CAN YOU PLAY? AN ANALYSIS OF VIDEO GAME USER-GENERATED CONTENT POLICIES

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AMY THOMAS

CREATe

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Amy Thomas*

Abstract

User-generated content (UGC) is notoriously difficult to regulate under the, often rightsholder-centric, default copyright regime. As an alternative regulatory mechanism, this working paper explores how the video game industry regulates user creativity through contract, not copyright, creating a parallel community system of exclusive rights and user exceptions.

The working paper examines the UGC policies of 30 popular game titles, identifying seven different types of UGC activities and the varying degrees to which they are permitted: either entirely without condition; with conditions; or wholly prohibited. In doing so, the paper identifies industry trends in regulating user creativity, and how this responsive contractual tool acts as a gateway for reflection for copyright reform.

1. Introduction

Video games have become an unexpected front-runner in the entertainment industry. For the newest generations, playing and sharing of video game content is perhaps the most culturally important, go-to storytelling form, and it is undeniable that they make up a large part of life online. Foremost among this is the ill-understood phenomenon of 'watching other people play games', now omnipresent on online platforms, with game streaming and recordings accounting for over 100 billion hours of YouTube content in 2020 alone (IGN, 2020). Increasingly, other forms of user creativity are emerging, with game photography, modding, and fan communities working together to prolong the lifespan and value of a game past its initial release. In sum, much of the value of games, as an entertainment industry, comes from the recreation, reinterpretation, and extension of the game world by the user.

The role of the user in this industry presents a tension to the, often rightsholder-centric, regulation of copyrighted works. As a type of user-generated content (UGC), this creativity is

* Amy Thomas is a Lecturer in Intellectual Property and Information Law all at CREATe, School of Law, University of Glasgow. This paper is based on findings from PhD research funded by a collaborative scholarship between CREATe and CMS. The 'You Can Play' project receives funding from an ESRC IAA User Engagement and Follow-on-Fund, with project number: 315056 and 318283. See You Can Play website available at: https://www.copyrightevidence.org/ycp/overview.

conceptualised in copyright doctrine as not quite authorial, but not quite consumptive either; resultingly, the law finds it difficult to categorise the continuous, collaborative creativity that UGC typifies, often resulting in a default treatment of copyright infringement.

Yet, this legal treatment is vastly different from the lived reality of game creators and users in the industry. Not only is heavy-handed copyright enforcement ill-advised at the risk of alienating influential user communities, but game creators speak more idealistically of 'encouraging [UGC] [which] is really important and leads to a creatively, and potentially commercially vibrant market' (Alae-Carew, 2020, 22). Resultingly, many game creators have relied instead on contract to cut through the gordian knot of default copyright law, creating a parallel system of regulating user creativity akin to a Creative Commons style of 'some rights reserved' licensing.

This paper illuminates the inner workings of the parallel system of video game user-contracts with findings of an empirical study that systematises and categorises a selection of 30 video game UGC policies. In doing so, the paper presents a case study of an alternative mechanism for regulating UGC that can inform copyright policy.

The paper begins with Section 2, which outlines the concept of UGC and how this manifests in the video game industry. Section 3 details the complex interplay between copyright and contract, and how infringing activities can be transformed into authorised (re)creations through contract. Section 4 offers a brief overview of the methods employed for the empirical study, detailing the data gathering and coding process employed. Finally, Section 5 offers a taxonomy of the different types of UGC derived from game UGC policies, with an analysis of the conditions most commonly attached to them. In doing so, this paper uncovers the strategic priorities of rightsholders in this industry, and how UGC policies can be used to look inward to defects of the copyright system (and how perhaps they may be corrected).

2. UGC and video games

UGC is an umbrella term which has come to be defined as a form of 'amateur' creative content published on online platforms (OECD, 2007). The 'amateur' component is taken quite literally at its definition to suggest that the user is making this content for the love of it; commercial activities, or profit making will generally preclude something from being defined as UGC. The 'content' component of UGC can in principle include multiple different types of creativity (Gervais 2009), but commonly it involves reusing existing (copyrighted) works owned by a third party (e.g. remixes, mash-ups etc.). Importantly, and whilst the distinction between the two has been, rightly, critiqued (to name but a few, Gibson 2007, Craig 2011, Meese 2018 and Iljadica 2020), UGC is generally conceptualised differently from a creative *work* created by an author, in

copyright discourse: the user is a creator, but not the kind of creator that is awarded an exclusive right. The sum image conjured by this definition of UGC is of an individual fan or enthusiast of an existing work, specifically not a business or an entity with profit making intention, engaging in (re)creating *with* that work with no desire for recompense.

In the context of video games, UGC takes two forms: in-game UGC, and UGC which exists outwith the game world. The former, in-game UGC, is self-contained within the constraints of the game's world, allowing for the creation of e.g., playable maps, skins, music, or characters. The latter, UGC outwith the game world, is more difficult to quantify as in theory it can have infinite variety in the 'real' world. For the purposes of this study, in-game UGC is largely excluded from the ambit of analysis as the authorisation for its creation and exploitation is presumed to be *de facto* sanctioned by the game creator by merit of it being made technically possible (and constrained) within the game world. Instead, this study is more concerned with the latter: UGC outwith a game world.

