visto como uma possível infração de direitos autorais, a natureza da indústria de videogames frequentemente rejeita essa perspectiva. A tese argumenta que a exceção de pastiche ofereceria um caminho legal que vai além da tradicional dicotomia entre exceções legais e infrações de direitos autorais, demonstrando a necessidade de uma abordagem mais estruturada para recompensar os criadores de CGU, oferecendo alternativas legais que vão além de contratos privados.

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Introduction

Humans have been playing throughout the ages; it is possible to find remains of games from ancient Greece, from the Mayan culture and even from the Vikings era, either with the aim of entertainment, for education purposes or as a competitive sport.[1] As Johan Huizinga argued in his book *Homo Ludens* from 1938, the humankind is, essentially, a playful living being that not only plays, in an instinctive way like animals do, but knows that plays (the *Homo Ludens*), making it the ignition spark of complex human social activities. In Huizinga's view, these complex social activities will unfold into several cultural instruments like language, myths and even art.[2] If "[p]lay is an essentially cultural phenomenon",[3] then the video game industry is also a cultural industry.

The United Nations Educational, Scientific and Cultural Organization (UNESCO) considers video games as a cultural and creative industry, together with films, music, books and many others[4] as it is an industry "whose principal purpose is production or reproduction, promotion, distribution or commercialization of goods, services and activities of a cultural, artistic or heritage-related nature."[5] However, this position is not unanimous. The dynamic of the video game industry, different from other entertainment media, has been often overlooked. By considering video games as simple electronic devices or as mere "child pastime", many scholars have, to a certain extent, neglected or marginalized this field of study.[6] In 2006, the Study *The Economy of Culture in Europe* (2006 EC Study) commissioned by the European Commission (EC) found out that video games could be categorized as a toy.[7] Nevertheless, the same Study concluded that the video game industry would be considered "serious business" due to its increasing revenue, especially when compared to other cultural sectors and, therefore, worthy of attention of the EC's cultural strategies.[8]

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[1] Bert Van Oers, 'Culture in Play' in Jaan Valsiner (ed), *The Oxford Handbook of Culture and Psychology* (1st edn, Oxford University Press 2012) 2; Simon Egenfeldt-Nielsen, Jonas Heide Smith, and Susana Pajares Tosca, *Understanding Video Games: The Essential Introduction* (4th edition, Routledge 2020) 2.
[2] Johan Huizinga, *Homo Ludens: A Study of the Play-Element in Culture* (first published 1938, Routledge 1980) 4.
[3] Bert Van Oers (n 1) 31.
[4] International Confederation of Authors and Composers Societies, EY, and UNESCO, *Cultural Time: The First Global Map of Cultural and Creative Industries* (EY 2015).
[5] ibid 11.
[6] James Newman, *Videogames* (1st edn, Routledge 2012) 6.
[7] KEA European Affairs, 'The Economy of Culture in Europe' Study commissioned by European Commission, October 2006, 54 (2006 EC Study).
[8] ibid 270.

By its turn, the EC position over video games as part of the cultural and creative industries has shifted along the decades and it is worth to give a closer look to it. In 2007, the EC approved a tax incentive implemented by France for the video game sector.[9] In this decision, the EC noted that the UNESCO recognizes video games a cultural industry and acknowledges "that certain video games may constitute cultural products."[10] In March 2014, although the EC has approved the tax incentives implemented by the United Kingdon, the discussion over video games cultural status had a shift towards the commercial (not cultural) nature of video games and the economic growth of the sector, which was (and still is) a fast-growing market and, therefore, should not need tax incentives.[11] Couple months later, mirroring that EC discussion, in June 2014, the European Union General Block Exemption Regulation, which allows European Union (EU) governments to allocate more public funds to a wider range of companies without prior approval from the European Commission, did not included the video game sector in the tax incentives for the cultural and heritage industries due to the fact that the EC has considered video games as a pure commercial activity.[12] Although controversial, this decision was not surprising, as it is in line with the discussions on the relative wealth of video game industry. Still in this aspect of tax aids, in 2022 a new guideline was issued, this time by the Council of the European Union in the sense that there should be financial aid to incentivize and leverage the competitiveness of cultural and creative industries, including video games.[13]

Recently, in 2023, the EC commissioned a new Study, *Understanding the value of a European Video Games Society* (2023 EC Study),[14] which, in line with the UNESCO, Council of the European Union and the 2006 EC Study, considered video games as a cultural industry once again. This analysis is worthy of attention, especially because the

[9] Commission Decision 2008/354/EC on State Aid C 47/06 (ex N 648/05) Tax credit introduced by France for the creation of video games (notified under document number C(2007) 6070) [2007] OJ L 118/16.
[10] ibid par 64.
[11]Commission Decision 2014/764/EU on the State aid scheme SA.36139 (13/C) (ex 13/N) which the United Kingdom is planning to implement for video games (notified under document C(2014) 1786) [2014] OJ L 323/1 paras 11-13. For further details on the decision, also see Sigrid Hemels, 'Tax Incentives for the Audio Visual Industry' in Sigrid Hemels and Kazuko Goto (eds), *Tax Incentives for the Creative Industries* (1st edn, Springer Singapore 2017).
[12] Commission Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L 187/1 recital 72.
[13] Council Conclusions 2022/C 160/06 ST/7809/2022/INIT on building a European Strategy for the Cultural and Creative Industries Ecosystem [2022] OJ C 160/13 paras 10 and 23.
[14] European Commission, 'Understanding the value of a European video games society – Final report" Study commissioned by the European Commission, 2023 (2023 EC Study).

authors divided video games not only as a cultural industry but also *for* cultural industries, in a more complex analysis than the one found in the 2006 Study. For instance, while the authors do their analysis from the perspective of the substantial numbers of the fast-growing video game industry, with around 246 million players in 2021 only in Europe,[15] they also analyse the relevance of video games for art (although much debated among artists), community building, promoting cultural heritage, education, and wellbeing.[16] Bearing this in mind, the authors concluded that video games "are an important part of Europe's cultural landscape, as their artistic and creative dimensions distinguish them from other technological products."[17]

While video games are increasingly establishing themselves as a significant cultural industry with a strong economic power, there remains a considerable gap in adapting existing legal frameworks to address their unique characteristics. Unlike other cultural industries, video games operate on multiple levels, involving a diverse array of individuals with various creative, professional, and academic backgrounds in their research, design, and development. Moreover, the protection of the video game as a work as a whole and the imbalance between stakeholders of the industry represents serious issues which are still under debate, not to mention the players, who play an important role in the industry and are, often, marginalized.

Intellectual Property (IP) law, particularly copyright law, is typically applied to cultural and creative industries to regulate such matters. However, applying this framework to video games presents distinct challenges, as above explained. In this context, defining and managing the rights and contributions of all parties involved in the creation of video games becomes a pressing issue. In other words: how can authorship and copyright ownership be appropriately attributed within the video game industry?

In light of this, the analysis will be confined to copyright issues, specifically under EU copyright law, as the focus is on the content of video games. Given that copyright law is not fully harmonized across EU Member States, there are territorial and material scope limitations. In the same sense, international treaties and agreements must be considered, as they underpin EU copyright legislation and commits the EU to various international obligations. Additionally, national legislation, particularly that of Sweden, will be

[15] ibid 38.
[16] ibid 139.
[17] ibid 3.

referenced to illustrate how Member States implement EU copyright law into their own legal systems, offering valuable examples and insights. Although a small, relatively comparing to the United States or the United Kingdon, Sweden represents the average EU video game market in terms of size, while at the same time being hub for innovation and development of the industry in the EU with a projected revenue growth of 13,5% in 2024.[18]

Additionally, other areas of IP, such as trademarks, are excluded from this discussion, as trademarks primarily protect distinctive signs rather than the substantive content of the video game. However, it is important to acknowledge that video game developers and publishers are indeed concerned with branding and commercialization, as the analysis below will demonstrate. Similarly, while competition law is relevant to issues such as market practices and anti-competitive behaviour, it is not the primary focus here, as the thesis centres on the specific legal challenges related to copyright ownership of video games.

To explore how copyright law addresses these challenges and ensure (or not) fair and comprehensive protection for the multifaceted nature of video game creation., I start by delimitating the criteria for what constitutes a video game in copyrights, conceptualizing video games as a complex subject matter (chapter 1). Next, it is essential to understand authorship within the EU legal framework to determine how copyright rights are assigned (chapter 2). If video games are indeed protected by copyrights, it is then necessary to establish to whom these rights should be granted (chapter 3). Finally, there is a need to add a new layer to the discussion. Although video games operate on multiple levels, incorporating individuals with diverse creative background, there is still one component that is missing: the player. Chapter 4 aims to discuss if players would have authorship over their derived creations and if so, how should it be assessed.

[18] 'Video Games - Sweden' (*Statista)* <https://www.statista.com/outlook/dmo/digital-media/video-games/sweden>.

Chapter 1: Defining video games

1.1 From traditional games to modern video games

Video games can be said to be nothing more than electronic type of games, as if a natural evolution of traditional boardgames. For this reason, it would be worth to discuss what is a game and how we can define them. Huizinga's *Homo Ludens* introduces what has been known as the theory of the "magic circle". The "magic circle" is the playground where a game is played, as a counter position to what the author calls throughout his work "ordinary life".[19] "Playing a game, in this view, means setting oneself apart from the outside world [ordinary life], and surrendering to a system that has no effect on anything that lies beyond the [magic] circle".[20] However, this formalistic perspective has been criticized.[21] As affirmed in *Understanding Video Games*, it is readily apparent that games do make impacts in the real world since games require time, interfere with the player's emotions, and can even become part of the "ordinary life" when a component from a game is traded using real money.[22]

Other scholars have engaged in the discussion over the formal definition of a game, raising several theories, among them, Ludwig Wittgenstein in *Philosophical Investigations,* where he defined games as a complex matrix of intersecting and overlapping similarities, encompassing both overarching resemblances and specific detailed correspondences, or, as he calls, "family resemblances".[23] Similarly, Elliott M Avedon and Brian Sutton-Smith see games in a multifaced way, as "an exercise of voluntary control systems in which there is an opposition between forces, confined by a procedure and rules in order to produce a disequilibrial outcome."[24] Marshall McLuhan in *Understanding Media* see games as a cultural product of a society, "collective and popular art forms with strict conventions."[25]

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[19] Huizinga (n 2) 10.
[20] Egenfeldt-Nielsen, Smith, and Tosca (n 1) 33.
[21] See, in general, Mia Consalvo, 'There Is No Magic Circle' (2009) 4 Games and Culture 408; Edward Castronova, 'The Right to Play' (2004) 49 N.Y.L Sch. L. Rev. <https://digitalcommons.nyls.edu/nyls_law_review/vol49/iss1/9/>; Thomas M Malaby, 'Beyond Play: A New Approach to Games' (2007) 2 Games and Culture 95.
[22] Egenfeldt-Nielsen, Heide Smith, and Tosca (n 1) 34-35.
[23] Ludwig Wittgenstein, *Philosophical Investigations* (first published 1953, G.E.M. Anscombe tr, 3rd edn, Blackwell 1968) 32.
[24] Elliott M Avedon and Brian Sutton-Smith, *The Study of Games* (1st edn, Wiley 1971) 7.
[25] Marshall McLuhan, *Understanding Media: The Extensions of Man* (reprint, MIT Press 1994) 257.

Roger Caillois went further. Besides criticising Huizinga's magic circle, which he calls as "at the same time too broad and too narrow",[26] in *Men, Play and Games* he proposes that games should be sorted into four different categories, that can be combined, according to the characteristic of the game. For instance, a game where there is a lucky component when playing it would be categorized as *Alea* (chance). If a game has a strong feature of role playing, then it would be categorized as *Mimicry* (imitation). The other two classifications are *Agôn* (competition) and *Ilinx* (perception).[27] While the latter encompasses games that perform physical sensations as in video game simulators, the former would represent games in which the competition factor stands out, as in sports like football or races. These various play categories can be further examined along the continuum between *paidia* and *ludus.*[28] As well summarized by the authors of *Understanding Video Games,* while in *paidia* there are no rigid rules and the outcome, whether winning or losing, is inconsequential, in *ludus* the opposite happens, as the rules are stricter and, by meeting all the rule's conditions, one might win the game.[29]

Although different, all the definitions above are related to traditional games only. When transposed to video games, numerous challenges become apparent. Let us take Caillois' *ludus* and *paidia*, for instance. As well pointed out in *Understanding Video Games,* "video games differ from traditional games in the sense that their rules are enforced by the computer [software] (…) and thus not open to the same type of negotiation possible in traditional board games like chess."[30] If, on one hand, there is a need to consider video games as a stricter system of rules than traditional games, on the other, there is a need to acknowledge the open-ended universes conceived in modern video games,[31] that allow players to choose between actively pursuing objectives and leisurely exploring the in-game environment,[32] enabling the player to switch between *ludus* and *paidea* as desired. Within this rationale, both *ludus* and *paidia* cannot be opposites as proposed by Caillois, but complimentary to each other.[33]

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[26] Roger Caillois, *Man, Play, and Games* (first Illinois paperback, Meyer Barash tr, Univ of Illinois Press 2001) 4.
[27] ibid 12–13.
[28] ibid 13.
[29] Egenfeldt-Nielsen, Heide Smith, and Tosca (n 1) 37.
[30] ibid 38.
[31] ibid.
[32] ibid.
[33] ibid.

The infinite possibilities that a player might have in a video game raises another challenge when applying traditional game definition to video games. By engaging with the video game, the player not only is embraced by the rules, but might also turn into an element of video games. Chris Crawford tackles this point by considering *Interaction* as one of the four key principles part of a video game. He claims that the interactions between players and the game in a computer game "injects a social or interpersonal element into the [game] (…) [and] transforms a passive challenge into an active challenge",[34] as opposed to the interactions that happen in, for instance, puzzles, toys, and stories, which are much simpler than the ones that happens in video games.

On one hand, while introducing *Interaction* and the encompass of the player's viewpoint when defining video games might be a novelty, on the other, Crawford's ideas of Representation, Conflict and Safety are very close to Huizinga's magic circle of traditional games. As Crawford claims that a computer game must allow players to fantasise that they are in a different reality to the real world, while trying to overcome "active, responsive, purposeful obstacles (…) [but] excluding their physical realizations."[35] As already refuted above, the idea of a "parallel reality" for games does not materialize, as games are always interfering in the "real" world. The same is valid to video games: as technology evolves, they are becoming more and more realistic, to an extent that real life objects are being now accurately reproduced, what might imply into real world consequences. Take for instance the French case Ferrari Spa (Ferrari) *vs* Take Two Interactive France (publisher of the video game *Grand Theft Auto*), where Ferrari claimed design infringement over the reproduction of their car in the defendant's video game.[36] As the barrier between reality and video games is getting thinner, a definition that only encompasses video games as simple electronic devices is not sufficient. As seen above, interactivity must be an element, but not only. Technology must also be taken into consideration, as it is one of the driven forces of the video game industry, as it allows the

[34] Chris Crawford, *The Art of Computer Game Design* (Osborne/McGraw-Hill 1984) 9-10.
[35] ibid 11-12.
[36] Cour d'appel de Paris Pôle 5 26 January 2016, n° 2014/10931. For more case law see Monika A Górska and Lena Marcinoska-Boulangé, 'When 3-D Objects in Video Games Pose IP Challenges' (*International Bar Association*, 8 December 2021) <https://www.ibanet.org/ip-july-2021-3d-object-video-games-ip#_edn12>.

processing of more and more complex rules, data and graphics that build entire new worlds.[37]

One of the most relevant definitions of video games in the EU doctrine comes from the above-mentioned 2006 EC Study. However, it does not delve into the main aspects of vide games, as the 2006 EC Study describes them as "an electronic or computerized game played by manipulating images on a video display or television screen."[38] Considering the previous arguments presented in this chapter, several issues can be extracted from this definition. The main one is that the definition is overly broad. To frame video games as computerized games is not enough when it comes to modern video games, considering the development of the industry so far. By associating video games to a computer, it is possible to infer that any kind of game that has some level of computerised interaction is a video game. For instance, if a boardgame that has a part of its gameplay played with the use of a computer, it is not clear, from the definition, if these games would be considered as video games.

Things get even more blur in the sense that the 2006 EC Study sees video games as a clear evolution of traditional games, as it considers video games as games with a technological plus. As previously discussed, this perspective is incorrect since it overlooks the interactivity element and technological advancements in both software and hardware that turn video games in a distinct medium. Moreover, the definition, to my view, is outdated. Technology has evolved and the definition given only includes reference to computers, video displays and television, leaving aside elements such as internet access, mobile devices and artificial intelligence, which are of major significance for the industry and have changed the way players play.[39] VR glasses, for example, removes the need for a video or television screen to play a video game. In other words, to consider video games as a game that is on the screen, ignores all technological efforts and layers of interactivity that a video game has, and might open a debate to what is or is not a video game under the 2006 EC Study's view from a pure hardware perspective.

