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The Copyright User: A Socio-Legal Enquiry

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Submitted in fulfilment of the requirements of the Degree of Doctor of Philosophy

School of Law
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30 November 2021

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any degree at the University of Glasgow or any other institution.

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Abstract

The user is an increasingly important subject in copyright law, yet it remains under-theorised. Whilst largely absent in copyright doctrine, existing literature positions the user either as a categorical entity (a consumer, a creator) or as notional one that is fundamentally unknowable. Building on this existing literature, this thesis offers an alternative methodological approach to conceptualising the user through contract.

The thesis focusses on end user licensing agreements (EULAs) as the main unit of analysis through which the user can be demystified. Applying Fairclough's dialectical-relational model of Critical Discourse Analysis (CDA), this thesis explores the textual, discursive, and sociocultural dimensions of EULAs as a discourse aimed at constructing the user. Importantly, this construction is not merely descriptive in the thesis, but also critical; EULAs, and by extension the user, are approached through the theoretical lens' of power, ideology, and common sense. In doing so, the thesis aims not only to address the absence of the user, but also to problematise it.

To achieve this aim, the thesis builds upon a primary dataset of 30 EULAs from the video games and eSports industries. Being of increasing cultural importance, these industries offer a rich testing ground for constructions of 'use'. As inherently interactive mediums, games necessarily invite use, but also the possibility of transgression; users become authors, consumers, and even professional eAthletes.

The key findings of this thesis confirm that there is no singular unified vision of the user. Instead, the user is given several, and often contradictory, characteristics as idealised by rightsholders at different times and in different contexts. Stratified across three key themes - Copyright, Consumption and Creativity – the user is shown to be understood as a player, a recipient of proprietary software, a non-reseller, a non-owner, a non-commercial amateur, a welcomed co-creator, or a vaguely piratical threat. In approaching these constructions critically, the thesis argues that these are not natural or inevitable characteristics of the user, but rather those which best perpetuate the strategic needs of a particular rightsholder under a given circumstance. For example, the user may change from a distant, formal recipient of proprietary software in a legal relationship with a rightsholder, to a welcomed friend and co-creator when they make creative, and valuable, additions to the game world. The user is thus revealed to be a malleable vessel whose construction can be manipulated by powerful forces to achieve particular ideologies.

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Abbreviations/Glossary

Berne Convention	Berne Convention for the Protection of Literary and Artistic Works
CDA	Critical Discourse Analysis
CDSM	Directive 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market
CJEU	Court of Justice of the European Union
Computer Programs Directive	Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs
CONTU	Commission on New Technological Uses of Copyrighted Works
Database Directive	Directive 96/9/EC of 11 March 1996 on the legal protection of databases
DMCA	Digital Millennium Copyright Act
DRM	Digital Rights Management
E-Commerce Directive	Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market
EU	European Union
EULA	End-User Licence Agreement
IBM	International Business Machines
Indie	Independent [Game]
InfoSoc Directive	Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society
IP	Intellectual Property
MMO	Massively-Multiplayer Online [Game]
Mod/modding	Modification [of a Game]
Orphan Works Directive	Directive 2012/28/EU of 25 October 2012 on certain permitted uses of orphan works with EEA relevance
OST	Original Soundtrack
TPM	Technical Protection Measure

Triple A	Referring to games by mid to large-sized developers with large development budgets
UGC	User-Generated Content
UK	United Kingdom
US	United States
WIPO	World Intellectual Property Organisation

Introduction

1. The copyright user

Historically, the user has never been the primary target of copyright, being recognised both formally and informally as part of the private sphere. Yet, with the pervasiveness of reproduction in the internet era, copyright is now routinely applied to individual users in their everyday interactions with the digital environment. Even if the user is unaware of this fact, copyright is omnipresent.[1] This omnipresence has caused a significant 'shift in the copyright rhetoric',[2] which has historically focused on the author, to rest on the user.[3]

But what is a user exactly? The term, whilst foundational to the language of the internet, has been adopted 'not without some awkwardness'[4] into the copyright lexicon. A migrant from the software industry, the user historically has more ties with software development (the *computer* user) than a sound basis in law. Previously, copyright discourse has tended to talk about readers, viewers, and listeners, rather than book-users or film-users;[5] it is only as software has come to permeate increasingly more types of cultural goods that so too has the tendency to use the all-encompassing designation of 'user'.

In its simplest articulation, the user is an entity which, at any given time, *uses* a copyrighted work. This definition is offered in a deliberately ambiguous manner, to be construed as broadly as possible. 'Use' of a work may simply implicate access to it, but also leaves open the possibility for the many derivative creative re-uses that have come to characterise 'remix culture'[6] and user-generated content (UGC). Copyright posits everyone and anyone as a potential user so long as their activity has a *causal* relation to a copyrighted work. The ambivalence of this all-encompassing designation, seemingly capable of capturing every and any kind of interaction with a work, is

[1] Mazziotti G, *EU Digital Copyright Law and the End-User* (Springer 2008) 5.
[2] Ginsburg J, 'Authors and Users in Copyright' [1997] 45 Journal of the Copyright Society of the USA, 2.
[3] See Cohen J, 'The Place of the User in Copyright Law' [2005] 74 Fordham Law Review, 348 who similarly positions themselves as 'happy to agree that copyright is first and foremost a law of authors rights… [but] a theory of authors' rights must be informed by a theory of the user as well'.
[4] ibid 347.
[5] See generally Litman J, 'Readers' Copyright' [2011] 58 Journal of the Copyright Society of the USA, and Wright S, *Toward a Lexicon of Usership* (Van Abbemuseum 2013) 67: 'We speak freely of "art lovers", but "art users" smacks of philistinism'.
[6] Coined in Lessig L, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (Penguin Press 2008).

precisely what makes the user an interesting object of study. Is it possible to accurately conceptualise everyone and anyone?

Copyright doctrine offers an unsatisfactory answer to this question. Whilst centrally important to the operation of copyright, the user is surprisingly absent here. The user is only ever imagined insofar as they constitute a vessel for authorised *uses*, as envisioned through specific copyright exceptions. In brief, copyright carves out areas of non-infringement for the user but does not imagine them as a stable legal subject in the same way it does an author: the user is simply an *object* of copyright, serving the furtherance of uses and hence, it is assumed, more creativity. An analogy used throughout this thesis is to understand the user as a type of negative space, existing only in the places the author does not occupy.[7] The overall diagnosis, as others have similarly concluded,[8] is that there is no singular, satisfactory answer in copyright doctrine as to what the user is. Importantly, this absence goes beyond just a theoretical enquiry, and has an explicit policy dimension: without understanding how the user is constructed, policy makers risk their misidentification, mismanagement, and ultimately erasure in the modernisation of copyright.

In the absence of a satisfactory conceptualisation of the user in doctrine, this thesis argues that copyright leaves open the possibility to design the user outwith law. More specifically, the thesis argues that the user's design can be achieved through private contract, which creates a more proximate relationship between rightsholder and user. Contract can, with more granularity, offer an *idealised* view of what the user should be. The various restrictions, obligations and promises embedded in the contract are suggestive of what qualities and characteristics are assumed of this ideal user. Fundamentally then, this thesis offers a view of contract as a narrative, a story about what a particular rightsholder *thinks* the user should be.

Whilst there are many different types of contracts to which a user may be party to, perhaps the most everyday interaction is with the end user licensing agreement (EULA). The connection between the user and the EULA is obvious on the face of it: after all, the user is addressed in the contract title by name. However, this thesis explores a much deeper connection between the two. Much like the user, the EULAs presentation is also innocuous, but ubiquitous, in the digital environment. Initially designed to protect software (the c*omputer* user), the EULA is now

[7] 'Negative space' here is used in the original sense of the art term, rather than the similarly named theory of negative space in IP (see Rosenblatt E, 'A Theory of IP's Negative Space' [2011] 34(3) Columbia Journal of Law and the Arts).
[8] See generally Cohen (n3); Liu J, 'Copyright Law's Theory of the Consumer' [2003] 44(2) Boston College Law Review; and Meese J, *Authors, Users and Pirates: Copyright Law and Subjectivity* (MIT Press 2018).

embedded with most digital works, usually taking the form of a clickthrough checkbox that the user can click to affirm they have read and agree to the terms therein. Whilst EULAs have not been immune from the gaze of copyright scholarship, the scope of previous studies have tended to take a narrower, legalistic approach in asking e.g., whether they respect a particular copyright exception and limitation.[9] Instead, this thesis takes a more qualitative approach in interpreting how the user is being constructed every day through contract, from numerous different viewpoints, from different rightsholders with different needs, all in a system that runs in parallel to the balance that copyright seeks to maintain.

The key research question of this thesis is thus: what is the concept of the copyright user constructed in EULAs? In answering this, the thesis seeks to demystify the seemingly neutral user (everyone and anyone) by ascribing it the idealised qualities imagined through the EULA.[10]

2. A socio-legal enquiry

As promised in the title, this thesis is a *socio-legal* enquiry into the conceptualisation of the copyright user. It is not an exhaustive doctrinal examination of how the user is conceptualised in courts or legislation. The 'legal' component of the socio-legal enquiry serves mostly to illustrate the beginning of the problem: that copyright doctrine does not give a satisfying answer as to who the user is, and ultimately leaves this to the discretion of the rightsholder via contract.

Instead, the 'socio' component of the socio-legal enquiry is the predominant methodological approach of the thesis. The thesis interprets the construction of the user in EULAs, as the main unit of analysis, using Critical Discourse Analysis (CDA). CDA is a qualitative, interpretative methodology, primarily concerned with the study of *language*. This thesis is not, therefore, a black-letter legal analysis of the EULAs legality; it does not aim to illustrate whether the EULA is compliant with the law or not. Instead, the EULA is treated as a discourse, as language, and as a narrative or story of the idealised user. The thesis questions how the user is being 'spoken' to through the EULA, revealing what the 'speaker' must think of them. It asks, according to this EULA, in an ideal world, how would the user think, act, or behave?

[9] For a detailed discussion on the literature on this matter, see Chapter 2 Section 3.2.
[10] In this thesis, the EULA is anthropomorphised and given agency, e.g., 'the EULA constructs…'. Whilst there is obviously a human behind this construction, without being able to accurately identify the role of this human (a lawyer? the rightsholder? an automatically generated boilerplate contract?) referring to the EULA in this way is more succinct.

Of course, law is also language. For this reason, the thesis engages in limited doctrinal analysis throughout, where appropriate, in illustrating the differences between the language of the EULA and the language of law. This brief doctrinal analysis is used illustratively to highlight the tensions between the parallel regimes of copyright and contract, and the malleability of meanings so far as they concern language. Where such doctrinal analysis is concerned, the thesis approaches this from the perspective of European Union (EU) law.

Finally, the critical component of the discourse analysis means that the thesis is not just descriptive of this conceptualisation of the user, but critical of it. The thesis presents this critical component in two ways. First, as the EULAs quasi-legal character can be made powerful by allocating the user as acting lawfully or unlawfully, the thesis is critical of this exertion of power to the extent that it may perpetuate a particular ideological position or create relationships of power difference between the rightsholder and user. The second aspect of the critical component results from the explicit political orientation of CDA as a vehicle for change.[11] The relative absence of the user in copyright doctrine is problematised in the thesis, and thus the law itself is also suspect, not just the EULA. The thesis is therefore not critical only of EULA, but also what it is responsive to: copyright. For this reason, the Conclusion offers suggested copyright policy implications in the furtherance of political change and improvement of our understanding of the user.

3. Thesis scope and aims

The thesis' scope and aims are defined in part by what they are not.

The thesis does not present a true or authentic understanding of the copyright user, nor does it claim to do so. In fact, the methodological approach of the thesis, being philosophically orientated in constructivism and critical realism, suggests that such an articulation is not possible. Instead, the thesis offers a context specific understanding of the user from a specific industry, in a specific time period. It is, more accurately, offering an understanding of the idealised user in the video game and eSports industries between 2019 – 2020.

[11] See Fairclough N, *Critical discourse analysis: the critical study of language* (2nd edition, Routledge 2013) 21: 'While [CDA] is not in itself a political praxis and strategy for achieving such social changes, it can be a part of and contribute to such a praxis and strategy in that praxis requires theory, knowledge and understanding to achieve its strategic goals'.

The limitation of research scope to these industries is partially pragmatic: as the user becomes the user of all things, the sites of study to examine the EULA are too vast for one thesis. Nonetheless, video games and eSports are presented as worthwhile sites of study in themselves, as copyright-intensive industries of increasing cultural importance. Further, as uniquely interactive mediums, the label of 'user' is immediately curious in the context of gaming: here, the user may capture the passive couch potato playing a PlayStation, but also the professional eAthlete whose livelihood may be dedicated to, and based on, access to a game. Even in this small corner of the creative industries, there is much tension around various user roles, which illustrates both the user's malleability, and its selective (and contestable) conceptualisation via the EULA.

The thesis does not question how users understand themselves as recipients or participants to the EULA discourse. The thesis instead aims to study the EULA as a one-way discourse that constructs the user, but where the user is emphatically not involved in this construction. Whilst the user is certainly a recipient of EULA, the thesis does not attempt to argue that the user is the reader or participant of the same discourse, a matter which has been thoroughly debunked in previous studies.[12] The findings of the thesis can instead be read to reveal more about the forces *behind* the EULA *making* the construction of the user, rather than the user themselves as a recipient of that discourse. This is a story of an idealised user who does not necessarily exist but is only imagined by the EULA. It is thus a fundamentally subjective exercise. In doing so, the thesis aims to problematise the way in which copyright doctrine enables a large amount of discretion to private parties to determine the ambit of use through contract.

Finally, the thesis does not aim, advocate for, or attempt to wholesale replace, the term 'user' in copyright discourse. Whilst the thesis is principally concerned with the study of the language of the EULA, the label 'user' is not in itself problematic. Copyright inevitably must categorise, and in some respects, 'user' may be the most appropriate descriptor for one's relationship with a work. Rather, the problematic aspect that the thesis seeks to investigate is the construction *behind* the label of 'user'. Such a label may misrepresent, misidentify, or erase the multitude of roles assumed by the user in the digital environment. In fact, the Conclusion suggests that the replacement of 'user' with a single word alone cannot resolve the problems illustrated in the thesis. The user has multiple, complementary, and some contradictory, roles in the copyright regime.

[12] See generally Bakos Y, Marotta-Wurgler F, and Trossen D, 'Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts' [2009] Working Papers 09-04, NET Institute and Obar JA and Oeldorf-Hirsch A, 'The biggest lie on the internet: Ignoring the privacy policies and terms of service policies of social networking services' [2008] 23(1) Information, Communication and Society.

4. Outline of chapters

The thesis comprises eight chapters in a three-part structure: Part 1 illustrates *why* the user and EULA are intrinsically connected; Part 2 outlines *how* the EULA can be interpreted to conceptualise the user; and Part 3 presents *what* this means for the conceptualisation of the user through the thesis findings.

Part 1 begins with Chapter 1, which problematises the absence of the user in copyright doctrine. Concluding that doctrinal materials alone are an unsatisfying way of understanding the user, the chapter offers a survey of the existing conceptual and theoretical work undertaken to date. The chapter distinguishes the thesis from this existing work by illustrating how the doctrinal 'problem' and conceptual or theoretical 'solution' may be interconnected via contract.

Giving the role of contract more form, Chapter 2 situates the EULA as the main unit of analysis for the thesis. The chapter provides a historical narrative that explains the relevance of the EULA to the construction of the (software) user through the lens of software development. Stratified over three key time periods (1950s – 1960s, 1970s – 1980s, and the present) the chapter shows how the EULA is a responsive tool, adaptive to the social and cultural needs of rightsholders in the industry at any given time. The concept of the user is shown to be constantly in flux throughout history, moving from a 'co-creator' to a 'thief', to (now) somewhere in between.

Moving from the historical narrative to the user of today, Part 3 (Methods) opens with Chapter 3, an overview of CDA as the chosen methodology for this thesis. As a qualitative, interpretative methodology, CDA is presented as an apt means of understanding the construction of the user through the language of the EULA. Adopting Fairclough's dialectical-relational model, the chapter outlines how textual, discursive, and sociocultural dimensions of discourse can construct the user concept, as envisioned by a powerful other.

As the user increasingly becomes the user of all things, to make the research scope manageable, Chapter 4 limits the focus of the thesis to the sites of study of video games and eSports. Given their increasing cultural significance, both sites are of course worthy of investigation in themselves. However, the chapter outlines key points of interest as to why the construction of 'user' in these

industries is particularly curious, whether because of the inherent interactivity of games that invite use, or the existence of the professional eSports player.

Having narrowed the sites of study, Chapter 5 outlines the specificities of the research design. The bulk of the chapter is dedicated to detailing the dataset construction of EULAs from the video games and eSports industries. Far from a straight-forward unit of analysis, EULAs comprise multiple documents, across multiple platforms and in respect of multiple game titles. The chapter thus illustrates how EULAs were carefully selected to generate a list of popular EULA discourse, representative of the most prevalent vision of the user in these industries.

Part 3 (Findings) consists of three chapters, each of which comprises a theme identified from the CDA.

Beginning with Chapter 6, the Copyright theme shows how the shared regulatory practice of copyright, manifested via EULAs, can be reconfigured to align with the ideological trajectories of specific communities. Copyright, and the exclusivity it bestows, is selectively engaged with by different industry communities, embraced by some and rejected by others. Regardless of the disparity at industry level, the chapter shows how the user is commonly assumed to be vaguely *oppositional* of the copyright regime, whether as a suspect actor to be controlled, or a player of a game who rejects the proprietary vision of software.

The second theme, Consumption (Chapter 7) represents the most homogenised conceptualisation of the user. Emphatically, the EULA constructs the user as both a non-owner and, perhaps more crucially, non-reseller: they are the endpoint in the transactional chain. However, this designation does not necessarily mean the user is understood to be a *consumer,* in the sense of being an owner of a copy of a work. The qualities of the consumer are reserved only for when commercial interests are at stake, whether in the battle against piracy or the war against a competitor.

The third and final theme, Creativity (Chapter 8) explores the way in which UGC is mediated through the EULA. In this chapter, the strategic labelling of 'use' (whether of the 'user' or 'UGC') disguises a range of otherwise authorial qualities of the creative user. These qualities are hidden behind a differentiated discourse, which is outwardly informal, polite, and friendly towards the user, but inwardly controlling and contradictory.

Finally, the Conclusion responds to the research question by tying together key themes from the findings. As CDA has an inherently political aim, the conclusion addresses the policy implications arising from the thesis.

PART 1: The User and the EULA

Chapter 1: The Copyright User

The task of this chapter is two-fold: first, to establish the existing conceptual work undertaken in respect of the user; and second, to identify an alternative and plausible framework through which the user may be conceptualised. Section 1 opens the discussion by positioning the new role of the user in relation to who they are not: the consumer, or public. Section 2 then looks to copyright doctrine to determine whether the user constitutes a discrete, legal subject under the EU legislative regime. Concluding that the user is, overall, under-theorised in this area, Section 3 and 4 illustrate the scholarly work that has been undertaken to date in an effort better conceptualise the copyright user. Finally, Section 5 offers an alternative way of conceptualising the user that reconciles both the doctrinal deficit, and the two theoretical approaches: conceptualising the user through contract.

1. The copyright user

As noted in the Introduction, copyright's focus on the user is relatively new, correlating somewhat with the rise of digital, use-based technologies. This newness raises two important, interrelated questions: is the user different from other pre-existing concepts in copyright? And why is this difference important? Section 1.1 first delineates the copyright user from potential competing concepts, namely the 'consumer' and the 'public'. Absent any stable or consistent definition of this new legal subject, Section 1.2 explores how the user has since been leveraged in copyright policy as a strategically malleable concept that can support or refute modernisations to the copyright regime.

1.1 Exclusion of competing terms

It is necessary to distinguish the 'user' from other competing terms and concepts that have historically been used to describe the recipients of copyrighted works. Certainly, if there is a deliberate choice to engage with this particular term, that the 'user' is the most accurate descriptor of this new copyright actor, then this must be to the exclusion of other competing conceptualisations.

Despite being the dominant trend of the 19th and 20th centuries, the 'user' positions itself outwith the consumption-production paradigm: it is not, *per se,* a consumer. 'User' rejects the implied destruction and non-replenishment of a work, which is inappropriate in the digital era of perfect

and infinite replicability. By rejecting the consumer, the concept of the user also rejects the suggestion of finite hand-to-mouth passivity; it is a recognition that, increasingly, the user adds new value to the creative process of a work rather than simply consuming it. This new value is primarily ascribed to the prevalence of so-called UGC in the Web 2.0 era. Whilst the term 'UGC' in principle refers to any type of content uploaded by a user (e.g., a selfie), copyright discourse has become increasingly concerned with the user's re-use and transformation of pre-existing copyrighted works to create new creative products.[13] The user's interactivity with a work, which expands its lifecycle and recontextualises it, distinguishes them from the destruction implied by consumption.

With the dismissal of the user as consumer, there are also dismissals of the legal concepts that have been developed around it. For example, in the EU the consumer is legally recognised as both 'savvy and susceptible'.[14] They are a: (i) natural person[15] who is (ii) 'reasonably well informed and reasonably observant and circumspect'[16] and (iii) plays a critical role as a 'driving force of economic growth'[17] in the internal market. This 'savvy and susceptible' conceptualization has led to the safeguarding of the vulnerable consumer through e.g. consumer protection laws.[18] By contrast, when looking at the copyright user, there is no reason to assume a user is a natural person, and is not, for example, an organization;[19] there is no articulation of a user as being anything resembling reasonable or observant; nor is there necessarily a perception of the user as being a driver of economic or competitive growth.[20] For the consumer, these recognitions helped place them in a position of opposition with the producer or 'economic operator',[21] but also - and importantly - in

[13] See taxonomy offered by Gervais D, 'The Tangled Web of UGC: Making Copyright Sense of User-Generated Content' [2009] 11(4) Vanderbilt Journal of Entertainment and Technology Law.
[14] Heymann LA, 'The Public's Domain in Trademark Law: A First Amendment Theory of the Consumer' [2009] 43(3) Georgia Law Review, 656.
[15] See Library of the European Parliament, 'The notion of "consumer" in EU law' (Library Briefing, 6 May 2013) <http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130477/LDM_BRI(2013)130477_REV1_EN.pdf.> accessed 14 September 2021.
[16] Case C-210/96 *Gut Springenheide and Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung* [1998] EU:C:1998:69 [1998] EU:C:1998:69, para 31.
[17] European Commission, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee (2007) *Empowering consumers, enhancing their welfare, effectively protecting them.* EU Consumer Policy strategy 2007-2013, Com(2007)99, Brussels, 2-6.
[18] e.g., Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L 171/12.
[19] See Directive 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market [2019] OJ L 130/92 which treats e.g. libraries, research institutions etc. as users, alongside natural persons
[20] Noting the interesting conflation by the CJEU in Case C-498/16 *Schrems v Facebook* [2018] EU:C:2018:37, para 39, holding that one can be both a user *and* consumer of the same work provided that usage is not 'predominantly professional' in association with one's profession or trade (suggestive of economic/competitive growth). Even this articulation excludes activities such as 'publishing books' as an activity that would deprive one of consumer status.
[21] Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] OJ L 134/114, art 1.8: '… the term 'economic

a position of *equivalence*, at least semantically, if not empirically.[22] Both the consumer and producer are autonomous of the other, polarised with differing and complementary functions (creation - destruction); this produces both a contrast and a balance that copyright (and consumer protection laws) can help mediate. The user does not share this articulation, or this relationship of equivalence. Their function sits somewhere between consumption and production, or perhaps outwith it entirely. Indeed, usership is perhaps more oppositional to *ownership*, the most absolute right one can have over a copyrighted work.

Nor is the user necessarily part of the public that comprise the 'public domain' or 'public interest'[23] in copyright (or, as in the Statute of Anne, the much more personable 'persons').[24] The public domain is generally defined as being the remit of the uncopyrightable, whether because e.g. certain elements are ineligible for protection or because the copyright term has expired.[25] As the user is only labelled as such where they are acting in *relation* to a copyrighted work, if that copyright does not exist for whatever reason, then this cannot be *use*. Instead, the uncopyrightable is relegated to the imaginary *space* of the public.[26] More properly imagined as a space, the 'public' is not a legal subject in copyright in the same way the consumer has been. As such, whilst it's possible for the user to benefit from, and transmit elements from the public domain, they are better understood as an explorer of this space, rather than being one and the same. The user's role has a much more causal interrelatedness with both the protected work, their existence being pre-supposed by its receipt, and the technological component of it. In this sense, the public represents an *object* of copyright, that the user is welcomed to interact with, but is not a subject in the way we suggest when we invoke the idea of a copyright user.

Thus, whilst the definition of 'user' is extremely vague (someone who uses a copyrighted work), it is perhaps the most accurate term to describe the often impermanent, opportunistic, use-based relationships characteristic of Web 2.0. In part, 'user' is a simplistic representation of the distillation of several complicated and competing concepts: someone with both consumptive and creative

operator' shall cover equally the concepts of contractor, supplier and service provider. It is used merely in the interest of simplification'.

[22] See Hamilton J, 'Historical forms of user production' [2014] 36(4) Media, Culture and Society.

[23] See Ginsburg (n2) 5, who specifically argues against the notion that the user's interest is equated to the public interest.

[24] An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the Times therein mentioned 1710, 8 Anne, c.19.

[25] Erickson K et al, 'Copyright and the Value of the Public Domain: an empirical assessment' [2015] Research commissioned by the Intellectual Property Office, 2015/44.

[26] Cohen (n3) 368.

qualities, a citizen who may be of the public, but is not necessarily; someone to be entertained but also engaged with a work. Whist this perhaps helps us understand what the user is *not*, we are nonetheless no closer to understanding what the user *is*. Consequently, it becomes easy to, deliberately or otherwise, misidentify the user.

1.2 The user in copyright policy

The ill-defined and elusive conceptualisation of the user has made it a powerful political tool in policy debates,[27] which formed one of the main stimuli for this thesis research. During the precipice of EU copyright reform, and negotiations on the Copyright in the Digital Single Market Directive (CDSM Directive)[28] the user became a malleable entity that could be used to support or refute key political arguments.[29] The debates and resulting legislative text demonstrate how the concept of the user goes beyond a theoretical enquiry to one that directly impacts copyright policy.

One of the most controversial provisions of the new CDSM Directive, article 17 (sometimes known colloquially as the 'upload filter' or 'censorship machine') expands the existing liability regimes for online platforms by imposing new obligations regarding copyright infringing content. Broadly, absent a licence agreement between the platform and rightsholder, that platform must use 'best efforts' to *prevent* the availability of infringing content.[30] This represents a divergence from the current *ex-post* notice-and-takedown regime of the Electronic Commerce Directive (E-Commerce Directive)[31] to an *ex-ante* system.

During the negotiation phase of the Directive, the policy debates surrounding article 17 were vastly polarised between those who supported and those who opposed these changes.[32] Curiously, whilst the main target of the legislation was intended to be large online platforms, such as YouTube or Facebook, much of these polarised debates concerned the nature of the user instead. Opponents of article 17, concerned that any *ex-ante* system would necessitate an imperfect general monitoring

[27] See Edwards L, Klein B, and Lee D, 'Framing the consumer: Copyright regulation and the public' [2012] 19(1) Convergence: The International Journal of Research into New Media Technologies; Erickson K, 'User illusion: ideological construction of "user-generated content"' in the EC consultation on copyright [2014] 3(4) Internet Policy Review; and Furgal U, Kretschmer M, and Thomas A, 'Memes and Parasites: A Discourse Analysis of the Copyright in the Digital Single Market Directive' [2020] CREATe Working Paper 2020/10.
[28] CDSM Directive (n19).
[29] See Furgal, Kretschmer, and Thomas (n27).
[30] CDSM Directive, art 17(4)(b).
[31] Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L 178/1.
[32] See Furgal, Kretschmer, and Thomas (n27).

obligation and algorithmic filtering, presented the user as a proxy for the democratic digital citizen, with a right to the free and unfettered internet.[33] The user here was someone with legitimate interests in accessing and uploading content, both in the interests of self-expression, and freedom of expression. Proponents' arguments were more complex, in part because, in any case, they dismissed the existence of any such filtering obligation.[34] Instead, they insisted that the user's interest is *conflated* with the author's interest. The user, whose existence is pre-supposed by receipt of a copyrighted work, is inevitably less valuable than the work itself; thus, it is in both the interest of the user and author that the work receives a 'high level'[35] of protection in an infringement-free internet.

The result of these debates as manifested in the legislative text is an amalgamation of this muddied user, with many contradictory qualities.[36] The latter introduction of certain user exceptions within article 17 speaks to the acknowledgement of a citizen with interests in freedom of expression, as argued by opponents. But the user itself remains fundamentally suspect as article 17 captures, in broad-brush strokes, all 'user-uploaded content' within its remit.[37] Regardless of the quality of that content, the user's activities are framed as an omnipresent threat of infringement – they are always a 'potential trespasser.'[38]

The definition of 'user-uploaded content' as such was not debated during the negotiations surrounding article 17, but rather the legislation seems to take an 'existentialist view'[39] of UGC: it exists because people say it does, even if it does subvert the authorial qualities of the user. This rule over all 'user-uploaded content', more accurately stated, *should* be read as a proxy for the upload of *copyright-protected* content – but its framing (anything that is 'uploaded') also captures the user's own original contributions. Thus, even if the user has original, creative qualities in what they are uploading, which would typically entitle them to authorship under copyright law, by merit of their designation as 'user', they do not benefit from the author-centric 'best efforts' test of article

[33] ibid.
[34] ibid.
[35] Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10 (InfoSoc Directive), rec 4.
[36] Notably, like its predecessors, the CDSM Directive speaks exclusively of the user and not the consumer. The public is treated as an entirely different entity that the user can communicate with through uploads, but they are not one in the same.
[37] CDSM Directive, art 17(1).
[38] Craig C, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Edward Elgar 2011), 3.
[39] Gervais (n13) 843.

17. Much like the competing terms of consumer and public, the creative user is thus also delineated from the author.

Article 17 is an illustrative example of a debate where, without understanding how the user is conceptualised (a consumer? an author? a pirate?), it becomes difficult to articulate a suitable regulatory regime. The concept of user, being a fundamental unknown, makes it a politically strategic concept that can be powerful to evoke when crafting new law. Similar copyright modernisation efforts in other countries, particularly the Canadian UGC exception, which are on the face of it progressive and flexible, may only serve to perpetuate unhelpful conceptualisations of the user as e.g. not an author.[40] As such, where the user is concerned, it is not only the conservative modernisations of copyright that we should be sceptical of, but also the *prima facie* progressive ones.

Before proceeding, it is important to reiterate that the thesis does not position itself as hostile to the term 'user' *per se*.[41] Inevitably, copyright must categorise, and this designation is in part a practical and functional descriptor for a person with many roles in the digital era. The main objection in this thesis is instead where 'user' is used as a sweeping category term that misidentifies or obscures the reality behind it. By positioning the elusiveness of the user as *a priori* problematic, a further necessary question arises: has the user ever been conceptualised as a distinct legal *subject* in copyright law? Does the underlying doctrinal material in fact offer a more stable articulation of the user than is presented in these policy debates?

2. The 'lawful' user

In examining the underlying doctrinal materials surrounding this question, this thesis focusses on EU law given the close tie between the impetus for the research and the recent policy debates surrounding the CDSM Directive. In this section, engagement with doctrinal copyright law is more

[40] Meese J, 'User production and law reform: a socio-legal critique of user creativity' [2015] 37(5) Media, Culture and Society, 37(5).

[41] This is not a universally shared view, noting particular backlash in software development: Norman D, 'Words Matter. Talk About People: Not Customers, Not Consumers, Not Users' (*jnd.org*, 3 December 2018) <https://jnd.org/words_matter_talk_about_people_not_customers_not_consumers_not_users/> accessed 14 September 2021; Meyer R, 'Facebook No Longer Likes the Word "Users"' (*The Atlantic*, 11 December 2014) <https://www.theatlantic.com/technology/archive/2014/12/facebook-doesnt-call-them-users-anymore/383638/> accessed 14 September 2021; Dorsey J, 'Let's reconsider our "users"' (*Tumblr*, 2013) <http://jacks.tumblr.com/post/33785796042/lets-reconsider-our-users> accessed 14 September 2021.

qualitative, aimed only at illustrating the user's relative absence from the EU legislative regime, rather than an exhaustive doctrinal analysis of its interpretation.[42]

From the outset, the EU's copyright harmonisation regime has positioned itself as being closer to the user than the consumer. As noted by Helberger and Hugenholtz, the term 'consumer' is not mentioned once in any of the copyright-related Directives since 1991, instead speaking exclusively of the user.[43] In part, this seems to be because the copyright harmonization regime also has a causal relationship with the rise and pervasiveness of software-based technologies. Beginning with The Computer Programs Directive of 1991,[44] the legislation ties users directly to computer programs and software, in that 'the function of a computer program is to communicate and work together with other components of a computer system and with users.'[45] Snowballing from this starting point, it is perhaps logical that the user has come to dominate the language of subsequent EU Directives, as computer systems permeate increasingly more traditional, non-software works.

Under this copyright harmonisation regime, the user has only one discernible, consistent quality: they must be *lawful*. The user's first designation in The Computer Programs Directive describes them interchangeably as the '*lawful* acquirer of the program',[46] or the 'person having a *right to use* the program'[47] or the 'person having a *right to use a copy* of a computer program' [emphasis added].[48] Similar, but inconsistent language is evident elsewhere in the legislative regime, with the '*lawful* user of a database' in the Database Directive,[49] the requirement of '*lawful* use' in the Information Society Directive (InfoSoc Directive),[50] and the analogous 'lawful access' requirement in the CDSM Directive.[51]

The limitation of the user as lawful is important because in many cases, lawful use or lawful access is the *prerequisite* for enjoying certain copyright exceptions, as detailed in Section 2.1. Therefore, the user is only defined in EU copyright law insofar as it pertains to someone's ability to benefit

[42] A task which is much better achieved in Synodinou TE, 'Lawfulness for Users in European Copyright Law: Acquis and Perspectives' [2019] 20 Journal of Intellectual Property, Information Technology and Electronic Commerce.
[43] Helberger N and Hugenholtz PB, 'No Place Like Home for Making a Copy: Private Copying in European Copyright Law and Consumer Law' [2007] 22(3) Berkley Technology Law Journal, 1066.
[44] Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs [2009] OJ L 111/268.
[45] ibid rec 10.
[46] ibid rec 13.
[47] ibid rec 14.
[48] ibid rec 15.
[49] Directive 96/9/EC of 11 March 1996 on the legal protection of databases [1996] OJ L 77/20, rec 34.
[50] InfoSoc Directive, rec 33 and art 5(1)(b).
[51] CDSM Directive, rec 14.

from a copyright exception, constituting the limited space in which the user exists in copyright doctrine.

2.1 The user in copyright exceptions

Copyright does not define the user *per se*, so much as it defines *uses*. Unlike the public domain as a space with uncopyrighted or uncopyrightable materials that can be used, copyright exceptions are legislative carve-outs that designate which uses are permitted in relation to a *protected* work. This relation to the protected work is what makes the beneficiary of copyright exceptions a 'user'. The logic follows that in copyright doctrine, everyone is a user until (i) they do something that is not included in a copyright exception, in which case this is copyright infringement, and ergo they are not a user because they have not acted lawfully, and (ii) even if the activity is covered by a copyright exception, if they have not accessed, or continued to use the work lawfully, then they are also no longer a user. [52] In EU law, copyright exceptions constitute an enumerated list of permitted uses derived from the InfoSoc Directive,[53] Orphan Works Directive[54] and CDSM Directive.[55] The majority of these exceptions arguably skew more towards copyright's function of furthering creativity through the stimulation of new works (and thus conceptualise a creative user), rather than passive use as such.

Exceptions which aim at furthering creativity through the creation of new works include: caricature, parody or pastiche;[56] quotation for criticism and review;[57] text and data mining;[58] study or private study,[59] or; illustration for teaching or scientific research.[60] Each of these exceptions further the stimulation of new works by encouraging social, cultural or political commentary of some kind – researching a new scientific theory for example, or criticising an important cultural work. It is the by-product of these more creative exceptions that form part of the umbrella term of UGC,[61] whereby the user incorporates elements of the original work into new derivative

[52] Hence Lessig's quip that a user is 'someone that can afford a lawyer' (Lessig L, *Free Culture: how big media uses technology and the law to lock down culture and control creativity* (Penguin Press 2004) 81).
[53] InfoSoc Directive, art 5.
[54] Directive 2012/28/EU of 25 October 2012 on certain permitted uses of orphan works with EEA relevance [2012] OJ L 299/5.
[55] CDSM Directive, arts 3, 4, 5, 6 and 17(7).
[56] InfoSoc Directive, art 5(3)(k).
[57] ibid art 5(3)(d).
[58] CDSM Directive, arts 3 and 4.
[59] InfoSoc Directive, art 5(3)(n).
[60] ibid art 5(3)(a).
[61] Gervais (n13).

content. These derivative works are certainly creative, though they are not typically considered an example of authorship. Rather, they are an instance where the derivative creation is simply non-infringing, being created within the ambit of an exception.[62] Whilst slightly paradoxical, the exception regime justifies this delineation between the creativity in derivative UGC and the creativity of authorship through the vector of *commerciality*. For the author, they are entitled to claim their exclusive economic rights and the opportunity for remuneration from their exploitation. However, for the user, who creates derived content with the benefit of the exception, their creativity will typically only be permitted if it is non-commercial.[63] For this reason, UGC has come to be known as 'amateur' creativity,[64] which if we take at its literal definition, means to create something for the love of it, rather than the promise of remuneration. Thus, whilst the author has an explicit commercial interest in the economic exclusivity of their work, the user is a distinctly non-commercial entity under copyright doctrine.

In contrast to these more creative uses, passive use exists only in the limited remit of the exception for temporary acts of reproduction[65] (and to some degree, private copying).[66] Whilst this is a limited remit, it is crucially important to the functioning of the digital environment, given copyright's constant implication in the act of making necessary, temporary copies of a digital work when interacting with it. Everyday acts, like browsing the internet, necessitate the invisible creation of many, temporary copies of copyrighted works – on the screen, in the cache of a hard drive - and are integral to the functioning of digital technologies. Whilst on the face of it a very pragmatic exception, it is also the *only* exception in the InfoSoc Directive which is premised on the '*lawful* use' of a work. Here, more so than with other exceptions, we must interrogate how 'lawful' is constructed in order to appreciate which users benefit from this exception, being so crucial to the operation of the digital environment.

Synodinou defines lawfulness in this context as being derived from either law, or the rightsholder's *consent* to the use of a work.[67] Consent in this case is typically expressed through either contract or

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[62] ibid.
[63] See e.g. Infosoc Directive, exceptions to the reproduction right in art 2(b) are premised on being 'neither directly nor indirectly commercial'. In national tests of 'fairness', commerciality may also be a relevant disapplying vector (see e.g. UK government guidance on fair dealing, Gov.uk, 'Exceptions to copyright' (*Gov.uk*, 12 June 2014) <https://www.gov.uk/guidance/exceptions-to-copyright#fair-dealing> accessed 16 September 2021).
[64] Defined as such in a report in a report by the OECD, Participative Web and User-Created Content: Web 2.0, Wikis and Social Networking [2007] DSTI/ICCP/IE(2006)7/FINAL.
[65] InfoSoc Directive, art 5(1).
[66] ibid art 5(2)(b).
[67] Synodinou (n42).

licensing,[68] which may include the payment of a fee at the conclusion of the contract, and/or the inclusion of other contractual provisions that the rightsholder obliges (which may or may not have anything to do with copyright). In the digital environment, this may be a simple, routine part of our innocuous interaction with everyday digital objects that include terms and conditions, terms of service, or an EULA (the latter forming the central unit of analysis for this thesis, discussed in more detail in Chapter 2). Further, Synodinou notes that this initial conclusion merely constitutes lawfulness of *access* to a work, not lawfulness of its *ongoing* use.[69] As a result, even if a user were to lawfully access a work at the conclusion of a contract, if they then subsequently breach a contract term (which again, may or may not have anything to do with copyright), then their use would no longer be lawful, as this undermines the consent of the rightsholder. This may be the case even where the user breaches a contract term to benefit from a copyright exception:

> The user cannot benefit from a copyright exception by their own initiative (for example by performing a reproduction that is forbidden by contract but allowed by a copyright exception) without becoming an unlawful user who cannot benefit from copyright exceptions. […] In this way the construct of a lawful user is used by owners as a supplementary tool to control and restrict copyright exceptions.[70]

Thus, copyright doctrine, vis-à-vis the temporary copying exception, makes it possible for a rightsholder to construct what is unlawful, and thus what is not a 'user', via contract. This not only allows for the encroachment of copyright's own articulation of the user, as manifested in copyright exceptions, but also more crucially makes the right to use a work in the digital environment subject to the rightsholder's ongoing consent past the initial checkpoint of access. The user is thus not necessarily absent in copyright, having some loose articulation in the realm of exceptions, but rather it is construed so liberally that much of its *meaningful* construction is left to the contractual dealings of the rightsholder.

2.2 Subject or object?

We might conclude from the above analysis that the user is not a defined legal subject in the same way as e.g. an author, who in the EU is understood to be deserving of a *high* level of protection

[68] See also Kretschmer et al, 'The Relationship Between Copyright and Contract Law' [2010] A Review commissioned by the UK Strategic Advisory Board for Intellectual Property Policy (SABIP), 106.
[69] Synodinou (n42).
[70] ibid 107.

through their exclusive rights.[71] The user instead exists in the realm of what is left after the author's bite of the apple: the negative space.[72] This is perhaps summarised most succinctly in a quote from Neelie Kroes (former Commissioner for Digital Economy and Society) at the outset of EU copyright reform: 'users interests and expectations matter alongside creators' rights… rules cannot be impractical, uncertain, or unreasonable for ordinary users.'[73] The user has an interest, and an expectation, as a *beneficiary* of that copyright, but this must always be contextualised alongside the *right* of the author. For this reason, the user, much like the public, is clearly a major *object* of copyright, but it is not a legal *subject*; exceptions provide a loose framework through which *uses* are regulated, but not necessarily the user.

Whilst few would dispute that copyright essentially serves as an author's bill of rights,[74] nonetheless the need for 'balance' between author and user is frequently invoked.[75] It is difficult to construct this 'balance' where one party is little understood, ill-defined and often misidentified. The risk here, as noted by Cohen, is that the lack of conceptualisation of the user leads to an inherent bias in copyright, cumulating in 'bad theory, bad policy and bad law.'[76] As copyright spearheads society's usological turn,[77] a solid understanding and theorisation of the user is therefore paramount.

In concluding this section, doctrinal materials alone are unsatisfyingly thin when conceptualising the copyright user. Not necessarily because the user is absent – it is certainly an object articulated through a variety of uses – but rather, with the very wide construction of lawfulness, and overridability of any doctrine via contract, this tells us only as much as the cautionary tale of the CDSM debate: that the user can be anything you want it to be. Unsatisfied with this under-theorisation of the user as a subject in copyright doctrine, critics have instead offered alternative methods of conceptualising the user. The literature to date is divided this into two groups of opposing theory: first, the theory of the categorical user (Section 3), which assumes that the user can be clearly delineated and identified; and second, the theory of the notional user (Section 4),

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[71] See e.g. InfoSoc Directive, recs 4 and 9 and assessment by Helberger and Hugenholtz (n43).
[72] See Rosenblatt (n7).
[73] Kroes N, 'Our single market is crying out for copyright reform' (*European Commission*, 2 July 2014) <http://europa.eu/rapid/press-release_SPEECH-14-528_en.htm> accessed 14 September 2021.
[74] Cohen (n3), 348 who similarly positions themselves as 'happy to agree that copyright is first and foremost a law of authors rights… [but] a theory of authors' rights must be informed by a theory of the user as well'.
[75] See e.g. CDSM Directive, rec 6: 'The exceptions and limitations provided for in this Directive seek to achieve a fair balance between the rights and interests of authors and other rightholders, on the one hand, and of users on the other'.
[76] Cohen (n3) 348.
[77] Coined by Wright (n5).

which argues that understanding the user is fundamentally undefinable, and can only be understood in relation to its context.

3. The 'categorical' user

Proponents of the categorical user suggest that the user is an identifiable entity that is clearly delineated from other legal subjects in copyright. Resultingly, the user often has a definite image, title, or role. Many of the theorists here rely on the poles of consumption and production to illustrate this, suggesting that the break down in definitions is not so stark as previously suggested in this chapter (Section 3.1). Others suggest a new iteration of the user in its entirety which may exist within, or outwith this spectrum entirely (Section 3.2).

3.1 User-consumer or user-creator

Foremost among the proponents of the categorical user are Ginsburg,[78] who identifies two user types:[79] the 'consumptive user' (occasionally referred to as the 'end-user'), defined by their desires for convenience of use, the dissemination of the work, and its subsequent exploitation; and the creative or transformative user who engages in the adaptation and transformation of existing works.[80] However, for Ginsburg, the distinction between these user types is illusory. The creative or transformative user will, inevitably, benefit from the protection of copyright too, should their creative or transformative use meet the appropriate threshold: simply put, you are a user until you are not. At some point in the creative process, 'chafing'[81] of the original work inevitably leads the creative user to become an author too; the consumptive user then is exactly that - a consumer. For Ginsburg, the relationship between user and author is therefore distinctly cyclical – but it is also hierarchal. Ginsburg places more value on the creative user, or rather, the author, as logically without authors, there are no works to use (akin to the reasoning of CDSM proponents outlined in Section 1.2 above). By stimulating user creativity, copyright is serving its ultimate function of promoting the public interest, which Ginsburg defines as the guarantee of the interests of the author and their rights:

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[78] Ginsburg (n2).
[79] Earlier, briefer consideration paid to these categories by Samuelson P, 'Fair Use for Computer Programs and Other Copyrightable Works in Digital Form: The Implications of Sony, Galoob and Sega' [1993] 1 Journal of Intellectual Property Law, 61 (distinguishing intrinsic and productive use) and Netanel N W, 'Copyright and a Democratic Civil Society' [1996] 106 Yale Law Journal, 311 (distinguishing consumptive and transformative use).
[80] Mazziotti (n1) 6.
[81] Ginsburg (n2) 6.

> End-users are indeed the ultimate beneficiaries, but they benefit because copyright is a law that seeks to promote authorship by ensuring authors a financial return from and reasonable control over the exploitation of their works. Copyright is a law about creativity; it is not, and should not become, merely a law for the facilitation of consumption.[82]

According to Ginsburg then, the strict binary between consumption and production, of use and authorship, serves copyright's function to stimulate creativity. A strict reading of this suggests that the user-consumer's relative absence and under-theorisation is not only justified, but also *by-design* in an inevitable bias towards the author.

Importantly, Ginsburg's interpretation is not universally accepted. Their equation of the public interest as being conflated with the author's interest is rejected in particular by Patterson and Lindberg, who instead equate the public interest with the *user* interest, and ergo the user as being a proxy for public. The label of user, they argue, is a limiting function to the more politically evocative 'public',[83] which has been utilized instead to justify the encroachment of their domain (e.g. through extended copyright terms or digital rights management). The purpose of copyright therefore is to serve the user-public interest, as central to its function to disseminate knowledge, evoking the full title of the Statute of Anne as being 'A Bill for the *Encouragement of Learning*" [emphasis added].[84] This influential re-reading of copyright law has served as the basis for calls for so-called 'user rights',[85] positive and enforceable rights (as opposed to the absence of infringement inferred by copyright exceptions), akin to that of the author, legitimizing the user-public as a viable legal subject. In concluding this, Patterson and Lindberg recognise that, in its current iteration, the user is *not* a viable legal subject, but unlike Ginsburg, suggests that it should be. [86]

Ginsburg, Patterson and Lindberg offer a view of the user that is largely consumptive, even if they come to vastly different conclusions as to what this means for copyright policy. In the above

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[82] ibid 20.

[83] Patterson LR and Lindberg SW, *The Nature of Copyright: A Law of Users' Rights* (The University of Georgia Press 1991).

[84] See also Litman (n5) 325: 'the purpose of copyright is to encourage reading'.

[85] It is outwith the scope of this thesis to undertake a full review of the climate or appetite for users' rights within the EU, and instead the focus is on assessing the concept or *concept* of the user, rather than any associated rights. Excellent full assessments are offered by Helberger and Hugenholtz (n43), and Chapdelaine P, *Copyright User Rights: Contracts and the Erosion of Property*. (OUP Oxford 2017).

[86] Such a regime has been implemented most notably through a form of judicial creep in Canada, beginning with *CCH Canadian Ltd. v. Law Society of Upper Canada* [2004] 1 SCR 339 (further details available in Geist M, *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (University of Ottawa Press 2013)).

proposals, the user is largely conceptualised only in relation to their access and dissemination of works, either because they are a passive recipient of a work (Ginsburg) or because of their entitlement to access works for the purpose of learning (Patterson and Lindberg). However, at the other end of the consumption-production spectrum, other scholars feel that it is a user's capacity for creativity and production which distinguishes them from competing categorisations. Sometimes referred to as 'prosumptive' or 'produsage',[87] this view places the user closer to the position of simply 'producer' in their act of generating additional value for the works used. There is more scholarly interest here, as Liu has noted, as the creative user will always tend to draw more critical and theoretical attention from scholars given its relatively novel position[88] (a phenomenon also noted in media studies).[89]

Beginning with Gervais's taxonomy of UGC,[90] the user here is categorised as being a non-professional content producer through their acts of creating UGC. Gervais identifies three types of UGC: user-authored content, which does not involve copying or adaptation - it is purely generated from the author; user-derived content, involving derivation and adaptation of existing work; and user-copied content, created through the act of e.g. uploading existing works. But to Gervais, ultimately 'there is no such thing as [UGC]'.[91] Instead, the label of 'user' in lieu of 'author', is an underhand means of introducing a new normative vector in copyright that distinguishes the amateur from the professional.[92] User rights group La Quadrature du Net couch this sentiment in similar language:

> [The Commission] uses the erroneous term 'user-generated content' to speak of remix, mashup and other such practices. These transformative works constitute original work even as they borrow material from previous works. To speak of user-generated content introduces a false hierarchy and a value judgement that separates the amateur 'user' from the 'professional' author, whereas this distinction does not exist in copyright law and is meaningless in the digital environment.[93]

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[87] See e.g., Bruns A, 'From Prosumption to Produsage' in Towse R and Handke C (eds) *Handbook on the Digital Creative Economy* (Edward Elgar 2013).
[88] Liu (n8) 430.
[89] See Bruns (n87) and Jenkins H, 'Vernacular Creativity: An Interview with Jean Burgess (Part Two)' (*Confessions of an Aca-Fan*, 8 October 2007) <http://henryjenkins.org/blog/2007/10/vernacular_creativity_an_inter_1.html> accessed 14 September 2021.
[90] Gervais (n13).
[91] ibid 842.
[92] ibid 844. See also Iljadica M, 'User generated content and its authors' in Aplin, T. (ed) *Research Handbook on Intellectual property and Digital Technologies* (Edward Elgar 2020).
[93] As quoted in Erickson (n27) 13.

Thus, but for the fact these creative uses are taking place through technology, these users would otherwise be considered authors; in effect, this reinforces existing power structures in copyright which favour only the author proper – the professional, potentially commercial, entity. For Gervais then, much like Ginsburg, the creative user already exists in the pre-existing copyright category of 'author'.

Being linked to the utilitarian and economic undercurrents of copyright which, it is supposed, incentivise creativity, the creative user is legitimised by the likes of Ginsburg and Gervais because they are essentially *producers* and thus living proof that creativity has indeed been successfully incentivised. However, such an outlook clearly runs the risk of erasure of the more passive user (or the 'couch potato' according to Liu),[94] which many theorists have seemingly abandoned amidst the emergence and buzz of participatory culture.[95] Backlash to this erasure has given rise to the more extreme end of the user-as-creator spectrum, where even seemingly passive, consumptive use is in fact a creative process. Tehranian provides a Hegelian articulation in defence of the creativity of passive use, flipping the application of personhood theory from its typical application to the author, to the user.[96] According to the adapted Hegelian approach, the user must be able to interact with commodified works in order to develop their personhood:

> Formation of personhood takes place internally as an individual's identity is shaped through interaction with objects in the external world. Meanwhile, the expression of personhood occurs when the individual communicates some aspect of her (already formed) identity to others as a way of contextualizing herself, through her relationship with objects, within the broader community.[97]

These interactions extend to even 'non-critical, pure use of copyrighted works.'[98] Thus, even seemingly passive consumption helps develop the formation of identity and the expression of identity through the interpretative communications of the user, and is thus inherently a creative process. Whilst Tehranian does not suggest the user is strictly an author *per se*, in the same sense

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[94] Liu (n8) 423.
[95] Tushnet R, 'Copy This Essay: How Fair use doctrine Harms Free Speech and How Copying Serves It' [2004] 114 Georgetown Law Faculty Publications and Other Works, on the value of 'pure' copying.
[96] Tehranian J, 'Parchment, Pixels, & Personhood: User Rights and the IP (Identitiy Politics) of IP (Intellectual Property)' [2011] 82(1) University of Colorado Law Review.
[97] ibid 23.
[98] ibid 82.

as Ginsburg or Gervais, they are a type of co-creator in the sense that they produce value *through* use, placing them closer to this end of the categorization spectrum.

3.2 New user types

So far, the theorists surveyed offer a largely binary view of the user in pre-existing categories: either as consumer/public (Ginsburg, Patterson and Lingberg) or as the producer-creator of value (Gervias, Tehranian). In an alternative and developing body of work, other theorists seek to remove the user from the consumer-producer binary in its entirety and do not attempt to shoehorn them into existing categorisations, but rather create a new image of the user in its entirety.[99] Such approaches are treated in this thesis also as 'categorical' even if their articulation of the user does not belong to pre-existing categories, as they nonetheless suggest a clearly identifiable entity that is delineated from other legal subjects in copyright.

Liu is very explicit in dismissing the dichotomy of passive or authorial use;[100] the former as too limiting by implying only an economic, purely consumptive relationship (the couch potato), and the latter being simply an author proper (evocative of Ginsburg, Gervais), which does not account for increasing 'micro-interactivity' and creativity in the Web 2.0 era. Instead, they propose the image of a user that is 'active', in that it acts with a degree of autonomy from the author, using works for communicating and sharing, whilst also having a degree of creative self-expression (i.e. 'mini-authorship' or 'uses primarily involv[ing] copying that is only minimally transformative').[101] For Liu, the 'active' user is thus a new category in and of itself that cannot be understood through the binary vectors of purely consumptive passive use or creative production.

Cohen replaces Liu's active user with the 'situated user.'[102] Similar to Liu's reasoning in proposing a new legal subject, they dismiss three user 'types' in arriving to this conclusion: the economic user, who acts entirely privately and consumptively; the romantic user, more akin to Ginsburg's creative or transformative user, essentially authorial; and the post-modern user, a subject which is vaguely piratical and oppositional to the copyright regime. Instead, the 'situated user' is a more imperfect

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[99] See Craig C, 'Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law' [2007] 15(2) Journal of Gender, Social Policy and the Law, 15(2), 233:

> '… The result is a copyright model that forces all intellectual production into doctrinal categories shaped by individualistic assumptions about the authorial ideal, producing the simplifying dichotomies of creation/reproduction, author/user, laborer/free-rider'.

[100] Liu (n8).

[101] ibid 416.

[102] Cohen (n3).

subject, with four discernible goals when interacting with a copyrighted work: consumption, communication, self-development and creative play (*homo ludens*):

> Unlike the economic user, the situated user is more than a narrow, self-interested consumer; unlike the romantic user, however, she knows when to sit back, have a beer, and fire up the TiVo. Unlike the postmodern user, the situated user has the capacity and will to link her own creative projects aspirationally to larger dreams of artistic and personal progress.[103]

This user is ergo not an either/or consumptive or creative, but instead can be both or neither – their interests can be 'conflicting',[104] but still share these identified characteristics. Cohen offers here an abstraction: a user of almost infinite variation whose situatedness and context may influence how they behave (whether to watch TiVo or link to creative projects).

Whilst Cohen and Liu are categorised in this thesis as proponents of the categorical theory as they offer a defined, delineated vision of the user, they also provoke the suggestion that the user has some autonomy to transgress the boundaries between existing categorisations. The active and situated user are autonomous actors, who have multiple and occasionally conflicting roles. In particular, both suggest that the context a user finds themselves in may influence the way in which they behave in relation to their various goals. Such an approach provides an apt bridge into theorists of the notional user, who take this context-specific understanding a step further by suggesting that the user is fundamentally undefinable outside of their immediate surroundings.

4. The 'notional' user

In contrast to the categorical theorists, who suggest that the user can be clearly delineated and identified, notional theorists argue that the user is a fundamentally open and neutral concept which is unknowable when divorced from its context. The meaning of 'user' is therefore entirely dependent on the legal or social discourse in which it is employed and has no true meaning independent of this: it is instead both relational and subjective (Section 4.1). For this reason, the user is fluid, and whilst they can move between the roles supposed by the categorical theorists, they are not limited to this. However, and crucially, notional theorists do not suppose that the

[103] ibid 372.
[104] ibid 374.

user's position is made more liberating because of their transgressive-ness. Rather, they take a more critical perspective of this undefined state and view the user as fundamentally vulnerable (Section 4.2).

4.1 Relationality and subjectivity

For the notional theorist, as the user is inherently interconnected with their context, this can lead to some hostility to the category term 'user' in its entirety, influencing the language used to describe them. Litman, for example, prefers the granularity of 'readers (and listeners, viewers, and other members of the audience).'[105] This reflects the fact that the user, as it were, can only be understood in relation to the *predominant activity* they carry out whilst engaged with a work. The gist of Litman's criticism is that 'user' is not the all-encompassing designation of which it is so often assumed; its utilitarian definition instead strips an individual of their circumstances to an economic transaction. For Litman, a user's interactivity with a work is primarily for their *private enjoyment*. Creativity is omnipresent in this enjoyment, in line with the Tehranian line of argumentation, as Litman presents the user's acts of reading, viewing and listening as worthwhile, valuable acts in themselves. Much like Cohen and Liu, Litman's work offers a useful bridge between the categorical and notional user, because whilst the user can be identified and categorised according to their predominant activity (as a reader, listener, viewer), this is only possible where we know the *context* in which the user interacts with a certain work.