The most common and well-known type of game UGC outwith the game world is the creation of game videos, either through live streaming or pre-recorded edited videos. Usually shared on online platforms such as YouTube or Twitch, it is possible to make a lucrative living from playing a game; famous examples include PewDiePie, Markiplier, or Jacksepticeye, who are followed by millions and make millions in return (Saab, 2021). Elsewhere, types of UGC outwith the game space include (but are certainly not limited to) game photography, modding (a slang term for modifications to the game, changing the way it looks or behaves), and other fan works, such as the creation of fan art. Often, these types of UGC prolong or extend the game universe in a dialogic fashion, by e.g., acting as post-release quality control (e.g. the extensive community modding of CD Projekt Red's *Cyberpunk 2077*, detailed in Irwin 2021), recontextualising the game as a professionalised competition (e.g. eSports, speed running), or contributing to the lore of the game world (see e.g., the quasi-fabled knight user-created character 'Let Me Solo Her' in Bandai Namco's *Elden Ring*, detailed in Smith, 2022).

Outlining the types of UGC possible in this industry illustrates its diversity and an introductory suggestion as to why it is difficult to regulate; user communities routinely, and in new and different ways, add value and prolong the life of a game past its release date with new forms of creativity. With creators of UGC potentially earning millions and creating a livelihood around the exploitation of game content, it is also a direct challenge to the doctrinal assumption of the creators of UGC as 'amateurs'; the more accurate conceptualisation in this case is one of a user industry.

3. Copyright vs contract

The creation and sharing of game UGC relies on a user's interaction with copyrighted content owned by a third party, usually a game publisher or developer. Games are considered 'complex subject-matter' as well as a stand-alone object of protection (see Case C-355/12 *Nintendo Co Ltd v PC Box SRL* [2014] OJ C93/8). This means that games cannot be reduced to a simple form of software, but rather may implicate several other different types of copyrightable subject-matter including: video (e.g., full-motion videos or cutscenes), graphic works (individual frames, character designs), audio (soundtracks, dialogue) and literary works (in-game lore, scripts). Whilst many game companies will outsource aspects of this subject-matter creation to other third parties (e.g., developers, composers, voice actors), the usual treatment is to revert ownership rights to the game publisher.

In a similar vein, whilst the user may generate much of the value of UGC in offering their entertainment or skill, copyright law has a narrow view of their 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. Whilst this matter has rarely entered the consideration of the courts (in the US, see and *Atari Games v Oman* 888 F2d 878 and Midway *Mfg v Artic International* 704 F2d 1009; in the UK see *Nova Productions Ltd v Mazooma Games Ltd & Ors* [2007] EWCA Civ 219) the default legal treatment remains that it is the game creator (or more specifically, the software developers employed by that company) that is the entity making the user's creative input possible, by creating the game in the first instance; in a cyclical fashion, even if a user is technically the entity making certain things happen on a screen, they do not have an authorial interest, instead reverting their inputs once again to the game company.

The recent Copyright in the Digital Single Market (CDSM) Directive offered the opportunity for more substantive discussions and legislative reform on the legal treatment of UGC, broadly conceived (see Erickson 2014 and Furgal, Kretschmer and Thomas, 2020), and indeed resulted in the newly incorporated concept of 'subject-matter uploaded by users' (Article 17(7)) (read: UGC). Lamentably however, the Directive does not offer any clarification or progression as to the legal treatment of UGC, but instead re-affirms the more traditional doctrinal standpoint that UGC is an activity for which the rightsholder ultimately can control by permitting, or denying, a platform's entitlement to host that content (see Article 17 CDSM Directive).

Decisively then, if the user has no authorial claim over their UGC, they are left with the option of seeking to benefit from a copyright exception to escape liability for copyright infringement. However, the EU copyright regime gives little solace to the user looking to exploit their UGC. No specific copyright exception exists that would make most types of game UGC, outwith certain

specific circumstances and conditions (such as e.g., for the purposes of education), lawful. To take a common example, if a user wants to stream themselves playing the entirety of a game on their Twitch channel (a 'playthrough'), this will run afoul of several issues that would prevent the straightforward application of a copyright exception:

- Whilst even quantitatively small amounts of content can be considered qualitatively substantial (see Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening*), there is little doubt that streaming the entirety of a game would be considered substantial, thus *prima facie* triggering copyright infringement. Modern games can take up to 200 hours to complete in their entirety, if they follow a linear narrative; games of infinite replayability or without a linear narrative make thousands of gameplay hours possible (e.g., multiplayer online titles, such as *World of Warcraft*). The vast difference between this time span of a 'completed' game work, and e.g., the duration of film or music, makes it difficult to compare these mediums meaningfully.

- The act of streaming a game does not necessarily fall under any of the closed list of exceptions in the InfoSoc Directive. Whilst users may criticise aspects of the game, or frequently include humour or mockery within their streams, they are not likely to satisfy the level of engagement obliged by e.g., the quotation for criticism and review (see Case C-516/17 *Spiegel Online v Beck*) or parody exception (see Case C-201/13 *Deckmyn v Vandersteen*) (leaving aside here the interesting question of a more general quotation exception forwarded by Aplin and Bently, 2020). The purpose of most playthrough streams are less about assessing, or mocking, the merits or particulars of a game, and more about the streamer themselves, their skills, observations, or rapport with the viewer, as a source of entertainment.

- In any case, should a copyright exception potentially apply, national implementations of the InfoSoc Directive often extend the non-commercial factor (obliged only in limited circumstances in the InfoSoc Directive, Article 5) into their assessment of 'fairness'. As such, any claim to an applicable exception is likely to be defeated by the commercial and profit-making nature of many streams. It is commonplace now that a streamer may receive ad revenue through partnership programmes, sponsorships, or fan donations in conjunction with their streaming activity. Whilst there is no static definition of commerciality in EU copyright jurisprudence, the definition given by Creative Commons indicates that this could be 'any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation' (Creative Commons, 2009, 11). Such recompense to streamers would almost certainly fall within this ambit.

