

## WHEN PLAYERS BECOME DEVELOPERS

A Study on Copyright in Game Modifications and the Practice of  
Acquiring Such Rights through an End User License Agreement

University of Helsinki, Faculty of Law

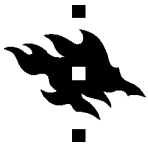
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<p>In the gaming industry, a decentralized form of content creation leveraging the creativity of players has gained significant traction during recent years. Increasingly, players are involved in not only the consumption, but also the production of game content through various practices collectively referred to as “game modding.” In this study, the practice of creating computer game modifications (“game mods”) is examined from the viewpoint of Finnish copyright law and, complementarily, contract law.</p> <p>The purpose of the study is, first of all, to analyze whether and to what extent player-made game mods may constitute original expression in which copyright subsists according to the law. In that regard, it is also considered whether the rights in game mods may be independent of the copyright in the original computer game. Secondly, this study examines the practice of acquiring rights in player-made creations through assignment or license clauses included in the standard terms associated with a computer game, i.e. the End User License Agreement (EULA). This contractual practice is, in particular, examined in light of the Finnish doctrine on standard form contracts as well as the doctrine on unfair contractual terms.</p> <p>Under copyright law, the products of game modding are subject to the same requirements for protection as any other subject matter. Therefore, those player contributions are protected by copyright, provided that they are original in the sense that they constitute their author’s own intellectual creation. In this light, many kinds of modding related creations such as in-game avatars and gameplay levels can reach the threshold for copyright protection. Whether or not such player contributions are protected independently of the original game or as derivative creations is a matter that needs to be determined based on the particularities of each case. On the abstract level, neither alternative can be excluded. At the same time, many innovative or valuable features of game mods fall outside the scope of copyright protection. These features include inter alia gameplay mechanics and concepts for game modes.</p> <p>Nonetheless, the fact that game mods are, at least to some extent, protected by copyright means that those rights need to be dealt with in the player–developer relationship. This is typically accomplished through the EULA. In that respect, Finnish law imposes both formal and material minimum requirements and limitations to how copyright can validly be transferred from players to the developer in such a context. From the viewpoint of the doctrine on standard form contracts, a standardized assignment or license clause included in a EULA is only likely to become binding on a player, if she is actually notified of the existence of the term and provided the opportunity to become acquainted with it prior to the conclusion of agreement. On the other hand, a player-to-developer copyright transfer is only unenforceable for material reasons if it is “unfair” in the meaning of Section 36 of the Contracts Act. In principle, such a transfer of copyright could be deemed unfair if it is significantly imbalanced. This might be the case in situations where the EULA sets out an exceptionally broad transfer of rights or where the player’s contributions turn out to have exceptional value.</p> <p>In practice, it is probable that standard terms are accepted as enforceable as long as certain minimum requirements are observed. Further, Finnish courts of law have, in practice, demonstrated a reluctance to intervene in transfers of copyright based on unfairness. Thus, it is found that, while certain requirements and limitations need to be observed, transfers of copyright executed through a EULA are likely to be generally valid under Finnish law. Conversely, this means that it may be difficult for players to challenge the transfer of copyright executed under a EULA. It is, however, unclear whether this is in practice a significant inadequacy in a player’s legal position. For instance, it is likely that some of the most “unfair” situations are addressed and resolved through other means, such as by the developer subsequently recruiting a particularly accomplished modder.</p>					
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Hallituksen esitys eduskunnalle laeiksi kuluttajansuojalain 3 ja 4 luvun, varallisuus oikeudellisista oikeustoimista annetun lain 36 §:n, huoneenvuokralain 5 §:n ja maanvuokralain 4 §:n muuttamisesta (HE 218/1994).

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# 1 INTRODUCTION

## 1.1 The Rise of the “Modder”

### 1.1.1 *The Impact of Modding on the Gaming Industry*

The practice of modifying computer games (“modding”) – that is, altering the content of a computer game with modifications (or simply “mods”) – is not exactly a new contrivance.<sup>1</sup> Yet, its true “emergence” has, in step with the general user-generated content phenomenon, taken place as a result of the development of the internet into a “global distribution channel for fan-created content.”<sup>2</sup> For the gaming industry, modding represents the shift towards a “participatory culture” in which the boundaries between production and consumption are quite fundamentally deconstructed.<sup>3</sup> In this “participatory culture,” the player<sup>4</sup> essentially becomes a developer by becoming intimately involved in not only the consumption, but also the production of game content.<sup>5</sup>

As *Kücklich* recounts, the history of modding extends as far back as 1983, when a modification called Castle Smurfenstein was released for the hugely popular Castle Wolfenstein game. Admittedly, the mods of that day and age were rather modest creations; for example, Castle Smurfenstein essentially (only) “reskinned” the Nazi characters of the original game by making them look like Smurfs instead. Thus, modding only took off in 1997, when id Software published the source code for

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<sup>1</sup> For a more detailed definition of modding, see section 1.1.2 *infra*.

<sup>2</sup> Sotamaa 2007, under “Studying game modifications.”

<sup>3</sup> Sihvonen 2009, p. 50. The ideology behind the notion of participatory culture has been described as “disrupting” the “distribution monopoly” of copyrighted content, which was traditionally centered on a model of “top-down creative control” (see e.g. Halbert 2009, pp. 927–929 and Lee 2008, p. 1460). The hero of this new participatory movement is the “conducer”, as in a consumer who is also a producer (see Garlick 2005, p. 425). Sometimes, the new hybrid consumer/producer is also referred to as a “prosumer” (see e.g. Loos et al 2011, pp. 41–45). – In Finland, the convergence in the consumption and production of copyrighted content has been noted at least by *Oesch* (see Oesch 2008, pp. 7–8) and a working group assigned by the Finnish Ministry of Education and Culture (see OKM 2010:9, pp. 14–15 and 21–22).

<sup>4</sup> In this study, the term “player” is used synonymously with “modder” to refer to the person who makes modifications to a computer games and is the counterparty to a EULA.

<sup>5</sup> This leads *Baldrice* to describe modding as a “symbiosis of content creation” (Baldrice 2007, p. 684). According to *Postigo*, participatory trends manifest in the gaming industry in three ways: firstly, in game developers releasing (official) modding tools for the community to use; secondly, in fostering or hosting modding communities; and thirdly, in “opening up” the mod development process more generally. In this regard, see Postigo 2010, under “Introduction.”

Doom (for modders to make use of). After that, the “modding scene”, as one might call it, has grown at a fast pace (just like the gaming industry in general), with today’s mod productions often being very respectable efforts that are in many ways comparable to full releases – and in fact sometimes even become full releases, as famously in the case of the Counter-Strike mod for Valve’s Half Life.<sup>6</sup>

Game developers<sup>7</sup> have not failed to realize the potential benefits that modding represents for them. As the “modding culture” grows and becomes increasingly “professionalized,” its potential to bring added value to the developer goes up as well.<sup>8</sup> This was demonstrated inter alia when the zombie survival mod DayZ for Bohemia Interactive’s combat simulation game ARMA II was released in 2012: within just one month of the mod’s launch, the total sales figures of ARMA II went up by no less than 400 percent.<sup>9</sup> Developers have certainly also come to appreciate player-driven content creation. In this respect, a quote from Gabe Newell, co-founder and managing director of Valve Corporation, is particularly illustrative:

*“In Team Fortress 2, just to be really clear, the community itself makes ten times as much content as we do. [- -] [W]e can’t compete with our own customers. Our customers have defeated us, not by a little but by a lot. They’re building content that’s just as good or better than what we’re building and they’re building it at a spectacular rate.”<sup>10</sup>*

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<sup>6</sup> Kücklich 2005, under “The History of Modding.” See also Sotamaa 2007, under “Studying game modifications.”

<sup>7</sup> For the sake of simplicity, I will not distinguish between the parties involved in holding copyright in a computer game or drawing up EULAs. Thus, simply the word “developer” is used to denote the proprietor of a computer game, although in reality e.g. the publisher of a computer game might, depending on the underlying contracts, be the more appropriate party to refer to in the context.

<sup>8</sup> On the professionalization of modding, see inter alia Kücklich 2005, under “The Modding Community as a Dispersed Multitude,” Sotamaa 2007, under “The relation of play and work in games,” and Sotamaa 2008, p. 7. The trend in modding is towards higher and higher production value, which, as Kücklich notes, simultaneously implies increased commercial viability. However, the professionalization of modding does not necessarily imply that modding is turning into a commercially motivated pastime. To the contrary, scholars who have studied modding tend to agree that modders’ primary motivations are often non-commercial. For example, Kow and Nardi describe modders as “players who mod for fun and occasionally to make money” (Kow – Nardi 2010, under “Introduction”). Wirman, on the other hand, emphasizes the importance of peer recognition (Wirman 2009, at para 7.2). See also Sotamaa 2008, pp. 5 and 8.

<sup>9</sup> For specifics, see <http://caas.raptr.com/how-dayz-brought-arma-ii-back-to-life/> (accessed 7 April 2015).

<sup>10</sup> Gabe Newell in 2013, as reported by IGN at <http://www.ign.com/articles/2013/02/07/gabe-newell-discusses-how-to-reinvent-gaming> (accessed 7 April 2015). Interestingly, it seems that while gaming industry professionals

From the developer perspective, it is quite clear that incentives to encourage modding do exist.<sup>11</sup> In fact, game developers may even feel pressured to support player-driven content creation (or be “mod-friendly,” if you will) due to a concern that players may migrate to a competitor’s game if they fail to do so.<sup>12</sup> On the flipside of the coin, many game studies researchers have assumed a critical stance towards the practices some developers have adopted in order to leverage the potential of player-driven content creation. For example, *Kücklich* writes about the commercialization of voluntary labor (“playbour”) and how the new business model in which a game developer “not only sells entertainment products, but also capitalizes on the products of the leisure derived from them” constitutes a radical departure from traditional forms of doing business.<sup>13</sup> In copyright terms, this means that game developers may, to the extent that players may be vested with copyright in their contributions, “purport to use the [terms of service] to transfer such interests to themselves.”<sup>14</sup> In fact, game studies researchers often view those contributions (including mods) as infringing the developer’s copyright in any case.<sup>15</sup>

In this study, I provide an outlook on game modding from the viewpoint of Finnish copyright and contract law. As such, it can function as a supplement to the game studies research on the topic. The discussion revolves around two themes – that is,

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perceive of “user-generated content” in computer games as a growing trend, they underestimate the amount of interest players actually have in it (see Lastowka et al 2013, p. 4).

