TALLINN UNIVERSITY OF TECHNOLOGY

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Let's Play!
Video Game Related User-Generated Content in the Digital Age -in Search of Balance Between Copyright and its Exceptions

Master Thesis

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I hereby declare that I am the sole author of this Master Thesis and it has not been presented to any other university of examination.

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The Master Thesis meets the established requirements.

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Table of Abbreviations (in alphabetical order)

DMCA	Digital Millennium Copyright Act
EC	European Commission
EULA	End User License Agreement
EU	European Union
IP	Intellectual Property
IPR	Intellectual Property Rights
MMOGs	Massively Multiplayer Online Games
OSP	Online Service Provider
TFEU	Treaty on the Functioning of the European Union
TOS	Terms of Service
TOU	Terms of Use
UGC	User-Generated Content
UK	United Kingdom
US	United States

Introduction

Not only has the video games became multi-million-dollar industry worldwide[1], but user-generated content (UGC) created by fans and other users has grown such a popularity it cannot be overlooked. In this time of digital age and social media UGC is here to stay, and it mainly created for purposes of sharing experiences, communication and businesses can benefit from it by getting free or low cost promotion for their products and services. Especially videos have started taking over and are the main type of UGC when it comes to video games that base on moving visual media. The major video-sharing platforms, YouTube and Twitch, are extremely popular and key actors facilitating gaming content created by users and the transition of gaming culture into mainstream. In addition to gaming companies, content creators benefit from multiple revenue streams having options to monetize content through advertisements, sponsorships, investments made by content viewers in the forms of subscriptions or donations. Because content creating and sharing is easy and gaming more and more popular, the volume of UGC is tremendous –as well as the quality of the content. [2]

Despite the benefits of UGC and its great impact on the games industry, copyright holders are also prone to suffer damages due to content based on their copyrighted works, and these conflicting interests are demonstrated by focusing on video game industry. The current regulation of copyright and its exceptions is a topical matter especially now in the digital age. A lot of discussion has raised about suitability of copyright framework for both the copyright holders as well as users utilizing copyrighted material in their content. Due to easy access to copyrighted content and numerous possibilities to easily copy, reproduce and make content publicly available, copyright holders regards that the law does not effectively protect them against mass-scale infringements and mechanisms for enforcing of copyrights are not efficient enough and requires a lot of efforts from copyright holders, and for these reasons infringements have become more and more common and unauthorized use of copyrighted materials are not necessarily considered as infringements by the public. At the same time, users consider that industries basing their business to copyrighted materials are in fact abusing their exclusive rights and exceeding their actual exclusive rights.

[1] Minotti, M. "Video games will become a $99.6B industry this year as mobile overtakes consoles and PCs", VentureBeat 21.4.2016.
http://venturebeat.com/2016/04/21/video-games-will-become-a-99-6b-industry-this-year-as-mobile-overtakes-consoles-and-pcs/ (2.1.2016)

[2] *See* Llamas, S., Foxman, M. Market Brief 2015: Gaming Video Content, SuperData, 2015

Digitalization and mass production of content in social media have created an evident gap between law and social norms that may require some re-considering of the rules.

It has been argued that copyright law in European Union (EU) falls behind the corresponding in United States (US), even if legislation is not necessarily up-to-date in the US either in this regard. This is caused by slow law making and harmonization mechanisms of EU and inflexible requirements for copyright exceptions and limitations implemented in national laws of the member states. In the US exceptions and limitations are applied in practice in accordance with the so-called fair use doctrine developed in case law, which is more flexible and can easier adapt to the changes in society. However, some early signs from updating copyright laws to better correspond today's society and having fair use model more like the one in use in the US can be seen in some member states. [3]

When determining use of copyrighted material as infringing or fair, permitted exception is often troublesome. A high number of derivative works of copyrighted works in digital, or electronic, form online and tools available for modification and adaptation of original copyrighted works gives rise to some extent of legal uncertainty in copyright law and weaken the ability of right holders to enforce their rights. A typical video or online game contain different copyrightable elements, such as graphics, video recordings and sounds which constitute audiovisual elements of the game, and on the other hand, software that divide into actual software and separable interfaces. Thus, copyright protection of video games is complex entity where different, separable elements of a game may be subject to protection separately. Video games have evolved to a very sophisticated level that allow users to create very complex and unique content within the game. Additionally, different add-ons and modifications for games and other gaming related UGC, such as game play videos, are very common, but are often interpreted as copyright infringements by the developer of the game.

Then, given that the business of game companies bases on utilizing intellectual property (IP), they must maintain their copyrights. In most cases players and publishers are only granted a license to use or access the game under specific terms, and to keep the value of the video game brand and safeguard made investments, the unauthorized use of elements of the game are usually regularly

[3] Tapio, V. Fair Use ja kolmivaihetesti joustavamman tekijänoikeudellisen sääntelyn mahdollistajana. Lakimies 2013, 1, pp 46-53

monitored by gaming companies. Right holders need intervene early in observed infringements to manage and control the use of copyrighted materials. Copyright infringements may include, in addition to producing copies of the game or its elements, misusing of copyrighted materials for the purpose of gain by misleading players to disclose their account or credit card details which at least, may infringe the terms of service (TOS), also known as terms of use (TOU), if such prohibitions have been included.

Some proportion of UGC also consist of derivative works presenting copyrighted material in a manner prejudicial to the author's artistic reputation or in such a form or context as to prejudice the author, or in a way that is considered to conflict with a normal exploitation of the work due to large amounts of UGC containing unwanted references and associations to technologies of which objectives primarily contain the purpose to interfere with the original work. While copyright holders' approaches to UGC vary, in many cases gaming companies are interested in setting some level of terms for content using copyrighted works, or assets, and monitoring that they are respected. The more UGC has associations or references that are considered negative by the copyright holder, the more restrictive is the approach and willingness to enforce copyrights. This view of copyright holders in gaming industry towards UGC represent the majority of gaming companies according to many writings, and is demonstrably the case based on several years of practical experience of the author of this thesis as a legal representative in monitoring and enforcing of video game copyrights against unauthorized use, including both UGC and other unauthorized use of intellectual property rights (IPRs), on behalf of a game developer company offering mobile games worldwide.

According to some point of views, copyright law may not necessarily serve its intended purpose in regard of UGC and reforming copyright laws are needed to meet the changing environment of copyright protected online content. Certainty in regard of copyright protection of video games and UGC is topical due to established video game culture and increasing popularity of online games, change in formats in which games are offered, and particularly, the large amount of UGC related to video games and uncertainty where is the fine line between permitted and infringing UGC. Maintaining and enforcing of copyrights is worthwhile, but the scope of actions should not be exaggerated as copyright is not an absolute. Copyright limitations and exceptions allow, inter alia, discussion and criticism of a work, the right to quote the work as required by the purpose and

in accordance with good practice (the so-called citation right), as well as the use of a work for educational purposes and, creating derivative works under certain conditions.

On the other hand, others consider the current copyright legislation to lack flexibility in terms of UGC and fixed list of exceptions and limitations does not comply with cultural change where social media and producing of UGC is essential phenomenon and way of communication. The European Commission has acknowledged copyright legislation to lack an exception or limitation to copyright that would allow creating of UGC and that can potentially hinder innovation and block new and potentially valuable work to disseminate, and even suggested introducing of a new exception for UGC to European copyright laws. [4]

Due to ongoing discussion about UGC and the conflicting interests of copyright holders, European approach to the exceptions and limitations to copyright by providing limited possibilities for them urges for review to find a balance and clarity to interpretation of exceptions in respect of UGC especially in the digital environment and considering cultural changes where individuals widely create new content based on existing, copyrighted content. This is done by comparing interpretations and the scope of fair use doctrine under American copyright law to corresponding European practice in the video game industry where UGC is particularly popular phenomenon among game players. It is worth considering if the closed type of list of exceptions should be opened in a way that allow member states to provide also other exceptions, especially for purposes of UGC, to copyright.

The exceptions and limitations to copyright base on the so called three-step test that was introduced in the Berne Convention[5], and Article 9(2) of Berne Convention forms the test as follows: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author." This has then been incorporated into the TRIPSs Agreement[6], WIPO Copyright Treaty[7], the WIPO

[4] European Commission. Green Paper on Copyright in the Knowledge Economy, COM (2008) 466/3 (July 2008), pp 19–20.
[5] Berne Convention for the Protection of Literary and Artistic Works, 9.9.1886 (Berne Convention)
[6] The Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C to the Agreement Establishing the World Trade Organization, 15.4.1994 (TRIPS)
[7] WIPO Copyright Treaty, 6.3.2002

Performances and Phonograms Treaty[8], the Software Directive[9], the Database Directive[10] and, into the InfoSoc Directive[11], in which it has been written out as an exhaustive list of exceptions and limitations that EU member states may incorporate in their national copyright legislation. The exceptions are laid down in the Article 5 of the InfoSoc Directive. In the US, exceptions are amendmed to the U.S.C under the title 17 Copyrights, or the Digital Millennium Copyright Act and its article 107, even though judge-created fair use doctrine has long practices in the US and has been developed through case law. Typically, UGC relies on the following exceptions: including of a work or other copyrighted subject-matter in other material incidentally, use of copyrighted material for the purpose of caricature, parody or pastiche or for quoting a work or other subject matter for purposes such as criticism or review.

However, the exceptions and limitations listed in the Directive are only applied in certain special cases which do not cause confliction between a normal exploitation of the work or other subject-matter, and, do not unreasonably prejudice the legitimate interests of the right holder. However, interpretation of these exceptions into practice is somewhat variable and case law is not established, and creating derivative works, UGC, may in fact infringe the exclusive rights of the copyright holder and damage the value of the work. For example, giving a false impression of a work is not permitted under the citation right, nor is presenting the work in an offensive context or in public allowed under educational purposes without an appropriate educational purpose.

Based on the brief problem analysis set forth above, the research of this thesis concentrate on the hypothesis that the current legal framework for copyright in the EU fail to meet its objectives in protecting the legitimate interests of copyright holders; at the same time, the known, limited exceptions to copyright leave UGC out of the permitted use of other's copyrighted materials even if such use would not prejudice the legitimate interests of the copyright holder. To confirm or overrule the hypothesis, this thesis examines the following research questions in the light of

[8] WIPO Performances and Phonograms Treaty, 20.5.2002
[9] Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ l 122, 17.5.1991 (Software directive)
[10] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77, 27.3.1996 (Database directive)
[11] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001 (InfoSoc Directive)

alleged shortcomings of current copyright regimes in the EU when comparing to the US in terms of right holders' exclusive rights and mechanisms for copyright enforcement:

1) **To what extent user-generated content is allowed under the exceptions and limitations to copyright in the EU?**
2) **How are the users creating content based on copyrighted materials affected by the current scope of the permitted exceptions and whether closed list of exceptions should be replaced with open and more flexible requirements or test for exceptions?**
3) **What enforcement measures the copyright law in the EU provide for the right holders and do they provide sufficient protection against unauthorized use of copyrighted works?**

The thesis reviews the current state of the conflicting rights between users and copyright holders in terms of UGC that is made public on online platforms, particularly in relation with video games. The phenomenon of UGC is connected to the widespread of digitization of works and commonness of mixing content by users, and UGC is also known as user-created content (UCC), and these terms are used to refer to content generated by users on social media platforms or other platforms online. There is no exact and widely accepted definition for UGC, but Wikipedia defines it as "any form of content such as blogs, wikis, discussion forums, posts, chats, tweets, podcasts, digital images, video, audio files, advertisements and other forms of media that was created by users of an online system or service, often made available via social media websites"[12]. In OECD's study on Participative Web and User-Created Content the term user-created content is used in the meaning of "i) content made publicly available over the Internet, ii) which reflects a certain amount of creative effort, and iii) which is created outside of professional routines and practices"[13].

In this thesis UGC means content that is created using or basing it on existing, copyrighted works and that is made available to the public over internet and reflects no or some creative, additional effort that exceeds the threshold of originality. The focus is particularly on game play videos, or "Let's Play" videos, and machinima based on copyrighted video game related materials, or assets, that is uploaded online through content sharing platforms, such as YouTube. Definitions for "game

[12] Article on Wikipedia on user-generated content https://en.wikipedia.org/wiki/User-generated_content (2.1.2017)
[13] Participative Web and User-Created Content, OECD 2007

assets" vary, but game assets can include 2D sprites, 3D models, missions, levels, areas, voice, key framing and motion capture, sound effects, music and special effects.[14]

In the broad sense, game assets can refer to any artwork, sounds, video, maps, and other data [15] related to a game, and thus basically anything that can be used by the game engine or is associated with the game, including, aside from audiovisual materials, literary material, code, scripts and other documentation. From copyright law perspective and in the context of this thesis, copyrighted assets or video game assets mean any material to which its author holds copyright, i.e. works that fulfill certain requirements to get protection.

In this thesis, the terms "video game" or "game" means to any computer game, console game and mobile game. By "online service provider" (OSP) or "intermediate service provider" is meant any service provider that provide platforms for uploading and making content, such as UGC, available to public and online, and are used as generic terms for any web host, social media platform or web site. According to Article 2 of the Electronic Commerce Directive (E-Commerce Directive)[16], the term "service provider" is any natural or legal person that provides an information society service. A service provider acting as intermediate between third parties on internet is intermediate service provider. [17] In terms of UGC and copyright enforcement the role of intermediary service providers is essential due to the imposed obligations to take an action regarding indicated IPR infringements.

This thesis uses the method of legal dogmatics to analyze and interpret the scope of reproduction right and fair use doctrines both in EU and the US and identifying when UGC constitutes copyright infringement under copyright law. The thesis provides an overview of video games' and its elements' eligibility for copyright protection, includes the views that joint works comprising of various elements may need special treatment in copyright law and cannot be classified as computer programs only due to their nature, and analyzes different categories of UGC based on video games and the related copyrighted materials in respect of the reproduction right and its purposes by qualitative and comparative research.