For these reasons, a clearer definition should be adopted, including not only delimitations on its scope, but also the key elements of interactivity and technology. The above-

[37] F. Willem Grosheide, Herwin Roerdink, and Karianne Thomas, 'Intellectual Property Protection for Video Games - a View from the European Union' (2014) 9 JICLT 1, 2.
[38] KEA European Affairs (n 7) 270 (emphasis added).
[39] Willem Grosheide, Roerdink, and Thomas (n 37) 2.

mentioned 2023 EC Study was a missing opportunity to address the matter and provide an updated definition. Since the EC has failed in providing a definition that fits the needs and features of video games, legal doctrine might give some answers. The definition put together by Gonçalo Frasca, fill the gaps left by the 2006 EC Study definition, as he considers video games as a "*computer-based* entertainment *software*, either *textual or image-based*, using *any* electronic platform such as personal computers or consoles and involving one or multiple players in a physical or networked *environment*."[40]

By using words such as "computer-based" and "environment", Frasca's definition encompasses both elements of technology and interactivity that are so intrinsic to video games and were missing in the former definition. It is interesting that both definitions use the word "computer" to address video games, but the use of the word in Frasca's definition is broader, in the sense of embrace all technology elements that exists in video games, in contrast to what is found in the 2006 EC Study. Frasca's definition also solves the discussion about the hardware, as "any electronic platform" would fit as a hardware for video games. Finally, Frasca's definition also adds a new layer over the discussion: what are video games made of? By stating that video games are made of software and audiovisual features at the same time, Frasca's concept leads us to a debate over the hybrid nature of video game. This has been recognized by the WIPO, as the agency states that a video game is made of "pictures, video recordings and sounds, and software, which technically manages the audiovisual elements and permits users to interact with the different elements of the game."[41]

Interactivity and technology are key elements that are mandatory to be in the core of any definition for video games. Due to the own analogue nature of traditional games, it is not possible to get to same level of sophistication that video games achieve when combining both elements. To my view, this represents more than just an evolution of traditional games; it is a completely new industry that complements traditional games, highlighting the importance of both.

[40] Gonzalo Frasca, 'Videogames of the Oppressed: Videogames as a Means for Critical Thinking and Debate' (MA thesis, Georgia Institute of Technology 2001) 4 (emphasis added).

[41] World Intellectual Property Office, 'Video Games' (*WIPO*) <https://www.wipo.int/copyright/en/activities/video_games.html>.

1.2 EU and national legal definitions for video games

Looking from an EU IP law perspective, video games are a very interesting subject to analyse. The legal treatment of video games in the EU primarily revolves around copyright laws because they are constituted by computer programs (software) and audiovisual elements and both these types of subject matter might constitute works of authorship if the legal requirements are fulfilled and, therefore, subject to copyrights protection, as the open list of art. 2 of the Berne Convention enables to classify video games as literary and artistic works.[42]

Considering the current EU IP legislation, there are thirteen Directives and two Regulations that partially harmonize "essential rights of authors, performers, producers and broadcasters."[43] When it comes to the audiovisual aspects of a video game, the InfoSoc Directive[44] is one of the main legal sources which standardizes specific elements within copyright and related rights in the information society. As per art. 1(2)(a) InfoSoc Directive precludes its provisions of being applied to software, which is under the Software Directive.[45] In fact, art. 1 of the Software Directive aligns computer programs with the status of literary works as defined in accordance with the Berne Convention.[46] If, on one hand, both audiovisual and software are protected under EU copyright law, on the other, both Directives stipulate different requirements for a work be protected either as an audiovisual work or as a software. Although it is clear that each element of a video game – music, design, underlying computer code – might be protected under copyright law, there is a heated debate over the protection of the video game as a whole.[47]

Due to the fact that IP law is only partially harmonized in the EU, as matter of territoriality and national supremacy, national legislation must be taken into consideration. When

[42]Berne Convention for the Protection of Literary and Artistic Works (adopted 09 September 1886, last revised on 28 September 1979) 1161 UNTS 3 (Berne Convention) art 2.
[43] European Commission, 'The EU Copyright Legislation' (*Shaping Europe's digital future*, 2 July 2023) <https://digital-strategy.ec.europa.eu/en/policies/copyright-legislation>.
[44] European Parliament and of the Council Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 1671/10 (InfoSoc Directive).
[45] European Parliament and of the Council Directive 2009/24/EC on the legal protection of computer programs [2009] OJ L 111/16 (Software Directive).
[46] "In accordance with the provisions of this Directive, Member States shall protect computer programs, by copyright, as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works. For the purposes of this Directive, the term 'computer programs' shall include their preparatory design material." Software Directive, art 1(1).
[47] For a comment on how the UK courts struggled with this concept, see Yin Harn Lee, 'Copyright and Gaming' in Tanya Aplin (ed), *Research Handbook on Intellectual Property and Digital Technologies* (Edward Elgar Publishing 2020) 45–46.

applying copyrights for video games (the work as a whole), certain jurisdictions primarily perceived video games as computer programs, given the distinct characteristics of these works and their reliance on software.[48] In such cases, the video game will be protected under Computer Program laws. Conversely, other legal jurisdictions might consider video games as pure audiovisual works or something in between, [49] what can raise legal insecurities that might be crucial for the industry to operate and develop in the EU market.

In the study *The Legal Status of Video Games* (WIPO Study) for the WIPO, the authors have researched the legislation of several countries, among them, seven are currently part of the EU: Denmark, Spain, France, Belgium, Sweden and Italy. According to the WIPO Study, despite neither of the above-mentioned countries have expressly included video games when transposing the EU directives, nor have any mention to computer games in their national legislation, all of them consider video games, by analogy, as works eligible for copyright protection. However, the discussion over to protect the video game as a whole work or each element continues at strike. For instance, while in Denmark, "a fragmentary protection of all the elements embodied in the [video game] (including graphics, musical works, computer code and audiovisual works)"[50] is guaranteed by national law, the majority of the above-mentioned countries recognize video games dual nature of software and audiovisual work, although each national court and doctrine has a different approach on this matter.

In Sweden, for instance, although video games are not expressly defined nor classified for copyright purposes in the same sense of the other jurisdiction above mentioned, the Swedish Copyright Act rules that, "[a]nyone who has created a literary or artistic work shall have copyright in that work, regardless of whether it is (1) a fictional or descriptive representation in writing or speech, (2) a computer program, (3) a musical work or a work of scenography, (4) a cinematographic work, (5) a photographic work or another work of fine art, (6) a work of architecture or applied art, (7) a work expressed in some other manner".[51] This means that, due to its complexity, video games elements could be classified under any of the categories of art. 1 of the Swedish Copyrights Act and,

[48] WIPO, *Video games* (n 41).
[49] WIPO, *Video games* (n 41).
[50] Andy Ramos, 'The Legal Status of Video Games: Comparative Analysis in National Approaches' (World Intellectual Property Organization 2013) 31.
[51] Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk art. 1 (Swedish Copyright Act).

consequently, different rules will apply depending on the category of each individual work.[52]

However, when it comes to the discussion of the work as a whole, Sweden has an interesting case law. In case MD 2011-29,[53] when accessing if the device sold by the defends constitute a circumvention of TPM in order to allow counterfeit copies of games being played in Sony's console *PlayStation 3*, the Swedish Market Court found that "the game with its pre-recorded sequences of moving images with sound, i.e. sequences which do not vary from game to game depending on the player's commands, contains independent cinematographic works."[54] What is most striking about this case law is that the Swedish Market Court understanding of video games as cinematographic works went against earlier Swedish Supreme Court case law.[55] The justification found by the Market Court was that the specific circumstances of the Supreme Court's case law were different from the ones the Market Court was judging.[56] Scholars, by their turn, point out that the Market Court usually does not encompass rulings involving such categorizations of copyright. Therefore, this ruling should be considered an outlier, indicating that video games can receive protection as a literary work – either under computer program or as graphic interface, but not under cinematographic works.[57] This is a clear example of what was argued above, in the sense that there is no discussion when it comes to protect individual elements of the video game, but in the protection of the work as a whole CJEU had to intervene.

1.3 The CJEU's concept of video games

As mentioned in the previous section, there is a lack of harmonization when it comes to acknowledge video games as literary works either throughout Member States or even between national courts, as the Swedish case law has demonstrated. In Italy, the *Tribunale di Milano*, by its turn, classified video games in the referral to Court of Justice of the European Union (CJEU) in Case C-355/12 *Nintendo Co Ltd and others v PC Box Srl*., as not being "simply as computer programs but are complex multimedia works expressing

[52] Alexandra Alquist, 'Is TPM a Dirty Word? Digital Rights Management-Systems and Video Games within the EU' (MA thesis Lund University 2013), 21; Ramos (n 51) 86.
[53] Marknadsdomstolen [MD] [Market Court] 2011 case no. 2011-29 (Swed).
[54] ibid para 57.
[55] ibid para 56.
[56] ibid para 57.
[57] Ramos (n 51) 85–86; Alquist (n 52) 21.

conceptually autonomous narrative and graphic creations. Such games must therefore be regarded as intellectual works protected by copyright."[58]

In *Nintendo v PC Box*,[59] the famous video game developer claimed that PC Box (the defendant) release a device (console) that could circumvents Nintendo's technological protection measures (TPMs) to prevent the play of illegal copies of their games. The defendant did not deny that their device could be used as a console to play the illegal copies, but also could be used as multimedia player for other video games, CDs, DVDs, etc. Moreover, PC Box claimed that Nintendo was compartmentalizing the market by using geo-blocking measures over the content and raising market barriers over independent software/game developers. If on one hand Nintendo was trying to prevent IP infringement by acts without authorization over their portfolio, on the other, PC Box was claiming lack of proportionality and interoperability in Nintendo's TPMs.

In summary, the Italian referring court sough for a preliminary rule over which Directive, Software or InfoSoc, should be taken into consideration when it comes to TPMs and how broad should be this interpretation in matter of if it should embrace only the video game itself or the consoles in which these video games are played as well. The CJEU reply was in the sense that the "effective protection measures" of art. 6(3) of the InfoSoc Directive must be interpreted in a broadly way, leaving to the national court to analyse if these TPMs were, in fact, proportional in the sense to prevent unauthorized acts.[60]

Although the background of this case law was about TPMs, the Court brought a definition of video games that was, so far, a novelty in the EU legal framework: "[video games are a] *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. In so far as the parts of a videogame, in this case, the graphic and sound elements, are part of its originality, they are protected, together with the entire work, by copyright in the context of the system established by Directive 2001/29*."[61]

Here, the CJEU considered video games as an 'entire work' encompassing not only the computer program but also graphic and sound elements. Consequently, it was deemed

[58] Case C-355/12 *Nintendo Co Ltd and others v PC Box Srl* EU:C:2014:25 Opinion AG Sharpston para 25.
[59] Case C-355/12 *Nintendo Co Ltd and others v PC Box Srl* EU:C:2014:25.
[60] ibid paras 37-38.
[61] ibid para 23.

eligible for copyright protection under the InfoSoc Directive as *lex generalis*,[62] which mandates that Member States grant exclusive rights over 'works' in general sense.[63] The CJEU definition is not only way superior and complex than the 2006 EC Study, but it also confirms that video games are not just an evolution of boardgames (simple subject matter), but it also highlights the hybrid nature of video games as the above-mentioned definition proposed by Frasca. In fact, the confirmation that video games are a complex subject matter "as well as a stand-alone object of protection (…) means that [video] games cannot be reduced to simple form of software, but rather may implicate several other different types of copyright subject-matter"[64] is welcomed.

By establishing a definition for video games as a work as a whole, the Court not only ensured video games a status of intellectual works,[65] but also diminished the legal uncertainty scenario across the national legislations in EU, a topic explored in detail in this chapter. It is important to highlight that for the purpose of this thesis, the analysis will be made considering the video game as the work as whole. However, it is impossible to ignore the existence of the several elements that constitute video games, specially when it comes to the intricate relationship between stakeholders of the video game industry.[66]

Given that video games (work as a whole) are protected by copyrights, a pertinent inquiry emerges: to whom should these IP rights be granted? This issue relates to the fact that video games operate on multiple levels, incorporating individuals with diverse creative, professional, and academic backgrounds in the fields of games research, design, and development, thereby creating various layers of authorship. The intricate nature of authorship in the realm of video games sets the stage for a deeper exploration of the evolving dynamics within the concept of author in the context of the EU copyright law.

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[62] For further details and critique regarding the application of *lex generali* by the CJEU see Tito Rendas, 'Lex Specialis(Sima): Videogames and Technological Protection Measures in EU Copyright Law' (2014) 37 European Intellectual Property Review.
[63] Lee (n 47) 47.
[64] Amy Thomas, 'Can You Play? An Analysis of Video Game User-Generated Content Policies' (Zenodo 2022), 4 <https://zenodo.org/record/6564948>.
[65] Eleonora Rosati, 'Nintendo Ruling Confirmed Lex Specialis Nature of Software Directive: Does This Have Implications for UsedSoft Exhaustion?' (*The IPKat*, 26 January 2014) < https://ipkitten.blogspot.com/2014/01/nintendo-ruling-confirmed-lex-specialis.html>.
[66] As I will further develop in Chapter 3.

Chapter 2: Authorship: subject matter and originality

2.1: The lack of legal definition

Jane C. Ginsburg claims that the author is a central figure when it comes to copyrights.[67] Since 1710, under the Anne Statute in the UK,[68] the discussion over "who is or can be the author" matters from the simple fact that there is no way to pursue copyrights without discussing to whom grant these rights. However, as both Ginsburg and Amin Gebru agree, the interests of large corporations, are often prioritized, creating an imbalance between these corporations, authors and users.[69] As I progress through this chapter and the following one, it will become evident that the discourse on authorship, especially in video game industry, is intricately connected to relationships of power and the economic benefits of ownership over a work.[70]

The definition of "author" is still open in the international copyright legal framework. The Berne Convention, to begin with, does not define who is an author, leaving this assignment to contracting parties.[71] Sam Ricketson and Ginsburg recognize the "agnosticism" of the Berne Convention when it comes to consider as author a legal entity or a natural person,[72] however, they see the acceptance of legal entities as authors as an exception: "That is, were it not the general Berne expectation that the 'author' and first owner would be a human being, it would not have been necessary to provide specifically for the vesting of rights in 'makers'."[73] Other scholars such as Dénes Legeza claim that the Berne Convention has a broad definition to authorship, admitting the possibility to other than a natural person could be entitled to copyrights. For Legeza, art.14*bis* does not bring an exception, but it "differentiates the owner of the copyright from the other authors, (…) and does not preclude the legal persons as authors"[74] especially when the Berne Convention provides specific clauses for cinematographic works, by stating that "[t]he

[67] Jane C Ginsburg, 'The Concept of Authorship in Comparative Copyright Law' (2003) 52 DePaul L. Rev. 1063.
[68] When, for the first time, the author was considered as right holder. See ibid 1064.
[69] Aman Gebru, 'Communal Authorship' (2024) 58 University of Richmond Law Review 337; Ginsburg (n 69).
[70] Ginsburg (n 67) 1067.
[71] Berne Convention, art. 14bis. Also see Martina Lattacher, 'Authorship Matters! Authorship in the EU with a Focus on Film.' (2021) 2 Stockholm Intellectual Property Law Review, 56.
[72] Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights* (OUP 2022), 370.
[73] ibid.
[74] Dénes Legeza, 'Employer as Copyright Owner from a European Perspective' (SERCI Annual Congress, Glasgow, September 2015) 6–7.

owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work".[75]

The absence of definition for "author" in the Berne Convention is not an exception in the international framework. In fact, this seems to be the international copyright legal framework standard, since even more recent international treaties as the TRIPS Agreement and the WIPO Copyright Treaty do not give any further elucidation regarding this matter: curiously, both treaties refer to the Berne Convention when it comes to authorship.[76] In this sense, the latest Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright Related Rights Terms (WIPO Guidelines),[77] reinforce its perspective of author as a natural person, concurring with Ricketson and Ginsburg's arguments above,[78] but it also adds on another layer to the discussion as it interprets art.2(6) of the Berne Convention by putting the concepts of "work" and "author" at the same level, indicating that authorship only happens in intellectual creations which qualify as works of authorship, and only those whose intellectual creative activity brings these works into existence are considered authors.[79] This reminds us that the discussion over author and authorship is wider than just the discussion over the author themself, as well pointed by Gebru, "[w]hile the lay person understanding of authorship is broader, the copyright system has created specific requirements that must be met before the status of an author is attained."[80] The so-called requirements mentioned by Gebru are two, as copyright law safeguards solely the way *ideas are expressed*, not the ideas per se (idea/expression dichotomy) and a work must be original.[81]

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[75] Berne Convention, art. 14*bis*.
[76] Lattacher (n 71) 56. The Rome Convention and the WIPO Performances and Phonograms Treaty give some guidance over the beneficiaries of the rights and broad definitions for performers only. See Mireille van Eechoud and others, 'Harmonizing European Copyright Law: The Challenges of Better Lawmaking' (2009) 19 Information Law Series, 48.
[77] The WIPO Guideline is a document where the WIPO aims to elucidate and expound upon the legal principles embedded in the treaties administered by the WIPO. See World Intellectual Property Organization, 'Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright Related Rights Terms' (WIPO 2003) (WIPO Guidelines).
[78] WIPO Guideline defines authors as: "The creator of a *work*. In general, a physical person – the intellectual creator of the *work*. Some national laws, however, also recognize the *authorship* of legal entities – such as employers, *producers*, etc. – who take the initiative and responsibility for the creation of the *work* (and who, in general, through determining the objectives and certain features of the *work* to be created, also have a direct or indirect impact on the nature, style and contents of the *work*)." ibid 269.
[79] ibid 31.
[80] Gebru (n 69) 9.
[81] World Intellectual Property Organization, *WIPO Intellectual Property Handbook* (Publication n° 489e, WIPO 2004) 40–42.