This contextual understanding of the user is more substantively developed by Meese,[106] who situates the user in a relational framework alongside the author and user. Influenced by Actor-Network-Theory and relational theorists such as Craig,[107] Meese suggests that users are subjectively constructed, rather than self-evident or clearly delineated copyright actors. Users may transgress boundaries into more authorial or piratical roles, creating chimera-esque hybrids such as the user-author or the user-pirate.

However, rather than emphasising these categories, or reducing the user to a single role, the core of Meese's relational theory holds that there is no singular true conceptualisation of user; the user is dialogic in the sense of being an actor within a conversation, rather than an endpoint, with

[105] Litman (n5).
[106] Meese (n8).
[107] Craig (n38 and n99).

multiple competing conceptualisations. Using the example of Felix Arvid Ulf Kjellberg (alias PewDiePie), a famous practitioner of 'Let's Play' videos on YouTube, Meese notes that, whilst the *legal* conceptualization of the user is of an amateur with no commercial interests in using a copyrighted work, PewDiePie is nonetheless fantastically wealthy from this venture.[108] PewDiePie is also, regardless of their wealth, primarily understood to be a *user* who would be categorised as making 'user uploaded content' under e.g. the CDSM Directive. For this reason, Meese's work is not exclusively doctrinal (which, as outlined in Section 2, is not particularly helpful in isolation), but instead focusses more on how cultural discourse builds an alternative view of the user that is highly *subjective* (malleable) and *relational* (interconnected to other legal subjects, such as the author).

Meese's subjective and relational theory of the user echoes findings of an earlier study by Erickson, involving a critical discourse analysis of written responses to the 2014 European Commission consultation on copyright and UGC.[109] In these policy responses, Erickson finds that the user is treated as both 'illusory and notional',[110] and their conceptualisation (as good, bad, or neutral) is dependent on the interests of relevant stakeholder groups who are presenting this concept. Resultingly, users are ascribed varying levels of agency, creativeness and productiveness depending on whether their activities are perceived as threatening or positive by the group who is constructing them:

> The lack of a stable definition of user-generated content may be politically advantageous for all stakeholders: rights holders choose to highlight the potential for direct infringement and piracy, while platform owners and users can evoke the creative and yet non-commercial status of UGC while it nevertheless circulates within a capitalist system of exchange. To evoke the metaphor of the illusionist: each of the stakeholder groups attempt to draw the audience's attention away from one aspect of user-generated content and towards another.[111]

Thus, the user is not a stable concept, but rather an identity that may be deliberately constructed in a certain manner by a powerful 'other' for specific (in this case, 'politically advantageous') purposes. Thus, and importantly for notional theorists, the user is not a subject constructed by

[108] Meese (n8) 96.
[109] Erickson (n27).
[110] ibid 3.
[111] ibid 14.

law, or indeed by the user themselves. Identity is instead leveraged *upon* the user, making them uniquely vulnerable in the copyright system.

4.2 Vulnerability of the user

Due to the presence of a powerful 'other', notional theorists largely reject what could be interpreted as the more emancipatory rhetoric of some categorical theorists, such as Cohen and Liu, who frame their vision of the new user as being a liberated, idealised subject: both consumer and author, both entertained and engaged, autonomous and expressive. Instead, for many notional theorists, this emancipatory rhetoric is harmful because it suggests that *power* is absent in the conceptualization of the user, and therefore it does not need to be analysed. Meese, for example, points to the fragility of the user in policy debates (akin to the illustration of the CDSM Directive in Section 1.2),[112] where consistent misidentification and misrepresentation has painted the user as piratical, leading to policies which disproportionately penalise and encroach upon lawful uses. Ergo, whilst Meese posits the existence of the many-faced user of which no bias should in theory exist, through powerful cultural discourse and the relationality of copyright subjects, the outcome in the reality is that the (lawful) user is often subsumed within the (unlawful) pirate.

Indeed, the theoretical influences of power and cultural discourse are omnipresent throughout notional theorist literature, which often frames the user as a cultural subject, rather than just a legal one. Meese,[113] Erickson,[114] Gibson,[115] and to a lesser extent Liu,[116] are directly influenced by Foucault in their discussions of the user in relations of power. For them, the user is positioned as 'other', in contrast to the more stable author figure who 'is the principle of thrift in the proliferation of meaning'.[117] As it is ultimately the author, or more likely the rightsholder, who can dictate this meaning, the user is by contrast weaker and more vulnerable in this power relationship. Gibson goes further to describe copyright as '*a priori* disenfranchis[ing]'[118] the 'anonymous' user, who in a regime dominated by the ideology of ownership is property-less. Given the pervasiveness of the belief that copyright exists to stimulate creativity, this enables the disinterest in the more passive user to focus on the producer-author. Resultingly, the user is increasingly excluded from

[112] See Meese (n8) at chapter 5 for further discussion.
[113] Meese (n8) 10, also noting inspiration from Althusser.
[114] Erickson (n27) 6.
[115] Gibson J, *Creating Selves: Intellectual Property and the Narration of Culture* (Routledge 2007).
[116] Liu (n8) 415-420 and 416: '… consumers use copyrighted works as vehicles or platforms for their own self-expression'.
[117] Foucault M, 'What is an author?' in Rabinow, P. (ed) *Essential Works of Foucault, 1954 – 1984* (The New Press 1998)
[118] Gibson (n115) 77.

meaningful participation in the copyright system. For the notional theorist then, the anonymity of the user may empower them to transgress positions, but this is not necessarily empowering.

Instead, unlike Ginsburg, who would argue that copyright's disinterest in the user is justified, Gibson emphasises the centrality of the user in the copyright system, where 'it is the capacity and contribution of the user that inscribes the value, and thus the singularity, of the object of intellectual property protection.'[119] Thus, whilst the notion of use or consumption is suggestive of an end-point to copyrighted works, Gibson instead argues that use is in fact the *only* measure of value of an intellectual property (IP) product. As such, they argue that greater credence should be given to the user as a co-creator of value, who is indispensable to the networked system of IP - a viable 'actor' rather than an object. The anonymity of the user is problematised for the notional theorist, but also situated as a starting point for improvement in the copyright regime.

5. Reconciling the categorical and notional user: the role of contract

Whilst ultimately arriving at different conclusions, theorists of both the categorical and notional user agree that the relative absence and under-theorisation of the user in copyright doctrine is problematic (perhaps with the notable exception of Ginsburg). The categorical approach speaks to the comfort in diagnosis, and a need to label the user, whether within a new or pre-existing category. Theorists like Ginsburg, Patterson and Lindberg, Tehranian and Gervais thus offer a method of identifying the user and improving the current copyright regime based on this more 'accurate' vision. By contrast, proponents of the notional user reject the categorical; the user is fluid, non-stable with no clear demarcation between other copyright roles such as the author or pirate. This fluidity leaves them susceptible to the influence of various stakeholders, who in recent years have tended to conflate usership with piracy, as well as creating artificial hierarchies of 'author-owners' and the paradoxical 'creative non-authors' of UGC.[120] As illustrated in Figure 1, Cohen, Liu and Litman bridge the gap between these approaches, offering a more concrete image of the user as active or situated (categorical), but also one that is construed so broadly that in reality it has infinite variety and multiplication (qualities more typical of the notional).

[119] ibid 109.
[120] Craig (n99) 235.

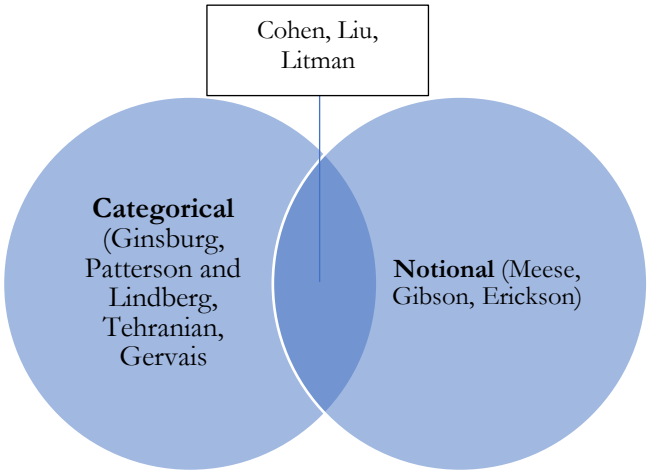


Figure 1: Venn diagram summary of literature: categorical vs notional user theorists

Arguably, notional theorists offer a more convincing, up-to-date articulation of the user, as well as a critique of some of the failings of the more categorical theorists. At the extremes of both user categories, Ginsburg's binary theory of user-consumer vs user-author, when conceived of in 1997, could not have anticipated the new normative vector of UGC in Web 2.0; nor could Tehranian in 2011 have accounted for the relative neglect of the couch potato user when favouring a view of them as intrinsically creative. Instead, the notional approach offers a more open and adaptable model for the modern, multi-faceted user.

The notional user also rejects the implicit emancipatory rhetoric of the categorical, introducing a critical dimension of power, hidden behind the anonymous presentation of the user. For this reason, proponents of the notional user do not focus exclusively on the articulation of the user in copyright doctrine, but instead on how the user is constructed through cultural discourse and policy debates. Power it seems is more traceable in these areas than elsewhere.

However, whilst power may be more *apparent* in the, often heated, conversational-discourse of culture and policy, the law nonetheless leaves open the possibility for power to manifest elsewhere: through contract (discussed in Section 2). Meese only briefly acknowledges that where contract is concerned the 'very infrastructure of copyright law is being ignored' in an 'attempt to fashion [an industry's] own discourse through which to legitimise their activity.'[121] But otherwise, notional theorists are silent on this important nexus between power, contract, and the user. And indeed, at this nexus lies the thesis' proposed alternative methodological framework through which to conceptualise the user.

[121] Meese (n8) 98.

In tying the theoretical solutions surveyed here to the doctrinal absence of the user, this thesis argues that, as copyright doctrine obliges that the user must be *lawful* in order to use a work, rightsholders are explicitly granted the power, by law, to conceptualise the user through contract. In eluding to the grant of power, the thesis is aligned with notional theorists who argue that the user role is constructed by a powerful 'other' rather than created autonomously, through the vector of contract. Nonetheless, the thesis is also aligned with categorical theorists in suggesting that this design results in an idealised image of the user which can similarly be unearthed through a reading of the text of that contract. In taking this stance, the thesis aims to reconcile both the categorical and notional approaches: the user is both absent and present, objectified rather than subjectified in contract rather than doctrine; and the user is both fluid, in the sense that their construction is subjective, dependent on whoever is writing the contract, but also stable (categorised) in that particular, frozen articulation. As such, the thesis is positioned closer to Liu, Cohen and Litman in suggesting that whilst one can offer a discrete vision of the user, this may vary depending on the particular contractual context the user finds themselves in.

The following Chapter 2, outlines how the EULA acts as a more quotidian construction of lawfulness through contract in the digital environment. Seemingly an innocuous digital relic, this in fact is a historically significant contract through which the user may be understood from its inception as the computer user. In doing so, this chapter illustrates how the EULA has been, and continues to be, a crucial way of constructing the lawfulness of the user both in law and discourse.

Chapter 2: The EULA

As illustrated in the previous chapter, the conceptualisation of the user in copyright doctrine is weak. At best, copyright offers a loose framework of exceptions that fashion an impression of *use* as an objective of copyright, but the user as a *subject* is little understood. This relative neglect of the user is often justified by the supposition that copyright exists primarily to serve the interests of the author.[122]

Yet, simultaneously, the user is becoming increasingly important and has more of a public policy character. Everyday interactions with software and software-based works invariably implicate one's status as a user; everyday creation of copies always implicates copyright law. Invocation of the term 'user', at least in the sense of a user of software, by extension introduces a new technological dimension to questions of authorship and ownership. Technology is now the mediator between those who make, and those who use.

The close interlinkage between users, copyright, and a technological element is often implicit in the literature explored in Chapter 1. But a more explicit relationship does exist. In fact, the user has always been positioned more closely with technology and software development than copyright law itself. Even at an etymological level, modern usage of the term 'user' in the copyright context stems from the '*computer* user', a term which arose in the computer industry around 1967.[123] At the time, the term differentiated between those who interacted directly with a computer mainframe, usually a programmer, and the end user, more analogous to the customer at the end of a transactional chain. Nowadays, the two tend to be subsumed with little credence to the historical distinction, and when the 'user' is invoked, this is often more analogous to the historic 'end-user'.

The rise of the term 'user' in 1967 also roughly correlates with the divorce of intangible *software* from physical hardware, which had previously been bundled together as a composite whole. As such, the rise of the computer user is more specifically associated with *software* use, as opposed to a more general interaction with a computer as a whole. As this chapter explores, this unbundling process fundamentally changed the nature of the transaction of buying and owning software,

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[122] See e.g., Ginsburg (n2).

[123] Online Etymology Dictionary, 'user (n.)' (*Online Etymology Dictionary*, date unknown) <https://www.etymonline.com/word/user> accessed 14 September 2021.

creating a new dialogue between users and software creators. This dialogue was achieved, not by a change in law, but by the introduction of a software licensing agreement, a contractual pre-curser to the modern-day EULA. In codifying this new transaction, the introduction of the EULA forced the creator into a situation where they envisioned and constructed the idealised user, quite separately from the law. Following this reasoning, this thesis argues that the conceptualisation of the user is not just the remit of the slow legislative change of law and judicial decision-making, but also the more frequent contestation of private law. Whilst not necessarily promising a more stable or consistent conceptualisation, it is an alternative methodological approach that aids in understanding and challenging the user's seemingly weak and neutral presentation in copyright doctrine.

This chapter consists of a historical narrative that explains the relevance of the EULA to the construction of the user through the lens of software development. Section 1 explores the early history of the software industry in the 1950s and 1960s, illustrating how software changed from being seen as a freely shared 'giveaway' to a commercialised product. This section focusses mainly on the 1969 International Business Machines' (IBM) unbundling of hardware from software, which forced a redesign in distribution models and the creation of the first EULA (and thus the first standalone software user). Section 2 details subsequent historical developments in the 1970s and 1908s, including the creation of the personal computer, and the shrink-wrap licence. This section also explores the change of the legal context of software licensing, with computer programs being included as protectable subject-matter in the 1980 amendments to the US Copyright Act. Finally, Section 3 details the present-day context of EULAs, drawing on studies in different industry contexts. Through each time-period, the distribution method of the EULA and its relationship to copyright are detailed to illustrate how software creators' rights have come to be realised vis-à-vis users.

As a brief note on the methodologies employed for this historical analysis, each section takes a different approach. Section 1 is best understood as a case study of IBM, given their central importance to the creation of the standalone software user as envisioned through the software licensing agreement. The analysis in this section focusses on primary sources from the Computer History Museum archives,[124] Humphrey's accounts of the Figueroa taskforce,[125] and the 1969

[124] Computer History Museum, 'Archival Finding Aids' (*Computer History Museum*, date unknown) <https://www.computerhistory.org/collections/findingaids/> accessed 14 September 2021.
[125] Humphrey WS, 'Software Unbundling: A Personal Perspective' [2000] 24(1) IEEE Annals of the History of Computing.

software licence and accompanying promotional materials which were retrieved by request from the IBM archives (the full text of the licence is available in Appendix 1).[126] The historical analysis at Section 2 moves from the IBM case study to focus on illustrative examples from the time-period (1970s – 1980s), given the many software companies arising at this time (including e.g. Microsoft). Information for this section is mainly collated through secondary sources. Section 3 consists of a more traditional literature review of the most current knowledge on EULAs and the user, drawing mainly on legal empirical studies. As a final methodological note, the history of software development is deeply intertwined with the United States' (US) copyright law. As such, despite the thesis's more general doctrinal focus on EU law, the historical narrative necessarily illustrates the development of the EULA through the lens of US copyright.

1. History of the software industry (1950s – 1960s)

During the early years of computing, IP concerns surrounding software were limited.[127] Large and expensive 'mainframe' computers were the exclusive remit of (large and wealthy) research institutions and corporations, rather than for personal private use or home-life. Any software installed on these mainframe computers would typically be purpose-built by the hardware supplier and was specific to their business or research needs. In this commercialised space, the earliest users were experts and professionals in their own right, who used the computer during their business or research; most frequently, users were managers of data processing.[128] Colleagues frequently shared information on the operation of the software, including to those third-parties who were passionate about developing computer technologies.[129] The cumulative impression of these early days of computing is that ownership and usership of a computer existed hand-in-hand, all in a centralised space.

As computer technologies only existed within this limited, custom-designed space, software creators had little incentive to monopolise any software, and thus little interest in seeking any IP protection. Whilst the idea of 'programming' was familiar, software, as a distinct intangible work,

[126] Procured via request to IBM Business Archive (archivist Max Campbell) on 12 November 2018.
[127] Madison MJ, 'Reconstructing the Software Licence' [2003] 35(10) Loyola University Chicago Law Journal, 311. Strangely, whilst software as a concept was not well recognised in the 1950s, the act of programming was – see Haigh T, 'Software in the 1960s as a Concept, Service, and Product' (2002) 24 IEEE Annals of the History of Computing.
[128] Haigh (n127).
[129] Mihm MT, 'Software Piracy and the Personal Computer: Is the 1980 Software Copyright Act Effective?' [1983] 4 Computer Law Journal, 172.

was not considered in these early years.[130] Little credence was given to the idea of software, to the extent that it could be conceived of as separate from the computer hardware. Instead, mainframe computers 'bundled' ownership of the physical chattel, the mainframe computer, *with* the intangible software, and both were sold together as a single unit. As such, ownership of computer software was initially subsumed within the default, national property regime that regulated the physical chattel, rather than IP law.

Even as accessibility to computers improved throughout the 1960s, and as users became more diverse, software nonetheless remained 'bundled' together with the hardware. Importantly, this ongoing decision to bundle was not motivated by a lack of technical capability. Indeed, a separate independent software market was apparent as early as the 1960s, with approximately 200 companies selling or developing software separately from hardware.[131] Thus, whilst unbundling was technically possible, bundling nonetheless persisted.

The main reason for this persistence was because bundling formed a core component of the computer hardware industry's marketing strategy. The most influential company in this respect was IBM which had an estimated 70% holding of the computer market in the 1960s.[132] Primarily, IBM sales were in hardware, and software was only used to boost these sales by making the purchase of the hardware more appealing. IBM essentially gave their software away for free, either custom-made for the user upon the installation of their computer, or as part of their ongoing customer service (e.g., writing new software as needed for the customer at no additional cost). IBM thus did not conceive of software as a commercial good, but rather a marketing expense in the form of customer service; the provision of software was simply the cost of doing (hardware) business.[133]

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[130] Johnson confirms that independent software companies existed in the 1960s, but with no indication of whether the founders of these companies considered their work as IP intensive (see Johnson L, 'Creating the Software Industry: Recollections of Software Company Founders of the 1960s' [2002] 24 IEEE Annals of the History of Computing). It is also possible that due to the US Copyright Office's scepticism on the copyrightability of computer programs at this time, there is correspondingly no documented litigation (see Madison (n127) 311).

[131] See Johnson (n130), noting that 'software packages' as a term appears in the late 1960s, and catalogues of available software products were made available from independent vendors as early as 1967.

[132] See Salmans S, 'Dominance Ended, I.B.M. Fights Back' (*NY Times*, 9 January 1982) <https://www.nytimes.com/1982/01/09/business/dominance-ended-ibm-fights-back.html> accessed 14 September 2021.

[133] Johnson (n130) 36:

> 'The conventional wisdom in the computer industry in the 1960s was that one could not make any money selling software. It was either given away free by the computer manufacturers or written specifically and uniquely for each computer installation'.

As software was not perceived to have a commercial value distinct from hardware, IBM continued to encourage users to write their own computer programs, and freely share code between them. As early as 1955, IBM users had formed groups, such as SHARE, where users could trade documentation and codes for software in reference manuals (see Figure 2). Practices like this were endorsed by IBM, who catalogued these reference manuals amidst a vast free software library.[134] As the market leader, IBM therefore created a widespread expectation that software was something given away for free, leaving a very limited market for an independent software industry.[135] Thus, whilst independent software companies had been offering products for mainframe computer systems throughout the 1960s, this market was being significantly undercut by the business practices of the dominant IBM.

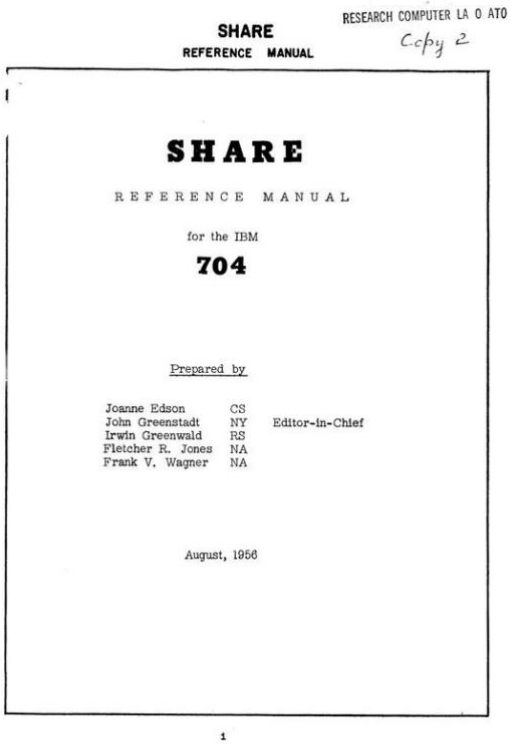


Figure 2: SHARE Reference Manual dated August 1956[136]

As a consequence of IBM's market dominance, the US Justice Department filed an antitrust lawsuit in 1969 claiming that IBM's bundling of hardware and software together was

[134] Otherwise known as the IBM Type-III Library.
[135] Johnson (n130).
[136] Computer History Museum, 'Software Reference Manual for the IBM 704' (*Computer History Museum*, 1956) <https://www.computerhistory.org/revolution/mainframe-computers/7/172/696> accessed 14 September 2021.

anticompetitive.[137] Perhaps in anticipation of this, IBM had pre-emptively established the Figueroa taskforce in 1966. The taskforce was to determine, not whether unbundling *should* occur (as it was already a technical possibility at the time), but *how* it should be done, and crucially, how to make this commercially viable.[138] The question on how to commercialise software prompted a radical rethinking of IBM's distribution model and with it a change in how to conceptualise the new standalone software user.

1.1 The first EULA: IBM, 1969

IBM's attitude towards the free sharing of software changed during the Figueroa taskforce discussions. Where users were once encouraged to share code and were given access to a massive free library of software, this became unviable when conceiving of software as a potential commercial product. The user changed into a *buyer* of that product. Thus, whilst it is true that software was probably seen by users as something that *should* be given away for free, in truth, the price of software had always been bundled into the initial cost of the hardware. Its forcible separation led to a rethink of the value of the software in isolation, and how to protect this value vis-a-vis the user.

Humphrey, the lead developer on the taskforce, was particularly worried that, given the relative ease of copying and sharing code, unbundling would mean that 'unethical people could copy and use programs without paying for them'.[139] Indeed, this was a legitimate concern that represented a particular vulnerability in the commercial viability of unbundling. At the time, there was no settled agreement as to whether software, divorced from the physical carrier of the hardware, could be protected by IP law.[140] Trade secret protection would prevent developers from sharing code, but no such obligation extended to the user, who for many years had been accustomed to accessing software for free, reverse engineering it, and sharing this with their community. For the unbundling process to be commercially viable, IBM needed some legal mechanism of regulating the user.

Curiously, despite worries about 'unethical people' using software without payment, IBM rejected the use of early technical protection measures (TPMs), like cryptography and single use keys, from

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[137] *United States v IBM Corp*, Dkt No 69-Civ-200 (SDNY complaint filed 17 January 1969). The suit would eventually be dismissed in 1982.
[138] Humphrey (n125) 60.
[139] ibid 60.
[140] Kretschmer M, 'Software as Text and Machine: The Legal Capture of Digital Innovation' [2003] 1 Journal of Information, Law and Technology.

the outset. Such measures were described as 'impractical and inconvenient for users and expensive for IBM', which 'would be onerous to our best customers and not effective against clever thieves'.[141] Instead, IBM would rely on the 'inherent honesty of [their] customers'[142] to not act unethically with the software.

Nonetheless, some form of IP protection for the software remained desirable. Patent protection was quickly dismissed given the multiplicity of software requiring protection under IBM's new business model and the corresponding lengthy application process.[143] Whilst copyright did not offer unambiguous protection for software, it was nonetheless preferred as a viable, but 'weak[er]' form of protection,[144] with the US Copyright Office, on occasion, having accepted deposits of computer programs as early as 1961.[145] Copyright was perceived as the weaker option as, in any case should it apply, it would only prevent the copying of software, and not the 'use [of] programs *without pay[ment]* for them' [emphasis added].[146] As software was still embedded in some kind of physical good (e.g. a disk), the distribution right of a software rightsholder would be exhausted in that particular disk when it was sold to the user (known in US law as the 'first sale doctrine').[147] This would entitle the user to resell that disk together with an embedded software copy, or indeed to give it away to a friend, lawfully. The person who then bought that copy or reused it would thus be legally entitled to do so without the *payment* IBM desired. In sum, whilst copyright would be useful in preventing copying of software, IBM's strategic priority lay elsewhere; their intention was instead to create a system where every purchase of software happened through IBM, for which copyright would provide no solace.

As a result, even if 'weak' copyright applied to IBM software, which would be helpful for preventing unauthorised copying, it did not necessarily aid the creation of a commercially viable software product if exhaustion/first sale rules applied. Regardless of copyright protection, there was a problem. The Figueroa taskforce had to find some legal mechanism for coupling the physical chattel containing the software, which if copyright applied could be exhausted (undesirable), with the intangible software, which in the absence of copyright could be copied (also undesirable). This

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141 Humphrey (n125) 60.
142 ibid, noting that '[n]o one has since devised a suitable security system, so the problem is still with us'.
143 ibid 60.
144 By North American Aviation in respect of Autonetics Recomp II, detailed in Gary GD, 'Copyright Registration and Computer Programs' [1963] 11 Bulletin of the Copyright Society of the USA. Registration in the 1960s peaked in 1967.
145 Kretschmer (n140).
146 Humphrey (n125) 60.
147 Copyright Act 1976, Pub L 94-553, s109(a)

no-win scenario led the taskforce to the idea of using contract law to construct a licencing arrangement between IBM and the user which could circumvent the perceived limitations in the law.[148] Through contract, IBM would be able to retain the title to the copies of software, if not through copyright, then under the default property regime. Such a licence, the taskforce thought, would 'provide the real protection'[149] in securing payment, rather than copyright.

The cumulation of these deliberations was the creation of the '*License Agreement for IBM Program Products*' (Appendix 1), the first agreement of its kind, and a contractual pre-cursor to the modern-day EULA. At approximately 4,000 words and four pages long (including signing block), this earliest iteration marks a stark difference from the EULA today (Section 3). Features of the licence, including its method of distribution (Section 1.2) and relationship with copyright (Section 1.3), are considered in the sections below to give an appreciation of how the user was conceptualised in response to the social and cultural concerns of the software industry at the time. In brief, these sections show how IBM utilised the licence agreement to establish their rights vis-à-vis the construct of a new, standalone, user.

1.2 Method of distribution: lease

Originally, the format of a licence agreement was similar to a lease, having no one-off fees for purchase and instead payment of monthly instalments for its ongoing use.[150] A user could only discontinue their use of the software by destroying their copy of the software and signing a Certificate of Discontinuance.[151] Through this distribution arrangement, IBM avoided the worry of the licence looking too much like a sale, which would trigger the undesirable exhaustion/first sale rule. Instead, by retaining the title to the software, and tying use to a specific term under conditions of ongoing payment, no copies of the software were ever technically 'sold'. The user was thus explicitly, and strategically, conceptualised in this licensing agreement as a licensor of a service, rather than an owner of a copy of a work.[152]

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[148] Humphrey (n125) 61.
[149] ibid 60.
[150] Detailed in IBM (1969) Marketing Announcement: IBM Programming. On file with author.
[151] ibid.
[152] Curiously, and despite how crucial the appearance of non-sale was to IBM to make their new business model work, Humphrey notes that this leasing process was quickly phased out due to its impracticality and the administrative burden of billing many customers for modest amounts. Within a short period, the leasing system was replaced initially by single-use charges, and eventually by the one-off fee licence still in use today (Humphrey (n125) 61).

Conceptualising the user as a licensor had a significant influence on the form in which the licensing agreements were offered. The 1969 agreement was offered physically on paper, and had to be signed by the customer, and counter-signed by IBM upon receipt to be effective. In this respect, the licence closely resembles a traditional contract in terms of offer and acceptance through the performative aspect of signing. Importantly, the user (licensor) who was receiving this licence was typically another commercial enterprise, rather than a private end-user. For example, the copy of the licence agreement in Appendix 1 has Genesco as the signatory, a US footwear company. As such, the formality of this contractual offering should be understood in the context of it being a business-to-business transaction, with the user as a business professional, rather than the private end-user typically assumed today. The methods of distribution employed in this licence speak to the explicit intention for this to be a formal, use-based relationship between companies, much like licensing of any other piece of industrial equipment.

Indeed, this relationship between *companies* means that the IBM licensing agreement was not the unilateral offering more typical of the EULA today (discussed in Section 3 below). Instead, there is evidence that the user, as a commercial enterprise, was able to negotiate some of the terms included in the licence. Whilst redacted from the copy secured from IBM, the licence in Appendix 1 alludes to '[s]everal amendments and modifications, identified in Schedule A, [which are] attached to and made a part of [the] agreement'.[153] Thus, the form in which the EULA was offered was more malleable to the user's intervention; their more powerful status at the time, as a commercial enterprise, offered the possibility for negotiation.

1.3 Relationship with copyright

As the licence was expected to be the main form of protection for IBM's software, copyright is treated as an afterthought which never takes precedence in the text itself. 'Copyright', as a term, appears discretely within indemnification clauses, and only then as an indemnification *from* the user to IBM about what will happen if they use IBM's software as a tool to infringe a third-party's copyright. Similarly, in the marketing announcement for the 1969 unbundling change, IBM only hint at the possibility of copyright without directly implicating it:

[153] Appendix 1, 4 ('Amendments').

> The customer is not permitted to copy or reprint any materials supplied under the License Agreement except therein provided, and is obligated to comply with all applicable copyright laws and regulations.[154]

Any '*applicable* copyright laws and regulations' [emphasis added], which may or may not exist, are in any instance secondary to the contractual obligation from the licence which obliges the user not to copy or reprint. Whilst in principle both function in the same way, this wording substantiates the view of copyright as the 'weaker' form of protection of software; IBM are clearly hesitant to tie themselves explicitly to this legal framework.

For IBM's own copyright over the software itself, this is relegated to a short sentence under the 'Permission to Copy or Modify Licensed Programs' section, which obliges the user to include a copyright notice on any copies they make, acknowledging the origins from the IBM product.[155] Whilst copyright is implicated here, the licence appears to be invoking the sentiment of copyright without following the strict letter of the law: obliging acknowledgement of the author of copyrighted works is not recognised in US law.[156] This request appears to have less to do with US copyright, and is more of a contractual courtesy for any derivative works made from the software. 'Copyright' in this case operates more as shorthand for 'please acknowledge our creation of the software'. Thus, and again, engagement with the legal framework surrounding the software is limited; copyright does not match the industry concerns of the time, and thus contract is used to construct its own, strategic user responsibilities.

The fact that a 'Permission to Copy or Modify Licensed Programs' section exists also suggests that IBM never conceptualised the user as merely a passive recipient of software. Coupled with the users' long-established practice of developing and sharing their own code, almost as co-creators alongside IBM, it seems that the user was always envisioned as a creator in their own right. Indeed, this conceptualisation of the creative user is in keeping with a more nuanced understanding of software itself at the time. Whilst the term 'software' now tends to be used synonymously with 'computer program', in the 1960s, software had a much narrower construction. IBM were licensing 'system software', which were understood to be programs used for the *purpose* of creating other programs or operating systems. Hence the importance of the historical distinction between the

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[154] IBM (n150).
[155] ibid.
[156] Only in the narrow subset of visual arts (Visual Artists Rights Act of 1990, Pub. L. No. 101-650).

user and end-user: the user (more likely a computer programmer) could create a custom-program for their company using the licensed system software, but the end-user would more likely be the person operating it day-to-day (e.g., a data scientist).[157] Software was therefore conceived as more of a tool or enabler for user creativity, rather than a creative work in and of itself. Thus, whilst much of the discourse surrounding users in the copyright context, tends to pose a dichotomy between either passive consumption or creative use (detailed in Chapter 1), it appears the understanding of the software industry has always been that the user is capable of both.

The licensing agreement is also notable for containing many primitive forms of copyright software 'exceptions', permitting certain uses of 'works'.[158] The agreement operates in a similar way to copyright, carving out acceptable, non-infringing uses from the general prohibition or exclusivity of copying. The licensing agreement gives '[n]o right to print or copy, in whole or in part, the licensed programs or optional materials […] *except* as hereinafter expressly permitted' [emphasis added].[159] The agreement then goes on to allow: making of back-ups of the software,[160] reverse engineering to understand the inner workings of the software's contents,[161] and the modification or 'merging' or software to make an 'updated work' (the latter being a form of adaptation or transformative work).[162] It would be more than a decade before the same permissions were enshrined in US law as copyright exceptions.

There is one notable omission in these primitive exceptions. Technically, the user has no right to create copies of the software, even where it is necessary to install and operate the software on their computer. Perhaps the broad licence to 'use' the software was considered to cover this eventuality, to the extent it meets an end (use) by fulfilling the contract. But in principle, the broad prohibition of any copying in the licence would exclude this. Notably, copyright also did not offer a more sensible alternative at this time: no exception for necessary technical copying would exist in US copyright law until many years later, and thus the use of software would also be *de facto* prohibited under the default legal regime. Consequently, the reading of the IBM licence as a broad grant to *use* would be, again, more practical than the copyright regime. The licence was therefore, as

[157] Haigh (n127).
[158] See Appendix 1, 2 ('Permission to Copy or Modify Licensed Programs').
[159] See Appendix 1, 1 ('License').
[160] ibid 1.
[161] See Appendix 1, 2 ('Permission to Copy or Modify Licensed Programs*').*
[162] ibid 2.

promised by the Figueroa taskforce, the 'real' protection for software in response to these perceived legal deficits.

1.4 The user of 1969

Having given an overview of the impetus behind the creation of the 1969 IBM licence, this section considers how the text can be understood to conceptualise an idealised user reflective of the social and cultural circumstances of the software industry at the time. IBM as the entity constructing the new standalone software user, had specific needs that bleed into the text of the licence. The user was idealised as a non-owner to prevent exhaustion in the copies of software, which was ensured through the initial leasing relationship and deliberate retention of title. The user was also envisioned as being a potential creator in and of themselves, working to modify and update the software using their own expertise. Users were also considered to be professionals in their own right, businesspeople utilising custom software for a specific purpose and entering into a formal licensing arrangement for a piece of industrial equipment.

In terms of power dynamics, the disparity between rightsholder and user is not so apparently unequal in this licensing agreement, as is usually assumed by notional user theorists (detailed in Chapter 1). Instead, without the bolstering effect of copyright law to legitimise many of the obligations of the licence, the user is not as conceptually weak, nor is the owner of the software exceptionally powerful. Indeed, with noted successful negotiations and amendments to the licence, the user, as a commercial enterprise, had more power to influence their own construction and penetrate the legal discourse of the licensing agreement.

Nonetheless, the only reason the creation of the software licensing agreement was made possible in the first instance was due to the massive market power of IBM, the dominant market leader of the time, enforcing a pivotal change to the commercialisation of software. IBM's decision to unbundle and create the licensing agreement was seen as innovative, risk-taking,[163] and even now is heralded as a massive technical achievement, which IBM themselves describe as 'giv[ing] rise to a multibillion-dollar software and services industry'.[164] However, as a separate software industry was apparent in the early 1960s, IBM's unbundling should not be understood as a singular event

[163] Johnson (n130).
[164] IBM, '1969' (*IBM*, date unknown) <https://www.ibm.com/ibm/history/history/year_1969.html> accessed 14 September 2021.

of technological breakthrough. Rather, it should be seen as a strategic change in the treatment of software as a giveaway to a commercial product. IBM '[gave] customers the message that buying software is not only OK, it's required'[165] whilst simultaneously making the sale of software commercially viable for competitors. Thus, whilst the power disparity between rightsholder and user is outwardly dampened in the licence agreement, the entire *creation* of the licensing agreement, and the standalone software user, was nonetheless an exercise of power of a different kind: market power.

In the truest sense then, the user, vis-à-vis this licensing agreement, is an object of pure construction relating to the commercialisation of software. The conceptualisation of the user is not, as one might have assumed, a result of technological determinism or a cause and effect resulting from the divorce of software from hardware. Instead, the standalone software user was constructed through deliberate choices that responded to the social and cultural needs of the software industry of the time. The resulting changes in business model and method of distribution have influenced the norms of software distribution to this day.

2. Subsequent historical developments (1970s-1980s)

The 1969 IBM unbundling made an independent software industry commercially viable, bringing new innovations and improvements to software and computer technology. Shortly after the 1969 unbundling, the creation of the microprocessor by INTEL in 1971, a key development of micro-computer technology, enabled the creation of the first commercially successful personal computers, such as the MITS Altair 8800 and Apple.[166] As accessibility and affordability of software and hardware improved throughout the 70s, computers evolved from being the sole remit of professional business institutions to the private home. The software user, previously being a role limited to commercial enterprises, was now 'virtually anybody'.[167] The offering of the EULA[168] shifted in response to this change, moving away from the formal, co-signatory contract, to the more instantly accessible shrink-wrap contract (Section 2.1). This historic period also sees the most significant shift in the EULAs relationship with copyright (Section 2.2) upon the first legal recognition of computer programs as protectable subject-matter.

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[165] Johnson (n130).
[166] Kretschmer (n140).
[167] Bardini T and Hovarth AT, 'The Social Construction of the Personal Computer User' [1995] 45(3) Journal of Communication.
[168] Note, from this point onwards, the term 'software licensing agreement' (specific to IBM) is replaced in favour of the generic label 'EULA' instead, which can more broadly be applied to all types of licensing agreements.

2.1 Method of distribution: shrink-wrap

The reconceptualization of the individual computer user, once a professional in a place of business and now a person in a private home, forced a redesign of the existing distribution method of the EULA. As the user became 'virtually anybody', the formality of the sign-and-return business contract of the IBM era was no longer appropriate. Similarly, for the newly established, smaller independent software businesses, dealing with as many contracts from 'virtually anybody' would be an expensive administrative burden. Instead, with the new mass-marketed software industry of the 1970s, 'ease of purchase became a key component in winning the business',[169] a component which transformed the offering of the EULA.

The result was the introduction of the 'shrink-wrap licence', so called because the licence itself was physically packaged within the software product itself. The licence was no longer available for the user to read pre-purchase, nor was signing necessary to show assent. Instead, the licence became effective upon removing the cellophane ('shrink') wrapping of the software product, or by breaking a seal closing the disk envelope or case (e.g., 'by breaking this seal you agree to the terms herein'). These new characteristics of the EULA embody the shift in the conceptualisation of the user from a commercial customer with specific business needs, to a mass audience of varying demographics and capabilities.

In later years, the new characteristics of the shrink-wrap licence would raise questions of its enforceability under general contract law.[170] However, throughout the 1970s, the shrink-wrap licence functioned as a practical solution to address the, still present, lacuna in law that IBM had sought to fill in 1969: software was still not unambiguously accepted as an object of copyright protection. Nor was it clear that the law could offer any alternative to the exhaustion/first sale mechanism that could ensure subsequent payment from each new user of a software work. This lacuna was becoming increasingly untenable with the new user becoming 'virtually anybody' (closer to a proxy for copyright's 'the public'), prompting calls for a change in treatment to the protection of software.

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[169] Germanowski G, 'Is the Shrinkwrap Licence Worth the paper Envelope it's printed on?' [1998] 6(3) International Journal of Law and Information Technology, 314.

[170] For a comprehensive assessment on the enforceability of shrink-wrap licences, see Lemley MA, 'Intellectual Property and Shrinkwrap Licenses' [1995] 68 Southern California Law Review.

2.2 Relationship with copyright

A more proprietary mindset was applied to the protection of software in the 1970s. The user was no longer understood as a customer of 'inherent honesty' as envisaged by Humphrey at the time of the IBM unbundling.[171] Instead, in the 1976 *Open Letter to Hobbyists* written by Bill Gates, co-founder of Microsoft, users are accused of mostly '*steal[ing]* your software' [emphasis added],[172] analogous to the language of theft used to describe infringement other traditionally copyrightable works.[173] David Bunnell, an early founder of personal computing and the Altair 8800, supported Gates' sentiment:

> Now I ask you - does a musician have the right to collect the royalty on the sale of his records or does a writer have the right to collect the royalty on the sale of his books? Are people who copy software any different than those who copy records and books?[174]

Whilst neither the open letter nor the response made a direct recommendation about the copyrightability of software, it is heavily implied. The close alignment between software, other copyrightable works (records and books), and concepts like 'copying' and 'royalties', suggests that the default property regime, then relied upon combined with licensing, was no longer seen as sufficient without copyright to bolster the protection of software. Within less than a decade, the ideology of software being a giveaway (SHARE) was largely gone, replaced by a proprietary vision of strong IP protection.

This proprietary vision was also being investigated at governmental level. As part of the revisions to US copyright law, the US Commission on New Technological Uses of Copyrighted Works (CONTU) was established in 1974 to resolve the issue of the computer's impact on copyright, including the question of copyright subsistence in software. The final CONTU report affirmed that 'computer programs, to the extent that they embody an author's original creation, are proper subject matter of copyright.'[175] CONTU's recommendations were embodied in the revisions to

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[171] Humphrey (n125) 60.
[172] Gates WH, 'An Open Letter to Hobbyists' (*NY Times*, 1976) <https://archive.nytimes.com/www.nytimes.com/library/cyber/surf/072397mind-letter.html> accessed 14 September 2021.
[173] Loughlan PL, '"You Wouldn't Steal a Car": Intellectual Property and the Language of Theft' [2007] 29(10) European Intellectual Property Review.
[174] Bunnell D, 'Across the Editor's Desk' [1975] 1(4) Computer Notes.
[175] National Commission on New Technological Uses of Copyrighted Works, 'Final Report on the National Commission on New Technological Uses of Copyrighted Works' [1981] 3 Computer Law Journal 54.

the US Copyright Act in 1980, which explicitly recognised software as an object of copyright protection. Shortly thereafter, in 1983 the first appellate court in the US held that computer operating systems could be protected by copyright.[176] The (then) European Economic Community followed these developments in 1991 with the Computer Programs Directive, recognising software as copyright protected subject-matter.[177] Gradually, software was achieving the desired status in law of being treated 'just like a book'.[178]

Yet, despite seemingly filling the lacuna in law with the explicit recognition of software as an object of copyright protection, software licences nonetheless continued to be widely used in the industry throughout the 1980s. This was legally tenable under the new Copyright Act which, inadvertently or otherwise enabled a dual role for copyright and the software licence.[179] As part of the recommendations to modernise copyright for the computer era, one of CONTU's suggestions was to exempt the user from copyright infringement where they make a copy of a computer program if it is fundamental to the use and installation of the software (otherwise known as the essential copying exception):

> Because the placement of a work into a computer is the preparation of a copy, the law should provide that persons in rightful possession of copies of programs be able to use them freely without fear of exposure to copyright liability. Obviously, creators, lessors, licensors, and vendors of copies of programs intend that they be used by their customers, so that rightful users would but rarely need a legal shield against potential copyright problems. It is easy to imagine, however, a situation in which the copyright owner might desire, for good reason or none at all, to force a lawful owner or possessor of a copy to stop using a particular program. One who rightfully possesses a copy of a program, therefore, should be provided with a legal right to copy it to that extent which will permit its use by that possessor.[180]

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[176] *Apple Computer Inc v Franklin Computer Corp* 714 F 2d 1240 (3d Cir 1983)
[177] The Computer Programs Directive (n44).
[178] Borlands, 'No-Nonsense License Statement' reproduced by Holwerda T, 'Borland in the 1980s: "Treat Software Just Like a Book"' (OS News 15 October 2009) <https://www.osnews.com/story/22342/borland-in-the-1980s-treat-software-just-like-a-book/> accessed 14 September 2021.
[179] Notably, the CONTU report (n175) does not detail anything about the relationship between software and end user licensing.
[180] CONTU (n175) 62.

CONTU recommended specifically that the 'rightful possessor' be excepted from infringement upon making a copy as part of an 'essential step in the utilisation of the computer programme'.[181] The rightful possessor in this case would be the person in *possession* of the software, foreseeably the user, provided they had legally acquired it through licence, sale, or otherwise (recall the comparable discussion on 'lawfulness' of use from the EU legislative regime in Chapter 1). However, for reasons unknown,[182] s117 of the 1980 Act changed the recommended CONTU language from the 'rightful possessor' of software, to the '*owner*' of a copyrighted program. 'Owner' as a term here is a key limiter. If the recipient of a software program is never an 'owner' of that program due to a licensing relationship designating them as a licensor or user, then the right to make reproductions necessary to use the software must be explicitly permitted to the user by the owner (e.g., the rightsholder).

The result of the language in the 1980 Act is that technically, if a licensing relationship is maintained and *ownership* of software remains with the software rightsholder, the user, even if they are a rightful possessor, must nonetheless be given permission to make a copy and use the software. Asking for an additional payment from each subsequent user of a work, as envisioned by IBM, would thus be an example of a now legally tenable request from the rightful owner of software to grant lawfulness of use. In doing so, the 1980 Act both preserved and enabled the norm of using software licensing as a means of granting rights to the user, not the law.[183] Thus, the US legislative history gives an important context for why software licences continue to be used in conjunction with copyright; as an important driver of the software market, the US continues to influence norms of distribution.

With the language of the 1980 Act effectively endorsing the ongoing use of software licensing, licences continued to be used in parallel to copyright throughout the 1980s. This would prove not only to be legally tenable, but commercially desirable amidst ongoing judicial uncertainty about the exact scope of software protection (e.g., of object code v source code).[184] The software licence could be used to claim broader protection over assets than the law might otherwise prohibit, or prevent lawful actions which might compromise the rightsholder. In this way, the EULA could

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[181] ibid 61.

[182] Hollaar LA, 'Legal Protection of Digital Information' (*Digital Law Online*, 2002) <http://digital-law-online.info/lpdi1.0/treatise1.html> accessed 14 September 2021: 'There is nothing in the legislative history of the bill that indicates why this change was made'.

[183] Noting that the original precursor to the GNU General Public License was also established at this time (1985 in respect of GNU Emacs, GNU Debugger and GNU C Compiler), leading to the free software/open software licence movement.

[184] See full discussion in Schwarz M, 'Tear-Me-Open Software License Agreements: A Uniform Commercial Code Perspective on an Innovative Contract of Adhesion' [1986] 261(7) Computer Law Journal.

design the idealised user by carving out the rightsholder's own designation of lawfulness. For example, software companies were concerned about reverse engineering practices giving competitors unfair advantage in the thriving software market of the 1980s.[185] Whilst not codified in s117 of the US Copyright Act at this point,[186] prohibitions against reverse engineering appeared prominently even in Borland's famously succinct 'no-nonsense' licence.[187] Strategically, commercial competitors were excluded from the conceptualisation of use through the EULA by only permitting lawful use to the *private* end-user who breaks the shrink-wrap seal.[188] Thus, whilst the user was no longer a named person in the sense of being a signing customer, they were certainly understood to be private and individual in nature: specifically, the user was conceptualised as being 'not a competitor'.

2.3 The user of the 1970s - 1980s

Through the historical narrative of the software industry in the 1970s and 1980s, the EULA was utilised as a tool to conceptualise an idealised user that was responsive to the social and cultural concerns of the time. Following the 1969 IBM unbundling, a fiercely competitive independent software industry, faced with ongoing legal uncertainties, established their rights vis-à-vis users. With personal computing reaching 'virtually anybody',[189] the EULA shifted in format from a formal business contract, to be amenable both to the naïve child,[190] and the possible pirate (with most, allegedly, 'stealing' software). By manifesting assent upon the breaking of packaging, the EULA changed the formality of the contractual offering and in doing so increased the social distance between the user as a signatory, changing the user into a mass, unknowable, and slightly suspect, audience.

During this period, the software industry was also becoming more powerful, with new copyright protection of computer programs introduced in the US in 1980; this bolstered the rightsholder's claim to ownership, and the ongoing regulation of software. However, far from removing the need for the EULA, it continued to run in parallel to the copyright protection, both because such a system was endorsed by the text of the 1980 Act, and due to ongoing judicial uncertainty over the

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185 See Bardini and Hovarth (n167).
186 Later understood in some circumstances to be fair use (see e.g. *Sega Enterprises v Accolade* 977 F 2d 1510 (9th Cir 1992), *Sony Computer Entertainment v Connectix* 203 F 3d 596 (9th Cir 2000) and permitted for the purposes of interoperability under the Digital Millennium Copyright Act (DMCA) Pub. L. 105-304, s1201.
187 Borlands (n178); notably, reverse engineering was openly endorsed in the IBM 1969 licence (see Appendix 1).
188 Lemley (n170).
189 Bardini and Horvath (n167).
190 ibid.

scope of software protection. The EULA was responsive to this and continued to shape the user in a way that meets the industry needs of the time through the construction of lawfulness via contract. Reverse engineering for example, once encouraged by IBM to improve their users understanding of their software, was now a risk from competitors. The user was therefore deliberately conceptualised as personal and private in nature to exclude any such competitors from the ambit of lawful use. Thus, even in the short period between the introduction of the EULA in 1969 and its mass-marketing in the 1980s, the user changed rapidly. They were no longer an expert co-creator in a business relationship with the rightsholder, but rather a naïve, private, and perhaps suspect, mass audience.

3. The EULA today

The EULA is now more prevalent than ever as software increasingly underlies more traditionally non-software works, including books (eBooks), films and music: even the routine accessing of websites and apps implicates software use.[191] The user is thus no longer limited in scope to a computer user, and instead 'use' is implicated in many everyday activities. The prevalence of software has resulted in a change of distribution of the EULA to 'clickwrap' format (Section 3.1) which, whilst more readily available, is simultaneously less *accessible* to the user as it increases in length and complexity. Unlike the previous time periods explored in this historical narrative, copyright protection of software is now unambiguous,[192] yet the EULA as a mediator of software use persists (Section 3.2).

It is worth noting that the current doctrinal and empirical legal knowledge of the interplay between EULAs and copyright is not mainly based on studies of 'pure' software (e.g., Photoshop).[193] Instead, where copyright is concerned, the contemporary understanding of EULAs is mostly derived from studies on areas where the introduction of software to traditionally non-software

[191] Whilst a website in and of itself is not software, it uses software in its deployment, and software is technically run remotely on demand (rather than in static programs like e.g. Microsoft Word).

[192] See e.g. DMCA in the US and the Computer Programs Directive in the EU. Formal recognition of copyright protection of software was recognised in international instruments, both in Trade-Related Aspects of Intellectual Property Rights (signed 15 April 1994) 1869 UNTS 299, Article 10 (1) and WIPO Copyright Treaty (signed 20 December 1996) 2186 UNTS 121, art 5.

[193] Studies on pure software EULAs are usually in the non-copyright context, focussing instead on questions of improving accessibility and readability. See Marotta-Wurgler F, 'What's in a Standard Form Contract? An Empirical Analysis of Software License Agreements' [2007] 4(4) Journal of Empirical Legal Studies, Grossklags J and Good N, 'Empirical Studies on Software Notices to Inform Policy Makers and Usability Designers' [2007] International Conference on Financial Cryptography and Data Security, and Good et al, 'Noticing notice: a large-scale experiment on the timing of software license agreements' [2007] *CHI'07:* Proceedings of the SIGCHI Conference on Human Factors in Computing Systems.

works has challenged existing distribution and ownership norms (presumably drawing more scholarly interest for precisely this reason).

3.1 Method of distribution: click-wrap

The current shift in the mode of distribution of the EULA stems from the mid-1990s general pivot of copyright and contract due to the emergence of new technologies, and particularly the rise of the internet and web browser.[194] With digital distribution increasing, the physical shrink-wrap licence has fallen out of favour. This is now replaced by 'clickwrap' EULAs in digital products, or 'browse-wrap' for websites. Both are digital prompts that appear when the software or website is initially used or accessed. Typically, these agreements take the form of a virtual box that either embeds, or links to, the relevant EULA, with the option to click 'I agree' to proceed (see Figure 3).

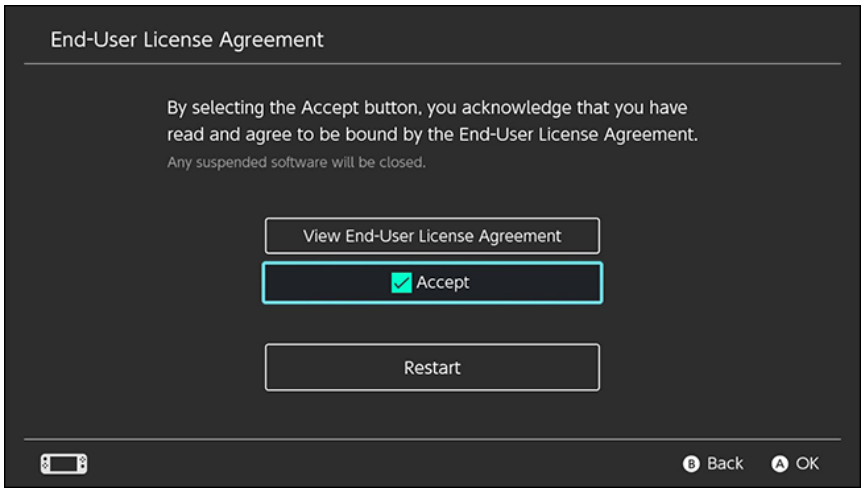


Figure 3: Screenshot from Nintendo Switch showing clickwrap EULA

Alternatively, the user can close the box, rejecting the terms, and in doing so is no longer able to use the software or access the website. Far from the formal contractual offering of the 1960s, the clickwrap licence is now embedded *within* the software itself, as merely another virtual device for the user to interact with. Much as with shrink-wrap in the 1970s and 1980s, the consequence of

[194] Kretschmer M, 'Copyright and Contract Law: Regulating Creator Contracts: The State of the Art and a Research Agenda' [2010] 18(1) Journal of Intellectual Property Law and Practice, 143.

these distribution shifts has increased dubiety as to whether the EULA is enforceable under general contract law, with no universal agreement yet being reached.[195]

Another retained feature from the shrink-wrap of the 1970s and 1980s is that the EULA no longer resembles a lease, as digital goods are often offered for a one-off fee in exchange for permanent transfer to the user. The fears of the Figueroa taskforce during the drafting of the IBM agreement, that software could be exhausted if it was presented 'for sale', have been systematically weakened over time. Certainly, the conceptual vocabulary surrounding these digital works has changed to reflect that things offered 'for sale' may not technically be 'owned',[196] in turn raising concerns about the 'end of ownership' (or at least, the user's ability to own a digital copy of a work).[197] Legal debates on the interplay between sales guised as licensing, and whether this is compatible with the principles of exhaustion in the digital environment, continue to be in flux. The legal position is clear only for software embedded in a physical carrier, such as software on a disk: an affirmative 'yes' that these would be exhausted upon first sale/distribution.[198] However, amidst the divorce of software from physical carrier, there is more legal uncertainty surrounding the exhaustion of *purely* digital goods. In the EU, the application of exhaustion to pure software is affirmative,[199] but in the US is much more uncertain.[200] As a result, and as with the EULAs development throughout its 50-year existence, the strategic conceptualisation of the user as a *licensor* still retains value to a software rightsholder in the face of ongoing judicial uncertainty. The EULA cuts through the gordian knot of muddy law by emphasising that the user is a non-owner, even if all other characteristics (e.g., a one-off fee, permanent transfer) suggest the opposite.

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[195] In the US, clickwrap contracts have been considered enforceable in in *Feldman v Google*, 513 F 2d 229 (ED Pa 2007), but not in *Specht v Netscape Comms Corp* 306 F 3d 17 (2nd Cir 2002). In a recent EU case (Case C-322/14 *Majdoub v CarsOnTheWeb.Deutschland GmbH* [2015] EU:C:2015:334), even hyperlinks to the EULA were considered sufficient denote consent and thus enforcement. See generally: Chiu AT, 'Note. Irrationally Bound: Terms of Use Licences and the Breakdown of Consumer Rationality in the Market for Social Network Sites' [2011] 21(10) Southern California Interdisciplinary Law Journal.

[196] Perzanowski A and Hoofnagle CJ, 'What We Buy When We Buy Now' [2017] 165 University of Pennsylvania Law Review.

[197] Perzanowski A and Schultz J, *The End of Ownership: Personal Property in the Digital Economy* (MIT Press 2016).

[198] In the EU, see InfoSoc Directive, rec 28: 'The first sale in the Community of the original of a work or copies thereof by the rightholder or with his consent exhausts the right to control resale of that object in the Community'.

[199] In the EU, C-128/11 *UsedSoft GmbH v Oracle International Corp* [2012] EU:C:2012:407 confirmed that digital exhaustion applied to pure software. The position for software that incorporates audiovisual work is not so clear. C-263/18 *Nederlands Uitgeversverbond* **v** *TomKabinet* [2019] EU:C:2019:1111 does not explicitly discuss sale v licence in digital works, but the prevention of resale in the licence was a persuasive factor in finding that ownership still vested with rightsholder (indirectly affirming the enforceability of clickwrap and subversion of exhaustion for other types of non-pure software).