With the slow pace of policy change and judicial interpretation by courts, it seems unlikely that the legal treatment of game UGC in copyright doctrine will change any time soon. Without intervention, this leaves UGC creators in an uneasy state of tolerated infringement, with an omnipresent threat of enforcement measures.

In the face of this doctrinal gordian knot, the video games industry has responded with an alternative mechanism of regulating user creativity: contract. Now, game companies routinely consider the user who approaches a game, not as a passive consumer, but as an active creator who is interested in what rights are licensed to them to interactively create with a game. The End User Licence Agreement (EULA) has long accompanied games at the point of sale and constitutes the primary licensing agreement between a game creator and user. Now, this licence will also routinely be accompanied by lengthy terms and conditions or policies (not to mention warranties, privacy policies, codes of conduct etc.) dedicated specifically to regulating UGC.

Much like the Creative Commons style of 'some rights reserved' licensing, game companies are increasingly using these contracts (in part) as opt-out mechanisms for the automatic protection bestowed by copyright in respect of their users' UGC. Copyright is still centrally important to this concept because it grants the game owner the initial right to exploit and determine those terms under which the UGC may be exploited, but the subsequent system of sanctioned creativity bears little resemblance to it. This divergence from the legal regime appears to be in both an effort to encourage influential user bases to create and distribute UGC, which may have a promotional effect for the primary game product, whilst also offering a more proximate degree of control over the nature of that content than the default copyright regime specifies. Thus, in this study, unlike much of the broader literature on video game user contracts that (importantly) explore the tendency towards oppressiveness in contract (to name but a few, see Dibbell 2006, Marcus 2008, Lastowka 2011 and Harbinja 2015), contract is positioned here as a more neutral device: the primary research question is, how does contract construct a parallel system of user creativity in the video game industry?

4. Method

4.1. Dataset

The dataset for this study comprises 30 individual game titles, corresponding to 30 distinct UGC policies, of 30 different game publishers. Game and eSports titles were selected based on their popularity, used here as a proxy for representative industry contracting standards, derived from

crowdsourced ranking websites Ranker (ranker.com) and eSports Earnings (esportsearnings.com).

The most up-to-date versions of game EULAs, terms and conditions, UGC policies and other variants thereof (in combination: the UGC policy), were collected and viewed holistically as the package of documentation with which a user would be presented with in making a determination about UGC authorisations. Resultingly, despite capturing 30 individual game titles, the study considers 61 individual documents which regulate the creation and authorisation of UGC, making for an average of 2 documents per title. Given that UGC policies are subject to change, static versions of these documents were captured on 21 December 2021 for the purposes of analysis.

4.2. Coding

UGC policies were coded according to two factors: which discrete activities were considered in relation to UGC, and; whether these were permitted (with or without conditions) or prohibited. A scoring system was created to rank 'levels' of permissiveness between different game creators. Every affirmative permission was given a score of 12.5; 6.25 for permissions accompanied by certain conditions, and; 0 if the activity was not permitted. Put simply, a score of 100 means that every activity is fully permitted by a game creator, whilst 0 would mean nothing is permitted. The analysis that follows in Section 5 (Results) consists mainly of descriptive statistics quantifying the range of permissiveness across different activities, and indications of trends in the industry.

5. Results

The study finds seven distinct types of UGC in the video games industry. These activities were derived iteratively from the text of the UGC polices and delineated based on their prevalence:

- Video: Creation of a moving image of a game, including live streams and pre-recorded videos.
- Monetisation: Permission to earn money (or equivalent) from videos uploaded to online platforms.
- Screenshots and game photography: Creation of a singular still, image, frame, or screenshot of the game.

- Soundtrack: Use of the custom-made soundtrack that accompanies a game, otherwise known as the 'original soundtrack' (OST). This category specifically excludes licensed music from third parties.
- Fan works: Creation of any derivative content based on a game or including game content (such as characters) including fan fiction, fan art, fan sites and fan games.
- Merchandise: The creation and sale of products based on a game, such as clothing featuring the image of a game character.
- Mods: The creation of modifications to the code of a game that changes the way it looks or behaves.
- Commercial use: Any use of a game in commerce (i.e., the course of a business).

Table 1 illustrates the levels of permission granted in relation to each activity.

Table 1: Level of permission by activity

UGC type	Permitted	Permitted with conditions	Not permitted
Video	16	5	9
Monetisation	7	12	11
Screenshots	15	1	14
Soundtrack	6	8	16
Fan works	5	11	14
Merchandise	2	2	26
Mods	2	3	25
Commercial use	0	0	30

In terms of 'permissiveness' scores, the mean average score across the dataset is 29.34 (roughly equating to two complete activities permitted and one with conditions, per game). No company surveyed in this dataset scored 100; the highest score is a more modest 62.5 (Mojang, creators

of *Minecraft*). By contrast, 8 companies score 0 (Tencent, Activision, Wargaming, Cygames, Sony, Warner Bros, Bandai Namco and Konami); essentially adopting all-rights-reserved, no-UGC-permitted model.

The following sub-sections consider each of these activities, and the nuances of their various conditions, in turn.

5.1. Videos

The creation of video content, including both streamed and pre-recorded content, is the most permitted UGC activity without conditions, and is permitted by the majority of rightsholders in the dataset (16). This is perhaps unsurprising as the creation of streams and pre-recorded game videos continues to dominate the game UGC spectrum. It seems that granting wholesale permission to the user (and sometimes even deterrents from contacting the game company to confirm same – see Red Barrels) is the most efficient approach, rather than continuous assessment by the rightsholder.