In the aspect of the expression of idea, the Berne Convention in its art. 2(1) provides a non-exhaustive list of literary and artistic works, which encompasses "every *production* in the literary, scientific and artistic domain, whatever may be the mode or form of its *expression*".[82] By its turn, the WIPO Guideline interprets the word "production" of art.2(1) of the Berne Convention in a broad way as "[a] mere idea is obviously not yet a production; it is only transformed into a production when it is developed into a concrete form of expression."[83] In the same sense, art. 9 of the TRIPs Agreement that rules: "[c]opyright protection shall extend to *expressions* and *not to ideas*, procedures, methods of operation or mathematical concepts as such".[84] A similar provision can be found in art.2 of the WIPO Copyright Treaty (WCT)[85]

Regarding the originality requirement, all the above-mentioned international treaties use several times the expression "original work(s)", but they lack any additional elaboration on the criterion of originality. Conversely, the WIPO Guideline defines originality as "the *author's* own *intellectual creation*, (…) not copied from another work."[86] It is important to note the difference between the use of the expression "original works" in both situations. While in the former the expression is often used in the context of derivative works, in the latter the originality requirement is in a sense of original creation. It is also important to mention that "[t]he ideas in the work do not need to be new but the form, be it literary or artistic, in which they are expressed must be an original creation of the author (…) independent of the quality or the value attaching to the work."[87]

The Berne Convention states that the author is the one who puts his or her name on a work.[88] If to exist an author there is a need to exist a creative expressed work, it makes sense, to me, that the discussion over authorship has shifted towards the work of authorship, and, consequently, to the requirements of originality – or *author's own intellectual creation* - and the idea/expression dichotomy. As much as both concepts are

[82] Berne Convention, art. 2(1) (emphasis added).
[83] WIPO Guidelines (n 77) 23.
[84] Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, as amended by the 2005 Protocol Amending the TRIPS Agreement) 1869 UNTS 229 (TRIPS Agreement) art. 9(2).
[85] "Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such." World Intellectual Property Organization Copyright Treaty (adopted 20 December 1996) TRT/WCT/001 (WTC) art. 2 (emphasis added).
[86] WIPO Guidelines' (n 77) 300 (emphasis added).
[87] WIPO, *WIPO Intellectual Property Handbook* (n 81) 42.
[88] Berne Convention, art. 15.

integral to the EU legislative framework, significant debate continues regarding these conditions and their practical application, as the definitions of "author" and "work of authorship" remain unharmonized, turning the attention to CJEU case law, as it will be discussed in the next section.

2.2: EU works of authorship

Some might claim that when it comes to authorship, the EU copyright legal framework provide some level of harmonization. It does happen, in fact, in specific situations where the EU legislator opted to acknowledge authorship to specific individuals. For instance, art. 2 of the Software Directive[89] stipulates as author of a computer program the natural person, following the above-mentioned international standard. The second part of art. 2(1) and art.2(2) of the Software Directive rule over the assessment of collective works and joint works, respectively, always considering the natural person as the primarily right holder. However, art.2(3) of the Software Directive opens the possibility to entitle as author a legal entity ("employer"). Art. 3 of the Software Directive confirms this interpretation by stating that "[p]rotection shall be granted to all natural or legal persons eligible under national copyright legislation as applied to literary works."[90] A similar provision can be found in the Database Directive.[91] The main differences are, first, that the Database Directive left the assignment of the provision over work made for hire, as there is in the Software Directive, to Member States.[92] Second, the terminology of both Directives is not the same, but scholars consider that this is not significant enough to converge to different interpretations, especially when it comes to collective and joint works.[93]

Another situation would be authorship on cinematographic works: the Satellite and Cable Directive[94] and the Rental and Lending Rights Directive[95] stipulates as author the

[89] Software Directive, art. 2.
[90] ibid, art. 3.
[91] European Parliament and of the Council Directive 96/9/EC on the legal protection of databases [1996] OJ L 77/20 (Database Directive) art. 4.
[92] ibid, recital 29.
[93] van Eechoud and others (n 76) 50.
[94] Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L 248/15 (Satellite and Cable Directive) art. 1(5).
[95] European Parliament and of the Council Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L 376/28 (Rental and Lending Rights Directive) art. 2(2).

principal directive of a cinematographic work. Similarly, art. 2(1) of the Term Directive[96] and art 2(2), that adds as co-authors "(…) the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work"[97] for the purpose of term protection, regardless of they are designated or not as co-authors.[98] Although software and cinematographic works are strictly connected to the video game industry, as mentioned in the previous chapter, the legal provisions above mentioned are not very helpful in evolving the discussion regarding authorship in general. To achieve a certain level of harmonization, there is a need for the European Union copyright regulatory framework to provide a formal and general definition for the concept of author, without leaving the assignment to each Member State.

This scenario of lack of definition and provisions persists when it comes to the criteria on assessing works of authorship. Following the international standard, the EU legislator opted to leave the concept of works of authorship unharmonized."[99] Surprisingly, this is not very problematic. As the authors of *Harmonizing European Copyright Law* have argued, the lack of definition, in this case, allows complex subject matters such as video games and other digital multimedia works to be included in the scope of literary works.[100] However, regardless of the nature of the work of authorship, there is still the need for understanding what encompasses works of authorship.

Regarding the requirement of *expression of idea*, none of the thirteen directives nor the two regulations on copyrights approach the idea/expression dichotomy.[101] One might say that the Software Directive addresses the criteria, as its art.1(2) rules that "[i]deas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright under this Directive."[102] However, as argued in *Harmonizing European Copyright Law*, the Software Directive, in the same way of the other EU legislations, does not "detail how the overarching notion of a work of authorship is to be interpreted."[103] As for the originality criteria, the EU legislator

[96] European Parliament and of the Council Directive 2006/116/EC on the term of protection of copyright and certain related rights [2006] OJ L 372/12 (Term Directive) art. 2(1).
[97] ibid, art. 2(2).
[98] Lattacher (n 71) 44.
[99] van Eechoud and others (n 76) 39.
[100] ibid.
[101] ibid 47.
[102] Software Directive, art. 1(2).
[103] van Eechoud and others (n 76) 34.

addresses it as “author’s own intellectual creation”. Starting with the above-mentioned Software Directive, its art. 1(3) rules that “[a] computer program shall be protected if it is original in the sense that it is the author's own intellectual creation (…).”[104] By its turn, art. 3(1) of the Database Directive also addresses “databases which , by reason of the selection or arrangement of their contents, constitute the author’s own intellectual creation (...).”[105] In the Term Directive, Art 6 uses the same expression for photographs,[106] and adds to the discussion the expression “reflecting his personality”.[107]

Although originality is more commonly addressed in the EU legislation when comparing to the idea/expression dichotomy, there is still a lack of guidance over the interpretation of both requirements, as it happens with the concept of authorship. In the words of Martina Lattacher, this results in "legal uncertainty, fragmentation, and a lack of effectiveness within EU copyright legislation."[108] The authors of *Harmonizing European Copyright Law* agree and add that there is also a lack of transparency, due to the fact that all the few provisions that do exist are found in different legislations.[109] To clarify these aspects would be the role of the CJEU. By analysing CJEU case law, it is possible to assess authorship in the same sense that the WIPO Guidelines did, “as the terms 'author' and 'work' are inextricably connected, looking at CJEU case law that clarifies the definition 'work' in connection with copyrightable works contributes to finding a definition for authorship.”[110] In this sense, I have selected leading CJEU case law regarding works of authorship, more precisely, the requirements of expression of idea and originality.

2.3 CJEU case law: expression of personal stamp

In *SAS Institute Inc. v World Programming Ltd*,[111] the idea/expression dichotomy was addressed by the Court when judging a case where the plaintiff claimed copyright infringements over their computer code by the defendant due to the fact that the defendant

[104] Software Directive, art. 1(3).
[105] Database Directive, art. 3(1).
[106] “Photographs which are original in the sense that they are the author's own intellectual creation shall be protected in accordance with Article 1. No other criteria shall be applied to determine their eligibility for protection. Member States may provide for the protection of other photographs.” Term Directive, art. 6
[107] ibid, recital 16.
[108] Lattacher (n 71) 57.
[109] van Eechoud and others (n 76) 70.
[110] Lattacher (n 71) 59.
[111] Case C-406/10 *SAS Institute Inc v World Programming Ltd* EU:C:2012:259.

used materials (more precisely, user guides) from SAS Institute Inc (the plaintiff) in order to create their own computer program ("World Programming System"). The defendant's program is so alike the program created by SAS Institute Inc. that it can emulate SAS components. In other words, it "enables users of the SAS System to run the Scripts which they have developed for use with the SAS System on the 'World Programming System'."[112] It was not alleged, however, that the defendant copied the computer code, but only the underling idea and elements of the original program.

Bearing this in mind, the CJEU analysed if in the scope of Software Directive, operational capabilities of a computer program, alongside its programming language and data file format utilized to harness specific functions, represent a mode of original expression of ideas within that program and, consequently, be eligible for copyright protection.[113] The Court found that these elements constitute ideas and principles which underlie the elements of the program and are, therefore, excluded from copyright protection. The CJEU emphasized that to consider these as copyright subject matter would monopolize ideas to the detriment of technological innovations.[114] By stating this, the Court reinforces the idea/expression dichotomy as a principle, that "serves to counterbalance the rights of authors in their work and the public interest in order to allow unrestricted access and exchange of ideas."[115]

In *Levola Hengelo BV v Smilde Foods BV,*[116] the Court decided in the sense of preventing the taste of a food to receive copyright protection.[117] However, in its decision, the Court has given another piece of guidance regarding how to interpret "works of authorship". To the CJEU, confirming previous case law and what was stated above, two cumulative circumstances (conditions) must exist in a work for it to receive copyrights protection: it must be an expression of an idea, in the sense of being "identifiable with sufficient

[112] Tatiana Synodinou, 'Decrypting the Code: CJEU SAS vs. World Programming' (*Kluwer Copyright Blog*, 5 July 2012) <https://copyrightblog.kluweriplaw.com/2012/05/07/decrypting-the-code-cjeu-sas-vs-world-programming/>.
[113] *SAS Institute Inc.* (n 111). para 29.
[114] ibid paras 31 and 40.
[115] Lattacher (n 71) 60.
[116] Case C-310/17 *Levola Hengelo BV v Smilde Foods BV* EU:C:2018:899.
[117] ibid para 46.

precision",[118] therefore excluding "taste"; and be original, in the sense of authors' own intellectual creation.[119]

The concept of authors' own intellectual creation is better explored in case *Infopaq International A/S v Danske Dagblades Forening,*[120] when the Court has interpreted if the reproduction right established by art.2 of the InfoSoc Directive was infringed by Infopaq for scanning news articles (eleven words extract) without prior authorization from right holders. The CJEU found that Infopaq activities do not fall in the scope of art. 5 exceptions,[121] but it would be a matter for the national court to decide upon the entitlement of a work as copyright protectable in the sense of "author's own intellectual creation."[122] As seen, the EU legislator has only considered author's own intellectual creation for software, database, and photographs. It was the CJEU, through case law that expanded this standard of originality to other copyright subject matter, giving guidance towards harmonization in this aspect. This case is also emblematic in the sense that, by establishing that an eleven words extract could be protected by copyrights, the CJEU has set up a very low ground for the originality threshold.

In *Painer v Standard VerlagsGmbH and others*, the Court have added another layer to the discussion over authors' own intellectual creation. When discussing if a portrait would receive copyrights protection, the CJEU decided that regardless the way the work is expressed, if the originality threshold is achieved by authors' free intellectual and creative choices and *personality*, then this work is copyrightable.[123] Considering that the background of this case is a photograph, the use of the word "personality" is a quite interesting the choice made by the Court, which I believe it is not by chance, as it mirrors Recital 16 of the Term Directive, validating that the author's personal touch is part of the originality threshold. From these CJEU case law it is possible to conclude that the author is the one who puts their name on an intellectual work, regardless of its nature, that is expressed with sufficient rigor, and it is a product of author's own free, creative and

[118] ibid para 40.
[119] ibid para 35-37.
[120] Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* EU:C:2009:465.
[121] ibid para 74.
[122] ibid para 51.
[123] Case C-145/10 *Painer v Standard VerlagsGmbH and others* EU:C:2011:798 para 99.

personal choices, as "for copyright to arise, works need to bear the personal stamp of the author".[124]

But what would be this "personal stamp" of a copyright protected work? This was the question made by the Swedish Patents and Market Court of Appeal (*Svea hovrätt, Patent- och marknadsöverdomstolen*) when refereed to the CJEU case *Mio AB, Mio e-handel AB, Mio Försäljning AB* (Mio) *v Galleri Mikael & Thomas Asplund Aktiebolag* (Asplund).[125] The issue at stake centres at if a table manufactured by Asplund enjoys copyright protection as a work of applied arts. Among the questions made by the referral court, one is regarding on how should be the assessment over the originality criteria, in the sense of "whether the examination of originality should focus on factors surrounding the creative process and the author's explanation of the actual choices that he or she made in the creation of the subject matter or on factors relating to the subject matter itself and the end result of the creative process and whether the subject matter itself gives expression to artistic effect."[126] In other words: should the personal aspect of the originality requirement flow from the author to the work or the other way around?

The *Mio* case is a clear continuation of other similar cases with the same background regarding protection of works of applied arts under copyrights.[127] As odd as it might sound, as this is not a case of literary and artistic works but of applied arts, this case might have an important outcome on how interpret the originality threshold, depending on the findings of the Court. On one hand, if the Court states that the author's own intellectual creation must be interpretated in the sense of the process of creation and creative choices made by the author, flowing from the author to the work, the originality criteria would be very low and subjective. On the other hand, if the Court states that the originality criteria should concern to the work of applied art itself, other issues may rise. As mentioned on the summary of the request for a preliminary ruling, the work would have to achieve a certain level of independence and to assess the degree of artistry of the work,[128] which would lead to an assessment over the degree of artistry. This would go against the Berne

[124] Lattacher (n 71) 61.
[125] Case C-580/23 *Mio AB, Mio e-handel AB, Mio Försäljning AB v Galleri Mikael & Thomas Asplund Aktiebolag* CJEU.
[126] ibid.
[127] See Case C-683/17 *Cofemel — Sociedade de Vestuário SA v G-Star Raw* EU:C:2019:721 and Case C-833/18 *SI, Brompton Bicycle Ltd v Chedech/Get2Get* EU:C:2020:461.
[128] Case C-580/23 Mio AB, Mio e-handel AB, Mio Försäljning AB v Galleri Mikael & Thomas Asplund Aktiebolag Summary of the Request for a Preliminary Ruling Pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice para 16.

Convention and WIPO interpretation, as the quality of the work is not relevant for copyright protection, nor be subject to a "imaginativeness test" or any kind of formalities[129] Bearing this in mind and previous CJEU case law as the ones above mentioned, I would say that the CJEU's possible outcome would probably be in the sense that the assessment over originality might consider both the author's creative choices upon the expression of the idea, the literary and artistic work itself, without, however, imposing any kind of formality.

From the international scope, passing through EU law, national law and CJEU case law, it is possible to conclude that the discussion over authorship is far from being solved. Something that may pass unnoticed is that the sole author perspective has been taken into consideration in the majority of the scenarios. As well put by Gebru, "[c]opyright law's origins are based on a romanticized view of the individual author creating original expression. The system has begrudgingly accepted joint authorship in the form of team-authored works"[130]

As discussed in chapter 1, video games as a whole work constitute a complex subject matter characterized by collaborative efforts, involving multiple individuals in the production process. This collaborative nature mirrors that of cinematographic works, which are often cited as prime examples of collective authorship. However, while specific legislative provisions exist for films as previous analysed, video games, along with other collaborative subject matters, lacks such clarity.

Lattacher criticizes this scheme, arguing that if we use the approach of author's own intellectual creation in the sense of the author's personal stamp, only the leader of such work would be considered as author. The so-called leader would be the one with more power, either economical or creative, disregarding the contributions of other collaborators.[131] Consequently, this approach risks marginalizing individuals with significant creative or economic input, perpetuating disparities in authorship recognition. Furthermore, the absence of standardized criteria for assessing authorship across Member States and even within national jurisdictions contributes to a lack of harmonization. [132]

[129] WIPO, *WIPO Intellectual Property Handbook* (n 81) 42; Berne Convention, art. 5(2). Also see Ginsburg (n 67) 1065.
[130] Gebru (n 69) 78.
[131] Lattacher (n 71) 62.
[132] ibid 65.

This case-by-case assessment often results in inconsistent determinations of authorship, leading to legal uncertainty and reinforcing power imbalances within the industry. In the forthcoming chapter, I aim to utilize the conceptual and legal insights on authorship previously examined applied to the video game sector.

Chapter 3: Ownership dynamics: copyright holders in the video game industry

3.1 The complexity of the video games industry

As analysed on the previous chapter, the original author of a work of authorship is, by rule, the human who created the work. For this work to be considered as work of authorship, and therefore, receive copyrights protection under the EU legislation, it must achieve conditions of being an expression of an idea and the originality threshold of author's own intellectual creation. However, as seen, to be categorized as literary or artistic work it is not as straightforward as it sounds, especially when it comes to joint or collective authorship work, such as video games. The interplay between creators, corporations, and users within the video game industry is not a merely transactional exchange but a complex negotiation of power dynamics that influences the attribution of authorship and the control over copyright assets. Exploring these nuanced relationships sheds light on the broader implications for the creative landscape and the evolving nature of copyrights in the realm of video games.

Various sources outline the organization of the video game sector in a uniform fashion.[133] Christina Teipen has summarized the industry in Figure 01 below. What is interesting about Teipen's approach is that she underscores the role of license agreements as the bond between stakeholders. She also decided to illustrate the value chain of the video game sector horizontally, giving the idea that there is no hierarchy between the market players, although, as I will further discuss, this is not actually true.

[133] 'Video Games - Worldwide' (*Statista - Market Insights,* March 2024) <https://www.statista.com/outlook/dmo/digital-media/video-games/worldwide>; Christina Teipen, 'Work and Employment in Creative Industries: The Video Games Industry in Germany, Sweden and Poland' (2008) 29 Economic and Industrial Democracy 309, 314; European Commission, 'Understanding the value of a European video games society – Final report" (Publications Office of the European Union 2023) (2023 EC Study) 33.