<sup>11</sup> See e.g. *Kücklich* 2005, under “The Economy of Modding” and *Arakji – Lang* 2007, p. 8. *Arakji and Lang* propose that by providing modding tools to player, developers can achieve reductions in both development cost and time as a result of a decentralization of information processing and decision-making. At the same time, modding is not exclusively a “dream come true” scenario for game developers. Modding can, for example, bring with it a need to monitor and regulate modders’ activities (*Sotamaa* 2007, under “Introduction”) or raise issues due to conflicts between interest and ethical views between modders and the developer (*Kow – Nardi* 2010, under “Introduction”). As *Fiorido* points out, mods even have the potential to “compromise the integrity of a game” or violate the moral rights of the developer (*Fiorido* 2013, p. 746). From a player-friendly perspective, *Postigo* argues that sometimes “corporate interests [- -] can stand in the way of creativity and participation,” leading to both frustration among modders and anger among players in general due to the inability to access innovative, modified game content (*Postigo* 2008, p. 61).

<sup>12</sup> As *Fiorido* puts it, a developer “can choose to embrace the nature of the online world and allow mods to the detriment of a game’s integrity, or risk being replaced by a competitor who does.” See *Fiorido* 2013, p. 755.

<sup>13</sup> *Kücklich* 2005, under “Modding as ‘Playbour.’” When referring to concepts like “playbour,” a clear distinction needs to be maintained to employment in legal sense. While a modder may de facto labor to the benefit of a developer, a modder is not an employee of the developer.

<sup>14</sup> *Burk* 2010, under “Terms of service” and *Scacchi* 2010, under “Mods, modders, modding, and the mod scene.”

<sup>15</sup> See *Wirman* 2009, at para 4.4.

the status of game mods under copyright law and the appropriation of those player-made creations by game developers. In that regard, I seek to challenge the often articulated idea that game mods, as a rule, infringe on the copyright of the game developer. Further, I examine whether and to what extent a developer can rely on the general standard terms associated with a computer game in order to acquire rights in game mods.

### 1.1.2 *The Many Faces of Game Modding*

In short, a game mod is a player-made contribution to a computer game. While this basic premise is widely accepted, it must be recognized that there is no authoritative definition for a “mod” or “modding.” As a result, diverging definitions may be found both in scholarly works and online. For example, the wiki page on the Valve Developer Community defines a modification as “an alteration or creation of files for a game engine, which allow it to modify the gameplay style, graphics, environments, [and] models [of a game].”<sup>16</sup> In game studies literature, on the other hand, *Sihvonen* has proposed that modding refers to “the activity of creating and adding of custom-created content [- -] by players to existing (commercial) computer games.” This “content,” according to *Sihvonen*, includes characters, enemies, weapons, levels, textures, music, and gameplay modes.<sup>17</sup>

As its definitions suggest, modding requires access to the original game at least to some extent. This access is often gained through “modding tools” (a software development kit (SDK), for example) provided by the game developer itself.<sup>18</sup>

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<sup>16</sup> See the wiki page at <https://developer.valvesoftware.com/wiki/Modification> (accessed 7 April 2015).

<sup>17</sup> Sihvonen 2009, p. 49. From an even broader perspective, *Scacchi* conceives of modding as “covering customizations, tailoring, and remixes of game embodiments, whether in the form of game content, software, or hardware” (*Scacchi* 2010, under “Mods, modders, modding, and the mod scene”). However, I specifically exclude hardware modifications from the concept of modding in this study. Some have claimed that the practice of hardware modding has, in fact, fallen out of vogue and has, therefore, become a rather obsolete topic in any case (see Note 2012, p. 802).

<sup>18</sup> *Scacchi* 2010, under “Game software infrastructure and development tools”. As *Scacchi* notes, such tools do not reveal the source code of game engine itself. Instead, it is in the game developer’s discretion to decide which (limited) functionalities the SDK or other modding tool will provide to the player-modder. Admittedly, in the lack of official modding tools or modding support for a game, players will sometimes develop unofficial modding tools without the blessing of the developer (*Wallace* 2014, p. 230). It is likely that modding without developer support may amount to copyright infringement or circumvention of technical protection measures. These types of modding practices are, however, not covered in this study.



Primarily, all mods require some kind of indirect access to the engine of the original game, although the engine's source code is usually not given out.<sup>19</sup> Secondly, a mod may – and almost always will – make use of the original game's asset library (graphics, audio, etc.) in some manner,<sup>20</sup> although this is not necessarily the case with total conversion mods (see below). From a technical perspective, it may be noted that, generally, a modder does not directly alter the source code of the game software, as modding is limited to interactions with the game's application programming interface (API).<sup>21</sup> However, this does not imply that modding could not involve (independent) coding, although sometimes the modding tools provided by the developer are developed so that coding may not be needed. For example, editing software like map editors often allow players to create content simply by using the functionality of that software tool.

In this sense, game modding is also distinguished from free open source software (FOSS) development. While proponents of both phenomena may subscribe to an idea of "communal ownership," there are evident differences between the two practices. For instance, game modding typically focuses on creating visual content, not source code. Further, unlike FOSS development, game modding is always clearly connected with a commercial product (computer game) to which content is created specifically.

The definitions attached to the term "modding" are, as a rule, very broad. For this reason, it is worthwhile to further divide game mods into subcategories based on their characteristics. According to one established categorization system, game mods are divided into *partial conversions* and *total conversions*. The distinction between the two is made based on the degree to which the original game is

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<sup>19</sup> Postigo 2010, under "Section 2." As noted, this access is often gained through specific tools, as direct access to the game engine is "not normally granted to players" (Sihvonen 2009, p. 131). In this regard, modders have more limited access to game resources than, for example, actual licensees of game engine software (Note 2012, p. 791).

<sup>20</sup> In fact, *Sihvonen* and *Wallace* argue that "altering and tinkering" with game assets is in practice the most common manifestation of modding (Sihvonen 2009, p. 131 and Wallace 2014, p. 226).

<sup>21</sup> Burk 2010, under "Copyright" and Kow – Nardi 2010, under "Introduction." Some developers have, however, elected to allow modders to access the source code of the game as such. This was, for example, the case when id Software released the source code of Doom in 1997. Even after that some (albeit not very many) developers have chosen this route. See also Sihvonen 2009, p. 79.

modified.<sup>22</sup> While partial conversions are *supplementary* to the original game (they add new content to it or modify existing content), total conversions effectively represent *new game experiences*. Both types of mods are, however, *complementary* to the original game in that they are bound to the “operating logic” of the underlying game engine.<sup>23</sup>

Another system for classifying mods is presented by *Arakji* and *Lang*. They propose that game mods could be ranked according to a three-tier system. In their system, tier one mods (M1) are “amateurish in nature and present relatively minor changes” to the original game. Tier two mods (M2), in turn, are “professional quality” modifications that “substantially extend or improve” the original game (in the case of partial conversions) or “radically modify” it (in the case of total conversions). Finally, the third tier of mods (M3) consists of the most outstanding M2 mods, which the game developers cherry-picks and subsequently appropriate for further development or official release as a stand-alone game product.<sup>24</sup>

To facilitate an analysis of the implications of modding from a copyright perspective, it is, however, necessary to establish a more detailed classification system which takes into account how a modder interacts with the content of an original game. In this respect, I refer to the following typology:

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<sup>22</sup> Arakji – Lang 2007, pp. 8–9. This corresponds with *Sotamaa’s* description of techniques used by modders, according to which those techniques range from “simple arrangements of the game world to total conversions that can be relatively independent of the original game” (see *Sotamaa* 2007, under “Studying game modifications”).

<sup>23</sup> Sihvonen 2009, p. 49. See also Arakji – Lang 2007, p. 10. As the latter authors note, the complementary nature of a mod is embodied in the fact that “consumers who download mods but are not interested in playing [the original game], still need to purchase the original game to access its engine in order to run the mods.”

<sup>24</sup> Arakji – Lang 2007, pp. 11–13.

	Modding categories	Aesthetic characteristics	Operational characteristics
Game-provided	<i>Interpretation</i>	Assembly and fabrication of game elements from a selection of existing parts and items	Taking advantage of glitches, bugs, and weaknesses in the game mechanics
	<i>Configuration</i>		Cheating: utilizing specific cheat codes provided by the developer
User-extended	<i>Reworking</i>	<ul style="list-style-type: none"> <li>- Creating new spaces</li> <li>- Altering the looks of objects and characters (texture and skin)</li> <li>- Altering the underlying models of objects and characters (mesh in 2D or 3D)</li> </ul>	<ul style="list-style-type: none"> <li>- Creating new spaces (not only aesthetically speaking)</li> <li>- Altering the functions of objects</li> <li>- Altering the behaviors of characters</li> <li>- Metagaming (using additional programs, patches, and hacks)</li> </ul>
	<i>Redirection</i>	<ul style="list-style-type: none"> <li>- Taking and distributing screenshots (e.g. "photo album" images)</li> <li>- Creating gamics ("game comics")</li> <li>- Creating machinima ("machine cinema")</li> </ul>	

Figure 1. Typology of Game Mods. Originally published in Sihvonen 2009, p. 154.

In this classification system, two forms of modding can immediately be excluded from the scope of this study. Namely, the *interpretation* and *configuration* of a game's operational characteristics are not discussed in this study, as they evidently pertain to the activities which constitute clever use of a game's functionality instead of creative effort.<sup>25</sup> The other types of modding included in *Sihvonen's* typology are, however, understood as included in the concept of "modding" in the context of this study.

## 1.2 Research Questions and Exclusions

The practice of "modding" games is a many-faceted topic, which could be approached from many angles with distinct disciplinary backgrounds. Thus, this study does not (and, indeed, cannot) propose to be a comprehensive discussion of

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<sup>25</sup> In this type of "modding," the player is merely using the game's existing mechanics to her advantage or for purposes such as entertainment. In so doing, the player is not "creating" anything besides the gameplay itself. The creative aspects of gameplay could certainly also be analyzed. To avoid an unnaturally broad conception of modding, this is not, however, done in the scope of this study.

the topic at hand. Instead, my focus is directed towards exploring two specific questions mainly from the viewpoints of copyright law and, complementarily, contract law.<sup>26</sup> These questions can be formulated as follows:

- 1) Can the products of game modding be protected under Finnish copyright law, and if so, can copyright subsist in them independently of the copyright in the original game?
- 2) What are the limits to a game proprietor's ability to effectively acquire copyright in game mods through an End User License Agreement (EULA), specifically in light of the Finnish doctrine on standard form contracts and the adjustment of unfair contractual terms?