Where conditions are attached to the creation of videos, these can mimic existing copyright principles, and may include obligations to make 'original contributions' (Riot Games) or add a 'creative spin' (Ubisoft)(akin to the originality requirement) to UGC, and not just 'ripping off' (Riot Games) the work of others or 'simply duplicating content' (Ubisoft) (akin to prohibitions against verbatim copying). Many more conditions are concerned with non-copyright areas relating to the quality and nature of the content itself. This includes prohibitions that protect the commercial viability of a game and its longevity, such as the prohibition of making videos that include spoilers or pre-release footage (Rockstar Games). Many more are concerned with ensuring the 'spirit and tone' (Epic Games) of a game is preserved in any user videos. This may be by preventing content which is 'obscene, sexually explicit, defamatory, offensive, objectionable, or harmful to others' (Epic Games), or 'objectionable' for any other reason (Ubisoft). These conditions leave open the possibility for the game creator to determine what factors match the 'spirit and tone' of a game and the quality of its use. Much like copyright, the quantity of how much of a game can be used in video footage is not relevant in the UGC policies; there is in theory no time limit on how much video footage one can show. Instead, it is the quality of the user's interaction with a game which is more important in determining its authorisation.

Of the nine UGC policies that do not permit the use of any kind of video content, eight form part of the broader all-rights-reserved models noted above (the exception is Toby Fox, creator of *Undertale/Deltarune*). For the most part then, within these UGC policies videos are not a specific

target of prohibition, but rather form part of the bigger context of an all-rights-reserved culture within specific game companies.

5.2. Monetisation

Profit and money-making intentions are often fatal for the application of copyright exceptions. However, a surprisingly high number of game companies, if not the majority, allow for monetisation of game content (7 without condition, 12 with). Importantly, 'monetisation' is construed very narrowly, and should not be understood as a universal permission to make money from any source in respect of UGC. Instead, UGC policies mainly permit passive ad revenue, money gained from partnership programmes with online platforms, and fan donations. Paywalls in any form (e.g., Patreon), whilst strictly constituting 'monetisation', are almost universally prohibited amongst those rightsholders who attach conditions to the monetisation permission (with the exception of Mojang who allow for a 24-hour embargo of paywalled content). As such, it may be more accurate to define monetisation as a user's entitlement to derive *passive* income from their UGC, but not the *active* solicitation of money from other users at the point of access. In this sense, monetisation of UGC is not transactional, but rather merit-based; other users may reward the creator of UGC with their time, subscription, or donation, but cannot be actively charged to access the content.

Importantly, monetisation is conceptualised very differently from commercialisation (discussed in Section 5.8 below). Permission to monetise content does not extend to commerce or businesses, evidencing a more nuanced consideration of the *source* of profit in the games industry.

5.3. Screenshots and game photography

Whilst game photography is not quite as prevalent as game videos, it is increasing in popularity as game worlds become larger and more intricate. Through the integration of in-game photography systems, users can share photography on online platforms, or even on occasion in gallery exhibitions (see e.g., 'Game Scenes' reported in Fowler 2020).

Game companies are divided, almost in half on whether screenshots and game photography are permissible (14 permitted without condition, 1 with conditions, and 14 prohibited). Whilst it would seem that, in substance, the difference in value between a video and a screenshot should not be much, and indeed many video game creators will use screenshots as a thumbnail for their videos, there is clearly a difference in perception as to what the game creator finds tolerable. As discussed in Sections 5.5 and 5.6 below, branding concerns are omnipresent throughout the UGC policies; the value of a static, still image of a video game object or character may bear closer

resemblance to the symbolic value of a brand, rather than the more ephemeral and unpredictable stream or video. Indeed, recent trends in in-game photography have seen the implementation of branded watermarks, as was infamously the case with Capcom's recent *Resident Evil: Village* release.

Alternatively, this *prima facie* restrictive approach may in part be a result of the very narrow definition of game photography adopted for this study; a still image as opposed to the moving image of a video is treated by default as excluded by the all-rights-reserved model unless it is specifically included, even if it is perhaps implied.

5.4. Soundtrack (OST)

One UGC policy cautions that '[m]usic licensing is complicated' (CD Projekt Red), which serves as an apt starting point for the discussion on game OSTs. Importantly, the OST is defined in this study very narrowly, so as to relate only to the custom-made soundtrack composed for a game; notable composers and OSTs from the dataset include Gustavo Santaolalla (Sony, *The Last of Us*), Marcin Przybyłowicz (CD Projekt Red, *The Witcher 3: Wild Hunt*) and Toby Fox (*Undertale*). Music licensed for use in a game from a third party, such as would play on an in-game car radio, are excluded from the ambit of this activity (and thus is not a reflection of those licensing terms between the third party and the game creator).

The use of OSTs in UGC is a contentious area. For many users, the OST designed to accompany a game is inseparable from the whole; it is purpose-made to accompany the scenes and atmosphere of the game, much like a film soundtrack. Yet, many anecdotal reports claim that copyright enforcement measures by game creators are primary directed towards the use of game OSTs, rather than the game footage as such (most recently, see Nintendo's spate of takedowns reported in Diaz 2022 and Microsoft/Bungie in Plunkett 2022). Evidenced in this study, game footage and OSTs are clearly delineated: 21 game companies allow videos, whilst only 14 allow use of the soundtrack that accompanies same. The OST thus appears to have a different value, severable from the rest of a game.