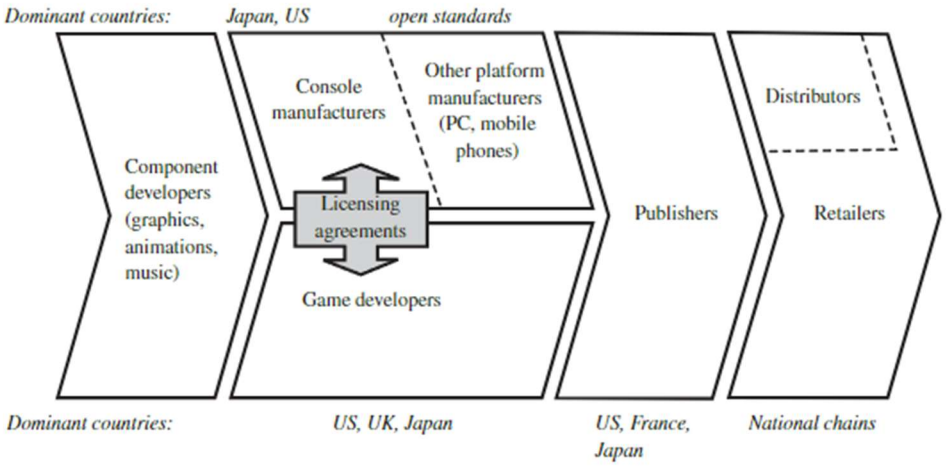

Figure 01 – value chain of the video game industry[134]

Game developers or development studios are the ones in charge of the production of the video game. It is them who come up with storytelling, sketches, and characters, for example. In Europe, the majority of companies that are part of the video game industry are development studios. According to the 2023 EC Study, 81% of the EU market is composed of game developers.[135] However, these companies are small and medium enterprises. If we take the Swedish market for instance, 85% of game developers employ less than ten people,[136] what creates an indie and export-oriented market as the other actors of the sectors are outside of the EU.[137] This scenario does not mean, however, that there are no big development studios in the EU. The 2023 EC Study gives as examples of successful companies Mojang (Sweden), the developers of *Minecraft*, King Digital Entertainment (Sweden), famous for mobile video games as *Candy Crush Saga*, and companies that developed AAA[138] games like CD Projekt Red's (Poland) *Cyberpunk 2077*. As found out by the 2023 EC Study, the main market barriers pointed out by market players are lack of economic investments (specially to indie companies) and strong international competition (mainly from the perspective of big companies).[139]

Publishers, however, have a more comfortable situation when it comes to finances, although these companies represent less than 1/3 of the EU video games market share.[140]

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[134] Teipen (n 133) 314.
[135] There are, approximately, 5.000 development studios across the EU while only 203 video game publishers. 2023 EC Study 103–104.
[136] ibid 105.
[137] This is a trend that has not changed in the EU for the last twenty years, as data from 2004 already showed this tendency. Teipen (n 133) 316–317.
[138] AAA or Triple A games are games that have a higher budget and merchandizer when compared to the average of the sector. 2023 EC Study 23.
[139] ibid 58–57.
[140] ibid 104.

The reasons behind this are due to the fact that publishers are the responsible ones for bringing a video game to consumers. They finance both independent and in house development studios, from production to marketing strategies. If on one hand publishers assume financial risks, as *nobody knows* if a title will be successful or not, on the other they get into license agreements with game developers to hold copyrights and tend to get the "lion's share" on profits to compensate these risks.[141]

If independent development studios need to negotiate with publishers to see their video game getting off the drawing board from an economic perspective, they also need to negotiate with console manufactures as "[t]he decision to which platform games will be developed for determines decisions about the budget, the choice of employees and techniques".[142] Often, these negotiations are mediated by the publisher, who is demanding a certain technology, for example, while in other cases, the developers are free to choose the platform which they want to negotiate. Console manufacturers or platform manufacturers are companies that produce the hardware in which the video game will be played, usually a console like PS5 (Sony), XBOX (Microsoft) or Nintendo Switch (Nintendo). Currently, there is no major European manufacturer in the sector,[143] meaning that even major European stakeholders like Ubisoft (France) need to enter into international licence agreements. It is important to highlight that big manufactures can also have their share from other sectors of the market. For instance, Nintendo has its own game developer studio and publishes its own video games. The *Super Mario Saga* is an example of Nintendo's activities throughout the market.[144]

In parallel, component developers are also part of the video game sector. These professionals can come from a range of expertise and include musicians, designers, animators, actors, voice actors etc and can be hired as freelancers (working with game developers in specific tasks), as an in-house team (i.e. musicians hired by big video games companies to compose the entire soundtrack of the video game) or to even as employees of third-party companies (experts in 3D animation or other specific technology).

Finally, the retailers are the ones responsible for organizing the sales of the video games. Although the golden age of analogue devices and products was until 2000's, there is still

[141] Teipen (n 133) 314–315.
[142] ibid 315.
[143] 2023 EC Study 27.
[144] 'List of Mario Games' (*Fandom*) <https://nintendo.fandom.com/wiki/List_of_Mario_games>.

market for physical products sold by local distributors. The Internet, the advent of digital and mobile gaming aligned with the digital nature of the video games marked a significant shift in the sector. App stores like Google Play (Alphabet) and Apple Store (Apple), alongside the rise of digital retail and distribution platforms such as Amazon, Valve Steam, and Epic Game Store, have revolutionized the dynamics of video game sales.[145]

While video games as a stand-alone work in the terms of CJEU's *Nintendo v PC box* decision, it is not possible to simply ignore the existence of all the elements that constitute a video game and have their own copyright protection if the legal requirements were satisfied. For instance, visual artists and art directors hold copyrights over original artworks like character designs, maps, and architectural renderings.[146] Meanwhile, audio elements such as musical compositions, voice recordings, and sound effects are attributed to composers, voice actors, and songwriters.[147] Other key contributors, including game artists, writers, scriptwriters, and animators, might hold copyrights over video elements such as images, animations, and text. Similarly, game designers and interface artists retain rights over storytelling aspects, encompassing original scripts, plotlines, character development, narrative structure, and gameplay concepts.[148] By their turn, programmers and game designers play crucial roles in the software aspect of game development. They are tasked with crafting the computer code that forms the backbone of a game, encompassing elements such as the primary game engine, ancillary code, and plug-ins.[149]

3.2 The use of license agreements

Although video games are a stand-alone work in terms of copyright protection, as seen, several other elements that constitute video games are also protected by copyrights or *sui generis* rights. To manage all economic and moral rights would not be possible due to the large amount of right holders, making the industry suffer from its own structure. In light of this, license agreements and contracts in general have a pivotal role in order to regulate copyrights ownership and the exploitations of these rights. For instance, the relationship between developers (a natural person) and the development studio is, often, a relationship

[145] 2023 EC Study 22.
[146] ibid 71.
[147] ibid.
[148] ibid.
[149] ibid. Also see David Greenspan and Gaetano Dimita, *Mastering the Game* (WIPO 2022) 59 for other components of a video game that might fall under IP protection, not only when it comes to copyrights, but also other IP branches.

of employment. The developer, as seen, is the creator of the computer code. By its turn, a computer code is an expression of idea and, if an author's own intellectual creation, is, therefore, a *sui generis* literary work, copyrightable under the EU legislation.[150]

In 2021, during the production and release of the video game *Aemon Must Die*, former employees of Limestone Games (Estonian development studio) claimed copyright ownership over the computer code as well over graphic elements, as they defend that these elements were developed outside the scope of the employment contract and that they did not receive appropriate economic compensation for the work.[151] In the meantime, the publisher (the French company Focus Home Interactive) released a press note in the official X account of the game confirming that both companies co-own IP rights of the video game.[152] To date, no formal legal procedure has been tracked regarding this case; however, it is worth a closer look as two completely different situations unfold.

As seen in Chapter 1, the CJEU found in *Nintendo v PC Box* that a video game should be considered as a stand-alone work, as it "compris[es] 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*. In so far as the parts of a videogame, in this case, the graphic and sound elements, are part of its originality, they are protected, *together with the entire work*, by copyright in the context of the system established by Directive 2001/29."[153] This precedent raises significant questions on complex subject matters, as they would fall only partially in the scope of the Software Directive, and, therefore, the InfoSoc Directive would be applied instead.[154]

On one hand, if the above-mentioned decision is applied an analogous way to the developers of *Aemon Must Die*, the employment relationship between the developers and Limestone Games would be irrelevant from a pure copyright perspective, as the InfoSoc

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[150] Software Directive, art. 1(1).

[151] European Innovation Council and SMEs Executive Agency, 'Copyright in Video Games, and Trade Marks for Remote Controls' (*IP Helpdesk - NEWS BLOG*, 15 October 2021) <https://intellectual-property-helpdesk.ec.europa.eu/news-events/news/copyright-video-games-and-trade-marks-remote-controls-2021-10-15_en>; James Batchelor, 'Former Aeon Must Die Developers Issue Fresh Demands to Focus and Limestone as Game Finally Launches' (*GamesIndustry.biz*, 14 October 2021) <https://www.gamesindustry.biz/former-aeon-must-die-developers-issue-fresh-demands-to-focus-and-limestone-as-game-finally-launches>.

[152] Aeon_Must_Die, 'Press Note - Aeon Must Die' (*X*, 12 October 2021) < https://x.com/Aeon_Must_Die/status/1447902909862227968>.

[153] Case C-355/12 *Nintendo Co Ltd and others v PC Box Srl* EU:C:2014:25 para 23 (emphasis added).

[154] Tito Rendas, 'Lex Specialis(Sima): Videogames and Technological Protection Measures in EU Copyright Law' (2014) 37 European Intellectual Property Review 11-12.

Directive does not regulate employment relationships, meaning that there is a need to dive in national legislation. If we take the Swedish legislation, the Swedish Copyright Act, prevents legal entities to be considered as original right holders of copyrights. Therefore, only through license agreements, as ruled by art. 27 and following articles of Chapter 3 of the Swedish Copyright Act, which, overall, respect the principle of freedom of contracting, a legal entity would be considered as secondary right holder.[155] In other words, regardless of the employment contract, there would have to exist a license agreement (or, at least a provision regarding IP rights in the contract of employment) between the developers and Limestone Games in order to Limestone to have copyrights ownership.

On the other hand, to exclude computer codes in the case of video games and, consequently, other complex subject matter, from the protection of the Software Directive would rendering hollow the idea behind this Directive. As well analysed by Tito Rendas, "the Court's understanding of the *lex specialis* doctrine in *Nintendo v PC Box* means that the Software Directive provisions on TPMs would be applicable only to acts relating to an exceptional minority of computer programs – those that are not composed of any other copyrighted works."[156] However, to consider each individual element of the video game would mean that the computer software created by the developers of *Aemon Must Die* should be a separated element from the graphic works. Consequently, the graphic work would continue to be licensed by contracts as mentioned above, but the computer code would fall in a completely different scenario, as the Software Directive should be the one to be applied. In terms of art. 2(3) of the Software Directive, a sort of work made for hire scheme was established, therefore, if a computer code is created under a relationship of employment, it is the employer who shall be entitled to exercise economic rights. It is important to highlight that the Software Directive, following the lead of recital 19 of the InfoSoc Directive, does not provide any guidance regarding moral rights.

Meanwhile, national legislation might also add interesting elements to the discussion. For instance, when transposing art. 2(3) of the Software Directive, the Swedish legislator decided to innovate. Art. 40a of the Swedish Copyright Act, not only replicates the work made for hire scheme of the Software Directive, but also stipulates that in this situation

[155] Swedish Copyright Act, art.27 ff.
[156] Rendas (n 154) 15.

all copyrights are to be transferred to the legal entity, unless otherwise agreed.[157] By changing the original text of the Software Directive, the Swedish doctrine agrees that the legislator would have meant the transfer of both economic or moral rights to the employer.[158] For Jan Rosén, the Swedish legislator's actual intention was likely to substantially diminish moral rights associated with computer programs authored by employees, while avoiding conflicts with the minimum standards outlined in the Berne Convention. However, for him, it is unclear how subsequent licenses and transfer of ownership would work, just as how such legal entity (the employer) would dispose of a moral right.[159] Either way, from the above explanation it is possible to infer that, under the EU and Swedish legislation, a developer that is the original author of a computer code under a relationship of employment would have her copyrights transferred to their employer, unless otherwise agreed.

As *Aemon Must Die* case shows the lack of legal certainty in the video game industry, reinforcing the need for well drafted, tailored contracts, it also demonstrates the intricate relationship between development studios and employees. Regardless of the path chosen by the video game development studio, there will be risks, but also inquiries about fair remuneration and abusive contractual clauses, proving that license agreements are not a silver bullet for the video game industry. Another interesting effect is that the position of dominance and influence of a party may vary according to the stakeholders involved on the contract. For instance, while development studios have a strong dominance over developers (natural person), the situation reverses when it comes to their relationship with publishers.

Helldivers 2 is a very unusual situation that shows that apart from the lack of legal uncertainty, as a creative and cultural industry video games also face the *nobody knows* effect. As Richard E. Caves argues, while contract theory focuses extensively on asymmetrical information, typically occurring when one party possesses more information over the subject matter of the agreement which are unknown to the other party, within creative industries a different dynamic emerges. [160] Due to the *nobody knows* effect, both parties are unaware of the circumstances and eventual consequences of the

[157] Swedish Copyright Act, art.40a.
[158] Jan Rosén, *Swedish software law: as related primarily to EC directives* (Juristförlaget 1995), 13.
[159] Jan Rosén, 'Moral Right in Nordic Law' (ALAI Conference in Moral Rights in the 21'st Century: The changing role of the moral rights in an area of information overload, Brussels, 18-19 September 2014) 12.
[160] Richard E Caves, 'Contracts Between Art and Commerce' (2003) 17 Journal of Economic Perspectives 73, 75.

contract, being hard to define financial compensations, especially from a copyright perspective, as it is impossible to predict if a creative work will be successful or not.

In February 2024, *Helldivers 2* was published by Sony and developed by the indie Swedish Arrowhead Game Studios. In one month (March 2024), the video game has achieved more than 450.000 simultaneous players and sold more than 8 million copies.[161] The numbers surprised everyone in the sector, showing the that the *nobody knows* effect can happen even with very large, experienced publishers. Caves argues that "*nobody knows* [effect] would matter little if the inputs to a flopped creative effort could be salvaged and reused. However, the ubiquitousness of sunk costs denies the producer that protection. A creative good's suppliers must snag enough rents from each hit to cover the losses on several flops."[162] This was exactly how Sony reacted. After three months of surprisingly success, Sony turned mandatory to have a PlayStation Network (PSN) account in order to play *Helldivers 2*. To have a PSN account, the user must live in a country in which PSN is available and share personal data and user information that would be used for publicity purposes.[163] The game community reacted in a very bad way, flooding Steam with more than 200.000 negative reviews after the announcement.

The CEO of the studio development announced on the social media X that, although they were still trying to find a middle-ground solution, Sony's decision to turn mandatory to have a PSN account to play the video games was an unilateral, and the developers were contractually binding to it.[164] After the video game being pulled out from 177 countries due to unavailability of PSN and received a massive negative response from the public, Sony reversed its decision after a couple of days.[165] Although it was not possible to analyse the agreement between Arrowhead and Sony, this situation is a clear example about how complex (and perhaps imbalanced) the relationship between development studios and publishers can be.

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[161] Jason Schreier, '"Helldivers 2" Is a Surprise Hit for Sony in an Oversaturated Market' (*Newsletter Game On*, 15 March 2024) <https://www.bloomberg.com/news/newsletters/2024-03-15/-helldivers-2-is-a-surprise-hit-for-sony-in-an-oversaturated-market?sref=P6Q0mxvj>.
[162] Caves (n 160) 74.
[163] Sony Interactive Entertainment, 'Playstation Network Terms of Service and User Agreement' (*Sony Interactive Entertainment*) <https://www.playstation.com/en-us/legal/psn-terms-of-service/>.
[164] Pilestedt, 'PSN Mandatory Account to Play Helldivers2' (*X*, 5 May 2024) < https://x.com/Pilestedt/status/1787251973927940297>.
[165] Kat Bailey, 'PlayStation Reverses Course on Helldivers 2 PSN Account Requirement' (*IGN*, 5 June 2024) < https://www.ign.com/articles/playstation-reverses-course-on-helldivers-2-psn-account-requirement>.

3.3 The main contractual imbalances in videogame production

From the above, it is possible to affirm that the video game industry is intrinsically dependent on contract law. This does not mean that copyrights are inconsequential. Copyright law is what delimitates the scope of each license agreement, the boundaries of economical and moral exploitation of a work. In other words, "[d]espite copyright's limitations, it still has a responsibility to protect the rights of creators."[166] However, employees and component developers rarely can sell or promote their work outside the video game in which they are cooperating, since it would not have any commercial value, as it is often a part or an element of a bigger artistic work,[167] demonstrating once more the need to discuss video games under copyrights as the work as whole. Whitin this context, it is possible to say that authorship detaches from ownership, in the sense that although the first author is, often, the human being, this license scheme does not allow them to also exercise ownership, as it will be the strongest market player (often, the publisher) the one with exclusive economic rights over each element of the video game as well as the work as a whole.