Generally speaking, the following discussion therefore revolves around the *initial ownership* of game mods in light of copyright law as well as questions pertaining to agreeing on the *subsequent ownership* (or exploitation) of such creations between a player and a game developer.<sup>27</sup> The Copyright Act (404/1961) is the central legal instrument in this analysis. The analysis of initial ownership revolves around Sections 1 and 4–5 of the Copyright Act, whereas subsequent ownership is analyzed in light of Sections 27 and 29. The primary purpose of this study relates to constructing a framework for analyzing the game modding related issues described in the research questions above.

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<sup>26</sup> It is, of course, generally recognized that the principles of contract law are employed "side by side" with the Copyright Act in examining copyright related agreements (see e.g. Oesch 2005, p. 286). However, the normative hierarchy between copyright law and contract law is not necessarily clear. In Sweden, for example, *Nordell* argues that either set of rules could be construed as superior to the other. Nonetheless, he proposes that the optimal solution is to think of copyright law as a "specifying complement" to the general principles of contract law. See Nordell 2008, pp. 325–326. As the rules of interpretation developed under copyright law are well aligned with the principles of contract law, this should not prove problematic. – As a player is simultaneously both an author and a consumer, consumer law related points are also brought up when the application of consumer law directly influences the subject of discussion. However, the consumer protection aspect of this study is, admittedly, limited.

<sup>27</sup> With "initial ownership" I refer to the ownership of a work which follows directly from the effect of the law. Thus, the part of this study focusing on the initial ownership of game mods discusses the question of which copyright-related claims the game developer and the player respectively may have in a game mod and how those rights operate in relation to each other. "Subsequent ownership," on the other hand, refers to the distributive state of copyright ownership accomplished through contractual means (*ex contractu*) – that is, after copyright has been initially vested in certain persons *ex lege*.

It is also necessary to expressly make a number of exclusions from the scope of this study. Firstly, this study focuses exclusively on the copyright related aspects of game modding and, even then, only from the perspective of economic rights. Thus, *moral rights* and their potential implications in the context of game modding are not considered.<sup>28</sup> Questions pertaining to *copyright infringement* are, as a rule, also excluded.<sup>29</sup> Similarly, the potential of *copyright exceptions* to serve as a legal justification for modding a game is not discussed. Thus, this study de facto discusses modding in circumstances where it is expressly or implicitly authorized (or even encouraged) by a game developer. While this may, at first, seem like an odd limitation to the scope of study, I believe it is justified based on the fact that the general tendency in the gaming industry is – and has been for a number of years – towards encouraging player to make game mods.<sup>30</sup>

Further, with respect to EULAs associated with computer games, this study focuses exclusively on the issues of incorporation and unfairness as regards the practice of assigning or licensing copyright in game mods. This means that inter alia questions relating to the invalidity of a EULA due to the legal incompetence of the player (due to minority, for example) are not discussed. Similarly, other potential issues with material fairness besides those arising out of an assignment or license of copyright in game mods are excluded.

Lastly, this study is primarily conducted from the viewpoint of *Finnish law*.<sup>31</sup> In the digital environment into which the gaming industry is deeply embedded, this

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<sup>28</sup> This is not to say that moral rights are not relevant in the context of modding, as they certainly are. In particular, the potential of game mods to infringe on the moral rights of a game developer is often noteworthy. That topic is discussed e.g. by *Fiorido* (see generally *Fiorido* 2013).

<sup>29</sup> This includes both the issues of infringement which may arise between a player and a developer (mods as an infringement of the copyright in the original game) and the third-party aspect (game mods containing unauthorized third party content). With “questions of infringement,” I also refer to things relating to the circumvention of technological protection measures.

<sup>30</sup> Similarly, see e.g. Festinger – Metcalfe – Ripley 2012, p. 88.

<sup>31</sup> By using the word “primarily,” my intention is to imply that certain international viewpoints from both Europe and the United States are sporadically used to complement the analysis by providing some background on the issues discussed. Additionally, copyright related arguments from the other Nordic countries (in particular, Sweden) are used to aid in the interpretation of Finnish copyright law, where domestic material is lacking. This is, in my opinion, justifiable due to the close proximity of the Nordic copyright laws in most issues – a proximity

naturally means that the applicability of the considerations presented in this study is not universal. By now, it is well known and understood among companies which operate globally that localization issues may arise when dealing with end users (in particular, consumers) from a multitude of jurisdictions. These issues are, however, not the subject of discussion here. The scope of this study is, thus, effectively limited to situations where the game mods might come to be evaluated under Finnish copyright law.<sup>32</sup> Similarly, the contractual questions of incorporation and unfairness are also approached from the perspective of national law. Consequently, the issues relating to *choice of law* is not addressed. What this means is that this study is only aimed at EULAs which are expressly governed by Finnish law – and those cases where the choice of law defined by the agreement is, for whatever reason, rejected in favor of Finnish law.<sup>33</sup>

Structurally, this study consists of three main sections dealing with substance, supplemented by this introductory section (section 1) and a concluding section with a summary of findings and some policy discussion (section 5). After this introductory section, the next section (section 2) provides a general background for the following analysis by looking into the topic of copyright protection of computer games in general. Section 3, in turn, deals with the first research question formulated above by considering whether and to what extent game mods can be protected by copyright. The last main section (section 4) addresses the second research question, discussing the formal and material requirements for the enforceability of a EULA as an instrument for an assignment or license of copyright.

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which, as is well known, stems from collaboration in the preparation of the laws. The copyright law of the European Union is also taken into consideration where applicable.

<sup>32</sup> Due to a lack of harmonization in the European Union inter alia with regard to derivative works and the categories of works recognized by copyright law, it is indeed not even possible to draw pan-European conclusions on the basis of this study.

<sup>33</sup> It is entirely plausible that a Finnish game developer would choose to refer to Finnish law as the governing law of their EULA, especially for developers who do not rely on a third-party publisher. This is evidenced by the fact that both Rovio and Supercell (both companies that publish their games independently) have chosen this solution in their respective EULAs (with the caveat that Supercell's terms prescribe the laws of the State of California for residents of the United States). Rovio's EULA is available at <http://www.rovio.com/eula> (accessed 7 April 2015) and Supercell's respectively at <http://supercell.com/en/terms-of-service/> (accessed 7 April 2015).

### 1.3 On the Method of This Study

Primarily, the *method* of this study is legal dogmatic.<sup>34</sup> The legal dogmatic method is seen to comprise the *systematization* of legal rules with the help of legal concepts as well as the *interpretation* of those legal rules, which, in turn, focuses on exploring their substance and the factors relating to their application.<sup>35</sup> Ultimately, the goal of the legal dogmatic approach is to make normative or interpretive propositions concerning the state of the law. While a *normative proposition* makes an assertion that a certain legal rule is a part of current law, an *interpretive proposition* goes further in making a claim as to the substance of that legal rule.<sup>36</sup>

The purpose of this study is to determine how current law could apply to the issue of copyright in game mods and the practice of transferring or licensing copyright in such creations between a player and a game developer. To that end, the existing rules of copyright law and contract law are *interpreted* against the backdrop of the given context. In essence, this means that the purpose of this study is to make *interpretive propositions* with respect to the application of copyright law and contract law to the given topic.<sup>37</sup> In making those propositions, a variety of argument types are employed, including semantic, teleological, and value-based (moral) arguments. However, the minimalistic style chosen by the legislator in regulating the matters at hand often leaves little room for semantic arguments (for example), which is why the other types of arguments tend to gain in importance.<sup>38</sup>

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<sup>34</sup> Essentially, this implies, *inter alia*, that this study subscribes to an *internal view* of the law, i.e. it accepts the validity of current law (Hirvonen 2011, p. 26).

<sup>35</sup> Aarnio 1978, p. 52. Interpretation is sometimes referred to as the “practical dimension” of the legal dogmatic approach (Hirvonen 2011, p. 25).

<sup>36</sup> Hirvonen 2011, p. 22.

<sup>37</sup> Implicitly, doing so also effectively results in a *normative proposition* being made concerning the validity of the legal rules, which the interpretive propositions relate to (see Hirvonen 2011, p. 22). This is, however, beside the point of this study, as the implications of those normative propositions are, in fact, rather axiomatic. It is, for example, quite clear that the legal rule according to which a transfer of copyright can be adjusted is a valid part of current copyright law. Thus, the normative proposition to that effect does not add much of value to the discussion. Nonetheless, it must, of course, be accepted that by invoking a legal rule, the invoker simultaneously makes the assertion that the legal rule in question is valid and applicable.

<sup>38</sup> On the defining characteristics of these types of arguments, see e.g. Hirvonen 2011, pp. 38–40.

In Finnish jurisprudence, *sources of law* are typically organized based on a hierarchical system, which recognizes three tiers of acceptable sources, ranked according to the degree to which they are understood as *binding* upon an interpreter of the law. *Strongly binding* sources of law, which consist of written law and established custom, are strictly binding in the sense that they must be observed in every case to which they apply. Second in binding effect are the *weakly binding* sources of law, which include the legislator's intent (mainly disclosed in the preparatory works of written law) and precedents. These sources are "weakly binding" in the sense that they may be deviated from, but only if such deviation is expressly justified. Lastly, the least binding tier, the *permitted sources of law*, includes, inter alia, practical arguments, ethical or moral arguments, general legal principles, and opinions presented in the doctrinal study of law.<sup>39</sup> As the traditional doctrine on sources of law was developed before the Finnish accession to the European Union, sources of European Union law were initially not addressed in that doctrine. Later on, however, the traditional classification of sources of law has been supplemented so that the hierarchical superiority of sources of European Union law to all national sources of law is recognized.<sup>40</sup>

The fact that game modding is a quite recently developed, unprecedented phenomenon, which is characterized by a "crowd-sourced" or decentralized form of content creation, poses certain problems with regard to adherence to the traditional doctrine on sources of law. Firstly, with regard to written law (mainly the Copyright Act), it is evident that no straightforward answers to the issues discussed here can be deduced solely based on the wording of existing provisions.<sup>41</sup> This results not only from the fact that the legislator could not anticipate the recent developments when enacting the current Copyright Act, but also from intentionally open-ended manner

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<sup>39</sup> Aarnio 1982, pp. 94–96, Aarnio 2006, p. 292 *et seq.* and Hirvonen 2011, p. 43. In theory, the classification also includes a fourth tier, i.e. "forbidden sources of law," which includes arguments that are either "against the law or good practice" or "openly political" (see e.g. Aarnio 2011, p. 151).