Companies are again divided, almost in half, as to whether the OST can be used in UGC (6 without conditions, 8 with conditions, and 16 prohibited). Often, once conditions are applied, the actual use of the soundtrack is very limited indeed. This may have an interplay with monetisation, which can be prohibited once the soundtrack is included with a game (for the most detailed examples, see CD Projekt Red and Toby Fox/Materia Music Publishing). Some OSTs may only be used for 'personal use and creative exploration' (Blizzard), seemingly excluding the possibility of including this in a game video on an online platform where the lines between personal and public are

blurred. A more common condition is that the OST cannot be used when divorced from the context of a game; it cannot for example, be used to accompany a product review (CD Projekt Red). Thus, for the OST, when permitted, its use usually has to be associated with the primary video game product.

5.5. Fan works

Fan works are the category with the most conditions attached to their use (11 permissions with conditions in total). This is perhaps as a result of the activity being collectively aggregated under the umbrella term of 'fan works', which embodies many different forms: fan fiction, fan art, fan sites, and fan games are specifically considered in this project. As a result of these different forms, game companies tend to differentiate between them, and the different conditions attached to them. Blizzard, for example, permit fan art (provided it is not used commercially), fan sites (provided they are made non-commercially and include attribution) but do not permit fan fiction (Blizzard). Toby Fox permits fan art (and its monetisation if not commercialisation), but no other forms of fan works (Fox). CD Projekt Red are silent on permissions to make fan works generally, but specifically do not permit fan sites or apps (CD Projekt). Game creators thus exhibit more variability with these activities, which in fact parallel some fan community norms around e.g., the selling of fan art, but not fan fiction (Fiesler 2018).

Concerns surrounding the use of assets, brands, and logos are also more apparent in the conditions permitting fan works. Users are frequently asked not to include trade marks with fan works (CD Projekt Red, Wizards of the Coast) or to use brands or logos in contexts outwith the game's world (Epic Games). Much as with screenshots, where the static value of an asset or character may hold separate value, associated branding with fan works, divorced from the original context of the game world, is a concern expressed strongly in UGC policies.

5.6. Merchandise

The creation of merchandise is almost universally prohibited by game companies (26 prohibiting this in total). UGC policies do not justify this: it is either a straightforward prohibition, or omission (thus falling under the all-rights-reserved default model) open to interpretation. As discussed in relation to screenshots (Section 5.3) and fan works (Section 5.5) branding is an omnipresent concern in the UGC policies; particularly branding divorced from its original context or used in association with unsanctioned works. The same concern is not expressed in relation to videos, but rather the static image used outwith the game world, and in the case of merchandise, semi-commercialised. It is likely these three activities are intended to interplay, such that a user cannot take a screenshot of a character, apply this to a t-shirt, and sell it at a convention.

Of the two companies that do attach conditions to the creation of merchandise, these details are among some of the most lengthy and complex. Mojang, creators of *Minecraft*, set specific limits on the amount one can earn from merchandise (i.e., no more than 5,000 USD in one calendar year), the amount of types of merchandise that can be made (i.e., no more than 20 of one type of item), and specifications that any merchandise must be hand crafted (i.e. not industrially produced) (Mojang). Toby Fox similarly permits 'most handmade items', but not including apparel, merchandise sold on online stores, or anything that can 'compete with official merchandise' (Fox).

In examining the conditions surrounding merchandise, it becomes apparent that many of the activities prohibited by game companies can usually (but not always) be associated with the protection of brand assets. Where the brand is untouched, as is the case with videos which are given separate value resulting from the user's interactivity, these permissions appear more likely (though even then, may be restricted by the company's 'spirit and tone').

5.7. Mods

Game mods are a point of intrigue in copyright scholarship, because of the phenomenon of a community regularly making lengthy and complex codes and software for no recompense (most recently, see Deng and Li 2021). Whilst often bizarre (see e.g. 'Thomas the Tank Engine over Mr X' in Resident Evil 2 by ZombieAli 2019), mods can also constitute substantial post-release quality assurance that remedies defects of a game by e.g. improving playability or graphics (see e.g. mods for CD Projekt Red's *Cyberpunk 2077* in Irwin 2021). Mods, perhaps more so than other forms of UGC, have a tendency to be viewed positively within the industry, particularly as these activities parallel a gateway to development and game creation itself: famously, the now eSports famous title *Counter-Strike* was a user mod of *Half-Life*.

Yet, despite the scholarly intrigue and outward-industry support surrounding mods, most of the games surveyed in this study wholesale prohibit mods (25 in total), instead reserving to the creator the, broadly construed, right to 'modify' a game.

A closer look at those UGC policies which do permit mods with conditions (3 total) reveals that this finding may be a by-product of the nature of the dataset. Most of the games included in this dataset are console or multiplayer titles, giving them a unique character. In respect of the former characteristic, the prohibition of mods is a straightforward meeting of contractual prohibition and technology: console titles usually do not technically allow for mods as a nature of their closed systems; it is usually not possible, except for the very technically capable, to access the technology necessary to install a mod on a console. In respect of the latter, mods are usually

prohibited for multiplayer titles because they jeopardise fair play; in the interests of fair play, it should not, for example, be technically possible to create a mod that allows one to shoot more easily or accurately in a multiplayer title. Indeed, in respect of multiplayer titles, Psyonix only allow mods to the extent that they 'do not offer a competitive advantage in online play' (Psyonix), whilst Blizzard deter 'god modding' (the act of controlling another player) (Blizzard). As games increasingly integrate networked, online, multiplayer features, this prohibition is only likely to increase in future.