In light of this, while Figure 01 effectively demonstrates the bond between stakeholders, it inaccurately represents the architecture of the video game industry, which operates vertically rather than horizontally, as publishers wield more economic power than studio developers, and studio developers may obtain economic advantages over employees and component developers and so on. Video games are then owned by the most powerful stakeholder, which most of times is the publisher. From a copyright perspective, this creates a scenario where only one person is considered as author, leading to what Lattacher has criticized: the existence of a central author tends to dominate decision-making and direction, potentially minimizing the roles and input of team members despite their valuable contributions. To avoid this, musicians, voice actors, designers, developers and many others only receive the credits for their works, "in a graduated manner so as to

[166] Melinda J. Schlinsog, 'Enderman, Creepers, and Copyright: The Bogeymen of User-Generated Content in Minecraft' (2013) 16 Tulane Journal of Technology & Intellectual Property 205 <https://journals.tulane.edu/TIP/article/view/2629>.
[167] Daniela Simone, *Copyright and Collective Authorship: Locating the Authors of Collaborative Work* (Cambridge University Press 2019) 193.

incentivise and reward contributors in a proportionate fashion"[168] in the same way as it happens in the film industry.[169]

Although this scheme may raise significant issues in the fields of competition law, which will not be covered in this thesis but can be explored in future research, there are very scarce case law regarding discussion of authorship in the video game industry and in the cultural sector in general.[170] Daniela Simone, based on an opinion from 2002 of the EC, argues that this is a sign that contracts and license agreements are, in fact, effective tools to regulate ownership issues and further harmonization on collective works are not necessary.[171] However, one must bear in mind that when it comes to contracts, especially in the scenario depicted above, there is a risk of imbalance between the parties. Lattacher, in the specific scenario of licensing agreements, agrees that there are not many disputes concerning authorship, however "the limited number [of litigations] (...) is also a sign of the imbalanced bargaining powers between authors on the one hand, and publishers and producers on the other hand."[172]

From a legal perspective, when it comes to license agreements regime, the EU legislator tends to do not interfere, leaving to Member States the task to legislate about provisions on this matter.[173] It was only in 2019 with the Digital Single Market Directive (CDSMD)[174] that the EU legislator aimed to harmonize, at least partially, some practices in the creative industry. Arts. 18 to 22 offer a set of mostly *ex post* provisions (except for art. 18)[175] with the aim to establish a more balanced relationship between authors and companies from the creative and cultural industry, trying to reduce information asymmetry and equivalence bargaining power in contractual negotiations (fair and

[168] ibid 197.
[169] For a full analysis in video game credits, see Hyerim Cho, Heather Moulaison-Sandy, and Chris Hubbles, 'Authorship Metadata for Video Games: "Collaborator", "Creator", or "Auteur"?' (2021) 8 NASKO <https://journals.lib.washington.edu/index.php/nasko/article/view/15863>.
[170] Martina Lattacher, 'Authorship Matters! Authorship in the EU with a Focus on Film.' (2021) 2 Stockholm Intellectual Property Law Review, 58; Simone (167) 192–193.
[171] Simone (n 167) 192–193.
[172] Lattacher (n 170) 58.
[173] Ula Furgal, 'Creator Contracts: Report on the Implementation of Chapter 3 of the Directive on Copyright in the Digital Single Market' (European Composer and Songwriter Alliance 2022) 03 <https://composeralliance.org/media/721-creator-contracts-report-on-the-implementation-of-chapter-3-of-the-directi.pdf>.
[174] European Parliament and of the Council Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC PE/51/2019/REV/1 [2019] OJ L 130/92 (CDSMD).
[175] Furgal (n 173).

proportionate remuneration).[176] However, when considering their application, particularly in the context of the video game sector, certain limitations become apparent.

First, the focus of art. 18 to 22 provisions on contractual negotiations and the relationship between authors and companies poses a challenge when attempting to apply them to the video game industry. Given that much of the sector revolves around software development, the intricacies of these contracts would be out of the scope of the CDSMD as art. 23(2) prevents these provisions to be applied to computer code contracts.[177] Moreover, in the terms of recital 72 of the CDSMD, these provisions only apply to authors as natural persons and are not applied to employment contracts, nor to user generated content.[178] While some of these exclusions may be justified by the distinct nature of the agreements, it underscores the difficulty in effectively addressing the multifaceted nature of creative production within the video game industry through a singular legislative framework. This indicates that any potential litigation concerning these contracts will be resolved behind closed doors, as seen in the case of *Aemon Must Die*, and discussions regarding fair remuneration and abusive clauses may not come to public attention, repeating the pattern found by Simone, in a vicious cycle.

3.4 Video game and film industry: different subject matters

In addition to examining the complexities of the video game industry, it is instructive to draw parallels with another collective creative domain: the film industry. By exploring the legal frameworks, production processes, and copyright considerations within both industries, we can gain valuable insights into the challenges and opportunities inherent in creative and cultural endeavours in the digital age. Just as video games are characterized by collaborative efforts and the convergence of various artistic elements, so too are films.

In fact, there are so many similarities between the two sectors that some jurisdictions even consider video games as cinematographic works. As explained in chapter 1, the Swedish

[176] ibid.

[177] "Members States shall provide that Articles 18 to 22 of this Directive do not apply to authors of a computer program within the meaning of Article 2 of Directive 2009/24/EC." CDSMD, art. 23(2). Also see Furgal (n 173) 09.

[178] "Authors and performers tend to be in the weaker contractual position when they grant a licence or transfer their rights, including through their own companies, for the purposes of exploitation in return for remuneration, and those natural persons need the protection provided for by this Directive to be able to fully benefit from the rights harmonised under Union law. That need for protection does not arise where the contractual counterpart acts as an end user and does not exploit the work or performance itself, which could, for instance, be the case in some employment contracts." CDSMD, recital 72.

Market Court,[179] in a controversial decision, considered video games consisted of several independent works, categorized as computer program, musical works, cinematographic works, and audiovisual works.[180] The Market Court surprisingly confirmed that, although the hybrid nature is also considered by the doctrine, the audiovisual elements could also be considered as cinematograph works according to the national and case law.[181]

The film industry, by its turn, as well as the video game sector, has a large chain of skilled contributors, from the plot of the movie to management, technical support, logistics, special effects etc. Producers, studios, and directors, however, are contributors with way more economic and creative power when comparing to the rest of the value chain.[182] As both industries are marked by substantial expenses and considerable risks, just like publishers from the video game sector justify the need to hold copyrights over the video game work to compensate these risks, producers and studios use the same excuse to claim authorship over films. Directors, by their turn, justify the need due to the *personal* stamp that they can provide to a movie.[183] In fact, it is not unusual to see movie posters advertising the last "creation" of a certain director and film critics often discuss about the style and signature elements of a certain director.[184]

Bearing in mind the above, as it happens to the video game sector, there is an intricate relationship between players of the film industries. For instance, while major stakeholders may assemble complete teams, bypassing intermediaries and mitigating copyright risks, small and medium players often need to negotiate license agreements with individual artists and musicians for the use of their work, either in video games or films. This is also common with video elements, that frequently require specialized technologies beyond the studio's expertise, necessitating the involvement of component developers.

If video games and films have shared similarities of being examples of collective authorship, especially when it comes to market architecture, this ends here. Films, unlike video games, have been specifically addressed by the international, EU and, consequently, national copyright legislations as specified in chapter 2. Simone argues,

[179] Marknadsdomstolen [MD] [Market Court] 2011 case no. 2011-29 (Swed).
[180] ibid para 30.
[181] See Andy Ramos, 'The Legal Status of Video Games: Comparative Analysis in National Approaches' (World Intellectual Property Organization 2013) 85-86.
[182] Simone (n 167) 161–162.
[183] ibid 164; Teipen (n 133) 319.
[184] New York Film Academy, 'Styles of Filmmaking: Exploring the Brands of Famous Directors' (*New York Film Academy*, October 2023) < https://www.nyfa.edu/student-resources/nyfa-building-your-brand/>.

however, that, in practice, the film industry does not rely on copyright law to assure ownership over the works, but in private ordering. For her, "[e]conomic control of a film tends to be streamlined through the assignment of rights by contributor's via contract"[185] since companies, in general, are not the original right holder under EU copyright law, but natural persons.

Although this fact might bring both industries closer together again, the type of license agreement typically used in the film industry does not include a software component, which is mandatory in the video game industry, as per the discussions above. This means that films, although collaborative works, do not share the hybrid nature of video games and even if one can argue that films could be a complex subject matter, it does not share the same legal uncertainties that video games face, since there are several provisions regarding authorship in the copyright legal framework.

Another significant distinction between films and video games lies in a fundamental aspect. As discussed in chapter 1, interaction, alongside technology, is a crucial element of video games. In contrast, this characteristic is absent in the film industry. While there are interactive movies, interactivity alone does not define a movie. In contrast, interactivity is intrinsic to video games, transforming players from mere spectators to engaged participants and fostering a sense of belonging within the game world.

In fact, "[p]layers who interact with a high frequency around a game (…) may develop a particular set of norms and forms of interaction"[186] creating a sense of fan community around a specific video game (the so-called game community) that "don't hesitate to discuss, often fiercely, the rules of a video game."[187] An example illustrating the influence of the gaming community can be seen in the aforementioned *Helldivers 2* case. As mentioned, when Sony obliged players to subscribe to a PSN account, there was a massive wave of complaints from the game community. While Sony did not reverse their decision solely due to player critiques, it is clear that this fan movement played a significant role.

As much influence as the game community can wield, most players, even when considering themselves a fan, still typically maintain a passive role, interacting with video games solely within the game itself. However, there are instances when a player

[185] Simone (n 167) 159.
[186] Simon Egenfeldt-Nielsen, Jonas Heide Smith, and Susana Pajares Tosca, *Understanding Video Games: The Essential Introduction* (4th edition, Routledge 2020) 325.
[187] ibid 38.

transcends this passive role and begins creating new content within the game's framework. The next chapter aims to analyse player behaviour in this active role, specifically focusing on the creation of user-generated content and if whether these players can be considered authors of their creations, building upon the arguments presented thus far.

Chapter 4: User generated content in the video game industry

4.1 User as a creative innovator

In the words of Greg Latowska "[v]ideo games (…) are inchoate media. They must be played to be experienced, and no two players will play a video game in exactly the same manner."[188] As seen in chapter 1, interactivity allows the player to change from *ludos* to *paidea* without any discretion, allowing the player to perform variable interactions with the interface of the video game that would be distinct of what developers and designs would have planned for that game, creating a new path or even a different solution to overcome (or not) the obstacles of the game.

Due to the undoubtable interactive nature of video games, many scholars have studied about the role of the player's performance of the video game and if it could be protected under copyrights. Here, the doctrine diverges. While some consider that the player's creative choices in executing the rules of the game might be creative enough to be protected under copyrights either as an author or as performer,[189] others argue that the experience the player faces when playing the video game is nothing more but the action that is expected from the player.[190] Even if the player decides to engage with the video game in a different way from what it is logically expected, they will, invariably, be attached to the video game world. As Marie-Laure Ryan argues, the user (in this case, the player) is part of a pre-stablished narrative (the video game itself). Although the act of playing the video game may be loosely connected to the narrative, as there might be variations, the control over the outcomes of the player's performance still belongs to video game authors.[191]

Amy Thomas argues that even if it would be possible to acknowledge that a player is a performer or would have authorship over the execution of the game rules, "such an argument has yet to be explicitly recognised in legislation or by courts."[192] In fact, the

[188] Greg Lastowka, 'Copyright Law and Video Games: A Brief History of an Interactive Medium' (2013) SSRN Electronic Journal 11 <http://www.ssrn.com/abstract=2321424>.
[189] Dan L. Burk, 'Owning E-Sports: Proprietary Rights in Professional Computer Gaming' (2013) 161 University of Pennsylvania Law Review 1535; Lastowka (n 188).
[190] Bruce E. Boyden, 'Games and Other Uncopyrightable Systems' (2011) 18 George Mason Law Review.
[191] Marie-Laure Ryan 'The Interactive Onion: Layers of User Participation in Digital Narrative Texts' in Ruth Page and Bronwen Thomas (eds), *New narratives: stories and storytelling in the digital age* (University of Nebraska Press 2011) 44.
[192] Amy Thomas, 'Copyright and the Player' (2023) Glasgow University 7 < https://eprints.gla.ac.uk/316945/>.

definition of video games provided in chapter 1 and how the industry is currently structured (chapter 3) does not leave space to acknowledge the player as an author or as a performer in the sense of the player's performance within the game, and nor should it. Instead, my focus in this Chapter is directed towards examining the content generated by the active player that is not solely related to their performance.[193]

Meta-interactive works, from the perspective of the video game industry is a work created by the active player (unlike the passive player, who just execute the rules of the video game)[194] in the sense that expands the world of that video game, without any control of the author of the video game, and it comes in different shapes and sizes: new levels, avatars, storytelling, comments, mockery, etc.[195] From this, it is possible to infer two facts: the first is that this kind of content is nothing more than user generated content (UGC); the second is that this kind of UGC is a transformative, derivative fan work.

4.2 Beyond the traditional amateur standards

UGC is an umbrella term for several types of content which is created by users. According to Marta Iljadica, UGC can be an original or a derivative creation of a solo user, of a community or of collective effort.[196] When it comes to UGC original creation, the word "original" assumes here the double meaning mentioned in chapter 2: it is both original in the sense of not derived from previous work, but also in the sense of author's own intellectual creation. Although there is much debate over the original contribution of this type of UGC (in both senses), I will not address it here, as it falls outside the scope of this thesis.[197]

Derivative UGC creations, however, represents exactly the type of content which is created by the active player of video games. Players involved in the game community create works that expands the world of the underlying video game, either outside the video game such as live streaming or pre-recorded video footages of their own playthrough adding comments, critics, hints and even humour elements (the so-called "Let's Play"

[193] Marie-Laure Ryan (n 191) 59.
[194] Greg Lastowka, 'Minecraft as Web 2.0: Amateur Creativity & Digital Games' in Dan Hunter, Ramon Lobato, Megan Richardson and Julian Thomas (eds), *Amateur Media: Social, cultural and legal perspectives* (Routledge 2013) 162.
[195] For further details, see Haihan Duan and others, 'User-Generated Content and Editors in Video Games: Survey and Vision', (IEEE Conference on Games (CoG), August 2022).
[196] Marta Iljadica, 'User Generated Content and Its Authors' in Tanya Aplin (ed), *Research handbook on intellectual property and digital technologies* (Edward Elgar Publishing 2020) 170–183.
[197] For details over this topic see ibid 170.

videos), game photography, machinima,[198] and fan arts; or in-game, such as video game modifications (mods). These kinds of fan work represent the most common UGC expressions in video games.[199]

In the same line of Ryan's meta-interactive content, Iljadica classifies this type of UGC as a "highly interactive UGC" which is a derived creation of (often) a solo user. However, she does not considers it as a fan work,[200] as, to her, fan works are a different type of derived UGC, which is created by a community, not by a sole user.[201] Rebecca Tushnet, on the other hand, agrees that fan works are "communal because it is inherently iterative",[202] but she claims that it does not mean that fan works are created by a community. In fact, the attribution of a fan as an author of UGC, even with the use of a pseudonym, "does remain a constant [in fan communities], with plagiarism off-limits and credit to fan authors vital because credit is the only recognition most fans receive."[203] Game communities, by their turn, are fan communities in all aspects, made of "forums and *fan* pages, putting millions of people together through their collective *passion* for a game or a game genre, sharing tips, tricks and even developing their own variants of their favourite games (mods) or art and stories with their favourite game characters."[204] If the active player of a video game engages with the game community, and creates UGC for and to the community, UGC in video games are, therefore, for the purpose of this thesis, a derived, fan work, solo creation.

Although I have identified the type of UGC that is often produced in the video game industry, there is, still, a lack of definition of UGC in general. The Organisation for Economic Co-operation and Development (OECD) declares that, even though there is no

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[198] Machinima is "[t]he practice of manipulating video games to produce animated films" in Simon Egenfeldt-Nielsen, Jonas Heide Smith, and Susana Pajares Tosca, *Understanding Video Games: The Essential Introduction* (4th edition, Routledge 2020) 327. Often, machinima brings a completely new storytelling involving the characters of the video game. For further details see Karin Wenz, 'Claiming Authorship? Machinima Production and the Streaming Practices of Gamers' in Christiane Heibach, Angela Krewani, and Irene Schütze (eds), *Constructions of media authorship: investigating aesthetic practices from early modernity to the digital age* (Walter de Gruyter GmbH 2021).

[199] Amy Thomas, 'Can You Play? An Analysis of Video Game User-Generated Content Policies' (Zenodo 2022) 3 <https://zenodo.org/record/6564948>.

[200] Iljadica (n 196) 175.

[201] ibid 183.

[202] Rebecca Tushnet, 'Architecture and Morality - Transformative Works, Transforming Fans' in Kate Darling and Aaron Perzanowski (eds), *Creativity without Law: Challenging the Assumptions of Intellectual Property* (2017th edn, New York University Press) 178.

[203] ibid 173.

[204] European Commission, 'Understanding the value of a European video games society – Final report" (Publications Office of the European Union 2023) (2023 EC Study) 147 (emphasis added).

consensus over the definition of UGC, three characteristics are common: (i) it is always a published work; (ii) it is an amateur work, created for fun – or in the case of video games, for and to fans, and; (iii) it is a creative work since users add their own creative value to the new work created by them.[205]

The first characteristic stablished by the OECD, or the publication requirement, means the availability of the work in websites and online platforms.[206] However, UGC has an offline root. Print zines, garage bands playing covers, book and art clubs were already a reality way before the Internet and did not raise significant issues in terms of copyrights. In fact, in the world of the traditional (offline) media professionals, very few amateurs dared to adventure due to the absence of technology that, when available, had high investment costs, which would limit the access to it strictly to the traditional media industry.[207] It was only with the web 2.0, when the Internet developed and allowed online forms of "participatory media" that emerged the opportunity for users to spread their works online, increasing the audience range. This, aligned with a lower cost of tools and features that allows content creation, created a shift towards which called the attention of traditional media.