<sup>40</sup> See e.g. Aarnio 2006, p. 295 and Hirvonen 2011, p. 43.

<sup>41</sup> Similarly, see Sorvari 2005, p. 19.



in which the relevant provisions of the Copyright Act are formulated.<sup>42</sup> Moreover, national precedents directly applicable to computer game modding are not available, either, inter alia due to the fact that not enough time has passed since the birth of the phenomenon for courts to have had the opportunity to address it.<sup>43</sup>

In the relative absence of binding sources, it is only natural that less binding sources of law gain in relevance. In the scope of this study, this is manifested in a number of ways. Firstly, the opinions of the Copyright Council become important as guidelines for interpretation.<sup>44</sup> This means that the discussion is supplemented by referring to such opinions where applicable. Secondly, the opinions of legal commentators need to be looked into more deeply in order to flesh out the broadly formulated provisions of written law. In this respect, Finnish legal commentators representing the disciplines of both copyright law and (general) contract law are cited in this study. The opinions of those commentators are, at times, supplemented by the writings of those from other Nordic countries (in particular Sweden) due to the extensive similarities between the Nordic copyright laws.<sup>45</sup>

Thirdly, due to the lack of national sources of law dealing specifically with computer game modding, international case-law and commentators' opinions – which, to be fair, almost invariably originate in the U.S. – are explored where available. The function of this exploration is, however, not *normative* but instead *empirical*. This implies that those sources are not utilized for drawing conclusions regarding the interpretation of national law. Instead, the reason why they are referred to relates to

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<sup>42</sup> In this regard, I refer to both the provisions relating to the conditions of copyright protection and forms of co-creation (Sections 1 and 4–5) and the provisions on transfers of copyright (mainly Sections 27 and 29).

<sup>43</sup> As *Pihlajarinne* points out, precedents are only an effective means for guiding interpretation in “static environments,” which remain essentially unchanged long enough for case-law to “catch up” (*Pihlajarinne* 2012b, pp. 547–548).

<sup>44</sup> The Copyright Council is not a public authority, but rather a body that mainly represents the various interest holders in copyright-related matters. Pursuant to Section 55 of the Copyright Act, the Council is mandated to give opinions on the interpretation of the Copyright Act. Although the opinions of the Council are non-binding, their de facto influence on the interpretation of the Copyright Act may be considered substantial (*Sorvari* 2005, p. 20).

<sup>45</sup> It is, of course, well known that the current copyright laws of the Nordic countries were prepared collaboratively and were, thus, essentially identical when they entered into force. See e.g. *Haarmann* 2005, pp. 8–9. Despite the respective laws branching out in different directions as a result of later amendments, the systems remain fundamentally similar to this day.

identifying potential issues and arguments, which may arise or be invoked in the context of game modding.<sup>46</sup> Whether or not the same issues and arguments are relevant or applicable under Finnish copyright law is, then, assessed separately.

In addition to legal sources, I cite sources authored by researchers in the field of game studies. This is done in order to form a sufficiently accurate conception of what “modding” actually comprises so that its implications might be reliably assessed from a legal viewpoint. In particular, the work of *Sihvonen* is used as a basis for establishing a typology of modding, which is then carried through the legal analysis.<sup>47</sup> Again, the goal with this reliance on game studies research is not to make normative conclusions with respect to the application of copyright law to game modding. Instead, such research is taken into consideration in the hope to avoid some of the vagueness and overgeneralizations concerning the practice of modding computer games which could otherwise follow.

#### 1.4 Some Remarks on Terminology

With respect to the terminology used in this study, it should be clarified that the term “modification” (and its shortened form “mod”) is, in this study, used in the sense in which it is understood in the gaming industry.<sup>48</sup> Thus, it is distinguished *inter alia* from the meaning attributed to the word under the Berne Convention.<sup>49</sup> That is to say, the use of the term “modification” in this study is not meant to imply any copyright related connotations such as a meaningful connection to a pre-existing work in the copyright sense. Instead of the term “modification,” the word “alteration” is used when referring to the act of changing a work in a way that is recognized by copyright law, while “derivative work” denotes the substantive form

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<sup>46</sup> See Pihlajarinne 2012b, pp. 555 and 557 as well as Pihlajarinne 2012a, p. 29.

<sup>47</sup> Concerning the typology of modding, see, in particular, Sihvonen 2009, p. 131 *et seq.*

<sup>48</sup> On the concept of a game mod, see also section 1.1.2 *supra*.

<sup>49</sup> According to the WIPO Glossary of Copyright and Related Rights Terms (p. 296), a “modification” is a synonym of “alteration,” and it is used in Article 6*bis* of the Berne Convention in the context of setting out an author’s right to object to certain modifications and other derogatory actions.

of the product of alteration where that product is recognized by copyright law as a protected creation.

Similarly, the word “creation” is, for the lack of a better word, used in a neutral manner to refer to “something that has been made (usually by the player).” Thus, the use of that word does not imply the subsistence of originality in the creation – unless used in conjunction with the defining adjective “intellectual.” In this sense, “creation” is distinguished from the term “work,” which implies originality. In contrast to “creations,” all “works” are perceived as *original productions* (intellectual creations), in which copyright *prima facie* subsists.

Lastly, I use the term “original work” only as a means to contrast with “derivative work.” Thus, “original work” de facto signifies “the pre-existing work based on which a derivative work was created.” In fact, as the WIPO Glossary of Copyright and Related Rights Terms points out, all “works” are original by definition, which is why using the word “original” in conjunction with “work” to refer to the originality of that work would be redundant.<sup>50</sup> On the other hand, the term “independent work” is used to specifically emphasize the non-derivative nature of original productions. It is also used when speaking of composite works to denote that the works enjoined to create that composite work remain distinct from each other (as regards their protection under copyright law, at any rate).

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<sup>50</sup> WIPO Glossary of Copyright and Related Rights Terms, p. 300.

## 2 COPYRIGHT LAW AND COMPUTER GAMES

### 2.1 How is a Computer Game Structured?

The formal structure of a computer game is quite complex. Essentially, a computer game is comprised of two main parts: a platform (game engine) and an application (game content).<sup>51</sup> A game engine is essentially a “software framework designed for the creation and development of video games.”<sup>52</sup> It may further be described as a “collection of reusable software modules that require time-consuming labor and large amounts of financing to develop.”<sup>53</sup> This “collection of software modules” typically includes several components, including a graphics renderer and a physics engine as well as systems for sound and artificial intelligence.<sup>54</sup> Thus, a game engine is comprised of software that is *inter alia* responsible for creating game output and processing player input.

As *Ramos* points out, game developers rarely start from square one in designing an engine for their game product. In order to save both time and money, they often choose to acquire a license for a third-party game engine (middleware), which has already been tried and tested by others. Therefore, only a small portion of the code comprising the game engine is tailored to an individual game.<sup>55</sup> The increasing use of middleware has led to the adoption of a “centralized innovation model” within the gaming industry, represented by the fact that “game engine development is performed by only a few companies.”<sup>56</sup>

In contrast to the software-based engine, game content is comprised of a variety of things, such as art, sound, characterization, story, and game objectives.<sup>57</sup> The interplay between the game engine and game content is such that the engine

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<sup>51</sup> See e.g. Note 2012, p. 790.

<sup>52</sup> [http://en.wikipedia.org/wiki/Game\\_engine](http://en.wikipedia.org/wiki/Game_engine) (accessed 7 April 2015).

<sup>53</sup> Note 2012, pp. 790–791.

<sup>54</sup> *Ibid.*

<sup>55</sup> See *Ramos* 2014.

<sup>56</sup> Note 2012, p. 797.

<sup>57</sup> *Ibid.*, p. 791.

utilizes game content to “patch together” the game output, which appears on the player’s display.<sup>58</sup> Due to the widespread use of third-party game engines (middleware), much of a game’s original content is typically in the game content.<sup>59</sup>

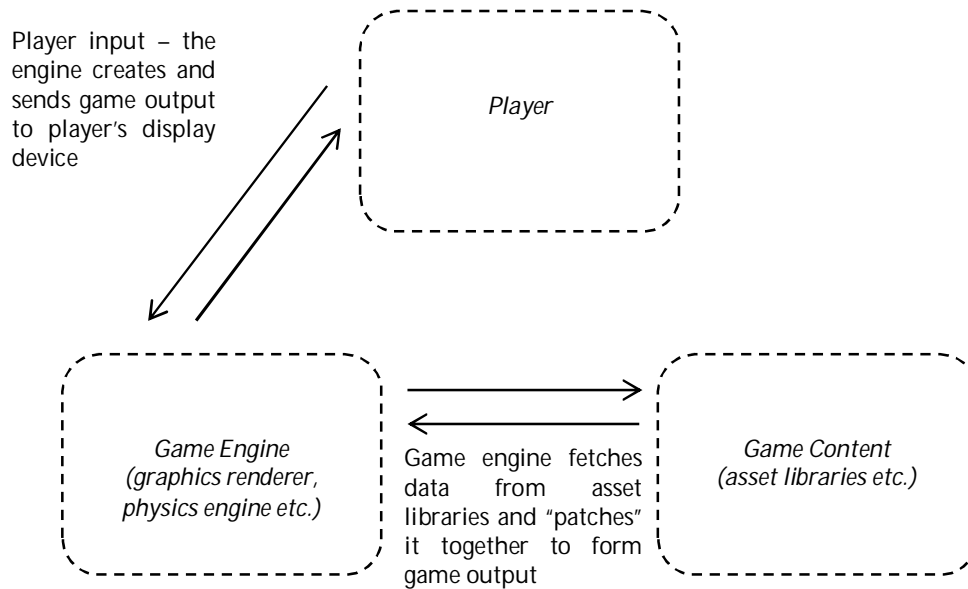


Figure 2. Simplified graph of the operating logic of a computer game during normal gameplay.