5.8. Commerciality

Commercial activities with UGC are always prohibited by game creators (30 in total). Whilst Mojang come close to permitting some kinds of commercial activity by allowing e.g., the limited publishing of books related to *Minecraft* (Mojang), they nonetheless maintain, repeatedly, that commercial activities are otherwise prohibited. Commerciality is otherwise only considered as a distinct activity in this study if only to highlight this as an emphatically prohibited activity.

It is curious however that 'commercial' activities are conceptualised more narrowly and specifically as activities in commerce or business, rather than being conflated necessarily with making profit. The very existence of a monetisation activity (Section 5.2) suggests that these concepts are intended to be understood differently. Copyright, by contrast, usually conflates commercialisation and monetisation when considering the application of an exception, for example, if it undermines the market for a primary work. Instead, game UGC policies frame prohibitions of commercialisation as an anti-business, anti-competitor provision, rather than anti-profit to the user *per se*. Riot Games, for example, specifically prohibit UGC projects where they have been in any part crowdsourced or involve a business (Riot Games). This presumably means that it would be prohibited for a company to use a game character or footage in their promotional advertisements, even if this does not generate a direct stream of revenue, simply by merit of its status of being used in relation to a business. By contrast, a user, as a natural person, can stream the whole of a game and earn infinite passive ad revenue from it without this being considered a commercial activity.

Thus, whilst on the face of it, this strong anti-commercialisation prohibition seems to preserve the conceptual framing of UGC as an 'amateur' activity, the reality is much more nuanced. Instead, this prohibition reads as more akin to a 'do not compete' clause of not undermining the primary game market (as also suggested in the discussion on merchandise in Section 5.6) or associating the game brand, or assets, with another business. Whilst in principle copyright does not distinguish between the natural and institutional user, in this industry the user, as beneficiary to these permissions, is much more explicitly intended to be a natural person.

6. Conclusion

As video games increasingly make up life online, it is important to bring awareness to a parallel system of content creation in this copyright-intensive industry. Copyright may give the game owner an initial right to determine what they want to permit with UGC, but the subsequent system of creativity manufactured through contract bears little resemblance to the rules set out in doctrinal law. Importantly, this system is operating as designed: copyright enables this amount of discretion for a rightsholder to, on a case-by-case basis, determine the scope of creative (re)use.

Yet curiously, the same rights-based system is ultimately emulated in arrogating the rightsholder the mandate to determine excused infringement: UGC policies ultimately claim ownership of certain rights over game content, whilst also manufacturing limited exceptions for the user. The seven types of activities uncovered in this study, that *prima facie* copyright would prohibit, are discussed and negotiated in the UGC policy's own terms, creating its own sub-factors of fairness, through contract. This study highlights how UGC policies are responsive to, and often circumvent, difficult legal questions that strain the default copyright regime.

Substantive use of the moving image of a game is, ironically by far the most unproblematic UGC activity, despite posing, as provoked in this study, a classic problem for the copyright regime. By contrast, there is more value, and thus less permissiveness, for activities with more static assets that can be divorced from the game world: a character on a t-shirt, or the use of an OST in a video not connected with the game. As such, branding (and perhaps ancillary concerns in trade mark) is more apparently an important consideration in the UGC policy as an activity to be constrained, despite the perception and framing that these are primarily copyright-related activities.

The study also offers a provocation to the classic puzzle of copyright in the digital era, namely the question of whether and how to award the continuous, often collective, creation of UGC. Recently, conversations around UGC and copyright have been fixated on the wholesale blocking and removal of content (particularly in the context of e.g. Article 17 of the CDSM Directive – see e.g., Frosio 2020 and Quintais et al. 2020). This remains a crucial discussion. However, the findings from this study suggest that another, less visible, frontier of discussion is not whether UGC is permitted or available – at least in this context, this is quite often the case – but rather, whether a user is permitted to be remunerated for their creativity. Indeed, this forms an important policy question about copyright incentives. Arguably, UGC policies approach the question of monetary rewards in a more structured way than copyright doctrine: 'commerciality' does not necessarily include, nor is limited to the concept of user profit or remuneration. Instead, there is growing recognition that the value of UGC can be recognised

through passive monetisation of content, and that this is not in conflict with the rightsholder's own entitlement for recompense via sales of (or within) the primary game product.

In concluding: is contract a suitable regulatory mechanism that can resolve the UGC/copyright 'problem'? This study does not necessarily argue that the UGC policies surveyed here are a better or worse solution than the default law of copyright and the delicate balance it seeks to maintain. Instead, it is clear that UGC policies are being used as a responsive tool that reflects the needs of the industry: it encourages researchers and policymakers alike to look inward to the system of copyright to see what the policies are responding to, and how in turn they may inform a progressive legal treatment of UGC.