Online platforms are the power engine of the web 2.0[208] and the best way to publish derived UGC, reaching as much audience as possible inside the fan community to which they belong. Often, the platforms selected by the fan communities do not target fan communities but were adapted by them to be used as forums for discussion and storage for fan-created content.[209] The proliferation of online platforms, combined with the easy access to content creation tools and the democratization of the Internet, has led to an unprecedented number of artists creating content, to a point which traditional media could feel the threat of derived UGC. To Lastowka, this shift represents "a remedy to the homogenisation and exclusion of diverse culture which is found in globalized professional media"[210] and it is the protection to traditional media industry business

[205] Organization for Economonic Co-operation and Development (OECD), *Participative Web and User-Created Content WEB 2.0, Wikis and Social Networking* (OECD 2007) 18.
[206] ibid.
[207] Lastowka, *Minecraft as Web 2.0: Amateur Creativity & Digital Games* (n 194) 155.
[208] ibid.
[209] Tushnet (n 202) 179.
[210] Lastowka, *Minecraft as Web 2.0: Amateur Creativity & Digital Games* (n 194) 162.

model aligned to consistent enforcement of IP law that support the rationale of UGC as amateur works,[211] the second characteristic given by the OECD.

The classification of UGC as amateur work gives to these works the connotation of non-commercial nature (as it is made just for fun) and of low quality, due to the absence of quality materials and tools to create it, creating barriers for the recognition of fan works as works of authorship. Fan communities do not prevent a work to be commercially available, nor to have commercial value. In fact, it is the opposite as, "fandom can be the source of important and economically significant innovations."[212] There are several examples proving that a fan work can be commercially desirable, such as the book series *Fifty Shadows of Grey* which was, in previous versions, a fan work based on *The Twilight* saga. In the video game sector, *Counter Strike* (*CS*) saga, started as a mod from the video game *Half-Life*, and *DotA Allstars*, a mod from *Warcraft 3*.[213]

The commercial success of some fan works also proves that technology has improved the quality of such work, however, even if it did not, quality should not be at stake. At the same time that non-commercialization or non-profit nature of the work is not relevant when it comes to copyright in original works of authorship, nor should exist the assessment over the quality of a fan work.[214] In the same sense, Brian L. Frye argues that derivative works are works in the sense of the primary works,[215] echoing art.2(3) of the Berne Convention which recognizes the protection of derivative works on copyrights without prejudice to the protection of the primary work. Although one might claim that the Berne Convention is protecting only adaptations and translations, the text of art. 2(3) does include the expression "other alterations of a literary or artistic work",[216] which could be the case of a fan work if there is sufficient intellectual creation added to the primary work.[217] To achieve this level of originality is not a problem when it comes to

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[211] Lastowka, *Minecraft as Web 2.0: Amateur Creativity & Digital Games* 166-167.
[212] Tushnet (n 202) 190.
[213] Joakim Henningson, 'The History of Counter-Strike' (*RedBull esports*, 8 June 2020) <https://www.redbull.com/se-en/history-of-counterstrike>.
[214] Tushnet (n 202) 177.
[215] Brian L. Frye, 'Aesthetic Nondiscrimination & Fair Use' (2016) 3(1) Belmont Law Review 50 < https://repository.belmont.edu/lawreview/vol3/iss1/2/>.
[216] "Article 2 (…) (3) Translations, adaptations, arrangements of music and *other alterations of a literary or artistic work* shall be protected as original works without prejudice to the copyright in the original work" Berne Convention, art. 2(3) (emphasis added).
[217] For a full comment see Sam Ricketson and Jane C Ginsburg, 'Authorship and Ownership' in Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights* (Oxford University Press 2022) 484.

fan works, as a fan work will only exist if a fan is unsatisfied with the primary work, having the need to change it.[218] Therefore, to obtain an UGC, there is a need, from the fan side, for persecute innovation and to develop and add inputs of creativity over the primary work.

With need to alter the primary work, the last characteristic given by the OECD draws a line between UGCs and piracy. When it comes to unauthorized copies, the IP infringement over at least reproduction and distribution exclusive rights is crystal clear. Piracy is particular important in the specific case of the video game industry. Although some scholars claim that piracy in the video game industry is a threat as it is to all creative industries,[219] research shows that the player who buys a counterfeit copy of a video game continues to buy counterfeit copies through the time, unlike to what happens with other multimedia industries, jeopardizing sales.[220] However, if a UGC is a work that adds a creative layer to the underlying work, this means that it is not a simple unauthorized or counterfeit copy.

Transforming the original work raises the question of if this type of UGC could be protected under copyrights. As seen in chapter 2, copyrights protect works of authorship as long as they are an expression of idea and original. The examples above mentioned such as Let's Play videos, fan arts such as paintings, machinima telling new stories about video game characters, game photography, and even mods are expressions of ideas due to their own nature. Regarding originality, as already mentioned, a fan work emerges from unsatisfaction, motivating the fan to insert its own individual and free creative choices when creating UGC, in the sense of including "new thoughts to existing characters and situations, and therefore represents *someone's creative expression.*"[221] To my view and according to the analysis of chapter 2, the creative effort put by fans in their UGC works can satisfy the threshold of originality in the sense of author's own intellectual creation in several situations.

If both expression of idea and originality thresholds were achieved, the logical conclusion would be that fan works shall be protected under copyrights. However, almost all fan

[218] Tushnet (n 202) 173.
[219] Gaetano Dimita, Yin Harn Lee and Dr. Michaela Macdonald, 'Copyright Infringement in the Video Game Industry' study commissioned by WIPO WIPO/ACE/15/4, 30 August 2002, 17-18
[220] Joost Poort, João Pedro Quintais, Martin van der Ende and others, 'Global Online Piracy Study' (Institute for Information law, University of Amsterdam 2018).
[221] Tushnet (n 202) 171 (emphasis added).

works, including in the video game sector, are derived from copyrighted works owned by a third part – therefore, derived UGC - which raises significant implications, as exclusive rights of reproduction and communication to the public are at stake. In this sense, Thomas argues that the user would not have authorship claims over their creation in the sense of being attributed exclusive rights.[222] She adds that in the specific case of video games, "copyright law has a narrow view of [the players'] creative input and does not give them an authorial interest that could act as a viable challenge to the initial grant of ownership to the game publisher."[223] In other words, players would be nothing more than creators, without any claims of authorship in the sense of what has been discussed in chapter 2. This is very much in line with the second characteristic of UGC proposed by the OECD, since by considering fans as creators, not authors, means that UGC works are amateur works.

However, the concept of a "one-size-fits-all" copyright, which assumes a small number of authors and a large number of consumers, is ill-suited to a world where everyone is both an author and a consumer.[224] As seen, the amount of content creation based on third party copyrighted works is a web 2.0 phenomenon, which Aaron Schwabach calls as a "post-originality era." To him, "'originality' is becoming increasingly less easy to assess as a criterion, not so much because original work is no longer being created (…) but because all or nearly all new content is in dialogue with prior content in the field; it necessarily refers to prior content and incorporates elements of it."[225] In fact, in the video game industry, UGC are, often, incentivized, as it generates more content to the underlying video games and it is also a way of indirectly advertise the video game,[226] which can be very effective, considering the audience of 1,35 trillion minutes watched in 2022 in Twitch platform.[227] It is even possible to make a living as UGC creator, with some famous names such as *PewDiePie* and *Ninja* with millions of followers.[228]

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[222] Thomas, *Can you Play?* (n 199) 2–3.
[223] ibid 4.
[224] Aaron Schwabach, 'Bringing the News from Ghent to Axanar: Fan Works and Copyright after Deckmyn and Subsequent Developments' (2021) 22 Texas Review of Entertainment & Sports Law 5 < https://uttresl.wordpress.com/issues/ > .
[225] ibid 5–6.
[226] WIPO, 'Copyright Infringement in the Video Game Industry' (n 219) 47.
[227] Twitch is an online platform of live streaming which, among other types of content, has hosted game community content majorly. J. Clement, 'Twitch - Statistics & Facts' (*Statista*, 1 January 2024) <https://www.statista.com/topics/7946/twitch/#editorsPicks>.
[228] J. Clement, 'Most Popular Twitch Channels Worldwide as of June 2024, by Number of Followers' (*Statista*, 27 April 2024) <https://www.statista.com/statistics/486914/most-popular-twitch-channels-ranked-by-followers/>. Also see Thomas, *Can you Play?* (n 199), Wenz (n 198) and Peter K Yu, 'Increased

However, active players can face serious problems if right holders decide to enforce their rights against fan-UGC.[229] Since there is no fair use in the EU IP legislative framework, the lack of a system that allows users to create and, at the same time, do not be persecuted by primary copyright holders only generates legal uncertainty and lack of harmonization throughout the EU, forcing the creative industry towards private ordering, as it happens in the video game sector.

4.3 Fan-UGC as copyright exception

The EU had a missed opportunity to legislate over the matter with the CDSMD. In fact, the Opinion of the Committee on the Internal Market and Consumer Protection for the Committee on Legal Affairs of the European Parliament from June 2017, proposed to include in the CDSMD, with the following definition: "'user generated content' means an image, a set of moving images or without sound, a phonogram, text, software, data, or a combination of the above, which is uploaded to an online service by its users;"[230] It also proposed that user-generated content to be considered as a copyright exception, in the sense of: "(…) allow for the digital use of quotations or extracts of works and other subject-matter comprised within user-generated content for purposes such as criticism, review, entertainment, illustration, caricature, parody or pastiche provided that the quotations or extracts: (…)."[231]

The definition found by the Committee for UGC is very similar to the OECD's publication requirement, as it is clear here that the Committee is only concerned about online content, majorly dispersed by online platforms. Once again, the web 2.0 outcomes of a more democratized Internet and post-originality era lie at the heart of the debate. What is curious in the Committee's definition is that there is no discussion about the creative input of the UGC, the amateur or non-commercial nature of the fan work,

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Copyrights Flexibilities for User-Generated Creativity' in Gustavo Ghidini and Valeria Falce (eds) *Reforming Intellectual Property* (Edward Elgar, 2022) 316 when it comes not only to numbers but to the importance of UGC for the video game and creative industry.

[229] See, for example, the Nintendo strategy over their IP portfolio and how they actively enforce their IP rights. Nintendo Co., Ltd., 'Nintendo Intellectual Property' (*Nintendo*) <https://www.nintendo.com/au/legal/nintendo-intellectual-property/>; Ryan Dinsdale, 'Nintendo Has Removed Thousands of Music Tracks From YouTube in Recent Weeks' (*IGN*, 2 February 2022) < https://www.ign.com/articles/nintendo-removed-thousands-of-music-tracks-from-youtube>.

[230] Committee on the Internal Market and Consumer Protection, 'Opinion for the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market' COM(2016)0593 – C8-0383/2016 – 2016/0280(COD) [AD\1127172EN.docx], amendment 37, art 2(1)(3).

[231] ibid amendment 55, art. 5(b)(1).

although it is clear here that the Committee is referencing to this derivative type of UGC.[232] Another questionable topic of the proposal is that an UGC would only be considered as copyright exception if in the terms of "criticism, review, entertainment, illustration, caricature, parody or pastiche". However, it is hard to understand, to my view, why would the EU legislator consider the derived UGC as an exception encompassed in other copyright exceptions such as caricature, parody or pastiche. If a derived UGC falls in the scope of a copyright exception, it should be considered as copyright exception *per se*, not to have another layer of interpretation just for the single reason of being an UGC.[233]

Although these specific proposals of amendment to CDSMD have their issues and were not adopted, they do have their merits in terms of considering derived UGC as copyright exception. Martin Senftleben argues that derived UGC could pass the "three-step test" under art. 5(5) of the InfoSoc Directive, as long as it includes significant creative input, which is typical of fan works and UGC in general. This creative input makes UGC a special case for the first step, balancing the freedom of expression for creators and the rights of copyright owners. [234] In the second step, Senftleben argues that UGC should not conflict with the original work's market by creating a substitution effect, as UGC typically generates only supplementary income[235] and, as seen, often serves as free indirect promotion of the underlying video game, for example, to new audiences. [236] For the final step, he proposes a "refined proportionality test" to ensure fair compensation for copyright holders, protecting them from unreasonable harm, as UGC, while not economically significant, is widely disseminated and requires compensation to balance freedom of expression with IP rights. [237]

However, how could the derived UGC exception be implemented? Should it be needed for a new and specific exception as proposed by the Committee? As seen, user-generated

[232] ibid amendment 55, art. 5(b)(1)(b).
[233] Martin Senftleben, 'User Generated Content: Towards a New Use Privilege in EU Copyright Law' in Tanya Aplin (ed), *Research handbook on intellectual property and digital technologies* (Edward Elgar Publishing 2020) 140–141.
[234] ibid 148. This argument has been supported by other authors in, for example, Péter Mezei, Bernd Justin Jütte, Caterina Sganga and other, 'Oops, I Sampled Again … the Meaning of "Pastiche" as an Autonomous Concept Under EU Copyright Law' (2024) IIC - International Review of Intellectual Property and Competition Law <https://link.springer.com/10.1007/s40319-024-01495-z>.
[235] Senftleben (n 233) 151.
[236] For a full explanation see Wenz (n 198) 221.
[237] Senftleben (n 233) 153–154.

creative layer added to the primary work creates a sort of mixture, a recombination of elements from the primary work, but it is not mandatory for UGC to embrace the elements of criticism, mockery or humour. Furthermore, they cannot be protected under the private copy exception and can be very profitable. Fan-UGCs could not be under the quotation exception neither, nor in the scope of parody or caricature. However, it could fall in the scope of pastiche exception. Pastiche, grouped together with parody and caricature due to "their nature of transformative expressive uses, having different purposes and thus different characteristics",[238] is a copyright exception ruled by art. 5(3)(k) of the InfoSoc Directive and by art. 17(7)(b) of the CDSMD for online content.

In the case of the InfoSoc Directive, it is an optional provision, thus, it is not possible to speak in a harmonized exception. In Sweden, which has been a country used as an example several times throughout this thesis, the national legislators opted for not transpose art. 5(3)(k), being covered by the general free use exception of art. 4(2) of the Swedish Copyright Act,[239] meaning that the primary work must only be used as an inspiration, levelling up the originality threshold.[240] In the context of derived UGC, the creative input provided by the user must be substantial enough to differentiate both works. By its turn, art. 17(7)(b) of the CDMS Directive, which, in contrast to art. 5(3)(k) of the InfoSoc Directive is a mandatory exception, had a curious outcome when transposed to Swedish national legislation. Sweden, as most countries, have transposed the text almost verbatim,[241] creating a strange phenomenon, as "Sweden now feature[s] a specific online-parody provision, while still lacking the general related exception"[242] In other words, Sweden has implemented a specific legal provision for online parodies without establishing a broader exception for related uses, leading to an inconsistency in its legal framework.

As if these issues would not be enough to conclude for a lack of legal certainty, both EU Directives do not provide a definition for pastiche, being hard to obtain an EU level of harmonization in this copyright exception. Once again, CJEU case law would be the solution in terms of paving the way "for the recognition of the pastiche privilege as a

[238] Mezei, Jütte, Sganga and other (n 234) 24.
[239] "If a person, in free association with another work, has created a new and independent work, his copyright shall not be depending on the right in the original work" (free translation) Swedish Copyright Act, art. 4(2).
[240] Mezei, Jütte, Sganga and other (n 234) 15–16.
[241] Swedish Copyright Act. Art.52(p).
[242] Mezei, Jütte, Sganga and other (n 234) 19.

copyright limitation covering user-generated remixes of protected works."[243] However, to date, there is not much case law related to user-generated content. This is not surprising, as fan works are considered low-IP, since a simple cease-and-desist notification is enough to remove most UGC, limiting interactions with the law and the courts, a peculiarity that indicates to Tushnet, that fan works grows in IP negative space.[244] As for pastiche, there is currently a pending case law in the CJEU, *Pelham v Hütter II*,[245] that might indicate the delimitations of pastiche, the same way the Court did with parodies in the leading case *Deckmyn v Vandersteen*.[246]

In *Deckmyn v Vandersteen*, Mr. Deckmyn created a very controversial (to say the least) parody based on characters of Mr. Willy Vandersteen (died in 1990). Due to hate speech disguised as political and social critique, the CJEU has considered, although the Court had, as it should, led the final assessment to the Belgian national court, that Mr. Deckmyn's work could not fall in the scope of parody due to the fact that it would be against "the principle of non-discrimination based on race, colour and ethnic origin,",[247] and, therefore, copyright holders "have, in principle, a legitimate interest in ensuring that the work protected by copyright is not associated with such a message."[248] It is important to emphasize that the discussion of this case law, in depth, was not about a fan work, but about hate speech. Here, what is at stake is not balancing the fundamental rights of freedom of expression (of users) and intellectual property (of right holders), as I argued above, but the moral right of Vandersteen's heirs to do not associate Vandersteen's work with discriminatory message.[249]

The assessment of the CJEU in this case regarding parody, is of the upmost importance to the concept of pastiche, as it is possible to apply, by analogy, "the judicial principles

[243] Senftleben (n 233) 158.
[244] For further details see Tushnet (n 202) 174.
[245] Case C-590/23 *CG and YN v Pelham GmbH and Others* CJEU. This case is a continuation of *Pelham v Hütter* (Case C-476/17 *Pelham GmbH, Moses Pelham, Martin Haas v Ralf Hütter and Florian Schneider-Esleben* EU:C:2019:624) where the CJEU has decided that, as a general rule, the rights of a phonogram producer are infringed when a sample is reproduced. Now, with the transposition of the pastiche exception the German legislation, the national court refers to the CJEU once again to interpret if a sampler can invoke a different exception or limitation (pastiche) to justify the unauthorized reproduction of a sample that does not meet the exclusionary criteria established by the Court in first place. For further details, see Mezei, Jütte, Sganga and other (n 233).
[246] Case C-201/13 *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* EU:C:2014:2132.
[247] ibid para 30.
[248] ibid para 31.
[249] Schwabach (n 224) 25–26.