## 2.2 International Trends to Protecting Computer Games

The copyright protection of computer games remains a rather murky subject, which lacks harmonization on the international level. To an extent, the difficulties in protecting computer games under copyright law derive from the lack of recognition of computer games as a distinct class of works. Internationally, this has led to diverging approaches in national legislations, with three alternative forms of protection emerging as the most prominent options. Namely, in a study commissioned by the WIPO, it was found that on the national level computer games are generally considered to be predominantly either computer programs, composite works (that is, each copyrightable element of a video game is considered

<sup>58</sup> Wallace 2014, p. 219.

<sup>59</sup> Game developers may, however, elect to use licensed third-party assets to a certain extent. Consequently, not all game content is original in the sense that it would originate from the developer.

independently of the others), or, in a more limited number of jurisdictions, audiovisual works.<sup>60</sup>

In principle, each of the prominent approaches to copyright in computer games suffers from its own weaknesses. The “computer games as computer programs” and “computer games as audiovisual works” approaches share an inherent risk of oversimplification, which may lead to an inappropriately one-dimensional form of protection. That is, they largely fail to take into account that a computer game consists of both a computer program (the game engine) and audiovisual elements. Focusing on just one of these aspects of a computer game seems like a suboptimal solution at best.<sup>61</sup> The third approach, which considers the merits of each element in a computer game independently, avoids the issue of oversimplification. It may, however, promote an overly fragmented and therefore impractical mode of analysis when it comes to, for example, finding originality in a game or comparing similarities between two games.

Further, perhaps the most pervasive critique of contemporary approaches to protecting computer games argues that they all completely ignore what is arguably the most crucial element of any game – that is, gameplay. Interactivity (“gameplay”) is understood as an essential element of any computer game.<sup>62</sup> Despite this fact, gameplay as such is not protected by copyright under any of the three approaches recounted above, as gameplay is not manifested in a computer

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<sup>60</sup> Ramos et al 2013, pp. 10–11.

<sup>61</sup> For example, protecting computer games predominantly as computer programs does not adequately take into account that games are often built upon an engine created by an outside company (“middleware”). The middleware serves as a “technical basis” for a subsequent game, which means that only a “small proportion of the code used is customized to a specific game” (Ramos 2014). Thus, by focusing on the computer program (game engine), the majority of the original expression put in by a game developer is largely overlooked. At the same time, it must be recognized that in jurisdictions which apply either the “computer games as computer programs” or the “computer games as audiovisual works” approach, other forms of expression are often recognized secondarily and thus not completely ignored. Nonetheless, an overly narrow view of computer games as copyright-protected subject matter is not desirable, as the application of such a system may lead to lopsided results (e.g. concentrating too much on similarities in the element that is perceived as predominant).

<sup>62</sup> As *Nichols* expresses it, “without interaction, videogames are incomplete” (Nichols 2007, p. 101). See also *Stamatoudi* 2002, p. 167. To a similar effect, *Grosheide, Roerdink, and Thomas* have used “control” as the defining keyword that sets video games apart from cinematographic works: “[C]ontrary to films, in games with multiple endings or games where the player shapes the personality of the characters he plays through, he is in *direct control* of the outcome.” (emphasis added) See *Grosheide – Roerdink – Thomas* 2014, pp. 10–11.

program, audiovisual work, or any other kind of traditionally protected work.<sup>63</sup> This arguably leads to a “lack of recourse” for game developers whose products are “cloned by opportunistic competitors,” which in turn causes those developers to “[prioritize] other aspects of videogames [- -] at the expense of innovative gameplay.”<sup>64</sup>

## 2.3 Protection of Computer Games under Finnish Copyright Law

### 2.3.1 *Doctrinal Origins: Driven by the Copyright Council*

In Finland, computer games have not received a great deal of attention in copyright related discourse. Currently, computer games are not specifically mentioned in the list of works included in Section 1 of the Copyright Act. To date, what limited doctrine there is on copyright in computer games originates from the Copyright Council, which touched upon the issue in two of its opinions – first in 1992, then in 2001.<sup>65</sup> At both occasions, the Council come to the conclusion that the computer games it was asked to evaluate were composite works (*yhteenliitetty teos*), which consist of a computer program combined with still images and music. It concluded that each of these elements is protected by copyright (or not) independently of the others.<sup>66</sup>

In its opinions, the Copyright Council also expressly rejected the notion that the computer games it examined could be seen as cinematographic works (while claiming to be a proponent of a “rather broad conception of the cinematographic work”). According to the Council, computer games and films both rely on “moving picture.” Yet, they are different in that the moving picture in computer games has *no independent significance*; it is merely through the input of the player that the

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<sup>63</sup> Cf. with TN 1994:7, pp. 1–2, where the Copyright Council confirms that a board game’s concept and underlying principles and rules are not protected under copyright law.

<sup>64</sup> Lee 2012, p. 867. One of the obvious counters to gameplay copyright refers to the idea/expression dichotomy in stating that gameplay is not a form of expression, but instead merely encapsulates an idea (ideas not being protected by copyright). However, Lee argues that protecting gameplay under copyright law would not be much different from protecting television formats, which are recognized as protected subject matter in many jurisdictions, subject to the fulfillment of specific conditions (pp. 868–870).

<sup>65</sup> See generally TN 1992:3 and TN 2001:15.

<sup>66</sup> TN 1992:3, p. 6 and TN 2001:15, p. 13.

images in a computer game move on the display, which, in turn, means that the sequence of images is different each time the game is played. The Council further argued that computer games are acquired for the purpose of playing as opposed to viewing, which is why they do not fit the description of a cinematographic work.<sup>67</sup>

*Salokannel* has heavily criticized the Copyright Council's opinion as being "an erroneous *in casu* decision made by a body, a majority of whose members represented different interested parties, not in any way resembling an impartial court [- -]." She contends that the "fact that one may play with a protected work is irrelevant from the point of view of its belonging to a given work category." In contrast to the Copyright Council's opinion, she proposes that video games should be protected as audiovisual works, as "there now seems to be a general consensus at the international level that video games are considered as audiovisual works."<sup>68</sup> It is easy to agree with *Salokannel* in as much as she argues that the Copyright Council's reasoning was somewhat lackluster. At the same time, *Salokannel's* conclusion regarding a "consensus" as regards the protection of computer games no longer seems to apply in light of more recent studies.<sup>69</sup>

The Copyright Council's opinion was, at least initially, quite well received. For example, the opinion was explicitly cited by the Vaasa Court of Appeals in a decision from 1993.<sup>70</sup> The influence of the Council's opinion is also apparent in the Government Bill from 1994 which concerned the addition of a neighboring right for producers of audiovisual recordings into the Copyright Act (Section 46 a). With regard to the applicability of Section 46 a to computer games, it was argued as follows:

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<sup>67</sup> TN 1992:3, pp. 5–6 (citing KM 1953:5, pp. 45–46). The Swedish Supreme Court has similarly rejected the notion that a computer game could be protected as a cinematographic work (see NJA 2000:87). – Especially the Copyright Council's dismissal of the public performance right with regard to computer games may appear rather outdated in today's setting. Namely, streamed gameplay has become a hugely popular form of entertainment in recent years, owing to the success of the Twitch streaming service. In 2014, Twitch, a service dedicated solely to streaming gameplay, was reported as fourth highest ranking website in the United States sorted by peak internet traffic. In this regard, see <http://blog.twitch.tv/2014/02/twitch-community-4th-in-peak-us-internet-traffic/> (accessed 7 April 2015).

<sup>68</sup> *Salokannel* 1997, pp. 79–81.

<sup>69</sup> See section 2.2 *supra*.

<sup>70</sup> Vaasa Court of Appeals decision of 17 August 1993, No. 1758, DNo. R 93/103.



*“Video games are not intended to fall within the scope of application of the provision [Section 46 a of the Copyright Act], even though video games also feature moving picture. That moving picture does not constitute a cinematographic whole that would be intended for viewing. Video games are meant for playing. The moving picture in a video game may change from one playthrough to the next subject to the rules of the game and the choices made by the player. Video games are protected solely as works [and not as audiovisual recordings].”<sup>71</sup> [unofficial translation]*

Thus, although neither the Copyright Council’s opinion nor the term “composite work” was expressly mentioned, the Council’s reasoning was indirectly affirmed in the Government Bill.

In more recent times, the Council’s opinion has sporadically been questioned in legal literature. For example, *Välämäki* suspects that the exclusion of computer games from protection as cinematographic works is not sustainable anymore, as many of today’s computer games feature professionally acted scenes.<sup>72</sup> Nonetheless, I believe it must, in the lack of more authoritative opinions to the contrary, be concluded that computer games are primarily seen as *composite works* under Finnish copyright law. Consequently, to form a better understanding of the protection of computer games under copyright law (and the implications that may have on game modding), it becomes necessary to briefly explore the concept of a “composite work” as understood in Finnish doctrine. This is done in the following section.

### *2.3.2 The “Composite Work” and the Protection of Computer Games*

As a concept, the “composite work” is, in fact, quite ambivalent, despite widespread recognition of its existence in the Finnish copyright system. Originally, the compilation (*kokoomateos*), the composite work (*yhteenliitetty teos*), and the joint work (*yhteisteos*) formed a coherent set of provisions, which dealt with works that

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<sup>71</sup> HE 287/1994, detailed reasoning for Section 46 a.

<sup>72</sup> *Välämäki* 2006, p. 13.

had been created by two or more authors.<sup>73</sup> In fact, the 1927 Act on Copyright in Intellectual Works specifically recognized each of these types of works (Sections 14 to 16). At that point in time, the composite work was clearly intended to constitute a rough equivalent to the compilation, the distinguishing factor between the two being that a compilation was comprised of works of the same type (for example, a combination of two literary works), while a composite work consisted of works belonging to different categories (for example, a musical work combined with a literary work).<sup>74</sup> The other significant difference between the compilation and composite work was that, in a composite work, there was no copyright “in the work as a whole,” but instead the respective authors disposed of the whole similarly to joint owners of a (tangible) property object.<sup>75</sup> When the current Copyright Act (the Copyright Act) was enacted in 1961, the provision on composite works was removed from written law. The Copyright Committee considered that the rule it set forth was axiomatic and, therefore, the provision was superfluous. At the same time, the Committee indicated that, by removing the provision from the law, the intention was not to alter the doctrine on composite works.<sup>76</sup>

However, it seems that the distinction between compilations and composite works has not always been applied in the way envisioned by the 1920 Legislative Council. Already during the time of validity of the 1927 Act, the Supreme Court applied the provision on compilations to *sound films*, which clearly consisted of works belonging to different categories (images and music).<sup>77</sup> In more recent history, the Copyright Council has also been amenable to construing combinations which include different types of works as compilations in the meaning of Section 5 of the Copyright Act, provided that the selection or arrangement of those works is original.