[14] Bethke, E. Game Development and Production. Wordware Publishing 2003, pp 115-126
[15] Carter, B. The Game Asset Pipeline. Charles River Media, 2004, p 17
[16] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 8.6.2000 (E-Commerce Directive)
[17] Supra nota 16, recital 40

The sources used for the thesis include existing legislation including E-Commerce Directive, InfoSoc Directive and reviews the new, oncoming Copyright Directive[18] as well as the Audiovisual Media Services Directive[19] and the legislative proposal amending it[20]. preliminary works of law, case law, opinions of copyright councils or similar institutions as well as legal journals and text books and studies. Research is conducted by analyzing court cases and opinions of copyright councils, together with literature concerning UGC in espeacially in digital environment. Preferred reasoning for choosing material is their relevance to video games and similar creative works, such audiovisual works, or works that are comprised of several various elements, i.e. multimedia works and to UGC as well as its relation to core purposes of copyright and exceptions to copyright.

The thesis divides into six chapters. Introduction part contains background information, purpose of the study and its scope, research questions and methods and results. Chapter 1 establish the legal framework for copyright protection of video games and their elements and requirements for eligibility for copyright protection under InfoSoc Directive and Digital Millennium Copyright Act (DMCA). It also contains relevant definitions of terms and concepts related to video games and their copyrightable subject matter, their protection, such as an explanation of idea-expression dichotomy and how it applies to video games. Further, Chapter 2 covers the limitations and exceptions to copyright and their interpretation in case law and on UGC both in the EU and the US, and compares the major findings between the two jurisdictions.

Chapter 3 analyses the enforcement mechanisms for copyright under the EU copyright law harmonization and compares them to the DMCA process under the US copyright law. Chapter 4 moves forward to explain UGC as a phenomenon, related copyright issues and its impact on copyright holders. Moreover, the chapter discusses pros and cons of possible introduction of more flexible norms for derivative works together with the conflicting interests of copyright holders and users preparing content based on preexisting copyright protected works. Finally, it is examined if contractual means would suffice as an additional instrument bridging the gaps in copyright

[18] Proposal for a Directive of The European Parliament and of the Council on Copyright in the Digital Single Market, COM (2016) 593 Final (September 2016) (Proposed Copyright Directive)
[19] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services, OJ L 95, 15.4.2010 (Audiovisual Media Services Directive)
[20] Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, COM (2016) 287 Final (May 2016) (Amendment to Audiovisual Media Services Directive)

legislation from the perspective of copyright holders with critical view whether license agreements are in fact setting the scope of exceptions and fair use too narrow. Conclusion chapter discusses findings of the research and make interpretations and implications of the results.

1. Copyright Protection of Video Games

1.1. Development of Copyright Protection of Video Games in the EU and the US

Video games are works that comprise of several different elements, computer programs, databases, audiovisual elements such as video material, still graphics and music and other voices. Due to the multidimensional nature of video games, legal classification and copyright protection of video games as a whole vary depending on the country or region. Due to national copyright laws and case law, in some countries video games have in principle been classified as audio-visual works that are protected in the same way than films, or as computer programs due to their strong dependency on software. In the EU, video games are considered to be joint, audio-visual multimedia works. According to the European Court of Justice, video games are always complex data sets, which not only include the code, but also audio-visual elements, and thus their creative value is not limited to the written code. Therefore, they cannot be considered exclusively as computer programs.

The development in terms of video games have evolved relatively rapidly at least from the perpective of copyright law. Video games or games in general were not eligible for copyright initially, and the related case law became into exitstence only in the 1990's, which was because games were considered as technical creations that lacked creativity and originality. That was in fact the case when the very first video games in 70's and 80's were created, as their graphics and other audiovisual materials were very rudimentary and simplified, and computer programs that run them were also very simple. Because computer programs were not copyright protected until the late 80's, video games were not protected either and for this reason, cloning and copying other's games was very common during the early years of video game history. After video games became more popular and common, they still only earned copyright protection for being computer programs only, or computer programs and at the same time, audiovisual works.

Copyright protection for computer programs was adopted originally from the US where first specific copyright act was enacted. Other countries followed the example universally. Early years after computers had emerged software protection concentrated on patents and they were granted for software as well. When computers became more popular in the late 1970s, patents were reconsidered due to rapidly increasing number of software, which facilitated introduction of

copyright as software protection tool.[21] World Intellectual Property Organization (WIPO) also drafted a special kind of *sui generis* right that fell under neither copyright nor patent laws[22]and could have covered all elements of computer programs, the source code, object code and related documentation.

WIPO Copyright Treaty provisions are covered similarly in the EU directives, InfoSoc Directive, Database Directive and Software Directive of which InfoSoc Directive and the Software Directive are the most relevant in regard of copyright protection of video games. All said directives as well as the WIPO Treaty rely on the TRIPS agreement which define copyright protection to cover expressions but not ideas, procedures, methods of operation or mathematical concepts as such[23]. In addition, the Software Directive and the TRIPS state that software are protected as literary works and protection apply to any form of computer program, which means that their source or object code are covered with copyright.[24] International treaties did not take stance on software interface protection but provided only minimum requirements for software protection generally which leaded to discretion in regulation in agreeing states.[25] Along with the TRIPS and WIPO Copyright Treaty copyright was selected to the main form of protection.

The concept of work in relation to video games as computer programs has been debated. From the perspective of a programmer, a computer program itself underlying the game is formed with written code, but to its users, it appears through the interface containing visual and audio elements, and by its functioning.[26] Similarly, a video game base on software but to the players most essential appearance is its audiovisual elements. As the Software Directive provides copyright protection for software as literary works within the meaning of the Berne Convention, it relies on presumption that core of a computer program is expressed in literary form. While acknowledging that the ideas

[21] Välimäki, M. Software Interoperability and Intellectual Property Policy in Europe, European Review of Political Technologies, 2005, 3 p 82-84. Patents were granted both in the US and in Europe.
[22] Välimäki (2005), supra nota 21, p 82-85.
Currently there is *sui generis* right for databases only, but it has occasionally considered for other software as well. *See* Toeniskoetter, S. Protection of Software Intellectual Property in Europe: An Alternative Sui Generis Approach. Intellectual Property Law Bulletin, Vol. 10, Issue 1 (Fall 2005)
[23] TRIPS Article 9
[24] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, Article 1 (1)(2) and TRIPS Article 10 (1)
[25] Mylly, U. Harmonizing Copyright Rules for Computer Program Interface Protection. University of Louisville Law Review, Vol. 48, Issue 4 (2010), p 879
[26] Välimäki, M. Oikeudet tietokoneohjelmistoihin. Talentum Media Oy 2009, p 17

and their written form often merge from the perspective of a programmer, nothing but code of the program as such is copyright protected.[27]

In terms of video games, copyright protection is more complicated as they are built both from software and audiovisual materials that can be separately protected when the elements meet the requirements for copyright. Video games are not categorized as software in the EU nor the US despite the underlying software allowing them to function. Categorization of video games as software or other category of works defines which of the EU copyright laws are applied, Software Directive, or InfoSoc Directive, under which most of the other works than computer programs falls. The question of categorization of video games may affect the scope of copyright protection but is, however, more relevant in respect of copyright exhaustion than protection of elements of video games or its underlying code that is protected as literary work, either under Software or InfoSoc Directive. It has been considered in the EU case law that the protection of videogames cannot be reduced to that what is provided for computer programs. Despite that a computer program allows video games to function, games operate following a narrated and predetermined route created by the game's the authors which makes a group of images and sounds appear together with some conceptual autonomy. [28]

1.2. Video Games as Joint Works and Their Copyrighted Elements

When a video game is developed with organized and coordinated manner, every author involved to programming has copyright to the whole entity, which means a joint work in the perspective of copyright. When existing software is re-programmed, each author has copyright to this new software and right holders of previous version have no right to it. In perspective of copyright this means a new work[29]. Depending on developing process a computer program might be considered either collective or joint work[30]. Division of different types of collective works is known slightly

[27] Välimäki, M. supra nota 26, pp 17-20
[28] CJEU 23.1.2014, C-355/12, *Nintendo and others*
[29] Välimäki, M. Avoimen lähdekoodin ohjelmistolisensseistä. Defensor Legis, p 857
[30] Opinion of Finnish Copyright Council TN 2007:3, at 4

differently in other jurisdictions[31]. A computer program may also be a mixture of compilation and joint work.[32]

Software development process defines relationship of authors to each other and hence reveals how copyrights have formed. Hence, even though software is mainly developed by several programmers and not just one, copyright scope and, for some parts, its moral rights can be examined only together with the development process. Input of programmers involved in development varies not only as to their ability to produce different functions with programming language but also as to their tasks. One programmer may write more creative code that creates functions and another one code that connect different functions of the program together[33].There is obviously a grey area between reproduction and derivative work in regard of infringement of either economic or moral right of integrity, but illegal utilization of combining work is less common than copying directly the actual code[34].

Today video games are widely copyright protected, either as a complete works or at least, by their elements when they fulfill the requirements for copyright, which means the elements may be copyrighted separately. Copyright protection for audiovisual elements of games were recognized in 1990's, when courts in the US started to end up in the conclusion that they are eligible for copyright in disputes related to video games. This meant that copyright infringements can happen regarding one element of a video game even if the copyright of other elements is not infringed. For instance, unauthorized use of video game graphics can constitute an infringement even though the software code has not been accessed or copied, and vice versa. In the EU, the written code of computer programs is copyright protected as literary works and in respect of video games, the code is only one part of the whole work, and copyright for other, audiovisual, elements is

[31] Determan, L. Dangerous Liaisons – Software Combinations as Derivative Works? Distribution, Installation and Execution of Linked Programs under Copyright Law, Commercial Licenses and the GPL. Berkeley Technology Law Journal, Vol. 21, Issue 4 (Fall 2006), pp. 1425. U.S Copyright Act uses terms derivative work separately from collective and compilation. Under U.S Copyright law, compilation is a work formed by a collection and is done by arranging pre-existing material in a way that constitutes an original work of authorship. Collective is included in compilations and it can be a periodical issue, for instance, which all constitutes independent works as themselves. Derivative work is a modification of pre-existing material, such as translation or dramatization and constitutes an original work of authorship.

[32] Välimäki, M. supra nota 26, p 29

[33] Välimäki, M. supra nota 26, p 28

[34] Välimäki, M. supra nota 26, p 29

important. Still, computer programs' code aas well as graphics can be relatively easily rewritten or drawn in a way that does not infringe certain written expression.

1.2.1 Copyrightable Subject Matter and Originality

Copyright provide exclusive, territorial rights which entitle legitimate right holder to prevent others from using copyrighted works without permission and protect the investment put in the development of a work. Usually a right holder requires compensation for the use and license the copyrighted work. Copyright protects expression of a work and that form where the idea of the work has been expressed, be it visual, audible or literal. As the core protection scope of copyright is to protect copying of literary and artistic works and concede a reward creative work, which also can be seen as enhancing of cultural asset generally, it differs from other IPRs.[35] However, the main interest for copyright protection of video games is economical.

Video games are form of media that is still constantly evolving. As their core nature is that they must be played and interacted to the work to be experienced, it is unlikely that two players of a video game play the game exactly in the same way and making the same choices. In this sense, video games might be compared to scripted plays or performances, where the play varies along with the choices actors make, even if there is certain written script determining and restricting the possibilities of choices to be made.

Video games consist of two, severable main elements: literary and audio-visual materials. Video games often contain complex graphics and other advanced elements that are considered as works and are thus protected by copyright. From the perspective of copyright law, video games are joint multimedia works composed of multiple works that are eligible for copyright protection individually when they exceed the threshold of originality. The audio-visual elements in video games include the graphic elements, moving and still images, as well as sound. Any images of the game as well as its visual background can be protected by copyright or related rights, and they can include, for example, series of images. In addition to images or graphics, any other parts of video games, such as 3D modelling, icons, music, sound effects and texts, can be protected by copyright as literary or artistic works. The software, which together with other elements of the video game

[35] Barnard, C. The Substantive Law of the EU: The Four Freedoms, Oxford University Press, 2007, p 174

enables the game to function in the desired, interactive way, is considered as literary work in copyright law.

Video games that base on written code of software can be protected as literary works, even though copyright does not necessarily protect the stories created by players. However, like any other computer program, it is not easy to define when a video game's code is written in an original and creative manner to be eligible for copyright and when it merely or rather executes functions with one of the simpliest ways. Yet copying of game code as such with the full extent may be straightforwardly to be an infringement, it is necessarily not anymore if its written expression is changed even though the storyline remains the same and executes the very same functions. [36]

Video games contain material that is rarely presented the same way regardless users of a game. Creative expression of a game is provided by copyright despite of that how the expression is presented and if it is in the original or altered form. This is important when considering copyright infringements of a game. Because all the game elements and possible storylines are created and written by the game developer, the player cannot create anything unique in the game that would constitute something independent and original that would no longer be copyrighted to the creator.

European copyright law nor CJEU case law do not harmonize the requirements for the form of a work or define what constitutes a work, while in the US, in order a work to be eligible for copyright, it must be in fixed form, or "tangible medium of expression." InfoSoc Directive does not contain any provisions conrcening the definition of a work, and the EU law harmonizing copyright protection only refers to the types of works, such as computer programs or databases. Instead, under InfoSoc Directive, a work is copyrightable when it is original. Further, according to the CJEU case law the threshold for copyright protection is relatively low regarding both literary and non-literary works[37]. On the contrary, the US copyright law regulates this well more precisely together with case law interpretations on how and to what extent works are copyright protected, and applies the same standard for originality to all works. In the US a work needs to be in some tangible medium of expression, or in a fixed form.

[36] Lastowka, G. Copyright Law and Video Games: A Brief History of an Interactive Medium in SAGE Handbook of Intellectual Property, SAGE Publications Ltd 2014, pp 5-6
[37] *See* CJEU 16.7.2009, C-5/08 *Infopaq International* and CJEU 7.3.2013, C-145/10 *Painer*

It has been considered that video game performances cannot be fixed, and for this reason recording of a game play without copying the underlying software code would not be an action infringing copyright holder's rights. However, this perspective concentrating on videogames as complete audiovisual works or entities does not take account the whole picture as the author holds copyright to the game graphics even though they are moving and appearing in different order and way in every game play performance. As a matter of fact, the US courts have found that, since the underlying software code is fixed and functioning through game's graphical interface, any game play performance does not change the fixed nature of work. [38] Confusingly, even though it was not disputed whether the audiovisual element of video games is fixed form of a work through its connection to underlying software, it is not established if each game play performance constitutes such a contribution to the original work that would be eligible for copyright protection.