developed for parodic uses on pastiche and, in this sense, indirectly grasp convergences and divergences in the potential approach of national courts to the matter",[250] and provides significant inputs over the possible closure of *Pelham v Hütter II.* In *Deckmyn v Vandersteen*, the CJEU has stablished that a parody must be interpretated as an autonomous concept of EU law, regardless of the optional nature of the provision in art. 5(3)(k) of the InfoSoc Directive, to harmonize the exception throughout Member States which have transposed this exception. [251] The Court has also stablished that the definition of parody must be found in everyday language, considering the context in which it is used.[252] Moreover, a work must have its own creative input that differentiates it from the original work while still bearing resemblance to it to be qualified as a parody. Consequently, parodies should be attributed to someone other than the original author, yet still relate to the original work, indicating its source (paternity).[253] Additionally, it should include elements of humour or mockery.[254]

When it comes to pastiche, the first doing of the Court should be the assessment over if the concept of pastiche, along with parody and caricature are or not three separated artistic expressions.[255] As seen, although parodies and pastiche share the same transformative nature in terms of adding a layer of creativeness, these exceptions should not be considered as the same. Using the same approach of the Court, in the sense of considering the common use of the word, The Cambridge Dictionary defines pastiche as "a piece of art, music, literature, etc. that intentionally copies the style of someone else's work or is intentionally in various styles, or the practice of making art in either of these ways".[256] The same dictionary defines parody as "writing, music, art, speech, etc. that intentionally copies the style of someone famous or copies a particular situation, making the features or qualities of the original more noticeable in a way that is humorous"[257]

The meaning of the words supports the argument that pastiche and parody are alike, although different in specific aspects such as the humour element, which is not present in

[250] Mezei, Jütte, Sganga and other (n 234) 16.
[251] *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* (n 246), paras 15-16
[252] ibid para 19.
[253] Schwabach (n 224) 28–29.
[254] ibid para 33.
[255] Mezei, Jütte, Sganga and other (n 234) 20.
[256] 'pastiche, n' (The Cambridge Dictionary Online, CUP 2024) < https://dictionary.cambridge.org/dictionary/english/pastiche>.
[257] 'parody, n' (The Cambridge Dictionary Online, CUP 2024) < https://dictionary.cambridge.org/dictionary/english/parody>.

pastiche. In fact, the lack of humour elements in pastiche is the main difference between pastiche and parodies along the national legislations.[258] The definitions above also raise a significant issue. If pastiche is a mere imitation, a copy, of someone else's style, the exception would be rendered ineffective, as style is not protected by copyrights for not being an expression of idea, and, therefore, the main goal of the exception in providing fair balance would fail.[259] Moreover, recital 70 of the CDSMD is clear that the provision of art. 17(7)(b) are to be related to UGC uploads. Moreover, it is important to mention that in *Deckmyn v Vandersteen* decision, the Court did not mention any requirement regarding the non-commercial nature of the parody. This is probably a requirement that would also not be considered in *Pelham v Hütter II*, due to the similarity of pastiche and parody natures, but also because the non-profit nature of a work is not relevant in terms of copyrights strictly speaking, either to consider a work as a work of authorship, an infringement or an exception, as mentioned earlier in this thesis.

The concept of pastiche should incorporate more than a simple imitation of style, but a combination of materials, sources and primary works put together with free and creative choices provided by the user, without having to incorporate elements of humour, mockery or critique, as parodies do.[260] The ability of UGC such as fan works to add a creative layer and still preserve the primary work as the "official" works, fits in the scope of pastiche copyright exception in all its elements. However, when it comes to the video game industry, the situation is more complex than it appears, due to the unique characteristic of copyright complex subject matter.

4.4 Pastiche exception in the video game industry

As seen in chapter 3, the video game industry is based on license agreements, with development studies being what can be called as a central point. It is the development studio which, often, needs to raise investments with publishers and get authorization from console manufacturer on one hand, while handling with software and other component developers, musician and other artists on the other hand. By its turn, the relationship between the video game industry and users is dictated by End User License Agreements (EULAs), which is imposed by the video game owner in order for a player to play the

[258] Mezei, Jütte, Sganga and other (n 234) 23–24.
[259] ibid 22.
[260] Also see Senftleben (n 233); Mezei, Jütte, Sganga and other (n 234).

video game.[261] Although players have a closer relationship with video game companies when compared to other creative industries due to the interactive nature of video games, this relationship is still heavily regulated by EULAs. These agreements, like in other sector of the industry, typically favour the stronger party—in this case, the video game owner.

Thomas argues that the use of EULAs reflects the inadequacy of the law, from a copyright perspective, to protect the interests video game industry when it comes to UGC and its characteristic creative and collaborative nature. By creating a parallel system, in which the industry has a loosely control over what is being created by players, but based in their copyrights over the video game, the industry can explore the infinite possibilities that these derived UGC may bring, while incentivizing it, often for its own benefits.[262] In the above mentioned *CS* video game, at first, created as an UGC, its developers (formerly, active players) were hired by Valve, the original development studio of the underlying video game (*Half Life*) to continue working on *CS*. It goes without saying that all IP rights regarding *CS* were waived to Valve[263] Another example would be with the video game *Minecraft*. The developer of this indie video game, where players can build their own structures, as if in a digital *Lego* builder, makes use of UGC as a way to indirectly advertise the video game, as there are massively content over online platforms such as YouTube, Twitch, Facebook and wikis, that add value to the video game while popularizing it.[264]

The use of EULAs here does not aim to demonstrate the fairness of each provision of a license agreement, nor if there are any issues regarding consumer law, although it also raises significant issues, but to emphasize how complex is the system created through private ordering when it comes to the perspective of the active player, who creates meta-interactive works, in the sense that it does not provide conditions for the fair balance between freedom of expression and information (for the player's perspective) and copyrights (from developers/publishers' perspective). Thomas has analysed 30 EULAs from different video game companies, grading them from 0 to 100 according to the level of permissiveness regarding UGC in video, monetisation, screenshots, soundtracks, fan

[261] WIPO, *Copyright Infringement in the Video Game Industry* (n 219) 16.
[262] Thomas, *Can you Play?* (n 199) 2.
[263] Henningson (n 213).
[264] Lastowka, *Minecraft as Web 2.0: Amateur Creativity & Digital Games* (n 194) 11; Wenz (n 198).

works, merchandise, mods, and commercial use.[265] She has reached scores from 0 to 62.5, demonstrating that although each video game company has its own policy, according to their own business strategy, none fully allow derived UGC. Furthermore, some provisions such as the possibility of monetization (passive income) in most EULAs demonstrate that video game companies are not concerned with the economic exploration of their intellectual works, but with the assets and the brand of the video game being commercialized without authorization (in the sense of active income), something that it is not direct connected with copyrights.[266]

Bearing this in mind, implementing a copyright exception for derived UGC under the concept of pastiche would provide legal certainty for the video game industry and help level the playing field in the market. However, one must recall that video games are a complex subject matter and, therefore, it is not always that a derived UGC in video games will reach the requirements to be considered under the pastiche exception, as demonstrated in Figure 02.

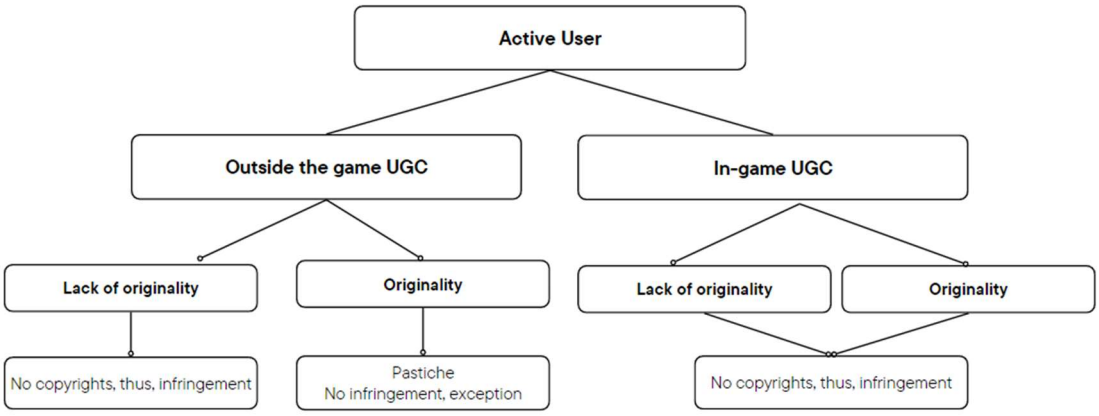

Figure 02 – UGC flowchart in the video game industry

If an active user creates a derived UGC outside the game, then this UGC must achieve the originality requirement in order to be considered under the pastiche exception. Considering what has been discussed above in this chapter and in chapter 2, it is possible to find examples of both situations within the game community. A silent stream, where the player only streams (live or recorded) his or her performance, without adding

[265] Thomas, *Can you Play?* (n 199) 7–8.
[266] 19 out 30 EULAs allow monetization, with or without conditions, while all EULAs prohibit commercialization (active income). For further details see Thomas, *Can You Play?* (n 199).

comments, analysis of the game or even his or her image, does not add any layer of originality or creative input in the sense of authors own intellectual creation since, as seen, the player does not have any authorship or performance rights over the execution of the rules of the video game. The same situation happens when a player uploads the soundtrack of a video game in YouTube, for example.[267]

Conversely, works such as machinima, where the players create an animation film with characters or even scenes from the video game, that have an original storytelling created by the player, could be under the pastiche exception, even if this machinima goes against the EULA of the video game company in which it is based. Here, it is possible to apply the three-step test as per art. 5(5) of the Info Soc Directive and as analysed above. Machinima would fall in a special case for pastiche considering that it has enough originality character, in the sense of free creative choices made by the player, adding an additional layer of creativeness that expands the world of the underlying video game, therefore the freedom of expression of this player must be guaranteed. By machinima being an animation film based on the underlying video game, it does not, in principle, clashes with the normal exploitation of the underlying work, because both works do not even have the same nature. As seen, video games and films, although sharing some characteristics are different in essence. Furthermore, the economic relevance of the UGC is, often, much smaller than the economic relevance of the underlying video game. Finally, machinima does not prejudice the legitimate interests of the underlying video game right holders, as it is a completely different work with an independent and original character, however, even if there is detriment to legitimate interests (due to *nobody knows* effect, for instance), most of fan works are hosted by online platforms, which could guarantee the fair remuneration of right holders.[268]

Things change, however, when it comes to in-game UGC. The example that stands the most would be mods which, as per the name, are modifications made in the game to add characters, new storylines, resource files and even some (fun) elements to the underlying game, as if a plug-in to the underlying video game.[269] From the perspective of copyrights, even if there could be enough originality in the sense of authors own intellectual creation,

[267] Soundtrack YouTube channels are very popular, even when most EULAs prohibit the use of UGC. See Ryan Dinsdale (n 229). Also see Thomas, *Can You Play?* (n 199).
[268] See recital 45 of the InfoSoc Directive in the sense that copyrights exceptions such as pastiche do not prevent contractual provisions of fair remuneration of right holders. InfoSoc Directive, recital 45.
[269] WIPO, *Copyright Infringement in the Video Game Industry* (n 219) 37

there would still be an infringement. This happens because the modifications made do not create a new independent work. In order to a mod exist, the source code of the underlying video game is altered,[270] an infringement from the perspective of copyright economic rights of adaptation, in terms of art. 12 of the Berne Convention, but also regarding the moral right of integrity, in terms of art. 6*bis* of the Berne Convention. Furthermore, considering that there is an alteration in the source code, it is also possible to claim infringement in terms of art. 4(b) of the Software Directive. From the InfoSoc Directive perspective, by publishing a mod, rights such as distribution, communication to the public regarding the underlying game might be infringed.[271] Additionally, there is a need to analyse the mod itself, in the sense that if this mod has elements of third-parties protected works, the mod itself might also constitute and infringement *per se*.[272] A famous example would be Thomas the Tank Engine, a famous children cartoon which was turned into a mod that appears on several video games from *Fallout* to *Resident Evil*.[273]

However, as seen in *CS* and other situations, mods are often tolerated by the video game industry, even if it is against its own EULA provisions,[274] as it can benefit the underlying video game in an economic sense, either by bringing in new players, increasing the life cycle of the video game or by adding important features and fixing bugs.[275] This approach proves that video game companies use copyrights as tool to protect their assets from a pure economic aspect only. In other words, if the derived UGC is beneficial, economically, to the video game, it will be tolerated, even if it is a clear copyright infringement or goes against their own EULAs.

[270] Although it is technically possible to create a mod without infringing copyrights or *sui generis* rights, mods, often, engage with the video game code. Gaetano Dimita (n 226) 38.
[271] InfoSoc Directive, arts 3-4; WIPO, 'Copyright Infringement in the Video Game Industry' (n 219) 38.
[272] WIPO, 'Copyright Infringement in the Video Game Industry' (n 219) 40.
[273] Thomas the Tank Engine is a character from a children cartoon, and its IP rights are owned by Mattel. See Edwin Evans-Thirlwell, 'Why Are People Modding Thomas the Tank Engine into Video Games?' (*The Face* 9 May 2019) <https://theface.com/culture/why-are-people-modding-thomas-the-tank-engine-into-video-games>.
[274] Only 5 out of 30 EULAs analysed by Thomas allow mods, 3 of them under certain conditions. See Thomas, *Can You Play?* (n 199).
[275] See, among others, Mark Kretzschmar and Mel Stanfill, 'Mods as Lightning Rods: A Typology of Video Game Mods, Intellectual Property, and Social Benefit/Harm' (2019) 28(4) Social & Legal Studies <http://journals.sagepub.com/doi/10.1177/0964663918787221>; Aline Arenque and Amanda Costa Novaes, 'IP Negative Spaces in Today's Evolving Video Game Industry' (2024) 4IP Council <https://www.4ipcouncil.com/research/ip-negative-spaces-todays-evolving-video-game-industry>.

Conclusion

The video game industry is a cultural industry that struggled among economists, scholars and governments to be recognized as such, and not a mere *amateur* hobby. In fact, the path that video games have transversed from their humble beginnings until nowadays goes in parallel with the development of technology, one of the major engines of the industry, allowing video game developers to create worlds that before would be impossible and enhancing the interaction between the player and the screen. To consider video games as computerized games, does not capture the layers of innovation, creativeness and interaction that a video game has. This hybrid nature of an artistic work and software work reveals the difficult in classifying video games under copyrights, thus, the CJEU findings on *Nintendo v PcBox* in the sense of video games as a complex subject matter and the need to acknowledge video games as a stand-alone work that is protected under copyrights. One, however, must not ignore the elements that compose a video game, as they are also protected under copyrights and even other IP rights and are essential to the development of the sector. By and large, the hybrid nature of video games and the complex interactions between users and market stakeholders are unique features compared to other cultural and creative industries, raising significant issues regarding authorship, either among stakeholders, either between the industry and the players.

The video game industry operates vertically rather than horizontally, with significant disparities in the economic power of various stakeholders. Publishers, for instance, wield more economic power than studio developers, who in turn have advantages over their employees and component developers. Musicians, voice actors, designers, developers, and others receive credits for their work in video game in a manner that aims to incentivize and reward them proportionately, similar to the film industry. It is important to highlight, as before demonstrated, that although video games and the film industry might share some singularities, these are different subject matters when it comes to IP rights, mainly due to lack of interactivity element in films.

License agreements serve as the primary means of coordination between stakeholders and tend to lean towards the stakeholder which has more economic power to bargain the best conditions. In the video game sector, this means that the video game owner is the most powerful economic stakeholder, usually the publisher. Within this context, authorship becomes detached from ownership; although the primary author is often a human being, the licensing scheme typically prevents them from exercising ownership in the sense of

exploring economic rights over their work, regardless of this work being a component of the video game or the video game as a whole work. Additionally, license agreements may hinder into very few case-law, making it seem like it is a silver bullet for all the issues faced by the video game sector when it comes to copyrights when, in fact, it may conceal discussions regarding fair remuneration and abusive clauses, a mirroring of the imbalance between stakeholders. Here, clear and harmonized rules over copyrights license agreements that actually protect the multifaceted nature of creative production, supporting primary authors, as it should, bargaining for fair remuneration, although other fields such as competition law and contract law may also play a crucial role.

Another situation in which harmonization would be useful, would be the definition of the pastiche exception. As seen, in the UGC umbrella, fan works are considered as derived UGC, since they combine unique creative inputs given the user (the fan) with underlying third part copyright protected works. The web 2.0 has fostered the development and dissemination of these works as never before, raising awareness regarding these works. Although there are not much legal controversies regarding fan works due to their low-IP nature, there is still the need to avoid legal uncertainties, especially in situations where UGC become the main source of income of several users, mainly in the video game fan communities. Bearing this in mind, pastiche exception would figure as a solution for UGC in the EU legislation to raise legal certainty and harmonization. The ability of UGC, as fan work, to add a creative layer while preserving the primary work aligns perfectly with the elements of the pastiche copyright exception.

For this, establishing a precise definition for pastiche is crucial. This ensures that fundamental rights, such as freedom of expression and information from the user's perspective, are balanced against IP rights of the video game owner, but not only. By having a harmonized legal definition for pastiche, it will be possible to apply it to all EULAs, creating a standard procedure among video games companies and raising legal certainty throughout the video game industry when it comes to UGC practices. Such a balance is necessary to address the complexities of derived UGC, which often constitutes legitimate works of authorship deserving copyright protection and authorship recognition.

However, not all derived UGC will fall under the pastiche exception specially in the video game industry. As demonstrated, only UGCs which are an independent work, in the sense of existing outside the underlying video game and perform an individual character in the sense of expression of idea and originality would fall in this exception, guarantying the

rights of the fan that have created it. Furthermore, it is not possible to deny that some UGC might fall outside the scope of the pastiche exception not due to its nature, but due to the nobody knows effect and/or due to the popularity of the creator, who could also be making a living from the profits (often, passive income, which is allowed under most EULAs) of their UGC. In theses cases, the UGC do not correspond to the three-step test of art. 5(5) of the InfoSoc directive, extrapolating the pastiche exception framework.