[200] In the US, there is general support for reading 'sale' as 'licence' and prohibiting resale, see: *Vernor v Autodesk Inc* 621 F 3d 1102 (9th Cir 2010) (regarding physical exhaustion) and *Capitol Records LLC v ReDigi Inc* 934 F 2d 640 (2d Cir 2018) (confirming same for digital exhaustion).

The shift to clickwrap format has also brought several changes to the structure of the EULA itself. Perhaps the most well-known change is that hardly any user will read an EULA.[201] Indeed, the declaration via clickwrap that 'I agree to the terms and conditions' has been dubbed the 'biggest lie on the internet'.[202] More informal experiments using hidden clauses within EULAs (e.g. that the recipient agrees to sell their soul, or wins a prize upon finding the hidden clause) similarly confirm an overall low rate of reading.[203] Studies on reading habits of privacy policies, which are similarly distributed, find that the clickwrap format is deliberately designed to contribute to this low read rate by their readily 'skippable' characteristics:

> [Clickwraps] maintain flow to monetized sections of services, while diverting attention from policies that might encourage dissent. Clickwraps accomplish this through an agenda-setting function whereby prompts encouraging circumvention are made more prominent than policy links. Results emphasize that clickwraps discourage engagement with privacy and reputation protections by suggesting that consent materials are unimportant, contributing to the normalization of this circumvention.[204]

Low readership may also be ascribed to both the vast amount of EULAs a user needs to agree to, and their increasing length and complexity, which discourage baseline access for the user. Quite famously, as early as 2012, the iTunes agreement at 56 pages long was longer than Shakespeare's Macbeth.[205] Compared to the 4,000-word, four-page IBM agreement of 1969, this is quite an extension. Combined with their length, EULAs increasingly rely on complex legal jargon, with dense and technical language, making them less understandable and therefore less likely to be read: or as one study participant expressed it, full of 'legal mumbo jumbo'.[206] Low readership means that many users are often surprised by the reality of what is contained in the terms, as their expectations

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[201] Bakos et al (n12) find in an experiment of nearly 50,000 households that only 1 or 2 of every thousand will access terms, and even those who do purport to read them do not spend nearly long enough to comprehend them.
[202] Obar JA and Oeldorf-Hirsch A (n12).
[203] See experiments by PC Pitstop (PC Matic Cybersecurity, '4 Years Later – PC Pitstop EULA Experiment Still the Buzz' (*Tech Talk*, 14 December 2009) <https://techtalk.pcpitstop.com/2009/12/14/4-years-later-pc-pitstop-eula-experiment-still-the-buzz/> accessed 15 September 2021) and Gamestation (Smith C, '7,500 Online Shoppers Accidentally Sold Their Souls To Gamestation' (*Huffpost*, 25 May 2011) <https://www.huffingtonpost.co.uk/entry/gamestation-grabs-soulso_n_541549> accessed 15 September 2021).
[204] Obar JA and Oeldorf-Hirsch A, 'The clickwrap: a political economic mechanism for manufacturing consent on social media' [2018] 4(3) Social media and Society, abstract.
[205] Pidaparthy U, 'What you should know about iTunes' 56-page legal terms' (*CNN*, 6 May 2011) <http://edition.cnn.com/2011/TECH/web/05/06/itunes.terms/> accessed 15 September 2021.
[206] Good N et al, 'Stopping Spyware at the Gate: A User Study of Privacy, Notice and Spyware' [2005] SOUPS '05: Proceedings of the 2005 Symposium on Usable privacy and security, 50.

tend to be more generous.[207] Again, reflecting on the changes since the IBM agreement of 1969, the user is no longer exclusively a commercial enterprise, which is perhaps equipped with specialists to interpret the EULA, but is more usually is a layperson, for whom the EULA is at best a nuisance, and at worst a restrictive, quasi-legal imposition.

Thus, whilst the user is certainly the intended *recipient* of the EULA, they are evidentially not their *readers*. Instead, the intended reader is more likely to be a lawyer, charged with interpreting the 'legal mumbo jumbo' of the text. The EULA is more likely directed at shaping the *legal* interpretation of the user, and situating them for litigation, rather than a direct communication to the user themselves.[208] Hence the position in this thesis that whilst the user is constructed by the EULA, this process is not dialogic. Unlike the negotiations between user and rightsholder hinted at in the 1969 IBM licence, the user is now in a one-way dialogue that they cannot penetrate. Through this one-way dialogue, identity is now leveraged on the user *en masse*: the user is constructed by a powerful 'other', as anticipated by notional theorists (Chapter 1) but is not involved in their own construction.

To illustrate this one-way dialogue, it is evident that the unilateral offering of software licences is becoming increasingly less amenable to users, despite being historically entrenched for the EULAs existence.[209] Changing social and cultural contexts mean that EULAs, or variants thereof, are a precondition of participation in the digital world, which may have broader implications for users' social and cultural realities. For example, in August 2018, many users were concerned about a purported change in the terms of service of various online platforms.[210] In response, users posted a viral 'warding charm' on their social media pages. This 'warding charm' was a faux-legal statement which proposed to opt the user out of the changes to the terms. In this way, the user believed they

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[207] Fiesler C, Lampe C, and Bruckman A, 'Reality and Perception of Copyright Terms of Service for Online Content Creation' [2016] CSCW '16 Proceedings of the 19th ACM Conference on Computer-Supported Cooperative Work and Social Computing.

[208] There is only limited evidence that EULAs are being made more user friendly. See Campos-Pardillos MA, 'End-user Agreements in Videogames: Plain English at Work in an Ideal Setting' in Ensslin A and Balteiro I (eds) *Approaches to Videogame Discourse: Lexis, Interaction, Textuality* (Bloomsbury 2019) and crowdsourced efforts to help understand implications of terms agreed to (See ToS;DR, 'Terms of Service; Didn't Read' (*ToS;DR*, date unknown) <https://tosdr.org/> accessed 15 September 2021 and tl;drLegal, 'Software Licenses in Plain English' (*tl;drLegal*, date unknown) <https://tldrlegal.com/> accessed 15 September 2021).

[209] Noting that it is possible the original 1969 IBM agreement was amended for the recipient of the licence in Appendix 1.

[210] Terms of service are used in this thesis as a proxy for 'EULA' as they permit access to website software. See generally Venturini J et al, *Terms of Service and Human Rights: an Analysis of Online Platform Contracts* (Revan 2016) and Wauters E, Lievens E, and Valcke P, 'Towards a better protection of social media users: a legal perspective on the terms of use of social networking sites' [2014] 22 International Journal of Information Technology.

would still be able to participate in their use of the service but be unaffected by the new and contentious terms. The example below relates to Facebook, but variants were also widely circulated on Twitter and Instagram:

> Don't forget tomorrow starts the new Facebook rule where they can use your photos. Don't forget Deadline today!!! It can be used in court cases in litigation against you. Everything you've ever posted becomes public from today Even messages that have been deleted or the photos not allowed. It costs nothing for a simple copy and paste, better safe than sorry. Channel 13 News talked about the change in Facebook's privacy policy. I do not give Facebook or any entities associated with Facebook permission to use my pictures, information, messages or posts, both past and future. With this statement, I give notice to Facebook it is strictly forbidden to disclose, copy, distribute, or take any other action against me based on this profile and/or its contents. The content of this profile is private and confidential information. The violation of privacy can be punished by law (UCC 1-308- 1 1 308-103 and the Rome Statute. NOTE: Facebook is now a public entity. All members must post a note like this. If you prefer, you can copy and paste this version. If you do not publish a statement at least once it will be tacitly allowing the use of your photos, as well as the information contained in the profile status updates. FACEBOOK DOES NOT HAVE MY PERMISSION TO SHARE PHOTOS OR MESSAGES.[211]

The reality is that such 'warding charms', however viral, are legally ineffective. Clickwrap licences are presented to the user as 'agree or leave': it is not a two-way dialogue that can be modified after assent. Put otherwise, is not possible to access the ends without the means. Nonetheless, the virality of this urban myth suggests that users are struggling to understand (e.g., misinformation and perplexing reference to the Treaty of Rome), and are actively contesting, the unequal power relationship now manifested through EULAs. The truth behind the urban myth then, that users are ultimately unable to construct their own identity in relation to a work, speaks to ongoing anxieties surrounding changing ideas of ownership and usership. Users are no longer commercial enterprises negotiating with another company for the use of industrial equipment as in 1969.

[211] Friedman Z, 'Stop Falling For This Facebook Scam' (*Forbes*, 19 August 2019) <https://www.forbes.com/sites/zackfriedman/2019/08/19/facebook-scam/?sh=5efafd01a4cf> accessed 23 November 2021.

Instead, they more closely resemble the private 'naïve' user envisioned in the 1980s, except now in a non-negotiable relationship with a powerful platform 'gatekeeper'.[212]

To summarise, as the user becomes the user of all things, the EULA has changed its distribution methods to reflect this social and cultural change. Clickwrap now embeds the EULA within a virtual device that is, in a contradictory fashion, both very available and easily ignored. By making the EULA actively hostile to being read, the user is conceptually weaker by discouraging them from baseline access to the text. The user is thus the recipient being shaped by the EULA, but not its intended reader.

3.2 Relationship with copyright

In its current format, the EULA is no longer used to correct a deficit in law, but instead is running in parallel to it, and tailoring its own understanding of copyright through the text. Indeed, where the law continues to define the user as a *lawful* user, with lawful access,[213] this lawfulness may be premised upon complying with the terms of the EULA (terms which may, or may not, concern copyright itself).[214] Therefore, even when enacting upon a copyright exception, if this is outwith the terms of the EULA, this may subvert the definition of lawful, in turn negating the application of the exception (see discussion on lawfulness of the user in Chapter 1).

For example, reverse engineering, once encouraged in the IBM agreement, has been in flux throughout the decades of the EULAs development. Come the 1980s, reverse engineering is actively discouraged in software licences, as fears of competitors using this exception to undercut their business arise.[215] Even as reverse engineering becomes a user exception which in principle cannot be contracted out of, limited to the purpose of interoperability, it still is forbidden by many EULAs.[216] The construction of a lawful user, via the EULA, can therefore be strategic in restricting copyright exceptions, if they are undesirable for the time in which the EULA is written.

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[212] See generally Kretschmer M, Furgal U, and Schlesinger P, 'The emergence of platform regulation in the UK: an empirical-legal study' [2021] CREATe Working Paper 2021/6. And noting that the sentiment expressed from Gates (n172) was based in his initial role as an entrepreneurial start up, rather than the larger corporate role that Microsoft is now known for.

[213] InfoSoc Directive, art 5(1)(b).

[214] As argued in Favale M and Derclaye E, 'User Contracts (Demand Side)' [2010] 18(1) Journal of Intellectual Property Law.

[215] See Borlands (n178).

[216] *Davidson and Associates DBA Blizzard Entertainment Inc; Vivendi Universal Inc v Jung et al* 422 F3d 630 (8th Cir 2005).

It is now unsurprising that EULAs will routinely attempt to contract out of other copyright exceptions and limitations, not just limited to the example of reverse engineering. Tan's work on the terms of service of social media sites offers a comprehensive and comparative analysis of this, ranging from incompatibilities with the idea/expression dichotomy to fair use and copyright exceptions.[217] Similar, far-reaching divergences between the EULA and copyright are highlighted in both the music[218] and video game[219] industries. Absent any specific prohibitions to the contrary, for example in certain countries where copyright exceptions cannot be overridden by contract, [220] these EULAs construct a parallel regime of balancing user and rightsholder interests, quite distinct from copyright.

Yet, subversion of copyright exceptions and limitations has not been the focal point of most recent academic attention on the interplay between EULAs, copyright and users. With new creative and interactive tools, and new platforms for sharing them, there has been increased attention on user creativity and UGC. Whilst, as evidenced by the 1969 IBM agreement, EULAs historically took account of the co-creator relationship between the professional user and the rightsholder, they are now more increasingly used as a management device for the copyright of others. Perhaps more radically than the flouting of copyright limitations and exceptions, EULAs are now a means through which usership and authorship are being mediated. In particular, the inclusion of an automatic licence grant in the EULA, whereby the user automatically gives the licensee (in this case the primary rightsholder) certain permissions concerning the content they have created, has been particularly contentious. See for example an extract from the Twitter terms of service which includes an array of different permissions granted from the user in respect of their content:

> By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods now known or later

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217 Tan C, *Regulating Content on Social Media: Copyright, Terms of Service and Technological Features* (UCL Press 2018).
218 Gasser U, 'iTunes: How Copyright, Contract, and Technology Shape the Business of Digital Media – a Case Study' [2004] Berkman Center for Internet and Society at Harvard Law School Research Publication No. 2004-07 and Grøndal L, DRM and Contract Terms. 2(12) Indicare.
219 Reuveni E, 'On Virtual Worlds: Copyright and Contract law at the Dawn of the Virtual Age' [2007] 82 Indiana Law Journal; Miller DC, 'Determining Ownership in Virtual Worlds: Copyright and License Agreements' [2003] 22 Review Litigation; and Roquilly C, 'Control Over Virtual Worlds by Game Companies: Issues and Recommendations' [2011] 35(3) MITS Quarterly.
220 Guibault L, *Copyright Exceptions and Contracts. An analysis of the Contractual Overridability of Limitations on Copyright* (Kluwer Law International 2002) and Favale and Derclaye (n214).

> developed (for clarity, these rights include, for example, curating, transforming, and translating).[221]

In a practical sense, digital platforms do need certain rights from the user simply to transmit the user's materials to other users, as this implicates copyright-relevant activities like reproduction, adaptation, and communication. But this clause also brings a new added dimension to the clickwrap licence: not only is the user assenting to terms on the use of the copyrighted work they are accessing, but also to the treatment of their own copyright.

The earliest flurry of studies concerning the mediation of UGC ownership via EULAs focus on video games around the mid to late noughties. Video games, having always been underlain with software, were perhaps not always the most contentious testing area for changing ownership norms.[222] Much like pure software, they have historically, and emphatically, been licensed.[223] However, with the development of new networked technologies enabling the creation of virtual worlds and massively-multiplayer online games (MMOs, e.g. *Second Life*),[224] contractual governance of games via the EULA started to have broader implications not just limited to copyright management of the rightsholder. Ownership of virtual property, earned or created in virtual worlds, has particularly been an object of interest given its perceived and real value which is systematically subverted by the terms of the EULA.[225] The user, even if in principle a more powerful 'author' through the creation of their own content, are conceptually weakened in the virtual world. Here, they remain a *user* of a copyrighted work, regardless of their creative contributions. Tan's studies of terms of service on Facebook, YouTube, Twitter, Wikimedia[226] and Instagram[227] similarly conclude on the inverse: that UGC grants, combined with contractual overridability of the copyright regime, have resulted in the 'extreme concentration of power in a few companies'.[228]

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[221] Twitter, 'Terms of Service' (*Twitter*, 19 August 2021) <https://twitter.com/en/tos> accessed 15 September 2021.
[222] Ramos et al, 'The Legal Status of Video Games: Comparative Analysis in National Approaches' [2013] WIPO Report, noting at 1.2 the difficulty in interplay between audiovisual outputs and underlying software.
[223] Notably no EULA was included with the games in the cases noted in n186.
[224] Rosedale P, *Second Life* (Linden Lab 2003).
[225] Humphreys et al, 'Fan-Based Production for Computer: User-Led Innovation, the "Drift of Value" and Intellectual Property Rights' [2005] 114(1) Media International Australia Incorporating Culture and Policy.
[226] Tan C, 'Terms of Service on Social Media Sites' [2014] 19(2) Media and Arts Law Review.
[227] Tan C, 'Regulating Social Media: Copyright's Regulation of Content-Generative User Behaviours on Instagram' [2018] 2 Intellectual Property Quarterly.
[228] Tan (n217) 24.

UGC management therefore has a contradictory nature. In principle, a rightsholder who hosts UGC needs certain rights to use it for its intended purpose, sharing and transmitting to others. On the other hand, the broad grants in favour of the platform have the potential for overreach and abuse of power.[229] Broadly, this has resulted in two opposing camps: those who believe the user, through new technologies is liberated and free to share their creativity with the world, and those who believe that the user is being exploited. For the first camp, the automatic transfer of UGC from the user to the rightsholder is not problematic, because the latter are ultimately an enabler of this openness and creativity: one cannot exist without the other (similar to Ginsburg's arguments on the production-consumption cycle in Chapter 1).[230] In the opposite camp are those who point to UGC as a form of free labour, with users being vulnerable and manipulated.[231] The overreach of UGC clauses, and their disguise behind a hidden clickwrap, is therefore contestable. With no resolution between the camps likely, much like the contradictory face of the user in previous eras, the user is now viewed simultaneously as emancipated and exploited in relation to their creativity.

Per Tan, in the current evolution of the EULA, copyright is now just one 'stitch in the fabric' between contract and technology.[232] Yet, now copyright works through the EULA to bolster the power of the speaker, resulting in the rightsholder becoming stronger, legitimated through the powerful institutional backing of law, whilst the user is systematically conceptually weakened. This interplay between law and contract have diverged further over time, as copyright exceptions, limitations and the ambits of authorship and ownership in relation to UGC become new variables worthy of attention. As with the development of the EULA throughout its history, aspects of copyright are cherry picked to correspond with the vision of the user that best meets the industry concern of the time.

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[229] For example, in 2012 concerns were raised surrounding a change of terms on Instagram to allow for the repackaging and selling of UGC for advertising purposes See Time Photo Department, 'Unfiltered: Photographers React to Instagram's New Terms' (*Time*, 18 December 2012) <http://time.com/3795218/unfiltered-photographers-react-to-instagrams-new-terms/> accessed 15 September 2021.

[230] Dibbell J, '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); Lastowka G, '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; Marcus TD, 'Fostering Creativity in Virtual Worlds: Easing the Restrictiveness of Copyright for User-Created Content' [2008] 55 Journal of the Copyright Society of the USA.

[231] Elkin-Koren N, 'Governing Access to Users-Generated-Content: The Changing Nature of Private Ordering in Digital Networks' in Brousseau E, Marzouki M, and Meadel C (eds*) Governance, Regulations and Powers on the Internet* (Cambridge University Press 2009); Erickson K (n27); Ahuja N, 'Commercial Creations: The Role of End User License Agreements in Controlling the Exploitation of User Generated Content' [2017] 16 John Marshall Review of Intellectual Property Law.

[232] Tan (n217) 3.

3.3 The user today

The user today is not necessarily a replacement of its previous evolutions. Elements of the customer and co-creator of IBM in the 1960s are still present. As is the mass and naïve audience of the 1970s, with clickwrap being simply a digital transposition of shrink-wrap. However, now there is also the suggestion that the user is a digital citizen ('netizen') as the permeation of software into many areas of life increasingly implicates democratic participation on e.g. online platforms.[233] By extension, the EULA has come to be described as a form of governance that is not just limited to protection and regulation of a commercial product, but regulation of a world in which users inhabit.[234] The resulting power imbalance between a rightsholder, enforcing contract through the powerful institutional backing of law, and the increasingly weak user, means the emancipatory rhetoric surrounding the notion of 'citizenship' does not often mesh with reality.

Instead, the idealised user of today is not a singular or unified vision. There is a high capacity for variance, depending on the industrial, social, and cultural context in which they inhabit. The music user, whilst also perhaps being e.g., a video game user, will not be conceptualised the same by different rightsholders. Both have differing needs in their respective industries, with one perhaps seeking a more restrictive view of use than otherwise envisioned in copyright, and the other a more liberal vision. In short, who the user is, according to the EULA, is highly dependent on 'who is speaking'. This method of conceptualising the user is no longer just limited to the software industry, but all industries where software is used to supply copyrighted works. The user of today is thus in constant flux and must be understood with reference their inhabitation of a specific industry, with reference to who is constructing them, and through what means.

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[233] Particularly in the video games context, see: Harbinja E, 'Virtual worlds players – consumers or citizens?' [2015] 3(4) Internet Policy Review.

[234] See de Zwart M, 'Contractual Communities: Effective Governance of Virtual Worlds' [2010] 33(2) The University of New South Wales Law Journal; Webin KC, 'The Social Media Contract: On the Paradoxes of Digital Property in This Digital Land' [2012] 46(2) Journal of Canadian Studies; Jankowich A, 'EULAw: The Complex Web of Corporate Rule-Making in Virtual Worlds' [2006] 8 Tulane Journal of Technology and Intellectual Property; Lastowka G and Hunter D, 'The Laws of the Virtual Worlds' [2003] 92(1) California Law Review; Humphreys S, 'Predicting, securing and shaping the future: Mechanisms of governance in online social environments' [2013] 3(1) International Journal of Cultural Politics; Belli L and Venturini J, 'Private ordering and the rise of terms of service as cyber-regulation' [2016] 5(4) Internet Policy Review and Celeste E, 'Terms of service and bills of rights: new mechanisms of constitutionalisation in the social media environment?' [2018] 33(2) International Review of Law, Computers and Technology. See also Facebook's seemingly abandoned Governance Page, which originally had been envisioned as a means for users to vote for and against changes to their terms of service (a form of constitution): fbsitegovernance Governance, 'Facebook Site Governance' (*Facebook*, 7 April 2009) <https://www.facebook.com/fbsitegovernance> accessed 15 September 2021.

4. Overview of the history of the EULA

Throughout history, the user has been a neutral vessel through which a creator establishes their rights. The EULA has been a mechanism for achieving this by conceptualising the user in response to the industry concerns at the time. In this respect, the conceptualisations of the user have never been stable or consistent, but constantly in flux in response to different legal, social, and cultural contexts. A timeline of these developments is charted in Figure 4.

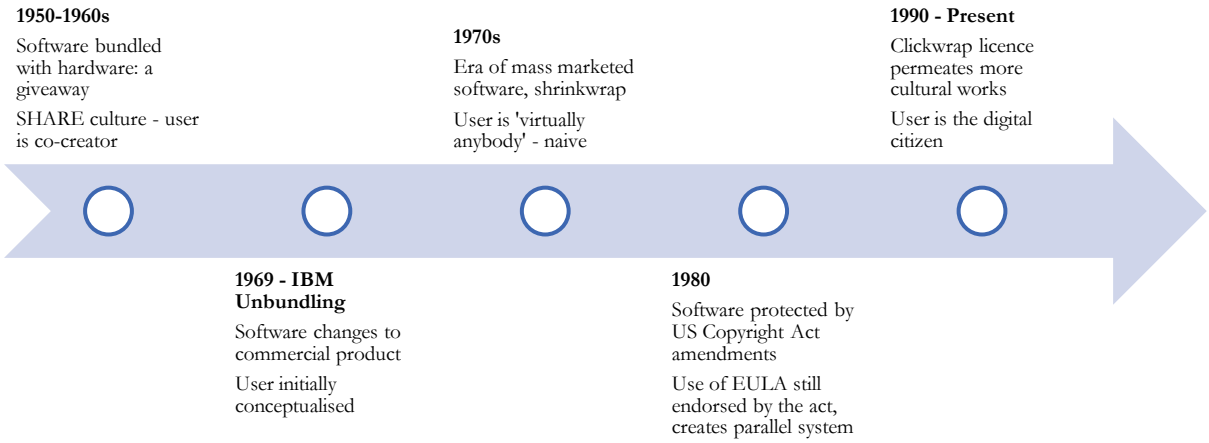


Figure 4: Timeline of EULA development

Whilst there is a tendency towards technological determinism when understanding the user, that essentially the user shifts and changes with new technologies, this is not entirely accurate. Whilst often presented as a technological innovation that spurred the 1969 IBM unbundling, birthing the independent software market and in turn the software user, this was in fact a business-led decision in response to an antitrust suit. Before this decision, software was viewed as a giveaway, the user existed in a sanctioned SHARE culture, as a professional using a computer in the course of their business. But the strategic choices in how to commercialise software following the recommendations of the Figueroa taskforce resulted in a new vision of the user. With the commercialisation of software, more specific visions of the user arise; they emphatically own no title to the software, but are also a co-creator in their own right. IBM, through raw market power, influence this vision of the user, and indeed the law, for years to come. Importantly, this early version of the user is *not* conceptually weak despite the unilateral offering of the contract. There is no institutionally backed power for the rightsholder with recourse to protection from copyright law, as the intangible software is not recognised as valid subject-matter at this point. There are also

reciprocal rights and responsibilities listed in the licence, a formal offering of a signed contract between businesses with clear and performative assent, and even evidence of negotiation between the parties.

The user concept then changes in response to new personal computing technologies in the 1970s and 1980s. With the new user being 'virtually anybody' and within the new remit of the private home, software creators become aware of the non-technical, non-expertise and naivety of the new user. Simultaneously, as mass marketing of software increases, concerns over piratical users increase, bluntly described as 'thieves'. Conceptually then, the user is both weakened and presented as distrustful, absent of any enforcement or legal recognition of software as property. In turn, both due to increased accessibility and changes in targeted users, the EULA changes from a formal contractual offering to the shrink-wrap format. By manifesting assent instantly through breaking the shrink-wrap or seal, the user's ability to negotiate or amend, in turn shaping their own conceptualisation, is removed.

Even after the explicit recognition of software as an object of copyright protection in the US in 1980, EULAs persist. Alongside the legitimation and powerful institutional backing of law, the use of software licensing now functions as a parallel system. These everyday contestations become more relevant in the current iteration of the user who, due to the prevalence of software-based technologies, becomes a user of all things. This is again reflected in a change of distribution model, from the physical shrink-wrap to the digital clickwrap. As new creative tools are made available to the user, the EULA also changes from a tool of managing a rightsholder's copyright, to a means of managing the user's copyright. The conceptualisation of the user now is split between an emancipated citizen of the web, to a subject of exploitation under big tech.

Throughout history, the EULA is a window through which the conceptualisation of the user can be understood, in a given industry, at a given time. Often this conceptualisation is intertwined with law, as a response to a perceived deficit in the default copyright regime. In much the same treatment as copyright doctrine, the EULA constructs the user not as a subject, but an object; a very neutral and malleable object through which new meanings can be strategically imparted. The only variable that changes this neutrality is the force constructing the user, through the EULA. The early computer user, for example, is very much a product of a software-design and production

perspective, which predates the law: 'the user is only a [software] designer's dream at first'.[235] Indeed, it is the 1969 IBM agreement which is a historically significant driver of copyright law, not the other way around. Many of the early 'user exceptions' codified in this agreement remain unchanged in the text of the 1980 amendments to the US Copyright Act. The idealised computer user is therefore imagined in the EULA initially, from which copyright law may be subsequently influenced.

The force behind the EULA has always been the remit of a powerful role, whether the raw market power of the dominant IBM in the 1960s, or as bolstered and enabled by the law post 1980. The user, by extension, has always been conceptually weaker. Whilst the starting point, pre-EULA positions the user as closer to a co-creator in a world of free software, this gradually weakens over time as the user is understood to be naïve and dependent on the rightsholder for access to more and more cultural goods.

Further, the conceptualisation of the user is not always consistent or logical. Indeed, the theme of the user as somewhat Janus-faced is prevalent throughout the development of the EULA, with several contradictory dualities that in principle cannot coexist. The user is both a consumer and creator; a person of inherent honesty but also a pirate. Through new technologies, they are both emancipated to share their creativity, but also exploited. The weight given to each of these dualities at any given time is very telling of the concerns of the industry shaping them. For example, when the mass marketed software industry of the 1970s demanded legal recognition from copyright, the presentation of the user as piratical is strategic, despite an openness to sharing culture only a decade ago.

In this sense, whilst the user is in principle neutral, the meaning ascribed to it, is decidedly not. The deliberate choices and constructions of the user, manifested through the EULA, are reflective of the social and cultural contexts of an industry at any given time. In the current iteration of the EULA, this offers a multiplicity of different conceptualisations as software increasingly underlies many cultural works. This conceptualisation is now happening, in many different areas, in many different respects, always in parallel to copyright. From this historical narrative, the neutral presentation of the user is crucially important - when invoking the user, it is anything one wants it to be.

[235] Bardini and Horvath (n167) 63.

Summarising, the historical narrative evidences that the EULA can be understood both as a text *and* a distribution method, which can conceptualise a strategic image of the user. An important, but often hidden, vector behind the user's neutral presentation are power differentials which, whilst omnipresent, are often in flux and can move between the rightsholder and user. The aim of this thesis is therefore to understand the conceptualisation of the user at this particular point in time, from a particular industry context, vis-a-vis the EULA. In doing so, the thesis also aims to uncover where power lies between the user and rightsholder today and how the EULA may disguise this. The following three chapters (3, 4 and 5) explore how this investigation can be methodologised through the application of Critical Discourse Analysis to the EULA.

PART 2: Methods

Chapter 3: Methodology

The previous chapters have illustrated the interlinkage between the copyright user, the software industry, and the EULA. This thesis argues that, in the absence of a detailed conceptualisation of the user in copyright law, EULAs offer an alternative means of constructing the idealised user. However, the EULA is a highly adaptable and responsive tool which, rather than offering a single, consistent, or stable conceptualisation of the user, is instead reflective of the social and cultural concerns of particular industries at particular times. The framing of the user within the EULA is thus always strategic and can be aligned to suit the ideological trajectories of certain communities. As such, the EULA should be understood as an instrument of a powerful legal actor who, through the generative power of law, has been given the authority to construct the user.

This chapter provides an overview of an alternative methodological framework through which the EULA can be studied to understand the construction of the user within its text. Section 1 provides an overview of CDA, a qualitative, interpretative methodology which offers a critical theory of language. CDA is presented as an apt methodology through which to study the user, as it can uncover otherwise naturalised identities which are artificially constructed by powerful actors. Section 2 and 3 expand on the theoretical and methodological assumptions of CDA respectively. In particular, these sections establish a distinct methodological approach that engages with theoretical concepts of CDA, rather than a particular theorist, and is aligned more specifically with Fairclough's dialectical-relational method of studying discourse. Finally, Section 4 ties together the key conceptual underpinnings of the thesis by outlining the interconnectivity between CDA, (copyright) law, the user, and the EULA.

1. Critical Discourse Analysis

In identifying an appropriate methodology for this thesis, recall the initial curiosity surrounding the word 'user' as a *term*, and as a deliberate label (Chapter 1). The blandness of this term reveals very little about the concept behind it and can make this seem like a neutral, utilitarian descriptor of one's relationship with a work. Yet simultaneously, this thesis has illustrated that it can in fact be used to describe many roles: a consumer, a creator, an ongoing recipient of a service, or a pirate (Chapter 1). The EULA, as a text, is illustrated in Chapter 2 as a vessel for this hidden framing. The EULA tells a story about who the user should be, in its own words, quite separately from law. Fundamentally then, this thesis is about language, and how language can be employed to construct

certain concepts. Further, the thesis is an investigation of the meaning behind those constructed concepts, and an illustration of how variable these can be depending on the specific context that they are invoked in.

The language-orientation of the thesis resulted in the identification of CDA as an appropriate methodology through which to understand the concept of user constructed in the EULA. This is to the exclusion of other competing methodologies which study language, such as content analysis, which has more of a quantitative and positivistic orientation. Instead, to understand the *conceptualisation* of the user, this requires a more qualitative and interpretative approach, of which CDA accommodates. This section provides more details on CDA as a methodology, and why this is appropriate to answer the research questions detailed in the Introduction.

1.1 Overview of CDA

CDA is a multi-disciplinary methodology, with multiple and distinct theoretical and methodological approaches, to the study of discourse. Despite this diversity, there is an agreed understanding that CDA is a critical theory of language, and that language is in itself a social practice.[236] In essence, CDA proposes that language can be used to shape reality, and in turn is shaped by it. This reality can comprise certain identities and concepts (e.g. 'user'). However, under the CDA paradigm, these identities and concepts are not something that one constructs themselves, but rather are constructed *for* them by other powerful actors. CDA is therefore an apt methodology for uncovering a shared underlying identity as conceptualised in a discourse text, with explanatory value in showing how identity can be understood with reference to specific social contexts and practices.

Formed during the linguistic turn of social sciences in the early 20th century, the 'critical' component of CDA distinguishes it from the broader discourse analysis.[237] This 'critical' component is mainly informed by the critical philosophy and social theorists of the Frankfurt school, with critique centred on relations of *power* difference, and how powerful actors can shape concepts and identities through a dominant discourse. As such, CDA is mainly concerned with a critique of discourses which can constitute, perpetuate, or challenge existing power structures.

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[236] van Dijk TA, *Elite Discourse and Racism* (Sage 1993), 131: CDA is 'at most a shared perspective of doing linguistic, semiotic or discourse analysis'.

[237] The terms are frequently treated as interchangeable in the UK/EU. For the purposes of this thesis, discourse analysis (*sans* critical) is understood as a more descriptive analysis of language which is less concerned with the social practice that surrounds and is manifested through discourse.

Language is thus not in and of itself powerful, but it can be *made* powerful depending on who is 'wielding' it and can be used to legitimise relations of organised power. Through this critical component, CDA aims to denaturalise and demystify language, exposing hidden ideas, assumptions, values, positions, and perspectives, and in doing so exposing how language can play a key role in maintaining ideologies, inequalities, and injustices:

> CDA [is] fundamentally interested in analyzing opaque as well as transparent structural relationships of dominance, discrimination, power, and control when these are manifested in language. In other words, CDA aims to investigate critically social inequality as it is expressed, constituted and legitimized by language use.[238]

As such, the end point of CDA is not merely critical, but progressive. CDA analysis is almost always normative, with the analyst taking an explicit position, usually to expose or resist social inequality, or as van Dijk suggests, is 'biased and proud of it':[239] power relations *should* in principle be de-mystified, exposed and ultimately challenged or changed. The aims of CDA are thus often explicitly political as a vehicle for change, and for this reason the political stances of CDA researchers are not value free.[240]

CDA is thus a qualitative, interpretative methodological approach that can be used to uncover naturalised identities and concepts that have been artificially constructed by powerful actors. CDA is well-suited to the aims of the thesis, which necessarily must take a narrow interpretative approach to uncovering the conceptualisation of the user, who is obscured in both legal discourse and the discourse of the EULA. The critical component not only obliges the thesis to *expose* the user's artificial construct, but also to *challenge* its neutral presentation and suggest how this can be changed or improved (e.g., in copyright policy).

Before expanding on the methodology in Sections 2 and 3, it should be noted that critics of CDA remark that CDA is not itself a method *per se*, but rather a grouped body of work with the shared

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[238] Wodak R, 'Critical Linguistics and Critical Discourse Analysis' in Ostoman J and Verschueren J (eds) *Handbook of Pragmatics* (John Benjamins 2006) 53.
[239] van Dijk TA, 'Multidisciplinary CDA: A plea for diversity' in Wodak R and Meyer M (eds.) *Methods of Critical Discourse Analysis* (Sage 2001) 96.
[240] For example, Fairclough's socialist stance is explicit in the influential Fairclough N, *Language and Power* (2nd edition Longman 2001).

view that language both shapes and is being shaped by society.[241] In essence, these criticisms suggest that CDA offers only a trans-disciplinary process of theoretically constructing the object of research, but ultimately leaves the method of doing so to the side. Indeed, this critique of CDA as a method is well-founded. Instead, it is better understood as being comprised of both a theoretical (Section 2) and method*ological* component (Section 3), both of which are explored in more detail below.

2. Theoretical and philosophical assumptions of CDA

CDA is viewed as a flexible methodological approach, in part due to its broad theoretical underpinning. The theoretical component of CDA draws from loosely grouped 'critical' theorists in both sociolinguistics and social theory.

The sociolinguistic aspect of CDA primarily derives from the functional linguistics approach developed by Halliday, a semiotic study of language primarily concerned with its function within broader society.[242] Language use can convey how one sees themselves, including one's identity and their understanding of others'. In this sense, 'meaning-making' of certain language and symbols is distinctly social.[243] However, CDA alters Halliday's approach to discourse and identity by suggesting that neither are closed systems shaped by individual choice, but rather are more rigidly informed by social structures: identity and concepts are *given*, not created. In this sense, CDA is more aligned with social theorists such as Bourdieu, and particularly his theory of *habitus*,[244] a collective entity through which dominant social and cultural conditions are established and reproduced institutionally. For the CDA scholar, language cannot be removed from the influence of the *habitus*, and thus is never neutral, always being either consciously or unconsciously ideologically based.

The reference to dominant social and cultural conditions hints at CDA's central focus on power, and particularly Foucault's orders of discourse and power knowledge.[245] For Foucault, the use of language must always be related to the 'body of rules that enable them to form as objects of a

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[241] See the series of critiques by Widdowson in Widdowson HG, 'Discourse analysis: a critical view' [1995] 4(3) Language and Literature and Widdowson HG, 'Reply to Fairclough: Discourse and interpretation: conjectures and refutations' [1996] 5(1) Language and Literature.
[242] See e.g. Halliday MAK, *Language as a Social Semiotic: The Social Interpretation of Language and Meaning* (Edward Arnold Ltd 1978.
[243] ibid.
[244] See e.g. Bourdieu P, *Language and Symbolic Power* (Harvard University Press 1991).
[245] Foucault M, 'The order of discourse' in Shapiro, M (ed.), *Language and Politics* (New York University Press 1984).

discourse and thus constitute the conditions of their historical appearance'.[246] These 'bodies of rules' form dominant discourses, whose authority stems from their power. Language thus has a constitutive force and can be used as a means of disguising power relations. However, for Foucault, this power is considered ubiquitous, and has a more relativist position; power can move between parties and be negotiated - it is not in and of itself inherently problematic. CDA scholars adapt Foucault's stance by aligning themselves more explicitly with Marxist social theorists who reject this relativism. Power is instead always problematised as belonging to an identifiable dominant *class*. In doing so, the socialist stance of CDA is quite transparent, drawing on Althusser's ideological state apparatuses and interpellation (which posits identity as being fixated in a subject position despite the perception of agency),[247] Gramsci's hegemony (whereby common sense presentation of language can disguise oppressive rules)[248] and Habermas' theory of communicative rationality (whereby language can be used as a medium of domination and social force).[249] All have shared interests in power, and how language can legitimate the dominance of a particular class through conflict and persuasion, to repeat and legitimate injustice. CDA's theoretical assumptions therefore create polarity between forces that are powerful, which use and manipulate language to secure certain ideologies, and the recipients of that language who are not powerful, and are in turn manipulated. Thus, a crucial question for the CDA analyst is: who benefits from the use of language?

From this broad theoretical influence, the resulting epistemological position of CDA is moderately constructionist, holding that reality and knowledge are both socially constructed and influenced by power relations from within society. In this sense, reality is not objective, nor can it be known directly, but only through the construction of language.[250] Reality is therefore contingent and context dependent, depending on who is wielding that language, and hence can be transformed. However, and crucially, discourse is not reduced to its communicative function, but also its social practice:

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[246] Foucault M, *The Archaeology of Knowledge* (Pantheon Books 1972) 48.
[247] Althusser L, *Lenin and Philosophy and Other Essays* (New Left Books 1971).
[248] Gramsci A, translated by Hoare Q and Nowell-Smith G, *Selections from Prison Notebooks*. (Lawrence and Wishart 1971).
[249] Habermas J, translated by McCarthy, T., *The Theory of Communicative Action: Reason and the Rationalization of Society* (Heinemann 1984).
[250] Regmi KD, 'Critical Discourse Analysis: Exploring Its Philosophical underpinnings' [2017] 2 African Review of Social Sciences Methodology.

> Language is also a medium of domination and social force. It serves to legitimise relations of organised power. Insofar as the legitimisations of power relations… are not articulated… language is also ideological.[251]

CDA's categorisation as epistemologically 'moderately' constructivist is a result of the emphasis placed on the role of social practice in language use. For the CDA scholar, constructivism runs the risk of being overestimated; instead, if language can be used to legitimise power relations, then many aspects of identity and lived reality are ideologically *pre*-constructed, a matter which we may be unaware of. As such, the moderately constructivist epistemology is balanced with a more stratified ontological position that errs towards critical realism.[252] Critical realism lies somewhere between a positivist approach and postmodernist; whilst it's not possible to objectively interpret our lived reality, which is ideologically constructed, it is possible to have better interpretations of that reality than what is offered by positivism. In short, CDA aims to demystify the constructed reality to explain the underlying truth.

Many of the key theoretical and philosophical assumptions of CDA are well-suited to the aims of the thesis. Throughout the history of the user and the EULA, there are themes of power, ideology, and the deliberate *construction* of the user as a marginalised subject within copyright discourse. Similarly, the CDA paradigm would suggest that the EULA is a constitutive force of power which can work to construct a certain identity for the user. However, the moderately constructivist paradigm of CDA suggests that it is impossible to study the authentic user; it will always be contextualised, and cannot be approached as a stable, legal subject, but rather one iteration of a pre-constructed identity or reality. Indeed, if identity is given and not chosen, the one-way discourse perpetuated by the EULA is explained aptly by the theoretical underpinnings of CDA.

Nonetheless, CDA critics suggest that this broad theoretical framework represents a weakness of the methodology in the way it blurs together many important distinctions between different concepts and disciplines.[253] Or rather, '[g]iven the striking heterogeneity of CDA's intellectual sources, it is at least surprising that there is little debate within CDA circles about their relevance or, indeed, their compatibility'.[254] For critics, the broad-brush approach to theoretical influences

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[251] Habermas as quoted in Wodak R, 'What CDA is about: A summary of its history, important concepts and its developments' in Wodak R and Meyer M (eds.), *Methods of Critical Discourse Analysis* (Sage 2001) 2.
[252] Regmi (n250).
[253] Widdowson (n241).
[254] Breeze R, 'Critical Discourse Analysis and its Critics' [2011] 214(4) Pragmatics, 501.

tends to miss the nuances of e.g. different epistemological approaches under the generalised heading of 'critical social theory'. For example, Foucault's explicit anti-Marxist position runs at odds with the close association of theorists belonging to neo-Marxism and the Frankfurt school (e.g. Althusser, Gramsci), as does his relativist approach to power, which CDA explicitly disavows. This may raise concerns that, as a methodology, CDA may not be robust due to the 'heterogenous' but ultimately incompatible collection of theorists through which its theoretical framework is drawn. However, this does not necessarily have to be a weakness of the methodology, but rather one that offers flexibility by engaging with particular theoretical *concepts*, rather than a particular theorist.

As such, this thesis does not limit this flexibility by aligning with a singular social theorist, but rather ties its theoretical framework more explicitly to key CDA *concepts*. In doing so, the thesis benefits from the broad theoretical influence with which CDA finds much appeal, whilst also offering a more structured and systemised approach to the analysis. The following sections consider the key theoretical concepts of power (Section 2.1.1), ideology (Section 2.1.2), social practice (Section 2.1.3) and common sense (Section 2.1.4). Whilst each concept has a dialectical relationship that often feeds into the other, in any case, each concept is given a separate and distinct definition.

2.1 Power

Most CDA scholars adopt the classic Weberian definition of power: that it constitutes the ability to exercise one's will over others.[255] By extension of this base concept, Fairclough more specifically defines power in terms of how people have different capacities to control how texts and discourses are produced, distributed and consumed.[256] For example, the unilateral offering of the EULA would be an example of how a powerful actor can control the distribution of a particular text.

In CDA, power is specifically linked to discourse because language can construct power relations, maintain them, or contest them. Under the CDA paradigm, power is constituted and sustained primarily through the realm of ideas and knowledge as opposed to force. Building on Foucault's distinction between sovereign and disciplinary power,[257] Fairclough has a similar formulation,

[255] Weber M, *Wirtschaft und Gessellschaft* (JCB Mohr 1925).
[256] Fairclough N, *Critical Discourse Analysis* (Longman 1995) 1.
[257] Foucault M, *Discipline and Punish* (Penguin 1979).

suggesting that both *coercion* and *consent* are necessary to sustain relations of power.[258] Of the two, manufacturing consent is generally considered more desirable because it can naturalise certain ideologies, and this can be achieved through the presentation of certain concepts and identities as common sensical (Section 2.1.4).

The EULA is a curious example to explore in this respect because it has elements of both coercion and consent: its more general presentation to the user is certainly naturalised, but the power behind it is more aligned with a coercive, sovereign character. Being based in law, the EULA can similarly have coercive power in designating what is lawful or unlawful. As such, much of the analysis in this thesis is concerned with how power can be shown either *behind* discourse, bolstered by the sovereign and inherently powerful character of law, or *through* discourse, as constructed solely in the language of the EULA.[259] For example, when an EULA claims ownership over a work, this is invoking power *behind* discourse, as this claim to ownership is sanctioned by the powerful institution of (copyright) law. This inherent characteristic, bestowed by law, thus inevitably affects the power difference between the EULA and the user as a recipient of that discourse. Power *through* discourse is instead more subtle and demonstrates how power relations are manifested *in* the language use itself. Common examples include levels of formality and politeness;[260] in conversational discourse power relations could be exemplified by simply addressing someone as 'sir'. Whereas in the EULA, the choice of whether to engage with formal, legal language, versus friendlier, plain English, could be an indicator of power relationships at play.

2.2 Ideology

Fairclough's definition of ideology largely draws on Althusser's supposition that ideologies are representations of reality from the perspective of a particular interest group.[261] Ideologies are:

> [C]onstructions of reality… which are built into various dimensions of the forms/meanings of discursive practices, and which contribute to the production, reproduction or transformation of relations of domination[262]

[258] Fairclough (n230) 33.
[259] ibid 33.
[260] Baker P and Ellege S, *Key Terms in Discourse Analysis* (Continuum 2011) 92.
[261] Althusser (n247).
[262] Fairclough N, *Discourse and Social Change* (Polity Press 1992) 87.

The emphasis on ideology in CDA again speaks to its ontological stance on critical realism and constructivist paradigm: ideologies can create a certain representation of the world (constructed), but it is not reality, as this is only the perspective of a dominant interest group (critical realism).

In the CDA theoretical paradigm then, through language, ideologies can be constructed, maintained, or challenged. However, the reference to 'relations of domination' is a subtle reference to the more explicit Marxist paradigm of many CDA scholars; the specific ideology being demystified is usually capitalism, an artificial construct being perpetuated by an identifiable ruling class. Deconstructing a *capitalist* ideology is therefore always the object of focus to be demystified through CDA.

However, in applying CDA theoretical concepts in this thesis, the critical Marxist bite is softened by not exclusively limiting power differences and ideology to class relations, as it is not always the most helpful measure of understanding power differentials. Whilst part of the appeal of the concept of ideology (and particularly by extension Gramsci's work) is its wide application to the state, this thesis is more concerned with the domination of a particular legal subject over another. Hesitancy to exclusively engage with class as a focal point of difference is not because class is irrelevant in this thesis, but rather the *orthodox* Marxist dichotomy of class (between bourgeoise and proletariat) often advanced by many CDA scholars,[263] is not the most apt dichotomy through which to shoehorn the rightsholder and user in a legal context. In fact, shoehorning these legal subjects in such a way becomes dangerously similar to proponents of the categorical user, and the unhelpful dichotomy between production and consumption discussed in Chapter 1. The stance in this thesis is therefore more relativist; power is more diffused and decentralised between the rightsholder and user. The EULA is not a tool particular to a singular, identifiable *class*, but rather a loosely connected group of legal subjects who have been given constitutive and generative power through law to construct the user, itself an entity that can move between different roles. Further, it is possible for both the rightsholder or user to be powerful in one context and powerless in another, depending on what the law designates as lawful or unlawful.

Resultingly, the analysis in this thesis is not limited to exposing a capitalist or political ideology through the EULA. Rather, this thesis takes a broader approach to uncovering the collective set of beliefs, manifested from a dominant interest group, that present a particular position of the user

[263] See Fairclough (n240, n256, n262), van Dijk (n236, n239) and Wodak (n238).

as reality. For example, the user being conceptualised as a non-owner of a copy of software in order to satisfy strategic business needs (discussed in Chapter 2 in the context of the 1969 IBM agreement) suggests that the EULA is manifesting a strong, proprietary ideology, whereby ownership of the software, in any capacity, always vests with the rightsholder.

2.3 Sociocultural practice

In the CDA theoretical paradigm, 'sociocultural practice' refers to the fact that language is something that is socially determined, and is shaped by broader social and ideological conditions, which can become structured and institutionalised. Broadly construed, this can include 'productive activity, means of production, social relations, social identities, cultural values, consciousness and semiosis'.[264] In part, this concept speaks to the fact that linguistic theories alone are considered unsatisfactory for interpreting discourse, and instead more social theories, including the dialectically related concepts of power (Section 2.1.1), ideology (Section 2.1.2) and common sense (Section 2.1.4), can be more appropriate vectors for analysis. Thus, when analysing language, one can only explain the *significance* of this with reference to the broader context in which it is taking place ('who benefits').

Thus, when examining how the user is constructed in the text of the EULA, for explanatory value, this must be related to the broader sociocultural practice in which it is situated. In Section 3 below, social practice as a concept is explored in more detail, and more specifically in relation to the sociocultural dimension of Fairlcough's dialectical-analytical approach.

2.4 Common sense

Common sense, sometimes known as naturalization,[265] refers to the process of how discourse becomes dominant and universal. This concept is closely tied to power; power is only successful where it is re-enacted in routine activities that go unquestioned and are seen as normal, resulting in Fairclough's concept of 'consent' of the majority, and a hegemonic influence. By naturalising and automating concepts and consent to them, they become opaque and no longer visible as ideologies, thus sustaining relations of domination:

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[264] Fairclough N, 'Critical discourse analysis as a method in social scientific research' in Wodak R and Meyer M (eds) *Methods of Critical Discourse Analysis* (Sage 2001) 122.
[265] Fairclough (n240) 76.

> In the naturalization of discourse types and the creation of common sense, discourse types actually appear to lose their ideological character. A naturalized type tends to be perceived not as that of a particular grouping… but as… neutral in struggles for power, which is tantamount to it being placed outside ideology.[266]

Translating this to CDA terms, discourses can play a role in the development and maintenance of the hegemony. The common-sensical presentation of certain ideas and concepts is embodied in van Dijk's challenge to 'subtle, routine, everyday forms of text and talk that appear "natural" and quite "acceptable"'.[267] This critical approach to discourse actively challenges the justification of one's position as natural, inevitable, or common-sensical, rather than an artificial social construct that benefits a particular dominant group.

It is worth noting here the parallels between Gramsci's concept of 'common sense', Fairclough's 'naturalised concepts' and the neutral presentation of the user and objectivity of the EULA. As a text, the EULA can work to secure consent to certain ideologies by presenting them as common sensical. The EULA becomes both ends and means: one must agree to proceed, therefore there is no alternative but to agree to their construction of use. As such, users will ultimately acquiesce to the terms of an EULA, even if they balk at them when read, because consent to them has become naturalised in the digital environment. In finding some explanatory value between this theoretical framework and the EULA, this thesis suggests that the EULA can be understood as a type of hegemonic code that presents one's status as a user as common sensical, thus manufacturing consent to its terms.

3. Methods of CDA

The current methodological approaches to CDA are informed by various opinions by key scholars including Wodak, who proposes a discourse-historical approach,[268] van Dijk, who proposes a socio-cognitive approach,[269] and Fairclough's dialectical-relational approach.[270] Whilst all share in

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[266] Fairclough (n240) 76.
[267] van Dijk TA, 'Principles of Critical Discourse Analysis' in Wetherell M, Taylor S and Yates SJ *Discourse Theory and Practice: A Reader* (SAGE 2001) 300.
[268] Wodak R and Reisigi M 'The Discourse-Historical Approach (DHA)' in Flowerdew J and Richardson JE (eds) *The Routledge Handbook of Critical Discourse Studies* (Routledge 2017).
[269] van Dijk TA, 'Socio-cognitive discourse studies' in Flowerdew J and Richardson JE (eds) *The Routledge Handbook of Critical Discourse Studies* (Routledge 2017).
[270] Fairclough (n240).

common the supposition that language shapes, and is in turn shaped by, social practice, they differ in their methods of analysis. In deciding the most appropriate CDA method through which to study the concept of the user in the EULA, both Wodak and van Dijk's approaches were dismissed. Wodak's discourse-historical approach has an explicit historical orientation, and thus would be more useful for an in-depth analysis of how the user concept has changed over time, rather than what the user is in the present. Wodak's approach also emphasises analysis of argumentation in discourse,[271] making it better suited to reciprocal, political discussion rather than a fixed, legal text. van Dijk's socio-cognitive approach is similarly inappropriate for the study of a fixed, legal text as its orientation is much more human-focussed, analysing the mental and (short and long term) memory structures that inform oral discourse. Resultingly, it is not clear that the socio-cognitive method can be applied to a text that does not have human mental capacity or memory, such as the EULA. In contrast to Wodak and van Dijk, Fairclough's dialectical-relational approach imposes no such restrictions, and offers a method that can apply to the EULA as a fixed, legal text.

Fairclough's dialectical-relational approach is a social theory of discourse, weaving together micro linguistic analysis and macro social practice. This approach extends critical linguistics to take a more holistic account of the ways in which social practices can influence, and are influenced by, language, making it an apt model to explore how sociocultural contexts can influence the conceptualisation of the user.

Fairclough's approach to CDA as a method is distilled into a model of three, interconnected dimensions or levels of discourse, illustrated in Figure 5.[272] Broadly conceived, the model posits that micro-level representations in a text can contribute to macro-level explanations of what these representations mean at in the sociocultural dimension with the mediating meso level examining the interpretative, discursive practice through which the text is produced. The macro level embodies the theoretical concepts such as power and ideology, whereas the micro level deals with more granular linguistic concepts such as grammar, style, and rhetoric. Essentially, the model examines to what extent the textual, micro levels of discourse reproduce, challenge, or perpetuate the sociocultural practice at the macro discourse.

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[271] Wodak and Reisigi (n268).
[272] Adapted from Fairclough (n240).

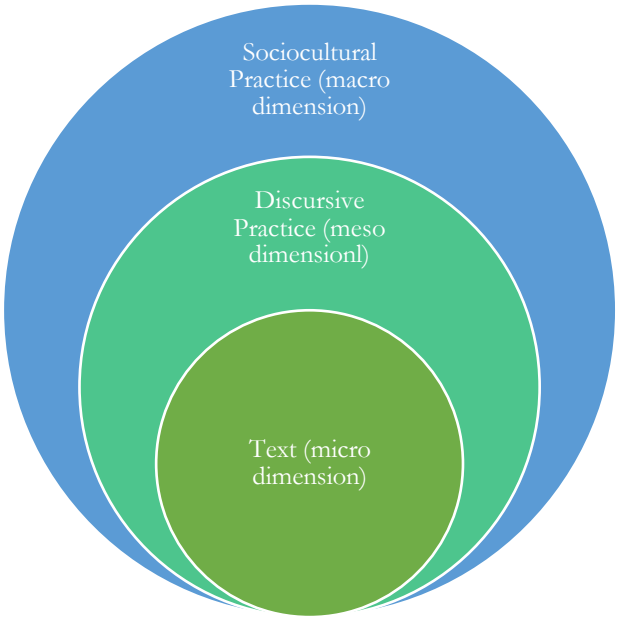


Figure 5: Representation of Fairclough's Three-Dimensional Model of CDA

Fairclough's dialectical-relational approach sees these processes as interrelated, with language being capable of constructing reality and vice versa. In this respect, the term 'dimension' may be more accurate than 'level', because 'level' implies an ascending or descending process, whereas, and as the embedded circular structure of Figure 5 illustrates, each of these are interdependent, and tend to overlap. As such, Fairclough's model offers multiple analytic points of entry that can be mutually explanatory, and does not necessitate a linear process of analysis from micro to macro or vice-versa, as the term 'level' might imply.

3.1 Textual dimension

The textual dimension of Fairclough's model involves a micro-level analysis of the specific linguistic and semiotic features of a text. This is otherwise known as an analysis of the 'descriptive' characteristics of the text, in the sense that this involves an interrogation of vocabulary (e.g. word choice, meaning, metaphor - formality), grammar (e.g. transitivity, modality - imperatives) and text structure (e.g. sentence length, complexity – emphasis, narrative). This may also include analysis of more granular features such as the choice of voice (active or passive), speech (direct or indirect) and emphasis (e.g. capitalisation, italicisation, underlining).

The aim of the textual dimension is therefore to look for particular linguistic patterns that assist in identifying an underlying conceptualisation of the user. In this thesis, analysis in this dimension

involves examining the text and language used in the EULA itself. In this dimension, some elements of content analysis are appropriate, in part because this can indicate the prevalence of a particular textual feature where appropriate (e.g. how often do UGC policies refer to UGC as 'fan' content?). Any such content analysis should only be understood as complementary to the main, qualitative, and interpretative CDA methodology.

At the textual dimension, where the textual meaning of a word may have a quite separate meaning in law, the thesis also offers doctrinal analysis where appropriate to highlight a difference between the concept in the text and the legal meaning. For example, Chapter 8 illustrates the differences between the EULA's definition of 'commercial' activities, which permits passive revenue making through monetisation on online platforms, versus the meaning given in copyright law, which would not permit such monetisation. Illustrating the differences between the legal meaning and alternative meaning as constructed in the EULA is required for this thesis as it impacts how word choice is interpreted in the text. The EULA may deliberately engage with, or subvert, the meaning enshrined in law and thus differing in the power it claims *behind* or *through* discourse. As previously explained in the Introduction, for any such doctrinal aspects, legal definitions or interpretations, the thesis focusses on EU law, given its close association with the impetus for this thesis.

3.2 Discursive dimension

The discursive dimension of Fairclough's model occurs at the meso-level and is mainly concerned with the methods and circumstances by which the text is produced, circulated, and distributed. Importantly, in this dimension the typical CDA scholar would also examine how a text is *consumed* by the recipient of the discourse. However, it is outwith the scope of this thesis to examine the user's interpretation of the EULA. This is not a limitation *per se*, as the specific aim and research question is to understand how the user is conceptualised, and idealised *by* particular legal actors, and how this identity is constructed, rather than received.