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<sup>73</sup> To this effect, see the 1920 Report of the Legislative Council, p. 30.

<sup>74</sup> The Legislative Council made this amply clear by explicitly referring to “works of the same kind” with regard to compilations and “works of different kinds” with regard to composite works (1920 Report of the Legislative Council, p. 30). The compilation provision was admittedly implemented into the 1927 Act in slightly altered form compared to what the Legislative Council had presented, but the underlying principles were not, in my understanding, tampered with (in this regard, see also HE 89/1926, p. 3).

<sup>75</sup> See the 1920 Report of the Legislative Council, pp. 30–31.

<sup>76</sup> KM 1953:5, pp. 50–51.

<sup>77</sup> See KKO 36 II 476 and KKO 36 I 59.

For example, in an opinion from 2001, the Council was ready to view *multimedia CDs* – which, according to the Council, included inter alia cinematographic works, maps, photographs, texts, and music – as not only composite works, but also compilations.<sup>78</sup> Thus, two forms of protection which were originally *mutually exclusive* seemed to become *supplementary* to one another. Similarly, the Council opined in 2013 that *educational material* – which consisted of photographs, charts, and texts – constituted a compilation.<sup>79</sup>

On the other side of things, the composite work is also not easily distinguished from the *joint work* as understood in Section 6 of the Copyright Act. Similarly to a joint work, a composite work is the result of a type of *collaboration* between two or more authors; however, the rules on joint works are not applied to composite works, since each author's contribution to a composite work is "independent."<sup>80</sup> According to the Copyright Council, the distinction between joint works and composite works needs to be made mainly based on the *nature of the authors' collaboration* – that is, their working habits. Further, if the contributions of each author are distinguishable from the whole *ex post*, this may imply that a composite work is at hand.<sup>81</sup> The Council further suggests that it may be particularly challenging to make the distinction when the authors' contributions belong to the same category of works.<sup>82</sup> With that comment, the Council also (perhaps inadvertently) reinforces the idea that the *classification* of the contributions of each author no longer has the relevance it originally did with regard to making the distinction between compilations,

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<sup>78</sup> TN 2001:15, p. 12. In fact, the Council concluded in the very same opinion that computer games, in turn, were simply composite works (without mentioning that games could similarly be protected as compilations).

<sup>79</sup> TN 2013:6, p. 6.

<sup>80</sup> Section 6 of the Copyright Act expressly requires that the contributions of each author to a joint work are not independent in nature. Thus, joint works seem to be distinguished from composite works based solely on the nature of the work as either a uniform creation or a "patchwork" made up of independent works; the mere subsistence of collaboration – or its absence – is not sufficient as a basis for making that distinction. See also Stray Vyrje 1987, p. 192.

<sup>81</sup> See TN 2003:11, pp. 8–9. The Council explains that if the collaboration between the authors was "extensive," the resulting creation should primarily be deemed a joint work in the meaning of Section 6 of the Copyright Act. In similar fashion, Kivimäki explains that joint authorship is at hand when the authors have worked in a state of "mutual interaction" based on "inspired mutual understanding." In the temporal dimension, that collaboration can, however, just as well be either *simultaneous* or *successive*. See Kivimäki 1966, p. 52.

<sup>82</sup> *Ibid.*, p. 9.

composite works, and joint works. Ultimately, it seems reasonable to make the distinction between the composite work and the joint work based on whether each author has contributed to the originality of the work “as a whole” or, alternatively, only to the originality of their own contribution.<sup>83</sup>

It may further be worthwhile to point out that the “composite work” as understood in Finnish copyright law does not fully match the definition of a “collective work” as understood in the Berne Convention, either. In the WIPO Glossary of Copyright and Related Rights Terms, the “collective work” is defined as “a work created by embodying the works of several authors, at the initiative and under the responsibility of a person or legal entity who or which published the work under his or its name [- -], and in which the various contributions – because of their great number or indirect nature – are merged into the totality of the work so that it is impossible, or at least impracticable, to identify the individual works and their authors.”<sup>84</sup> Although a composite work may sometimes constitute a collective work as understood in the Berne Convention, it is equally evident that not all composite works fulfill the above-cited definition. For example, in a composite work the contributing authors can be clearly enumerable (such as in the case of an opera), whereas the “collective work” is, by definition, such that the authors of each contribution included in it are impossible or impracticable to identify.

Thus, the term “composite work” refers to a creation that is comprised of a combination of multiple authors’ works, which are independent and, consequently, protected separately of each other.<sup>85</sup> At the same time, a composite work “as a

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<sup>83</sup> For example, in a case from the Turku Court of Appeals (2 August 1985, No. 451, DNo. 1985 S 7 Tre IV 447 §), joint authorship was found in certain illustrations created by A based on designs made by C. In that case, both A and C had contributed to the originality of the joint creation as a whole, without their contributions constituting independent works. Cf. with KKO 56 II 76, in which it was concluded that the writer of the libretto of an opera did not contribute to the creation of the opera’s music by the composer, and thus the writer and composer each had a claim only to their own contribution (that is, the opera was considered a composite work). – At the same time, the criterion of contributing to the originality of a work is used to distinguish between *technical assistants* and *actual authors* (see Olsson 2009, p. 77, TN 1989:7, p. 8, and Vaasa Court of Appeals decision of 27 December 1985, No. 1968/85, DNo. S 84/486). Cf. with KM 1987:8, p. 66.

<sup>84</sup> WIPO Glossary of Copyright and Related Rights Terms, p. 275.

<sup>85</sup> See e.g. Harenko – Niiranen – Tarkela 2006, p. 63 and Haarmann 2005, p. 105. In this regard, the “textbook example” is an opera, in which music is combined with a literary work so that both remain “independent” (see e.g. KM 1953:5, p. 50 and SOU 1956:25, p. 142).

whole” does not appear to be separately protected by copyright.<sup>86</sup> For a computer game, this implies that copyright does not subsist in the game “as such.” Instead, the individual elements of a computer program are protected (provided that they satisfy the criteria for copyright protection). In its opinions, the Copyright Council has only mentioned a computer program, still images, and music as protectable components of a computer game.<sup>87</sup> However, the Council’s list should probably not be construed as an exhaustive one; instead, any types of works included in the computer game should continue to be protected by copyright as such.<sup>88</sup>

#### 2.4 Summary and Conclusions: Copyright Protection of Computer Games

As we have seen, a computer game is structurally comprised of a game engine (computer program) combined with game content consisting of various visual, audio, and text assets.<sup>89</sup> Internationally, this has led legislators to adopt diverging approaches to the protection of computer games under copyright law: computer games are predominantly viewed as computer programs, audiovisual works, or composite works.<sup>90</sup> Finnish copyright doctrine seems to follow the last mentioned approach, recognizing at least the computer program, still images, and the music of a game as potentially protected elements. This list cannot, however, be construed as exhaustive: any other types of works included in a computer program should be

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<sup>86</sup> Indeed, the “composite work” could be understood to arise only through a contract between the authors (concerning the “enjoinment” of their works for whatever purpose). See Kivimäki 1966, p. 54. Of course, copyright cannot be created *ex contractu*; its subsistence is governed *ex lege*. As *Weincke* points out, the doctrine on composite works thus forgoes the assumption that a person would have “combined” the independent works included in a composite work in order to create an independent work (*Weincke* 1976, p. 48). – In this sense, it may actually be quite misleading to speak of a “composite work,” as the use of the term “work” in this way implies that the composite work as a whole is an intellectual creation in which copyright subsists, although only the independent works included in the “composite work” in fact are intellectual creations.

<sup>87</sup> See *supra* at note 66.

<sup>88</sup> For a comprehensive list of potentially copyrightable elements in a computer game, see Ramos et al 2013, p. 8 and Burk 2010, under “Copyright.” – Sometimes databases are mentioned as protectable subject matter found in a computer game (see e.g. Stokes 2014, p. 215). However, a number of commentators have pointed out that databases found in computer games generally might not qualify for copyright protection due to a lack of originality in selection and arrangement (Burk 2009, p. 9) or lack of individual accessibility in the meaning of the Database Directive (Grosheide – Roerdink – Thomas 2014, p. 10 citing *Tanya Alpin*). Under Finnish law, the lack of individual accessibility is, however, a non-issue, as the requirement of “individual accessibility” is not included in the Copyright Act.

<sup>89</sup> See section 2.1 *supra*.

<sup>90</sup> See section 2.2 *supra*.

protected as well. However, the focus on individual components (as independent works) simultaneously means that a computer game “as such” is not protected separately of its components.<sup>91</sup>

For the purpose of conducting an analysis of game modding, it is de facto necessary to examine the content of compute games on the level of individual game assets (data files or objects). Following the operating logic of the “composite work,” these individual assets are protected as independent works, subject to them being original. As far as visual assets are concerned, this marks a deviation from the Copyright Council’s opinions, which probably construed individual frames of the *visual output* produced by a game as “still images,” which can be protected as independent works. In this sense, the Council probably likened the visual output of a game to a cinematographic work, in which individual frames can be protected by copyright. However, when dealing with game modding, it is untenable to focus solely on the visual output of the game as such. The reason for this is that a modder de facto operates with individual assets, and therefore only indirectly with the visual output of a game, which is rendered based on those assets during gameplay. In these circumstances, focusing solely on the impact of a modded object on the visual output of the game would be analogous to evaluating an alteration of a watercolor painting based on how it could potentially be portrayed in a photograph. That is to say, it would be confusing beyond measure.

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<sup>91</sup> See sections 2.3.1 and 2.3.2 *supra*.