Although one might immediately think that these would be cases of copyright infringement, the video game industry is not as straightforwardly as most creative industries are. In this scenario, the application of the pastiche exception would be an example of something that goes beyond the traditional dichotomy between exceptions and copyright infringement. If UGC is crucial to the video game industry either in the development of new genres, free promotion of the underlying video game or by recycling or extending the life cycle of the video game and these practices are often incentivised, expressly permitted in EULAs or even tolerated by the industry, along with the pastiche exception, there should be space for a compensation scheme, in the sense that even when outside the pastiche exception, there should be more room for delivering different legal answers instead of relying solely on private ordering.

Bibliography

Legislation:

International Treaties and Agreements

Berne Convention for the Protection of Literary and Artistic Works (adopted 9 September 1886, last revised 28 September 1979) 1161 UNTS 3 (Berne Convention).

World Intellectual Property Organization Copyright Treaty (adopted 20 December 1996) TRT/WCT/001.

Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, as amended by the 2005 Protocol Amending the TRIPS Agreement) 1869 UNTS 229.

European Union Legislation

Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L 248/15.

European Parliament and of the Council Directive 96/9/EC on the legal protection of databases [1996] OJ L 77/20.

European Parliament and of the Council Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 1671/10.

European Parliament and of the Council Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L 376/28.

European Parliament and of the Council Directive 2006/116/EC on the term of protection of copyright and certain related rights [2006] OJ L 372/12.

European Parliament and of the Council Directive 2009/24/EC on the legal protection of computer programs [2009] OJ L 111/16.

Commission Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] OJ L 187/1.

European Parliament and of the Council Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC PE/51/2019/REV/1 [2019] OJ L 130/92.

National Legislation (Sweden):

Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk (Swedish Copyright Act).

Cases:

Court of Justice of the European Union

Case C 5/08 Infopaq International A/S v Danske Dagblades Forening EU:C:2009:465.

Case C-145/10 Painer v Standard VerlagsGmbH and others EU:C:2011:798.

Case C-406/10 SAS Institute Inc v World Programming Ltd EU:C:2012:259.

Case C-201/13 Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others EU:C:2014:2132.

Case C-355/12 Nintendo Co Ltd and others v PC Box Srl EU:C:2014:25.

Case C 310/17 Levola Hengelo BV v Smilde Foods BV EU:C:2018:899.

Case C 683/17 Cofemel — Sociedade de Vestuário SA v G-Star Raw EU:C:2019:721.

Case C-476/17 Pelham GmbH, Moses Pelham, Martin Haas v Ralf Hütter and Florian Schneider-Esleben EU:C:2019:624.

Case C 833/18 SI, Brompton Bicycle Ltd v Chedech/Get2Get EU:C:2020:461.

Case C-580/23 Mio AB, Mio e-handel AB, Mio Försäljning AB v Galleri Mikael & Thomas Asplund Aktiebolag CJEU.

Case C-590/23 CG and YN v Pelham GmbH and Others CJEU.

National Courts:

Marknadsdomstolen [MD] [Market Court] 2011 case no. 2011-29 (Sweden).

Cour d'appel de Paris Pôle 5, 26 January 2016, n° 2014/10931 (France).

Official Documents

Commission Decision 2008/354/EC on State Aid C 47/06 (ex N 648/05) Tax credit introduced by France for the creation of video games (notified under document number C(2007) 6070) [2007] OJ L 118/16.

Commission Decision 2014/764/EU on the State aid scheme SA.36139 (13/C) (ex 13/N) which the United Kingdom is planning to implement for video games (notified under document C(2014) 1786) [2014] OJ L 323/1.

Committee on the Internal Market and Consumer Protection, 'Opinion for the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market' COM(2016)0593 – C8-0383/2016 – 2016/0280(COD) [AD\1127172EN.docx].

Council Conclusions 2022/C 160/06 ST/7809/2022/INIT on building a European Strategy for the Cultural and Creative Industries Ecosystem [2022] OJ C 160/13.

World Intellectual Property Office, 'Copyright Infringement in the Video Game Industry' WIPO/ACE/15/4 (2002).

World Intellectual Property Organization, 'Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright Related Rights Terms' (WIPO 2003) (WIPO Guidelines).

World Intellectual Property Organization, WIPO Intellectual Property Handbook (Publication n° 489e, WIPO 2004).

Books:

C Ginsburg J, 'The Concept of Authorship in Comparative Copyright Law' (2003) 52 DePaul L Rev 1063.

Caillois R, Man, Play, and Games (first Illinois paperback, Barash M tr, Univ of Illinois Press 2001).

Caves R, 'Contracts Between Art and Commerce' (2003) 17 Journal of Economic Perspectives 73.

Crawford C, The Art of Computer Game Design (Osborne/McGraw-Hill 1984).

Egenfeldt-Nielsen S, Heide Smith J, and Pajares Tosca S, Understanding Video Games: The Essential Introduction (4th edn, Routledge 2020).

Gebru A, 'Communal Authorship' (2024) 58 University of Richmond Law Review 337

Greenspan D and Dimita G, Mastering the Game (WIPO 2022).

Grosheide W, Roerdink H, and Thomas K, 'Intellectual Property Protection for Video Games - A View from the European Union' (2014) 9 JICLT 1.

Harn Lee Y, 'Copyright and Gaming' in Aplin T (ed), Research Handbook on Intellectual Property and Digital Technologies (Edward Elgar Publishing 2020).

Hemels S, 'Tax Incentives for the Audio Visual Industry' in Hemels S and Goto K (eds), Tax Incentives for the Creative Industries (1st edn, Springer Singapore 2017).

Huizinga J, Homo Ludens: A Study of the Play-Element in Culture (first published 1938, Routledge 1980).

Iljadica M, 'User Generated Content and Its Authors' in Aplin T (ed), Research Handbook on Intellectual Property and Digital Technologies (Edward Elgar Publishing 2020).

K Yu P, 'Increased Copyrights Flexibilities for User-Generated Creativity' in Gustavo Ghidini and Valeria Falce (eds) Reforming Intellectual Property (Edward Elgar, 2022).

Lastowka G, 'Minecraft as Web 2.0: Amateur Creativity & Digital Games' in Hunter D, Lobato R, Richardson M and Thomas J (eds), Amateur Media: Social, Cultural and Legal Perspectives (Routledge 2013).

M Avedon E and Sutton-Smith B, The Study of Games (1st edn, Wiley 1971).

McLuhan M, Understanding Media: The Extensions of Man (reprint, MIT Press 1994).

Newman J, Videogames (1st edn, Routledge 2012).

Organization for Economic Co-operation and Development (OECD), Participative Web and User-Created Content WEB 2.0, Wikis and Social Networking (OECD 2007).

Rosén J, Swedish Software Law: As Related Primarily to EC Directives (Juristförlaget 1995).

Senftleben M, ‘User Generated Content: Towards a New Use Privilege in EU Copyright Law’ in Aplin T (ed), Research Handbook on Intellectual Property and Digital Technologies (Edward Elgar Publishing 2020).

Simone D, Copyright and Collective Authorship: Locating the Authors of Collaborative Work (Cambridge University Press 2019).

Tushnet R, ‘Architecture and Morality - Transformative Works, Transforming Fans’ in Darling K and Perzanowski A (eds), Creativity Without Law: Challenging the Assumptions of Intellectual Property (2017th edn, New York University Press).

Van Oers B, ‘Culture in Play’ in Jaan Valsiner (ed), The Oxford Handbook of Culture and Psychology (1st edn, Oxford University Press 2012).

Wenz K, ‘Claiming Authorship? Machinima Production and the Streaming Practices of Gamers’ in Heibach C, Krewani A, and Schütze I (eds), Constructions of Media Authorship: Investigating Aesthetic Practices from Early Modernity to the Digital Age (Walter de Gruyter GmbH 2021).

Wittgenstein L, Philosophical Investigations (first published 1953, GEM Anscombe tr, 3rd edn, Blackwell 1968).

Articles

Arenque A and Costa Novaes A, ‘IP Negative Spaces in Today’s Evolving Video Game Industry’ (2024) 4IP Council https://www.4ipcouncil.com/research/ip-negative-spaces-todays-evolving-video-game-industry

Castronova E, ‘The Right to Play’ (2004) 49 N.Y.L Sch. L. Rev https://digitalcommons.nyls.edu/nyls_law_review/vol49/iss1/9/

Cho H, Moulaison-Sandy H, and Hubbles C, ‘Authorship Metadata for Video Games: “Collaborator”, “Creator”, or “Auteur”?’ (2021) 8 NASKO https://journals.lib.washington.edu/index.php/nasko/article/view/15863

Consalvo M, ‘There Is No Magic Circle’ (2009) 4 Games and Culture 408.

E Boyden B, ‘Games and Other Uncopyrightable Systems’ (2011) 18 George Mason Law Review.

Furgal U, ‘Creator Contracts: Report on the Implementation of Chapter 3 of the Directive on Copyright in the Digital Single Market’ (European Composer and Songwriter Alliance 2022) https://composeralliance.org/media/721-creator-contracts-report-on-the-implementation-of-chapter-3-of-the-directi.pdf

J Schlinsog M, ‘Enderman, Creepers, and Copyright: The Bogeymen of User-Generated Content in Minecraft’ (2013) 16 Tulane Journal of Technology & Intellectual Property 205 https://journals.tulane.edu/TIP/article/view/2629

Kretzschmar M and Stanfill M, ‘Mods as Lightning Rods: A Typology of Video Game Mods, Intellectual Property, and Social Benefit/Harm’ (2019) 28(4) Social & Legal Studies http://journals.sagepub.com/doi/10.1177/0964663918787221

L Burk D, ‘Owning E-Sports: Proprietary Rights in Professional Computer Gaming’ (2013) 161 University of Pennsylvania Law Review 1535.

L Frye B, ‘Aesthetic Nondiscrimination & Fair Use’ (2016) 3(1) Belmont Law Review 50 https://repository.belmont.edu/lawreview/vol3/iss1/2/

Lastowka G, ‘Copyright Law and Video Games: A Brief History of an Interactive Medium’ (2013) SSRN Electronic Journal 11 http://www.ssrn.com/abstract=2321424

Lattacher M, ‘Authorship Matters! Authorship in the EU with a Focus on Film’ (2021) 2 Stockholm Intellectual Property Law Review.

M Malaby T, ‘Beyond Play: A New Approach to Games’ (2007) 2 Games and Culture 95.

Mezei P, Jütte B J, Sganga C and others, ‘Oops, I Sampled Again … the Meaning of “Pastiche” as an Autonomous Concept Under EU Copyright Law’ (2024) IIC - International Review of Intellectual Property and Competition Law https://link.springer.com/10.1007/s40319-024-01495-z

Poort J, Quintais J P, van der Ende M and others, ‘Global Online Piracy Study’ (Institute for Information Law, University of Amsterdam 2018).

Rendas T, ‘Lex Specialis(Sima): Videogames and Technological Protection Measures in EU Copyright Law’ (2014) 37 EIPR.

Ricketson S and Ginsburg J C, International Copyright and Neighbouring Rights (OUP 2022).

Ryan M-L, 'The Interactive Onion: Layers of User Participation in Digital Narrative Texts' in Page R and Thomas B (eds), New narratives: stories and storytelling in the digital age (University of Nebraska Press 2011).

Schwabach A, 'Bringing the News from Ghent to Axanar: Fan Works and Copyright after Deckmyn and Subsequent Developments' (2021) 22 Texas Review of Entertainment & Sports Law 5 https://uttresl.wordpress.com/issues/

Teipen C, 'Work and Employment in Creative Industries: The Video Games Industry in Germany, Sweden and Poland' (2008) 29 Economic and Industrial Democracy 309.

Thomas A, 'Can You Play? An Analysis of Video Game User-Generated Content Policies' (Zenodo 2022) https://zenodo.org/record/6564948

___ __, 'Copyright and the Player' (2023) Glasgow University 7 https://eprints.gla.ac.uk/316945/.

van Eechoud M and others, 'Harmonizing European Copyright Law: The Challenges of Better Lawmaking' (2009) 19 Information Law Series.

Reports:

International Confederation of Authors and Composers Societies, EY, and UNESCO, Cultural Time: The First Global Map of Cultural and Creative Industries (EY 2015).

KEA European Affairs, 'The Economy of Culture in Europe' (European Commission 2006) (2006 EC Study).

European Commission, 'Understanding the Value of a European Video Games Society – Final Report' (Publications Office of the European Union 2023) (2023 EC Study).

Ramos A, 'The Legal Status of Video Games: Comparative Analysis in National Approaches' (World Intellectual Property Organization 2013).

Conference Papers:

Duan H and others, ‘User-Generated Content and Editors in Video Games: Survey and Vision’ (IEEE Conference on Games (CoG), August 2022).

Legeza D, ‘Employer as Copyright Owner from a European Perspective’ (SERCI Annual Congress, Glasgow, September 2015).

Rosén J, ‘Moral Right in Nordic Law’ (ALAI Conference in Moral Rights in the 21st Century: The Changing Role of the Moral Rights in an Era of Information Overload, Brussels, 18-19 September 2014).

Other sources:

__ __ 'Video Games - Worldwide' (March 2024) https://www.statista.com/outlook/dmo/digital-media/video-games/worldwide

__ __‘Video Games - Sweden’ (Statista) https://www.statista.com/outlook/dmo/digital-media/video-games/sweden.

A Górska M and Marcinoska-Boulangé L, ‘When 3-D Objects in Video Games Pose IP Challenges’ (International Bar Association, 8 December 2021) https://www.ibanet.org/ip-july-2021-3d-object-video-games-ip#_edn12

Aeon_Must_Die, ‘Press Note - Aeon Must Die’ (X, 12 October 2021) https://x.com/Aeon_Must_Die/status/1447902909862227968.

Alquist A, ‘Is TPM a Dirty Word? Digital Rights Management-Systems and Video Games within the EU’ (MA thesis, Lund University 2013)

Bailey K, ‘PlayStation Reverses Course on Helldivers 2 PSN Account Requirement’ (IGN, 5 June 2024) https://www.ign.com/articles/playstation-reverses-course-on-helldivers-2-psn-account-requirement.

Batchelor J, ‘Former Aeon Must Die Developers Issue Fresh Demands to Focus and Limestone as Game Finally Launches’ (GamesIndustry.biz, 14 October 2021) https://www.gamesindustry.biz/former-aeon-must-die-developers-issue-fresh-demands-to-focus-and-limestone-as-game-finally-launches.

Clement J, 'Most Popular Twitch Channels Worldwide as of June 2024, by Number of Followers' (Statista, 27 April 2024) https://www.statista.com/statistics/486914/most-popular-twitch-channels-ranked-by-followers/

Clement J, 'Twitch - Statistics & Facts' (Statista, 1 January 2024) https://www.statista.com/topics/7946/twitch/#editorsPicks

Dinsdale R, 'Nintendo Has Removed Thousands of Music Tracks From YouTube in Recent Weeks' (IGN, 2 February 2022) https://www.ign.com/articles/nintendo-removed-thousands-of-music-tracks-from-youtube.

European Commission, 'The EU Copyright Legislation' (Shaping Europe's digital future, 2 July 2023) https://digital-strategy.ec.europa.eu/en/policies/copyright-legislation

European Innovation Council and SMEs Executive Agency, 'Copyright in Video Games, and Trade Marks for Remote Controls' (IP Helpdesk - NEWS BLOG, 15 October 2021) https://intellectual-property-helpdesk.ec.europa.eu/news-events/news/copyright-video-games-and-trade-marks-remote-controls-2021-10-15_en.

Evans-Thirlwell E, 'Why Are People Modding Thomas the Tank Engine into Video Games?' (The Face 9 May 2019) https://theface.com/culture/why-are-people-modding-thomas-the-tank-engine-into-video-games.

Frasca G, 'Videogames of the Oppressed: Videogames as a Means for Critical Thinking and Debate' (MA thesis, Georgia Institute of Technology 2001)

Henningson J, 'The History of Counter-Strike' (RedBull esports, 8 June 2020) https://www.redbull.com/se-en/history-of-counterstrike.

New York Film Academy, 'Styles of Filmmaking: Exploring the Brands of Famous Directors' (New York Film Academy, October 2023) https://www.nyfa.edu/student-resources/nyfa-building-your-brand/

Nintendo Co., Ltd., 'Nintendo Intellectual Property' (Nintendo) https://www.nintendo.com/au/legal/nintendo-intellectual-property/.

Pilestedt, 'PSN Mandatory Account to Play Helldivers2' (X, 5 May 2024) https://x.com/Pilestedt/status/1787251973927940297.

Rosati E, ‘Nintendo Ruling Confirmed Lex Specialis Nature of Software Directive: Does This Have Implications for UsedSoft Exhaustion?’ (The IPKat, 26 January 2014) https://ipkitten.blogspot.com/2014/01/nintendo-ruling-confirmed-lex-specialis.html

Schreier J, ‘“Helldivers 2” Is a Surprise Hit for Sony in an Oversaturated Market’ (Newsletter Game On, 15 March 2024) https://www.bloomberg.com/news/newsletters/2024-03-15/-helldivers-2-is-a-surprise-hit-for-sony-in-an-oversaturated-market?sref=P6Q0mxvj.

Sony Interactive Entertainment, ‘Playstation Network Terms of Service and User Agreement’ (Sony Interactive Entertainment) https://www.playstation.com/en-us/legal/psn-terms-of-service/.

Synodinou T, ‘Decrypting the Code: CJEU SAS vs. World Programming’ (Kluwer Copyright Blog, 5 July 2012) https://copyrightblog.kluweriplaw.com/2012/05/07/decrypting-the-code-cjeu-sas-vs-world-programming/'List of Mario Games’ (Fandom) https://nintendo.fandom.com /wiki/List_of_Mario_games.

World Intellectual Property Organization, ‘Video Games’ (WIPO) https://www.wipo.int/copyright/en/activities/video_games.html.