In application to this thesis, this dimension examines the circumstances in which the EULA was produced, circulated, and distributed. For the most part, this is a static and linear relationship in that there is only one speaker, the rightsholder, and one recipient, the user. However, distribution of the EULA changes in terms of whether it is distributed physically or digitally, whether there is a singular agreement or multiple agreements, and where those agreements can be found (e.g., as a static version on an institutional webpage).

3.3 Sociocultural dimension

The sociocultural dimension of Fairclough's model has the explanatory function of tying the micro and meso textual and discursive dimensions together by situating this within the broader social, cultural and/or historical context in which it occurs. In doing so, this dimension questions the extent to which the text changes or copies existing *social practices* within that particular context, and thus distils this concept from the theoretical framework more specifically to the method of analysis.

In relation to this thesis, some important questions at this level include: What type of ideology does this EULA perpetuate? Does this constitute or maintain a particular power relationship, or challenge it? What is considered lawful or important, hence desirable, in a user? Is there a shared underlying identity of the user conceptualised in the text? Does it naturalise otherwise debatable or unhelpful conceptualisations of the user? In this thesis, the sociocultural dimension also contains elements of doctrinal analysis as a natural extension of the word choice and meaning evoked at the textual dimension. For example, Chapter 7 illustrates how EULAs claim power *through* discourse by dismissing the legal limitations on resale of physical chattel, and that this dismissal is significant for bolstering the discourse on resale at industry level.

4. CDA and the law, the user, and the EULA

Having given an overview of CDA more generally, this section offers a more specific consideration of CDA in relation to the core components of this thesis: the law, the user and the EULA. In adapting CDA to the research question, one problematising aspect is that legal language is often viewed as purely functional rather than conceptual; law is language, therefore approaching this as a discourse ignores its doctrinal function. Indeed, as CDA has its roots in socio-linguistics, this methodology is more commonly applied in e.g. cultural studies, gender studies and media studies than law. Whilst less common in legal studies, CDA occasionally appears as an analysis method for conversational speech acts such as unscripted discourse in courtrooms and policy debates.[273]

[273] See Favale M, Kretschmer M and Torremans PC, 'Who is steering the jurisprudence of the European Court of Justice? The influence of Member State submissions on copyright law' [2020] 83(4) Modern Law Review; Erickson (n28); Edwards L et al, 'Discourse, justification and critique: towards a legitimate digital copyright regime?' [2015] 21(1) International Journal of Cultural Policy; Kalimo H, Meyer T and Mylly T, 'Of Values and Legitimacy – Discourse Analytical Insights on the Copyright Case Law of the Court of Justice of the European Union' [2018] 81(2) Modern Law Review.

Comparatively, the choice to study legal language in the form of a written and fixed contract as discourse is quite unorthodox.[274]

In part, hesitancy to engage with CDA to analyse fixed, written legal texts is because law is a language for a specific purpose. Law has a conservative function in that it seeks to have consistency and reliability over time, which results in a frozen written style.[275] Written legal text is typically characterised by its formality, impersonal nature, textual complexity, lengthy sentences, formulaic expressions (e.g. binomials 'represent and warrant', 'disburden and dispone') and legal jargon (e.g. 'heretofore').[276] Frequent intertextual references to pre-existing cases (e.g. legislation or statutes) are another typical textual feature of discourse which have a functional purpose of establishing precedent.[277] This frozen style may lead to the belief that there is nothing meaningful to be gained from approaching a written legal contract as a discourse, as the reason it 'speaks' in a particular way is purely functional, to secure precedent. In short, some aspects of legal writing are simply formulaic to achieve a specific purpose.

Yet, written law is also conceptual, and is not necessarily purely functional, or indeed, neutral. Indeed, if CDA supposes that reality is created through language, and law is in its essence language, then law cannot be objective. As well as having a function which manifests in a specific textual style, it is also a tool of social construction; law criminalises the undesirable, and legitimates the approved, if only tacitly by omission. As an institution of power, and generative power, the law delegates the superordinate and subordinate, and manifests asymmetrical power relations between them.[278] From a CDA perspective then, the very fact that legal language is often presented as objective, neutral, and purposeful, makes it *in itself* a worthwhile object of study, because it can often disguise the conceptual, constitutive element underlying it, and the power relations that sustain it.

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[274] But not unheard of. Of contracts see Nartey M and Huang H, 'Situated Identities in the Discourse of Insurance: A Comparative Critical Discourse Analysis of Chinese and British Contracts' [2018] 6(2) Language, Discourse and Society. Of legislation, see Hollis V, 'A Critical Discourse Analysis of the Intellectual property Chapter of the TPP: Confirming What the Critics Fear' [2017] 6(1) Communication.

[275] See Hultunen R, 'The Grammar and Structure of Legal Texts' in Solan LM and Tiersma PM (eds) *The Oxford Handbook of Language and Law* (Oxford University Press 2012); Finegan E, 'Discourses in the language of the law' in Kaplan, J.P. (ed) *The Routledge Handbook for Discourse Analysis* (Routledge 2012); Kaplan JP, *Linguistics and Law* (Routledge 2019).

[276] Kaplan (n275).

[277] ibid.

[278] See Niemi-Kiesilainen J, Honkatukia P and Ruuskanen M, 'Legal Texts as Discourses' in Gunnarsson A, Svensson E and Davies M (eds) *Exploiting the Limits of Law* (Ashgate 2007).

If law is language, and that language constitutes discourse, then by extension this logic applies to the EULA. EULAs can be understood as a form of quasi-legal text, that carry a particular message sent from a speaker (e.g. a rightsholder) to a recipient (e.g. the user). Noting again here the deliberate choice to label the user as a 'recipient' rather than a reader; such a label recognises that the one-sided nature of the EULA means the user is not an active participant or reader in the discourse, but rather an object being shaped. The fact that the user cannot influence or penetrate the discourse does not make this any less worthy a discourse to study. Indeed, a strict interpretation of 'discourse' does not implore that it is a two-way communication, but merely an example of language use.[279] The absence of this crucial participant, if anything, speaks *more* to the need for demystification and exposure of power relations within the EULA.

Much like the law, the EULA is also partly functional; it is a technical, if not necessarily legal document that follows certain conventions in order to grant access to a particular work. However, and like the law, it is also conceptual.[280] The EULA continues to exist long after its initial legal justification has expired (as discussed in Chapter 2), so it cannot merely be functional. The EULA now instead forms a hidden part of a user's everyday interaction with the digital environment, an interaction which has become so naturalised that the user completely ignores it.

The same logic can by extension be granted to the user as a legal subject in copyright. The user, despite its abstract and neutral presentation in doctrine, is not merely a functional label that is objective, but is instead a subject situated within a particular historical, social, or political condition. Much like the language of law or the EULA, the label of 'user' may in part be functional (simply describing an interaction with a work), but its conceptual construction is never neutral or natural. Instead, the user should always be understood from a specific context where their conceptualisation is being constructed, and subsequently sustained, perpetuated, or challenged. Indeed, many of the critiques leveraged at the current understanding of the user within copyright indirectly reach the same conclusion, such as Meese's relational theory of the user[281] or Cohen's situated user.[282] For both theorists, the user can only be understood within the contextualised sphere of social practice that CDA emphasises, but none have gone so far as to actually examine the user in a specific context, only stating that it is plausible.

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[279] Fairclough (n240).
[280] Niemi-Kiesilainen, Honkatukia and Ruuskanen (n278).
[281] Meese (n8).
[282] Cohen (n3).

In summarising the justifications for selecting CDA as the methodology for this thesis, whilst its application to the standard form contract is unorthodox, it is nonetheless defensible. In fact, hesitancy to treat the language of law as a discourse, rather than doctrine, may be specifically because of its neutral, technical character. From a CDA perspective, such characteristics are, in themselves, justification enough to approach the law critically, to challenge the neutrality of legal texts, the labels of legal subjects, and seek to demystify them.

5. Summary of methodology

CDA as qualitative, interpretative methodology is an apt approach to understand the conceptualisation of the user vis-a-vis the EULA. In particular, the 'critical' dimension encourages CDA analysts to be sceptical of the neutral presentation of the user, and the invisible, largely ignored EULA, hidden behind a clickthrough agreement, and naturalised into widespread acceptance. Whilst the application of CDA to the standard form contract is unorthodox, it is nonetheless defensible to understand the law as being a type of discourse, as text, and as having a generative function that can constitute and sustain power asymmetries. Nonetheless, this methodological approach makes certain adjustments to CDA to answer the research question of the thesis more suitably.

First, the theoretical framework for this thesis engages with the prevalent theoretical CDA *concepts* of power, ideology, social practice, and common sense, rather than a specific theorist. In doing so, the EULA is framed as a type of hegemonic code, wielded by a powerful actor, which can naturalise the presentation of the user. As such, the thesis aims are explanatory in exposing this artificial construction of a seemingly neutral concept, and how this can be used to secure the consent of the majority.

Second, the thesis follows Fairclough's dialectical-relational approach to CDA, using a three-dimensional model to study discourse. This model stratifies CDA between the micro textual factors of discourse to the macro sociocultural practices, with a mediating discursive dimension. In the textual dimension, doctrinal and content analysis are employed to better understand the meaning of certain word choices, and the prevalence of certain concepts within the EULA. In the discursive dimension, the manner through which a text is consumed by the recipient is excluded as a vector for analysis. In line with the constructivist epistemology employed in this thesis, the user is approached as a constructed object, rather than an individual that can autonomously

construct themselves. In the sociocultural dimension, engagement with the identified theoretical concepts of power, ideology, and common sense explain the textual and discursive features of the EULA. In turn, this shows how the user is constructed in a manner which responds to the social and cultural needs of the rightsholder.

Having outlined the CDA methodological approach, the following two chapters detail the more practical aspects of how CDA can be applied to the EULA by narrowing the sites of study to a manageable testing ground (Chapter 4) and outlining the research design (Chapter 5).

Chapter 4: Sites of Study: Video Games and eSports

The sites of study for this thesis are a narrower subset of the broader software industry discussed in Chapter 2, and one of increasing cultural importance: video games, and their companion industry eSports.

Importantly, video games and eSports should be understood as but one instance of possible applications of the methodology to the study of the user. There is no reason that the methodology cannot be extended to any industry that operates on the same foundation of standard form contracts as a mediator of use, making the possible sites of study vast. Indeed, video games and eSports were selected as viable sites only after earlier pilot studies in social media,[283] software-as-a-service subscription models,[284] and pure software.[285] As such, video games and eSports as sites of study should be understood as an important limiter in illustrating a particular context in which the user is conceptualised, rather than a claim to an authentic or definitive understanding of the user as a standalone concept.[286] Sectorial differences in user conceptualisation remain possible.

In outlining the justification for choosing video games and eSports for sites of study, this chapter purposefully differentiates between the two industries. Whilst closely related, they also have meaningful differences between them that give the opportunity for a comparative analysis of the user concept. Put simply, is the user of a video game different from that of eSports? For example, eSports introduces the vector of a professionalised, competitive user who is reliant on game access for income; this may be radically different than the user envisioned through the casual play of a less competitive game. The following sections explore in more detail video games (Section 1) and eSports (Section 2) as sites of study, and the justification for their selection.

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[283] Of social media, initial pilot studies were conducted on the terms of: Twitter, Facebook and Tumblr.
[284] Of software-as-a-service: Netflix and Spotify.
[285] The pilot study revealed that the vast range of software types now available makes pure software, that is software that is distinct from more traditional media, as a site of study problematic. Types of pure software may range from providing base functionality for a computer's operation (e.g. system software or operating software, such as Android) to software where user productivity is by design (e.g. application software, such as Microsoft Word or Adobe Photoshop). The pilot study suggested that with pure software, the functional and conceptual components are very muddied, making them difficult to methodologise from a CDA paradigm. For example, in examining the conceptualisation of the creative user in the act of making UGC, this is difficult to meaningfully engage with this where the purpose of most pure and application software is the *functional* enablement of production and creativity (e.g. accessing a computer's operating system to use Microsoft Word to write a novel).
[286] Noting that this approach is also in line with the critical realist and constructivist theoretical underpinnings of CDA detailed in Chapter 3, Section 2.

1. Video games

The primary motivation for selecting the video game industry as a site of study for this thesis is the immediate curiosity that the user of a game should be categorised as a 'user' of a work at all. In terms of copyright subject-matter, video games are best understood as multimedia works[287] comprising both software and audio-visual components.[288] Typically, rights to this game are owned by the game publisher through a complex network of employment contracts with developers (more accurately the authors of the work).[289] However, the user also performs an essential, quasi-authorial role in playing a game. Perhaps more so in video games than any other medium, the user is necessarily invited to forward the works progression: it is an inherently interactive medium of increasingly infinite variability, and the user is essential in influencing its meaning when played.[290] This inherent user interactivity can muddy the traditional copyright binary between the user and author, making their explicit designation as one, rather than the other, highly selective and strategic (Section 1.1). The muddying between user roles can be further explored in the context of video game UGC, with illustrations of multiple types of user creativity taking place both within and outwith the game world (Section 1.2). In summary, these sections aim to illustrate how video games are a site of user-centric interactivity which, whilst operationalised in the industry upon the assumption of a clear binary between author and user, is increasingly contestable, and artificial, when approached with a critical lens.

1.1 User interactivity

As illustrated above, video games are a curious site of study is because they are, perhaps more so than other more traditional mediums (such as books or film), inherently interactive. Described by Lastowka as 'inchoate',[291] a game is incomplete without user interaction, and dependent on the user to have meaning. The user has a necessary input into the progression of the events of the game itself, changing its presentation, structure, and outcome. The user's choices and skill

[287] Discussed throughout in Aplin T, *Copyright Law in the Digital Society: The Challenges of Multimedia* (Hart Publishing 2005).
[288] Ramos et al. (n222).
[289] For example, Sony Interactive Entertainment are the publishing company for a variety of development studios who are either wholly owned subsidiaries or contracted ad hoc, including, e.g., Naughty Dog (developers of *The Last of Us*), Bluepoint Games (developers mainly focussed on remasters and remakes of older game titles) and Insomniac Games (developers of famous series including *Spyro the Dragon* and *Ratchet and Clank*).
[290] The debate concerning the importance of the user in influencing the text of a game is long debated by game theorists (discussions on narratological vs ludological viewpoints are summarised by Lastowka G, 'Copyright Law and Video Games: A Brief History of an Interactive Medium' (*SSRN*, 2013) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2321424> accessed 15 September 2021.
[291] Lastowka (n290) 11.

influence the sequence of events on screen, and the game is only responsive to their actions: alone, it is meaningless. In their influential book on the history of software design, Laurel concludes that software, and by extension games, exist to represent action initiated by the user as an agent: that '[the computer's] interesting potential lay not in its ability to perform calculations but in its capacity to *represent action in which humans could participate'* [emphasis added].[292] Games thus enable user interactivity that gives 'freedom from the tyranny'[293] of an overall narrative as designed by a game creator. In other words, video games make for an interesting site of study by merit of their base nature: they *invite* the user to give the game meaning, with a prominent role in influencing its text.[294]

Take, for example, the *Mass Effect* series,[295] a science-fiction franchise set within an alternative universe of advanced, universe-traversing technologies and alien races. Throughout the series, the user can choose certain dialogue and action options (divided into 'paragon' or 'renegade' options) when interacting with other characters and environments within the game world. These granular options ultimately influence many outcomes of the entire game itself, determining which characters survive, which alien races will support you in the final battle, and indeed, the fate of humankind. This decision-tree type of interactivity is perhaps more analogous to the 'Choose Your Own Adventure' style of books, but nonetheless, it is the user's choices that influence the final text and presentation of the game.

To take a more complex example, in contrast to the decision-tree method of interactivity, *Death Stranding*[296] offers an alternative insight into the way user interactivity influences the game text. The game is set in a post-apocalyptic US, where the user assumes the role of Sam Bridges, a courier who must traverse dangerous terrain to deliver packages to survivors, who are taking shelter in their homes. Whilst the game is primarily a single-player title with a linear narrative, it nonetheless has a multiplayer function through internet connectivity which enables users to influence the game environment. As the gameplay centres around crossing difficult terrain and mastering delivery routes, other users spend resources to build roads, bridges, and ladders, which can assist other user in their travels. If many players walk using a certain route, that path will become worn down and more accessible e.g. by clearing snow, flora and stone. The community of users thus influence the

[292] Laurel B, *Computers as Theatre* (2nd edition Addison-Wesley Professional 2013) 1.
[293] Bushnell R, *Tragic Time in Drama, Film and Videogames: The Future in the Instant* (Palgrave MacMillan 2016) 80.
[294] Noting that this position is closer to the ludological perspective of games as opposed to narratological (see Lastowka (n290)).
[295] Electronic Arts, *Mass Effect* (Electronic Arts 2007).
[296] Kojima H, *Death Stranding* (Kojima Productions 2019).

experience of the world and navigability of the game outwith the exact design and specifications envisioned by the game designers, and each playthrough and experience of this is uniquely constructed amongst this community, even if the narrative itself is linear.

The user's prominent role in influencing the text, narrative and progression of a game has been discussed extensively in the vast literature on persistent virtual worlds,[297] such as *World of Warcraft*[298] or *Second Life*.[299] In such games, any narrative offered by the rightsholder is largely absent, and the emphasis is instead on the user's choices and investment in character progression, whether through combat or mastering the in-game economy. The removal of any linear narrative has led game scholars to argue that such a game can never be complete in the same sense as a movie or film,[300] because it is a constant process of collaboration between users, rather than an identifiable author as assumed in copyright.

Importantly, the above examples should not be understood as 'UGC', which is discussed separately in Section 1.2, but rather these are intended to illustrate the base interactive nature of a game that invites the user to interact with and 'complete' the text in a manner unorthodox to many traditional works.[301] Game theorists in fact frequently refer to the user of a game as an 'author'.[302] This terminology seems to have been borrowed more from the meaning ascribed to authorship in cultural/media studies (referring to 'origination'),[303] rather than the technical specificity of copyright.[304] Nonetheless, the sentiment is the same: the user is presumed to have some kind of authorial role because of how they influence the text of the game, and by extension some kind of ownership interest over those outputs: interactivity in this medium makes the user *transgressive* between user and author. Yet, the default designation of usership means that they are nonetheless still a subject which can be constructed through the EULA at the discretion of the rightsholder. The exact manner in which this is addressed in the text speaks directly to the tension between these roles, and the binary that is often presumed and enforced under copyright doctrine.

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[297] See n234.
[298] Blizzard Entertainment, *World of Warcraft* (Blizzard Entertainment 2004).
[299] Rosedale (n224).
[300] Nichols WJ, 'Painting through Pixels: The Case for a Copyright in Videogame Play' [2007] 30 Columbia Journal of Law and the Arts
[301] See discussion on narratology and ludology by Lastowka (n290).
[302] Bushnell (n293).
[303] Defined here as 'writing the rules for the interactor's involvement, that is, the conditions under which things will happen in response to the participant's action' (Murray JH, *Hamlet on the holodeck: the future of narrative in cyberspace* (MIT Press 1998) 153).
[304] e.g. as it relates to standards of originality or tests of joint authorship. In the context of video games, the user has also been explored as a potential performer, see Burke DL, 'Owning e-Sports: Proprietary Rights in Professional Computer Gaming' [2013] 161 University of Pennsylvania Law Review.

1.2 Video game UGC

Whilst user creativity is not a new variable in video game industry,[305] it is now certainly the most prominently discussed topic in video game copyright literature.[306] The many types of UGC made possible by using a video game makes them as a rich site of study to understand how creative use is negotiated between the rightsholder and user and indeed, how the binary between them is increasingly contestable and artificial. The new creative opportunities afforded to users by gaming technologies adds a more explicit layer of additive creativity to the baseline interactivity illustrated above. However, and importantly, this section distinguishes UGC from this baseline interactivity of simply *playing* a game (described in Section 1.1) by defining it as the creation of new, derivative content based *in* or *on* the game world.

Perhaps the most well-known example of in-game UGC is the practice of 'modding' (a slang term derived from 'modify'), referring to any user alteration to the game code to make a game perform in a way not originally conceived of by its creators. Mods can constitute minor tweaks that range from the bizarre (e.g. replacing a *Resident Evil 2*[307] villain with Thomas The Tank Engine, see Figure 6)[308] to, essentially, a form of post-release quality assurance (debugging, improving usability, accessibility, gameplay, or graphics).[309] Mods can also be more substantive, major overhauls of a game. Quite famously, *Counter-Strike*,[310] one of the most influential first-person shooter games in history, was initially a mod of its predecessor, *Half-Life*,[311] before it was subsequently acquired by Valve.

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[305] As early as the 1980s, UGC was prevalent: Dead Smurf Software, *Castle Smurfenstein* (Dead Smurf Software 1983) is for example, a modded (parody) version of Warner, S.S., *Castle Wolfenstein* (Muse 1981).
[306] See generally n224 and Lastowka (n220, n224, n273).
[307] Kadoi K and Yasuhiro A, *Resident Evil 2* (Capcom 2019).
[308] ZombieAli, 'Thomas the Tank Engine over Mr X' (*Nexus Mods*, 3 March 2019) <https://www.nexusmods.com/residentevil22019/mods/62> accessed 15 September 2021.
[309] Recently, and most notoriously, *Cyberpunk 2077*'s (CD Projekt Red, *Cyberpunk 2077* (CD Projekt Red 2020) poor performance was improved substantively by community mods (including 'better vehicle handling' or a 'better mini map' (see PC Games, 'The best Cyberpunk 2077 mods' (*PC Games*, date unknown) <https://www.pcgamesn.com/cyberpunk-2077/mods-best> accessed 15 September 2021).
[310] Valve, *Counter-Strike* (Valve 2000).
[311] Valve, *Half-Life* (Valve 1998).



Figure 6: 'Thomas the Tank Engine over Mr X' mod by ZombieAli

Other types of in-game UGC can only be created in, and accessed through, the game itself. This is usually enabled through in-game tools provided by the game creator, which allow players to customise certain aspects of the game ('painting through pixels').[312] Typical examples would include customisable character designs, maps, music, and clothing or environmental textures and patterns. The example in Figure 7 shows in-game UGC from *Animal Crossing: New Horizons,*[313] in the form of a 'Floral Pink' pattern which can be applied to clothing, flooring, wallpaper and furniture. This creation is uploaded to the online game server and can be shared with other players using a unique 'custom design' or 'creator' code, enabling other users to apply the pattern in their own game.



Figure 7: 'Floral Pink' by user Jessica

[312] Nichols (n300).
[313] Kyogoku, H., *Animal Crossing: New Horizons* (Nintendo 2020).

The nature of in-game UGC can be much more substantial where the purpose of the game itself is to *create*. Usually dubbed as a 'sandbox' game, such games have no objectives other than to grant a large degree of creativity to the user. *Minecraft*[314] is the typical example of such a successful sandbox, centring around a virtually infinite world made of individual, modifiable 'blocks'. Users can interact with these blocks to influence the shape of the environment (e.g., using dirt, sand, and granite to build mountains or rivers) and create new objects (e.g., a castle) at their own pace, with no narrative constrictions. To take an example of the types of worlds that can be created in *Minecraft*, consider the Cairngorms Minecraft Project, a virtual replication of the Cairngorms National Park.[315] Built by members of the Cairngorms Youth Action Team, the Cairngorms Minecraft Project map is scaled to size (approx. 1,700 square miles), so that the user can cover the same amount of ground per in-game day as they could in real life. The map also replicates many of the iconic geographical features in the National Park, including the Cairngorm Plateau and Lake Avon (illustrated in Figure 8).



Figure 8: 'Loch Avon' by Cairngorms Minecraft Project

In contrast to in-game UGC, UGC based *on* or *around* a game is much more varied as it can exist anywhere outside of the game space, making it difficult to quantify.[316] The most well-known type of this UGC is game streaming (live, unedited recordings of gameplay) and 'Let's Plays' (non-live,

[314] Persson M and Bergensten J, *Minecraft* (Mojang 2011)

[315] Cairngorms National Park, 'Cairngorms Minecraft Project' (*Cairngorms National Park*, date unknown) <https://cairngorms.co.uk/caring-future/education/learning/minecraft/> accessed 15 September 2021

[316] The most comprehensive assessment to date was undertaken in a project developing on the findings of this thesis, which quantifies different allowances from game EULAs (see You Can Play, 'Overview' (*You Can Play*, date unknown) <https://www.copyrightevidence.org/ycp/overview> accessed 23 November 2021).

edited recordings of gameplay) which are hosted on online platforms such as YouTube or Twitch. These recordings usually involve a user playing a portion of, or occasionally the whole of, a game, accompanied by their own commentary, which tends to be critical or humorous rather than e.g. an objective strategy on how to complete the game (though game strategies, walkthroughs and 'speed runs' are also popular). Famous gamer personalities and influencers have arose from this particular form of UGC, and indeed can be a profitable lifestyle for the minority. Multimillionaires who have made their fortunes through 'playing games' include PewDiePie, Ninja, and Markiplier.[317] With standalone game streaming communities on online platforms, and well-established systems for securing revenue, this type of UGC is perhaps better understood as a user *industry* which can have significant economic benefits for both game publishers and gamer personalities alike.

Other, less common, types of UGC that exist outwith the game space include a new strand of virtual photographers, who use in-game photography tools to capture stills of increasingly beautiful and complex game worlds. Virtual photographers may enhance the game using improved graphics, details, lighting, and reflections, and much like a non-virtual photographer will similarly spend much time waiting on and constructing the perfect shot. Virtual photographers display their shots in alternative virtual spaces (e.g., social media) or occasionally in physical formats in galleries. One of the better-known virtual photography series by street photographer Fernando Pereira Gomes replicates this genre of photography in the world of *Grand Theft Auto V*,[318] an example of which is displayed in Figure 9.[319]

[317] Perez M, 'Top-Earning Video Gamers: The Ten Highest-Paid Players Pocketed More Than $120 Million in 2019' (*Forbes*, 2020) <https://www.forbes.com/sites/mattperez/2020/01/29/top-earning-video-gamers-the-ten-highest-paid-players-pocketed-more-than-120-million-in-2019/> accessed 15 September 2021.
[318] Benzies L and Sarwar I, *Grand Theft Auto V* (Rockstar Games 2013).
[319] Independent, 'GTA V player takes "Street" Photography using in-game camera phone' (*Independent*, 2013) <https://www.independent.co.uk/voices/iv-drip/gta-v-player-takes-street-photography-using-game-camera-phone-8879370.html> accessed 15 September 2021.

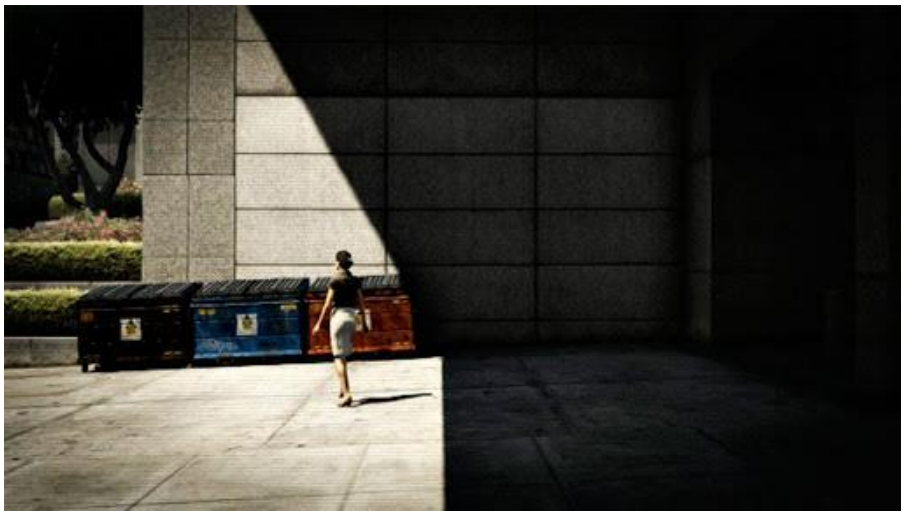


Figure 9: 'Street Photography V' by Fernando Pereira Gomes

Less commonly, and more controversially,[320] UGC outwith the game space also includes user-created *games* based on the original game world (better known as 'fangames'). This may involve one of two possibilities: either using the original game software as a template, with the user's own audiovisual contributions, or using the audiovisual assets of the original game creator, with different software code. Occasionally, and in part contributing to their controversy, fangames may entirely 'clone' the original, usually if the game is no longer accessible (usually due to hardware or software redundancy).[321] As a recent example, user EpicLBPTime recreated the entirety of *P.T.*, a 'playable teaser' an upcoming *Silent Hill* game.[322] Despite critical acclaim, *P.T.* was subsequently cancelled shortly after the release of the teaser, with the teaser also being removed from download on digital stores. EpicLBPTime thus recreated the game to emulate the now defunct, cult-classic title.[323]

Having sketched some of the possibilities of video game UGC, it is evident that the users who create this content seem to be moving more in the direction of being authors proper, of the sort

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[320] Certain game publishers, particularly Nintendo, take a very hostile approach to this. See Craddock R, 'Nintendo Issues Mass DMCA Takedown, 379 Fan-Games Forcibly Removed' (*NintendoLife*, 6 January 2021) <https://www.nintendolife.com/news/2021/01/nintendo_issues_mass_dmca_takedown_379_fan-made_games_forcibly_removed> accessed 15 September 2021.

[321] See Phillips T, '"Don't clone my indie game, bro": Informal cultures of videogame regulation in the independent sector' [2015] 24 Cultural Trends and Katzenbach C, Herweg S and van Roessel L, 'Copies, Clones and Genre Building: Discourses on Imitation and Innovation in Digital Games' [2016] 10 International Journal of Communication

[322] Kojima H, *P.T.* (Konami 2014).

[323] Wales M, 'Player takes impressive stab at recreating cult corridor horror PT in Media Molecule's Dreams' (*Eurogamer*, 23 January 2019) <https://www.eurogamer.net/articles/2019-01-21-player-takes-impressive-stab-at-recreating-cult-corridor-horror-pt-in-media-molecules-dreams> accessed 15 September 2021.

of relational slippage discussed by Meese.[324] Increasingly, video game rightsholders make available tools to foster users' creative expression (e.g., the sandbox genre or in-game photography tools), and new platforms for sharing them widely. Indeed, the user's changing role here is marked in subtle ways. For example, the game controller for Sony's PlayStation 4 includes an integrated 'share' button that allows the user to instantly stream and record their gameplay and share it on online platforms. In the newest iteration of Sony's PlayStation hardware, the PlayStation 5, the 'share' button has been rebranded as the 'create' button.[325] As a different label for the same interaction, the difference is subtle but distinct: there is the suggestion that the user is no longer *sharing* content owned by someone else, but rather are *creating* their own.

The EULA plays an important role in regulating the ambit of what is considered permissible UGC by the game rightsholder. Importantly, whilst EULAs did not pre-exist early formats of user creativity,[326] they certainly have changed the way that user creativity is approached by framing this as an interaction with *proprietary software*, rather than the play of a game.[327] Copyright, and the delineation between usership and authorship, therefore become arbitrated within the text of the EULA, rather than the law (an exercise of power *through* discourse, with reference to the theoretical underpinnings of CDA). Given the slipperiness of the user roles in this industry, this arbitration has the potential for a very strategic formulation of the user. As both subject and creator, consumer and producer, the EULA may give more weight to one aspect of user identity depending on the broader social and cultural needs of the industry. Thus, by treating EULAs as a genre of video game metadiscourse, it is possible to understand how the creative user is idealised by the video game industry, and whether the blurriness between roles is resolved in the text. Indeed, as an increasingly important factor of this site, the mediation of UGC in the EULA may have large consequences for the user given the immense value of the new content they create.

2. eSports

Having explored the significance of video games as a site of study more generally, this section focusses on eSports, being electronic sports, as a viable comparator to this industry. Whilst

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[324] Meese (n8).

[325] Tailby S, 'PS5 DualSense Create Button: What Does It Do?' (*PushSquare*, 17 November 2020) <https://www.pushsquare.com/guides/ps5-dualsense-create-button-what-does-it-do> accessed 15 September 2021.

[326] See n305.

[327] It is difficult to trace the historic development of the EULA in the video games industry. During the initial phase of arcade games, the agreement of the end user, being the person entering the arcade, was presumably not accounted for. In the early days of home gaming, it also seems the EULA was not accounted for (absent in both cases in n186).

eSports' exact definition is disputed amongst sports philosophers,[328] eSports are defined in this thesis broadly, including any competitive video gaming in a professionalised and commercialised context. Unlike the amateur assumption of user creativity explored in Chapter 1, the user in eSports is typically acting in a commercial capacity as an 'eAthlete': they are a professional user (Section 2.1). As a further point of interest as a site of study, EULAs have arisen as a (surprising) substitute for eSports governance in the absence of any national or international regulator (Section 2.2). In contrast to the generally accepted rule that users do not read EULAs (recalling 'the biggest lie on the internet'),[329] for the professional eSports user, it possible that they are both recipient and reader, given the importance of these rules for their profession.

2.1 The professional user

Initially a South Korean phenomenon, eSports have since turned into a global (and thriving) industry.[330] Naturally, as a portmanteau of 'electronic' and 'sports', eSports invites both a natural analogy with traditional sports, such as tennis or football, and the same economic stakeholders.[331] The professionalised, and commercialised, transformation of video gaming into competitive sports results in two new actors more usually associated with traditional sports: the professional player (sometimes known as the 'eAthlete'),[332] and the eSports organiser, who is also a type of institutional user.

The professional players specialise in particular eSports games, competing in leagues and tournaments with accompanying coaches, teams, and sponsors, for prize money. eSports players will train with the same level of intensity as a traditional sports athlete, often for 12 hours or more

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328 To take an example of two opposing opinions on this, see Jenny SE et al, 'Virtual(ly) Athletes: Where esports Fit within the Definition of Sport' [2016] 69(1) Quest; and Parry J, 'eSports are Not Sports' [2019] 13(1) Sport, Ethics and Philosophy.

329 Obar and Oeldorf-Hirsch (n12).

330 Estimating almost 40% year-on-year growth, see Newzoo, 'Global 2018 Global eSports Market Report – Light' (*Newzoo*, 1 May 2018) <https://newzoo.com/insights/trend-reports/global-esports-market-report-2018-light/> accessed 15 September 2021. As early as 2014 it seemed that eSports had surpassed some traditional sports in popularity, with reports claiming that the 2014 championship final of League of Legends had more viewers than the National Basketball Association (NBA) finals (See Dorsey P, '"League of Legends" ratings top NBA Finals, World Series clinchers' (*ESPN*, 2 December 2014) <https://www.espn.co.uk/espn/story/_/page/instantawesome-leagueoflegends-141201/league-legendschampionships-watched-more-people-nba-finals-world-series-clinchers> accessed 15 September 2021.

331 Importantly, eSports do not typically comprise sedentary sports (e.g. playing a video game emulation of football) and are more commonly first-person shooters, racing games or strategy games (etc.).

332 Note: 'user' is replaced here with 'player' for this portion of the thesis so as to succinctly distinguish between the natural user (the professional player) and the institutional user (e.g. third-party competition organisers).

per day,[333] and occasionally incurring eSports related injuries in the process.[334] Certainly, they will be the most skilful of their respective game, estimating that a top-tier eSports player can make up to 10 in-game moves per second.[335] The professional player may hold a salaried position with a tournament organiser, team or game publisher, or earn money independently e.g. through sponsorships, or broadcasting of training videos on platforms such as YouTube or Twitch. Top tier users can make a highly lucrative living; at the time of writing, the highest earning eSports player, Johan 'N0tail' Sundstein, has earned in excess of six million US dollars in prize money.[336] In part, some of this income will be derived from the player's ability to control the use of their recorded gameplay content, e.g. of training videos or 'best of' moments. Certainly, for newer and less-established users, the advertisement revenue and fan donations through YouTube and Twitch may account for a more substantial part of their comparatively smaller income.

In any case, the professional player's interest in this area is not necessarily for playful or frivolous engagement with a game, but as a source of livelihood. Therefore, the professional player, who is dependent on access and exploitation of a game for income, is situated as having a distinctly commercial interest in a game. This is an immediate challenge to the consistent conceptualisation of the user as being an amateur in copyright (discussed in Chapter 1), that is, that they are assumed to be acting or creating for the love of a work, rather than financial recompense. The existence of the professional eSports user presents a paradox for copyright: in principle, the user cannot exist in this commercial condition under a strict reading of doctrine. As such, the manner in which the user is constructed at industry-level, whether as a commercial or non-commercial actor, and how this manifests in the text of the EULA, is highly strategic.

The second new types of users introduced by eSports are the institutional third-party tournament organisers (e.g., Electronic Sports League). Such organisers are responsible for arranging eSports events, either in-person (occasionally in custom built stadiums) or wholly online. Much like traditional sports, this will include advertisements, merchandise, ticket-sales and broadcasting of the tournament content (including e.g., commentary, filming, graphics, theme songs). Again, the

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[333] Detailed in Kari T and Karhulahti VM, 'Do e-Athletes Move?: A Study on Training and Physical Exercise in eSports' [2016] 8(4) International Journal of Gaming and Computer-Mediated Simulations.

[334] Lee D, 'The Real Scars of Korean Gaming' (*BBC*, 5 June 2015) <https://www.bbc.co.uk/news/technology-32996009> accessed 15 September 2021.

[335] American Osteopathic Association, 'Elite-level Video Gaming Requires New Protocols in Sports Medicine: eSport Athletes at Risk for Physical, Psychological and Metabolic Disorders' (*Science News*, 4 November 2019) <https://www.sciencedaily.com/releases/2019/11/191104121617.htm> accessed 15 September 2021.

[336] eSports Earnings, 'Top 100 Highest Overall Earnings' (*eSports Earnings*, date unknown) <https://www.esportsearnings.com/players> accessed 15 September 2021.

commerciality of these activities presents a challenge to the amateur assumption of use, which must be negotiated through the text of the EULA. Much like the prohibitions of reverse engineering during the 1970s and 1980s (Chapter 2), it is possible that such users may be strategically excluded from the ambit of lawful use in the EULA by designating the user as a natural person, and not an institutional user. Nonetheless, the possibility that such institutions may be regulated by the terms of an EULA, as 'users' of the same, is intriguing.

As a site of study for the user concept, the existence of both professional players and commercial, third-party organisers in eSports outwardly suggests less of a power differential than is typical between the user and rightsholder in other industries. In eSports, the user is not an amateur audience of dedicated fans, but instead are highly specialised, dedicated workers who accrue additional value to the game through their expertise and labour. Much as with the value of use and the interactivity of video games discussed in Section 1.1, the pacing, tension, and spectacle of the eSport is accrued solely from the user. But in eSports, it is multiplied in its reach by the efforts of yet another user: the third-party organiser. Given the immense value offered by these professional users, both monetary and otherwise, power is moving between actors in the industry, which may manifest in the text of the EULA. Thus, as a site of study, eSports offers both a viable challenge to the consistent conceptualisation of the user as an amateur in copyright doctrine, and as a comparatively weak legal subject.

2.2 EULA governance

Unlike with many traditional sports, there is, at the time of writing, no global regulatory body for eSports, despite many failed attempts.[337] Instead, eSports governance has been established in a piecemeal fashion via the rules set by the owner of the video game that underlies the respective eSport: namely, through the EULA. The use of the EULA to regulate eSports suggests that the professionalised, and institutionalised context of eSports does not change the fact that they are still ultimately treated an activity *underlain* with a copyrighted work, subject to ongoing control by the rightsholder. Thus, and whilst as outlined above, power is outwardly less asymmetrical in the eSports context, the hidden, legal bolstering of the rightsholder's powerful position as eSports owner is disguised.

[337] Further details in Thomas A, 'A question of (e)Sports: an answer from copyright' [2020] 15(12) Journal of Intellectual Property Law and Practice, 963.

Whilst Burke, in his seminal 2013 article on US copyright and eSports, hoped that EULAs were 'less likely to be present in [this] professional context',[338] developments since then have proven that eSports communities in fact do rely on EULAs as a form of eSports governance by the community.[339] There is the suggestion that for the professional player, the EULA is not simply received, but also read; their construction becomes more transparent and, as the examples below demonstrate, contested.

Beginning in 2014,[340] professional player Lee 'Faker' Sang-hyeok signed an exclusivity agreement to stream their *League of Legends*[341] gameplay with Azubu, an eSports streaming platform. A Faker fan, StarLordLucian, thereafter created a simultaneous, automated stream of Faker's gameplay (entitled 'SpectateFaker') using Riot Games' free, in-game software tools. StarLordLucian streamed SpectateFaker on Twitch, a competing eSports streaming platform. Azubu, believing that they had exclusive rights to stream Faker's gameplay, issued a notice-and-takedown against the SpectateFaker streams, which was subsequently challenged by StarLordLucian. Following community unrest at the issuing of the notice, Riot Games were asked to intervene. In particular, Riot Games were directed by the community to their own EULA and terms of use in making their determination. Per these terms, users are only granted 'authorship' in private or non-commercial derived works based on the game, not publicly streamed, commercial gameplay. This term may be understood to mean that authorised derivatives involving gameplay were only authorised to the extent they are non-commercial in nature, and all other content would be owned by Riot Games by merit of the automatic licensing relationship.[342] As such, Riot Games, and not Azubu, owned the gameplay content as played by Faker and StarLordLucian. Following this, any exclusivity agreement over such content to another party (Azubu) would be unenforceable if the players could not give what was owned by Riot Games (*nemo dat quid non habet*); this would seemingly serve as a sound basis for and invalidating the legal basis of the takedown notice. StarLordLucian, in responding to the controversy, maintained that they were not at fault:

> I know some people will disagree with this and bring up ethics, but I think this whole issue is about a lot more than Faker. It's about Riot not enforcing their own legal terms of service. […] It's about a company (Azubu) issuing a false DMCA claim for content they

[338] Burke (n304) 1549.
[339] See also the recurring theme of governance on literature concerning virtual worlds at n234.
[340] Mitchell F, 'What we learned from SpectateFaker' (*DoteSports*, 10 March 2015) <https://dotesports.com/league-of-legends/news/spectate-faker-riot-games-replays-lessons-1615> accessed 15 September 2021.
[341] van Roon A, *League of Legends* (Riot Games 2009)
[342] See *League of Legends* documentation as detailed in Appendix 2.

> didn't even own. These are issues that will affect the future of the game and the spectator mode. All of this needs to be debated for the future of League of Legends and esports.
>
> Right now nothing my stream does is illegal or against the League of Legends terms of service. Riot can always change their terms. And Riot *can* DMCA my stream at anytime, as they have the power to put any League related IP or Project to an end.
>
> If Riot does DMCA my stream that will be the end of it, I won't counter them or try to make a new stream. But I won't be listening to anyone else from Riot or on Reddit lecture to me about morals anymore. To those people I say, I'm doing this stream because I can legally and it's allowed by League of Legends' legal terms.[343]

Nonetheless, Riot Games elected in this case to ignore their own EULA, stating that, regardless of these terms, the SpectateFaker streams caused 'material harm' to Faker.[344] In coming to this conclusion, Riot Games largely ignored the copyright/EULA question *per se*, which would be fairly decisively in favour of StarLordLucian, and instead framed the problem around behaviour that was tantamount to 'harassment and bullying'.[345] The exact metrics of what is 'material harm' and 'bullying' in this case is unclear, but instead seems to have been used as a discretionary power by the rightsholder (Riot Games) to *usurp* the EULA. In line with the CDA value of explanatory force, we can see how there may be strategic significance in branding StarLordLucian as an unlawful *user*, but not Faker, as the valuable brand asset. Thus, even for those users who uncharacteristically demonstrate diligence in reading the EULA, the power behind the discourse is such that the frozen text of the EULA becomes malleable for the rightsholder and can be usurped depending on their strategic priorities.

The Azubu/SpectateFaker decision remains controversial, particularly as a later similar dispute resulted in a very different outcome. In 2018, third-party organiser Electronic Sports League (ESL) agreed an exclusive broadcasting agreement with Facebook for their upcoming tournament, which included Valve's eSports title *Dota 2*.[346] However, many *Dota 2* personalities disapproved of this

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[343] StarLordLucian, 'I'm the admin of "SpectateFaker" - after reading Travis's article and double checking all the legal facts I've decided to continue the livestream and stand up to Azubu's false DMCA claim' (*Reddit*, 2015) <https://www.reddit.com/r/leagueoflegends/comments/2woxph/im_the_admin_of_spectatefaker_after_reading/cotgdum/> accessed 15 September 2021.
[344] Yin-Poole W, 'Riot Boss regrets reaction to League of Legends SpectateFaker case' (*Eurogamer*, 28 February 2015) <https://www.eurogamer.net/articles/2015-02-28-riot-boss-regrets-reaction-to-league-of-legends-spectatefaker-case> accessed 15 September 2021.
[345] See comment by user Tryndamere in StarLordLucian (n343).
[346] Valve, *Dota 2* (Valve 2013)

exclusivity arrangement (on both technical and moral/personal grounds)[347] and instead chose to stream the events on their personal Twitch channels. In response, ESL issued takedown requests to the defector streamers, claiming that the *Dota 2* content was exclusive to them. Rather than filing a counter-notice, the streamers instead turned to Valve, as the rightsholder of the game, to resolve this conflict. They disputed both ESL's legal standing to issue the requests in the first instance, but also that, in any case, the takedown requests were in violation of Valve's own *DotaTV* guidelines (incorporated by reference into their EULA). Per these guidelines, anyone is free to broadcast any *Dota* game for their own audience using the in-game spectator tools, provided that the stream is non-commercial, that it does not use any third-party content belonging to the organiser (e.g. commentary), and that it does not compete with the original stream.[348]

Whilst it is unclear if Valve took any affirmative action to specifically counter these notices, a statement from the company largely affirmed the community's concerns.[349] On the first issue, Valve confirmed that they were the *only* party entitled to issue takedown notices in respect of *Dota 2* content, by extension confirming that ESL had no legal standing to issue the same. On the second point, Valve also affirmed that it is a matter of their sole discretion and interpretation as to whether community rules had been violated: specifically, not the tournament organiser's. In particular, they highlighted that the rules were designed to be 'flexible' to ensure that less established personalities can stream tournaments on their own channels, whilst prohibiting commercial competition from other competitive parties.[350] Certainly, this flexibility has served the community of users, as spectators. However, if ESL, as a third-party organiser, can also be categorised as an institutional user in themselves, then this flexibility also introduces a large amount of uncertainty for them. Immediately following Valve's statement, concerns were expressed that third-party leagues would be non-existent if broadcasting rights over game content were worthless and unenforceable.[351] Therefore, the power *behind* the discourse of the EULA again highlights how

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[347] Stewart S, 'Valve Releases Statement on DotaTV Broadcasts Following ESL One Controversy' (*IGN*, 2018) <https://www.ign.com/articles/2018/01/26/valve-releases-statement-on-dotatv-broadcasts-following-esl-onecontroversy> accessed 15 September 2021.

[348] See Valve documentation as detailed in Appendix 2.

[349] The original statement has since been removed, but is replicated on PC Games, 'Valve clarify "no one beside us is allowed to send DMCA notices" to Dota 2 streamers' (*PC Games*, 26 January 2018) <https://www.pcgamesn.com/dota-2/dota-2-esl-one-genting-facebook> accessed 15 September.

[350] ibid.

[351] lrich Schulze, co-founder of ESL, tweeted in the company's defence: 'Here is how many Dota tournaments there are going to be in the future if noone is taking money for broadcast rights anymore: Exactly one (The International). Having your cake and eating it too never works' (Schultz I, Tweet (*Twitter*, 23 January 2018) <https://twitter.com/theflyingdj/status/955811518066642945?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E955811518066642945%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.pcgamesn.com%2Fdota-2%2Fdota-2-esl-one-genting-facebook> accessed 15 September 2021).

the construction of 'lawful use' can be interpretative and strategic; in this case, it can be used to justify unequal treatment between natural and institutional users.

In line with the theoretical underpinnings of CDA explored in Chapter 3, the type of control exerted over an eSport gives the rightsholder an unprecedented amount of *power*; if an eSport can be owned, the rightsholder will always be able to influence the practice of play in a way that is contradictory to our normal understanding of fairness, unpredictability and competition in traditional sports.[352] Even if outwardly it seems that there should be less of a power differential given the professionalised/commercialised context of the new users, the asymmetrical power difference in eSports has led to the phenomenon of 'publisher reliance', whereby all downstream usage of a game is dictated by the game publisher (usually the rightsholder).[353] In both the 2014 and 2018 incidents, this 'publisher reliance' goes beyond the text of the EULA, to the power behind it. Ultimately, it is the rightsholders status as the copyright owner that enables flexibility and discretion as to how to interpret and enforce their respective EULAs. This is reflective of the fact that the EULA is a one-way discourse that the user ultimately cannot penetrate, even if in these (exceptional cases) they are readers of the same. Regardless of whether a user reads and relies on the EULA, either as a natural or institutional user, it ultimately does not matter because the power wielded by the rightsholder firmly situates the user as a recipient; their identity is given, not created, per the CDA paradigm. With rightsholders wielding the EULA as a form of governance, eSports are a natural site of study for CDA, which can uncover relationships of power otherwise disguised in the text.

3. Summary of sites of study

As sites of study, both video games and eSports offer exceptional and complex roles to the user. Neither follow the tradition of a one-way, linear narrative as with other cultural goods, and instead are reliant on the user to progress and 'complete' the text of the game. The inherently interactive nature of a game puts the user at the centre of the medium, and in a state described in this thesis as 'transgressive'. In both sites, the role and characteristics of the user are increasingly blurred,

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[352] Andriychuk O, 'The Legal Nature of Premium Sports Events: "IP or Not IP – That is the Question"' [2008] 7(3–4) International Sports Law Journal.

[353] Being more particularly investigated in US antitrust, see Arin M, 'Competing Competitions: Anticompetitive Conduct by Publisher-Controlled eSports Leagues' [2020] 104(3) Minnesota Law Review, Miroff M, 'Tiebreaker: An Antitrust Analysis of Esports' [2019] 52(2) Columbia Journal of Law and Social Problems and Karhulahti VM, 'Reconsidering eSport: Economics and Executive Ownership' [2017] 74(1) Physical Culture and Sport, Studies and Research.

with characteristics of both the subject and creator, the consumer, and the producer. The user's ability to easily move between these roles speaks to many of the theoretical queries raised by notional theorists in Chapter 1. As such, the conceptualisation of the user in these sites may be strategic in framing the user per whichever vision suits the priorities of the rightsholder best (e.g., as a passive consumer, or an active co-creator?).

Both industries also offer additional complicating factors as sites of study, in addition to this baseline query of user-centric interactivity. New tools for user creativity and new platforms for sharing them have resulted in multiple forms of UGC being created both within and outwith the video game space. As the user moves towards a more authorial role, that would typically confer with it exclusive rights of the user's own, the choice to label this content under the heading of 'user' is very strategic indeed, and may contribute to the naturalisation of problematic concepts.

Importantly, eSports adds the comparative vector of the professional 'eAthlete' user and the institutional user in the form of the tournament organiser. Both have distinctly commercial interests which run in opposition to the traditional categorisation of the user as an amateur or non-commercial actor as envisaged by copyright literature and exceptions. Further, as the EULA has ongoing significance as a form of governance in this industry, this makes it a very powerful tool, wielded by a particularly powerful actor, who in effect 'owns' the eSport. The pre-existence of this asymmetrical power relationship makes this a worthy site for CDA.

Both industries are of course worthy of analysis in and of themselves given their increasing cultural importance. Findings from these sites can nonetheless also be extended to other communities and cultural goods which rely on interactivity, user-led innovation, or internet-based social software (and may be particularly relevant as lives increasingly take place in proprietary spaces).

Having narrowed the focus of the analysis to video games and eSports as manageable sites of study, the following Chapter 5 explains how the research process was designed.

Chapter 5: Research Design

This chapter is mainly dedicated to outlining the dataset selection process in Section 1. The section details the methods through which EULAs from the video games and eSports industries were identified and collected, alongside key summary statistics and limitations of the selection process. Section 2 details the coding method based on Fairclough's dialectical-relational model of CDA, including the key considerations for textual, discursive, and sociocultural dimensions of analysis. Finally, the chapter includes a brief reflexivity statement in Section 3, in line with the recommended advice for CDA researchers.[354]

1. Selection of dataset

As games may have an individual EULA that is specific to that particular game, rather than a generalised policy by the publisher, the EULA dataset is derived based on individual game titles. Given the multiplicity of games available, in determining which titles to select, the most *popular* types of discourse were considered to be the most *prevalent*, and thus popularity is used as a metric through which to select titles (a process detailed separately for both video games in Section 1.1 and eSports in Section 1.2). Popularity and prevalence are treated in this thesis as a proxy for the most dominant discourse, and by extension, the most prevalent visions of the user.

The dataset of EULAs is derived from 30 individual game titles (equally split between video game and eSports titles 15/15), each of which is published by a separate game company. This small, but representative, sample is not problematic in the context of the research design, as the goal of the thesis is explanatory, offering a specific and contextualised view of the user in a particular industry, rather than aiming for generalisability of findings.[355] Before detailing this sampling process in more detail, there are some important caveats in the dataset construction which limit its scope.

First, titles were excluded from consideration where the EULA was not available via the publisher or developer's website. Titles were further excluded where the EULA had previously been captured by an earlier title, e.g. where multiple game titles were regulated under a single EULA by a single publisher. For example, Ubisoft titles appear multiple times within the population for the

[354] Jorgensen M and Philips LJ, *Discourse Analysis as Theory and Method* (SAGE 2002).
[355] See Niemi-Kiesilainen, Honkatukia, and Ruuskanen (n278) 78, describing the worry about generalising as 'validity angst'. The recommended sample size for qualitative research is between 20 and 50 units (Onwuegbuzie A and Leech N, 'The role of sampling in qualitative research' [2005] 22 Academic Exchange Quarterly).

eSports dataset, but they are all regulated by the same EULA and do not have separate rules for different games. Counting each title as a separate instance of discourse, where in essence they are regulated under the same EULA, would result in duplication, and therefore were omitted.

The definition employed in identifying 'EULAs' was broad and holistic. Appreciation was given to the terms of what text *regulates* the user of a video game or eSport title. For example, where games are played wholly online (e.g. *Dota 2*), or are free-to-play (e.g. *Fortnite*), the EULA is more often replaced by 'terms of use' or 'terms of service'. Whilst such terms are not strictly branded as a licence as such, they still constitute the only permission to the user to use the game (and indeed may contain a prominent licensing clause).[356] In other cases, particularly where the game rightsholder is also the owner of a platform, game titles may be made available under the platform's general terms and conditions, rather than as a standalone regulation.[357] Where games are made exclusively available under that platform, these terms again constitute the only permission to the user, and function akin to a traditional EULA. Thus, where functionally there is a primary document concerned with giving the user permission to use the title, this is embraced as the main unit of analysis, regardless of the strict branding as 'EULA'.

Indeed, in constructing the dataset, it became apparent that EULAs usually do not exist in a vacuum, and instead incorporate many supporting documents, such as UGC policies and codes of conduct, or additional terms of service that apply alongside the EULA. This is both an analytical consideration for the discursive dimension of Fairclough's model (concerning the process of production, distribution), and a pragmatic consideration for data collection. As such, where further documents are incorporated by reference to the EULA, or accompany it, those documents were also gathered and treated as an extension of the primary agreement for the purposes of the analysis. Documents for more specific purposes, such as privacy policies and warranties, were excluded from this ambit, instead focussing only on documents which regulated the user in their use of, or creation of, creative content (i.e. the 'copyright' user). As a result, whereas there are only 30 titles in the dataset, in total there are 61 individual documents, making for an average of two documents per title.

In conducting key word searches for these documents, it became apparent that some game rightsholders were communicating, particularly UGC policies, more informally through other

[356] For example, Valve's only licence to the user is included in their 'Steam Subscriber Agreement' (see Appendix 2).
[357] Such is the case with both Sony, Microsoft and Valve (see Appendix 2).

means of communication, such as social media and contact forms. Whilst it is not possible to take an exhaustive account of such communications given the multiplicity of people involved in game development, where relevant, examples of these types of communication are used to illustrate alternative approaches of communication (per Fairclough's discursive dimension of CDA). Importantly, these examples are supplementary to the primary dataset of EULAs, and should be appreciated as illustrative only.

As a final consideration of dataset collection, throughout the process of gathering this data, it became evident that the EULA is very much a 'live' document which is frequently updated and modified. Having gathered the dataset between late 2019 and mid 2020, eight of the primary EULAs were updated at least within the last year (and most within the last six months),[358] with only 11 failing to state their date of last update. [359] The EULA is therefore not a static document that is created to accompany the initial release of a title which is subsequently left untouched. Instead, this frequency of update suggests that the EULAs should be responsive to any subsequent developments in their respective markets, particularly in eSports where game titles that are not intended to be eSports are subsequently used as such.[360] Unfortunately, the lack of version control offered via publishers' websites means that a historical appreciation of these changes is not possible. As EULAs are subject to multiple updates during their lifespan, each agreement was retained as a static copy from the particular date it was gathered. As a result, the selection on file with the author is reflective of the particular discourse occurring between late 2019 to mid 2020.

After accounting for these caveats and limitations, in total, the dataset constitutes 30 game titles, equally split between video games and eSports, comprising 61 total individual documents. A complete list of game titles examined and constituent documents, including dates of retrieval, are included in Appendix 2. The following sections provide more detail about the composition of both the video game and eSports datasets, and their manner of selection.

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[358] Electronic Arts (18 July 2019), Magic Online (25 September 2019), Microsoft (September 2019), Psyonix (8 July 2019), PUBG (28 June 2019), Valve (30 April 2019), Rockstar (11 July 2019), Warner Bros (September 2019) (Appendix 2).

[359] Being Epic Games, Ubisoft, Bandai Namco, Bethesda, Studio MDHR, Nintendo, Red Barrell, Sony, Superhot Team, Take 2, Toby Fox (Appendix 2). Noting that most of the games which omit this are indie titles, and thus may be a biproduct of less financial investment in re-drafting.