The InfoSoc Directive sets originality as criteria for eligibility for copyright protection. According to the Directive, a work is original if it is the author's own intellectual creation. Originality of a work in the sense it is the author's own intellectual creation does not mean any expression constitutes a work that is eligible for copyright protection. If a video game would have been created in a manner that is like following a programming textbook without advanced audiovisual elements, and the outcome is mere putting an idea into practice, it may not be considered as original and independent.[39] This means that the work is regarded to be original if anybody else engaged the same task would not have created the work in such way than the author of the work has chosen.[40]

The requirements for originality should be the same for all types of works. Some viewpoints consider the concept of originality is inconsistency between computer programs and other works protected with copyright as originality in the Software Directive was intended to mean different things for software, even though the ECJ rulings do not support this. [41] This understanding bases on that the different directives, the Database Directive, the Software Directive and the InfoSoc Directive, regulate copyright of different works. For instance, the InfoSoc Directive specifically rules in Article 1(2) and paragraph 50 of preamble it does not affect legal protection of computer programs which exclusively addressed to the Software Directive. On the other hand, the court

[38] Burk, D. Owning E-Sports: Proprietary Rights in Professional Computer Gaming. University of Pennsylvania Law Review 2013, 161 (1535), pp. 1559-1574
[39] Välimäki, M. supra nota 26, p 21
[40] Haarmann, P. *et al.* Immateriaalioikeuden perusteet, Talentum 2009, p 89
[41] Mylly, U., supra nota 25, p 880

regarded in case Infopaq [42] that copyright originality is generally harmonized by the InfoSoc Directive.

Originality requirement for copyright is generally considered to mean also independency without expressly referring to it in copyright laws, and it means a work cannot be imitaton of any other work. This is, however, a starting point, while a work may exceed the threshold for originality even if it is in fact an imitation if it contains certain level of unique expression. Particularly this can be seen certain kind of works that substantially rely on previous works, like computer programs, and some consider the originality concept inconsistency between software products and other works. It has been argued that originality criteria under Software Directive is something different, even though the ECJ rulings do not support this,[43] basing on the fact the different directives, the Database Directive, the Software Directive and the InfoSoc Directive, regulate copyright of different works. For instance, the InfoSoc Directive specifically rules in Article 1(2) and recital 50 it does not affect legal protection of computer programs which exclusively addressed to the Software Directive. On the other hand, the court regarded in case Infopaq [44] that copyright originality is generally harmonized by the InfoSoc Directive. [45]

1.2.2. The Idea-expression Dichotomy

The idea-expression dichotomy is the division of elements eligible for copyright protection: only literary original elements of a computer program are copyrightable, whereas other non-literal elements are not in the scope of copyright. This promotes achieving economic balance between right holder and public interests. [46] The dichotomy origins from international treaties, the TRIPS and the WIPO Copyright Treaties, and has rooted to copyright legislation in the EU. The dichotomy has not always been used when drawing line between protectable and non-protectable elements of computer programs but instead, the originality requirement is used. [47] The use of originality requirement may not necessarily lead to similar ruling as using the dichotomy which depart for instance theme, subject matter, conclusions, principles, method and facts outside of

[42] CJEU 16.7.2009, C-5/08 *Infopaq International*
[43] Mylly, U. supra nota 25, p 880
[44] CJEU 16.7.2009, C-5/08 *Infopaq International*
[45] Rosati, E. Originality in a work, or a work of originality: the effects of the Infopaq decision. European Intellectual Property Review 2011, 33 (12), pp 746-775
[46] Mylly, U., supra nota 25, p 902
[47] Mylly, U., supra nota 25, p 903

protection despite of their possible original nature. [48] Thus, the benefits of using the dichotomy have been noticed.

There are tests for determining which elements of a computer programs are structural or rather ideas, and which elements are only representations of them, expressions, but they vary depending on court and jurisdiction. [49] For instance, in the US, the court used three-step test of abstraction-filtering-comparison in Computer Associates case [50] and by its means a court may examine a computer program at various levels of abstraction. A program is abstracted into four levels. At the lowest level a program is seen as a whole with all its elements and, at the highest level only the abstract idea of the program is left, without any expressions and implementations.

There are four types of elements: ideas, elements indicating ideas with efficient way or merger doctrine, elements required by external factors than the program itself and elements taken from the public domain.[51] Under this test non-protectable elements can be filtered out and thus comparing the original program and alleged copy is possible. At certain abstract, low level are elements that represent ideas at the simplest or the most efficient way.

For these elements courts have in some cases allowed minimum protection for avoiding monopolizing the use of such elements, because efficiency is regarded as industry-wide goal and thus any program task can be implemented only by limited amount of ways.[52] This bases on capability of programming languages also, because certain functions may be written efficiently by only one or a few possible set of commands, and allowing copyright protection for certain written commands would make all others than the right holder obligated to circumvent them. [53] This is related to the originality requirement also. Simple written commands cannot be seen as independent and original, because anyone else could have written them in the same way with that particular programming language.

[48] Mylly, U., supra nota 25 p 903
[49] Stuckey, K. Internet and Online Law, ALM Properties, Inc., Law Journal Press, 2004, at 31
[50] *Computer Associates International, Inc. v Altai, Inc*, 982 F. 2d. Circuit Court, United States of America 1992 (2nd Circuit1992)
[51] Mylly, U., supra nota 25, p 903
[52] Mylly, U., supra nota 25 p 905
[53] *Computer Associates International, Inc. v Altai, Inc*, 982 F. 2d. Circuit Court, United States of America 1992 para 709

Even subsequent work where the same structural elements are used but expressed differently does not constitute a copyright infringement. [54] In regard of computer programs, the idea-expression dichotomy thus allows competitors to adapt ideas from existing programs, write them within an original manner and avoid developing the actual idea of the program from the scratch, even though writing an idea with own original and independent manner requires considerable preparatory work and resource investments. It is known that copyright builds low protection barrier for ideas and allow quite easily others to adapt the ideas of a copyrighted work and express them differing form which does not constitute copyright infringement. [55]

The idea/expression dichotomy in the US set forth in Section 102(b) of the Copyright Act does not provide protection for any idea, procedure, system, method of operation, concept, principle or discovery despite of its form where it is illustrated or described, which in case of video games would mean the concept of maze game, for instance. In this regard, games that basically always are systems and contain procedures on how players can operate within the game, certain game elements fall outside of eligibility for copyright protection. This means that designated game rules and functions available in video games and incorporated in their code are unprotectable ideas that are, though represented by tangible medium of expression through graphical and audio elements and written code. [56]

However, this remark does not affect copyrightability of video games that often this days contain very sophisticated and artistic expression forms but concerns more traditional type of games such as board games out of the scope of copyright protection. [57] In principle, it is widely agreed that systems are not in the scope of copyright, and to this regard neither are games otherwise than by their fixed expressions. In some cases, like regarding so called copycat games where all the elements have been copied, including systematic elements and ideas but original expression have only been redrawn and designed, it could be possible to have protection for the game's expression as a whole due to great similarity between different element that altogether create confusingly alike look and feel experience.

[54] Mylly (2010), supra nota 25, p 903
[55] Langus *et al.* Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU. European Commission (2013). p 3. Additionally, the case law for instance in EU and US relating to software protection indicate the same contrary to rightholders' interests.
[56] Lastowka, G.36, pp 5-7
[57] Boyden, B. Games and Other Uncopyrightable Systems. George Mason Law Review, 2011, 18 (2), pp 446-449

Furthermore, some viewpoints consider that the scope of copyright cannot extent to include player performances and performance and related experience from a game is comparable to reading a book or watching a movie and then having certain impression on the work combined with viewers or readers own activities. Also, based on this argument, game play recordings cannot be considered as infringing activity but fair use because of the limited nature of copyrighted work captured, and because game play video differs from the original work. [58] This is an interesting view and contrary to a court ruling, where a court held that unauthorized player performance of a game was an infringement of copyright. [59]

[58] Boyden, B. Copyright's middle ground: The interaction of players and video games' in proceedings of The Game Behind the Video Game: Business, Regulation, and Society in the Gaming Industry, New Brunswick, New Jersey, April 8−9, 2011.

[59] *Red-Baron-Franklin Park, Inc. v. Taito Corp*. 883 F.2d 4th Circuit Court 1989, United States of America

2. Limitations and Exceptions to Copyright

2.1. European Union

2.1.1 An Exhaustive List of Exceptions and the Three-Step Test

Harmonization of copyright in the EU introduced an exhaustive list of exceptions and limitationss to copyright. [60] Exceptions and limitations allow certain specific activities, incuding scientific research and use for libraries, to balance copyright holders' interests and protect reward for their creations and, future innovation and dissemination of knowledge products. The exceptions provided by the Directive are not mandatory for Member States but are listed to illustrate to what extent exceptions may be implemented into national level copyright laws. Member States have generally implemented exceptions but narrower than provided by the Directive. [61]

Framework for limitations and exceptions to copyright in the EU member states have been laid down in Article 5 of the InfoSoc Directive in terms of rights of reproduction and communication to the public in Articles 2 and 3. According to Article 5(2), reproduction is allowed for photographic reproductions on paper or any similar medium of works, if the right holders receives fair compensation, and non-commercial reproductions on any medium made by natural persons for private use and if right holders receives fair compensation. Further, reproduction is allowed for non-commercial libraries, educational establishments, museums or archives, or for purpose of broadcasts archival or madae by "social institutions pursuing non-commercial purposes, such as hospitals or prisons, when the right holders is receiving fair compensation.

The exhaustive list of permitted exceptions and limitations to copyright has been seen as a problem to copyright law in the EU because it is unclear whether the three-step test prvovided in Article 5(5) should be used to determine if national implementations of exceptions of Article 5(1) -(4) are consistent with the Directive or, is it used by national courts when they interpret the exceptions they have implemented to their respective copyright laws. The implementation of the exceptions appears to be inconsistent and harmonization did not provide anything more than already existing in national level laws of Member States. Additionally, it seems unclear Article 5(5) is applied only in regard to whether national implementation of Directive's exceptions other than those provided

[60] InfoSoc Directive, recital 32
[61] European Commission. Green Paper on Copyright in the Knowledge Economy, COM (2008) 466/3 (July 2008), pp 13, 16

in Article 5(5) are consistent with the Directive. Further, the list of exceptions has been critized for being created without a full and comparative study and coherently expressed policy objective. Despite that the copyright law harmonization was to incorporate the objectives of WIPO Treaties, the exceptions were not taken into consideration until late stage of drafting of the Directive. [62]

Article 5(3) incorporates requirements for complying moral rights under copyright, and allows exceptions to the reproduction right and the right of communication to the public under certain conditions and purposes. These purposes include illustration for teaching or scientific research, uses for the benefit of people with a disability, current event reporting, and reproduction by the press or other communication to the public on current topics. Further, quotations for purposes such as criticism or review, use necessary for the purposes of public security or reporting of parliamentary, judicial or administrative proceedings, for political speeches or extracting of public lectures and similar work for informatory purposes and during religious or official celebrations organized by public authority are allowed.

More,the use of works made to be located permanently in public places, inclusion of a work in other material, for advertising public exhibition or artistic works sales, caricature, parody or pastiche, when demonstrating or repairing of equipment as well as use of an artistic work, drawing or plan of a building in order to reconstruct a building fall under the allowed exceptions. Copyrighted works may also be used for non-commercial research or private study, as well as some other, minor importance cases for what there are exceptions existing in national law. Said exceptions and limitations are generally allowed when the source, including the author's name, is provided.

Additionally to the conditions for exceptions in Article 5(2) and 5(3), Article 5(5) provides that the exceptions are applied onlly in certain special cases, where the use must not conflict with a normal exploitation of the work or other subject-matter, and the use cannot unreasonably prejudice the legitimate interests of the right holder, which leaves some room for case by case interpretation even if conditions as such are fulfilled. This Article 5(5) is known as the ”three-step test”, which is also referred as to threefold condition[63]. The three-step test is applied cumulatively, meaning that all three requirements must be fulfilled in order exception or limitation to copyright to be

[62] Griffiths J. The ‘Three-step Test’ in European Copyright Law: Problems and solutions, Intellectual Property Quarterly 2009, 4, pp 428-438
[63] CJEU 7.3.2013, C-145/10 *Painer*, para 110

permitted for the use in question, but the three conditions do not have to be fulfilled separately. [64] The preface of the Directive also addresses member states to take technological and economic developments into consideration and acknowledges the potential risks of digital private copying by emphasizing a proper implementation of exceptions and enforcement mechanisms for copyright to both avoid circumvention of technological means for using content or enforcement against it. [65]

There is no exception allowing the use of preexisting, copyrighted works to create new derivative works under the exhaustive limitation list of InfoSoc Directive. Currently, if any UGC based on copyrighted works is prepared and made available, the content creator must clear rights with the right holder. In practice, this rarely the case. Given that UGC is prepared by individuals and not professionals, general perception might be that creating of derivative works especially for fan content purpose is allowed. Understanding of this aspect of copyright law is vital to comply with the law. Still, as exceptions vary within the EU and they are open to interpretation, more precise and harmonized approach allowing UGC would be beneficial. [66] Additionally, when video game related video content obviously requires the use of copyrighted assets in the form of game play recordings, it would be an overreaching action to prohibit any UGC for the sake of exclusive rights.