List of sources

Alae-Carew N (2020) 'Intellectual Property and "Terms of Trade": The Challenges for Entertainment Businesses in the Emerging Platform Economy' CREATe Working Paper 2020/5

Aplin T and Bently L (2020) 'Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works' Cambridge University Press

Craig C (2011) *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Edward Elgar 2011)

Creative Commons (2009) 'Defining "Noncommercial": A Study of How the Online Population Understands "Noncommercial Use"' Creative Commons Report

Deng Z and Li Y (2021) 'Players' rights to game mods: Towards a more balanced copyright regime', Computer Law & Security Review, 43

Diaz A (2022) 'Nintendo crushes fan-favourited game music YouTube channel with thousands of copyright claims' (Polygon, 3 February 2022) <https://www.polygon.com/22916040/nintendo-video-game-music-osts-youtube-gilvasunner-copyright-takedown> accessed 29 April 2022

Dibbel J (2006) 'Owned! Intellectual property in the age of eBayers, gold farmers and other enemies of the virtual state, or how I learned to stop worrying and love the end-user license agreement' in Blakin JM and Noveck BS (eds) *The State of Play: Law, Games and Virtual Worlds* (NYU Press 2006)

Erickson K (2014) 'User Illusion: Ideological Construction of "User-Generated Content" in the EC Consultation on Copyright' Internet Policy Review, 3(4), 1-19

Fiesler (2018) Everything I Needed to Know: Empirical Investigations of Copyright Norms in Fandom. IDEA – The Law Review of the Franklin Pierce Centre for Intellectual Property, 59(1), 65-87

Fowler H (2020) 'Third-person shooter: In-game photography is becoming an avant-garde art form' (*Digital Trends*, 15 July 2020) <https://www.digitaltrends.com/gaming/in-game-photography-art/> accessed 29 April 2022

Frosio G (2020) Reforming the C-DSM Reform: A User-Based Copyright Theory for Commonplace Creativity. International Review of Intellectual property and Competition, 51(6) 709-750

Furgal U, Kretschmer M and Thomas A (2020) 'Memes and Parasites: A Discourse Analysis of the Copyright in the Digital Single Market Directive' CREATe Working Paper 2020/10

Gervais D (2009) 'The Tangled Web of UGC: Making Copyright Sense of User-Generated Content' Vanderbilt Journal of Entertainment and Technology Law, 11(4), 841-870

Gibson J (2007) *Creating Selves: Intellectual Property and the Narration of Culture* (Routledge 2007)

Harbinja E (2015) 'Virtual worlds players – consumers or citizens?' Internet Policy Review, 3(4)

Iljadica M (2020) 'User generated content and its authors' in Aplin T (ed) *Research Handbook on Intellectual property and Digital Technologies* (Edward Elgar 2020)

Irwin D (date unknown) 'The best Cyberpunk 2077 mods' (*PC Games*, date unknown) <https://www.pcgamesn.com/cyberpunk-2077/mods-best> accessed 15 September 2021)

Lastowka G (2011) 'Minecraft as Web 2.0: Amateur Creativity & Digital Games' (*SSRN*, 5 October 2011)<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1939241> accessed 15 September 2021

LeBlanc W (2020) '200 Billion Hours Were Spent Watching Gaming Content on YouTube in 2020' (*IGN*, 31 December 2020) (<https://www.ign.com/articles/100-billion-hours-were-spent-watching-gaming-content-on-youtube-in-2020> accessed 29 April 2022

Marcus TD (2008) 'Fostering Creativity in Virtual Worlds: Easing the Restrictiveness of Copyright for User-Created Content', Journal of the Copyright Society of the USA, 55

Meese J (2018) *Authors, Users and Pirates: Copyright Law and Subjectivity* (MIT Press 2018)

Plunkett L (2022) Destiny Copyright Takedowns Go Rogue, Are Even Hitting Bungie Videos (*Kotaku*, 20 March 2022) <https://kotaku.com/bungie-destiny-2-youtube-copyright-takedown-affiliate-c-1848678292> accessed 29 April 2022

OECD (2007) 'Participative Web and User-Created Content: Web 2.0, Wikis and Social Networking' DSTI/ICCP/IE(2006)7/FINAL

Quintais J, Frosio G, van Gompel S, Hugenholtz B, Husovec M, Jütte BJ, and Senftleben, M (2020) 'Safeguarding user Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics', JIPITEC, 277

Saab H (2021) '10 Most Popular Gaming YouTubers, Ranked By Subscribers' (*ScreenRant*, 16 August 2021) <https://screenrant.com/most-popular-gaming-youtubers-ranked-by-subscribers/> accessed 16 September 2021

Smith D (2022) 'Someone Called 'Let Her Solo Me' [sic] Is Tricking Elden Ring Players Into Thinking The Great One Has Arrived' (Kotaku, 19 April 2022) <https://www.kotaku.com.au/2022/04/let-her-solo-me-tricking-players/> accessed 29 April 2022

ZombieAli (2019) 'Thomas the Tank Engine Over Mr X' (Nexus Mods, 1 March 2019) <https://www.nexusmods.com/residentevil22019/mods/62> accessed 29 April 2022

UGC policies referenced from primary dataset[**]

Blizzard "Terms and Conditions of Fan Art Submissions to Blizzard Entertainment' <https://www.blizzard.com/en-gb/legal/a03da66c-273f-4a11-b18c-869db5b53688/terms-and-conditions-of-fan-art-submissions-to-blizzard-entertainment> latest version retrieved 21 December 2021

Blizzard 'Video Policy' <https://www.blizzard.com/en-gb/legal/2068564f-f427-4c1c-8664-c107c90b34d5/blizzard-video-policy> latest version retrieved 21 December 2021

CD Projekt Red 'Video Policy' <https://support.cdprojektred.com/en/witcher-3/playstation/content-policies/issue/830/video-policy> latest version retrieved 21 December 2021

CD Projekt Red 'Fan Content Guideline' <https://cdprojektred.com/en/fan-content> latest version retrieved 21 December 2021

Epic Games 'Fan Content Policy' <https://www.epicgames.com/site/en-US/fan-art-policy> latest version retrieved 21 December 2021