[360] Virality can also be a factor in changing policies. See, for example, a substantive change in Capcom's video sharing policy in 2021, released in response to the virality of *Resident Evil: Village*: Capcom, 'Capcom Video Policy' (*Capcom*, 15 March 2021) <https://www.capcom.com/video-policy/> accessed 15 September 2021.

1.1 Video game sample

The video games market is a more diverse site of study than eSports. Whereas many eSports titles are purpose-made, or at least share many of the same ludological features in the sense they are made to be played competitively with multiple people, video games in this sample represent a more diverse population. They range in genre from sandbox (e.g. *Minecraft*), narratological/open world (e.g. *Red Dead Redemption 2*),[361] platform/arcade games (e.g. *Cuphead*)[362] and horror (e.g. *Resident Evil 2*).[363] This diverse selection anticipates that the nature of the game genre might alter the conceptualisation of the user they cater for. *Minecraft*, for example, offers vast in-game creation capabilities, hence its categorisation as a 'sandbox', and invites creativity by its nature. The creative user therefore must be anticipated by the EULA. By contrast, many narratological/open world titles tend to have less creation functionalities, and more closely resemble a film in terms of narrative and progression. For this reason, they may anticipate, or indeed explicitly prohibit, a more creative user in line with its genre (particularly if this is to avoid e.g. spoilers of the narrative).[364]

Diversity is also evidenced in the variety of rightsholders. Unlike in eSports, the titles in the video game sample are not the exclusive remit of large corporations, but also include indie, or indie-originating titles.[365] The label of 'indie' typically refers to the independence of a game rightsholder from larger financial structures and major publication houses and can range from being a single person to a small or mid-sized team. Usually, 'indie' titles are juxtaposed against so-called triple A titles, which are more analogous to the Hollywood blockbuster, being characterised by their very high budgets and large development teams. For this reason, triple A titles tend to be the sole remit of major developers and publishers. Depending on the background context of the company in which a game is created, this may influence how the user is conceptualised given the vastly different corporate culture surrounding the rightsholders.

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[361] Rockstar Games, *Red Dead Redemption II* (Rockstar Games 2018)
[362] Moldenhauer C and Moldenhauer J, *Cuphead* (Studio MDHR 2017)
[363] Kadoi K and Anpo Y, *Resident Evil 2* (Capcom 2019)
[364] Such as was the case with *Persona 5*, where game publishers prevented the sharing of content past a certain (early) point in the game narrative (Orland K, 'Posting *Persona 5* spoilers could get you hit with account suspension' (*Ars Technica*, 4 May 2017) <https://arstechnica.com/gaming/2017/04/atlus-threatens-takedown-of-persona-5-spoiler-videos/> accessed 15 September 2021.
[365] Being *Minecraft* (Mojang, noting that this is 'indie originating' as it was subsequently acquired by Microsoft), *Superhot* (Superhot Team), *Undertale* (Toby Fox), *Cuphead* (Studio MDHR) and *Outlast* (Red Barrels) (see Appendix 2).

This diversity of titles and rightsholders makes the metrics of assessing popularity difficult, particularly where games are distributed in many ways, across multiple platforms. Choosing popular titles based on the number of players online at any given time tend to be skewed towards particular genres, such as MMOs (e.g. *World of Warcraft*)[366] and would not capture offline titles (e.g. *Undertale*).[367] Best-selling lists will not capture free-to-play titles (e.g. *Fortnite*),[368] and depending on their configuration may selectively include either physical or digital sales, but not both.[369] In short, most ways of determining the popularity of a given video game title based on *volume* are not representative of the full and diverse market.

Instead, an alternative metric for assessing video game popularity has been to use a hybrid of community and critic-sourced ranking systems. For many years, Metacritic has been the 'go-to' source for determining game popularity, being an aggregation website that can be used to determine popularity based on weighted average reviews from users and critics alike.[370] Earlier versions of the research design for this thesis used Metacritic scores as a metric to determine popularity, but this was subsequently adapted towards the end of the data gathering period, as questions of the reliability of the site were called into doubt. In particular, a spate of 'review bombing' appeared to be artificially skewing aggregated scores.[371]

Instead, the most popular video game titles were determined with reference to Ranker, a community sourced polling site which is more resilient to review bombing than Metacritic.[372] One key difference is that Ranker does not incorporate critic reviews into its determination of popularity, and instead is purely user sourced (perhaps more fitting given the overall theme of this thesis). Resultingly, the dataset was constructed with reference to Ranker's 'Best games of 2010s'

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366 As of September 2021, World of Warcraft is estimated to have 116,833,497 total players or subscribers (MMO Population, 'World of Warcraft' (*MMO Population*, date unknown) <https://mmo-population.com/r/wow> accessed 15 September 2021.

367 Fox T, *Undertale* (Toby Fox 2015).

368 Epic Games, *Fortnite* (Epic Games 2017)

369 See e.g. Sirani J, 'Top 10 Best-Selling Video Games of All Time' (*IGN*, 9 February 2021) <https://www.ign.com/articles/2019/04/19/top-10-best-selling-video-games-of-all-time> accessed 15 September 2021, which notes that 'free mobile downloads don't count toward sales'.

370 Metacritic, 'Games' (*Metacritic*, date unknown) <https://www.metacritic.com/game> accessed 15 September 2021

371 Most notably in response to *Last of Us: Part II* (see Tassi P, 'After "The Last of Us Part 2" Insanity, Metacritic Has Changed User Score Submissions' (*Forbes*, 18 July 2020) <https://www.forbes.com/sites/paultassi/2020/07/18/after-the-last-of-us-part-2-insanity-metacritic-has-changed-user-score-submissions/?sh=57f869617e6f> accessed 15 September 2021.

372 Ranker, 'How Do Rankings Work?' (*Ranker*, date unknown) <https://blog.ranker.com/faqs> accessed 15 September 2021.

vote to establish the 15 most popular video game titles, as determined by a community vote on their quality, subject to the caveats outlined in Section 1.[373]

1.2 eSports sample

As noted above, eSports titles tend to share many of the same ludological features in the sense of being competitive, online multiplayers games, even if they are stratified over a number of different genres, such as first-person shooters (e.g. *Call of Duty: Black Ops 4*),[374] strategy (e.g. *Starcraft II*)[375] and racing games (e.g. *Rocket League*).[376] Unlike the video games sample, there is not as much stratification across platforms for eSports. Due to the need for high-bandwidth internet access and precision technologies, eSports are almost the sole remit of PC gaming, or less commonly console. Mobile gaming is all but automatically excluded from the ambit of eSports due to these necessary constraints. As such, eSports is a much more homogeneous industry with less variety in terms of titles and rightsholders.

As with video games, in respect of the eSports sample, there is no definitive metric of defining popularity. The same considerations which limit the capacity to measure video games' popularity also apply with eSports in terms of genre, business models, and self-reporting. In looking for an authoritative source from which to reference for this sample, the British eSports Association, estimate approximately 30 recognised eSports titles, though these are, unhelpfully, unlisted.[377] Given the inability to cross-check between them and verify the identity of these titles, it is not possible to infer popularity in this way.

Instead, similarly to the video game sample, the eSports sample draws from a crowdsourced website in order to determine an appropriate selection of eSports titles and corresponding EULAs. The sample was drawn from eSports Earnings, which is described as a 'a community-driven competitive gaming resource based on freely available public information',[378] dependent on user submissions for its accuracy. The 'Game Rankings' list details the top 100 eSports titles based on

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373 Townsend K, 'The Best Video Games Of the 2010s, Ranked' (*Ranker*, 22 October 2020) <https://www.ranker.com/list/best-video-games-2010s/kyle-townsend> accessed 15 September 2021.
374 Blundell J, *Call of Duty: Black Ops 4* (Activision 2018)
375 Blizzard Entertainment, *Starcraft II: Wings of Liberty* (Blizzard Entertainment, 2010)
376 Silloway T, *Rocket League* (Psyonix 2015)
377 British eSports Association, 'British eSports Association' (*British eSports Association*, date unknown) <https://britishesports.org> accessed 15 September 2021.
378 eSports Earnings, 'eSports Earnings' (*eSports Earnings*, date unknown) <https://www.esportsearnings.com/> accessed 15 September 2021.

overall prize money, from which popularity, and hence prevalence, is inferred within the community.[379] From this list, 15 titles were selected (see Appendix 2), subject to the caveats outlined in Section 1.

One important observation in this selection process relates to how condensed the market for eSports is. Unlike video games, where a diversity of rightsholders is noted, it appears that only a small number of large games publishers specialise in eSports titles, resulting in many titles being owned by the same company, and therefore often regulated by the same EULA. In order to obtain 15 different EULAs from the sample, it was necessary to uncover the ownership of the first 25 titles listed within the 'Game Rankings' list; or to put this another way, the top 25 eSports games are owned by only 11 games publishers.[380] Only one of the titles examined here can be categorised as indie.[381] eSports titles therefore appear to be the exclusive remit of those with the budget and capacity to maintain the more demanding technical upkeep of larger, multiplayer games.

As a note of caution for the eSports sample, whilst eSports titles are used in this thesis as a proxy for the professional player, because these are titles that are known to be played professionally, it is not a *guarantee* that every user of an eSports title is a professional eSports player: it is simply more likely. For titles such as *Fortnite*, it is entirely possible to engage with this game casually and for personal enjoyment rather than professional. However, in any case, as the EULA is a live document, one could anticipate that both of these types of users are accounted for within the text.

1.3 The platform 'layering' effect

In constructing the EULA dataset, it is important to acknowledge that game software does not exist in a vacuum. The game will always require a facilitatory medium to make it playable for the user via, often third-party, hardware and system software. This facilitation is typically via a mobile device (via e.g. Apple App Store), game consoles (e.g. Sony's PlayStation, Microsoft's Xbox), or PC (either via a disk, or downloaded from a virtual marketplace). Broadly, this facilitation acts as a platform on which the game can be played. This has characteristics of a two-sided market,[382]

[379] eSports Earnings, 'Game Rankings' (*eSports Earnings*, date unknown) <https://www.esportsearnings.com/games> accessed 15 September 2021.
[380] The eSports industry may be even more condensed than this if one examines the broader corporate structure of the larger publishers (e.g. both Activision and Blizzard are subsidiaries of the larger Activision Blizzard; Microsoft now also owns both Mojang and Bethesda).
[381] Being *Rocket League* (Psyonix) (see Appendix 2).
[382] Landsman V and Stremersch S, 'Multihoming in Two-Sided Markets: An empirical inquiry in the video game console industry' [2011] 75(6) Journal of Marketing.

illustrated in Figure 10, with users who have a consumptive demand for the platform itself, and the third-party game publishers and developers who seek to make their wares available via the platform.



Figure 10: Representation of two-sided video game market

The interplay between the platform, users and third-party publishers is intricate. The platform plays an important role in creating a space that is attractive for both the user and the third-party creators, both of whom generate value and demand for the platform. Whilst most game titles are available on multiple platforms,[383] the exact platform through which the game is accessed may change how a game can be regulated, both technically and contractually.

For example, at the technical level many platforms have integrated sharing features that exist outwith the game itself. As previously noted, the PlayStation 4 has an integrated 'share button' (in the PlayStation 5, now a 'create button') in the controller itself, which allows the player to share screenshots and videos of gameplay, and stream directly onto authorised platforms, such as Twitch and YouTube, at the touch of a button. This invites the possibility that even if a publisher's EULA prohibits sharing of certain content in the text, this is made technically possible by merit of the platform on which the game is played.

The hardware software divide in this market means that platforms themselves can also act as an arbitrator for the contractual conditions of accessing and using a game through their own EULAs. Depending on the platform, this may impact who has the authority to regulate the user: the platform or the third-party rightsholder. Whilst not strictly within the ambit of this thesis, a brief pilot study of the terms of four of the main gaming platforms (Sony, Microsoft, Valve and Apple) was conducted to determine whether this could have a significant effect when conceptualising the user.

[383] Titles that are exclusive to certain platforms from the dataset include: *Dota 2* (Valve/Steam), *Halo 5* (Microsoft/Xbox), *The Last of Us* (Sony/PlayStation), *The Legend of Zelda: Breath of the Wild* (Nintendo/Switch). Other titles, such as *Superhot* and *Undertale*, are not specific to a platform as such, but are only available through a PC and not a games console (see Appendix 2).

Both Sony (in respect of their PlayStation 4) and Valve (in respect of Steam) take the position that any terms imposed by a third-party game publisher apply in *addition* to the terms of their own platform:

> If another company is the publisher of the Software, they license you to use it on terms which include, but may not be limited to, these Terms. That company may tell you about other terms it imposes on your use of its Software, in which case those terms apply in addition to these Terms, not instead of them. In the case of any conflict between the additional terms and these Terms, these Terms apply.[384]

> Some Subscriptions may impose additional terms specific to that Subscription ("Subscription Terms") (for example, an end user license agreement specific to a particular game, or terms of use specific to a particular product or feature of Steam).[385]

The Sony example makes for a particularly interesting reading, because in the event of any conflict between their own terms and the terms of a third-party publisher, Sony's will prevail. If, for example, Sony prohibited an act of sharing, but the third-party publisher of a particular game permits this, then Sony's rule would prevail. As such, shaping of the user ultimately defers to the platform, not the rightsholder. By contrast, Microsoft and Apple hold that third-party EULAs, where provided, shall take precedence over any platform terms:

> Your use of the Software is governed by the terms of the end user licence agreement, if any, which accompanies or is included with the Software ("Licence Agreement").[386]

> Any App that you acquire is governed by the Licensed Application End User Licence Agreement ("Standard EULA") set forth below, unless Apple or the App Provider provides an overriding custom licence agreement ("Custom EULA").[387]

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[384] Sony, 'Software Usage Terms' (*Sony*, October 2020) <https://www.playstation.com/en-gb/legal/software-usage-terms/> accessed 15 September 2021.

[385] Valve, 'Steam Subscriber Agreement' (*Steam*, date unknown) <https://store.steampowered.com/subscriber_agreement/> accessed 15 September 2021

[386] Microsoft, 'Microsoft Services Agreement' (*Microsoft*, 1 April 2021) <https://www.xbox.com/en-GB/legal/XboxComTOU> accessed 15 September 2021.

[387] Apple, 'Apple Media Services Terms and Conditions' (*Apple*, 16 September 2020) <https://www.apple.com/uk/legal/internet-services/itunes/uk/terms.html> accessed 15 September 2021.

These groupings and differences in approach are difficult to explain with reference to any industry-specific factor. If Sony and Microsoft had similar terms, it may be explained by their positioning together in the console market as necessitating a particular approach; instead, it is differentiated between them. Similarly, Valve and Apple operate more accessible digital marketplaces where third-party publishers can more easily and accessibly make games available, yet again their approach is differentiated between them.

Whilst this curious differentiation and 'layering' effect of EULAs is worthy of further study, it is ultimately outwith the ambit of this thesis to conduct a full assessment of each EULAs compatibility with the relevant terms of the platforms that facilitate them. Instead, it should be understood that the EULAs examined in this thesis offer a window into the vision of an idealised user from the perspective of a *game rightsholder* and how that user is conceptualised by this particular actor, rather than the platform itself. However, through both technical and contractual layering, the reality of what is technically or contractually permitted to the user may be very different depending on the medium through which they access a game.

1.4 Summary statistics of dataset

Whilst the constructivist underpinnings of CDA would caution against a quantitative treatment of data, some initial observations are worth measuring to give an appreciation of the diversity of the sociocultural context, per Fairclough's model. Particularly, given the CDA emphasis on the context in which a text is produced, the characteristics of game publishers were noted to the extent that they may impact their approach to conceptualising the user. In particular, competing culturally specific considerations, both from the publisher's country of origin, and their corporate structure (e.g., whether indie, triple A, or a publisher who is simultaneously the owner of a game platform, detailed in Appendix 2) were noted.

At the outset, there are indications of a potential US hegemony in both the video game and eSports industries. Of the 30 game titles examined, over half were published in the US (16), followed by Japan (five), as illustrated in Figure 11. Predominantly then, this dataset offers a conceptualisation of the user from a US perspective.

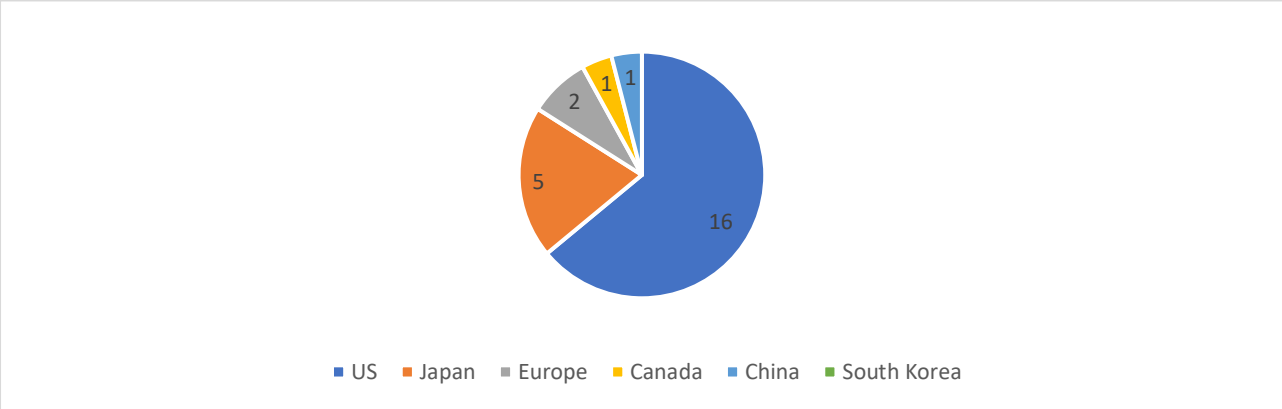


Figure 11: Pie chart showing game title distribution by Country

In terms of corporate structure, across the entire dataset, including both video games and eSports, there are only seven indie titles total.[388] Further, the distribution of indie titles across the dataset is uneven; five are from the video games sample, whereas only one indie title is present in the eSports sample. This relatively small number of indie titles is in line with expectations given the more limited reach of titles with less financial backing (limiting e.g., advertisement and promotion). The indie skew towards the video games sample indicates that eSports is more of an exclusive remit for those companies with substantial financial backing and technical capacity to support larger, multiplayer titles.

To reiterate, this light quantitative approach in a constructivist methodology is not typical. Instead, this brief summary of the contextual factors surrounding the EULAs should be understood as illustrative of the larger discursive and sociocultural dimensions of Fairclough's CDA model. Part of understanding the broader context of the EULA necessarily involves illustrating the global nature of the industry, with actors in vastly different corporate structures, each with potential conflicting ideological approaches to the construction of the user.

1.5 Limitations of dataset selection

Whilst efforts have been made in this thesis to optimise the means of selecting video game and eSports titles, there are several limitations to the dataset selection which restrict the research design and, to a degree, the findings resulting from this.

[388] Being *Rocket League* (Psyonix), *Smite* (Hi-Rez), *Minecraft* (Mojang), *Superhot* (Superhot Team), *Undertale* (Toby Fox), *Cuphead* (Studio MDHR) and *Outlast* (Red Barrels).

First, there is a lack of transparency as to which agreement is actually presented to, and agreed by, the user upon installation of the game itself. The EULAs in this dataset are static versions captured from the institutional webpage of the relevant game publisher or developer. Whilst there is a strong presumption that this is the same document, which can be accessed by the user any time post-installation via a hyperlink in a game, this version may nonetheless not correspond to the version the user accepts upon installation of a game, which is impossible to verify without technical access to each title and each corresponding game platform in the dataset. Where possible, the version presented to the user upon installation was verified using key word searches on search engines (including image searches) and reference to a private collection of games.[389] However, and importantly, this should not be understood as an exhaustive verification of the EULA presented to the user during installation of a game, due to lack of full technical access to all titles across the dataset.

Second, the dataset is limited in that it does not attempt to differentiate between titles available on particular platforms, and the hierarchy between the platform's EULA and the publishers. As noted in Section 1.3, the layered aspect of the hardware-software market leads to a huge amount of variety in terms of which EULA will technically prevail in the event of a conflict between a publisher and a platform. And indeed, depending on which EULA technically prevails may influence what we view as the 'dominant' vision of a user, if not the most prevalent view of them. However, given that the thesis aims focusses more narrowly on the construction of the user by a game rightsholder, in this case the game publisher or developer, the exclusion of the platform intermediary is perhaps a reasonable limitation of the research design.

Third, treating crowdsourced websites, including Ranker.com and eSports Earnings, as a proxy for popularity is problematic. Whilst Sections 1.1 and 1.2 explicitly outline the problem of meaningfully understanding popularity in video games and eSports, there nonetheless remains no way of testing the veracity of the voting system or crowdsourced information for either website. This lack of transparency presented a bias problem for the initial design to use Metacritic, justifying its exclusion. To account for any such bias, where possible, other sources (a sort of triangulation,

[389] Where possible, the author of this thesis confirmed from their own game collection, which only has limited cross-referencing with the EULA dataset (being *The Witcher 3: Wild Hunt*, *The Elder Scrolls V: Skyrim*, *Red Dead Redemption II*, *The Last of Us*, *Batman: Arkham City*, *The Legend of Zelda: Breath of the Wild*, *Minecraft*, *Dark Souls III*, *Resident Evil 2* and *Metal Gear Solid V: The Phantom Pain*). Screenshots of in-game EULAs were checked via key word searches on Google Images for those titles which could not be technically accessed.

including other ranking websites[390] and best-selling/highest-grossing[391] lists) were used to verify that the selection was representative of genuine popularity, and not a result of trolling.[392]

Indeed, relying on crowdsourced sites has potentially led to certain skews in the dataset. Despite no deliberate attempt to exclude mobile games from the ambit of the sample, none appeared on either of these lists. In respect of the eSports sample, this exclusion is perhaps understandable given that the market tends to be the exclusive remit of PC and console-based games. However, the exclusion from the video games sample is a notable omission, as this is undeniably an important market in itself. Nonetheless, it is the result of the 'crowd-wisdom'[393] of Ranker.com. In this case, the omission of mobile games may in fact give parity between the eSports and video games samples, by removing this capacity for variance between different gaming platforms. It is a notable omission from the dataset, nonetheless.

As a final consideration, the EULAs were gathered only in the English language, and accessed using a UK network. As a result, there is a risk that the EULAs examined here are specific to users in the UK and may not be reflective of e.g. what a user in Japan would receive. To confirm whether this was the case, each institutional webpage per title was checked to confirm if the rightsholder offered alternative versions of EULAs which were tailored for other countries that could be verified against the UK versions retained on file. Checks were conducted for Japanese and US versions of the EULA as the two most common jurisdictions from the dataset. Only one publisher's webpage offers such a service that is not simply a translation of the English EULA, but is in fact customised per country: Bethesda.[394] However, when comparing the UK, US and Japanese versions against each other, they are almost verbatim copies with no substantive differences between them (even when accounting for slight differences in translation of the Japanese version). The UK version has slightly more content in terms of refunds, returns, unfair

[390] Bearing in mind the caution to using Metacritic noted above, Dietz J, 'Highest-Scoring Games of the 2010s' (*Metacritic*, 4 January 2020) <https://www.metacritic.com/feature/best-videogames-of-the-decade-2010s> accessed 15 September 2021, includes 11 cross-over titles.
[391] See e.g. Willings A, 'Best selling games list of 2010s is surprising for its lack of surprises' (*Pocket Lint*, 20 January 2020) <https://www.pocket-lint.com/games/news/150785-best-selling-games-of-the-last-decade> accessed 15 September 2021, which includes five cross-over titles.
[392] See n371.
[393] Ranker (n372).
[394] Bethesda, 'Fallout 76 EULA' (*Bethesda*, date unknown) <https://bethesda.net/en/eulas/fallout-76> accessed 15 September 2021. This EULA includes versions for: US/Latin America, UK, Germany, France, Spain, Italy, Australia/New Zealand, Japan, Polish, Russian, Brazil.

terms and privacy than the US or Japanese versions (possibly to account for the influence of EU privacy legislation),[395] but otherwise the language itself is highly homogenous.

After this initial assessment, a VPN was used to check a selection of titles[396] using a US and Japanese IP address to access the publisher's institutional webpages and reroute to the appropriate country-specific EULA. However, again it seems that the EULA is a verbatim copy (or close, accounting for post-translation differences for the Japanese version) of the UK version in both countries, with the exception of the same provisions on e.g., privacy, refunds, and returns. As such, there is relative universal stability in terms of the EULAs across different countries. Whilst outwith the scope of this thesis to investigate this further, one possibility for this highly homogeneous language is due to the inclusion of clauses on choice of law or jurisdiction,[397] which would seemingly usurp the need for a tailormade version particular to different countries. As such, the fact that only UK versions of EULAs have been captured is not immediately problematic, as this appears to be much more of a universal document than previously anticipated.

2. Coding process

No text analysis software was used when coding the EULAs, and instead a plain reading of the text was conducted in order to capture the types of granular nuance required at multiple levels of the CDA analysis. Working 'bottom-up', the coding process began at the micro dimensions of the text, identifying particular linguistic patterns (e.g. grammar and vocabulary that implies a degree of formality or informality). Whilst a holistic approach was applied to evaluating the entirety of the EULA, given the thesis' focus on the *copyright* user, concern was focussed on clauses that regulate the *creative content* of the game. To this end, clauses concerning e.g., indemnification, warranties and privacy, are largely excluded from the ambit of analysis as being more specifically orientated around e.g., consumer protection, litigation and data protection, rather than copyright. Thereafter, the meso discursive dimension was analysed to understand how the text was distributed to the user, e.g., physically or digitally, in-game or outwith. Finally, in the sociocultural dimension of analysis, the prevalent themes of the text and discursive dimensions were tied together, seeking an

[395] e.g. Regulation 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data [2016] OJ L 119/1.
[396] Being the first three titles listed in each dataset. From eSports: *Dota 2* (Valve), *Fortnite* (Epic Games), *League of Legends* (Riot Games). From video games: *The Witcher 3: Wild Hunt* (CD Projekt Red), *Red Dead Redemption II* (Rockstar Games), *The Last of Us* (Sony).
[397] Noting that in each case the choice of law is US-based, with the exception of CD Projekt Red, which designates Polish laws as the choice of jurisdiction for European users (see documentation in Appendix 2).

explanation as to why these particular features were present with reference to the theoretical concepts identified in Chapter 3. In this final dimension, the textual and discursive features are demystified to uncover the concept of user constructed within the EULA, and the strategic significance behind this designation. Table 1 illustrates the types of questions considered in each dimension of analysis.

Table 1: Example questions across CDA dimensions of analysis

Textual	Discursive	Sociocultural
How does the EULA describe the characteristics of the user? (e.g. as consumer, customer) How do vocabulary, grammar and structure of the text create the impression of a particular concept? (e.g. if formal, a distanced relationship – if informal, a more proximate one) Does the EULA use specific terminology that is indicative of a particular underlying or hidden opinion (e.g. 'user-generated content' or 'fan-made content')?	How is the EULA distributed? (e.g. physically or digitally, in-game or outwith the game) Are there any alternative means of communicating to the user outwith the set space of the EULA? (e.g. in a contact form or on social media)	Does the EULA construct, maintain or challenge existing power relations? (e.g. between the rightsholder and user) Is the construct of the user reflective of a particular ideology? (e.g. a strong, proprietary vision of software) Does the EULA contribute to normalising a particular view of the user? (e.g. as a consumer, or non-owner of a game)

Following the coding process, three themes were derived iteratively from the findings given their salience and delineation in the dataset: Copyright, Consumption, and Creativity, each detailed in the following Chapters 6, 7 and 8 respectively. These themes were derived initially from the textual dimension of analysis, where clusters of keywords indicated the forming of a broader concept. For example, the Copyright theme was inferred by clusters of keywords including: copyright, intellectual property, property, ownership, title, (exclusive) rights, law, legal or the reference to a specific legislative act. The prevalence of entire clauses could also be captured within this keyword

coding approach. 'Ownership' and 'Intellectual Property' clauses, for example, appear early, prominently, and repeatedly in the text of the EULA, stressing their importance in constructing the user. The use of these terms in combination suggested that the concept of user was tied to law, and specifically copyright law, hence the designation of the Copyright theme.

3. Reflexivity statement[398]

As with all qualitative research, it is recommended that CDA researchers include a reflexivity statement.[399] Particularly, as a researcher presenting a construction of social reality, I recognise that I also play an active part in generating certain meanings. As such, throughout the research, I maintained an openness to the meanings conveyed in the text, and rather than limiting myself only to a critical analysis, also offer an *explanatory* one. My prior work experience and research in EULAs meant I fully anticipated that the EULAs would be at times draconian in their oppressiveness, however, if there is a functional, legal purpose for a particular textual or discursive feature that may otherwise be interpreted harshly under the CDA paradigm, I make sure to acknowledge this. In this respect, I did not approach the EULAs as being either a tool of 'good' or 'evil', but rather an instrument that can be wielded for either, and one that may be partially purposive in response to a more fundamental problem in the default legislative regime (based on the history of EULAs outlined in Chapter 2).

4. Summary of research design

In outlining the methods of data collection and analysis for this thesis, it is clear that the EULA cannot be understood as a standalone document that exists in isolation from other influential factors. Instead, the EULA often includes multiple documents, which vary across multiple platforms, and in respect of multiple game titles.

In respect of data collection, the thesis builds upon a primary dataset of 30 individual game titles, equally split between video games and eSports titles (15/15), with a total of 61 individual documents. These titles were selected based on their popularity, measured with reference to secondary datasets curated on crowd-sourced, ranking websites, Ranker and eSports Earnings.

[398] In the spirit of reflexivity, this statement is written in the first-person perspective, given its purpose is to acknowledge the researcher's role in relation to the research (see Jorgensen and Philips (n354)).
[399] ibid.

Popularity is treated in this thesis as a proxy for prevalence of discourse, and hence the dominant conceptualisation of the user in these industries.

As part of this data collection process, sociocultural factors that may influence the EULA were also captured. This brief overview reveals that the dataset is mainly comprised of US-based, triple A rightsholders, which form the dominant discourse in this dataset. Whilst this skew is perhaps an accurate reflection of the games industry in its current state, there is nonetheless a representative sample of titles from other countries, and smaller indie rightsholders, allowing for a degree of comparative analysis between them.

This chapter also outlines a number of limitations to the construction of the dataset, and the methods used to mitigate this. In particular, attention is drawn to the potential for a platform 'layering' effect, whereby depending on which platform a game is hosted on may have a significant effect on what terms technically prevail in the legal regulation of the user. However, it should be stressed that this thesis focusses on the construction of the user from the perspective of the rightsholder of an EULA, as a discourse, rather than a doctrinal, legal enquiry into the technicalities of contract law or nuances of the platform economy.

In respect of data analysis, the research was conducted in line with Fairclough's dialectical-relational model of discourse, with analysis across three key dimensions: textual, discursive, and sociocultural practice. Working from the micro to the macro, the data analysis derives three themes iteratively from the coding process, given their delineation and importance to the construction of the user: Copyright, Consumption and Creativity. The following chapters outline the findings across each of these themes in turn.

PART 3: Findings

Don't be a rules lawyer. --- Gaming idiom

Chapter 6: Copyright

Whilst the EULA was initially designed to substitute for a deficit in copyright law (the lack of protection for software, detailed in Chapter 2), this has since been corrected. The EULA's ongoing existence suggests that its relationship with copyright has changed but is nonetheless still intrinsic to realising the rights and responsibilities for the use of creative works. The Copyright theme therefore explores the ways in which copyright law and the legal genre manifest in the EULA, and how this is significant to the construction of the user.

The chapter shows that, far from offering a consistent or logical vision of the user, ideological stances on copyright lead to a highly fragmented conceptualisation. This fragmentation is stratified at industry level between two polarised stances: the triple A publisher, who views the user as a weak legal subject that is engaging with proprietary software; and the indie publisher, whose conceptualisation of the user is perhaps closer to a 'player' of a game. This differentiation is evident initially in the textual dimension (Section 1), where the choice to engage with or ignore legal and copyright concepts is indicative of different ideological stances and intended relationships of power. The differentiation is furthered in the discursive dimension (Section 2), where the integration of the EULA within the game interface is fully absorbed by indie companies as a broader element of play and form of hypermediacy. Explaining the difference in approaches to conceptualising the user in the sociocultural dimension (Section 3), the analysis mainly focusses on the different material relations of rightsholders in the game industry, and how tensions between the ideologies of profit-driven creativity and artistic freedom result in different levels of engagement with copyright law.

1. Textual dimension

In the textual dimension of analysis, the dominant discourse in this dataset frames the EULA as a distinctly *legal* document with a close relationship with copyright law, an institution that takes great precedence within the text. Engagement with the law, and particularly the formality and authority conveyed by this, manifests within the text in two closely related ways: through the adoption of the legal genre in language, terminology, and format, (Section 1.1); and through direct, intertextual references to copyright law (Section 1.2 and Section 1.3).

1.1 Legal genre

The dominant discourse presents the EULA as a distinctly *legal* agreement as opposed to e.g., a business transaction. The seriousness of its legal character is often emphasised explicitly at the outset of the text by reminding the user that '[this] is a legal document…'[400] or 'this Agreement is enforceable like any written contract signed by you':[401] it is emphatically an 'IMPORTANT LEGAL NOTICE'.[402] The intention to engage in a *legal* relationship with the user is also mirrored in the EULA throughout the text by the adoption of particular styles, characteristics and formatting that are typical of the legal genre.[403] The most common manifestation of this is the tendency towards a high-degree of formality, complexity, and lexical denseness. The following example is emblematic of many of these characteristics:

> To the fullest extent permitted by applicable law, by submitting any UGC (including without limitation, images, videos, customer service submissions, idea submissions, suggestions and message postings) you automatically grant (or represent and warrant that the owner of such rights has expressly granted) Activision a perpetual, worldwide, royalty-free, irrevocable, non-exclusive right and license to use, reproduce, modify, adapt, publish, translate, sub-license, create derivative works from and distribute such UGC or incorporate such UGC content into any form, medium, or technology now known or later developed throughout the universe, and agree that Activision shall be entitled to unrestricted use of the UGC for any purpose whatsoever, commercial or otherwise, without compensation, notice or attribution.[404]

The complexity and length of such a sentence is not typical of e.g., oral-conversational discourse, and resultingly, is difficult for the average reader to engage with. As a singular sentence, this example contains 112 words, which should be compared against the average of 20 in non-legal genres of discourse.[405] The language is dense and technical ('irrevocable', 'sub-licensable'),[406]

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[400] Epic Games, 'Fortnite End User License Agreement' (Appendix 2).
[401] Riot Games, 'League of Legends Terms of Use' (Appendix 2).
[402] Hi-Rez, 'End User License Agreement' (Appendix 2). Noting that the use of all caps to denote emphasis is often utilised in contract writing to draw attention to a particular clause, or the use of defined terms to refer to contract subjects.
[403] Kaplan (n275).
[404] Activision, 'Terms of Use' (Appendix 2).
[405] The Acropolitan, 'Sentence Length Has Declined 75% in the Past 500 Years' (*Medium*, 29 August 2017) <https://medium.com/@theacropolitan/sentence-length-has-declined-75-in-the-past-500-years-2e40f80f589f> accessed 16 September 2021.
[406] Rockstar Games, 'Limited Software Warranty and License Agreement' (Appendix 2).

favouring the legalese version of a term rather than more colloquial appropriations (e.g. 'attribution' rather than 'credit' or 'acknowledgement').[407] The text also borrows specific legal tropes, such as the use of binomials ('represent and warrant'),[408] passive referral in the third person ('you automatically grant… Activision')[409] and catch-all conditions to anticipate all potential scenarios ('technology now known or later developed throughout the universe').[410] Much like the law, the EULA also mimics the infringement-consequence ('if-then') process.[411] The EULA emphasises the seriousness of its terms by detailing consequences for non-conformity, ensuring obedience is enforced. Such penalties for non-conformal include termination of the agreement and temporary or permanent bans from online servers (though more often this is in relation to breaches of codes of conduct/player behaviours).[412]

By utilising these characteristics of the legal genre, the cumulative impression is that of a formal legal text written by a powerful legal actor. Engaging with the language of the law, as a closed genre with pre-set rules that ensure conservatism through precedent and technical specificity, is exclusive only to those that can engage with it, and thus exclusionary to the (non-lawyer) user.[413] This significantly weakens the position of the user in the face of the more powerful, legal character of the rightsholder. The user can thus never penetrate or shape the discourse of the EULA but is instead are an *object* of it.

As such, the user is perhaps better conceptualised here as a *recipient* of the discourse, who is unilaterally obliged and commanded to act by the text ('you automatically grant').[414] Indeed, the objectification of the user continues throughout the EULA, where the user is obliged through the prevalence of modal verbs, such as 'shall'[415] and 'must,'[416]denoting necessity, obligation, and a particular force behind the text, contributing to its perceived power. By comparison, the rightsholder is framed by conditionals and hypotheticals – they 'may'[417] act, 'if'[418] something

[407] ibid.
[408] Bandai Namco, 'Terms of Use' (Appendix 2).
[409] Activision, 'Terms of use' (Appendix 2).
[410] ibid.
[411] Kaplan (n275)
[412] e.g. Riot Games, 'League of Legends Terms of Use' (Appendix 2) permits termination or suspension of an account for the breach of any terms or if 'doing so would be in the best interests of our community or the Riot Services'.
[413] Niemi-Kiesilainen, Honkatukia and Ruuskanen (n266).
[414] Activision, 'Terms of Use' (Appendix 2). Noting that the use of 'you' to address the user, as opposed to formalistic passive third person, is a departure from the legal style. Only on two occasions is the user addressed as 'user' (interchangeable with 'you') (Capcom and Ubisoft) and once as 'customer' (Cygames).
[415] Konami, 'Terms of Use: Metal Gear Solid V: The Phantom Pain' (Appendix 2).
[416] ibid.
[417] ibid.
[418] ibid.

happens, unless in their 'sole discretion'[419] they decide otherwise (and in the example above, 'for any purpose whatsoever').[420] These are examples of a linguistic technique known as 'hedging'[421] which, by avoiding precision, also avoids commitment, and tends to be indicative of a more powerful speaker who will not be obliged. The contrast evident in this use of language (modality vs hedging) suggests that the rightsholders position is *optional*, whereas the user's position is *mandatory*; the user continues to be a passive object, rather than an active subject, within the discourse.

The adoption of the legal genre of discourse is dominant across the majority of EULAs surveyed. The result is a distanced relationship between the rightsholder, who presents themselves as a powerful legal actor, and the user who, if not equipped with the appropriate resources, is excluded from participation in the discourse, and thus comparatively weak. Instead, the user's position is mandatory; they are objectified in the text as an *object* of a legal relationship, but not an active subject within it.

However, whilst this formal, legal relationship is manifested through the most *dominant* discourse, it is not the *exclusive* discourse observed in the dataset of EULAs. Instead, and more accurately, the formal, legal relationship is the dominant discourse perpetuated by the major-sized, triple A publishers. This dominant discourse is subverted, if not outright rejected, by the smaller, indie video game publishers. In contrast to the highly formal, legal relationship implied by the triple A discourse, indie publishers adopt an informal and friendlier approach to the EULA text by altering their register and style, thus making the discourse more penetrable to the user. As a side-by-side comparison, Table 2 illustrates differences in the textual approaches between Capcom (a triple A publisher) and the Superhot Team (rightsholders of an indie title).

Table 2: Comparison of triple A and indie discourse styles: Capcom and Superhot

Capcom	**Superhot Team**
Capcom shall grant a non-exclusive license to users who install the Program to their own personal computer only for the purpose of playing the game for its personal use under the	This Agreement entitles you to install and personally use as many copies of the Software Product as you in your heart of hearts desire.[423]

[419] ibid.
[420] Activision, 'Terms of Use' (Appendix 2).
[421] Baker and Ellege (n260).
[423] Superhot Team, 'End User License Agreement' (Appendix 2).

condition that the users shall abide by and comply with the provisions hereunder.[422]	

This necessary clause permits the use of a game through an express grant and is typical of most EULAs. But in these examples, the indie expression is caged in a more friendly, playful way than the more traditional, formal approach of the triple A publisher. Whilst some legal tropes are still apparent for the indie title, such as the capitalisation of defined terms ('Software Product'), many of the more formalistic and technical terms typical of the genre are not present ('non-exclusive' or 'hereunder' as in the Capcom example). Instead, there is permission to use 'as many copies' as 'you in your heart of hearts desire'. The use of this idiom and informal expression is evident of a less authoritative stance by the indie rightsholder. As a natural extension of the adoption of this oral-conversational discourse, the relationship between the user and rightsholder is more proximate than the formal and authoritative legal relationship in the mainstream EULA discourse: the user is instead being 'spoken' to in a language similar to their own. Even if the user ultimately still cannot change the discourse in the indie EULA, they are not *prima facie* excluded from it through the technical invocation of the legal genre.

Mojang, rightsholders of *Minecraft*, make for an interesting case study of this 'indie effect' and subversion from the dominant legal genre of discourse.[424] Whilst Mojang was subsequently acquired by Microsoft (a triple A publisher), its indie roots or 'spirit' are still preserved in their EULA.[425] Where the triple A publisher makes clear at the outset their intention to form a formal, legal relationship with user, Mojang instead express an explicit hesitancy to engage with the format of the EULA in its entirety:

> In order to protect Minecraft (our "Game") and the members of our community, we need these end user license terms to set out some rules for downloading and using our Game… We don't like reading license documents any more than you do, so we have tried to keep this as short as possible.[426]

Whilst Mojang acknowledges that the EULA is necessary ('we need these…'), it also actively describes itself as an unpleasant reading experience ('[w]e don't like reading license documents any

[422] Capcom, 'End User License Agreement' (Appendix 2).
[424] More extensively discussed in Campos-Pardillos (n208).
[425] Noting that the Microsoft, 'Game Usage Rules' (Appendix 2) specifically except *Minecraft* from their ambit of regulation.
[426] Mojang, 'Minecraft End User License Agreement' (Appendix 2).

more than you do'). Immediately, this expression of solidarity and complicity lessens the social distance between the user and rightsholder, creating a shared commonality between them, rather than opposition. Even if Mojang are participating in the format of the dominant discourse (in the sense that they are indeed nonetheless using an EULA), they do not necessarily agree with the formalistic, legal relationship it typically implies.

The creation of a common space between the indie rightsholder and user also manifests in other textual elements of the Mojang EULA which mimic the language of the user. Mojang differentiate themselves from the dominant discourse by avoiding technical, legalese terms, instead substituting them for specific colloquialisms, e.g. 'griefing' and 'trolling' (rather than, e.g. 'offensive or harmful behaviour'),[427] 'general stuff' (rather than miscellaneous),[428] or describing something as 'no fun' (rather than 'prohibited')[429] or 'okay' (rather than 'permitted').[430] Where the use of a technical term is unavoidable, its meaning is explained ('… unless done so in good faith (e.g. to develop mods.').[431] Many other legal tropes are subverted in the Mojang EULA, with the use of oral-conversational discourse (such as 'Oh'),[432] metaphor ('put a lid on it' rather than 'enforce'),[433] and idioms. Legal threat, whilst present, is toned down in comparison with the more dominant discourse where, if necessary, the rightsholder '… might even have to ask our lawyers to help out'.[434] The hesitancy expressed in this condition suggests an unwillingness to engage in the same enforcement procedures ('if-then') endorsed in the dominant, triple A discourse. This friendlier and conversational approach, being much more personable, was noted even in early versions of the Mojang EULA, which was signed by 'Marcus Persson and friends'.[435]

Indie companies thus differentiate themselves from the dominant discourse of triple A at the textual dimension by modifying, and significantly lightening, their engagement with the legal genre. Where the user is conceptualised by the triple A as a weak object in a formal, legal relationship with the rightsholder, for the indie company, the user is more of a countercultural signifier to the dominant discourse.

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[427] ibid.
[428] ibid.
[429] ibid.
[430] ibid.
[431] ibid.
[432] ibid.
[433] ibid.
[434] ibid.
[435] Noted by Campos-Pardillos (n208) 120. Including this signature resembles the *politique des auteurs*, whereby the hallmark of an independent production is to recognise the author's name in paratexts around indie games (a personal stamp of the *auteur*).

1.2 Intertextuality: copyright ownership

Within the dominant discourse, the EULAs' perceived power is bolstered by its repeated, intertextual claims to ownership of the underlying IP rights comprising the video game or eSport. Much emphasis is put on the power of ownership, as vested by law, to legitimise the rightsholders entitlement to construct the user within the EULA. References to rights ownership appear early and prominently in the text, usually within the introductory or first clause of the EULA:

> All title, ownership rights and intellectual property rights in and to the Content and Services and any and all copies thereof, are owned by Valve and/or its or its affiliates' licensors. All rights are reserved, except as expressly stated herein. The Content and Services are protected by copyright laws, international copyright treaties and conventions and other laws. The Content and Services contain certain licensed materials and Valve's and its affiliates' licensors may protect their rights in the event of any violation of this Agreement.[436]

In the above example, there are multiple repetitions and variants of claims to ownership ('title', 'ownership rights', 'intellectual property rights', 'owned by Valve', 'all rights reserved') which are substantiated with a more vague and general reference to protection by 'copyright laws, international copyright treaties and conventions and other laws'. Other EULAs make more specific reference to named legal acts, such as the Japanese Copyright Act[437] or the 'copyright laws of New Zealand, the United States…', [438] which, whilst perhaps having a more limiting legal effect, more specifically frame the discourse around the issue of copyright within a named jurisdiction. By stating this ownership as factual, the introductory clause claims, without dispute, the authority to mandate the rest of the agreement through this intertextual reference to the law. The EULA may also employ a complementary reversal of this mechanic, and oblige the user to recognise this authority, rather than claiming it *per se*:

> As between you and Hi-Rez, you acknowledge Hi-Rez's exclusive rights in and to the Software Product and that the Software Product is unique and original to Hi-Rez and that Hi-Rez is the exclusive owner thereof.[439]

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[436] Valve, 'Steam Subscriber Agreement' (Appendix 2).
[437] Capcom, 'End User License Agreement' (Appendix 2).
[438] WB Games Inc, 'End User License Agreement' (Appendix 2).
[439] Hi-Rez, 'End User License Agreement' (Appendix 2).

In this example, the obligation of the user to recognise the rightsholder's authority is stated in the active voice ('you acknowledge' that the game is 'unique and original'), resulting in a direct command to the user. Nonetheless, whether claiming ownership or obliging it, these are manifestations of power *behind* discourse, as the EULA is making an intertextual reference to an authoritative text through which its power has been derived: the law.

Similar 'Intellectual Property' clauses which appear later in the text reiterate and repackage this initial claim through repetition. CD Projekt Red offers a particularly interesting example of this repetition. CD Projekt's EULA is split into two columns: the 'Full Text' and the 'Quick Summary', accompanied with a cautionary note that only the Full Text is legally binding, whereas the summary is only intended to 'help you understand what it means'.[440] Differences in textual approaches between the Full Text and Quick Summary at clause 7 ('Ownership and Intellectual Property Rights') are illustratively explored in Table 3.

Table 3: Comparison of 'Intellectual Property' clauses: CD Projekt Red 'Full Text' vs 'Quick Summary'

Full Text	**Quick Summary**
CD PROJEKT RED games and services, including (but not limited to) their graphics, computer code, user interface, look and feel, audio, video, text, layout, databases, data and all other content and all legal and exploitation rights regarding them, are either owned by us or we license them from third parties. All rights are reserved except as we have explained in this Agreement. You may not use or exploit any part of CD PROJEKT RED games or services except as explained in this Agreement.	We spent years building CD PROJEKT RED and our games/services. Enjoy it all, but please behave and do not cause trouble.

The Full Text version of this clause is typical of many other EULAs which intertextually claim similarly 'all legal and exploitation rights'[441] to a lengthy list of game components, some, or most of which, are copyrightable subject-matter (e.g. graphics, computer code, audio etc.). By contrast,

[440] CD Projekt Red, 'User Agreement' (Appendix 2).
[441] ibid.

CD Projekt's Quick Summary column reveals that this clause is not only a claim to ownership, but it is also intended to have a deterrent effect ('please behave and do not cause trouble'). This is a hidden value that is not otherwise expressed, except implicitly, in the Full Text claim to ownership.[442] The Quick Summary reveals a more explicit view that claims to ownership through the invocation of law are not just factual statements, but warnings to the user.

These repeated claims, obligations to recognise, and warnings concerning legally sanctioned ownership are examples of textual claims to power. Consequently, and despite most often classifying itself as an 'agreement' *between* the user and rightsholder (suggesting reciprocity), most of the EULA is dedicated to listing the responsibilities, rules and conditions placed solely upon the user. Therefore, whilst the user is omnipresent throughout the EULA and constantly foregrounded as the subject within an active voice, this is always conditioned by the authority of the EULA (see e.g. 'You agree to only use the Software, or any part of it, in a manner that is consistent with this Agreement…').[443] Resultingly, again we see the user is again an object of construction by the rightsholder, whose power to construct is justified through the invocation of ownership via copyright law.

However, whilst the law is treated with great importance in establishing this initial ownership, notably, EULAs do not treat copyright, or indeed any other law, as a potentially *superior* or conflicting legal regime external to the EULA (i.e., important ≠ superior). Instead, the EULA frames the law as a conditional application that is paralleled with the authority of the EULA itself:

> Except as otherwise permitted under this Agreement (including any Subscription Terms or Rules of Use), or under applicable law[444]

Whilst each EULA caveats itself as only applying to the fullest extent of applicable law (or variants thereof), in this example the key use of 'or' suggests that the law is not the dominant text to which the EULA defers to, but rather a parallel regime which is complimentary to the agreement. In doing so, the EULA situates itself as not only having power *behind* discourse (with intertextual reference to the law) but also suggests power *through* discourse, by framing itself as being paralleled

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[442] Of interest, the Steam version of *The Witcher 3: Wild Hunt* EULA is even more informal than the version accompanying console and PC games (CD Projekt Red, 'The Witcher 3: Wild Hunt' (*Steam*, 18 May 2015) <https://store.steampowered.com/app/292030/The_Witcher_3_Wild_Hunt/> accessed 16 September 2021).
[443] Psyonix, 'End User License Agreement' (Appendix 2).
[444] Valve, 'Steam Subscriber Agreement' (Appendix 2).

with this powerful institution. Resultingly, it deflects responsibility for determining its compliance with the law by omission and imprecision: what exactly is the relevant 'applicable law' is never defined in the EULA, and instead it is often the responsibility of the user to seek out this understanding:

> Any other use of Nintendo's intellectual property and creation of content outside of this scope is subject to the relevant laws of the applicable jurisdiction. Nintendo cannot provide legal advice to you, so we encourage you to seek your own legal counsel if you have any questions about whether your particular proposed use is permitted.[445]

This imprecision is a linguistic technique known as 'obscurification'[446] for which two potential explanations may apply: first, it may be that the information is omitted because it is too obvious to include. This would suggest that the reader's knowledge of applicable law, and the extent to which the EULA is compliant with this, is obvious. Given that this is unlikely, the alternative is that this information is supressed because it conflicts with the dominant discourse that may idealise something that the law would not permit (such as e.g. the subversion of copyright exceptions discussed in Section 1.3 below). This would instead suggest that if the law likely conflicts with the EULA, the EULA will seek to obscure this fact in order to maintain its authority.

Indeed, copyright law is more specifically obscured throughout the EULA by the adaptation of specific terminology. The EULA frequently uses specialised, copyright terms which, initially, demonstrate both an awareness and willingness to invoke the technical specificities of copyright terminology. This includes claims to work being 'original',[447] and deserving of 'moral rights'[448] and 'authorship',[449] with corresponding prohibitions of 'reproduction',[450] 'modification',[451] 'distribution'[452] and the creation of 'derivative works'.[453] Each of these terms have a fixed, technical, meaning in copyright which, one would assume, is what is being invoked alongside the legal genre of discourse. However, the EULA instead applies a degree of flexibility and adapts these concepts

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[445] Nintendo, 'Game Content Guidelines' (Appendix 2) and recalling Lessig's quip about a 'user' being someone who can afford a lawyer (n52).
[446] Baker and Ellece (n260).
[447] Hi-Rez, 'End User License Agreement' (Appendix 2).
[448] Nintendo, 'End User License Agreement' (Appendix 2).
[449] Blizzard, 'End User License Agreement' (Appendix 2).
[450] Wizards of the Coast, 'Magic Online End User License Agreement and Software License' (Appendix 2).
[451] ibid.
[452] ibid.
[453] EA, 'Electronic Arts User Agreement' (Appendix 2).

to obscure both the limits of exclusive ownership, and the beginnings of user entitlements. For example, Mojang place great emphasis on prohibiting 'distribution' of their game, which the EULA defines as giving copies of the game to anyone, making commercial use of the game, trying to make money from the game, or letting other people access any aspect of the game in a way that is unfair or unreasonable.[454] A strict reading of 'distribution' under a pure copyright context does not ascribe the same meaning,[455] and instead this invocation of a technical copyright term is given a much broader interpretation through the EULA. This should be read as a cautionary note that, even where the discourse in the EULA appears to be mimicking copyright, there is rarely a shared commonality on the interpretation of the technical specificity of its definition.

Thus, in the textual dimension of discourse, the invocation of copyright holds a prominent place and an important function within the text of the EULA. Through intertextual reference to the law, whether implicitly (e.g. 'ownership rights') or explicitly (e.g. 'copyright laws') the EULA claims a particular type of authority derived from previous, institutionally and societally backed power that legitimates and justifies the content of the EULA. This functions as both a claim to power, and a warning to the user; rights are claimed, and by extension penalties for non-compliance. This extension into enforcement is presented as a natural consequence of copyright, rather than a deliberate choice. However, whilst the law is relied upon to establish this power, it is not treated within the text as a superior regime that may place limitations upon the enforcement of the EULA, but rather a complementary system that applies in tandem with the EULA. The co-existence between contract and copyright is not necessarily unusual, but in this instance, it is highly selective. Whilst great importance is placed on the initial title awarded by copyright, willingness to engage with its ongoing principles are rejected. Copyright concepts are only clear in the EULA when they apply in favour of the rightsholder (establishing ownership) but are otherwise obscured in their application to the user. This obscurification manifests more prominently in the interplay between the EULA and copyright limitations and exceptions discussed below.

1.3 Intertextuality: copyright limitations and exceptions

[454] Mojang, 'Minecraft End User License Agreement' (Appendix 2).

[455] In Case C-516/13 *Dimensione Direct Sales Srl and another v Knoll International SpA* [2015] OJ C236/58, InfoSoc Directive, art 4(1) was interpreted to mean 'that it allows a holder of an exclusive right to distribute a protected work to prevent an offer for sale or an advertisement of the original or a copy of that work' (para 20) but does not extend to e.g. access of a work by another.

The EULA parallels the structure of copyright law by first creating an exclusive right (the intertextual claims to copyright ownership discussed above) to which conditional exceptions and limitations may apply. The EULA first mandates itself with an encompassing exclusivity to 'ALL RIGHTS'[456] over the software. Thereafter it creates a conditional that this shall be the case unless certain permissions are '… EXPRESSLY GRANTED TO YOU IN THIS AGREEMENT'.[457] Crucially, the EULA itself ('THIS AGREEMENT') claims to determine the existence and scope of any such rights (conditional on being 'GRANTED'). Therefore, anything not expressly *excused* by the rightsholder is forbidden. By contrast, in copyright law, exceptions and limitations are normally characterised by the *absence* of infringement (being 'excepted'). The EULA, in arrogating itself the mandate to determine the ambit of use, instead changes these exceptions into *excused* infringement. Resultingly, both infringing and non-infringing activities of the user are constructed within the text of the EULA.

Indeed, for the most part, the bulk of the EULA is not overly concerned with copyright-specific behaviour as such (e.g. copying aspects of the game or distributing it), but rather on user behaviour more generally (e.g. banning unfair play practices or offensive, harassing behaviour).[458] References to copyright exceptions, such as parody or quotation, are particularly rare within EULAs, and when they do manifest this is presented as an excused activity by the rightsholder, rather than a positive entitlement granted by the law. For example, the Hi-Rez EULA includes a broad restriction on general copying but includes the caveat that the user may 'make one (1) copy of the Game Software […] for archival purposes': essentially a back-up copy exception.[459] No other equivalent copyright exceptions, such as using the game for the purposes of education, are included within the Hi-Rez EULA. Instead, by only including this specific, named exception explicitly within the text of the EULA, all other exceptions are by its own definition, omitted.

Only two EULAs prove an exception to this general no-exceptions rule: *Minecraft* and *Outlast*, both indie titles. Mojang reminds the user (twice) in their UGC policy that they may '[d]o things that are specifically covered by 'fair dealing' or 'fair use' exceptions to copyright and trademark laws'[460]

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[456] Psyonix, 'End User License Agreement' (Appendix 2).
[457] ibid.
[458] See for example, the Konami, 'Terms of Use: Metal Gear Solid V: The Phantom Pain' (Appendix 2) code of conduct, which contains 26 provisions, of which only four concern copyright-related activities.
[459] Hi-Rez, 'End User License Agreement' (Appendix 2), largely paralleling the private copying exception in the InfoSoc Directive, art 5.2(b).
[460] Mojang, 'Minecraft End user License Agreement' (Appendix 2) and Mojang, Brand and Asset Usage Guidelines (Appendix 2).

notwithstanding the rest of the restrictions in the agreement. Red Barrels, rightsholders of *Outlast*,[461] has no specific policy for making content other than video recordings and streams of gameplay, but reminds the user that in any case they have rights to make 'certain kinds of user-generated content' under Canadian copyright law.[462] Again then, there is some limited evidence of an indie effect in this construction of the user; the user's entitlements are less obscured for these indie rightsholders than with the dominant, triple A discourse.