### 3 INITIAL OWNERSHIP OF GAME MODS UNDER COPYRIGHT LAW

#### 3.1 The U.S. Discussion on Copyright in Game Mods

Internationally, the United States is (unsurprisingly) a jurisdiction in which courts were faced with cases relating to game modding at a relatively early stage. This means, on the one hand, that the position of the copyright system with respect to game modding is more established in the United States than it is, for example, in Finland, where case-law on game mods is nonexistent. At the same time, the applicable precedents in the United States are rather aged and the interpretations put forward in them potentially questionable.<sup>92</sup> Nonetheless, it may be concluded based on case-law such as *Midway*<sup>93</sup>, *Galoob*<sup>94</sup>, and *Micro Star*<sup>95</sup> that, in the United States, game mods are, as a rule, understood to fall within the scope of an author's right in derivative works.<sup>96</sup>

In *Micro Star*, the Ninth Circuit found that player-created gameplay levels (in the form of MAP files) for a game called "Duke Nukem 3D" constituted derivative works. The court explained that a MAP file essentially consists of instructions, which the game engine reads and executes in order to create the desired audiovisual output. In other words, the file "describes the [gameplay] level in painstaking detail, but it does not actually contain any of the copyrighted art itself."<sup>97</sup> Nonetheless, the court found that such a description satisfies the requirement of "permanent or concrete form" of a derivative work (which was not the case with the Game Genie in *Galoob*), just as in the case of sheet music and a

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<sup>92</sup> The fact that court opinions on the copyright status of game mods exist has, however, had the positive effect of encouraging several commentators to present their own propositions on the topic. See generally inter alia Ochoa 2004, Garlick 2005, Baldrice 2007, Nichols 2007, Note 2012, and Ochoa 2012.

<sup>93</sup> *Midway Manufacturing Co. v. Artic International, Inc.*, 704 F.d 1009 (Seventh Circuit of Appeals 1983).

<sup>94</sup> *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*, 964 F. 2d 965 (Ninth Circuit of Appeals 1992).

<sup>95</sup> *Micro Star v. FormGen Inc.*, 154 F.3d 1107 (Ninth Circuit of Appeals 1998).

<sup>96</sup> This premise is admitted even by scholars who argue that the teachings of existing case-law might be interpreted in favor of a different outcome (see e.g. Baldrice 2007, p. 693 and Note 2012, p. 802). In support of the established interpretation, see generally Wallace 2014. – Note that the *Midway* and *Galoob* decisions are not discussed here in detail, as they related to *hardware modding*, which, as a practice, has become rather obsolete and is not de facto included in the definition of modding adopted in this study.

<sup>97</sup> See *supra* at note 95, p. 1110.

musical composition.<sup>98</sup> The player-created gameplay levels were, therefore, viewed as sequels to the Duke Nukem story and derivative works made based on the original game.<sup>99</sup>

The decision of the Ninth Circuit in *Micro Star* has been subject to discussion and critique among legal commentators in the United States. For example, *Nichols* has argued that the *Micro Star* court's reasoning was lacking in that it failed to consider the possibility that the player-created maps could be *joint works* in which both the player and the developer could have copyright interest. She believes that the essential element of joint authorship – namely, *intent* – could have been construed based on the facts of the case.<sup>100</sup> *Burk*, on the other hand, has questioned the logic of equating a MAP file, which “described” the arrangement of graphical assets, with the plot or narrative of a derivative work. He points out that while the files contained references to the game's asset library, nothing of the Duke Nukem game was, in fact, incorporated into them.<sup>101</sup> It has also been suggested that *Micro Star* could be interpreted as “protecting only the expressive elements of a game” and, therefore, leaving the door open for, at least, recognizing modders' copyright in total conversion mods.<sup>102</sup> In conclusion, then, courts of law in the United States have generally opted to view game mods as derivative works, while legal commentators have argued for increased situation-dependency which could lead to more strongly recognizing a player's copyright interest in a game mod.

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<sup>98</sup> *Ibid.*, pp. 1111–1112.

<sup>99</sup> *Ibid.*, p. 1112. According to the court, the outcome would be the same if, instead of gameplay levels, the sequel was told in the form of a book (“even if [the book] contained no pictures”).

<sup>100</sup> *Nichols* 2007, pp. 125–127.

<sup>101</sup> *Burk* 2009, p. 13. See also *Ochoa* 2004, pp. 1029–1030. It appears, however, that *Burk's* critique related mostly to the particularities of Ninth Circuit's reasoning in *Micro Star*, as he later concluded that mods are most likely to be derivative works in any case – although he also considered joint authorship an alternative. See *Burk* 2010, under “Copyright.”

<sup>102</sup> *Note* 2012, pp. 803–804.



## 3.2 The Framework for Assessing Game Mods

### 3.2.1 *The Original Author in the Context of Modding*

In the Finnish system, copyright is always initially vested in the *natural person* who makes an intellectual creation.<sup>103</sup> This rule also applies to works created with the help of a computer.<sup>104</sup> However, in some situations where a computer program is used in order to create a work, difficulties may arise with regard to determining whether the *programmer* of that computer program has an ownership interest in the creation.<sup>105</sup> To address that issue, it must be considered whether the programmer in fact contributed to the originality of the work created with the computer program. Most commonly, a computer program only provides *technical functionality* (editing or processing capability) which aids in another author's creativity activity. Where this is the case, the programmer has no claim of authorship in the product of that creative activity. If, however, the programmer contributes to the originality of a protected expression created with the computer program, it may be appropriate to reach another conclusion. In that case, the computer-made creation may constitute a work of joint authorship.<sup>106</sup>

Without a doubt, game modding constitutes a form of computer-aided creation. In creating mods for a computer game, a player may utilize both software provided by a developer (modding tools) and the protected assets pertaining to the original game. These two aspects of the player-developer relationship are, in the following discussion, addressed as separate matters. Firstly, this means that the provision of software tools, which provide technical functionality for the purpose of modding, is regarded as irrelevant to the investiture of copyright, as it does not, as such, contribute to the originality of an expression created with that software. Secondly, it leads me to examine game mods as distinct, subsequent creations, not as works of

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<sup>103</sup> See e.g. Kivimäki 1948, pp. 133–137 and Haarmann 2005, p. 100.

<sup>104</sup> KM 1987:8, p. 65. This means that the *computer* in itself is never considered an author. Instead, a computer is seen merely as a technical tool used by a natural person in the creative process.

<sup>105</sup> Haarmann 2014, p. 68.

<sup>106</sup> See KM 1987:8, p. 66.

joint authorship.<sup>107</sup> As a result of this construction, the original author of a game mod is always the player. However, it must be admitted that, as a result of the complexity of the player–developer relationship in this respect, it is not unimaginable that another way of dissecting the situation could also be advocated.

### 3.2.2 “Originality” as a *Sine Qua Non* of Copyright Protection

In Finnish copyright doctrine, the longstanding teaching is that only works which are *independent* and *original* are eligible for copyright protection.<sup>108</sup> A literary or artistic creation that satisfies these requirements is described as reaching the “threshold of copyright” (*teoskynnys*).<sup>109</sup> Although the height of this threshold is rather ambivalent, it is understood as being rather low.<sup>110</sup> To qualify for protection in this sense, a work needs to be original in the sense that no other person would have created an identical work.<sup>111</sup> This “double creation test” essentially prescribes a conception of originality as *statistical uniqueness*. The concept of originality is, nonetheless, *subjective*.<sup>112</sup> In the assessment of originality, neither the amount of labor and skill expended in creating a work nor the artistic value of the work itself is relevant to finding originality in a creation.<sup>113</sup>

However, recent developments in the European Union have directed the assessment of originality towards what *prima facie* appears to constitute a slightly different

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<sup>107</sup> This is, in my opinion, justified on two grounds. Firstly, the contributions of the developer and the player are easily distinguished from one another as separate creations, which is why the “without constituting independent works” criterion (see *supra* at note 80) built into the concept of joint authorship is not satisfied. Secondly, it is hard to argue that any meaningful “collaboration” exists between a developer and a player to the effect that each of them would have contributed to the originality of the other’s creation (see *supra* at note 83). In this light, I find it hard to support the notion that joint authorship in the meaning of Section 6 of the Copyright Act could serve as a framework for analyzing game modding.

<sup>108</sup> This is the case despite the fact that the Copyright Act does not expressly mention either concept. Conventionally, it is argued that the wording of Section 1 of the Copyright Act implies the existence of these requirements (see KM 1953:5, p. 44).

<sup>109</sup> See e.g. Haarmann 2005, pp. 59–61 and Olsson 2009, p. 52 *et seq.*

<sup>110</sup> In this regard, see Haarmann 2005, p. 63 and Olsson 2009, pp. 52–53.

<sup>111</sup> Haarmann 2005, pp. 63–64.

<sup>112</sup> *Ibid.*, p. 64. In this sense, the originality criterion is distinguished from the patent law concept of “novelty,” which sets an objective standard.

<sup>113</sup> See e.g. Kivimäki 1948, p. 75, Harenko – Niiranen – Tarkela 2006, p. 15, and Haarmann 2005, p. 67.

approach. Namely, starting with the *Infopaq* case, the CJEU has assertively sought to establish a harmonized concept of “originality” in the European Union.<sup>114</sup> In the *Infopaq* test, any work that constitutes its author’s own intellectual creation is original and, therefore, must be protected by copyright.<sup>115</sup> In *Infopaq* and subsequent decisions, the CJEU has presented several definitions for what constitutes an “intellectual creation:” it has emphasized the role of an author’s “linguistic expression” in the “choice, sequence, and combination” of words,<sup>116</sup> the “specific arrangement or configuration” of components in a graphic user interface,<sup>117</sup> and a photographer’s “personal touch” as well as her “free and creative choices.”<sup>118</sup> Looking beyond the differences in wording, these definitions seem to point to the same conclusion: the author’s *freedom to make creative choices* is the essential element of originality in the European Union.<sup>119</sup>

In the light of CJEU case-law, it is clear that originality should be deemed to subsist in any work, which is its author’s own intellectual creation. However, it is more unclear whether the CJEU’s test of originality is fully compatible with traditional Finnish doctrine and should, therefore, have the effect of lowering the level of originality required for copyright protection under the “threshold test.” *Haarmann* assesses that there is no need to realign Finnish doctrine in a major way.<sup>120</sup> It seems that the Copyright Council has adopted the *Infopaq* teaching by simply integrating the language used by the CJEU into the threshold test.<sup>121</sup> It seems reasonable to

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<sup>114</sup> The standard for originality had previously been harmonized as regards software and databases in their respective directives. However, beginning with *Infopaq* the CJEU extended an essentially identical standard for originality to cover *all types of works*.