Introducing of the concept of fair use in Europe, similarly to the doctrine used in the US, has been discussed and studied to allow a greater fleixibility as to exceptions and limitations in the EU. Because the exceptions and limitations are restricted under InfoSoc Directive, Member States cannot adopt exceptions broader than the ones provided by the Directive. Instead, Member States have been reviewing their respective national copyright laws to map suitability of current copyright exceptions to the digital age and national implementations of Article 5(5) exceptions. These states include at least Ireland, the Netherlands and the UK. [67]

For example, in the UK, the Hargreaves Review studied the possibility to introduce a fair use exception in the UK. The review reasoned that the UK government should modernize copyright licensing and on the other hand, to take an action to update copyright law in a way that allow

[64] Kur, A. Of Oceans, Islands, and Inland Water - How Much Room for Exceptions and Limitations Under the Three-Step Test? Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No. 08—04, 2008, pp 40-41
[65] InfoSoc Directive, recital 39
[66] Matulionyte, R. The Upcoming EU Copyright Review: A Central-Eastern Europe Perspective. International Review of Intellectual Property and Competition Law, 2015, 46 (4), pp. 443-44
[67] Cook, T. Exceptions and Limitations in European Union Copyright Law. Journal of Intellectual Property Rights, May 2012, 17, p 244

copying for private purposes and when it does not damage the undelying aims of copyright. For instance, as the UK copyright law prohibits the use of modern text and data mining techniques despite the purpose of use, and such should be allowed for scientific and other research purposes. The review considered that a more comprehensive and flexible approach, comparable to the US, that base on the fair use defence would be beneficial, and comes to conclusion that current copyright regime cannot be considered fit for the digital age because now a significant number of internet users breach copyright already when they only move works, such as videos or music, from one device to another. [68]

The UK government's response[69] broadly accepted the recommendations of the Hargreaves Review and proposed that restrictions to use copyrighted materials should not be imposed other means than more flexible exceptions, and for instance, contractual allowance of the use is not fit, and agrees that the widest possible exceptions under the existing the EU framework would be reasoned. A study[70] published after governmental reviews examines further the existing fleixibilities on the European copyright regime that could be considered as the concept of fair use, and recognizes that there in fact is more scope for flexibility within the wording of the Directive.

The study notices that amending of exceptions provided by InfoSoc Directive could be reasoned, but focuses on analysing why there is need for flexibilities in copyright law today to what extent are open norms compatible with the copyright system and, whether the EU legal framework leaves room for Member States to adopt open, fair use type of exceptions to copyright, to their national laws. As there is more scope to flexibility than presumed and because Member States have implemented exception of Article 5(5) narrowely than allowed, wanted flexibility could be achieved by writing these exceptions provided in Article 5(5) as well as elsewhere in the Directive in full into national laws.

[68] Hargreaves, I. Digital Opportunity. A Review of Intellectual Property and Growth. An Independent Report by. May 2011

[69] The Government Response to the Hargreaves Review of Intellectual Property and Growth (Government Response), August 2011.
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32448/11-1199-government-response-to-hargreaves-review.pdf (2.1.2017)

[70] Hugenholtz, B.P, Senftleben, M. Fair use in Europe – In Search of Flexibilities. November 2011, http://ssrn.com/ abstract=1959554 (2.1.2017)

2.1.2 Exceptions in Practice

CJEU case law is limited regarding Article 5 of InfoSoc Directive, although there are increasing number of copyright exception cases heard, including C-5/08 *Infopaq*[71] and C-302/10 *Infopaq*[72] on temporary reproductions, C-467/08 *Padawan*[73] and C-462/09 *Stichting de Thuiskopie*[74] on private copying and C-145/10 *Painer*[75], where the issue was whether adaptations of a photography infringed the original work. The three-step test of Article 5(5) was considered in all the mentioned cases, to some extent at least.

The *Painer* case considered mainly the subsistence of copyright in the first place and then, the scope of exception under Article 5(3) for quation, criticism and review purposes as well as for public security. The plaintiff, a freelance photographer, had taken a photograph of an abducted child before her disappearance. The photographs were later published in the original form and, in some cases, as photofit pictures that had been prepared by modifying one of the original photographs, in several newspapers without authorization of the photographer, who sued the newspapers for copyright infringement. As to question whether realistic photographs enjoy copyright protection, the court reasoned that a work, be it photograph or other work, should be original in the sense that it is its author's own intellectual creation in order to be eligible for protection. An intellectual creation, then, is an author's own if it reflects the author's personality. [76] As an outcome, photographs are not subject to weaker protection than other works.

Advocate General Trstenjak assessed whether a derivate work, a photofit, constituted a reproduction of the work in his opinion. A photofit is prepared by first scanning the original photograph, which as such will be a reproduction of a work. According to Trstenjak, if a work fulfills the requirements for protection, then the publication of a photofit constitutes a reproduction of the original work if it is embodied in the photofit, but it must be taken into account that the elements comprising the personal intellectual creation in respect of the work used as a template might be that largely removed that a photofit does not constitute a reproduction. The further the photofit is taken from the original work and its unique characteristics, the more likely it will

[71] CJEU 16.7.2009, C-5/08 *Infopaq International*
[72] CJEU 17.1.2012, C-302/10 *Infopaq International*
[73] CJEU 31.10.2008, C-467/08 *Padawan*
[74] CJEU 16.6.2011, C-462/09 *Stichting de Thuiskopie*
[75] CJEU 7.3.2013, C-145/10 *Painer*
[76] CJEU 7.3.2013, C-145/10 *Painer*, para 87-88

infringe copyrights as the elements comprising personal intellectual creation in the original are repressed to an extentthey are not significant anymore. [77]

Given that the list of possible exceptions is exhaustive, there is not much room for UGC type of use of copyrighted works, unless they are made for quotations for purposes such as caricature, pastiche, parody, review or criticism. Parody as an exception was considered in case C-201/13 *Deckmyn v. Vandersteen* [78], and there were two issues to be clarified, firstly, the scope of harmonization of the parody exception in InfoSoc Directive, or is the concept of parody an autonomous concept of the EU law, and secondly, what is the criteria for a work to be a parody. The autonomous character of the concept of fair compensation was already decided in C-467/08 *Padawan* on the basis of the need for a uniform application of the EU law and the principle of equality, the EU law provisions that do not make express references to national law of the Member States, must be given an independent and uniform interpretation throughout the EU. [79]

In the light of the *Deckym* ruling, autonomous character of the concept of parody was expected because there are no provisions in InfoSoc Directive referring to national laws in this regard. As there is also no definition given to a parody in the Directive, its meaning was to be searched from every day language, its essential characteristics being evoking an existing work while being noticeably different from it and to constitute an expression of humour or mockery. Thus, using of copyrighted assets merely for illustrative or humoristic purposes will not qualify as an exception.

When defining a copyright infringement for works in written form, European copyright law relies rather on quality than quantity of the material used from the original work. In SAS case Advocat General Bot envisaged the pecualiar test for defining infringement in his opinion for the case, taking a view that using of a substantial part of the expression of the functionalities of a computer program may constitute a copyright infringement which would have led to that national courts would have to consider if reproducing the functionalities of a computer program is reproducing a substantial part of the elements that are the expression of copyright holder's own intellectual creation. However, as neither the Software Directive nor the InfoSoc Directive contain references to "substantial part" and since preceding case law[80] had adopted a test for copyright protection

[77] Opinion of Advocate General Trstenjak on case C-145/10 Painer, delivered on 12 April 2011, para 129-130
[78] CJEU 3.9.2014, C-201/13 *Deckmyn and Vrijheidsfonds*
[79] CJEU 31.10.2008, C-467/08 *Padawan,* para 32
[80] CJEU 16.7.2009, C-5/08 *Infopaq International*, para 47–48

based on quality and not quantity, the court did not uphold this opinion presented by Advocate General Bot. [81]

This approach allows more freedom for the so-called copycats in videogame industry but at the same time, limits the risk of extending copyright protection from expression to ideas which is clearly established principle in copyright law. While basing a work to other work's structure or functionalities rarely constitutes an infringement, the amount in written works of which usage is considered as reproduction that is not allowed without the consent of the right holder within the meaning of Article 2 of InfoSoc Directive is 11 consecutive words, providing that such repoduction is the author's expression of intellectual creation. Although Member States have a quite broad discretion on how they implement exception under Article 5, it seems the exceptions are still interpreted strictly. [82]

2.2 United States

2.2.1 Digital Millenium Copyright Act and Fair Use

The US differs from the EU in terms of copyright exceptions having the fair use doctrine that allows courts to consider with a more flexible manner if the use is considered as fair use that does not infringe the exclusive rights provided to the copyright holder. Two of the WIPO treaties, Copyright Treaty and Performances and Phonograms Treaty, were implemented in the U.S.C under the title 17 Copyrights by the Digital Millennium Copyright Act (DMCA) to comply with the treaties adopted in 1996. The amendment came into force in 1998, and its main purposes were protecting access to or copying of a copyrighted work[83] as well as providing UGC OSPs and ISPs a safe harbour from copyright infringement claims if they apply certain takedown procedures[84]. DMCA provides at least five exclusive rights to copyright holder, including right to reproduce the copyrighted work, create modified, derivative works based on preexisting copyrighted works, distribute copies of the copyrighted work to the public by sale, lease, loan or other transfer, perform the copyrighted work publicly and display the copyrighted work publicly. [85]

[81] Opinion of Advocate General Bot on case C-406/10 SAS Institute Inc. v World Programming Limited, delivered on 29 November 2011
[82] Cook, T., supra nota 67 p 244
[83] 17 U.S.C § 1201
[84] 17 U.S.C. § 512
[85] 17 U.S.C. § 106

According to 17 U.S.C. § 106, an exclusive copyright is granted to the creator of a work and that right include the right to prepare derivative works based on their own content. The US copyright law defines derivative works to be works that base upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted, and consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship. [86] Under certain conditions under which the use of copyrighted material is considered as ”fair use”, others arre allowed to create derivative works as well.

Fair use is a limitation on exclusive right of the copyright holder laid down in § 107, to which it was codified in 1976. Before including it into the Copyright Act, the doctrine was developed and applied for 125 years through case law, starting from justice Story's decision for case *Folsom v. Marsh* in 1841, where the issue was whether defendant's verbatim use of the copyrighted letter constituted an act of piracy under the then copyright law. Although the court found that defendant's use of work was not fair use, it recognized the principles to be basis for the modern fair use doctrine: ”*In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work*”. [87] At the time of this decision the right to create derivative works was not recognized and the test developed here was to determine if a new work incorporating the original was to be considered as reproduction in the sense it would be a substitute of the original work, or was there a different purpose and market for it. Therefore, the portion used is essential, as well as the purpose. Using a work for criticism or commentary does not aim to substitute the original work.

The rationale developed for the *Folsom* case has then been followed by courts by weightening the used amount of the copyrighted work, the use of the purpose and the possible negative effect on the market of the original work. Today's fair use is codified to maintain the status quo of long practice, and to allow making of reproduction in copies or phonorecords or other means for purposes such as criticism, comment, news reporting, teaching, scholarship, or research. Such use

[86] 17 U.S. Code § 101
[87] *Folsom v. Marsh*, 9 F. Cas. 342 United States Circuit Court for the District of Massachusetts 1841

is not considered as a copyright infringement, and consideration of whether the conditions qualify the use as fair use consist of

> ”*(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work*.”

Still, the use may qualify as fair use under the above-mentioned factors even if the original work is unpublished.

2.2.2 Fair Use Interpretation in Case Law

Despite of long history of fair use doctrine and its interpretation in American case law, there are still uncertainty regarding use that is considered fair. Fair use consists of four factors that do not constitute an exhaustive list. Commercial and educational nonprofit distinction represent two opposing nature of the use, and it is in many cases hard to define to which side the use falls more as often the use has characteristics from both, yet in a slightly more cases the use is to be considered rather as commercial than non-commercial. The more the use is commercial, the more likely the use is considered as infringing.

In practice, courts have not necessarily concentrated only on the use of copyrighted work but the financial factors of the person, whether natural or legal. For example in cases *Princeton University Press v. Michigan Document Services, Inc*.[88] and *Basic Books Inc. v. Kinko's Graphics Corp.* [89] where both were about photocopying of substantial amounts of copyrighted materials for academic use by university students and professionals, the courts considered the use commercial and not constituting fair use because the copied materials were bound into course packs that were sold to students and thus for profiting purposes. There is no established definition for commercial use,

[88] *Princeton University Press v. Michigan Document Services*, Inc. 99 F.3d 6th Circuit Court, United States of America 1996
[89] *Basic Books, Inc. v. Kinko's Graphics Corp*. 758 F. Supp. United States District Court for the Southern District of New York 1991

and most entities aim for economic activity for what most uses could be regarded as, more or less, commercial use. [90]

To help analyzing of commerciality, the US courts have commenced to consider the transformative nature of the use after this doctrine was introduced in 1990 by Judge Pierre Leval in a commentary article about developing of fair use doctrine[91]. Leval reasoned that the use transformative enough results a new work serving a different purpose than the one of the original work, and thus the use should be fair. Transformative use affects weight of commercial use making it less significant the more the use is transformative. The ruling in *Clean Flicks of Colorado LLC v. Sondrbergh* held that editing and removing of audio and visual element the plaintiff considered inappropriate from legally acquired copyrighted films and selling them was not transformative use, because such action did not add anything new to the original works, and the defendant distributed unauthorized copies to the public for commercial purposes. [92]

It has been found that slightly transform in the medium is not enough. In *Rogers v. Koon* [93] the defendant, sculptor used plaintiff's copyrighted photograph to create a sculpture and claimed the purpose of the use was a parody of the original. Because the essence of the photograph was copied in its entirety to the sculpture with only changing the medium of the work and the purpose of the use was commercial in nature, the court concluded the market of the original work to been prejudiced.

Transformative use is also essentially present in most UGC, and the more content creators refine and add their own content with an original manner, the more likely the use is fair. All the same, transformative use of the original work refers to similar use of a work than creating a derivative work, a work based upon on preexisting works, to which the right is exclusively reserved to the right holder. Providing that the relevance of transformative use has increased in case law, there seems to be some level of conflict in this regard and due to this the other factors are important to

[90] Landau, M. "Fair Use" under U.S. Copyright Law - The Need for Clarity and Consistency. IPRinfo Special Issue, September 2006
[91] Leval, P. Towards a Fair Use Standard. Harvard Law Review 1990, 103(1105)
[92] *Clean Flicks of Colorado, LLC v. Soderbergh*, 433 F. Supp. 2d United States Distric Court of Colorado 2006
[93] *Rogers v. Koons*, 960 F.2d 2d Circuit Court, United States of America 1992

determine if the use, despite of its transformative nature, is fair use or within right holder's exclusive rights. [94]

The second factor to evaluate fair use is nature of the copyrighted work, but its significance has lessened in practice. Case law indicates, that the more informative and factual the original work is, such as pieces of news, the more room there is for creting derivative works based on copyrighted work and vice versa. In *Harper& Row Pubs., Inc. v. Nation Enterprises* fair use was not found when the defendant obtained an unauthorized copy of manuscript of public figure's memoir before its publication in book to be published by the plaintiff, and quoted it with an extensively manner, reasoning this with the great public interest. The holding was mainly decided on the basis of the right of first publication that favored the plaintiff, the unpublished nature of the original work being the defining characteristic. [95]

The substantiality of the portion of the copyrighted work used for preparing a new work give an indication by the means of common sense whether the use is infringing or not, and the usual standard for this factor is quantity. The greater is the quantity the more likely the use is not held fair use. However, sometimes a portion can be qualitatively substantial, like it was ruled in the above-mentioned *Harper& Row Pubs., Inc. v. Nation Enterprises* case, where the used amount, less than one percent of the original work was substantial because it was the heart of the matter, containing the core of the work. Although the rationale is, in principle, simple, the taking from the original work can be argued to be substantial, be it small amount or large. If the used amount is small, it probably represents the original work with more meaningful manner, therefore it being qualitatively substantial, while large portion would be quantitatively substantial. Under this reasoning, quantitatively substantial portion of video game assets for UGC could be copyrighted picture used as a game logo or intro graphics when starting a game, or the main character graphics.