Relatedly to exceptions, EULAs similarly obscure the limits of copyright by, for example, claiming indefinite ownership of content (copyright duration)[463] or claiming ownership of uncopyrightable subject-matter. The latter is particularly notable for its broad, indiscriminate, and all-encompassing claims to ownership of lengthy lists of content which includes both protectable and unprotectable subject-matter:

> […] any titles, trademarks, service marks, and trade names, computer code, themes, objects, characters, character names, stories, dialog, catch phrases, locations, concepts, artwork, animations, sounds, musical compositions, audio-visual effects, methods of operation, moral rights, and any related documentation[464]

Other examples of the types of content the EULA claims to own includes colour schemes, concepts, ideas,[465] locations, functionalities, and re-enactments,[466] and 'catch-all' claims to 'all other original works of authorship contained [herein]'.[467] Such textual framing suggests that everything within the list of the EULA is part and parcel of the legitimate ownership derived through copyright. Therefore, much as with copyright exceptions, whilst the EULA shows willingness to engage with copyright insofar as it establishes the initial ownership claim, the corresponding limitations of this system are not respected. Instead, for the dominant, triple A discourse, this is merged together as part of a broader ideology of ownership of proprietary software.

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461 Red Barrels, *Outlast* (Red Barrels 2013)
462 Red Barrels, 'Message to YouTubers' (Appendix 2).
463 Per the Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as revised at Stockholm on July 14, 1967 (Berne Convention), art 7, most countries will be limited to a minimum of copyright protection for the life of the author plus at least 50 years after their death.
464 Activision, 'Terms of Use' (Appendix 2).
465 Psyonix, 'End User License Agreement' (Appendix 2).
466 Blizzard, 'End User License Agreement' (Appendix 2).
467 ibid.

Surmising, the dominant discourse of the EULA cherry-picks aspects of copyright which match the dominant ideology in supporting the power of the copyright owner, whilst suppressing or misrepresenting the aspects which do not support this. The overall effect is obscurifying, disguising what is otherwise permitted by law (copyright exceptions) or unregulated by it (copyright limitations e.g., on subject-matter or non-copyright-related activities). The construction of the user in this respect is thus very strategic indeed. Lawful uses are presented as being mediated by the EULA, which selects only the aspects of law that best suit the business strategy of the rightsholder. Curiously, in the case of the indie rightsholder, the best business strategy appears to be, conversely, to be more transparent about the entitlements of the user in law.

2. Discursive dimension

Whilst in the textual dimension, the EULA is presented as a formal, legal document, this formalistic legal tradition is less obvious in the discursive dimension. The fact that games can be distributed physically, digitally, or via account membership, does not change the method by which the EULA itself is distributed. All formats of a game will tend to use static versions of an EULA which sit on the institutional homepage of the game rightsholder. Increasingly, they are presented to the user within the interface of the game itself and effectively become absorbed into a broader aspect of play (Section 2.1). Some indie titles appear to take this absorption a step further in turning the EULA into a kind of performance art rather than the presentation of a formal, legal contract (Section 2.2).

2.1 Integration within the game interface

The shifting character of the EULA is important for the context of this theme in the discursive dimension. Historically, EULAs would have been included within the shrink-wrap of a game, denoting assent to its terms by the user breaking a seal on game packaging. Whilst it is difficult to pinpoint exactly when shrink-wrap became obsolete in the video game industry, influential game creator Ubisoft reportedly stopped producing paper documentation in their physical games in 2010.[468] Since then, it is prudent to assume that EULAs have been steadily moving to exclusively clickthrough methods of distribution. That is, they are presented to the user post-purchase, post-installation, where assent is indicated by the user by clicking a digital checkbox before proceeding.

[468] Fahey M, 'Ubisoft Does Away With Tree-Killing Instruction Manuals' (*Kotaku*, 19 April 2010) <https://kotaku.com/ubisoft-does-away-with-tree-killing-instruction-manuals-5520261> accessed 16 September 2021.

Whilst all of the games observed in this dataset have a static version of their EULA available via their institutional webpage (a necessary limitation of the methodology for data collection detailed in Chapter 5), the EULA is also now built into the game interface, accessible upon first installation of a game, and usually subsequently through e.g., accessing an in-game menu. As such, the EULA has been transformed into another tool that the user may interact with in a game, in much a similar way as the user may access a game character's inventory. The example in Fig 12 shows 'Support and Legal Information' included through the in-game 'Options' menu, which can be accessed whilst the game protagonist is resting between game missions.



Figure 12: Example of access to EULA through in-game menu (Metal Gear Solid V: The Phantom Pain)

Turning briefly to contrast this new transformation with the origins of the EULA, there is a large evolution. Whereas, for example, the original IBM agreement was a physical document to be signed and counter-signed, the digital interface removes the performative formalistic context typically associated with a legal document. The material act of breaking a seal or signing a document is, as argued in this thesis, a different relationship with a work than simply clicking a button or skimming text to click 'I agree'. Particularly, by integrating the EULA within the game interface, and changing this into another virtual device for the user to interact with, the EULA is simply absorbed as another aspect of play. It becomes no more significant that a user's interaction with a character inventory or in-game map, and simply shares the game-space, rather than a stand-alone legal document. For the triple A, legal and formalistic textual discourse, this informal interaction through a game-space does not match the seriousness of the text it contains; the text becomes hidden, and obscurified through its absorption into the broader play of the game.

Surprisingly, these discursive features do not change even in the eSports context. Here, the user is not necessarily a casual player who may be relatively uninvested in occupying a more powerful position, but instead a professional player engaging in a professional activity. As such, one might anticipate that the distribution of a text to eSports players would mimic this formality and professionalism. However, only one of the game rightsholders observed in this dataset offers a separate, more formal eSports tailored licence.[469] A minority simply exclude eSports players from the remit of the EULA entirely, obliging them to contact representatives of the rightsholder separately.[470] But for the majority of EULAs, the same informality of distribution is the same for professional eSports players as with more casual users. This method of distribution is thus a complete norm in both industries and does not often change in response to the professionalised user. In this sense, even if the concept of the user at textual dimension is not stable in this theme, the methods of communicating to the user are.

The cumulative effect at the discursive dimension is to minimise the role of the user, by giving them no input on the contractual relationship with the game rightsholder; the rightsholder's authority alone is presented as being sufficient to unilaterally offer and change the terms,[471] which is legitimated at the textual dimension by reference to the institutional backing of law. The production, distribution and consumption of the text is thus entirely unilateral, with no room for agency by the user. Discursively then, the transformation to click-through and particularly the inclusion of the EULA as part of the game interface, which obscures its existence within the play of the game, situates the user as a weaker object of the relationship, with no agency as an active subject.

2.2 Indie differentiation in distribution

Indie games, in keeping with a less formal textual approach also differentiate at the discursive dimension by creating two separate, parallel discourses; one which is presented to the user through the static, institutional webpage, and a separate agreement which is more ephemerally presented to the user upon installation of the game through the in-game interface.

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469 Blizzard, 'Organize your own community Esports competition' (*Blizzard*, date unknown) <https://communitytournaments.blizzardesports.com/en-gb/> accessed 16 September 2021.

470 Bethesda, 'Terms of Service' (Appendix 2) Hi-Rez, 'End User License Agreement' (Appendix 2) and Riot Games, 'League of Legends Terms of Use' (Appendix 2) mention eSports, but only insofar as they discourage users from using footage of eSports tournaments (whether organised by themselves or a third-party).

471 See e.g. Bandai Namco, 'Terms of Use' (Appendix 2): 'At its sole discretion, BNEE reserves the right to change, modify, add or remove parts of these Terms of Use'.

Whilst it is not possible to survey each game title to check whether the online version of the EULA corresponds with the in-game version presented to the user upon installation (a limitation explored in Chapter 5), this is confirmed for at least one of the indie game titles, and one indie game sequel.[472] Both display an alternative EULA to the user upon installation through the game interface which is different from the static online version on their institutional webpages.

The first example, *Superhot*,[473] displays an alternative, parody version of an EULA upon installation, a screenshot of which is shown in Figure 13. The EULA automatically scrolls at great speed during installation, making it impossible for the user to read. This appears to be both a reference to the most common approach the user takes when interacting with an EULA (scrolling as fast as possible to agree before proceeding with the game, whilst indeed not actually reading its contents) and an inversion of the actual game mechanics. In *Superhot*, time only moves when the user moves, and thus is more akin to playing a game in slow motion. The EULA, in scrolling incredibly fast, is therefore also an acknowledgement of this mechanic: the malleability of time and space.

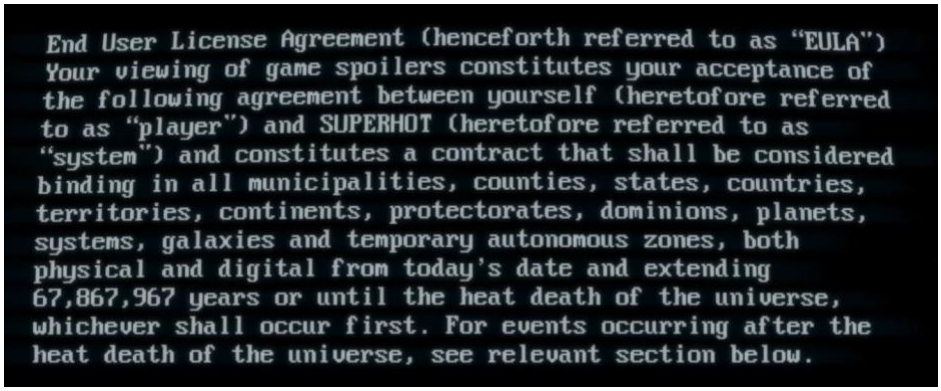


Figure 13: Superhot in-game EULA

The *Superhot* parody EULA is deliberately contradictory in mocking its own existence. It uses hyperbole and humour, exaggerating the overreach of the typical, triple A EULA (purporting to last '…until the heat death of the universe', noting that previous examples of EULAs examined here also claim, in all sincerity, to reach to the extent of the universe)[474] and exaggerating formalism

[472] See disclaimer in n359. Boolean search strings were used to search for screenshots of in-game EULAs on Google – e.g. "Superhot" AND "EULA" AND "install".
[473] Iwanicki P, *Superhot* (Superhot Team 2016).
[474] 'Heat death of the Universe' is indeed defined by the parody EULA: 'In the event that all energy has been exhausted from the universe and all matter has reverted to cold lifeless husks, this contract shall remain in effect and all rights, properties or consciousnesses abrogated to the system shall remain part of the system.' Superhot Fandom, 'End

('heretofore'). In doing so, it deflates the seriousness of the dominant, triple A discourse that emphasises the formalistic and legal nature of the EULA by analogising the rightsholder to an authoritarian superintelligence (the 'system').

However, this ironic and humorous in-game EULA does not exist in isolation, and in fact is accompanied also with a different, static version available via the *Superhot* institutional homepage. Whilst the in-game EULA subverts the dominant discourse by mocking it and exaggerating its reach, the official EULA largely feeds into the very system it purports to mock. Table 4 shows a comparison of clauses from both the official and parody EULA which have approximately the same function of introducing the purpose of the document.

Table 4: Comparison of Superhot EULA: official vs in-game version

Superhot: Official EULA	**Superhot: In-Game EULA**
This copy of SUPERHOT ("the Software Product") and accompanying documentation is licensed and not sold. This Software Product is protected by copyright laws and treaties, as well as laws and treaties related to other forms of intellectual property. SUPERHOT Sp. z o.o. or its subsidiaries, affiliates, and suppliers (collectively "SUPERHOT Team") own intellectual property rights in the Software Product. The Licensee's ("you" or "your") license to download, use, copy, or change the Software Product is subject to these rights and to all the terms and conditions of this End User License Agreement ("Agreement").[475]	System stipulates that while it does not relish needing to create this document (heretofore referred to as "the EULA") it feels it must in order to protect its rights against those who seek to harm or destroy system. System sincerely hopes you are not part of this regrettable, misguided group of dissidents and apologizes for any future actions it might take against you, provided such apology does not infringe upon its legal and/or physical ability to destroy you, your livelihood and those who love you.[476]

Resultingly, two discourses exist for the user, separated in the discursive dimension. The first, being the official, static EULA uses many of the legalistic tropes examined in the textual dimension

User License Agreement' (*Superhot Fandom*, date unknown) <https://superhot.fandom.com/wiki/End_User_License_Agreement> accessed 16 September 2021.
[475] Superhot Team, 'End User License Agreement' (Appendix 2).
[476] ibid.

(e.g. defined terms, intertextual reference to copyright, immediate claims to ownership of the game), more typical of a the dominant triple A discourse. This is in some ways less accessible to the user because it has to be actively sought out via the institutional homepage. The second discourse is instead a mockery of the first, by again exaggerating the formalism, seriousness, and all-encompassing nature of the dominant discourse. This version is more outwardly presented and accessible to the user through the game interface upon installation; thus, the user's immediate impression, as presented to them on the screen, is of an entity who rejects the dominant discourse.

The choice to create this differentiation in the discursive dimension is curious. To media scholars, this would be an example of hypermediacy, being a way of reminding the user of the medium that they are using.[477] In this case, the game is a ludic medium, with a ludic, playful introduction that matches the theme of the game itself. Presenting the EULA as a parody of itself within the game interface may be a deliberate strategy of matching the EULA to the tone and atmosphere of the ludic game. As noted above, the fast speed in which the EULA is presented could be read as an extension of the game mechanic of varying speed and time. In this way, it is a true absorption of the EULA into the broader purpose of play. However, whilst the outward presentation of the EULA has ludic intent, the existence of a separate, static, and formal document of the institutional webpage suggests there is ultimately still an underlying and cautious legal approach. To the indie rightsholder, it is apparently not acceptable for power relations to be played out within the game interface, but it can legitimately be present elsewhere. Whilst the user, outwardly, appears to be engaging with a less powerful actor, who creates a shared space where the dominant discourse is mocked, power is still omnipresent: it is simply disguised by a layer of humour.

Much like *Superhot*, the in-game EULA presented to the user upon installation of *Deltarune* (sequel to *Undertale*) has ludic intent.[478] As illustrated in in Figure 14, the EULA simply reads 'YOU ACCEPT EVERYTHING THAT WILL HAPPEN FROM NOW ON'.

[477] Hancock M, 'Playing It By the Book: Instructing and Constructing the Player in the Videogame Manual Paratext' in Ensslin A and Balteiro I (eds), *Approaches to Videogame Discourse* (Bloomsbury 2019).
[478] Whilst *Deltarune* (Fox T, *Deltarune* (Toby Fox 2021)) does not strictly appear in the primary dataset for this thesis, it is incorporated as supplementary data given its billing as the 'parallel story' of *Undertale* (analogous to a subsequent chapter in a book) (see Steam, 'Deltarune' (*Steam*, 2021) <https://store.steampowered.com/app/1671210/DELTARUNE/> accessed 24 November 2021).

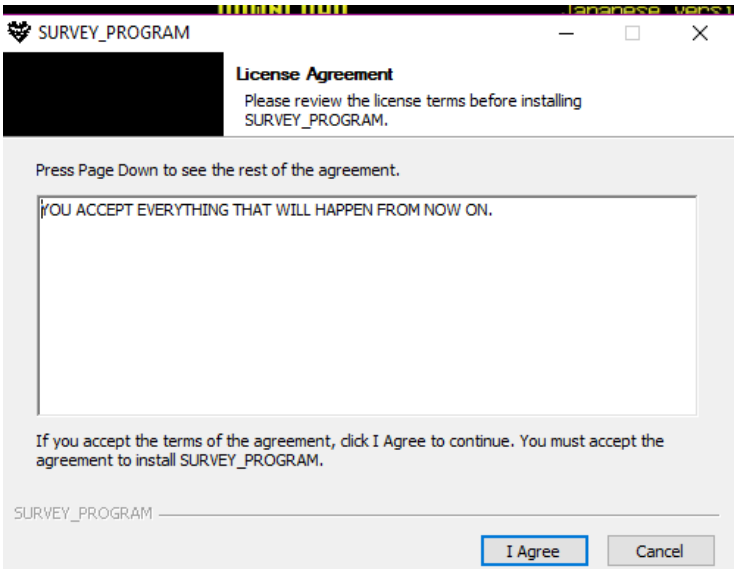


Figure 14: Deltarune in-game EULA

As with *Superhot*, the intent here seems to be to use hyperbole in order to exaggerate the severity and overreach of mainstream EULA discourse. The in-game EULA for *Deltarune* imitates the legal genre features of using all caps, direct designations ('YOU') and an all-encompassing claim for every eventuality that happens post-acceptance.

However, unlike *Superhot*, *Deltarune* has no alternative, static EULA to compare with. Instead, the true intent in this case is more apparently hypermediacy of the kind described above. Indeed, the principle of *Deltarune* itself is that any choices you make within the game (e.g., the interactions with different characters or story choices) ultimately do not matter, as the ending will always be the same. The EULA therefore is absorbed both within the game interface, and as a paratext of the game itself. The user's only interaction with the EULA is as a further element of play, and thus they are more analogous to a *player of a game*, rather than a *user of proprietary software,* per the dominant triple A discourse. This construction is quite deliberate in rejecting the dominant discourse which engages with the power of copyright law to turn play into proprietary space; instead, the indie rightsholder seems to reject the notion that copyright should have a role in regulating the play of a game at all.

In both examples, *Superhot* and *Deltarune*, the in-game EULA works to reject the dominant discourse of the Copyright theme, lessening the social distancing effect between the rightsholder and user by using humour and camaraderie. The indie effect leans into the changing medium of the EULA, from physical to digital, and embraces it as simply another feature within the game that

a user may interact and play with. By mocking the EULA, the indie rightsholder simultaneously creates a shared space in which both they and the user are vaguely oppositional to the dominant discourse. By aligning their interests, the user becomes less conceptually weak than with the formal and authoritative approach of the dominant discourse. Even if the user ultimately cannot shape or engage with the discourse, they are invited to enjoy the EULA as a paratext of the game itself (lessening its severity), and more accurately conceptualising the user as a *player*.

3. Sociocultural dimension

Unlike the original 1969 IBM licence agreement, copyright is no longer an afterthought in the EULA. Copyright instead plays an important symbolic and legitimating function in establishing relationships of power in the dominant discourse of the EULA, mainly, but not exclusively, adopted by the triple A publisher. Evidentially, copyright has not *replaced* the need for the EULA, but rather its generative role has allowed the EULA to evolve into a parallel system. For the triple A publisher, it is crucial to transform the act of 'playing a game' into the 'use of proprietary software' – an activity regulated by copyright. This in part explains the omnipresence of law and legal concepts throughout the text of the typical triple A EULA. In essence, the power of the rightsholder to define the user is rooted in a claim to ownership of the underlying software, which is legitimated with reference to the legal regime of IP, and particularly copyright. This is achieved through intertextual reference to the law and the adoption of tropes from the legal genre of writing. This is an example of power *behind* discourse, as copyright is used as a badge of authority, which is both real in the sense it is generated from the institutionally and socially backed power of copyright law, but also constructed through a re-packaging of this in the EULA. The utilisation of the law is thus both functional and conceptual, in the sense that it achieves the desired outcome of establishing a legal relationship, whilst at the same time more conceptually framing the user as a weaker object within this.

Power dynamics have also shifted as the discursive form of the EULA has shifted. The sociocultural significance of this evolution is more important when framed within the historical context outlined in Chapter 2. Where the creator was once in a weakened, vulnerable position before software was recognised as an object of copyright protection, there was a more explicit need for performative consent to the EULA. Achieving that consent by constructing the user as a rational legal party was important, through a sign and return mechanism. Now, the rightsholder has become bolstered by the generative power of the law, and the user is by default in a weaker

position. As a result, the construction of the user as a consenting legal party is less important, hence the change in form to clickthrough and assent through the game interface. The legality implied in the text has thus outgrown the discursive form it has evolved into. The user has no opportunity to engage with or shape this discourse but is instead a passive recipient of it. Returning to the theoretical underpinnings of CDA, common sense is useful as an explanatory factor here, having underpinnings of coercion, consent, and hegemony; users may balk at the terms of the EULA, but ultimately agree to them in order to participate in the game world. This routine acceptance has become normalised, and ultimately disguised in the discursive dimension.

The grammatical features in combination, suggests that the position of the user in the EULA is *mandatory*, compelled as it is by the authority of the rightsholder, whose position is instead made entirely *conditional* and can be occasioned by a range of factors. These positions are mimicked in copyright; the rightsholder's position is conditional in the sense that they are initially divested with exclusivity to which they may, or may not, choose to forsake. Similarly in the EULA, the rightsholder 'may', 'might' and 'could', linking itself explicitly with the discretionary execution of rights. The user's ambit is limited to a pre-set range of situational conditions, they 'will', 'shall' and 'must' much like the situational conditions of the copyright exception system. The EULA, by positioning itself as speaking from a place of power, legitimated by law, situates itself as having the mandate to determine the concept of the user. By contrast, the user's baseline access to this discourse is discouraged both technically at the discursive dimension, by transforming the EULA into a unilateral, non-negotiable offering within the game interface upon installation, and through the adoption of the legal genre with (often impenetrable) specialist language. Given the specialist nature of the law, to invoke this specialist language is to create a social distancing effect between the copyright owner and user; unless the user can engage with this language, the former is utilising specialised knowledge to exercise power over the other. Indeed, the ongoing use of elements specific to the legal genre, particularly the choice to use dense, technical language, is striking considering the mounting evidence that this is indecipherable to the 'average' lay user.[479] The user is, by design, excluded from being a *reader* of this discourse, and is instead a *recipient* of it. Instead, the ongoing relevance of the legal genre in the EULA may be to situate the user in a format for litigation. If 'lawful' use can be determined by contract (see Chapter 1), the EULA adopting the legal genre of discourse can be explained. Even if the person being shaped by the discourse is the user, the intended reader of the EULA is more likely to be a lawyer. Perhaps paradoxically in the

[479] Fiesler, Lampe, and Bruckman (n207).

exercise of attempting to understand the construction of the user, the ultimate result is that the discourse tells us more about the person behind the EULA: the rightsholder themselves, whose ideological position on copyright bleeds into the textual characteristics of the EULA.

For the triple A rightsholder, the dominant discourse of their EULAs ideologically feeds into, and feeds from, an exclusive rights-based system to which all subsequent use is conditioned upon and subject to the authority granted to the rightsholder. The rightsholder is authoritative because of the legitimacy they claim through the law, an institution with significant power and societal backing; the user, by contrast, both textually and discursively, is a comparatively far weaker object. These unbalanced power relations and structural inequities are present even in an industry where this wouldn't be anticipated: eSports. In eSports, with the potential for a professional user, this does not seemingly change the relatively weak position of the user; their ambit is still made mandatory by the authority of the rightsholder. Rarely are they subject to a differentiated discourse.

However, the ideology of games-as-proprietary-software is not omnipresent throughout the dataset of EULAs. Instead, the 'indie effect' offers an interesting window into a critique of the dominant, triple A discourse. Whereas the triple A EULA is a very literal exertion of power that relies heavily on the symbolic backing of copyright, indie games demonstrate more of an ideological struggle in their invocation of IP. In the textual dimension, they are differentiated through their colloquial and conversational approach. In the discursive dimension, the use of in-game hypermediacy recognises the ludic nature of games; the user is here to play, rather than act as a legal subject. Subsequently, the EULA becomes a paratext to the game itself.

Importantly, there is the capacity for an Occam's razor argument in explaining the indie effect: one might argue that, as indie companies do not have the same financial support systems, there is simply not enough money to invest in the legal advice to create a 'proper' EULA akin to the triple A publishers, who tend to have larger budgets. However, this argument unconvincing, not least because copy-and-paste boilerplate EULA templates are freely available online.[480] There is no suggestion that indie companies that use more informal ways of writing invest less in the EULA *per se*; *Superhot*, for example, arguably invests *more* by creating two parallel versions. One could also argue that for indie companies, having less financial support for advertisements and promotions, rely more on the value of being seen as socially responsible, rather than as having a draconian

[480] TermsFeed, 'EULA Generator' (*TermsFeed*, date unknown) <https://www.termsfeed.com/eula-generator/> accessed 16 September 2021.

approach to protecting their copyright. *Minecraft* is both a good and bad example of this given its many variables. Minecraft's target demographic skews towards a younger audience and is also increasingly used in educational settings.[481] As such, one could argue, it is simply not appropriate to engage with the same level of legal formality with a nine-year-old in primary school, thus justifying the EULAs more informal approach. Yet, it seems implausible that Mojang, in being socially responsible, would anticipate that a nine-year-old, or their teacher, would read the EULA regardless.[482] Improved reader-friendliness of the EULA is thus not necessarily responsive to the likely audience.

Instead, the indie rejection of the dominant triple A discourse is explained in part due to the sociocultural context in which indie games have been formed. Historically, the rise of indie game development was in opposition to a perceived lack of innovation in the mainstream games industry, and particularly the corporate culture of triple A publishers, which tended to re-invest only in limited, repetitive 'crowd-pleasing' genres.[483] Such genres have historically been commodified under branded, IP-intensive series, such as *Call of Duty* (Activision),[484] *Resident Evil* (Capcom),[485] or *Halo* (Microsoft)[486] which, whilst certainly valuable, have contributed to criticisms of market stagnation in the industry and a lack of creativity.[487] These profit-driven incentives to re-invest only in well-known, branded series, is oppositional to the indie mentality of original creativity and experimentation. Indeed, many of the games surveyed in this dataset share little to no ludic similarities to the triple A titles, simplistically illustrated in a comparison of screenshots in Figure 15. Whereas triple A titles mainly comprise the 'first person shooter' genre, mainly differentiated on different graphical styles, indie titles are much more varied, ranging from the time-based mechanics of *Superhot*, to the hand-drawn, stylised arcade format of *Cuphead*.

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[481] See Mojang, 'Minecraft: Education Edition' (*Mojang*, date unknown) <https://education.minecraft.net/en-us/homepage> accessed 16 September 2021.
[482] See n12.
[483] Dutton G, 'What is Indie?' (*Eurogamer*, 18 April 2012) <https://www.eurogamer.net/articles/2012-04-16-what-is-indie> accessed 16 September 2021.
[484] See Blundell (n374)
[485] See Kadoi and Anpo (n307)
[486] Longo T, Halo 5: Guardians (Microsoft Studios 2015)
[487] GameCentral, 'Triple-A games are killing gaming' (*Metro*, 5 April 2020) <https://metro.co.uk/2020/04/05/triple-games-killing-gaming-readers-feature-12506993/> accessed 16 September 2021.



Figure 15: Illustrative game screenshots: Triple A titles (left column - top to bottom) Halo 5 (Microsoft), Call of Duty Black Ops 4 (Activision), Borderlands 2 (Take 2); Indie titles (right column – top to bottom) Superhot (Superhot Team), Undertale (Toby Fox), Cuphead (Studio MDHR)

For the indie company, the repetition of genres in triple A titles is therefore in part due to the commodification of the branded *series*, which, far from copyright's intended purpose to stimulate creativity, ironically results in stagnation. Opposition to commodification in the corporate culture of triple A therefore also bleeds through to oppositional indie opinions on copyright more generally. Markus 'Notch' Persson, creator of *Minecraft*, has previously claimed that 'piracy isn't theft' and 'if you steal a car, the original is lost. If you steal a game, there are simply more of them in the world.'[488] Toby Fox, creator of *Deltarune*, has distributed this game for free.[489] Others, such as the Superhot Team, relied on crowd-funding to develop their game, supported by the same

[488] Purchese R, 'Minecraft man: "Piracy is not a theft"' (*Eurogamer*, 3 March 2011) <https://www.eurogamer.net/articles/2011-03-03-minecraft-man-piracy-is-not-a-theft> accessed 16 September 2021.

[489] Fox T, *Deltarune* (*Deltarune*, date unknown) <https://www.deltarune.com> accessed 16 September 2021.

users who would go on to play it.[490] The indie origins of a game thus indicate an oppositional stance to the triple A corporate culture; for the indie company, engagement with copyright is more analogous to this profit-driven creativity, and greed at the expense of artistic freedom. This ideological position has a direct effect on the textual and discursive features of the indie EULA that reject the dominant discourse of triple A. Indie companies align themselves as sharing the same ideological space as the user, who is also conceptualised as being oppositional to this dominant discourse (recall: 'We don't like reading license documents any more than you do').[491] Ironically, triple A publishers must ultimately also support this conceptualisation, that the user is vaguely oppositional to copyright, but the manner of treatment results in copyright maximalism rather than minimalism. For the triple A publisher, the user is framed more as an opponent, with a resultingly stronger and more punitive source of power: an exact iteration of what is owned, what can and cannot be done, and with corresponding penalties for noncompliance.

For this reason, where the triple A publisher must insist that the recipient of the EULA is a *user of proprietary software*, for the indie company, the user is instead a *player of a game*. As a player of a ludic medium, copyright is not implicated nor viewed as necessary in this relationship. Instead, through hypermediacy, the indie company transforms the EULA into a broader element of play and refuses for power relations to be enacted through a ludic medium.

In conclusion, explaining the significance of the Copyright theme in the sociocultural dimension, the shared regulatory practice of copyright, manifested via licensing agreements, can be reconfigured to align with ideological trajectories of specific communities, whether indie or triple A. The textual and discursive features of the EULA are responsive to the material relations of rightsholders at industry level, and thus engagement with copyright is explained more readily by their corporate cultures. For the triple A publisher, the ideology of ownership sees the propertyless user as conceptually weak, something whose behaviour can be controlled and ultimately constrained, for which power must be derived in the text. For the indie rightsholder, the ideology of artistic freedom, and opposition to the commodification of this, results in a conceptualisation of the user as a *player* playing a game, rather than a weak object of a legal relationship. For them, power cannot legitimately be enacted through a ludic medium, and resultingly the EULA is essentially transformed into an extension of the game itself. Yet, for both the indie and triple A

[490] Superhot Team, 'Superhot' (*Kickstarter*, 2015) <https://www.kickstarter.com/projects/375798653/superhot> accessed 16 September 2021.
[491] Mojang, 'Minecraft End User License Agreement' (Appendix 2).

rightsholder, whilst ultimately arriving at different conclusions on how to regulate the user, the underlying assumption is that the user must be someone who is vaguely oppositional to the regime of copyright: either a threat to be constrained, or someone who does not want to engage with proprietary, copyrighted software at all, but rather to simply play a game.

Chapter 7: Consumption

The complexities of usership are often reduced to the simple fact that 'user' is a designation for someone who does not own the copyright of the work they are using, even if they own a copy of that work.[492] When a user is described as not being an 'owner' of that thing, it is often assumed to be a simple statement of this fact, or that they are a licensee in an ongoing relationship with a rightsholder, rather than a consumer of a product. User then, it is supposed, must be a purposeful differentiation from the 'consumer', being an entity that can own a *copy* of a work, if not the copy*right*.

Unlike the Copyright and Creativity themes, where the conceptualisation of the user varies considerably, the Consumption theme is highly homogeneous. The construction of the user as a non-owner is so strongly and consistently expressed across all EULAs that there is little room for debate about the intention behind the discourse. Section 1 illustrates the presence of a strong, textual construction of the user as a non-consumer and its mirror image as non-reseller: in combination, and emphatically, the user is conceptualised as a non-owner. These textual constructions are so strong and consistent that variations in the discursive dimension, illustrated in Section 2, do not change this conceptualisation. The consistency of this discourse across textual and consumptive dimensions is explained by a homogenous agreement of opinion in the sociocultural dimension in Section 3. Rather than being opposed to consumption as such, resale is in fact conceptualised as the 'imaginary dragon' of the games industry, which must be slayed to ensure its ongoing survival. Thus, whilst the user may have consumptive qualities in the EULA, they are more accurately conceptualised in this theme as a non-reseller.

1. Textual dimension

The conceptualisation of the user in the textual dimension of the Consumption theme is strongly expressed through two related and complementary constructions: first, that the user is a non-owner, in the sense that nothing is transferred to them (Section 1.1); and second, that the user is a non-reseller, in the sense that nothing can subsequently be transferred by them (Section 1.2). This conceptualisation of the user is then strongly ensured by the addition of a moral deterrent in the textual discourse, which likens the act of reselling to piracy (Section 1.3).

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[492] Perzanowski and Schultz (n197).

1.1 Construction of the user as non-owner

The user is explicitly framed as a non-owner (that is non-owner of a *copy* of a work), and thus non-consumer within the text of the EULA. In the true spirit of the user being granted a *licence*, this condition of non-ownership is often expressed explicitly, and early in the EULA, taking precedence within the text. Notably, in the case of both Nintendo[493] and Psyonix,[494] it is in fact the very first sentence. Often, this statement of non-ownership is capitalised and/or emboldened to denote emphasis: the user has 'NO OWNERSHIP OR OTHER PROPERTY INTEREST'[495] in the game, and in any case '**THIS SOFTWARE IS LICENSED, NOT SOLD**'.[496] These techniques of ensuring prominence of the designation in the text (primacy, capitalisation, emboldening) suggests that non-ownership is an important construction of the user. The EULA presents the retention of ownership and refusal of transfer as a statement of fact, precluding competing conceptualisations of the user as, e.g., a consumer, without further consideration. From the outset, the user is therefore constructed as being allocated a series of permissions, rather than having any property interests or ownership over that particular copy of a game.

Claims and statements of non-ownership are made repeatedly within the EULA, in different iterations but having the same functional purpose. Often, this extends into other aspects of game content creating a tiered effect: the game itself is not sold, and therefore neither is anything within it. For example, the Riot Games EULA provides a simple, plain-English explanation of the non-ownership status of virtual goods: '[d]o I "own" the Virtual Goods I unlock? (No. What you "unlock" is not the virtual good itself, but rather, a qualified right to access it in the Game.)'.[497] This is then immediately re-iterated in an expanded format:

> Once again: I don't *own* these Virtual Goods? ("No!" shouted all the lawyers.) **NOTWITHSTANDING ANYTHING TO THE CONTRARY HEREIN, YOU ACKNOWLEDGE AND AGREE THAT YOU SHALL HAVE NO OWNERSHIP OR OTHER PROPERTY INTEREST IN YOUR ACCOUNT, AND THAT ALL RIGHTS IN AND TO YOUR ACCOUNT ARE AND SHALL FOREVER BE OWNED BY AND INURE TO THE BENEFIT OF RIOT**

493 Nintendo, 'End User License Agreement' (Appendix 2).
494 Psyonix, 'End User License Agreement' (Appendix 2).
495 Activision, 'Terms of Use' (Appendix 2).
496 Psyonix, 'End User License Agreement' (Appendix 2).
497 Riot Games, 'League of Legends Terms of Use' (Appendix 2).

> **GAMES. YOU FURTHER ACKNOWLEDGE AND AGREE THAT YOU HAVE NO CLAIM, RIGHT, TITLE, OWNERSHIP, OR OTHER PROPRIETARY INTEREST IN THE GAME CONTENT THAT YOU UNLOCK OR ACCUMULATE, REGARDLESS OF ANY CONSIDERATION OFFERED OR PAID IN EXCHANGE FOR RIOT POINTS OR VIRTUAL GOODS.**[498]

The importance of non-ownership is doubly emphasised here through capitalisation and emboldening of the statement. The repetition of this string of words immediately after a plain-English explanation suggests that this particular iteration has a legally functional, quasi-magical quality, that gives them legal effect. As part of the legal genre of discourse (detailed in Chapter 6), this text must be partially functional to achieve a specific purpose, and to be so, it must be expressed in a particular way such that plain English alone is seemingly not satisfactory, or possibly legally risky in isolation.

This string of magical words may also be functional in that it is a response to, what is fundamentally, a confusing situation. The game, alongside its virtual goods, such as in-game loot crates or skins, are typically advertised as being 'sold' to the user. Such virtual goods may also have a monetary value separate from the currency of the game; they have been purchased, and are possessed by the user, in exchange for 'real' money. Yet, they are not in fact 'owned'. Separating these concepts is conceptually challenging, and therefore justifies its repetition within the EULA:

> Notwithstanding any use of the terms "purchase", "buy", "sell", "order" or the like, Virtual Currency and Virtual Goods you obtain using Virtual Currency are licensed, not sold, and you do not obtain title to or any ownership interest in any Virtual Currency or Virtual Goods.[499]

The conceptual vocabulary to describe the differences between ownership and usership become strained as the EULA explicitly outlines contradictory definitions. These words do not mean what the user thinks they mean; the severability between buying and owning has not yet been firmly established in their mind. Hence, it is stressed explicitly in the text of the EULA. This suggests the status of the user is difficult to pinpoint on the spectrum between usership and ownership, but rather it is defined by what it is not: a buyer, a purchaser, or a consumer.

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[498] ibid.
[499] Rockstar Games, 'Limited Software Warranty and License Agreement' (Appendix 2).

The only suggestion of a more affirmative and explicit conceptualisation of the user's status is tied to the distinctly *personal* right to the *use* of the game. Complementary to this, the user is often limited to non-commercial uses of a game for 'enjoyment'[500] and 'entertainment purposes'.[501] The user is assumed to be a natural person, making use of a game for play. 'Play' is in fact a common condition of the EULA. Licences are given 'for the sole purpose of *playing* the game',[502] or granting a 'personal right to play'.[503] Others conceptualise them as two different permissions altogether; the user may 'play *and* use [the game]' [emphasis added].[504] In another curious example from CD Projekt's EULA, the contrast between the informal 'Quick Summary' and adjacent legally binding text, illustrated in Table 5, reveal a hidden quality about the connection between ownership of a game and 'fun'.

Table 5: Comparison of textual approaches: CD Projekt Red 'Full text' vs 'Quick Summary'

Full text	**Quick summary**
We (meaning CD PROJEKT RED) give you the personal right (called a 'licence' legally) to download, install and play The Witcher 3: Wild Hunt on your personal computer as long as you follow these rules. This licence is for your personal use only (so you can't give a sublicense to someone else) and doesn't give you ownership rights. At all times we continue to own all of The Witcher 3: Wild Hunt, all in-game content, any updates or additional content for them, manuals or other materials about them and the intellectual property rights in them, including	We grant you the right to play The Witcher 3: Wild Hunt and we sincerely hope you will enjoy it. We spent over 3 long years working on it, so let us add that it is our creation and remains our ownership. This will not limit you in having fun with it, will it? ;)[506]

[500] CD Projekt Red, 'User Agreement' (Appendix 2).
[501] Cygames, 'Terms of Service Agreement' (Appendix 2).
[502] Bethesda, 'End User License Agreement' (Appendix 2) and Wizards of the Coast, 'Magic Online End User License Agreement' (Appendix 2).
[503] CD Projekt Red, 'User Agreement' (Appendix 2).
[504] Mojang, 'Minecraft End User License Agreement' (Appendix 2).
[506] ibid.

all copyright, trademarks, patents and legal things like that […][505]	

In the Quick Summary, the more playful iteration of this assertion of ownership reveals that the user's ability to have 'fun' in fact justifies the rightsholder's assertion of ownership. The EULA cages this restriction with a rhetorical question ('will it?') and uses a winking emoticon (notably, the only emoticon to appear in this dataset of EULAs) which, whilst not strictly text, can be used to 'hint at desirable outcomes or to prod someone to take a particular action'.[507] As the user is an actor engaged in 'fun', they are therefore also idealised as an entity who does not *want* to be an owner. According to the EULA, 'play' is not compatible with the comparable seriousness and formality of ownership.

There is no legal definition of what it means to 'enjoy', 'entertain', have 'fun', or 'play' as distinct from use. But the conscious choice to differentiate between the two in the textual dimension is intriguing. Is this difference significant? 'Use', for example, is more utilitarian in the sense that it tends to be a wider grant in the pursuit of an interaction with a work. If 'play', at its plain meaning, implies only using a game for frivolity or personal enjoyment, does this preclude using the game e.g., for research purposes, or to monetise as a hobby (e.g., through streaming)? Combined with the explicit non-commercial designation of the user (explored more fully in Chapter 8), this limitation seems plausible. In such a case, the user is more explicitly limited as a *player* of the game than a user of a work. This is a specific interaction, rather than the broader designation of what 'use' encompasses. Curiously, unlike in the Copyright theme, where the indie designation of the user as a player is a means of rejecting a heavy-handed approach to IP, in the Consumption theme 'play' is used as a limiter to describe the quality of the interactions a user can have with a game. It is a personal right to enjoy and experience play *within* the limited space of the game, but not any use outwith it.

1.2 Construction of the user as non-reseller

The second component in textually constructing non-ownership is the prevention of downstream transfer. This is the natural corollary of the first component of non-transfer, in that the user cannot

[505] CD Projekt Red, 'User Agreement' (Appendix 2).
[507] Dictionary.com, 'Winking Face emoji' (*Dictionary.com*, date unknown) <https://www.dictionary.com/e/emoji/winking-face-emoji/> accessed 16 September 2021.

give away what they do not own (*nemo dat quod non habet*). Often, this restriction is buried within a list of prohibited activities such that it does not take the same precedence e.g., of the early and stressed format of non-ownership:

> You agree that you will not […] License, sublicense, transfer, assign, reproduce, duplicate, copy, sell, resell, distribute or otherwise exploit for commercial purposes, any portion of, use of or access to the Application.[508]

Instead, the effect is more subtle. In combination with other broader restrictions on distribution and sublicensing, the intention is that the user should be the end point of the transactional chain. According to the EULA, the game, once purchased, should be retained by the user indefinitely. The EULA obliges, for example, that '[y]ou must be an end user to purchase products from the Store. Resellers are not eligible to purchase'.[509] Presented again as fact, the EULA precludes the possibility of 'resellers' to obtain a game in the first instance.[510] It is interesting to observe that, whilst the traditional distinction between end user and user has broken down over the years (noted in Chapter 2), it is resurrected here as a meaningful distinction between those who resell, and those who retain a game indefinitely.

The homogenous characteristic of this construction is such that, with only one exception, each EULA examined contains a broad and explicit prohibition of resale of a game. The exception, CD Projekt Red, does not exactly list resale as an affirmative right of the user, but rather it is an activity not explicitly prohibited by the EULA in the same list of prohibitions: '[d]on't copy, rent, lend, lease, sublicense, distribute, publicly display any of CD PROJEKT RED games or services'.[511] Only two other EULAs provide an *exception* to the broad and explicit prohibition of resale, which is conceptualised differently depending on whether the game exists in a physical or digital carrier. Whereas the principle of digital equivalency should in theory lead to the same treatment of these two mediums,[512] the rules for the physical and digital user are different in the EULA:

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[508] Konami, 'Terms of Use: Metal Gear Solid V: The Phantom Pain' (Appendix 2).
[509] Microsoft, 'Terms of Sale' (Appendix 2).
[510] Noting that it is unclear in this example whether this restriction may be referring to e.g., purchase of a game by a retailer (commercial actor rather than reseller as natural person(s)), but there is no compelling reason to infer this from the text.
[511] CD Projekt Red, 'User Agreement' (Appendix 2).
[512] Reiterated in relation to exhaustion in *UsedSoft GmbH v Oracle International Corp* (n199), para 61.

> You may permanently transfer all of your rights and obligations under this Agreement to another person only by (i) where applicable, physically transferring the original media (e.g., the CDROM or DVD you purchased), all original packaging, and all User Manual(s) and Documentation distributed with the Software Product[513]

> […] you may permanently transfer all of your rights and obligations under the License to another person for non-commercial use by physically transferring the original Game Software media (e.g., the CD-ROM or DVD you purchased)…[514]

Whilst only evidenced in two agreements, the existence of this exception suggests that the connection to a physical disk results in a different user, who has a legitimate entitlement to resell, as opposed to their digital counterparts. A user's connection to the physical chattel (discussed in Chapter 2) thus remains important. Only notably on one occasion does an EULA (Sony) explicitly prohibit both physical and digital resale:

> You must not resell either Disc-based Software or Digital Software, unless expressly authorised by us and, if the publisher is another company, additionally by the publisher[515]

For the most part however, the distinction between physical and digital carriers are not explicitly outlined by the EULA. Instead, the broad restrictions on resale can be read to indiscriminately apply to both formats. Nintendo, for example, have a broad prohibition on the transfer of 'Game Software', which it defines as 'the game you have just purchased',[516] regardless of whether physical or digital:

> NINTENDO does not recognize the transfer of the Game Software. Therefore, you may not give, purchase, sell, bargain, barter, market, trade, offer for sale, sell, license, assign or otherwise divest your rights, responsibilities or obligations under the Agreement, either in whole or in part, without the prior written consent of NINTENDO. Any attempt to do so shall be void and of no effect.[517]

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513 Hi-Rez, 'End User License Agreement' (Appendix 2).
514 PUB G, 'End-User License Agreement' (Appendix 2).
515 Sony, 'Software Usage Terms' (Appendix 2).
516 Nintendo, 'End User License Agreement' (Appendix 2).
517 ibid.

The result in this example is paradoxical: on the one hand, by the EULAs own definition, the game has been purchased; on the other, there is no recognition of any transfer. Instead, this restriction creates an artificial entanglement between the non-ownership construction of the user (Section 1.1) and their status as non-reseller. The interlinkage ('Therefore') between non-owner and non-reseller concepts reveals that the purpose of creating the initial non-owner status is only in furtherance of the, more extensive and purposeful, restrictions on resale. Iterated here in several variations, the user may not 'sell' (repeated twice), 'give', 'offer for sale', 'market', 'licence', 'assign' or 'otherwise divest [their] rights, responsibilities or obligations' under the catch-all clause. These restrictions go beyond mere prohibition, and instead the EULA refuses the reality of these transactions: it simply does not recognise any such transaction and declares them, factually, to be 'void and of no effect'. The power conveyed *through* this discourse is therefore absolute as it obliges the user to reject the evidence of their own reality: the game they have just purchased has not been transferred, and anything they have done to subsequently transfer it simply does not exist.

It is worthwhile pausing here to consider that this strong exertion of power *through* discourse is somewhat indicative of the absence of power *behind* it. As illustrated in the Copyright theme, the EULA will readily engage with the copyright concepts that it finds helpful to bolster its own position, whilst obscuring the concepts that apply to the user. Extending this to the question of ownership and resale, in the EU, the principle of exhaustion applies both to physical carriers (e.g. disks) and pure digital software,[518] but does not apply to other types of audio-visual digital works,[519] including digital games (which are usually characterised as a hybrid of both software *and* audio-visual components).[520] Thus, there is *less* (legal) power behind the claim that a user does not own a physical copy of a game, and *more* (legal) power behind the claim that a user does not own a digital copy of a game. Much as with the techniques employed by IBM in 1969 (Chapter 2), when faced with ongoing legal uncertainty, the EULA attempts to cut through the gordian knot by creating a strong conceptualisation of the user as a non-reseller in the text, regardless of whether the game is distributed physically or digitally, and with or without the institutional power of law behind it. Explanations for this tension between doctrine and discourse are illustrated further in Section 3 below, but are worth signposting at this early stage in the analysis given their strong expression in the textual dimension.

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518 *UsedSoft GmbH v Oracle International Corp* (n199).
519 *Nederlands Uitgeversverbond v TomKabinet* (n199).
520 Case C-355/12 *Nintendo Co Ltd v PC Box SRL* [2014] OJ C93/8 and Ramos (n222).

The strong conceptualisation of the user as a non-reseller extends also to the restrictions placed on virtual currency and virtual goods within the game (the aforementioned 'tiered' effect). Such goods 'are not redeemable for any sum of money or monetary value',[521] or are characterised as being 'non-commercial'.[522] Not only then are virtual goods tied to the idea of the user as the end point in the transactional chain, but more accurately, the user is prohibited from receiving any subsequent *income* for these goods after the transfer. The result is again paradoxical: whilst these goods are by their nature transactional, in the sense they have been offered by a company and subsequently bought, this does not extend to the user. Once virtual goods are associated with the user, they absorb into the concept of being personal, for private enjoyment and entertainment: specifically not for a monetary value. Again then, the designation of the user being invited to 'play' rather than 'use' is significant in the context of the Consumption theme as it situates the user as a distinctly non-commercial entity. The user is invited to play with the copies of virtual goods in games, but not to *use* the proprietary software that underlies them for its own benefit.

As a final remark, unlike the first theme on Copyright where there is a demonstrable 'indie effect' in the softening of the proprietary mindset towards copyright protection and enforcement, there is no such fragmentation at industry level when conceptualising the user as a non-reseller. The presence of this theme is consistent throughout the EULAs, regardless of rightsholder background context, or whether the rightsholder is a mainstream video games company or indie company. For example, the Superhot Team, who have been notable for taking a much more informal approach throughout the EULA (detailed in Chapter 6), have a more rigid, formalistic and explicit stance on resale from the outset: '[t]his copy of SUPERHOT […] is licensed and not sold.'[523] In contrast to the otherwise informal and friendly construction of this EULA, the authoritative formulation is reiterated again when preventing downstream transfer:

> Without first obtaining the express written consent of SUPERHOT Team, you may not assign your rights and obligations under this Agreement, or redistribute, encumber, sell, rent, lease, sublicense, or otherwise transfer your rights to the Software Product.[524]

Much of this example replicates the more restrictive legal tropes typical of the dominant triple A discourse explored in the Copyright theme and is not reflective of the indie ideology towards

[521] Rockstar Games, 'Limited Software Warranty and License Agreement' (Appendix 2).
[522] Konami, 'Terms of Use: Metal Gear Solid V: The Phantom Pain' (Appendix 2).
[523] Superhot Team, 'End User License Agreement' (Appendix 2).
[524] ibid.

copyright more generally. Instead, again, the control of the *copy* is conceptualised differently from the reliance on copy*right* for the indie company, making them severable: restrictions on what a user can do with the copy is a power that can be legitimately exerted, even in a ludic medium. With no notable indie effect, the consistency of this theme throughout the EULAs suggests that this conceptualisation of the user, as a non-reseller and non-owner, is the most textually homogeneous.

1.3 A moral deterrent: resale as piracy

The general construction of non-ownership, and related restrictions on resale, rental, lending etc. are justified in the EULA by positioning these activities as being closely associated with serious and unlawful acts, such as piracy and fraud. In doing so, the EULAs construct resale, as a lawful, but clearly undesirable behaviour, as being *factually* illegal. There are three notable examples of EULAs in which this manifests: Mojang, Microsoft and Nintendo.

The first example, Mojang's EULA, otherwise notable for its very permissive and anti-interventionist stance ('If you steal a game there are simply more of them in the world'),[525] explicitly prevents resale or rental of their game under a broad prohibition that can apply to both physical and digital copies. Being, at least historically, part of the indie genre of games, Mojang justify this position, rather than leaving it as a simple prohibition. The EULA explains that prevention of resale is 'important to help us stop piracy and fraud and to protect our Game.'[526] Prevention of resale is therefore presented as a natural corollary of preventing piracy and fraud, both serious and unlawful activities, and therefore a legitimate means of protecting the game based on this implied connection. In the context of an otherwise very permissible EULA, which takes a more relaxed approach to its copy*right* more generally, this restriction is notable for exhibiting a protectionist stance towards the actual *copy* of a game.

In the second example, the EULA for Microsoft games similarly equates the resale of gamertags, or purchases of games from 'unauthorised sellers', both of which are prohibited by the EULA, as being fraudulent, presented under the heading of 'fraud benefits no one'.[527] Again, this creates a close association between resale and deceptive, or unlawful behaviour. By constructing two separate groups, authorised and unauthorised sellers, by default, anyone who is restricted in their

[525] Purchese R (n488).
[526] Mojang, 'Minecraft End User License Agreement' (Appendix 2).
[527] Microsoft, 'Community Standards for Xbox' (Appendix 2).

entitlement to resale, including the user upon acquiescing to this EULA, is acting fraudulently. Microsoft are also notable for taking a strong stance on 'accounts-sharing' (i.e., the practice of using someone else's online account to access a game, similar to 'password sharing' on e.g., Netflix). These practices are described as 'not a victimless crime – it robs game providers of revenue that funds games and add-ons that people want to play'.[528] The emotive and violent language of 'robbery' creates a close association between the act of the user accessing another person's account and committing a crime.[529] Both the game creators (the 'victims') and the wider community (the 'people [that] want to play') are framed as the casualties in the act of sharing accounts, creating a double moral imperative to the user to remain as the transactional end point.

The third example, Nintendo, presents an interesting case study whereby the user is doubly conceptualised as both a non-owner *and* lawful acquirer, depending on the ultimate purpose of the text itself. In their EULA, Nintendo frames the user very explicitly as a licensee and non-owner, who is explicitly prohibited from resale. Indeed, the very first line of Nintendo's EULA reads 'THIS SOFTWARE IS LICENSED NOT SOLD',[530] the primacy and emphasis of which suggests this is an important and essential construction of the user. This protectionist stance is mirrored in their Anti-Piracy Programme, where users are urged to 'use caution when purchasing used games'.[531] Again, by tying resale under the heading of 'piracy' and 'caution', Nintendo create a close association between unlawful behaviour, danger, and the resale of used games. In a similar manner to Mojang and Microsoft, the user is first constructed as a non-owner and non-reseller, bolstered by a moral imperative associated with criminality.

However, this discourse changes in Nintendo's Anti-Piracy agreement, where users are instead framed as legitimate, lawful *owners* of copies, not licensees, in the 'battle'[532] against piracy. In the context of this battle, Nintendo claims that they 'depend on legitimate *sales* of their games… in order to survive' [emphasis added].[533] The user is thanked in this agreement for their lawful purchase. The result is of course contradictory; on the one hand, Nintendo emphasises in their EULA that their games were never sold in the first instance, but in the Anti-Piracy agreement, they are simultaneously reliant on legitimate sales of games, and recognise that the user has played

[528] ibid.
[529] Loughlan (n173).
[530] Nintendo, 'End User License Agreement' (Appendix 2).
[531] Nintendo, 'Anti-Piracy Programme' (Appendix 2).
[532] ibid, noting again the similarities to language of theft explored in Loughlan (n173).
[533] ibid.

a part in contributing to this. The construction of the user as a licensee or lawful owner is therefore strategic depending on the particular business imperative of the text. Where the transaction of licensing a game is concerned, the user is a non-owner, transactional end-point; where the company's 'survival' is concerned, the user is a valued owner of a Nintendo game in the 'battle' against piracy.

Throughout all these examples, concepts like piracy and fraud are closely aligned to resale. The overall effect and intention is to doubly deter the user from resale in conjunction with the more general prohibition and statement of non-sale through a moral deterrent. However, and notably, none of the EULAs offer further explanation about this connection. Unlike the legal tropes of 'if-then' explored in Chapter 6, resale has no corresponding enforcement mechanism. Rather, it is a subtle discouragement of the act by aligning it with criminality. In essence, this activity is listed under the heading of piracy and/or fraud, without further justification as to why the two are connected. The reader is instead left to infer this connection for themselves and draw their own conclusions as to why this is the case.

2. Discursive dimension

The text of the EULA insists that no ownership of the copy of a game is conferred on the user, and that because of this, no subsequent transfers of the game are permitted. Some EULAs stratify this restriction on the lines of physical or digital distribution, thus one might anticipate that this textual construction will change if the method of distribution for the game itself changes. However, despite substantial distributive variability in the dataset of EULAs, it is notable that regardless of the differences in distribution, this ultimately has no effect on the textual construction of non-ownership and non-resale. Whether the game is distributed physically, digitally, as a service or through a game key, the same textual narrative persists; nothing is transferred, and nothing can subsequently be transferred by the user.

Historically, games have been distributed in a physical chattel, such as a cartridge or disk (or earlier iterations in e.g., arcade coin-operated machines), which have been necessary to play or run the game via hardware (e.g., console or PC). Physical copies of a game can be purchased first or second-hand directly from the game publisher, or through third party retailers (e.g., in the UK:

Game, in the US: GameStop). However, the sale of physical games is undeniably in decline,[534] and whilst it is difficult to anticipate exactly which games in this dataset are more frequently consumed from the physical disk or the digital sale, digital consumption is undeniably more common.[535]

The games in this dataset are distributed in a variety of ways, but broadly can be grouped under three mediums: physical disks, digital downloads, and streaming. Games are rarely exclusive to one distributive medium, with the biggest exception being indie titles: from this dataset, *Undertale*, *Superhot*, *Cuphead* and *Outlast* are all digital exclusives.[536] Instead, most titles will rely on more than one method of distribution, and indeed, it is possible for all three to be made available to the user. For example, it is possible to buy Sony's *The Last of Us*[537] on a physical disk, via digital download on the PlayStation Store, or to stream as part of a subscription service on PlayStation Now. However, and regardless of the distribution method employed, the terms of access predicated in the text of the EULA do not change in response to this; or rather, regardless of the variety of methods employed in the discursive dimension, the textual dimension remains constant.

Yet, as illustrated in Section 1.2 in relation to the application of the exhaustion doctrine, the distributive medium of a game can still be crucial in determining whether one claims power *behind* discourse, with the institutional backing of law, or *through* it, by manufacturing its own power in the text. Copyright law does not bolster every claim to construct the user a non-owner and is more legally ambiguous where digital mediums are concerned.[538] As such, in the discursive dimension, it may be desirable to steer the user towards a digital medium, where there may be some valid claim to power *behind* discourse, with institutional backing of law. For example, in the latest generation of game consoles (on which many of the games in the dataset can be played),[539] both Microsoft (in respect of their Xbox Series X) and Sony (in respect of their PS5) now offer two alternative models of their consoles: one with a physical disk drive, the other without. The disk drive is effectively monetised as both consoles cost more to incorporate this feature. As such, without textually spelling it out, there is a deterrent effect at the discursive level, which aims to

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[534] Good OS, 'COVID-19 pandemic turns console gamers to digital sales in record numbers' (*Polygon*, 11 August 2020) <https://www.polygon.com/2020/8/11/21363951/video-game-sales-digital-online-xbox-one-ps4-publisher-figures-ea-activision-2k-games> accessed 16 September 2021.

[535] Notably, many indie titles are unlikely, if ever distributed through a physical disk, and are normally the exclusive remit of digital stores (e.g. Steam). For example, *Superhot* has no physical disk and is an exclusive digital download, and *Undertale* only has physical disks in very rare collectors' editions of the game.