Materia Music Publishing (Materia Music Publishing, 'YouTube FAQ' (*Materia Music Publishing*, date unknown) <https://materiamusicpub.com/youtube-faq/> accessed 21 December 2021

Mojang 'Brand and Asset Usage Guidelines for our Games' <https://account.mojang.com/terms#brand> latest version retrieved 21 December 2021

Psyonix 'Rocket League Code of Conduct' <https://www.rocketleague.com/news/rocket-league-code-of-conduct/> accessed 21 December 2021

Red Barrels, 'Message to YouTubers' <https://redbarrelsgames.com/contact/> latest version retrieved 21 December 2021

Riot Games 'Legal Jibber Jabber' <https://www.riotgames.com/en/legal> latest version retrieved 21 December 2021

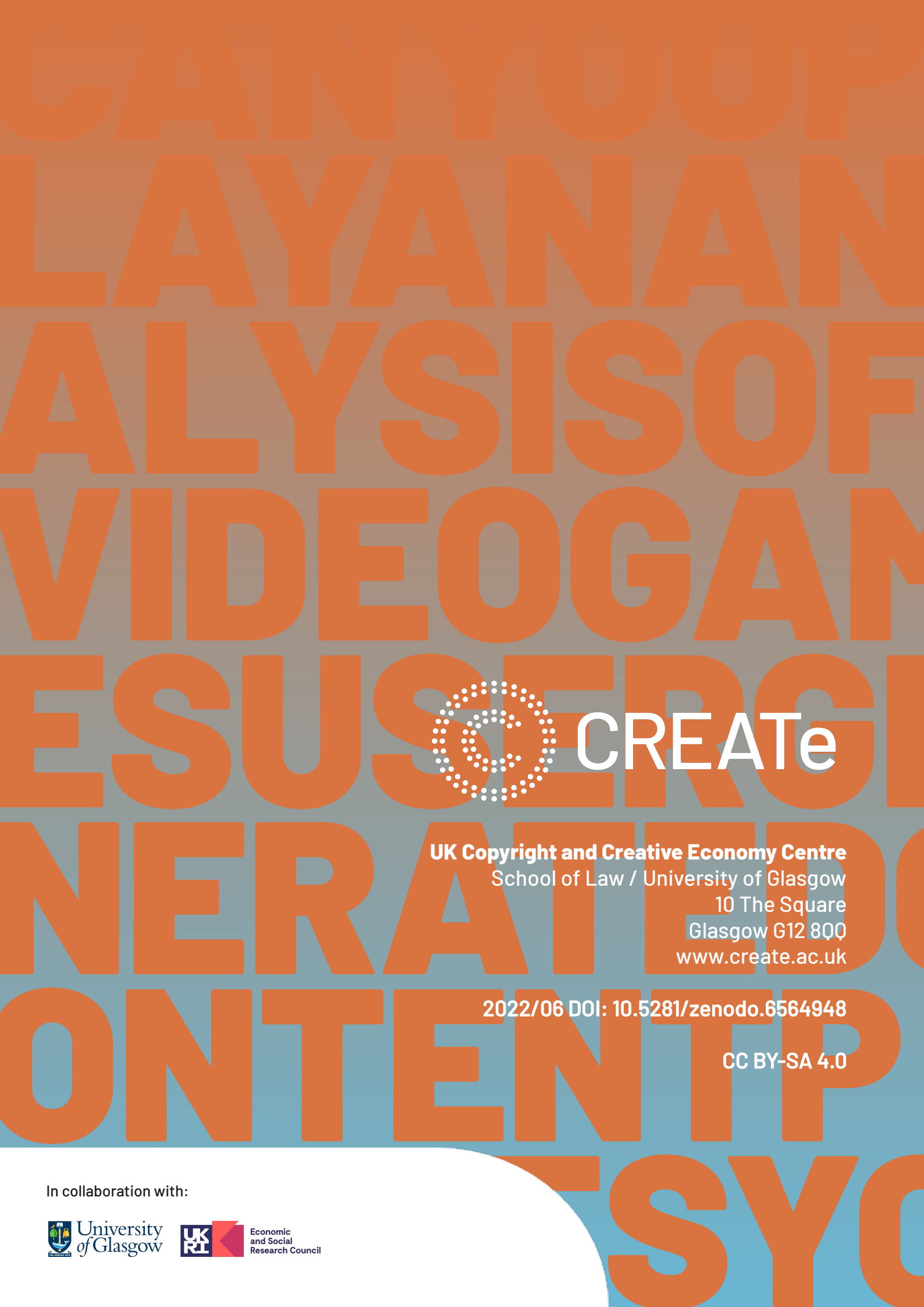
Rockstar Games 'Policy on posting copyrighted Rockstar Games Materials' <https://support.rockstargames.com/articles/200153756/Policy-on-posting-copyrighted-Rockstar-Games-material> latest version retrieved 21 December 2021

[**] Available at: https://www.copyrightevidence.org/ycp/overview.

Toby Fox, 'Official Undertale Blog: Changing Policy on Fan Merch' (*Tumblr*, 21 February 2016) <https://undertale.tumblr.com/post/139726155020/changing-policy-on-fan-merch> accessed 21 December 2021

Ubisoft 'Video Policy' <https://www.ubisoft.com/en-us/videopolicy.html> latest version retrieved 21 December 2021

Wizards of the Coast 'Fan Content Policy' <https://company.wizards.com/en/legal/fancontentpolicy> latest version retrieved 21 December 2021



UK Copyright and Creative Economy Centre
School of Law / University of Glasgow
10 The Square
Glasgow G12 8QQ
www.create.ac.uk

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