As for the fourth factor is assessed the effect of the use upon potential market and value of the copyrighted work. The rule of law on market harm was set forth with the case *Sony Corp. of America v. Universal City Studios, Inc*, and according to it, the use of copyrighted work for commercial gain create a presumption of harming the future market of the original work. The defendant of the case had marketed products for recording televised programs that the plaintiffs,

[94] Landau, M. supra nota 90
[95] *Harper& Row Pubs., Inc. v. Nation Enterprises*, 471 U.S. 539, Supreme Court, United States of America 1985

movie studios, claimed to constitute a copyright infringement and contributorily liability. The Supreme Court held that encouraging to infringing activity through an advertisement does not make the encourager liable for copyright infringement because the alleged infringer is not in a position to control the use of copyrighted works by others. Additionally, most of the use would constitute fair use when recorders are used for own use and time-shifting of programs. The advertisements did not have any references to any specific audiovisual material. That being said, the plaintiffs had the burden to show potential market harm which could not be done. [96] The effect on the market has been considered the single most important factor.[97] All the fair use factors are to be used together as they are partially overlapping and can be used for evaluating others.

2.3. Video Game Related User-Generated Content as Derivative Works

There is no general consensus if and to what extent players can hold copyright to their creations within a game. As a starting point, creator of a work is entitled to the copyright as long as the work fulfills the requirements for copyright. According to some views, copyright law should server the purpose of promoting beneficial creations and provide incentives to create works also in terms of users. The development of in-game objects may take significant time investments from players, and because such creations do not come into existence in the game before considerable efforts from the player, the works remind any work eligible for copyright, even though they are created by using existing materials and software code in the game that are provided by the game developers. [98]

If in game-creations, being it game characters or game play that appears as certain expression or performance, would be copyrightable, the players could also create UGC based on them and make it available within their exclusive rights. Determining ownership to the content defines, whether and what type of UGC is a derivative work or an independent work. Let's Play videos are likely to be considered as derivative works because they usually are lacking original and unique contribution. The case law in the EU has evaluated very little the subject matter of derivative

[96] *Sony Corp. of America v. Universal City Studios, Inc*., 464 U.S. 417, Supreme Court, United States of America 1984
[97] *Harper& Row Pubs., Inc. v. Nation Enterprises,* 471 U.S. 539, Supreme Court, United States of America 1985, p 471
[98] Stephens, M. Sales of In-Game Assets: An Illustration of the Continuing Failure of Intellectual Property Law to Protect Digital-Content Creators. Texas Law Review 2002, 80 (6), pp 1529-1530

works, but rather the economic rights and their ownership that has lead to lack of standards that could be applied to UGC. [99]

Hence, creation and making UGC available is problematic issue due to the above-mentioned reason as well as the scope of exceptions allowing the use of copyrighted assets that generally require transformative nature and additional, creative input to the work basing on other's work. In many cases the game developer prohibits the preparation of derivative works by contractual means through TOS or EULA, but this right is, in principle, is also reserved to the right holder under copyright law both in the EU and the US. The right holder may limit the use of copyrighted assets by others by setting contractual clauses in licesinging agreement in which the right to use copyrights and other rights are granted, but contractual setting of the limits of use rights does not entirely answer how derivate works are allowed, especially in case of use outside of contractual relationship.

Again, the case law in the US shed more light to the topic than the corresponding in the EU. In case *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc* [100] the court established the user's right to modify copyright protected work for user's own use, the issue being whether a game device designated to modify video games in real time constituted a derivative work. The court ruled that, in case of a derivative work, it did not make any difference whether a work is in fixed form or otherwise satisfy the requirements for copyright, even though the derivative work must be on some concrete or permanent form. This differs from infringement of reproduction right, where the infringing reproduction of a work must be in fixed form. In this respect, user-generated videos always are in concrete and fixed form. Conversely, user-generated live streamings a not fixed, due to their transitory nature. In addition to permanent form, transformative nature and substantiality of the used amount original work are essential when defining a video as derivative work, although these do not necessarily make a video as derivative work. [101]

[99] Guibault, G. et al, Study on the implementation and effect in Member States' laws of Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society, report commissioned by the European Commission, ETD/2005/IM/D1/91, (February 2007), available at http://www.ivir.nl (2.5.2017)

[100] *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc*., 964 F.2d, 9th Circuit Court 1992

[101] Mejia, S. Fair Play: Copyright Issues and Fair Use in YouTube Let's Plays and Videogame Livestreams. Intellectual Property Brief 2015, 7 (1), pp 2014-2015

Only the fact that a work base on preexisting work does not constitute a derivative work falling under fair use. In *Warner Bros. Entm't, Inc. v. RDR Books* [102] the issue was if it was fair use to elements of a copyrighted work to create and distribute an encyclopedia-like guide for the original work. The court did not find fair use because, even if the work based on copyrighted work had transformative purpose, its actual use of copyrighted work was not consistently transformative, and, additionally, the amount of used work was greater that what was reasonably necessary for being a guide.

[102] *Warner Bros. Entm't, Inc. v. RDR Books*, 575 F. Supp. 2d District Court for the Southern District of New York 2008

3. Copyright Enforcement

3.1. Copyright Enforcement in United States

While IPRs are rights of which infringing may constitute a criminal offence, they are private rights and thus their enforcement by criminal sanctions, let alone monitoring them by governmental agencies can be debatable. Criminalization of IPR infringements have been deemed as fit measure for characteristic of counterfeiters that intentionally take advantages of others' exclusive rights for the purpose of financial gain. Custom surveillance and seizing of importation of illegal goods is globally required due to criminalization of trademark counterfeiting, which has been done at least sice the end of the 19th century. [103] Still, governmental enforcement of copyrights has been considered unnecessary even in case of illegal file sharing, because the DMCA provides very good and sufficient means for private actors and right holders to enforce copyrights.

In the EU, no public authority monitors in general IPR infringements on ad hoc basis, except those related to import, export and transport of counterfeit products, which only covers a fraction of all goods crossing the state or union borders and in most cases, is about counterfeiting which constitutes a trademark infringement or piracy which infringe copyrights of movie or music records. Contrary to the EU, the US government agencies have been involved in monitoring and enforcing copyright infringement with increasing extent, yet the focus being merely on illegal file sharing of movies and music, which is a more traditional form of copyright infringement. It has also been argued that generally recognized high costs and negative publicity associated with rising court proceedings against individuals that have kept right holders from enforcing their legitimate rights does not justify governmental involment in enforcing such private rights, because that would be like enforcing other property rights by actively monitoring them. [104] No society can afford to have police enforcement to keep eye on every store in case of thefts but it's the right holders, or owners, responsibility to protect his property by himself or having a professional guard to do it. Infringing others' property rights, whether online or not, require the right holders to take the responsibility primarily and that can be supported by governmental actions.

[103] WIPO Advisory Committee on Enforcement. The Enforcement of Intellectual Property Rights by Means of Criminal Sanctions: An Assessment, September 7, 2007, p 5

[104] Fitzdam, J. Private Enforcement of the Digital Millennium Copyright Act: Effective without Government Intervention, Cornell Law Review 2005, 90 (4), pp 1085-1117

Particularly due to 17 U.S.C Chapter and the § 512 implemented in 1998, the enforcement of copyright has become significantly more efficient it was before the amendment, because many OSPs have set simply, straightforward procedures that allow fast removal or disabling of the allegedly infringing content from the network of the respective OSP. Above mentioned procedure is generally referred as DMCA takedown procedure or notice and takedown. The process contains two steps, submitting of complaint and removal of the content. In order to submit a DMCA takedown notice, the copyright owner has to provide the OSP with the copyright holder's name, address and physical or electronic signature, identification of the material and its location at the time of making the notice, sufficient information to identify the copyrighted work which the material infringes accompanied with statements that the copyright holder has a good faith belief that there is no legal basis for the use of the complained materials, and that the notice is accurate and that, under penalty or perjury, the complaining party is the copyright owner or authorized to act on the behalf of the owner.

To avoid fraudulent or erroneous takedown notifications, the content creator whose content has been claimed, may file a counter notification to the OSP under penalty or perjury that the claim was made by mistake after which the OSP is entitled to await 10 to 14 days before reinstating the content that the claimant presents evidence to the OSP of filing of an action seeking a court order against the counter notifier. Without evidence of filing of court order, the content will be reinstated and the dispute must be taken into a court. The waiting time OSP is required to wait evidence does not affect the claimant's possibility to file an action to a court, but the disputed content will be reinstated until a court confirm the alleged infringement.

The safe harbour from copyright infringement liability and thus monetary liability was confirmed by a court in 2010 in case *Viacom Inc v YouTube Inc*[105], when the court held that YouTube was not to be held liable for infringements as it had taken immediate actions complying the DMCA and taken the content down after the copyrighholder had notified and identified the infringing material available on YouTube, in 24 hours. Viacom regarded that an effective takedown system does not suffice in case of massive and systematic copyright infringing activities. Further, Viacom consider that YouTube was aware of such content and in fact, facilitated uploading of infringing

[105] *Viacom Int'l, Inc. v. YouTube, Inc*., South District Court of New York, 2010

material on the platform without separating treatment for infringing and non-infringing content because it attracts users which increase advertisement revenue.

Copyright law does not set any specific timeframe for processsing takedown notices, but requires expeditious action. [106] Acting expeditiously has not been confirmed in case law, but DMCA takedown notices are often processed within few hours to few days depending on the OSP. In that regard, YouTube fulfills DMCA requirements quickly and efficiently, and generally it could be expected any OSP to take an action within a few days.

As additional tool, some OSPs worldwide provide additional tools for prior content management, such as YouTube's Content Verification Program, that helps copyright holders to find and remove allegedly infringing content and it is designed for right holders that need frequently do multiple removal requests based on copyright infringements, or Content ID tool used by YouTube. Content ID is an example of automated tool for scanning audiovisual material from a platform hosted by an OSP. Content ID is an automated system for locating copyrighted content by comparing uploaded UGC to the reference files in form of audio, visual or audiovisual and related metadata provided by the copyright holder. Content ID allows automatic claiming of material which prevents material from being published on YouTube. [107]

Yet automated systems can be considered essential to tackle and manage large amounts of data containing potentially infringing material of which UGC is very typical manifestation of such content, the use of automated tools and systems easily create problems in terms of exception to copyright. While considering that the EU restricts copyright exceptions more extensively when comparing to the US, the use of automated content control technology is not free from risk false claims or acting contrary to the spirit of copyright law even in the EU. These issues conserning flagging of legitimate uses of original content appear clearer in the US where a large portion of UGC falls under the fair use doctrine. [108]

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[106] 17 U.S.C. § 512

[107] *See* YouTube's Content ID system
https://support.google.com/youtube/answer/3244015?hl=en&ref_topic=4515467. (2.1.2017)
and Content Verification Program at
https://support.google.com/youtube/answer/6005923?hl=en&ref_topic=2778544 (2.1.2017)

[108] Bartholomew, T. The Death of Fair Use in Cyberspace: YouTube and the Problem with Content ID. Duke Law & Technology Review 2015, 13 (1), p. 66-67

In a platform like YouTube, copyright infringement claim leads to negative consequences for the uploader of allegedly infringing material. This include loss of monetization, namely advertisement revenue, immediately after a claim is placed against a video, and in many cases, also removal of the content in question. Content ID can detect, for example, audio material from a video, which means the audio material may be disable from the video if that is the remedy option that the copyright holder has chosen from the options that are available to the right holder. The options may include blocking the material that has been used without authorization or the whole video, monetizing the video by running advertisements against it and taking or sharing the revenue with the uploader or, tracking the video's viewership statistics.

Even though case-by-case evaluation of copyright infringement by a right holder or an OSP would not be any way feasible, management of content creators and content as well as providing guidance within smaller networks by professionals may reduce the burden from monitoring. Until year 2013, so called managed channels were excluded from Content ID scrutiny due to the fact they were managed by media entities who were to deal with any copyright infringement allegations made by right holders. Smaller circles allowed more effective case-by-case analysis and means for right holders to enforce their rights as these managing media entities would take the responsibility for infringements within their networks. [109]

3.2. European Copyright Enforcement Mechanisms

Mechanisms for copyright enforcement have similarities in the EU and the US, but the system is a slightly more fragemented in the EU. While both jurisdictions have harmonized copyright laws, the US has clearly one common enforcement system, every member state of the EU has their own, national procedures and OSPs must comply the system within the state where they are based. Enforcement is harmonized by the E-Commerce Directive and its Article 14 that provides general outline for intermediary liability regime or safe harbor, similar to the DMCA safe harbor, and takedown procedure but leaves some room for enforcement means.