[536] The lack of physical chattel for indie games is a noted hallmark of the industry (see Dutton (n483)).

[537] Straley B and Druckmann N, *The Last of Us* (Sony Computer Entertainment 2013)

[538] See n199.

[539] All titles are available for next generation consoles through backwards compatibility or remaster, with the exceptions of: *Arena of Valor*, *Dota 2*, *League of Legends*, *Shadowverse* and *Starcraft II* (all being PC exclusives).

cement the user as a non-owner and non-reseller by physically removing any lingering problematic physical chattels in the method of distribution. By forcing a movement towards all-digital distribution of games, this can be read as intent to claim power *behind* discourse: if the law also supports the prevention of reselling digital copies of games, and this is also the desire of the rightsholder as evidenced in the text, forcing digital distribution models at the discursive level is strategically significant. Conceptualising the user as a non-owner is thus explicit in the textual dimension, but more subtly enforced in the discursive.

For games which are bought for a one-off fee in return for permanent possession, the above explanation is plausible (that the push to all-digital distribution at the discursive level is strategic in achieving a particular ideology or construction of the user as non-owner). However, and alternatively, stronger prohibitions on resale may correlate with newer methods of distribution which more explicitly do not confer any ownership rights, such as subscription services. Indeed, some of the games in this dataset are accounts-based and determined through ongoing membership of a service, rather than as a game purchased in return for a one-off fee to permanently possess. Valve for example, exclusively release games on the subscription and accounts-based platform, Steam. Free-to-play titles, such as *Fortnite*, add another complicating vector as they are in fact never purchased in the first instance (though may include subsequent micro-transactions for virtual goods).[540] The use of such games is therefore more akin to a service, and the accessing of an online account rather than the purchase of a copy of a game as a product.[541] Restrictions on ownership and resale in such cases are therefore more accurately understood as restrictions on the ownership or resale of a personal account, tied to a specific user, than a singular game as such. This changes the context of the distributive mechanism because there is less slipperiness around the conceptualisation of sale and subsequent possession of the copy of a game: it is more apparently 'use' in the truest sense, and the user more apparently the recipient of a service than an owner. Thus, the more explicit discursive framing of the game as a service legitimates the textual construction of the user as a non-owner.

However, in illustrating the variety of ways in which games can be distributed at the discursive level, the key conclusion from this analysis is that, regardless of the physical or digital character of the work, the textual construction of the user does not change. The most common textual constructions of the user as non-owner and non-reseller are drafted so broadly as to apply to *all*

[540] Subject of ongoing litigation in *Epic Games Inc v Apple Inc* 493 F.Supp. 3d 817.
[541] Perzanowski and Schultz (n197).

distributive types. Thus, whilst there are some efforts in the discursive dimension to drive users towards an all-digital distribution system and claim power *behind* discourse by aligning itself with the law, this is not as critical as the power claimed *through* the discourse in the textual dimension that insists the user is, in any case, a non-owner and non-reseller.

3. Sociocultural dimension

Consumption is the most homogenous theme throughout the EULA discourse. Textually, the construction of the user as a non-owner and non-reseller does not alter regardless of the background context of the rightsholder, or whether the distribution format changes substantially. This is an example of power *through* discourse, because this construction is exclusively achieved by the text, rather than relying on the institutionally backed power of the law (as is the case in asserting ownership through the law as detailed in the Copyright theme). Whereas physical resale of a lawfully acquired game is always, indisputably permitted given its tie to the physical chattel, it is consistently contracted out of. The law is not omitted, but deliberately subverted, and in fact inverted; resale is strategically framed as being unlawful and, by extension, the user as reseller. Resultingly, this conceptualisation of the user is artificial as it has seemingly no justification for this construction outside of the text itself.

Instead, framing the EULA as a 'licence to use' speaks directly to its historical origins, where the purpose was to convert a perceived sale into a licence, and to change the recipient from a consumer to a user with conditional access-based usage. Given this formulation is critical to the operation of the EULA, it is perhaps unsurprising that it continues to be a stable and consistent factor across the discourse today. As detailed by Perzanowski and Schultz, the ongoing use of this puzzling and contradictory construction may in fact be a poorly expressed statement of what is otherwise an obvious fact: the EULA does not grant the user any property rights over the copy*right* itself. [542] An optimistic speculation is that this is the intention of the expression, rather than to restrict the user's potential personal property rights in the *copy* of the game.

However, in the examination of video games and eSports, we see that this optimistic speculation is unlikely. Textually, the user is not merely a non-owner, which may be explained by the logic above, but also, very explicitly, a non-reseller, even of the physical chattel post-purchase. The

[542] ibid.

EULA is explicit in tying the latter factor as being associated with crime, creating not only a quasi-legal but also morally deterrent effect. The desired outcome suggests that the rightsholder should always have some ongoing right to control the individual *copy* of a game, not only the broader copy*right*. Resultingly the construction of the user suggests they must either indefinitely retain that individual copy or destroy it should they wish to be rid of it. But the user is always, emphatically, the end point in the transactional chain; in this sense, they may have consumptive qualities, but are not a consumer *per se*.

Whilst the conceptualisation of the user as non-owner is noted in many industries,[543] the emphasis on the corollary of non-resale is perhaps more peculiar to the gaming industry and bears further explanation. Whilst most other digital formats of copyrightable works will now prohibit resale, to more or less legal effect, it is not framed in the same way as it is here, closely tied with piracy, fraud and crime. There is no common-sense explanation as to why these two concepts are connected, or why resale is positioned as a harmful activity. Instead, the homogenous characteristic of this discourse must be explained with reference to the broader sociocultural context of the video games industry.

Unlike with other industries, rightsholders of games and eSports place less blame on piracy as an explanatory factor behind declining revenues.[544] Rather, blame has usually been placed on ongoing transactions post-legal purchase. As early as the 1980s, following a *de facto* legal ban in Japan, game rentals were perceived as the culprit of declining profits for the industry.[545] In perhaps a natural extension from this, the new proposed culprit for declining revenues is resale. Mainstream developers and game publishers have been openly oppositional to reselling of used games, citing the need to recoup increasing production costs through primary sales of a game,[546] and unfairness of resale given that games 'don't wear and tear'[547] or lose resale value in the same way as other mediums. The language surrounding this opposition can be quite emotive, with rightsholders

[543] ibid.
[544] Purchese R (n488).
[545] *Nintendo of America Inc v Blockbuster LLC* 746 F.2d 112.
[546] Game designer Bleszinksi as quoted in Cushing T, ;"Gears of War" Designer: Used Games Must Be Killed So Sustainable Development Can live' (*Techdirt,* 18 June 2013) <https://www.techdirt.com/articles/20130616/20142123500/games-war-designer-cliff-bleszinski-used-games-must-be-killed-order-unsustainable-aaa-development-to-live.shtml> accessed 16 September 2021.
[547] ibid.

describing the situation as 'disastrous',[548] and something that should be 'actively fought against'.[549] Others express hope that, given resale is relatively limited to physical exchanges, that digital distribution will 'stab used game market in the heart'.[550] At the centre of these concerns, the insinuation is that each resale of a game by a user is deprivation of rightsholder revenue: it is 'a critical situation, because people are selling multiple times intellectual property'.[551] From this statement, we see that the construction of the user as a non-reseller within the discourse is therefore not a statement of the obvious, that the user does not own the copyright of a game, nor a product of clumsy, over-broad drafting: rather, it is indeed much more explicitly the intention to retain ongoing control of the individual copy of a game.

Notably, the discourse in the sociocultural dimension of the gaming industry matches many of the discourses surrounding piracy and deprivation of revenue in other industries,[552] but instead the direction of the complaint is again altered towards resale. Unlike other aspects of the discourse, where indie developers differentiate themselves from the mainstream (as in the Copyright theme), where Consumption is concerned, even indie companies share this hostile sentiment towards resale. Indie companies mimic the dominant, triple A discourse claiming, for example, that the reselling of game keys is more harmful to them than piracy.[553] Such a perspective even from indie companies helps explain the homogeneity of the textual connections of resale to serious crimes such as piracy and fraud; because in this industry, reselling is perceived as the more serious, or at least equivalent offence:

> In a literal way, when you purchase a game used, you are not a customer […] If I am purchasing games in order to reward their creators, and to ensure that more of these ingenious contraptions are produced, I honestly can't figure out how buying a used game

[548] ISFE, 'French Ruling on Copyright flies in face of established EU law' (*ISFE*, 20 September 2019) <https://www.isfe.eu/news/french-ruling-on-copyright-exhaustion-flies-in-face-of-established-eu-law/> accessed 16 September 2021.
[549] Game developer Avellone as quoted in Yin-Poole W, 'Fallout: New Vegas dev hopes digital distribution "stabs used game market in the heart"' (*Eurogamer*, 13 December 2011) <https://www.eurogamer.net/articles/2011-12-13-fallout-new-vegas-dev-hopes-digital-distribution-stabs-used-game-market-in-the-heart> accessed 16 September 2021.
[550] ibid.
[551] Intat as quoted in Martin M, 'EA: Second-hand sales are a "critical situation"' (*Gamesindustrybiz*, 28 August 2008) <https://www.gamesindustry.biz/articles/ea-second-hand-sales-are-a-critical-situation> accessed 16 September 2021.
[552] Loughlan (n173).
[553] Kelion L, 'Pirate our games, don't buy them from key resellers, say indies' (*BBC News*, 8 July 2019) <https://www.bbc.co.uk/news/technology-48908726> accessed 16 September 2021.

> was any better than piracy. From the perspective of a developer, they are almost certainly synonymous.[554]

The responsibility to prevent this purported 'disastrous', and 'critical' piratical situation is therefore deflected onto the user via the EULA, who is given a moral imperative to act in a way that is desirable both for creators, and the broader gaming community. Strategically configuring the user as a non-reseller within the EULA therefore mimics the discourse in the sociocultural dimension and can be used to bolster and support it. In essence, it is not only a complaint that the act of reselling is unethical, but also a technicality that resale has never permitted in the first instance through the mechanism of contract, making its breach doubly unethical.

However, there is some limited suggestion that this strategic framing of non-ownership, and its corollary non-resale, is not necessarily a static designation even within the same EULA 'conversation'. Nintendo's Anti-Piracy statement transforms the user from a non-owner into a legitimate *consumer* when faced with the 'battle' against piracy. Thus, whilst the concept of user as non-owner is highly homogenous, it is not completely static, and can change depending on the particular business imperative of the rightsholder. In the case of Nintendo, where there is a need for morally deterring piratical acts, presenting the user as a welcomed, legitimate customer is perhaps more appealing than the (largely artificial) construct of the user as non-owner and heavily regulated non-reseller.

The malleability of this strategic framing of the user is best illustrated with reference to one of the stronger iterations of the resale restrictions discussed above: Sony's explicit prohibition of resale of *both* physical disks and digital copies of a game. The explicit prohibition of resale of physical disks is striking, not least due to its incompatibility with the principles of exhaustion.[555] What is more striking, is that Sony, quite famously, have previously and explicitly engaged with the malleability of the resale concept when the framing of the user as an owner of a copy was strategically beneficial.

Resale of games was a controversial topic during the so-called 'console wars' of 2012, being the competition between video game console manufacturers in trying to secure better sales of their

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[554] Holkins J and Krahulik M, 'Words and Their Meanings' (*Penny Arcade*, 25 August 2010) <https://www.penny-arcade.com/news/post/2010/8/25> accessed 16 September 2021.
[555] InfoSoc Directive, art 4(2).

new hardware upon their release. In this iteration of the console wars, the initial design of Microsoft's Xbox One caused widespread controversy due to its inclusion of restrictive digital rights management (DRM) technologies.[556] Amidst these controversial design choices, Microsoft gave third-party game publishers the ability to determine whether to block or restrict the resale, rental or lending, of used games.[557] In this model, physical game disks would only be a means of transferring the initial code onto the hard drive of the Xbox One, and thus was merely a means of installing a game, but was not necessary to run it. In this way, the physical copy of the disk was not tied to ownership of the centrally important game code, and by extension, neither was the possibility to resell or lend the game code without some technical interference with the code, rather than the disk. If a publisher elected to allow this code to be technically resold, or indeed borrowed by a friend of the initial user, additional fees would have to be paid upon the repurchase or replay directly to the game publisher. Therefore, whilst resale and lending were technically possible, it could be prohibited, or was otherwise heavily restricted subsequent to payment of additional fees. Essentially, Microsoft proposed to make real the textual reality of the transactional relationship between rightsholder and user: games had always been licensed, never sold, and users as licensees were only ever entitled to 'sublicence' where permitted. The new Xbox design merely offered a technological realisation of this fact.

These initial design proposals received resoundingly negative feedback and outcry from user communities,[558] with Microsoft's plans described as 'devastating to consumer rights'.[559] The negative response to Microsoft's controversial plan was subsequently leveraged by their main rivals in the console war: Sony, in their promotion of the PlayStation 4. The negative response to the Xbox One was such that Sony's branding strategy for their console became centred around 'not being Microsoft'. Indeed, one of their central claims was that the PlayStation 4 did not include any of the same technical restrictions on resale as the Xbox. During the unveiling of the PlayStation 4 at the gaming exhibition E3, Sony produced a 21-second long promotional 'Used Game

[556] The initial design included an 'always on' microphone system, persistent camera access, and the requirement for a persistent internet connection to permit a server 'check-in' every 24 hours, otherwise access to games would be disabled.
[557] 343 Industries, 'How Games Licensing Works on Xbox One' (*Xbox News*, 6 June 2013) <https://news.xbox.com/en-us/2013/06/06/license/> accessed 16 September 2021.
[558] Bramwell T, 'Microsoft kills game ownership and expects us to smile' (*Eurogamer*, 7 June 2013) <https://www.eurogamer.net/articles/2013-06-07-microsoft-kills-game-ownership-and-expects-us-to-smile> accessed 16 September 2021.
[559] ibid.

Instructional Video',[560] which simply shows someone handing a game to another person in order to transfer it (screenshot in Figure 16).

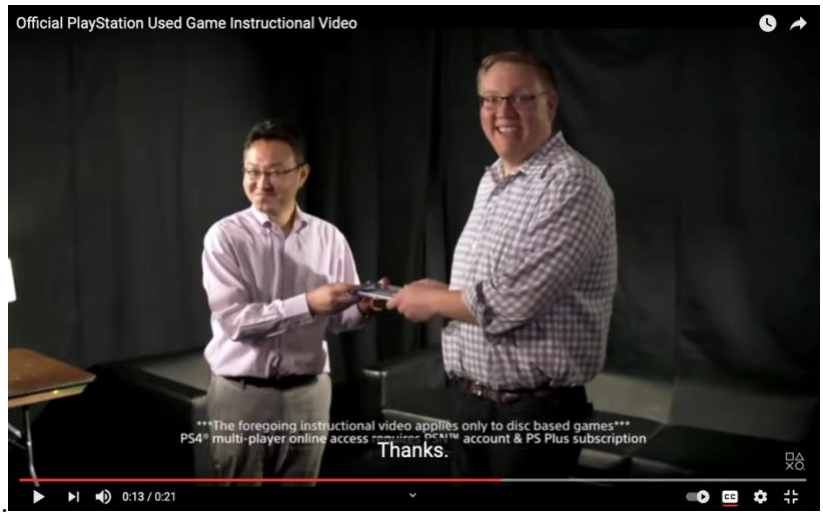


Figure 16: Screenshot of 'Official PlayStation Used Game Instructional Video'

In contrast to the controversial and complicated plans of Microsoft, Sony purports that lending and resale of physical disks is not only possible on the PlayStation 4, but easy to do, and encouraged. In mocking Microsoft's plan, Sony aligned themselves as being the more socially responsible company representing the interests of users, assuring them of their own personal property interest in the physical copy of a game. The outward discourse of mockery creates camaraderie with the user by suggesting that Sony agrees with their disapproval of Microsoft, and indeed that their allegiance is best placed with the PlayStation 4.

Yet, we also see that this veil of outward mockery disguises the reality behind which Sony operate. Sony in fact emulate the very system it seeks to mock in its own legal discourse through the EULA. As discussed above, the first clause of the Sony EULA states that 'this product is licensed to you not sold.' And indeed, it is the only EULA that makes a separate and conspicuous rule against the resale of physical disks, a critical component of the 'Used Game Instructional Video'. Thus, as with the Nintendo example, whilst the concept of the user as non-owner is very stable in the EULA, where there is a strategic business significance in presenting the user as a legitimate *consumer* of a copy of a game (e.g., to incentivise more primary sales of a console) this concept can become malleable. This is a powerful technique, and indeed, even after the forced redesign of the Xbox

560 PlayStation, 'Official PlayStation Used Game Instructional Video' (*YouTube*, 10 June 2013) <https://www.youtube.com/watch?v=kWSIFh8ICaA> accessed 16 September 2021.

One saw resale restrictions removed, Sony is still largely viewed as the winner of the previous console war,[561] and were praised for 'embracing consumer rights'.[562]

Summarising, with reference to the broader sociocultural context of the games industry, the user's status as non-owner is in fact not so significant as their conceptualisation as a *non-reseller*. Deprivation of ownership of the copy a game is a functional means of achieving the broader ideology of non-resale, and the desire to route all primary sales through the rightsholder, not the reseller (much like the original IBM EULA discussed in Chapter 2). In order to do so, the user must be conceptualised as the endpoint in the transactional chain; crucially, a non-reseller. Yet, this conceptualisation, whilst highly homogenous, is malleable and can be strategic. Outwardly, the user may be presented as a *consumer* where commercial interests are at stake – in the battle against piracy or the war against a competitor. Thus, and in keeping with the initial distinctions outlined in Chapter 1, the user is imagined as having consumptive *qualities*, but their labelling as a *consumer* is highly context dependent.

[561] 343 Industries, 'Your Feedback Matters – Update on Xbox One' (*Xbox News*, 19 June 2013) <https://news.xbox.com/en-us/2013/06/19/update/> accessed 16 September 2021.
[562] McShea T, 'Sony's Triumphant Night' (*Gamespot*, 10 June 2013) <https://www.gamespot.com/articles/sonys-triumphant-night/1100-6409715/> accessed 16 September 2021.

Chapter 8: Creativity

The creative user is not necessarily new, with the cycle of creativity and reuse having long been recognised in copyright theory.[563] However, amidst the emergence and buzz of participatory culture and Web 2.0, user creativity, in the form of UGC, is certainly more *prevalent* than it has ever been. Given this prevalence of UGC, the EULA has a new function in mediating the relationship between the rightsholder and the creative user. This chapter explores how the EULA draws a fine line between encouraging the kinds of creativity that can extend the value and duration of a game's life cycle, whilst also constraining the risk of a derivative commercial blockbuster that reroutes sales from the primary rightsholder.

Section 1 illustrates aspects of the creative user which are largely anticipated by previous literature: that they are a contradictory conceptualisation in copyright law (both creative but non-authorial), and a distinctly non-commercial entity, even in the professionalised eSports context (the amateur assumption of user having been previously discussed in Chapter 1). However, the most striking aspect of the textual analysis shows that the creative user is subject to a differentiated discourse than the passive user envisioned by e.g., the Consumption theme. In contrast to the authoritative and formalistic approach of the mainstream discourse, the creative user is addressed in a manner that is friendly, informal, polite, and encouraging. This differentiated textual approach is perhaps explained by a difference in methods of distribution in the discursive dimension of analysis at Section 2. In many cases, discourses surrounding UGC are not technically taking place within the one-way conversation of the EULA, but rather in separate UGC policies, or in more radical cases, social media. This may justify a distinct textual approach more appropriate to the genre of the medium being used. However, analysis in the sociocultural dimension in Section 3 suggests that this 'Occam's Razor' argument, that different mediums implicate different textual approaches, is unlikely. Instead, conceptualising the creative user as a friend disguises the contradictory, and controversial, nature of ongoing control of UGC, presenting it as common sensical when it is anything but.

1. Textual dimension

563 Fisher W, 'Theories of Intellectual Property' in Munzer SR, *New Essays in the Legal and Political Theory of Property* (Cambridge University Press 2001).

In the textual dimension of the Creativity theme, the user is initially conceptualised in a highly contradictory manner. The user is defined as a creative subject which is intrinsically linked to originality and uniqueness, but not authorship (Section 1.1). This highly contradictory nature, and its ability to instil ongoing control by the primary rightsholder, is disguised by the presence of a differentiated discourse aimed towards the creative user, which is informal, encouraging, and friendly (Section 1.2). As a final facet of creative usership, textual analysis confirms per the earlier literature surveyed in Chapter 1 that the user is conceptualised as a distinctly non-commercial entity (Section 1.3).

1.1 UGC: the defined object

As a preliminary issue, UGC is examined as a defined object within the text of the EULA. UGC in itself may be a contentious term[564] that, whilst widely accepted in copyright parlance, may not translate into the video game industry. The analysis below reveals a fragmented approach to conceptualising UGC in EULAs, which exists on a sliding scale between an all-encompassing designation for a myriad of derivative activities, or as a narrower formulation of user creativity.

The majority of EULAs define content created by users, either within or outwith the game, as 'User Generated Content',[565] or a variant thereof (e.g., as an acronym – UGC).[566] This is in keeping with the legal adoption of the same term and is the most neutral of the variants observed in this dataset. There is some implication of passivity: 'generated' suggests that a user's content is a by-product of a primary activity, rather than consciously created. By contrast, other EULAs which

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564 Barlow C, 'Selected Essays on Technology, Creativity, Copyright, and the Future of the Future' (Tachyon Publications 2008) 1:

> [T]he new meaning of the word "content" is plain wrong. In fact, it is intentionally wrong. It's a usage that only arose when the institutions that had fattened on their ability to bottle and distribute the genius of human expression began to realize that their containers were melting away, along with their reason to be in business. They started calling it content at exactly the time it ceased to be.

See also Burgess as quoted in Jenkins (n89):

> Let me say to begin with that I don't like the term user-generated content very much at all. First we're masses and now we're generators? Users isn't great either, but it's hard to think of a better term for the relationship it describes.

565 Valve, 'Steam Subscriber Agreement'; Riot Games, 'Legal Jibber Jabber'; Psyonix, 'End User License Agreement'; Activision, 'Terms of Use'; CD Projekt Red, 'User Agreement and Video Policy'; Bethesda, 'End User Agreement', Zenimax Media, 'Terms of Service', 'Code of Conduct' and 'Video Policy'; Warner Bros, 'End User License Agreement' and 'Terms of Use'; and Bandai Namco, 'Terms of Use' (all Appendix 2).

566 EA Games, 'User Agreement'; Rockstar Games, 'Limited Software Warranty and License Agreement' and 'Policy on posting copyrighted Rockstar Games materials'; Sony, 'Software License and Software Usage Terms' (all Appendix 2).

use 'User Created'[567] or 'Player Created'[568] content to describe UGC offer a subtle but distinct acknowledgement of active engagement. Other EULAs take a narrower and more restrictive approach to defining UGC as an object. For example, EULAs which permit the creation of 'Fan Content'[569] narrow the scope of the user considerably by implicating creativity only as a fan service. This tends to be framed more specifically in relation to works of homage, such as personal fan art or merchandise (e.g., a t-shirt with a game character),[570] and more subtly a positive endorsement of a game. The most restrictive approach gives the least autonomy to the creative user by labelling UGC as the more abstract 'Use of the Licensed Items',[571] 'Game Content Usage',[572] or 'Brand and Asset Usage'.[573] This framing limits the user's creativity to a form of risk management for the game's brand, rather than an acknowledgement of new creative content in its own right.

Regardless of how UGC is presented as a singular object, the EULA in fact tends to use this as an umbrella catch-all term that includes multiple, different kinds of creativity. Commonly, UGC includes game recording and streaming on online platforms, game photography, fan art, fan fiction, fan sites and the creation of merchandise (e.g. hand-crafted items such as t-shirts, prints, buttons etc.).[574] Surprisingly, the practice of 'modding' (i.e. altering the game itself to change its appearance, behaviour etc.), whilst theoretically interesting in copyright scholarship,[575] is increasingly excluded from permitted UGC activities.[576] Instead, mods tends to be expressly prohibited by broad restrictions on 'modification' of a game,[577] and unless explicitly thereafter excused within the EULA, remains reserved to the game rightsholder. The relative absence of modding may in part be explained by the fact that most games in this dataset include a multiplayer, competitive, online community, where modding can constitute unfair advantage against other players (such as e.g., an auto-aim mod for first person shooter genres).[578] Supporting this suspicion, none of the titles from

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567 Take2, 'Limited Software Warranty and License Agreement' (Appendix 2).
568 PUB G, 'End-User License Agreement' and 'Using PLAYERUNKNOWN'S BATTLEGROUNDS in Player-Created Content' (Appendix 2).
569 Red Barrels, 'Message to YouTubers' (Appendix 2).
570 Capcom, 'FAQ' (Appendix 2).
571 Proxima Beta (Tencent), 'Arena of Valor – Terms of Service' (Appendix 2).
572 Microsoft, 'Game Content Usage Rules' (Appendix 2).
573 Mojang, 'Brand and Asset Usage Guidelines for our Games' (Appendix 2).
574 See You Can Play (n316).
575 See, e.g., Lastowka (n290).
576 Only permitted in Superhot Team, 'End User License Agreement'; CD Projekt Red, 'User Agreement'; Mojang, 'End User License Agreement' and 'Brand and Asset usage Guidelines for our Games'; and Bethesda, 'Code of Conduct' (all Appendix 2).
577 e.g. Activision, 'Terms of Use' (Appendix 2): 'you may not[…] modify[…] the Product, any updates or any part thereof'.
578 Bethesda, 'Code of Conduct' (Appendix 2) expressly excludes 'god modding', defined as 'forcing another community member's character into a situation they have not agreed to'.

the eSports dataset, all of which are by their nature online and competitive, permit any kind of modding.

Another, notable creative work frequently excluded from the ambit of UGC is the use of the original game soundtrack (OST), being the bespoke, custom music written for the game, usually by a third-party composer.[579] Where UGC is concerned, EULAs may treat such OSTs more explicitly as 'not ours to give',[580] or alternatively carefully exclude it from the ambit of e.g. permitted 'video' (but not strictly music).[581] This restriction is fairly consistent at industry level, with even permissive indie creators, such as Toby Fox (who in fact writes and composes the music for *Undertale* and *Deltarune* themselves) having separate OST policies that restrict use (usually only to be used in conjunction with game play, and not e.g. as the background music for a product review) and monetisation in game video recordings and streaming.[582] Perhaps most succinctly summarised in CD Projekt Red's fan content policy,[583] 'music licensing is complicated' and the user should be 'careful' about using the OST.[584] The almost *suis generis* status of OST, and its exclusion from the ambit of UGC is particularly curious as most EULAs will include first a claim to own all 'audio' in the game at the outset (through intertextual claims to legal standing detailed in the Copyright theme), which one would presume includes the OST as part of this broad definition. Instead, it seems that where the user's position is concerned, they again become obscurified, much in a similar fashion as with copyright exceptions (detailed in Chapter 6). As such, the conceptualisation of the user as 'creative' is certainly not unlimited, in the same way the author is unlimited in how they can express their creativity: instead, it is more fragmented.

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[579] 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*), Toby Fox (*Undertale*, compositions of such complexity as to only be playable through using a computer).

[580] Microsoft, 'Game Content Usage Rules' (Appendix 2).

[581] e.g. CD Projekt Red, 'Video Policy' (Appendix 2).

[582] See Studio MDHR, 'Message to YouTubers' (Appendix 2) includes separate guidance for 'Use of the Cuphead Soundtrack'. Toby Fox, despite composing their own music for use in *Undertale* and *Deltarune* does not permit OST usage outwith strict guidelines maintained by Materia Music Publishing (Materia Music Publishing, 'YouTube FAQ' (*Materia Music Publishing*, date unknown) <https://materiamusicpub.com/youtube-faq/> accessed 16 September 2021).

[583] In the wake of criticisms following the release of their latest title, *Cyberpunk 2077*, CD Projekt Red created an automated feature to 'disable copyrighted music' when creating UGC (see CD Projekt Red, 'Dedicated *Cyberpunk 2077* Feature for Content Creators: 'Disable Copyrighted Music' (*Cyberpunk 2077*, 23 November 2020) <https://www.cyberpunk.net/en/news/36734/dedicated-cyberpunk-2077-feature-for-content-creators-disable-copyrighted-music> accessed 16 September 2021).

[584] CD Projekt Red, 'Fan Content Guideline' (*CD Projekt Red*, 10 December 2020) <https://cdprojektred.com/en/fan-content/> accessed 16 September 2021.

In contrast to the fragmented approach of defining UGC, there is a more consistent conceptualisation of user creativity as only being within the legitimate ambit of permitted activities of the EULA where it is original and creative work. The EULA obliges users to include 'your creative input and commentary'[585], 'your own unique content',[586] 'your own, original contribution to the community',[587] or 'your creative spin on our owned content'.[588] Notably, whilst originality and authorship are often conflated in copyright (the standard of originality being a prerequisite of the grant of authorship),[589] the two are treated as distinct concepts within the EULA. Riot Games, for example, demand original content from their creative users, but simultaneously refuse to acknowledge any 'works of authorship' based on the game.[590] It is unclear if the invocation of 'authorship' is a deliberate engagement with the technical specificity of the concept in copyright, or whether they are intended to be interpreted differently. Regardless, the intention appears to be to construct a new creative *user*, and specifically *not* an author.

The obligation of originality also translates to the natural corollary of hostility towards light-touch adaptations of an existing work, whether the proprietary content of the rightsholder, or that of another user. UGC should not 'just rip off or add light commentary to existing content' or 'cannibalise' the content of others.[591] Instead, the purpose of the UGC policy is to '[h]elp foster community and creative expression. Simply duplicating content does neither. You're better than that'.[592] The original and creative user is therefore presented as a more legitimate creator ('better') than those who merely 'copy' the work of others, but all are nevertheless captured within the ambit of UGC and concept of the creative user.

Applying the critical lens of CDA to the textual construction of UGC, the key characteristic that distinguishes UGC from a work of authorship is that it is subject to a degree of ongoing control by the rightsholder. All EULAs observed within the dataset contain an automatic licence grant from the user in favour of the rightsholder, in respect of any content that the user generates within the game (e.g. avatars, player-made maps or items etc.) or as derived from the game (e.g. fan art,

585 Nintendo, 'Game Content Guidelines' (Appendix 2).
586 Mojang, 'Brand and Asset Usage Guidelines for our Games' (Appendix 2).
587 Riot Games, 'Legal Jibber Jabber' (Appendix 2).
588 Ubisoft, 'Video Policy' (Appendix 2).
589 National states finding commonality in the obligations of the Berne Convention.
590 Riot Games, 'Legal Jibber Jabber' (Appendix 2).
591 ibid.
592 Ubisoft, 'Video Policy' (Appendix 2).

video walkthroughs/reviews etc.). This licence grant is usually expressed by a string of lexically dense and all-encompassing legalese:

> You grant us, from the time of uploading or transmission of Your Content, a worldwide, perpetual, irrevocable, sublicenseable, transferable, assignable, non-exclusive and royalty-free right and license to use, reproduce, distribute, adapt, modify, translate, create derivative works of, publicly perform, publicly display, digitally perform, make, have made, sell, offer for sale and import Your Content, including, all copyrights, trademarks, trade secrets, patents, industrial rights and all other intellectual and proprietary rights related thereto, in any media now known or hereafter developed, for any purpose whatsoever, commercial or otherwise, including, giving Your Content to others, without any compensation to you.[593]

In claiming this entitlement to a licence from the user, the EULA returns to the same format of the legal genre of discourse which characterises the typical, triple A EULA (most apparent in the Copyright theme). As a singular sentence, it is lengthy (98 words long), with dense, technical, legal jargon ('irrevocable', 'non-exclusive') and tropes ('thereto'). The claim is also expressed as a direct command to the user ('You grant us'), who has no agency in the conversation, but rather is obliged to act. Much as with the other examples of the legal genre, the purpose of constructing the text in this way is to claim a particular type of power from the precedent of law, and subsequently exercising this power over the weaker legal object: the user. The default treatment of the creative user, and further the conceptualisation of UGC, is that it is something the rightsholder can claim proprietorship of, and thus power, in a way that justifies its ongoing regulation.[594] The intent behind this dense and wide-reaching list of permissions is subject to ongoing debate as to whether they are simply necessary, and therefore invisible parts of the UGC sharing process which should not be interrupted, or more sinister in nature.[595] For now, in respect of the textual dimension of analysis, it is sufficient to acknowledge that whilst the user is obligated to make an original creation, and indeed presumably has a valid copyright over that creation which can be subsequently licensed, it is simultaneously predicated on a degree of ongoing control by the rightsholder.

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[593] Riot Games, 'Terms of Service' (Appendix 2).
[594] As a recent example, in Sato M, *Resident Evil Village* (Capcom 2021), any screen captures of game footage are automatically accompanied by a Capcom watermark and caption. Capcom is notably one of the few games in this dataset which do not have any UGC policy, presumably implying it is not permitted in any way.
[595] See, for example, contrasting opinions from Tan (n217) and Perzanowski and Schultz (n197).

Notably, the same licence grant is not usually reciprocated to the user, and rarely will they be granted an explicit licence to create the same UGC that is being gifted back to the rightsholder (found only once in this dataset).[596] Instead, it is common that any permissions to create UGC are bundled into a much less formal statement of acquiescence (discussed in more detail in Section 2 below). Alternatively, some EULAs, such as Sony, acknowledge the possibility for UGC's existence, in the sense that they include an automatic licence grant from the user in favour of the rightsholder, but never otherwise give the user permission to make the UGC in itself.[597] The result is that the user technically has no permission to make UGC, but in any case, if they do, Sony (or equivalent) own it. Thus, per the EULA, the creative user is only permitted to exist where it is in the rightsholders favour.

It is tempting to explore at this point the contradictory nature of the framing of the creative user from a copyright perspective. The user is both someone who is explicitly granted only a use-based permission, servile to a rightsholder, but who are also a unique creator in their own right, who can express originality through the game content. In principle, the copyright binary does not suppose that these two roles can exist simultaneously. For the moment (as this contradictory nature will be explored more in Section 3 below), it is worth noting that the EULA does not acknowledge this contradictory nature, but rather purports that these characteristics can co-exist within the ambit of 'user': whether passive or active, the EULA 'encourage[s] everyone'[598] to create.

1.2 Differentiated discourse towards the creative user

Supplementary agreements concerning UGC, particularly video policies and fan art policies, adopt a distinct textual approach when compared against the dominant discourse of the triple A EULA. Whereas the triple A EULA is characterised by its formality, authoritative tone and complexity, UGC-specific agreements adopt informal, friendly, and less complex language. Colloquialisms are used, with simpler, shorter sentences and indicators of empathy and emotion. The opening statements of UGC policies are particularly emotive and informal in encouraging users to be creative:

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[596] Riot Games, 'Legal Jibber Jabber' (Appendix 2).
[597] Sony, 'Software License' and 'Software Usage Terms'; Capcom, 'End User License Agreement'; Konami, 'Terms of Use: Metal Gear Solid V: The Phantom Pain'; Proxima Beta (Tencent), 'Arena of Valor – Terms of Service'; Activision, 'Terms of Use'; Wargaming, 'End User Licence Agreement' and 'Game Rules'; Cygames, 'Service Agreement'; Warner Bros, 'End User License Agreement' and 'Terms of Use'; and Bandai Namco, 'Terms of Use' (all Appendix 2).
[598] CD Projekt Red, 'Video Policy' (Appendix 2).

> We love our players and the awesome stuff they create.[599]
>
> We are humbled every day by your loyalty and passion for Nintendo's games, characters and worlds, and respect that you want to be able to express yourself creatively by sharing your own original videos and images using content from our games.[600]
>
> Everyone at Epic Games is extremely honored by the interest shown by our fans in our games and our company, and we think it's cool that you want to create artwork, websites, and other stuff based on our intellectual property.[601]
>
> We consider ourselves extremely fortunate to have fans actively engaging and creating with our game content.[602]
>
> We know that people like you – gamers, fans, individuals, and enthusiasts – love our games and sometimes want to use things like gameplay footage, screenshots, music, and other elements of our games ("Game Content") to make things like machinima, videos, and other cool things (your "Item(s)"). We'd like to make that easier to do for fans of our games.[603]

These examples show stark textual differentiations from the authoritative stance of the EULA by using emotive language ('love', 'extremely honored') and appraisal lexis ('extremely') which contribute to an informal and friendly tone. Colloquialisms are used to transform e.g., the formal 'protected content' into 'things' and 'stuff'. Elsewhere, forms of 'internet-speak' are adopted, such as 'TL;DR' (too long; didn't read)[604] as a way of condensing information into friendlier, shorter expressions, or 'defo' to indicate permission (internet shorthand for definitely).[605] This personable and more informal approach is also mirrored at the end of the UGC policy, which thank the user for their contributions,[606] encourage the user to 'create, have fun and be awesome'[607] and even

[599] Riot Games, 'Legal Jibber Jabbber' (Appendix 2).
[600] Nintendo, 'Game Content Guidelines' (Appendix 2).
[601] Epic Games, 'Fan Content Policy' (Appendix 2).
[602] Ubisoft, 'Video Policy' (Appendix 2).
[603] Microsoft, 'Game Content Usage Rules' (Appendix 2).
[604] Riot Games, 'Legal Jibber Jabbber' (Appendix 2).
[605] ibid.
[606] Microsoft, 'Game Content Usage Rules' (Appendix 2).
[607] CD Projekt Red, 'Video Policy' (Appendix 2).

include a personal signature from the game creator.[608] The combined effect of this textual differentiation lessens the social distance between the rightsholder and user through the 'conversationalisation' of the discourse.[609] Indeed, some UGC policies are framed as questions and responses, which gives more immediacy and mimicking of a conversation with the rightsholder, rather than a contract.[610] The creative user is framed, not as a mere recipient of the discourse, but an active and valued participant in the conversation.

This lessening of social distance between the user and rightsholder is also achieved by disavowing responsibility for any restrictions on the creation of UGC and placing this on 'lawyers'.[611] Riot Games make for an interesting example of this through its use of hypermediacy, a characteristic more typical of the indie EULA (explored more extensively in the Copyright theme). Their UGC policy (entitled 'Legal Jibber Jabber') gives permission for the user to create works based on the game 'by formal decree of the Demacian High court (our legal team)' (Demacia being a kingdom within the world of the game, *League of Legends*). The UGC policy ends by advising that the user simply '[doesn't] upset Corporate Mundo'[612] (a skin in *League of Legends*, presenting a character as a business manager who wields his suitcase in battle). A somewhat meta representation of Corporate Mundo accompanies the UGC policy, illustrated in Figure 17, with the character seeming to offer the user the very contract they are presently reading. The very inclusion of such a picture is in itself evidence of a differentiated discourse, accompanying an otherwise formalistic and black and white legal document with colourful game art.[613]

608 Red Barrels, 'Message to YouTubers' (Appendix 2).
609 Baker and Ellege (n260) 22.
610 Observed in FAQ-style policies in Nintendo, 'Game Content Guidelines', Capcom, 'FAQ' and Riot Games, 'Legal Jibber Jabber' (all Appendix 2).
611 Microsoft, 'Game Content Usage' (Appendix 2).
612 Riot Games, 'Legal Jibber Jabber' (Appendix 2).
613 Noting only one other example where a policy is accompanied with pictures/art: Sony, 'Software Usage Terms' (Appendix 2).



Figure 17: Corporate Mundo as featured in Riot Games' League of Legends EULA

By tying the UGC policy to the whims of Corporate Mundo, rather than the creators of the game, Riot Games disavows responsibility for restrictions on UGC in two ways. First, this framing lessens the seriousness of the regulation by connecting it to a character within the game, thus framing the UGC policy as a broader paratext (in much the same fashion as indie companies and their use of in-game EULAs explored in the Copyright theme). The character itself is a cartoonish exaggeration or mockery of a profit-driven business manager, which the creators again disassociate themselves from.[614] Secondly, the textual framing disavows responsibility for UGC regulation by creating an 'us and them' narrative. The UGC policy presents the rightsholder as being happy with the user creating works, but 'corporate', a supposed separate entity, is not. Similar devices in other UGC policies scapegoat lawyers (or per Wizards of the Coast, the 'law mages')[615] not the game creators, as the entity responsible for enforcing these restrictions:

> This means that if you add to the game universe or expand on the story told in the game with "lost chapters" or back story or anything like that, distribution of your story or idea may appear in a future game without any compensation to you. (Sorry, but our lawyers tell us we need to do this in order to avoid frivolous lawsuits getting in the way of making more great games).[616]

[614] Forming part of the universe of *Dungeons and Dragons*, Wizard's of the Coast also suggest that enforcement measures will be taken by the 'Demogorgon' (see Wizards of the Coast, 'Fan Content Policy' (Appendix 2)).
[615] ibid.
[616] Microsoft, 'Game Content Usage' (Appendix 2).

Framing the text in this way suggests that the rightsholder is more closely aligned with the interests of the user than the antithetical corporate or lawyers. Apologising for these restrictions ('sorry') suggests hesitancy and regret, and also a call for empathy from the user; the lawyers are obliging these restrictions, and but for their influence, the rightsholder would be acting differently. The attempt to explain or justify these restrictions is also in contrast to the formal, authoritative mainstream EULA, which usually does not ever necessitate, nor attempt to justify itself (noted in the Copyright theme). By offering explanation, the rightsholder attempts to build mutual understanding and camaraderie with the user.

However, the user is, more subtly, also positioned here as a potential *threat* by merit of their creativity. In the example above, the rightsholder suggests that UGC restrictions are necessary in order to avoid 'frivolous lawsuits.' By framing any lawsuit in respect of UGC as 'frivolous', the UGC policy recognises that the user may be entitled to take legal action against them, but suggests this is unworthy of the time or cost of pursuing. This may be doubly emphasised as being an illegitimate pursuit, both in terms of legalities as well as community interests:

> We want fans to create and share cool things with each other, and we want to remove barriers to sharing. If we spotlight a fan Project or make something that resembles what a fan might have made, we don't want to be sued, so you give us permission to spotlight or share your Project with the world.[617]

Automatic licence grants to share user's works are framed as fair because 'we don't want to be sued' (legal threat) but also because any 'barrier[s] to sharing' are a threat to the larger community. This double-framing of illegitimacy immediately problematises any suggestion of enforcement measures by the user, as a creator of content. In doing so, ongoing control of user creativity is legitimated and framed as necessary to the rightsholder, which is bolstered by an underlying moral deterrent to the user should they wish to challenge these restrictions.

Many of these characteristics of informality, friendliness, and lessening of social distance, resemble the differentiated indie discourse noted in the Copyright theme. Here, there is not an indie effect as such, as most indie companies use a more informal register and style as a default. But for companies that otherwise adopt a formalistic style in their EULA, particularly triple A publishers,

[617] Riot Games, 'Legal Jibber Jabber' (Appendix 2).

this differentiated approach in UGC policies is very stark indeed.[618] The strategic choice to engage with this language is often an attempt to build rapport and lessen social distance between the rightsholder and user by indicating solidarity and a common interest.[619] Certainly, the stance is less authoritative, and suggests the EULA is presenting the interests of the rightsholder and user are more closely aligned where UGC is concerned. The lawyers are, by contrast, the common enemy.

There are only two, notable exceptions from this differentiated, friendly, and informal discourse. First, and as briefly noted in Section 1.1, larger companies, such as Warner Bros, Sony, and Proxima Beta (subsidiary of Tencent),[620] do not have separate detailed UGC policies, and instead only address UGC insofar as they include an automatic licence grant from the user to the rightsholder in respect of their content. In doing so, the rightsholder technically does not *add* any restrictions on UGC in the same way more complex agreements negotiate e.g., commerciality (detailed in Section 1.3); though nor does it explicitly permit its creation. Such an approach both acknowledges creative use as a possibility, but does not negotiate it, nor engage in a friendly conversation with the user about it.

The second notable exception relates to Japanese companies, which consistently take a restrictive view of UGC.[621] These are notable at a textual level for maintaining a higher degree of rigid formality throughout their agreements than other comparable agreements (e.g. Psyonix are the only company that address the user in the third person as 'customer').[622] Similarly to the approach of larger companies, UGC only tends to be acknowledged implicitly as a derivative asset of the primary materials. For example, both Bandai Namco and Konami oblige an *exclusive* assignation of UGC (uncommon in this dataset), which is absorbed into the broader definition of 'Content', alongside the proprietary materials of the rightsholder.[623] Capcom similarly has only limited policies on the creation of fan sites and the use of characters, and 'one-off' activities on the creation of works for 'school projects or a personal T-shirt.'[624] This very restrictive attitude towards UGC is mirrored in the authoritative tone of the text, which achieves formality through brevity. There is

[618] Notably: Epic Games, Microsoft, Nintendo, Riot Games, Rockstar Games Ubisoft Wizards of the Coast (all documents detailed in Appendix 2).
[619] Baker and Ellege (n260) 22.
[620] See n597.
[621] Being: Cygames, Nintendo, Bandai Namco, Capcom, and Konami.
[622] Psyonix, 'End User License Agreement' (Appendix 2).
[623] Bandai Namco, 'Terms of Use' and Konami, 'Terms of Use: Metal Gear Solid V: The Phantom Pain' (both Appendix 2).
[624] Capcom, 'FAQ' (Appendix 2), noting a substantial change in 2021 with the introduction of a new video policy (see Capcom (n360)).

no engagement in conversation: the creative user is acknowledged, but ultimately absorbed within the proprietary ideology of the rightsholder.

1.3 User as non-commercial

The conceptualisation of the creative user as an amateur is often implied in the literature explored in Chapter 1, but rarely explicitly stated. This underlying assumption weaves its way into the discourse of the EULA through the widespread prohibition of commercial uses of game content. Every EULA surveyed restricts the use and dissemination of UGC to non-commercial purposes, forming the 'fundamental rule'[625] for user creativity (which must be '[o]ne word: F-R-E-E').[626]

'Non-commercial' is doubly-constructed in the EULA as either meaning 'free for others' (e.g., not behind a paywall, such as Patreon), or a prohibition on the UGC itself generating revenue for the user. The Blizzard EULA is an example that blends both:

> For clarity, please note that as long as the website that hosts your Production provides a free method to allow viewers to see the Production, Blizzard Entertainment will not object to your Production being hosted on that site, regardless of the site's "for pay" premium service plans.[627]

> … you may not license a Production you have created to another company for a fee, or for any other form of compensation, without specific written permission from Blizzard Entertainment to do so.[628]

The non-commercial restriction is often justified by reference to reciprocity in free-to-play models ('Our games are free-to-play, and so must be the Video Content!'),[629] or by invoking the community's interest in accessing content for free: '[y]our Video Content must be free to the public to enjoy, forever';[630] or '[w]e support players who use our intellectual property… to create free fan projects for the benefit of the community'.[631] This framing emphasises that non-conformal to the

[625] Blizzard, 'Video Policy' (Appendix 2).
[626] Wizards of the Coast, 'Fan Content Policy' (Appendix 2).
[627] Blizzard, 'Video Policy' (Appendix 2).
[628] ibid.
[629] Hi-Rez, 'Policy for Streaming Videos and VODS' (Appendix 2).
[630] ibid.
[631] Riot Games, 'Legal Jibber Jabber' (Appendix 2).

restrictions is viewed as a moral imperative, rather than being driven by any commercial interest. Ideas of openness, freedom, and community harmony are central to this invocation.

However, this moral imperative is not reciprocated by the rightsholder, as evidenced by a closer reading of the automatic licence grant from the user:

> […] you agree that we may use, copy, modify, distribute, and make derivative works of your Project in any form, on a royalty-free, non-exclusive, irrevocable, transferable, sub-licensable, worldwide basis**,** for any purpose and without having to credit you, pay you anything, or obtain your approval.[632]

Instead, the automatic licence offers the possibility of a commercial interest in the user's content, but only so long as it is not for the user's benefit. This seems to be in disconnect from the claim, made from the same document, that 'free fan projects [are] for the benefit of the community' (which also includes, presumably, the user themselves).[633] More accurately put, when including the automatic licensing grant into consideration, free fan projects are only conceptualised in the EULA insofar as they benefit the rightsholder.

Commerciality is often presented as having a self-evident meaning in the EULA ('Free means FREE'),[634] but there is some evidence that the 'fundamental rule' of non-commerciality is more stratified than its plain, everyday meaning, or indeed the definition given in copyright law. At its plain, everyday meaning, we might expect this to both restrict activities relating to commerce (e.g., that a company should emblazon their website with game UGC) or profit-making of any kind. Whilst there is no static definition of commerciality in EU copyright law jurisprudence,[635] the definition given by Creative Commons indicates a similarity to the plain meaning, that it is 'in any manner that is primarily intended for or directed toward commercial advantage or private monetary compensation'.[636] The exclusion of commerce and commercial advantage is perhaps fairly self-evident given EULAs are usually limited to a personal, private right to enjoy the game

[632] Riot Games, 'Terms of Use' (Appendix 2).
[633] Riot Games, 'Legal Jibber Jabber' (Appendix 2).
[634] Wizards of the Coast, 'Fan Content Policy' (Appendix 2).
[635] Metzger A and Heinemann T, 'The Right of the Author to Grant Licenses for Non-Commercial Use: Creative Commons Licenses and the Directive on Collective Management' [2015] 6(1) Journal of Intellectual Property, Information Technology and Electronic Commerce Law.
[636] Creative Commons, 'Defining "Noncommercial": A Study of How the Online Population Understands "Noncommercial Use"' [2009] Creative Commons Report, 11.

which would seemingly exclude non-natural persons (see discussion the Consumption theme). However, the profit-making dimension of commerciality is more complex in the EULA. In contrast to both the plain meaning and copyright definition, 'non-commercial' in the EULA differentiates between profit-making commercialisation and *monetisation*. Often, the rules against commerciality are waived in respect of passive ad revenue generation and partner programmes for videos on online platforms such as YouTube or Twitch:

> The only exceptions to this rule are if you participate in partner programs with YouTube, Justin.tv, Blip.tv, Own3d.tv, or Ustream.tv (the "Production Websites") whereby a Production Website may pay you for views of a Production if you are accepted into their partner program.[637]

> Am I allowed to have advertisements in my Video Content?... Yes, but only if you are doing so as part of an official partner program operated by YouTube, Twitch, or other similar online video publication platform.[638]

Whilst in copyright doctrine monetisation would be within the ambit of commerciality, monetisation through mechanisms such as passive ad revenue is conceptualised very differently within the EULA. This contradictory nature is recognised in the UGC policy by Wizards of the Coast:

> Q: You said I can't license my content to third parties for money. Aren't partner programs with YouTube or Twitch technically licenses that I earn money on? Is this allowed?
> A: . . . who let the rules lawyers into the FAQ?[639]

The use of the gaming term 'rules lawyer' refers to a person who frustrates the play of a game by following the letter, rather than the spirit of the rules that regulate it. Here, the EULA suggests that the user is a 'rules lawyer' for noticing the inherent contradiction between preventing commerciality whilst condoning money-making activities. The EULA suggests that the spirit of user creativity is not that the user is prevented from making money *per se*, but rather this cannot

[637] Blizzard, 'Video Policy' (Appendix 2).
[638] Hi-Rez, 'Policy for Streaming Videos and VODS' (Appendix 2).
[639] Wizards of the Coast, 'Fan Content Policy' (Appendix 2).

be actively solicited: it must be passively generated (returning to the idea that the determination of a work's value is its use).

As a final note, the non-commercial conceptualisation of the user is so consistent that it even applies to eSports UGC, which may be more closely tied with a professional user, dependent on exploitation of the game for income. eSports is only specifically excluded from the ambit of the non-commercial rule in three agreements: Blizzard provides a separate eSports agreement on request;[640] Hi-Rez specifically excludes eSports from the ambit of their UGC policy;[641] and Bethesda requires written permission before commencing any eSports competitions.[642] More indirectly, Microsoft offers the possibility of a commercial licence for game videos, which could viably refer to eSports.[643] In this minority of cases, the eSports user is treated with a degree of exceptionalism, and is not something to be dealt with within the ambit of the user of the average EULA.

Much like the homogeneous conceptualisation of the user as a non-reseller (explored in the consumption theme), non-commerciality is also a consistent conceptualisation of the user. The non-commerciality condition compliments other facets of usership, such as the designation of the user as personal, and using a game solely for play or enjoyment. In combination, these aspects make more explicit the underlying assumption that the user is conceptualised as an amateur, making UGC only for pleasure, and only entitled to derive passive monetary value from their creations without actively soliciting it.

2. Discursive dimension

Whereas discourses on Copyright and Consumption are packaged within the formalistic, click-through EULA, discourses on UGC are produced and distributed in more disparate ways, and may be scattered across multiple mediums that exist outside of the EULA itself. Typically, only the automatic licence grant given by the user in favour of the rightsholder in respect of their UGC is incorporated into a short clause within the EULA itself.[644] This is treated as part of the operation

[640] Blizzard (n469).
[641] Hi-Rez, 'Policy for Streaming Videos and VODS' (Appendix 2).
[642] Bethesda, 'Video Policy' (Appendix 2).
[643] Microsoft, 'Game Content Usage Rules' (Appendix 2).
[644] See, e.g., Activision, Bethesda Epic Games, Hi-Rez, PUB G, Riot Games, Rockstar Games, Sony, Ubisoft, Wizards of the Coast (all Appendix 2).

or initial conclusion of the licensing relationship, but often does not constitute the rightsholder's entire policy on the exploitation of UGC.

Instead, in many cases, guidelines on the exploitation of UGC are detailed in a separate document that is ancillary to the EULA. The manner of accessing these documents is very similar, in that they exist within the same virtual space as the EULA and tend to be accessible through the same section of the institutional webpage. The EULA may make reference to this policy, but does not necessarily incorporate it in the same way as it does by reference for e.g., terms of use, which is a necessary pre-condition of accepting the EULA. As a result, there is some dubiety as to whether such UGC policies are incorporated into the licensing relationship, or rather are non-binding statements of acquiescence that merely *accompanies* the main licensing relationship. Notably, for such agreements, no click-through functionality is included, for which two plausible explanations exist. The first possibility is that assent to the UGC policy, if incorporated by reference through the EULA, is also concluded upon agreeing to the primary document. Alternatively, if the UGC is considered a non-legally binding statement and not an agreement, no such demonstration of assent is required (more akin to a promise).

Discourses on UGC are also scattered through other, more informal mediums, including social media and other online social spaces. For example, whilst having no formal UGC policy included within their EULA or institutional homepage, the Superhot Team confirm in a comment through their Kickstarter page[645] that the creation and monetisation of any and all video content of their game is permissible (see Figure 18).

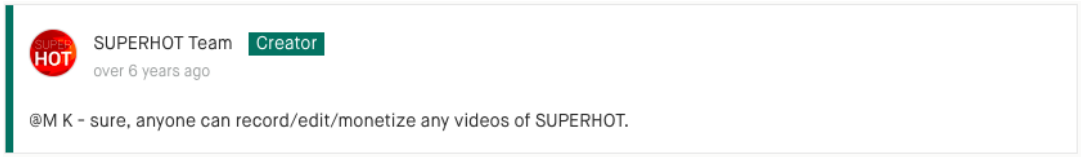


Figure 18: Superhot Team comment on Superhot Kickstarter page

The brevity of the comment suggests that the question is dealt with in an offhand matter. With characteristics of the same conversationalisation as other UGC policies, the manner of communication is formed through question and response, and a more proximate means of communicating directly with the user. This is a rare example of the user being an active participant

[645] See n490.

in shaping the direction of their construction (but for the question being asked, this activity may never have been permitted).

Toby Fox, creator of indie titles *Undertale* and *Deltarune*, makes for an interesting study of the distribution of UGC discourse. Fox has previously responded directly to user queries through his Twitter account to communicate his own preferences as to how game content should be used (see Figure 19).



Figure 19: Tweet by Undertale/Deltarune creator Toby Fox[646]

Evidenced here are many of the same textual approaches as analysed in the textual differentiated discourse towards the creative user (Section 1.2), including brevity and informality, but on this occasion through a different medium. There is a restriction ('if you see someone selling unofficial undertale merch at a con, contact convention staff about it') but this is caged by a friendlier or humorous 'enforcement' mechanism ('dont make me fly there and yell at them' [sic]). The discourse format also changes at the textual level as appropriate for the genre of discourse expected on social media. It is succinct, informal and humorous, without formal grammar (e.g., lowercase 'i', no apostrophe in 'dont'). Again, the user becomes closer in proximity to the rightsholder through their participation in the UGC conversation and sharing of the same internet-speak language.

[646] Whilst the original tweet has since been deleted, this screenshot has been captured by user Shattered-Earth, 'PSA for the Undertale fandom since a lot of y'all don't seem to know (or care)' (*Tumblr*, 13 December 2015) <https://shattered-earth.tumblr.com/post/135148560643/psa-for-the-undertale-fandom-since-a-lot-of-yall> accessed 16 September 2021.

Fox would later use his Tumblr account to inform users of his 'Changing Policy on Fan Merch'.[647] This static page is a more consolidated version of his restrictions, and is less ephemeral than Twitter, but still exists on a disparate and less official space than comparative video game titles. The *Undertale/Delarune* website also encourages users to contact Fox directly via email if they have a query about using game content for a 'class project, performance etc.' rather than offering a generalised policy.[648] Again, the possibility of a conversation with the rightsholder is invited.

This is a more responsive approach, indicative of a more intimate rightsholder-user relationship where the policy is being approached as a conversation, rather than as a static, unilateral policy as such. An even more functional possibility is that this invitation is reflective of the fact that indie rightsholders are often not a team within a larger corporate structure and representing multiple interests, which by its nature cannot be as responsive or adaptable to user queries, but rather an individual person who can communicate their wishes directly. [649] As such, responsive mediums such as social media are a more adaptable approach than the formalisation of a static policy. The lessening of the social distance between the rightsholder and user is therefore both functional and ideological. The choice to use this discursive medium encourages direct contact with the rightsholder, which is both pragmatic and responsive for the indie company, as well as a rejection of the formalised, static policies more typical of the triple A publisher (in line with the indie countercultural ideology explored in the Copyright theme).