IPR enforcement and protection of copyright from infringements of commercial scale are currently topical matters in the EU, and despite of existing enforcement systems harmonized into the member states' laws, the EU is working on preventing infringements of IPRs in a more advanced

[109] Bartholomew, T. supra nota 108, p. 68

manner for enhancing internal market objectives by ensuring infringing activity for not impairing growth and sustainable employment in the EU and by seeking cooperation between authorities at all level. Further, it is acknowledged that efficient and effectively enforcement of IPRs is also important for avoiding economic harmss for actors in market, and especially for purposes of ensuring innovation and avoid commercial-scale infringements. [110]

The Directive on the enforcement of intellectual property rights was adopted in 2004, and it requires all the EU member states to apply effective, dissuasive and proportionate mechanisms for enforcing IPRs, including copyrights. Despite of that, the European legislation in this regard urges modernization and updating of enforcement mechanisms to better respond the needs. This should be done in a manner that promote the functioning of digital markets, which means not reducing online infringements by not only enabling legislation but enforcement measures. Enabling supporting legislation for the development of legitimate content offerings will not be enough and will serve only some industries, such as music distributors. On the other hand, technological means are not itself sufficient tools for protection. Therefore, efficient legal means to enforce copyrights is essential. [111]

The EU has been working on an update to copyright directive since 2014, when a working group was decided to set up by the JURI Committee, and its objective is handle IPR issues and ease the oncoming copyright reform in the EU. The Commission published a consultation in 2015 on the evaluation and modernisation of the legal framework for the enforcement of IPRs. In the Commission's Communication of May 2015 the proposal was described to include, inter alia, to provide greater legal certainty for the cross-border use of content for specific purposes that would include research, education, text and data mining, through harmonised exceptions and to clarify the rules that apply to the activities of intermediaries in relation to copyright-protected content and to modernize enforcement of intellectual property rights, focusing on commercial-scale infringements. [112] On that basis, this new proposal to reform copyright legislation should be the key in resolving the discussed matters related also to copyright enforcement and UGC.

[110] Günther, P. The Plan for a Digital Single Market in Europe and Reforming EU Copyright Rules to Develop a Market-Oriented Approach to Reduce Infringement on the Internet. European Intellectual Property Review 2016, 38 (1), pp. 48-50
[111] Günther, P., supra nota **Error! Bookmark not defined.**, pp. 51-52
[112] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Digital Single Market Strategy for Europe, COM (2015) 192 Final (May 2015) (Communication of May 2015), p 8

On September 14th, the European Commission released a new copyright reform package, which include a proposal for a new Directive on Copyright in the Digital Single Market[113]. The reform brings along changes to national copyright laws within the EU, and an interesting proposal in its Article 13 on 'Certain uses of protected content by online services'. Article 13 requires intermediate service providers to take measures to ensure functioning of license agreements with right holders, and, on the other hand, to prevent availability of works that have been indicated by the right holders on their services. Further, the Article requires setting complaint and redressing mechanisms in case of disputes and that Member States facilitate the cooperation between service providers and right holders to determine appropriate and proportionate content recognition technologies. These provisions partially respond to the urges regarding copyright law but has also raised some debate regarding certain issues that include the questions of UGC and its filtering as exception and general monitoring obligation to be set for intermediary service providers.

For instance, in an open letter addressed to the European Commission, the European Parliament and the Council, a group of academics urge re-assessment of the new provisions against the CJEU case law, the Charter of Fundamental Rights of the European Union and E-Commerce Directive and particularly its Article 15 that prohibits imposing of general monitoring obligation to service providers, and is contrary to the new provisions imposing such. According to this critical statement, prohibition of general monitoring obligation supports two objectives, namely innovation and protection of fundamental rights of all internet users, and therefore no monitoring obligations should be enacted.

Moreover, the statement presents concerns towards Article 13 and Recital 39 of the Proposed Copyright Directive especially in terms of Article 7 Respect for private and family life, Article 8 Protection of personal data, Article 9 Right to marry and right to found a family, Article 10 Freedom of thought, conscience and religion and Article 14 Right to education of the Charter of Fundamental Rights of the European Union. [114] Recitals 38 and 39 of the Proposed Copyright Directive provides further explanation to Article 13 by emphasizing the importance of cooperation between right holders and service providers so that they are able to build functioning content recognition and other technologies, and obligation to implement effective technologies for

[113] Supra nota 18
[114] Stalla-Bourdillon, S et al. An academic perspective on the copyright reform. Computer Law & Security Review, February 2017, 33 (1), pp 3-4

protection of copyrighted works and conclude licensing agreements with right holders, but the recitals do not justify the obligations under Article 13. According to the letter, the lack of justification, especially when the new obligations are against settled CJEU case law relating to provisions of the E-Commerce Directive and InfoSoc Directive that provide with safe harbour for service providers, prohibit general monitoring obligation and the exclusive right to right holders to make their works public.

Together with the proposal for a new copyright directive, a communication "Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market" was released. [115] The Communication of September 2016 explains that the purpose of Article 13 is to fill up the value gap, which has occurred due to unfairly distributing of revenues generated from online use of copyrighted content between actors involved in the value chain of online publishing. [116] The issue exists between ad-funded platforms, including YouTube and Vimeo, and subscription-funded platforms, such as Netflix and Spotify. The difference between these two types of platforms is, that the ad-funded platforms contain high volumes of UGC that is managed with notice and takedown procedures and subscription-funded platforms focuses on copyright licensing, requires consent from copyright holders and enforces license terms, thus the latter ones not being in the center or not at all relevant in respect of UGC.

Generally, in the US or the EU, in case of ad-funded platforms, when UGC based on copyrighted material is detected, an intermediate service provider may offer different options to copyright holders to treat the content they own and which can include the possibility to negotiatie on share from ad-revenues with the UGC uploader, disable the copyrighted content or mute audio, block audiovisual material from viewing or track viewership statistics[117], even if it is not obliged to so. Still, according to the Impact assessment on the modernisation of the EU copyright rules[118] and the related executive summary, at least regarding subscription-funded platforms, right holders face

[115] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market, COM (2016) 592 Final (September 2016) (Communication of September 2016)
[116] Communication of September 2016, supra nota **Error! Bookmark not defined.**, p. 7
[117] How Content ID works on YouTube, https://support.google.com/youtube/answer/2797370?hl=en&ref_topic=2778544 (2.1.2017)
[118] Commission Staff Working Document, 'The Impact Assessment on the modernisation of EU copyright rules Accompanying the document Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market and Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes', SWD (2016) 301 Final (September 2016)

difficulties when seeking to control and monetize their content by OSPs when service providers give access to content.

According to the Communication, one problem to be faced within the current environment is related to monetary revenue left out from reach of copyright holders. Because a great number of UGC is published through social media platforms such as YouTube, Vimeo and Twitch, revenue is allocated to the platform and UGC provider, while the actual copyright holder cannot get in between. The problem is linked particularly to ad-funded platforms who are not obligated to negotiate and agree on sharing of revenue. For such purpose licence agreements cannot be effectively used by copyright holder, except performing restrictive policy in terms of the use of copyrighted materials.

Furthermore, it has been recognized in the Communication "Towards a modern, more European copyright framework" that copyright framework in the EU provides the basis for the global competitiveness of Europe's creative industries, and is essential part of the set of rules which governs the circulation of creative content across the EU along with internal market and competition rules and other policies, and plays a role in determining how the value from the works is generated and shared among market participants. [119] Against the described background, the Commission's approach seems to favor right holders with several anticipated measures to support copyright enforcement for reasons that are of special interest of right holders, or at least in the line with their interest, such as facilitating IP protection for the sake of internal market objectives by creating conditions for healthy market, which also respect valuable intellectual property of businesses.

Interestingly, the upcoming amendment to the Audiovisual Media Services Directive that is a sector specific regulation continues along these lines set by the Proposed Copyright Directive by tightening service providers' responsibilities for its part. The draft has been discussed in the end of April within the Council and may be subject to modifications and interpretations. Similarly to the Proposed Copyright Directive, new provisions of the Audiovisual Media Services Directive will make professional users of video sharing platforms subject to more extensive responsibilities. The current Audiovisual Media Services Directive does not apply to any UGC that is offerd

[119] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Towards a modern, more European copyright framework, COM (2015) 626 final (December 2015), p 2

through video-sharing platforms, because the service providers are not under editorial responsibility regarding the content, but may be subject to the E-Commerce Directive instead, and have no liability over the illegal content if they qualify only as hosting providers within the meaning of the Directive. Hosting, or intermediaries are exempt from the liability when they do not have control or knowledge about any illegal content. However, the proposed amendment will cover UGC on video-sharing platforms and impose the service providers an obligation to place technological measures that protect minors from harmful content, all users from incitement to violence and hatred. The Directive does not provide measures for copyright protection not its enforcement, but can be seen as supportive regulation from the perspective of right holders, who are likely to consider videos with harmful content or videos containing violence and hatred to be prejudicial if such is associated with their works.

The draft indicates that the oncoming directive aim promoting of European works, protecting minors from harmuful content and commercial communications. The draft also analyses and defines the monitoring requirements imposed in E-Commerce Directive in comparison with the proposed provisions to the Audiovisual Media Services Directive. [120] While the E-Commerce Directive in fact prohibits Member States to impose any general obligation to intermediate service providers to monitor content, there are monitoring requirements for specific cases under Article 15 of the E-Commerce Directive. Correspondingly, the proposal for Audiovisual Media Services Directive does not allow Member States to require service providers to apply stricter policies than what has been laid down in the E-Commerce Directive, which will continue in force in its current state. [121]

3.3. Contractual Limitation of the Use of Copyrighted Materials

The relationship with game players and copyright holder and the permitted use of copyrighted assets can be determined in a license agreement that is precondition for accessing a game. License agreements have traditionally been the foundation for granting access to any software products, being it purely software or something with additional material, such as video games. License agreements' purpose is to define and lay down the rights and obligations of each party regarding for the use of a software product. A license is the right to access and use copyrighted work under

[120] Supra nota 20, pp 1-2
[121] Supra nota 20, p 8

certain conditions that the copyright holder may determine in such a way that protect the work best, and if needed, licenses can be customized for each individual licensee individually. In practice, video game license agreements are tailored for certain user group within all the users have the same rights. The transferred right may be limited only to a certain purpose, extent or period of time.

According to the EU copyright law, transfer of a copy of a work does not constitute a transfer of the copyrights to the work unless that is expressly agreed. Considering that accessing copyrighted materials is more difficult without lawfully acquiring the game, it is worth to set the necessary and wanted restrictions for the use in a license agreement. Limiting the use of copyrighted materials with end user license agreements (EULA) and terms of services is another way for copyright holder to control how game assets are used, and by contractual means it is possible to limit the freedom provided by the exceptions and limitations set to copyright, and thus any action making content available without a license to do so infringes rights and interests of the author. Presumably the most and the most harmful UGC is created by users who have agreed with TOS and who play the game and have incentives to produce related UGC.

EULAs can be used to the benefit of copyright holders as private parties are free to agree contractually terms regarding the contractual subject matter unless the matter is regulated and it is expressly provided by the law that a matter does not fall under contractual freedom. In case *Davidson & Associates Inc v. Internet Gateway*[122] the court held that the EULA and Terms of Use (TOU) were enforceable due to contractual freedom despite that the disputed term concerned reverse engineering which is considered as fair use under American copyright law. Moreover, the court rejected arguments that the terms were not consistent with the reasonable expectations of the parties with the reasoning that defendants were computer programmers who due to their professional duties must be aware of and familiar with language used in EULAs and TOUs, and therefore terms prohibiting reverse engineering did not constitute misuse of copyright by the copyright holder. In this regard, the court's reasoning appears to be sufficient, because reverse engineering requires more advanced technical skills and understanding of software development, and to be able to perform reverse engineering means very likely that one is familiar with such term that is common in any EULA or TOU.

[122] *Davidson & Associates Inc v. Internet Gateway*, 334 F.Supp.2d The Eastern District of Missouri, 2004

In the view of above mentioned, many pitfalls for copyright holder can be avoided by drafting comprehensive agreements that are prerequisites for playing copyrighted games. It is hardly possible to reverse engineer a game without accessing it legally in the first place, and by accepting the EULA and TOU. However, contractual establishment of certain obligations and limited rights to use copyrighted content can protect the copyright holders' rights to the wanted extent but efficient enforcement of such rights still calls for straightforward and efficient enforcement mechanisms. No copyright holder cannot go for litigation as a default solution for enforcing their copyrights, when intrests for each infringement is little but escalates significant along with the volume of typical online UGC.

In principle, TOS applies only to users that have agreed with it and accessed the game but not users that find copyrighted material elsewhere than directly playing the game. Still, in some cases it might be legal actions available for preventing sources of unwanted interfering technologies without contract, by attempting to cease game hack developers from distributing third party software that user-generated videos promote. In the US, gaming companies have succeeded when suing game hacks providers for tortious interference with agreements between video game users and game developers.

Tortious interference means intentional interference with contractual relations that leads a party to breach the contract, and where a person committing tortious act cause someone thus unfairly to suffer harm that result from legal liability. This was ruled in *Blizzard Entm't Inc. v. Ceiling Fan Software LLC*, [123] where a game company Blizzard accused Ceiling Fan Software for violating its TOU and EULA for World of Warcraft game by providing and marketing automation software, and since this holding gaming companies have filed several suits against game hack creators. Due to uncertainty, as to relationship between copyright protection and the use of automation software, many video game companies started to add clauses to their game licensing agreements prohibiting players from using bots in game play. [124]

[123] *Blizzard Entm't Inc. v. Ceiling Fan Software LLC*, 28 F. Supp. 3d, 23.9.2013, District Court of California
[124] Rosenthal, J. et al. Bots and the Bottom Line: The Copyright Act and the DMCA. Westlaw Journal Entertainment Industry 2016, 28 (11), p 4

4. Conflicting Interests and Finding the Balance

4.1. User-Generated Video Game Content and its Purposes

According to a digital gaming analysis from 2015, the market for gaming videos created by users is worth of 3.8 billion US dollars, and its value is growing. Similarly, the audience of gaming-focused video content will grow strongly even to 790 million people. Gaming companies take various approaches to game related UGC varies, some being more tolerant while some taking rather excessive, zero tolerance policy against almost all UGC, and which would constitute passive support, active support, restrictive or conditional support. Actively supporting right holders may provide hands-on support to the development and expansion of UGC, for example in the form of hosting and supporting gaming tournaments and video channels, and acknowledge sharing of gaming tactics and being spectators as integral part of the gaming experience. Some companies do not really take a stance on UGC either way, but rather passively allow its creation and publication. In contrast to actively supporting companies, some practice strict and limiting policy on content, which is often contested by players. More lenient approach than be restrictive is to support content conditionally. [125]

A famous game developer Nintendo, for instance, has been known for its considerable restrictive policy until the very recent years. After wide contestation by public due to massive takedowns on YouTube made by the company and an attempt to enforce copyright on videos using its assets by demanding certain amount of ad revenue collected from video views, Nintendo decided to loosen its policy and support a tournament and allow its live streams and recordings on Twitch and YouTube. [126] In general, restrictive policy does not allow any UGC regardless the quality or nature, while active support style leaves room for enforcing rights when necessary, same time when encouraging and supporting to create content. Right holders set up their respective rules governing the use of game assets and may set them forth in TOS or TOU to be agreed when accessing the game and hence mass license copyrights. [127] This has the advantage of enforcing a contract, which

[125] Llamas, S., Foxman, M. Market Brief 2015: Gaming Video Content, SuperData, 2015, pp. 1-6, 11

[126] Karmali, L. Nintendo helping to resolve some youtube issues. IGN.com 13.12.2013. http://www.ign.com/articles/2013/12/13/is-nintendo-claiming-copyright-on-youtube-videos-again, (31.12.2016)

[127] *See* for example Supercell's Fan Content Policy
http://supercell.com/en/fan-content-policy/ (2.1.2017)
and Terms of Service
http://supercell.com/en/terms-of-service/. (2.1.2017)
Fan Content Policy is part of the Terms of Service, that is must be agreed by the user before accessing or using the games.

is more efficient and allows more stringent terms, at least in theory, than enforcing the rights provided by copyright law.

While the term UGC refers to content created by a user, and may give the impression that the user holds its copyright, the reality is not that straightforward from the copyright law perspective. The starting point in UGC is that the content always somehow relies on existing material by either making references to it or by utilizing it by basing the created new content to the existing material by combining and modifying them. An OECD study on user-created content defines UGC as "content made publicly available over the Internet, which reflects a certain amount of creative effort, and which is created outside of professional routines and practices"[128].

UGC can be divided into three categories, two of them not directly using game assets, and one using copyrighted assets. Fan content that is not directly connected with game experiences can be for instance artworks, costumes, stories, fan websites and walkthroughs that do not use any audiovisual game material as such. [129] UGC can also include traditional type of artworks created outside of the game environment or the context of the game but then connected to the game play somehow, for instance presenting a song during multi-player game session. [130] These two types are generally considered categorically acceptable if not desirable UGC by copyright holders, unlike the third category of UGC, namely content that based on game assets, either software or audiovisual elements or both, with or without authorization of copyright holder. [131] Often when content creator does not have authorization to use game assets, the UGC may contain references, promotion of or contain itself technologies or methods to interfere with the game.

User-generated videos utilizing game assets include game play videos and machinima, and they fall into the third category of UGC presented above because they show the game play and game assets. Game play videos contain in the simpliest form game play recordings where a player plays a game without any commentary or additional elements, meaning that the content is what anyone would see when playing the game. In such case the only contributions to the copyrighted material are the choices that the player does in the game. These type of recordings are not very popular,

[128] Participative Web and User-Created Content, OECD 2007, p 9.
[129] Wirman, H. On Productivity and Game Fandom', Transformative Works and Cultures 2009, p 3. http://journal.transformativeworks.org/index.php/twc/article/view/145/115 (2.1.2017)
[130] Reuveni, E. Authorship in the Age of the Conducer. Journal of the Copyright Society of the USA 2007, 54(285)
[131] Scacchi, W. Computer game mods, modders, modding, and the mod scene. First Monday 2010, 15(5). http://firstmonday.org/ojs/index.php/fm/article/view/2965 (2.1.2017)

unlike videos where some kind of commentary has been included, and such videos are usually made for the purpose of reviewing or providing instructions or ”how-to” type of guidance to the game. In addition to the previous type of videos, it is common to add some addditional and original content to the game-play, such as voices and soundtracks, storylines or the like. Machinima, in turn, means videos that are created using graphical assets of the game to create game animation and cinematography. Assets for machinima are obtained with the help of third party software and technologies to copy and reproduce wanted audiovisual elements of a game.

In short, there are two kind of game play videos, those that boost the gaming community and serve as promoting the game and those that damage the gaming company's brand, game and gaming community. Third party software in the broad sense may basically mean any another's company software that is not developed and provided by the actual video game developer, and prohibiting of use of any third-party software is not possible as any video game most likely need to rely on technologies developed by other actors and be interoperable with different devices and platforrms. Usually gaming companies do not authorize the use of technologies that allow actions prejudicial to author's exclusive rights, copying and modifying of a game, especially if such actions are likely to be conducted to circumvent essential features of a game, such as revenue collection systems or games functioning, or cause otherwise damage to the gaming community.

Interfering with the game is more likely regarded as unwanted by the copyright holder in case of massively multiplayer online game (MMOG) type of game where players play against each other and the use of cheating methods by some players places other players into unequal position. The use of technologies interfering with the game are often called game hacks or cheats, and they include game play on a private server, automation software (bots), or mods. Bots that work to simulate player's participation in a game and allow advancing through its levels without active game-playing, are often based on game application programming interface, and private server playing and mods are based on and created utilizing a copy of the original game file. Modding practices consist of a wide range of customizations, tailorings, and remixes of game embodiments that can all appear in the form of game content, software, or hardware. [132]

[132] Scacchi, W. Computer game mods, modders, modding, and the mod scene. First Monday 2010, 15(5). http://firstmonday.org/ojs/index.php/fm/article/view/2965 (2.1.2017)

Therefore, UGC does not always mean content that is in fact created by the user, and often when a work can be considered as an independent, separate work from the original one or derivative work, it is not clear whether the transformation, modification or adaptation of the original work is substantial and fulfill the requirements for originality to exceed the threshold for copyright. OSPs and ISPs provide the platform and the means for uploading and making the content available to the public, and in principle, UGC is not inspected before uploading or after publishing it by the service providers which creates a great possibility of infringements. Despite a few prior content management tools, such as Content ID or Content Verification Prograams provided by YouTube, enforcement of IPRs are conducted by notification made by the right holder, and requires therefore constant and active monitoring of UGC platforms that can be a great expense and require relatively significant resources to keep the amount of UGC under control.

Traditionally copyright holders have been able to control distribution channels and media which have also guaranteed certain quality in the content. On the contrary, when content is created directly by users using various devices, software and skills and published on UGC platforms and ISPs, there are more actors in the value chain that are difficult, if not impossible, to control in terms of quality and content type. While a great number of game-related UGC is created without purpose of gain but rather for the sake of gaming communities, connecting with other gamers, sharing experiences and self-expression, similarly to any other fan content, monetizing of and profiting from UGC is still common and increasing phenomenon.

The possibility to create and make UGC available to the public easily is a challenge to the right holders and the real problem being the volume of UGC created and published which affect particularly the most popular gaming companies. Many users are not aware of copyright law or capable to understand with a sufficient level what kind of use of copyrighted material is permitted under copyright law, or license agreement. Further, the more UGC is produced and published, the more existing UGC support incomplete or incorrect understanding the nature of exclusive rights provided by copyright and permitted use, for what many users may not even realize they are infringing copyrights and why the burden of right holders increases. The difference between tolerating the use and licensing is legal. Gaming companies do not generally have reason to

prohibit all use but only that causing harm, and as right holders they are entitled to revoke the rights by terminating the license agreement or based on clause allowing that in certain cases. [133]

Even though users are primarily responsible for their content, the risk of being detected for infringement is relatively small. In this regard, the question whether or to which extent, service providers are to be considered responsible or liable for copyright infringements. Defending of copyright holders' interests is not necessarily the primary objective for service providers because intermediate service providers usually operate by advertisement revenues, and any content - sometimes unwanted content even more than content created in a good spirit -attracts audience to the service. Currently the copyright legislation in the US provide a safe harbour in terms of secondary liability for copyright infringements made by users, but the downside here is, still, that the service providers consider they are not responsible for any content unless it is specified by the right holder. From the perspective of copyright holders making of UGC available may appear at least partially as an act conducted by OSP or ISP. [134]

4.2. Copyright Issues in User-Generated Video Game Content

Given that exceptions to copyright allow creating of derivative works based on copyrighted works that do not conflict with a normal exploitation of the work or other subject-matter, and do not unreasonably prejudice the copyright holder's legitimate interests, it could be argued that UGC rarely can be considered to cause damage when the quality of UGC varies, it is easy to detect that UGC is created by the users and due to its differenet nature when comparing to the original work, UGC does not necessarily compete with the original work. Instead, UGC can be seen as promotion of original content and therefore author of original works actually benefit from the publicity brought along with UGC.

Yet, from the perspective of copyright holders, not any UGC based on copyrighted assets is always acceptable, especially what comes to UGC that copyright holders regard prejudicial to the value of the work or its author or both, what is likely the case when UGC is a mod, bot or private server tutorial. Such content may cause damages to the product especially when there is tremendous

[133] Gervais, D. The Tangled Web of UGC: Making Copyright Sense of User-Generated Content. Vanderbilt Journal of Entertainment and Technology Law 2009, 11 (4), pp 868-870
[134] Wang, J. Not All ISP Conduct is Equally Active Or Passive in Differing Jurisdictions: Content Liability and Safe Harbour Immunity for Hosting ISPs in Chinese, EU, and US Case law. European Intellectual Property Review 2015, 37 (11), pp 732-735

amount of UGC published that promote something unwanted content that is associated with the original work. Monetization of the content makes the matter only worse. These considerations are important to any brand owner in terms of UGC, and in gaming culture content enhancing good spirit in gaming communities and among players is often vital. UGC promoting third party software interfering with the game and presenting cheating methods lessens general motivation of players to play games fairly, and reduces gaming companies' profits, if cheating methods circumvent revenue models by providing parallel gaming environments from where revenue for the coypright holder cannot be generated from. In general, game hacks and even UGC providing false and misleading information violate the original game's TOS and very often copyrights that are used to attract potential users or viewers for game hacks or promoting content to get profit by fraudulent activity or generate ad revenue.

There are two main strategies for copyrigholders provided by copyright law to manage UGC. Most of the content can be controlled within the scope of exclusive rights if the content does not fall under the list of restrictions and limitations to copyright. In addition to that, or even most importantly, the copyright holder may rely on contractual terms laid down in TOS. Remedies for enforcing the exclusive rights include, primarily, using of takedown procedures provided by OSPs and ISPs, direct communication with the UGC creators in form of cease and desist letters and secondary, filing an action to a court in order to restrain alleged infringing activity. Online piracy is a large-scale problem for many right holders, and seeking a court order is rarely the first action when detecting an infringement due to the slow and inefficient nature of court proceedings and resulting expenses. [135] As long as UGC is actually based on copyrighted material, the copyright holder is able to, by means of exclusive rights provided by copyright, to restrict and prohibit at least certain type of content.

The aims of the DMCA include prevention of piracy and economically harmful unauthorized uses of copyrighted materials as well as encouraging of right holders to use new technologies when protecting and disseminating works. For these reasons, copyrigh protection under the DMCA prohibits marketing or selling technologies whose purpose is to circumvent the exclusive rights or

[135] Yan, M. The Law Surrounding the Facilitation of Online Copyright Infringement. European Intellectual Property Review 2012, 34 (2), pp 122-124

allow unauthorized access to copyrighted work. [136] Consequently, video game companies have used the means of the DMCA to prevent cheating. Important decision on circumvention provisions[137]was *Chamberlain Group Inc. v. Skylink Technology Inc* [138], the plaintiff Chamberlain claimed that the defendant activity to constitute trafficking in circumvention technology. The right holder is required to present a nexus between unauthorized access and infringement of its copyright, but in this case, it could not be proven that the defendant was able to copy the protected material using the alleged circumvention device. On the contrary, in case *MDY Industries LLC v. Blizzard Entertainment Inc*.[139], also about trafficking in circumvention technology, it was held that no nexus was to be proved between the circumvention device and copyright infringement. Thus, it was held that the anticircumvention provisions of the DMCA[140] extend the traditional form of copyright protection.

[136] Mitchell, R. A Holistic Approach to the Digital Millennium Copyright Act, Syracuse Science & Technology Law Reporter 2010, 23, pp 25-27
[137] U.S.C 17 § 1201(a)(2)
[138] *Chamberlain Group Inc. v. Skylink Technology Inc*., 381 F.3d The Court of Appeals for the Federal Circuit, United States of America, 2004
[139] *MDY Industries LLC v. Blizzard Entertainment Inc*., 629 F.3d, 9th Circuit Court, United States of America, 2010
[140] U.S.C 17 § 1201(a)(1) and 1201(a)(2)

Conclusive Remarks

In the context of video game industry, similarly to many other industries where UGC flourish, UGC is fuel of marketing and essential way to users to experience offered products, such as video games. Popularity of UGC in gaming culture represents the significance of sharing experiences and interacting with peers, and UGC often forms an equal or sometimes even greater portion of gaming experience than playing games without creating any content based them. Commenting, reviewing and criticism of copyrighted works falls under the scope of freedom of expression.

UGC is not free from contradictions in copyright law or conflicting interests between copyright holder and users. A great number of UGC act againsts right holders' objectives and may cause harm, even if gaming companies benefit from majority of UGC. Unauthorized use of other's copyrighted assets is piracy, but neither wide permissiveness nor heavy restrictions can ease and balance partially conflicting interests. The use that can be considered be fair, or an exception to the exclusive right, is not unauthorized use.

Still, the right holders have well reasoned incentives to monitor and restrict the use of their exclusive rights to their works, for what current copyright laws do not provide sufficient mechanisms despite of some substantive improvements that include DMCA takedown procedure or allow a fair share from advertising revenue. [141] At the same time, neither the copyright regimes in the EU nor in the US recognize exceptions to copyright that would response to the existence of UGC. As it turns out, the doctrine for exceptions in the US, fair use, seems to be too vague to provide clear, general guidelines, and in the EU, too inflexible. This state of affairs appear to hamper both users and right holders who can not rely on understandable directions on what is permitted use and what is infringing copyright. This, in context of extremely high volume of UGC, makes it ineffective and difficult to manage the use of copyrighted works and deal with infringements.