The multiplicity of different mediums used to communicate discourse in UGC is possibly too disparate to meaningfully quantify. However, with observations limited to this particular dataset, this difference in discursive approach may offer a limited explanation of the differentiated discourse in the textual dimension. To the extent that different distribution methods necessarily implicate different textual approaches, such as social media, there may be some justification for adopting a style or register of writing which is more informal, friendly, or humorous. What is more puzzling is where this friendly and informal approach exists alongside, and in close proximation to, a formal and authoritative EULA.[650] Where the otherwise formal and authoritative discourse differentiates in its style and register towards the creative user *specifically*, it implicitly acknowledges that they are not as weak as their passive counterparts constructed through the Copyright and

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[647] Official Undertale Blog, 'Changing Policy on Fan Merch' (*Tumblr*, 21 February 2016) <https://undertale.tumblr.com/post/139726155020/changing-policy-on-fan-merch> accessed 16 September 2021
[648] Fox T, 'FAQ' (*Deltarune*, date unknown) <https://www.deltarune.com/help/> accessed 16 September 2021.
[649] A notable exception being Capcom which encourages direct email (Capcom, 'FAQ' (Appendix 2)).
[650] See n618.

Consumption themes. Something has changed where the creative user is concerned: perhaps they are viewed as more powerful, essentially as a co-creator, extending the value of the game past its normal life cycle. As such, speaking to one's co-creator requires the conversationalisation observed in the EULAs and UGC policies, as the rightsholder requires their support, collaboration, and good will.

3. Sociocultural dimension

Discourses surrounding UGC and the creative user are subject to a very different textual and discursive approach than the mainstream discourse of the EULA. In the context of the otherwise formal and authoritative quasi-legal relationship envisioned by the EULA, UGC policies tend towards a friendlier, humorous, polite, and encouraging discourse towards the user. The effect of this differentiated approach is to reduce social distance between the rightsholder and user and develop rapport. Heavy-handed uses of power are less obvious here than in the themes of Copyright and Consumption, with a change in register and style that indicates a less powerful stance by the rightsholder. Indeed, any restrictions are instead caged as being the fault of lawyers/corporate or justified explicitly as an object of necessity ('we need to do this'),[651] rather than an arbitrary rule. Where the creative user is concerned, the once powerful rightsholder is presented as comparatively subservient under the rule of a legal/corporate 'other'. By contrast, the user, textually and discursively, is outwardly positioned in the EULA as being more powerful, involved in a reciprocal conversation with the rightsholder, as a near co-creator, an equal, extending the world of the game. This positive role is seemingly acknowledged by the rightsholder, who is friendly, outwardly encouraging, and grateful for this work.

In demystifying this discourse, the EULA and accompanying UGC policies must be understood with reference to the broader sociocultural context in which they are situated. In the video game industry, the creative user is perhaps more accurately understood as a participant within a user *industry*, rather than a community. The most obvious example is the professional eSports player, who commodifies their UGC, in the form of game recordings and streaming, in competitive tournaments and competitions. This UGC is packaged and traded between different teams, player associations, tournament hosts, and rightsholder themselves: in 2020, Chinese video sharing website Bilibili reportedly paid Riot Games 113 million USD for the exclusive rights to show *League*

[651] Microsoft, 'Game Content Usage' (Appendix 2).

of Legends championships in China for the next three years.[652] Even where there is less competitive gaming, game recording streaming personalities (or influencers) on online platforms, such as PewDiePie, Markiplier, or Jacksepticeye, are followed by millions of users and earn millions in return.[653] These personalities have been notable for bringing previously obscure games to the unprecedented popularity. For example, Psyonix sold five million copies of their then little-known *Rocket League* after becoming one of the fifth most-watched games on Twitch.[654] Finally, modding, whilst surprisingly less present in this dataset, is not the sole remit of the (better publicised) bizarre,[655] but is now increasingly commonly used to patch, improve (e.g. appearance, controls, handling) and debug a game post-release.[656] It is not uncommon for games to be released without being fully polished and functional, and indeed, two notable games in this dataset have been substantially modded by users in order to improve their base functionality: *The Elder Scrolls V: Skyrim*[657] and *Batman: Arkham City*[658] Effectively, the creative users who mod these games act as a quality assurance industry for the primary rightsholder.

Given the immense value of this creativity to the game rightsholder, on the face of it, the EULA makes an effort to support these ancillary user industries. The EULA in fact offers a more liberal regime for creative users than the default law of copyright, which may not be as accommodating for the range of uses illustrated here. It is not clear, for example, that a video recording of a substantial part of a game (or in many cases, the entirety of a game) would be eligible to benefit from any of the existing exceptions in the EU copyright regime.[659] A typical game recording may have elements of criticism and review, in that the user may comment on which aspects of the game they enjoy or dislike, but this does not usually comprise a large part of any such recording, thus

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[652] Martinello E, 'Bilibili reportedly acquires broadcasting rights in China for next 3 League World Championships' (*DoteSports*, 3 December 2019) <https://dotesports.com/league-of-legends/news/bilibili-reportedly-acquires-broadcasting-rights-for-next-3-league-world-championships> accessed 16 September 2021.

[653] Saab H, '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.

[654] Johnson MR and Woodcock J, 'The Impacts of Live Streaming and Twitch.tv on the Video Game Industry' [2019] 41(5) Media, Culture and Society.

[655] For an example, see ZombieAli (n308).

[656] For an example, see PC Games (n309).

[657] Popular Skyrim mods include, for example: 'High Resolution Patch', 'Performance Textures' and 'Realistic Humanoid Movement Speed' (Livingston et al, 'The best Skyrim mods' (*PC Gamer*, 9 August 2021) <https://www.pcgamer.com/uk/best-skyrim-mods/> accessed 16 September 2021).

[658] Some of the most popular mods for the game include 'Enhanced Look', 'Improved Quality [shaders]' and 'Catwoman (more natural face)' (NexusMods, 'Batman: Arkham City' (*Nexus Mods*, date unknown) <https://www.nexusmods.com/batmanarkhamcity?tab=popular+%28all+time%29> accessed 16 September 2021).

[659] Of the likely candidate exceptions afforded by the InfoSoc Directive, game recordings are unlikely to be a quotation for criticism or review (art 5.3(d)), not typically being a sole critique of a game (and also usually comprising a large amount, or total, content of a game), nor a parody (art 5.3(k)), not typically being targeted at satirising or mocking a game.

finding little solace in such an exception. Other creative user activities, such as the creation of merchandise, fan sites, or mods find even less legal support, or rather face substantial legal uncertainty, under the copyright regime.[660] Instead, the EULA constructs the possibility for permitted uses of UGC that fall outwith copyright exceptions or limitations. The EULA goes further to conceptualise non-commerciality as a more liberal community standard which permits monetisation of some content, something which copyright would *prima facie* prohibit as being unfair to the rightsholder.[661] As such, it is tempting to view the EULA's treatment of UGC as a more permissive, user-friendly regime than copyright itself.

However, and approaching this finding from a necessarily critical angle (being a fundamental component of CDA), power is *not* absent here, despite the presentation of a more liberal regime. The type of style and register switching evidenced in the EULA is in fact indicative of a *more* powerful speaker.[662] By selecting or altering linguistic elements due to the social context or conversational setting, it is the prerogative of a powerful speaker to determine the tone of conversation. It is the rightsholder, not the user, who can determine whether to take this more friendly and informal approach. In doing so, the outward presentation of friendliness and encouragement ultimately disguises the reality of the aspects of the EULA that may be disagreeable to the user. The user, for example, may not be pleased that they cannot commercialise what they perceive as their own independent creation (that they have made efforts to make 'original' and 'unique'), but the EULA reassures them that this is necessary; that it is only imposed because of 'corporate'; that the rightsholder is humbled by the wonderful creation; and in any case the user should not be a 'rules lawyer'. The cumulative effect is to present the disagreeable aspects of UGC as being common sensical and reasonable, and in doing so naturalising acquiescence to this by the user. The user is not only framed as being a *user* rather than an author, whose content can be controlled by the rightsholder, but is obliged to be accepting and agreeable to this.

In justifying this criticism, it is important to acknowledge the fragmentation of distribution methods in the discursive dimension of analysis for this theme. Such fragmentation across different types of communicative mediums, such as social media, leads to the temptation for an

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[660] In regards copyright exceptions, fan works likely face the same limitations as listed in n610. For more detail on the legal problems faced by fan communities in video games, see Humphreys et al (n215) and Lastowka G, 'The Player-Authors Project' (SSRN 2013) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2361758> accessed 16 September 2021.

[661] See Creative Commons (n636).

[662] Baker and Ellece (n260) 22.

Occam's Razor argument; that is, that different mediums of communication results in necessary differences in textual dimensions appropriate to their genre. Technically, many of the UGC policies surveyed here are not incorporated within the EULA as such, but rather are ancillary to the primary conclusion of the licensing relationship. UGC is both interesting, but also risky to the user, and as such UGC policies may be more likely to be consulted than the EULA itself. Resultingly, the deliberate intention to make UGC policies more readable by using friendly, plain, short, and jargon-free language may be a natural response to high-readership. Certainly, addressing questions on UGC via social media platforms implies a different stance of formality related to the medium of communication, as opposed to a conscious choice to switch one's tone or register to manufacture camaraderie. Alternatively, if the user is truly valued as a co-creator in the process of extending a game's world past its release date (or e.g., as a promotional tool for a lesser-known game), then communicating in a clear and friendly manner with an 'equal' is entirely plausible. This may either be as a result of the 'co-creator' status of many professional players, for whom there is often mutual benefit in a fair, clear, UGC system. Alternatively, in the indie context, the users creating UGC may be the same users who were responsible for funding its creation or manufacturing its subsequent success: in such a case, it is not possible for the rightsholder to have a bad relationship with the user, who in such a scenario is more akin to their investor.[663]

However, this argument becomes less persuasive when the broader context in which the UGC policy is situated is examined. If UGC is very important, or presents a significant risk such that it must be addressed separately from the licensing relationship, why adopt a *less* formal approach which, when adopted in the EULA, is intended for its accuracy through the invocation of the technical specificity of the law? If UGC only became a consideration post-conclusion of the licensing agreement, the licensor is not prohibited from amending the agreement to include such an addition.[664] Indeed, EULAs are updated frequently, and appear to be live documents (noted in Chapter 5). Why then document a UGC policy separately if the primary agreement can simply be amended? If, instead, clearer, plainer communication is preferred, why be selective only in respect of UGC, and not the entirety of the agreement? It is more obvious, for example, that indie titles adopt a plainer language throughout their licensing relationship, rather than for selective aspects. However, where the formality of the EULA and informality of the UGC policy co-exist, this Occam's Razor argument is much less plausible.

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[663] The most direct example of this being the user-led Kickstarter project for *Superhot* (see n490).
[664] See example wording in n471.

The alternative explanation is that this deliberate choice to engage in friendly and informal language masks the reality of what is permitted to the user: creativity, but heavily conditioned. The dramatic switch in language, register, and tone, and particularly elements of politeness and humour, signal that the EULA wishes to avoid disharmony and build rapport in order to achieve agreement on the subject discussed.[665] This, in itself, is indicative that what is being discussed is contentious, and indeed, the logic behind conceptualising the creative user as a 'user' at all is debatable if they are, by the EULAs own definition, creating things of authorial 'originality'.[666] By framing UGC policies in a friendly and informal manner, the effect is to naturalise and normalise the assumption that UGC is an object that can, and should, be controlled, not by the creator (in this case the user) but by the enabler of its creation (the game rightsholder). Framing the creative user in this way legitimates the dominant proprietary ideology of the rightsholder; that in any and all creative interactions with a game, their copyright will attach, and the user is always subservient to this.

Part of this problem is exacerbated by the fact that there is no good conceptual vocabulary to describe the creative revolution that allows users to participate in co-creation of a work. UGC is an awkward creation that clings to the rhetoric of 'us and them', rightsholders and users, despite a breakdown in distinction in the participatory era. If UGC was instead described as 'the content you create', there would presumably be more active contestation and questions of why any third party should regulate what has been created other than the author. Instead, the EULA treats creativity as a spectrum that can be moderated, rather than a yes/no question. Attaching 'user' to the notion of creativity within the EULA is therefore an artificial construct that justifies this control. Allowances for control of creativity becomes an exception granted by the enabler, rather an entitlement of the author.

Creativity by the user is, in any case, subservient to the more homogenous conceptualisation of the user as a non-commercial entity. More accurately, the 'user' component of UGC acts as a proxy for 'amateur' in UGC policies. The 'professional' eSports player is, by contrast, largely absent from this discourse, and is directed to a closed environment elsewhere. The suggestion that the user is an amateur is an implicit assumption in copyright doctrine which is made explicit through the EULAs limitation of commercial activities. This amateur creation seemingly works to bolster the subversion of authorship elsewhere.[667] Ultimately, the conceptualisation of the creative user is only

[665] Baker and Ellece (n260) 16 and 48.
[666] See n585 – 588.
[667] Echoed by Iljadica (n92) and Meese (n8).

permitted insofar as it makes good business sense to do so, and this determination tends to be tied to capital.

The importance of the strategic configuration of user creativity for commercial interests can in part be illustrated by the puzzling, restrictive approach of Japanese companies in the dataset. Initially, when looking for an explanation for this more restrictive approach in the sociocultural dimension, this finding is difficult to explain. The Japanese companies observed here vary in size, and genres of game,[668] but all share the same restrictive view of user creativity. Further, and paradoxically, as Japan is widely understood to be the home of fan culture and fandom, this would assume a more permissive, rather than restrictive, view of user creativity.

Instead, the commonality between all Japanese companies observed here is that they have the oldest dates of founding (Nintendo being by far the oldest established in the dataset, established in 1889). Most have roots in arcade games, with well-established characters, game series and OSTs: Nintendo is responsible for *Mario, Pokemon, Legend of Zelda,* amongst many others; major Konami titles include the *Metal Gear Solid* series and *Silent Hill* series; Bandai Namco's predecessor Namco created *Pacman*; Capcom is responsible for series such as *Street Fighter* and *Resident Evil*. The richness of the assets from these well-established game series in terms of merchandising probably has more value than any other company in the dataset. A more in-depth analysis would be needed to confirm this suspicion, but in any case, it seems that the restrictive view of UGC is more closely correlated with the length of establishment of the branding and the IP value of a game franchise viewed holistically, rather than its country of origin.

Therefore, whilst the user is understood as a potential creative, and outwardly this is encouraged, the same creativity is treated as a dangerous variable within the community, a danger which only increases where the value of that creativity also increases. Creativity is encouraged, insofar as it makes strategic business sense, but is ultimately constrained. A differentiated discourse in textual and discursive dimensions demonstrate that this is a site of contested power struggle, which in effect looks to re-write the rules of the copyright binary between author and user. Disguising this in the form of a more immediate conversation that is friendly, informal, and polite, hides this reality.

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[668] Ranging from e.g. the large and well-established brand names of Nintendo, known for publishing family-friendly, cartoonish, and accessible games (in this dataset, *Legend of Zelda: Breath of the Wild*), to Capcom, a mid-sized creator of realistic horror-franchises (in this dataset, *Resident Evil 2*) to Cygames, a small, less-established company who create virtual card games (in this dataset, *Shadowverse*).

In leveraging this criticism, it is important to acknowledge that the UGC policy is both functional as well as ideological. The primary task here is to establish a fine line between encouraging dissemination and creativity, whilst retaining control of a potentially commercially valuable enterprise, all within a system of copyright that would not otherwise permit any of this and is otherwise relegated to the realm of contract. The rapid growth of eSports, video game streaming, and fan merchandise, makes the regulation of user creativity more akin to regulating an influential user industry. Acknowledging that this cannot be an easy task, and the newness of this variable likely means that it needs to be negotiated and discussed in a more responsive way, may also help explain the differentiated discourse approach.

Conclusion

1. Key findings

This thesis has offered a conceptualisation of the copyright user as idealised in a selection of EULAs. Using CDA, the thesis demonstrates how the user is subjectively constructed, and is never a stable concept, even within one small corner of the creative industries: video games and eSports. There is no natural, nor inevitable vision of the user, but rather a construction which best perpetuates the strategic needs of a rightsholder at a given time. This construction usually supports, but may occasionally refute, the dominant ideology of a strong, proprietary and protectionist view of software. The apparent neutrality of the 'user' is precisely what makes it a powerful tool for the realisation of this ideology, and the naturalisation of assent to the EULA makes it the best means of achieving this. The choice to describe the user in this respect as a 'tool' is deliberate, precisely because throughout this analysis the user is not the person influencing the discourse, but rather being shaped by it. The user is a vessel through which a particular vision can be realised; their construction in fact reveals more about the priorities of the force doing the shaping.

The first theme, Copyright, best demonstrates the malleability of the user concept. The dominant discourse of the triple A rightsholder uses the EULA to frame the recipient as *a user of proprietary software*. Through the immediate invocation of law and adoption of legal tropes, the rightsholder invokes power *behind* discourse, as bestowed by copyright law. By comparison, the user is a comparatively weak object within this legal relationship, who is framed as oppositional to the proprietary interest of the rightsholder. Throughout this theme, copyright protection is clearly important in the dominant discourse, but only insofar as it supports the dominant proprietary ideology: by contrast, where the user's interest is concerned, copyright is obscured.

Yet, the dominant discourse of triple A is but one facet of the Copyright theme and legal claims to power through discourse are not universal. Instead, indie companies, who emphasise artistic freedom and opposition to corporate culture, reject this discourse. Indie companies turn the EULA into a shared ideological space where the user is invited to join them in being vaguely oppositional to copyright, which is treated as almost synonymous with heavy-handed copyright enforcement within the text. Where the triple A fears this opposition, the indie company channels this to turn the EULA into an extension of the game *play*. The Copyright theme thus reveals that

material relations at industry level impact the degree to which a rightsholder idealises a *copyright* user of proprietary software, rather than a player of a game.

The second theme, Consumption, is the most homogenised aspect of the discourse, regardless of the industry characteristics of the rightsholder (e.g., country of origin, corporate culture), suggesting that this construction of the user is the most universally concrete and agreed upon. In this theme, the user is doubly constructed first as a non-owner and then, more purposively, as a non-reseller. Even as distribution mechanisms fluctuate between different business models, both physical and digital, this ultimately does not impact the textual construction of the user, even where it should both in principle and as a matter of law. This is an example of power *through* discourse, as it is purely an artificial construction of the text with no justification outside of the discourse itself.

Analysis at the sociocultural level suggests that the homogenised, double construction of non-ownership and non-resale is in the furtherance of retaining ongoing control of a game *copy*, rather than just the copy*right*. This is again suggestive of a strong, protectionist view of game software that extends in excess of the limitations of copyright law. The discourse is justified within the industry by painting resale as the 'imaginary dragon' of video games, which must be slayed to ensure their ongoing survival, and thus justifying ongoing retention of control of the copy. By aligning the act of reselling as both piratical and fraudulent, the view of the user as a transactional endpoint becomes normalised, and morally justified. Thus, whilst the user may have consumptive qualities (buying, purchasing etc.) they are strategically excluded from being framed as a *consumer* within the EULA to emphasise more transient use and retention of ownership by the rightsholder.

The third theme, Creativity, strategically configures a system whereby creative authorial acts are subsumed within the ambit of usership. This again furthers a protectionist and proprietary view of game software by transforming creativity into an exception granted by the rightsholder, rather than an authorial act in itself. In this theme, the user is shaped by a differentiated discourse that is outwardly friendly, informal, and encouraging of creativity, contrasting with the formal, authoritative approach of the dominant, legalistic, and formal discourse adopted elsewhere in the EULA. This type of register and style switching within the EULA is indicative of a hegemonic influence that normalises acquiescence to what may otherwise be a disagreeable construction of the user.

In the Creativity theme, the treatment of the user as a content creator, rather than an author, is justified through a strong non-commercial construction. All UGC activities are permitted only insofar as they promote the furtherance of personal enjoyment and play. The user is, more accurately, understood to be an amateur who makes content for the love of the game, rather than for acknowledgement or the promise of remuneration. Importantly, non-commerciality is conceptualised differently in this theme than in copyright law; it does not extend to *passive* monetisation. This passivity is key: UGC's value is only determined by its use but cannot be actively solicited. The user cannot exploit their content in the same way an author may with their work, thus preserving the binary between them.

Having summarised the key aspects of these themes, it is worthwhile reflecting on how they can also be read as a historical narrative about the evolution of the user, and a sliding scale of power.

First, it is evident that the evolutions of the user explored in Chapter 2 have never actually disappeared or been replaced over time, but rather have been incorporated and amalgamated into the user of today. The need for a legal relationship with the user, manifested through copyright, as called for during the 1970s, is still present. As is the user as a non-consumer as imagined from the origins of the EULA in 1969. The most recent variable of user creativity from the web 2.0 era is also prevalent. These historical facets of the user therefore co-exist, and build upon each other, with the resulting user as an evolution or amalgamation of these developments, rather than a replacement.

Second, the legitimacy and negotiation of power varies throughout the themes. Beginning with Copyright, the symbolic invocation and interaction with law evidences power *behind* discourse, which is presented as the strongest and most legitimated justification for the EULAs existence. In Consumption, power is instead mediated *through* the discourse, as the crucial construction of the user as a non-reseller is purely textual. The artificial nature of this power makes it more contestable and thus it can change and be responsive to criticism by user communities. Finally in Creativity, lack of power, whether because the rightsholder is weaker or the user more powerful, is disguised behind a friendly and informal discourse which aims to build rapport with the user. In this final theme, any legitimacy of power whether behind or through the discourse is thus contestable.

Finally, in returning to the core research question of the thesis: what is a copyright user and how are they constructed within the EULA? From the perspective of game and eSports rightsholders,

the user has only three consistent, strong conceptualisations: as a non-reseller; as an amateur, non-commercial entity; and emphatically as *not* a consumer. These characteristics are expressed strongly and consistently within the discourse. On other aspects, the user is less stable. There are considerable differences at industry-level between whether the recipient of a EULA is a *user* of proprietary software or the *player* of a game: perhaps they are both. The creative user is treated as a welcome co-creator, but also paradoxically as a non-author. There is thus no singular, unified conceptualisation of the user, but rather a collection of, often contradictory, characteristics as idealised by the rightsholder in different contexts and under different circumstances.

Nor are these characteristics of the user natural or inevitable; the user is, as designed in copyright doctrine, a neutral vessel upon which more colourful characteristics can be applied by external forces. Strategically, the EULA applies these characteristics in such a way as to best perpetuate the industry needs of the time, whether supporting a strong, proprietary vision of software, or a countercultural rejection of copyright enforcement. The user then, as a neutral vessel, can be shaped by the EULA in order to realise one's rights, but also to achieve particular ideologies.

2. Significance and contribution

The thesis is situated amidst the existing conceptual and theoretical literature explored in Chapter 1. The thesis makes a contribution to this body of work by creating a bridge between the doctrinal 'problem' of the absence of user in copyright, and the conceptual 'solution' via contract. The thesis explains the relative neglect of the user in copyright doctrine with reference to the construction of 'lawful use' through contract (see Chapter 1), which offloads the conceptualisation of the user to an external force. In doing so, the thesis largely rejects that 'user' is a wholesale replacement of existing categorisations, such as consumers,[669] the public,[670] or authors.[671] Instead, building on the notional line of argumentation,[672] the thesis submits that whilst users can have the qualities of these existing categories and can move between them, they can also be conceptualised quite differently depending on the context in which they are situated. The thesis does not describe this as a universal identity that the user actively constructs for themselves (supposed by Cohen and Liu),[673] but rather

[669] Ginsburg (n2).
[670] Patterson and Lindberg (n83).
[671] Tehranian (n96) and Gervais (n13).
[672] Meese (n8), Gibson (n115) and Erickson (n27).
[673] Cohen (n3) and Liu (n8).

an identity that is leveraged upon the user via the EULA. In this respect, the thesis is more critical of the manner in which the user is constructed than in previous scholarship.

The thesis gives the user a defined image, demystified from the text of the EULA and as imagined by rightsholders in the video game and eSports industries. In attempting to avoid the problem of listing permitted *uses* (akin to copyright exceptions), the thesis instead describes the *characteristics* of the idealised user: as a player, recipient of proprietary software, non-reseller, non-owner, an amateur, a vaguely piratical threat. Many of these characteristics are anticipated by the existing literature and realised in this thesis. The user as an amateur is firmly embedded in copyright's assumptions about UGC and exceptions being premised on non-commerciality.[674] The user as a player, who primarily engages with a game for the purposes of enjoyment, as opposed to a user of proprietary software, is echoed in Litman's work on the copyright reader.[675] Situating use within video games and eSports as sites of study, being inherently interactive mediums which necessitate user input, is reminiscent of Tehranian's Hegelian account of 'passive' use as an inherently creative process.[676] Perzanowski and Shultz have written extensively about the user as a non-owner and to a lesser extent non-reseller.[677] Meese and Cohen rightly anticipate that, given the user's outward neutrality, they will inevitably be shoehorned into the category of pirate.[678] Importantly, each of these characteristics are normally treated in the literature in isolation, or as a singular truth, rather than a context and time specific idealisation. By contrast, this thesis finds that the concept of user implied in EULAs is an amalgamation of *constructed* characteristics which vary depending on the strategic needs of the force creating them. Notably, the only characteristic which is firmly embedded in the literature, but which is not replicated in the thesis, is the conceptualisation of the user as consumer.[679] The thesis finds that whilst the user may have consumptive *qualities*, they are consistently rejected as a consumer except in very limited, strategic situations. The user is understood to be a distinct subject in this respect.

The thesis also makes contributions to method, offering an alternative methodological perspective through which to conceptualise the user (detailed in Chapter 3). CDA, whilst unorthodox in its application to fixed, quasi-legal language, is adapted here to reveal the conceptual features of legal

[674] See n63 and n64.
[675] Litman n5.
[676] Tehranian (n96).
[677] Perzanowski and Schultz (n197).
[678] Meese (n8) and Cohen (n3).
[679] Ginsburg (n2).

texts, rather than a functional legal analysis. Engagement with the theoretical and philosophical principles of CDA is useful both for systematising the critical dimension inferred in previous literature,[680] and giving explanatory value to the ongoing existence of the EULA. For example, regarding power, if language is not powerful in itself but can be made powerful depending on who wields it, then the EULA should be in principle a neutral tool. As such, the thesis is not firmly situated amidst outright opponents[681] or proponents[682] of private contract in and of itself. Indeed, in using the EULA as a tool, it is apparent that the dominant ideology of a strong, protectionist view of game software is not universally accepted, but rather something that is specifically imparted on the user by identifiable actors in the triple A sector. According to this methodological paradigm, the EULA is neither 'good' nor 'bad', but rather purposeful; it is a tool to achieve a specific, ideological objective. Much like the user, the EULA is also a vessel through which one can realise, and idealise, their rights. Thus, through the lens of CDA, the EULA is better understood as a form of hegemonic code which can embody a particular ideology and present it as common sensical by mediating the means to an end, thus normalising its acceptance. Future research on the nexus between copyright, the user and contract may benefit from engagement with these theoretical concepts, given their explanatory value.

2.1 Limitations

The thesis offers a conceptualisation of the user, as manifested from EULAs in the video games and eSports industries, between 2019 and 2020. As such, it is possible that there may be sectorial specific differences between user concepts in different industries, which are not captured in this thesis. Had time and resources been permitting, a larger comparison between multiple, and more obviously different, industries (e.g. music, books, television etc.) would have been beneficial in further testing the variability and malleability of the user concept. Whilst eSports is introduced in this thesis as a viable comparator to the video games industry, it is curiously invisible in the findings. The non-commercial conceptualisation of the user is so consistent in both industries, such that it *de facto* excludes the professional player and thus dampens its effect as a comparator. Evidencing a dramatically different conceptualisation of the user in an entirely different industry may offer an enlightening comparative perspective that bolsters the finding of the user's malleability, which could be the subject of future research.

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[680] Meese (n8), Gibson (n115) and Erickson (n27).
[681] See n230.
[682] See n231.

The frozen temporal element of the research should also be understood as a type of limitation to the thesis findings. Indeed, reflecting on the findings in a subsequent project commenced approximately one year after the initial data collection,[683] it seems that during the COVID-19 pandemic, many EULAs in this dataset were updated to include more liberal UGC policies,[684] user-friendly language,[685] and new eSports permissions.[686] This change may be as a result of increased home gaming and remote eSports events, in the suspension of other social activities and live sport competitions.[687] However, in observing this rather rapid change, the frozen view presented in this thesis also affirms one of the key findings: that the user is constantly in flux and the EULA is responsive to the social and cultural context in which they find themselves. A review of the same dataset even one year after collection may achieve very different findings, but this does not mean the earlier findings are irrelevant. Rather, the thesis is better understood as offering an alternative methodological perspective to conceptualising the user through contract which inevitably will continue to be an ongoing, and context-specific, process.

3. Implications

In line with the philosophical underpinnings of CDA, it is not sufficient for the thesis to be only critical, but also progressive. Thus, is it possible to accurately understand the user to avoid misidentification, mismanagement and ultimately erasure? This section considers two key implications from the thesis and how these can be used to inform future copyright policy and research agendas.

3.1 Conceptual vocabulary

As the thesis methodology is primarily concerned with language, throughout the thesis there are many examples of strains on the conceptual vocabulary of copyright that should be interrogated and improved.

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683 You Can Play (n316).

684 Notably Nintendo (post-release of *Animal Crossing: New Horizons*) and Capcom (in response to the virality of Lady Dimetrescu in *Resident Evil: Village*).

685 Psyonix, for example, post-acquisition by Epic Games, are absorbed into a friendlier, more informal 'Fan Content Policy' (Appendix 2).

686 EA, 'Community Tournament Guidelines' (*EA*, date unknown) <https://www.ea.com/compete/guidelines> accessed 16 September 2021.

687 Lufkin B, 'How online gaming has become a social lifeline' (*BBC News*, 16 December 2020) <https://www.bbc.com/worklife/article/20201215-how-online-gaming-has-become-a-social-lifeline> accessed 16 September 2021.

As noted in the Introduction, the thesis is not *per se* oppositional to the term 'user'. Reiterating again that CDA holds language is not in itself powerful, 'user' is only problematic in certain contexts, and in others may be the most appropriate way of describing one's relationship with a work (e.g., as a recipient of a digital service). Whilst it is tempting to think that wholesale replacement of the term may change outcomes,[688] such a solution does not fix the fatal flaw where user is being applied to non-user entities. As such, precision rather than wholesale replacement is more desirable: 'consumer' should be used to describe someone acting in their capacity as a consumer, and 'author' to describe an author. Disguising either behind the label of 'user' results in deprivation of the benefits of either and normalises their respective (mis)treatment.

However, whilst the term 'user' should not in itself be seen as contentious, one other is: 'content' or 'generated content', or any variant thereof referring to UGC.[689] In some respects, the study of UGC necessitates an existential viewpoint ('it exists because people say that it does').[690] Further, this thesis shows that UGC policies are often (partially) pragmatic, community regulatory responses to uncertain law.[691] Simultaneously however, it is a dangerous concept to import *into* copyright precisely because of its contradictory nature. Throughout the Creativity theme, UGC appears to be used as a label to deprive authorship on the implicit assumption of amateurism and non-commerciality. Original works are thus transformed into controllable content, and authors become users: all are an extension of the original rightsholder's initial interest in the work. The concept of UGC then can distort principles of aesthetic neutrality by treating creativity as an exception rather than an authorial act in itself. 'UGC' normalises a view that works created by a user are somehow less worthy of remuneration or acknowledgement compared with more authentic, 'professional' originality.[692] Resultingly, even seemingly progressive UGC exceptions should be treated with a degree of scepticism lest they impart this defect. As with the term 'user', a wholesale replacement of 'UGC' is not likely to be effective in changing outcomes, but rather recognising the myriad of characteristics assumed by the user and accurately categorising them for what they are: in many cases, this may be as an author.

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[688] e.g. Patterson and Lindberg (n83) in framing the user as the people formerly known as the 'public'.
[689] See similar dissidents in n553. Noting that 'content' as a term seems to be in the process of being reclaimed and meme-ified by creators (see e.g. Burnham B, 'Content' (*YouTube*, 9 June 2021) <https://www.youtube.com/watch?v=9Tnux7K3MOQ> accessed 16 September 2021), including phrases such as: 'look I made you some content', 'here comes the content', 'mountains of content').
[690] Gervais (n13) 843.
[691] Community norms/enforcement are suggested by Iljadica (n92) as a more effective way of regulating UGC.
[692] A tension also criticised by Iljadica (n92) and Erickson (n27).

Whilst this 'rights vs rights' approach has been criticised,[693] the Marxist influences in the thesis' theoretical framework may offer an alternative compelling framing of the UGC problem. As UGC is used in this thesis to justify an automated ongoing control of an independently created work, its operation is more akin to the orthodox Marxist framing of labour (and alienation thereof).[694] This alternative framing can deflect from the omnipresent concern that, if one argues the user is important, then the author is somehow less important.[695] On the contrary, the thesis is more dialectical in suggesting both can be one in the same. It is perhaps more useful to move the user outwith the consumption-production paradigm, and instead frame the user as more oppositional to *ownership*; effective ownership of labour in this case may be a more useful way of framing the UGC 'problem'.

3.2 Copyright and contract

The thesis problematises the amount of discretion left to the rightsholder in private contract law by copyright doctrine (allowing for the construction of 'lawful' use). In principle, copyright intends to preserve a balance between the rightsholder and user, but this is difficult when one is routinely being conceptualised elsewhere, every day, in contract. For this reason, the thesis has implications for the growing body of work on the nexus between copyright and contract, particularly user rights (outlined in Chapter 1).

The thesis suggests that the EULA continues to be used past its initial justification for a reason, or rather, what specific actors in these industries *perceive* as a legitimate reason. Throughout history, the EULA has consistently been a response to a perceived legal defect, usually the under-protection of software (thus leading to the dominant discourse and ideology of a *strong*, proprietary view of software). As such, the EULA is better understood as a symptom rather than a cause. Rather than offering implications on whether the overridability of contract by copyright is still justified, the more apt implication from the thesis is that the EULA encourages scholars and policy makers alike to look inward to the copyright system itself to understand what the EULA is responding to. For example, UGC policies, whilst imperfect, exist as they are the only meaningful way to permit user creativity without the continuous implication of infringement under the default

[693] Craig (n99).
[694] See generally Fairclough (n240, n256, n262).
[695] A concern omnipresent in Ginsburg (n2).

copyright regime. In the face of ongoing legal uncertainty surrounding digital exhaustion and resale, a firm stance against this creates a party line and attempts to fashion a new community norm (however contestable in its execution). Perhaps the malleability of the vocabulary of copyright law is most indicative of attempting to remedy the perceived deficit, with legal concepts being given new meanings through discourse. Rightsholders have a firm grasp of the non-commercial designation of the user offered by copyright law, but its adaptation in meaning to exclude passive monetisation suggests that the legal definition alone does not sufficiently account for the nuances of the community. The EULA is thus not a mirror of the law, but rather a door that encourages one to first look inwards to the defects of the copyright system itself.

However, and importantly, the thesis should not be read as an indictment of the EULA. Recalling again that, per the CDA framework, language is not in and of itself powerful, the EULA *should* in principle be a neutral tool. Nonetheless, the dominant discourse often uses this neutral tool to perpetuate a heavy-handed, proprietary ideology of software that goes far in excess of the delicate balance copyright seeks to maintain. Yet, it is precisely the copyright system that makes this excess possible. Resultingly, any proposed overhauls to the copyright-contract nexus should consider that limited user rights over specific exceptions are unlikely to cause meaningful change without more substantive changes to the determinants of 'lawful' use (Chapter 1).[696]

As such, the thesis should be read as an illustration of how the relative neglect of the user in copyright doctrine allows for a rightsholder to construct the user in their own image, via contract. Even if in principle this contract should be a neutral tool, inevitably it can, and will, be wielded by powerful forces to leverage the realisation of rights, both real and imagined.

[696] With particular reference to the user 'exceptions' for quotation, criticism and review, and caricature, parody or pastiche, latterly introduced to CDSM Directive, art 17(7)(a) and (b).

Appendix 1

IBM, 'License Agreement for IBM Program Products' (1969)

International Business Machines Corporation *Armonk, New York 10504*

License Agreement for IBM Program Products

To: International Business Machines Corporation

License Agreement No.:

Branch Office Address:

Br. Off. No.:

Customer No.:

Name and Address of Customer:

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The Programming Service Classifications are:

Class A

When the Customer encounters a problem which IBM Field Engineering diagnosis indicates is caused by a defect in a current unaltered release of the licensed program, IBM Field Engineering will (1) if the licensed program is inoperable, apply a Program Temporary Fix (PTF) or make a reasonable attempt to develop an emergency by-pass, and (2) prepare an Authorized Program Analysis Report (APAR) and submit it to an IBM Central Programming Service location.

IBM Central Programming Service will respond to any problem caused by a defect in a current unaltered release of the licensed program by issuing a PTF to the originator of the APAR and/or issuing corrected code or notice of availability of corrected code. Corrections will be incorporated into new releases of the licensed program which will be made available to the Customer by IBM. Any other programming services or assistance will be provided at a charge.

Class B

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IBM Central Programming Service will respond to any problem caused by a defect in a current unaltered release of the licensed program by issuing a PTF to the originator of the APAR and/or issuing corrected code or notice of availability of corrected code. Corrections will be incorporated into new releases of the licensed program which will be made available to the Customer by IBM. Any other programming services or assistance will be provided at a charge.

Class C

Programming services or assistance will be provided at a charge. Central Programming Service will not be provided, except for corrections applicable to APAR's received prior to the date Class C becomes effective for a licensed program previously assigned Class A or Class B.

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ployees without prior written consent from IBM, except during the period any such person is on the Customer's premises with the Customer's permission for purposes specifically related to the Customer's use of the licensed program or optional materials.

Patent and Copyright Indemnification

IBM will defend at its expense any action brought against the Customer to the extent that it is based on a claim that licensed programs or optional materials, used within the scope of the license hereunder, infringe a copyright in the United States or a United States patent, and subject to the limitation of liability stated herein, IBM will pay any costs, damages, and attorney fees finally awarded against the Customer in such action which are attributable to such claim, provided that, the Customer notifies IBM promptly in writing of the claim and IBM may fully participate in the defense and/or agrees to any settlement of such claim. Should the licensed programs or optional materials become, or in IBM's opinion be likely to become, the subject of a claim of infringement of a copyright or a patent, IBM may procure for the Customer the right to continue using the licensed programs or optional materials, or replace or modify them to make them noninfringing. If neither of the foregoing alternatives is reasonably available to IBM, then IBM may discontinue the licensed program and/or optional materials upon one month's written notice to the Customer. If, however, the licensed program and/or optional materials is not the subject of a claim of copyright infringement, the Customer may notify IBM in writing during the one month after IBM's notice of discontinuance that the Customer elects to continue to be licensed with respect to the licensed program or optional materials until there has been an injunction or the claim has been withdrawn, and agrees to undertake at the Customer's expense the defense of any action against the Customer and to indemnify IBM with respect to all costs, damages, and attorney fees attributable to such continued use after such notice is given to IBM; it being understood that IBM may participate at its expense in the defense of any such action if such claim is against IBM. Upon IBM's written notice of discontinuance to the Customer, a licensed program with Programming Service Classification A or B will be changed to Programming Service Classification C. IBM shall have no liability for any claim of copyright or patent infringement based on (1) use of other than a current unaltered release of the licensed program or optional materials available from IBM if such infringement would have been avoided by the use of a current unaltered release of the licensed program or optional materials available from IBM or (2) use or combination of the licensed program or optional material with non-IBM programs or data if such infringement would have been avoided by the use or combination of the licensed program or optional material with other programs or data. The foregoing states the entire liability of IBM with respect to infringement of any copyrights or patents by the licensed programs or optional materials or any parts thereof.

Responsibilities of the Parties

IBM will publish design objectives and estimated availability dates for licensed programs which it announces. However, IBM does not represent or warrant that such design objectives or estimated availability dates will be met.

IBM will publish Program Product Specifications for each licensed program with Programming Service Classification A or B as the licensed program is included in the IBM Program Information Department Library (Library).

IBM will provide a functional description of each licensed program with Programming Service Classification C as it is included in the Library.

The Customer shall be exclusively responsible for the supervision, management and control of his use of the licensed programs, and/or optional materials, including but not limited to: (1) assuring proper machine configuration, program installation, audit controls and operating methods, (2) establishing adequate backup plans, based on alternate procedures and/or based on access to qualified programming personnel to diagnose, patch, and repair licensed program defects, in the event of a licensed program malfunction and, (3) implementing sufficient procedures and checkpoints to satisfy his requirements for security and accuracy of input and output as well as restart and recovery in the event of a malfunction.

The Customer agrees that he will take appropriate action by instruction, agreement, or otherwise with his employees or other persons permitted access to licensed programs and/or optional materials to satisfy his obligations under this Agreement with respect to use, copying, modification, and protection and security of licensed programs and optional materials.

Delivery

When available from the Library, licensed programs will be shipped to customers generally within one month after confirmation of order, subject to conditions beyond IBM's control, unless the Customer requests a later delivery date. Announced licensed programs will be included in the Library in accordance with IBM's estimated availability date for each licensed program. However, IBM does not represent or warrant that shipment or availability dates will be met.

Program storage media (magnetic tapes and disks) will be provided at a charge by IBM if not supplied by the Customer. Licensed programs will be shipped to the Customer without charge.

Risk of Loss

If any licensed program or optional material is lost or damaged during shipment, IBM will replace the licensed program or optional material and program storage media at no additional charge to the Customer.

If any licensed program or optional material is lost or damaged while in the possession of the Customer, IBM will replace the licensed program or optional material at a charge for program storage media unless it is provided by the Customer.

Discontinuance

Within one month after the date of discontinuance of any license under this Agreement, the Customer will furnish IBM a completed IBM Program Product Certificate of Discontinuance certifying that through his best effort, and to the best of his knowledge, the original and all copies, in whole or in part, in any form, including partial copies in modifications, of the licensed program and any optional material received from IBM or made in connection with such license have been destroyed, except that, upon prior written authorization from IBM, the Customer may retain a copy for archive purposes only.

Warranty

Each licensed program with Programming Service Classification A or B will conform to its published Program Product Specifications when it is shipped to the Customer. Sample data will be shipped with such licensed programs to assure that the Customer has received a valid copy.

Each licensed program with Programming Service Classification C will be distributed on an "as is" basis without warranty.

Limitation of Liability

The foregoing warranty is in lieu of all other warranties express or implied, including, but not limited to, the implied warranties of merchantability and fitness for a particular purpose.

The Customer agrees that IBM's liability hereunder for damages including but not limited to liability for patent infringements, but excluding liability for copyright infringements, regardless of the form of action, shall not exceed the charges paid by the Customer for the particular licensed program or optional material involved.

The Customer further agrees that IBM will not be liable for any lost profits, or for any claim or demand against the Customer by any other party, except a claim for patent or copyright infringement as provided herein.

No action, regardless of form, arising out of the transactions under this Agreement, may be brought by either party more than one year after the cause of action has accrued, except

that, an action for nonpayment may be brought within one year after the date of last payment.

In no event will IBM be liable for consequential damages even if IBM has been advised of the possibility of such damages.

General

The terms of this Agreement may be modified by IBM upon six months' written notice to the Customer, except for the terms and conditions which relate specifically to (1) discontinuance of this Agreement or licenses granted under this Agreement as provided in the section of this Agreement entitled "Term" and the section of this Agreement entitled "Patent and Copyright Indemnification", and (2) charges for licenses granted under this Agreement as provided in the section of this Agreement entitled "Charges". The Customer may terminate this Agreement or discontinue any of the licenses hereunder on the effective date of such modification upon one month's prior written notice to IBM; otherwise, such modification shall become effective.

The term "this Agreement" as used herein includes any future written amendments, modifications or supplements made in accordance herewith.

The terms of this Agreement will take precedence over the terms of any present or future order from the Customer for any licenses hereunder. The Customer agrees that his acceptance of future delivery of any licensed program or optional material from IBM is conclusive evidence of his agreement that the license for such program or optional material is governed by the terms of this Agreement.

If any of the provisions, or portions thereof, of this Agreement are invalid under any applicable statute or rule of law, they are to that extent to be deemed omitted.

The Customer's remedies in this Agreement are exclusive.

The Customer acknowledges that he has read this Agreement, understands it and agrees to be bound by its terms and further, agrees that it is the complete and exclusive statement of the agreement between the parties, which supersedes all proposals oral or written and all other communications between the parties relating to the subject matter of this Agreement; except as noted below.

This Agreement will be governed by the laws of the State of New York.

IBM hereby grants the Customer nontransferable, nonexclusive licenses under the terms of this Agreement to use the following licensed programs and/or related optional materials in machine readable form on designated serial numbered CPUs and/or to utilize licensed programs and related optional materials in printed form, as specified below.

Program Product List

Program/Material	Programming Service Classification	Designated CPU Type/Serial Number	Designated CPU Location	Estimated Shipment Date	Charges

AMENDMENTS

Several amendments and modifications, identified in Schedule A, are attached to and made a part of this agreement.

IBM_____

GENESCO_____

Received by IBM at_____

The Program Product List may be continued on the Continuation Sheet.

By_____
Branch Manager's Signature

_____
Branch Manager's Name

On_____
Date

Accepted by:

International Business Machines Corporation

By_____
Authorized Signature

_____
Name

_____
Title

On_____
Date

_____
Customer

By_____
Authorized Signature

_____
Name

_____
Title

On_____
Date

Appendix 2

Dataset of EULAs

Game Title	Rightsholder	Country of origin	Industry Category	Dataset	Sources
Dota 2	Valve (founded 1996)	US	Platform	eSports	Valve, 'Steam Subscriber Agreement' <https://store.steampowered.com/subscriber_agreement/> latest version retrieved 27 November 2019 Valve, 'Valve Video Policy' <https://store.steampowered.com/video_policy> latest version retrieved 27 November 2019
Fortnite	Epic Games (founded 1991)	US	Triple A	eSports	Epic Games, 'Fortnite End User License Agreement' <https://www.epicgames.com/fortnite/en-US/eula> latest version retrieved 27 November 2019 Epic Games, 'Fan Content Policy' <https://www.epicgames.com/site/en-US/fan-art-policy> latest version retrieved 27 November 2019
League of Legends	Riot Games (founded 2006)	US	Triple A	eSports	Riot Games, 'League of Legends Terms of Use' <https://na.leagueoflegends.com/en/legal/termsofuse> latest version retrieved 27 November 2019 Riot Games, 'Legal Jibber Jabber' <https://www.riotgames.com/en/legal> latest version retrieved 27 November 2019
Starcraft II	Blizzard (founded 1991)	US	Triple A	eSports	Blizzard, 'End User License Agreement' <https://www.blizzard.com/en-gb/legal/08b946df-660a-40e4-a072-1fbde65173b1/blizzard-end-user-license-agreement> latest version retrieved 27 November 2019

					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 27 November 2019 Blizzard, 'Video Policy' <https://www.blizzard.com/en-gb/legal/2068564f-f427-4c1c-8664-c107c90b34d5/blizzard-video-policy> latest version retrieved 27 November 2019
PlayerUnknown's Battlegrounds	PUB G Corporation (founded 2018)	South Korea	Triple A	eSports	PUB G, 'End-User License Agreement' <https://www.pubg.com/eula/> latest version retrieved 27 November 2019 PUB G, 'Using PLAYERUNKNOWN'S BATTLEGROUNDS in Player-Created Content' <https://www.pubg.com/player-created-content/> latest version retrieved 27 November 2019
Arena of Valor	Proxima Beta (subsidiary of Tencent) (founded 2003)	China	Triple A	eSports	Proxima Beta, 'Arena of Valor – Terms of Service' <https://www.arenaofvalor.com/terms.html> latest version retrieved 27 November 2019
Rainbow Six Siege	Ubisoft (founded 1986)	France	Triple A	eSports	Ubisoft, 'End User License Agreement' <https://legal.ubi.com/eula/en-GB> latest version retrieved 27 November 2019 Ubisoft, 'Terms of Use' <https://legal.ubi.com/termsofuse/en-GB> latest version retrieved 27 November 2019 Ubisoft, 'Video Policy' <https://www.ubisoft.com/en-us/videopolicy.html> latest version retrieved 27 November 2019

Rocket League	Psyonix (founded 2000)	US	Indie	eSports	Psyonix, 'End User License Agreement' <https://www.psyonix.com/eula/> latest version retrieved 27 November 2019 Psyonix, 'Terms of Use' <https://www.psyonix.com/tou/> latest version retrieved 27 November 2019
SMITE	Hi-Rez Studios (founded 2005)	US	Indie	eSports	Hi-Rez, 'End User License Agreement' <https://web2.hirez.com/hirez-studios/legal/SMITE-End-User-License-Agreement-2016-10-21.pdf> latest version retrieved 27 November 2019 Hi-Rez, 'Hi-Rez Studios Policy for Streaming Videos and VODS (videos-on-demand)' <https://web2.hirez.com/hirez-studios/legal/Hi-Rez-Studios-Policy-for-Streaming-Videos-and-VODs-Videos-on-Demand-7-12-18.pdf> latest version retrieved 27 November 2019 Hi-Rez, 'FAQs' <https://www.hirezstudios.com/legal> latest version retrieved 27 November 2019
Call of Duty: Black Ops 4	Activision (founded 1979)	US	Triple A	eSports	Activision, 'Terms of use' <https://www.activision.com/uk/en/legal/terms-of-use> latest version retrieved 27 November 2019
Halo 5: Guardians	Microsoft (Game Studios founded 2000)	US	Platform	eSports	Microsoft, 'Terms of Sale' <https://www.microsoft.com/en-gb/storedocs/terms-of-sale> latest version retrieved 27 November 2019

					Microsoft, 'Community Standards for Xbox' <https://www.xbox.com/en-US/legal/community-standards> latest version retrieved 27 November 2019 Microsoft, 'Game Content Usage Rules' <https://www.xbox.com/en-us/developers/rules> latest version retrieved 27 November 2019 Microsoft, 'Services Agreement' <https://www.microsoft.com/en-gb/servicesagreement#serviceslist> latest version retrieved 27 November 2019
Magic: The Gathering Arena	Wizards of the Coast (founded 1990)	US	Triple A	eSports	Wizards of the Coast, 'Magic Online End User License Agreement and Software License' <https://magic.wizards.com/en/mtgo/eula> latest version retrieved 27 November 2019 Wizards of the Coast, 'Fan Content Policy' <https://company.wizards.com/en/legal/fancontentpolicy> latest version retrieved 27 November 2019 Wizards of the Coast, 'Code of Conduct' <https://company.wizards.com/legal/code-conduct> latest version retrieved 27 November 2019
World of Tanks	Wargaming (founded 1998)	Belarus	Triple A	eSports	Wargaming, 'End User Licence Agreement' <https://legal.eu.wargaming.net/eula/?_ga=2.226753625.519148912.1591803691-1999682024.1591803690> latest version retrieved 27 November 2019 Wargaming, 'Game Rules' <https://legal.eu.wargaming.net/en/game-rules/> latest version retrieved 27 November 2019

Apex Legends	EA Games (founded 1982)	US	Platform	eSports	EA, 'Electronic Arts User Agreement' <https://tos.ea.com/legalapp/WEBTERMS/US/en/PC/> latest version retrieved 27 November 2019
Shadowverse	Cygames (founded 2011)	Japan	Triple A	eSports	Cygames, 'Service Agreement' <https://shadowverse.com/terms.php> latest version retrieved 27 November 2019
The Witcher 3: Wild Hunt	CD Projekt Red (founded 1994)	Poland	Triple A	Video game	CD Projekt Red, 'User Agreement' <https://regulations.cdprojektred.com/en/user_agreement> latest version retrieved 1 December 2020 CD Projekt Red, 'Video Policy' <https://support.cdprojektred.com/en/witcher-3/playstation/content-policies/issue/830/video-policy> latest version retrieved 1 December 2020
The Elder Scrolls V: Skyrim	Bethesda (founded 1986)	US	Triple A	Video game	Bethesda, 'End User Agreement (EULA)' <https://bethesda.net/data/eula/en.html> latest version retrieved 1 December 2020 Bethesda, 'Zenimax Media Terms of Service' <https://bethesda.net/en/document/terms-of-service> latest version retrieved 1 December 2020 Bethesda, 'Code of Conduct' <https://bethesda.net/en/document/code-of-conduct> latest version retrieved 1 December 2020 Bethesda, 'Video Policy' <https://bethesda.net/en/article/3XrnHrB0iAesac8844yeuo/bethesda-video-policy> latest version retrieved 1 December 2020

Red Dead Redemption II	Rockstar Games (founded 1998)	US	Triple A	Video game	Rockstar Games, 'Limited Software Warranty and License Agreement' <https://www.rockstargames.com/eula> latest version retrieved 10 December 2020 Rockstar Games, 'Terms & Conditions' <https://www.rockstargames.com/legal> latest version retrieved 10 December 2020 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 10 December 2020
The Last of Us	Sony Interactive Entertainment (founded 1993)	US	Platform	Video game	Sony, 'Software License' <https://www.playstation.com/en-us/legal/softwarelicense/> latest version retrieved 1 December 2020 Sony, 'Software Usage Terms' <https://www.playstation.com/en-gb/legal/software-usage-terms/> latest version retrieved 10 December 2020
Batman: Arkham City	Warner Brothers Interactive Entertainment (founded 2004)	US	Triple A	Video game	WB Games Inc, 'End User License Agreement' <https://legal.wbgames.com/wbgames-legal/epic/eula/eula_epic_en_NZ.html> latest version retrieved 10 December 2020 WB Games Inc, 'Terms of Use' <https://policies.warnerbros.com/terms/en-us/html/terms_en-us_1.2.0.html> latest version retrieved 10 December 2020

The Legend of Zelda: Breath of the Wild	Nintendo (founded 1889)	Japan	Triple A	Video game	Nintendo, 'End User License Agreement' <https://www.nintendo.com/consumer/info/en_na/docs.jsp?menu=3ds&submenu=ctr-doc-eula> latest version retrieved 10 December 2020 Nintendo, 'Intellectual Property' <https://www.nintendo.co.uk/Legal-information/Intellectual-Property/Intellectual-Property-Policy-625951.html> latest version retrieved 10 December 2020 Nintendo, 'Nintendo Game Content Guidelines for Online Video & Image Sharing Platforms' <https://www.nintendo.co.jp/networkservice_guideline/en/index.html> latest version retrieved 10 December 2020 Nintendo, 'Nintendo's Anti-Piracy Programme' <https://www.nintendo.co.uk/Legal-information/Nintendo-s-Anti-Piracy-Programme/Nintendo-s-Anti-Piracy-Programme-732261.html> latest version retrieved 10 December 2020
Minecraft	Mojang (founded 2009)	Sweden	Indie	Video game	Mojang, 'Minecraft End User License Agreement' <https://account.mojang.com/documents/minecraft_eula> latest version retrieved 1 December 2020 Mojang, 'Brand and Asset Usage Guidelines for our Games' <https://account.mojang.com/terms#brand> latest version retrieved 1 December 20202
Borderlands 2	Take2 (founded 1993)	US	Triple A	Video game	Take2, 'Limited Software Warranty and License Agreement' <https://www.take2games.com/eula/> latest version retrieved 1 December 2020

					Take2, 'Take-Two Interactive Software Inc Terms of Service' <https://www.take2games.com/legal> latest version retrieved 1 December 2020
Dark Souls III	Bandai Namco (founded 2006 – merger of two earlier companies, Bandai 1960 and Namco 1955)	Japan	Triple A	Video game	Bandai Namco, 'Terms of Use' <https://en.bandainamcoent.eu/terms-of-use> latest version retrieved 1 December 2020
Resident Evil 2 (Remake)	Capcom (founded 1979)	Japan	Triple A	Video game	Capcom, 'End User License Agreement' <http://game.capcom.com/eula/eng.html> latest version retrieved 1 December 2020 Capcom, 'FAQ' <http://www.capcom-europe.com/faq/> latest version retrieved 1 December 2020
Superhot	Superhot Team (n/a – active since 2016)	Poland	Indie	Video game	Superhot Team, 'End User License Agreement' <https://superhotgame.com/eula/> latest version retrieved 1 December 2020
Undertale	Toby Fox (n/a – active since 2009)	US	Indie	Video game	Toby Fox and YoYo Games, 'Undertale EULA' <https://store.steampowered.com/eula/391540_eula_0> latest version retrieved 1 December 2020
Cuphead	Studio MDHR (n/a – active since 2017)	Canada	Indie	Video game	Studio MDHR, 'Cuphead Video Streaming Policy' <http://studiomdhr.com/video-streaming-policy/> latest version retrieved 1 December 2020

Metal Gear Solid V: The Phantom Pain	Konami (founded 1969)	Japan	Triple A	Video game	Konami, 'Terms of Use: Metal Gear Solid V: The Phantom Pain' <https://www.konami.com/mg/mgs5/tpp/_common_all/eula/tppps3web/eula/eula.en.html> latest version retrieved 1 December 2020
Outlast	Red Barrels (founded 2011)	Canada	Indie	Video game	Red Barrels, 'Message to YouTubers' <https://redbarrelsgames.com/contact/> latest version retrieved 1 December 2020

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WIPO Copyright Treaty (signed 20 December 1996) 2186 UNTS 121

European Union

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Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs [2009] OJ L 111/268

Directive 2012/28/EU of 25 October 2012 on certain permitted uses of orphan works with EEA relevance [2012] OJ L 299/5

Directive 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market [2019] OJ L 130/92

Regulation 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data [2016] OJ L 119/1

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Copyright Act 1976, Pub L 94-553

Digital Millennium Copyright Act 1998, Pub L 105-304

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