Video games are complex works of authorship, which nowadays almost always are sophisticated, movie-like products that consist of multiple copyrighted works. These works can be divided in audiovisual and written works, where first contain graphics, videos and sounds and the latter software code and other written elements of the game. Derivative works, or works that have been

[141] Mejia, S, supra nota 101, pp 4-6

based upon preexisting, copyrighted works, are recognized to belong primarily under the exclusive right of a copyright holder. This right means the right to take extracts from the original work, alter, modify and combine them into a new works, such as translations. When comparing to other commonly known forms of copyright infringements, such as piracy or unauthorized copying and sharing of pirated copies, the heart of UGC is the transformative nature of copyrighted material. While traditional piracy means making copies and sharing of those copies as such, UGC is created to add something by the user. Therefore, it is essential to draw a line between mere a derivative work and a transformative work, and take other factors supporting and opposing permitted use copyrighted work into consideration.

Under certain conditions others may use in a similar, but more limited manner the original works. In short, these conditions require that the taken material from the original work must be used in a transformative manner that cannot be prejudicial to the original work or its author, unless the work based upon preexisting materials is a parody, for instance. In the EU, exceptions to copyright have been in principle harmonized with a closed list of limitations, which does not provide much room for UGC, even though it does not compete with the same market than original works that are either part of a video game or related materials. As a comparison, in the US a few of the fundamental factors determining if use is fair or not, is the market of the content using copyrighted assets and the purpose of the content.

An exhaustive list used in the EU does not recognize the actual right to prepare derivative works. Instead, the use copyrighted works is possible for UGC only with a limited manner for purposes of quoting, commenting, reviewing and making parody. Further, these exceptions have been variously implemented by Member States into their respective copyright laws, and finally, the interpretation of exceptions is somewhat unclear and subject to varying interpretations. In the US, the legal framework for UGC is more permissive, yet the concept of fair use is, similarly to the EU, inexact and unsharpened despite of more extensive case law. Copyright law in both jurisdictions reserve the rights of reproduction, display, public performance, distribution, and creating derivative works to the right holder.

In case of video game related UGC, there are even more ambiguity. It is not yet defined whether and when such content infringes their source material, and how an infringement should be defined. Let’s play videos can infringe one or more of the exclusive rights of copyright holder, and it is

difficult to define and argument what is their effect on the potential market, how their nature and purpose is to be defined. As presented above, video content created by players often promote and interfere with the original works causing disturbance, although the rest are good quality content that encourage to create and innovate.

According to many copyright law analyses and comments regarding UGC considers it should be allowed as an exception to copyright. It has been also noted that derivative works should have different normative target than the right of reproduction even if they do overlap. [142] Because video game UGC does not really compete with the games, content creation based on other's works is not intended infringement, and is not prejudicial to the right holder's interests unless it contains for instance violence or instructions how to interfere on functioning of a game that might constitute copyright infringement by violating the EULA. [143]

The use of other's copyrighted works has been extremely popular particularly in some entertainment fields, and this phenomenon has both advantages as well as pitfalls in regards of copyright holders' interests. Some may argue that copyright is evolving into direction where reproduction right should not be as limited as it used to be before the digital era and culture of social content creation. However, at the same time when creating content based on others' content, copying copyrighted works and making them available to public has become both very common and easy and when rights to the content is not necessarily verified before uploading, and the rules for determining what kind of use is infringing are not nearly clear. [144]

From the point of view of copyright holders, enforcing mechanisms seem to fall behind when significant amounts of UGC based on copyrighted materials is constantly created and uploaded without consent of authors and thus more effective system for copyright protection is needed. It is a big question how this is achieved. Practical implementation of system for protecting copyright holders' objectives is a true challenge, that requires extensive reforms to copyright legislation, that will probably mean enhancing of enforcement mechanisms both with ex-ante and ex-post means, by requiring intermediate service providers apply content examination systems when content is

[142] Gervais, D. The Derivative Right, or Why Copyright Law Protects Foxes Better than Hedgehogs. Vanderbilt Journal of Entertainment and Technology Law 2014, 15 (4), pp 849-854
[143] Rosenthal, J. Supra nota 124, pp 1-5
[144] Landau, M. "Fair Use" under U.S. Copyright Law - The Need for Clarity and Consistency. IPRinfo Special Issue, September 2006, p 2

uploaded, and then provide copyright holders efficient mechanisms to enforce their rights. The latter would require actual and more comprehensive evaluation of content and whether the requirements for fair use or exceptions and limitations to copyright are fulfilled.

Currently the major copyright holders as well as intermediate service providers have agreed certain practices and principles to proctect the interests of both parties, yet these are not necessarily enough or applied to the degree that would satisfy the needs of copyrightholdrs arising from the great volume of UGC. Clearly these practices including various monitoring and filtering technologies are emerging trend that are needed to be applied even more widely, both for filtering of content prior publication and after detecting infringing content after making it available to the public upon notification of copyrigtholdes. Obviously, it is not enough to have technologies only for filtering for assisting and on behalf of copyright holders but also for ensuring that the legitimate interests of UGC creators are met and UGC is not takendown arbitrarily if it is reasoned as an exception or limitation to copyright.

Moreover, these solutions are to ensure that UGC creators may not, correspondingly, misuse counter notification possibility if they in fact have unauthorizedly used copyrighted materials in infringing way. This would mean more efficient system for balancing and evaluating the conflicting intrests, by the means of alternative dispute resolution, for example, to avoid inefficient and expensive litigations or seeking of court actions that are not useful due to large amount of UGC and, on the other hand, expenses that UGC creators who in most cases are individuals would bear.

One major concern presented together with more effective enforcement mechanisms and increased urge of gaming companies to restrict UGC is misusing copyright law. Incentives can contain restricting content that does not primarily infringe copyright, but appears otherwise unwanted or is, in fact, targeted to interfering technologies such as automation software. Easiness of copyright enforcing tools can tempt to use them to eliminate practices of which challenging through other

legal means would be expensive and inefficient. [145] On the other hand, righthholders may want to use them to turn criticism down. [146]

The need for making enforcement of copyrights in the EU more efficient is recognized and well reasoned due to large amount of reproduction of copyrighted materials and UGC made publicly available. The EU has proposed the member states should ensure the functioning of agreements concluded with OSPs and right holders for the use if their copyrighted works and, strengthen enforcement through cooperation with OSPs. One major changes coming along with the reform is harmonization of intermediary liability of OSPs and converging with the US in terms of it seems a working solution as it provides higher level of legal certainty for both copyright holders and users. Applying of effective, similar procedures for copyright enforcement throughout the EU reliefs pressures and shortcomings copyright holders are currently experiencing, sets reasonable obligations to OSPs but retrict the burden by limiting their liability when complying laws.

Communication to the public, under Article 3 of InfoSoc Directive, means making a work available to the public in such way that public can access it when and where they want to, which can be understood as an act made by the content creator and not primarily the OSP. The responsibility of making of a work publicly available and the right to do it is upon the content creator. The OSP is responsible only if does not disable or remove disputed content from being available to the public, but OSPs are not regarded to be responsible only for providing access and platform for any content. However, the new EU proposal for copyright law changes the responsibility in the sense that if the OSP is not eligible for safe harbour, it is considered to making works available to the public, which leads to copyright infringement and liabilities even if the OSP does not create the content and has implemented takedown procedures it will perform when requested by copyright holder. Clearly, there are potential issues from perspective of UGC providers and copyright holders, including interpretations on copyright liability.

At the same time one of the greatest concerns is that the fair balance between right holders and users and their fundamental rights cannot be meet with the schemes the EU is working on to reform

[145] *See* Still, V. Tekijänoikeuden väärinkäytöstä, Defensor Legis 2008, 4, pp 613-630

[146] Kris L. "Developer Accused of Using Copyright Takedown to Censor Critic (updated)", GAMASUTRA 21.10.2013.
http://www.gamasutra.com/view/news/202810/Developer accused-oftusing-copyright-takedown to censorscriticupdated.php (2.1.2016)

copyright laws. Particularly the proposed new Article 13 that seems to be problematic for balancing copyright and its exceptions. Partially this is due to the wording that potentially leads to weakening of users' rights to create content and strengthen copyright holders power in enforcing of their rights detriment on users and their fundamental rights such as freedom of speech. To this regard, some essential principles have been established by CJEU case law, including censorial acts for monitoring and enforcing others' rights, which the proposed reform must not lead to.

As can be seen from national attempts to map possibilities to introduce more open norms for exceptions within the framework of the EU copyright law[147], some national courts have also taken steps to search flexibility within national copyright law exceptions.

For instance, The Federal German Supreme Court has considered in case *Vorschaubilder II* [148] on Google thumbnails that the search engine company is not liable for copyright infringement when copyrighted works are displayed as preview pictures in search results. A photographer, who had taken the photographs which were displayed in Google image search, claimed the use as unauthorized use and to be copyright infringement. The photographer had, however, granted some website owners the right to use the pictures on the websites. The reasoning for holding was that uploading of copyrighted works online without preventing searching and displaying of the works with technically possible means would constitute an implied consent to the reproduction of the works as preview picture. This implied consent can be assumed when the uploader of the works is author, or a third party who does so with the consent of the copyright holder.

While the German decision can be seen, in a way, as reaching towards wider interpretation of exceptions, a similar interpretation was achieved very recently by CJEU in case C-160/15 *GS Media* [149] regarding alleged copyright infringement when linking copyrighted material. CJEU ruled on basis of fair balance between copyright holder and fundamental rights of users that linking does not constitute an infringement when the material is legally published and linking to it is done without intention of seeking financial gain. On the contrary, CJEU held that posting of clickable link for profit, the person posting it should ensure it has been legally published, and linking to a

[147] *See* Government Response, supra nota 69
[148] German Federal Supreme Court 19.10.2011. I ZR 140/10 *Vorschaubilder II*. *See* also German Federal Supreme Court 29 April 2010. I ZR 69/08 Vorschaubilder I
[149] CJEU 8.9.2016, C-160/15 *GS Media*

work that is illegally published online, constitutes a communication to the public which may constitute an infringement.

Even though the German or CJEU case does not deal with UGC but rather extending interpretation of copyright exceptions, the decisions indicates a slight move toward more open norms and possibility for more flexible use of copyrighted content when preparing UGC. For instance, if a user wish to publish a video with intention to promote technologies infringing and interfering with copyrighted game, it could be associated with the game by using a YouTube thumbnail or tag, and thus copyright infringement claim can be avoided if no game assets are displayed in the actual video.

One possibility that has been discussed across Europe both in the EU and national level, is implementation and introducing open norms as to copyright law exceptions that currently are considered too restrictive in terms of UGC. In addition to scientific research and use of libraries, flexibility in terms of copyright exceptions is, particularly, needed for UGC. Social media and tools for sharing content online have established themselves as methods of communication, and are becoming increasingly more common and popular, which has been acknowledged during recent years along with the need to update copyright law to be compatible with UGC.

According to some viewpoints[150], national copyright laws in the EU do not leave much room for UGC since exceptions currently allow creation of content based on existing works for the purposes of critisism, parody or pastiche. More, it has been acknowledged in the Green Paper on Copyright in the Knowledge Economy by European Commission that lack of exception allowing new or derivative works in InfoSoc Directive and thus UGC, and this can appear as a barrier to innovation blocking new, potentially valuable works from being disseminated. In the Green Paper from 2008, the Commission suggest introducing of a new exception allowing especially UGC that has not been amended. [151]

[150] *See* supra nota 70
http://ssrn.com/ abstract=1959554 (31.12.2016)
and Hargreaves, I. Digital Opportunity. A Review of Intellectual Property and Growth. An Independent Report by. May 2011
[151] European Commission. Green Paper on Copyright in the Knowledge Economy. Brussels. COM (2008) 466/3 (16.07.2008), pp 19–20

A group of leading copyright scholars, the Wittem Group, has already drafted the European Copyright Code in 2010, which the result of the Wittem Project commenced in 2002 aiming promoting of transparency and consistency in copyright law. The Copyright Code is builds on existing international agreements on copyright, Berne Convention and TRIPS Agreement, and focus on a few key elements of copyright codification, namely authorship, ownership, moral rights, economic rights and limitations, leaving, for instance, enforcement out of its scope. [152] The Code received criticism due to its overall ambitiousness and comprehensiveness, but could have still some merits as a starting point and basis for future copyright law development. [153]

From the perspective of users, the European legal framework regulating UGC does not look promising. Firstly, anticipated changes will only cover more efficient measures for controlling UGC and unauthorized use of copyrighted works, but it seems that the copyright reform does not manage to renew exceptions for UGC other than very limited manner. A new exception introduced for data and text mining in Article 3 of the Proposed Copyright Directive is limited only to reproductions and extractions made by research organizations. Similarly, another new exception for educational uses extends the limitations set for educational use of InfoSoc Directive, but does not provide more room for works that use preexisting works or other subject matter to disseminate new content online. Finally, it provides a limited exception for digital heritage institutions to copy material. [154] The fair use doctrine in use in the US has some merits when comparing to inflexible the EU copyright law in terms of UGC, although it lacks clarity and precise rules of application. It has been suggested that the fair use should be applied in the same way than transformativeness analysis is done in the light of creation/dissemination distinction. [155]

Even though many views support extending of the three-step test to fill the gap in the EU copyright law, the test has been criticized and has some vagueness similarly to the fair use, if not even more. [156] Such proportionate measures are needed to provide real possibilities for creation of UGC, and

[152] European Copyright Code
http://copyrightcode.eu (2.1.2016)
[153] Rosati, E. The Wittem Group and the European Copyright Code. Journal of Intellectual Property Law & Practice, 2010, 5 (12), pp 863-864
[154] Geiger, C. et al. The Resolution of the European Parliament of July 9, 2015: Paving the Way (Finally) For a Copyright Reform in the European Union? European Intellectual Property Review, 2015, 37 (11), pp. 689-691
[155] Gervais, D. supra nota 133, pp 862-867
[156] Geiger, C. et al. The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law. 2013. PIJIP Research Paper no. 2013-04, pp 3, 5-9

it is also needed to protect legitimate rights of copyright holders. Right holders, such as video game companies, are susceptible to harmful content and fairness evaluation would eliminate obviously prejudicial content in an understandable way. For the EU, adopting such doctrine could be refined based on the three-step test and by further strengthen it with analysis and tests connected to the fair use principle, and by implementing the exception clearly through harmonization within the EU.

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