<sup>115</sup> See *Infopaq*, at para 37. The CJEU has further reinforced this interpretation in *BSA*, at para 45–46, *Painer*, at para 87, and *Football Dataco*, at para 37.

<sup>116</sup> *Infopaq*, at paras 44–45.

<sup>117</sup> *BSA*, at para 48.

<sup>118</sup> *Painer*, at paras 92 and 94. See also *Football Dataco*, at para 37.

<sup>119</sup> Cf. with *Painer*, at para 93, where the “freedom available to the author to exercise his creative abilities” is used as to judge the originality of a portrait photograph.

<sup>120</sup> Haarmann 2014, pp. 55–56. See also Haarmann 2005, pp. 62–63, where a similar conclusion was reached in respect of the definitions of originality included in the Database Directive (96/9/EC), the Computer Programs Directive (2009/24/EC), and the Copyright Term Directive (2006/116/EC).

<sup>121</sup> To this effect, see e.g. TN 2010:11, TN 2011:3, and TN 2012:5.

prefer this subtle kind of assimilation over more radical reworking of established doctrine. Thus, I will operate on the assumption that the *Infopaq* test is compatible with the traditional “threshold test,” provided that the threshold test is interpreted in a manner which takes into consideration the CJEU’s construction of originality.

### 3.2.3 Selection or Arrangement as a Manifestation of Originality

The act of *selecting* or *arranging* existing works or parts of works in an original manner can also constitute intellectual creation pursuant to Section 5 of the Copyright Act. In practical terms, “originality” in these situations stems from the fact that the author follows an original plan in the process of selection and arrangement.<sup>122</sup> Textbook examples of compilations include anthologies, encyclopedias, newspapers, journals, and certain types of databases.<sup>123</sup> However, Section 5 of the Copyright Act has also been applied to inter alia computer files (TN 1996:15), multimedia CDs (TN 2001:15), and a combination of a (conventional) literary work and a computer program (TN 2007:3).

It is somewhat unclear where the boundaries to the scope of application of Section 5 of the Copyright Act should be drawn. Following its wording, the provision could, for example, be applied to a situation where a modder “combines” (that is, selects and arranges) pre-made textures to create a new gameplay level. It may, however, be the case that this method of creation is more naturally analyzed under Section 4.2 of the Copyright Act. For example, *Nordell* contends that a combination of works that constitutes a “compilation” must have an actual *compiling function* (*sammanställningsfunktion*). In this sense, he distinguishes between “active” and “passive” compilations. The purpose of the former is not limited to compiling existing works, but instead they represent a meaning or convey a message of their own (as a whole). According to *Nordell*, these active compilations are, therefore, better addressed as independent works in the meaning of Section 4.2 of the Copyright Act (if anything). Passive compilations, in turn, are true compilations in

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<sup>122</sup> KM 1953:5, p. 50.

<sup>123</sup> See e.g. KM 1953:5, p. 50, Kivimäki 1966, p. 50, and Olsson 2009, p. 65.

the meaning of Section 5 of the Copyright Act, as their purpose is limited to the presenting of existing works (in a “dormant” state).<sup>124</sup> To rephrase *Nordell's* idea, a “compilation” which purports to be something “more” than the “sum of its parts” might be more naturally deemed an independent work (if anything), as its originality does not stem merely from the act of selection or arrangement. While applying this principle might lead to a reasonable result, it is not evident that the law requires the existence of a “compiling function” as a prerequisite for protection under Section 5 of the Copyright Act.<sup>125</sup> Therefore, the possibility of protecting certain types of game mods as compilations is nonetheless considered where appropriate in the following sections.

### 3.2.4 *Tools for Distinguishing Independent and Derivative Creations*

Undeniably, intellectual creation is often if not always influenced by pre-existing works.<sup>126</sup> Also copyright law has had to embrace this reality. This is evidenced in, at least, the following ways: Firstly, copyright law recognizes that *being influenced* by pre-existing works is permissible and, consequently, does not as such exclude an intellectual creation from the scope of copyright protection as an independent work. Secondly, a secondary form of protection is granted to intellectual creations which build upon existing works in a more concrete manner – for example, by translating,

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<sup>124</sup> Nordell 1991, p. 378. *Nordell's* proposition is, to some extent, supported by the general understanding that a compiler does not, in fact, create anything new that was not already apparent in the works that were combined (see e.g. Kivimäki 1966, p. 50 and SOU 1956:25, p. 138).

<sup>125</sup> This ambiguity may be illustrated with examples concerning computer programs. In this respect, the Swedish Copyright Committee first stated in 1985 that a computer program that is comprised of modules could qualify for protection as a compilation under Swedish law (SOU 1985:51, p. 90). In his work, *Nordell* challenged this view precisely on the grounds that a module-based computer program as such “describes” (*beskriver*) something other than the underlying modules severally – in other words, because a computer program lacks a “compiling function” due to the “active” role of the modules (see Nordell 1991, p. 378). In Finland, however, at least the Copyright Council has continued to apply the compilation provision to computer programs even in quite recent opinions (see e.g. TN 2005:7, p. 11). In this light, it is clear that *Nordell's* proposition cannot be unquestioningly accepted as a correct construction of currently valid law.

<sup>126</sup> To this effect, see e.g. KM 1953:5, p. 50 and Nordell 1991, p. 371. *Nordell* explains that pre-existing creations and styles may even unconsciously influence the work of an author. That being so, an author can never effectively disconnect from all sources of inspiration.

adapting, or converting an original work to another form of art (Section 4.1 of the Copyright Act).<sup>127</sup> These types of works are referred to as “derivative works.”<sup>128</sup>

Clearly, derivative works are situated somewhere between *a non-original alteration (or copy) of a pre-existing work* and *an independent work* based on their degree of originality.<sup>129</sup> For practical purposes, it thus becomes imperative to come up with analytical tools for distinguishing a derivative work from its “neighboring phenomena.” Only by establishing a system for distinguishing between non-original alterations, derivative works, and independent works can the copyright interests in game mods be satisfactorily identified.

For distinguishing a derivative work from a non-original alteration (or copy) of a pre-existing work, the concept of originality is key. An alteration which is *routine* or *mechanical* in nature is not afforded protection under Section 4.1 of the Copyright Act.<sup>130</sup> This is due to a perceived lack of originality in routine or mechanical alterations.<sup>131</sup> Alterations which are deemed “routine” or “mechanical” may include, for example, proofread documents or simple transpositions of a musical piece.<sup>132</sup>

In practice, it is not always easy to draw the line between routine or mechanical and original alterations. This may be demonstrated, for example, by comparing a Vaasa Court of Appeals decision to two opinions of the Copyright Council. In the

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<sup>127</sup> Thus, originality is an absolute requirement for copyright protection also for creations which are merely protected under this form of “secondary copyright.” However, the originality requirement may need to be interpreted in slightly different fashion when it comes to secondary creations, as a derivative author who translates or adapts an original work cannot, strictly speaking, “create anything new.” Nonetheless, copyright subsists in a translation or adaptation as long as it demonstrates sufficient originality. See Kivimäki 1966, p. 44, Haarmann 2005, p. 90, and SOU 1956:25, p. 133.

<sup>128</sup> As pointed out in the WIPO Glossary of Copyright and Related Rights Terms (p. 281), the term “derivative work” is sometimes used “with a broader meaning” by extending it to also cover compilations (or collections of works). Indeed, the compilation is a “derivative work” in the sense that its creation depends on the existence of pre-existing works, which are then combined (Harenko – Niiranen – Tarkela 2006, p. 61). In this study, however, I refer to derivative works in the narrow sense, unless expressly stated otherwise.

<sup>129</sup> Similarly, see Deichmann 2004, p. 102.

<sup>130</sup> See Kivimäki 1966, p. 44.

<sup>131</sup> Thus, an alteration needs to be sufficiently original to attract protection under (what is now) Section 4.1 of the Copyright Act (Kivimäki 1948, p. 104). As the Finnish Copyright Committee notes, it is consistent with the ratio of copyright law to grant protection only to original creations (KM 1953:5, p. 49). This must apply to derivative works just as it does to independent works.

<sup>132</sup> SOU 1956:25, p. 133.

former case, the Court of Appeals had to consider whether or not copyright subsists in an *abridgement* of a theatrical play. The court concluded that, regardless of the fact that the abridged version was significantly reduced in length compared to the original (the abridged script comprising 42 pages, 5 acts, and 12 parts, as opposed to the 150 pages, 8 acts, and 27 parts of the original), the editing process had not involved the creation of any “novel thing,” which is why the abridgement did not constitute original expression. Consequently, the Court of Appeals concluded that the abridgement was not as a derivative work in the meaning of Section 4.1 of the Copyright Act.<sup>133</sup>

By contrast, two opinions of the Copyright Council seem to point to a more lenient approach. In the first opinion, the Copyright Council stated that an article, which essentially constituted a summary of a decision of the Consumer Disputes Board (*kuluttajariitalautakunta*), was a derivative work, owing to the fact that the writer had exercised a “modicum of discretion” in leaving out certain parts of the decision, combining sentences, and rephrasing a number of expressions (without, however, supplementing the summary with any significant analysis of her own device).<sup>134</sup> In the second opinion (given based on facts which, in fact, resemble those of the Vaasa Court of Appeals case), the Copyright Council similarly concluded that a handout comprising of a roughly 30 page summary of a 228 page book also constituted a derivative work due to the fact that, considering the considerably reduced length of the handout as compared to the original book, the person who had created the summary had exercised discretion in selecting the parts of the original book which were to be included in the summary.<sup>135</sup>

At least in theory, making the distinction between derivative works and independent works may be even more challenging. The line between the two types of creations essentially needs to be drawn based on the *nature of the connection* between an intellectual creation and a pre-existing work. If an intellectual creation merely “draws influence” from pre-existing works by borrowing details, stylistic

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<sup>133</sup> Vaasa Court of Appeals decision of 26 February 1981, No. III/686, DNo. V 153/1978.

<sup>134</sup> TN 1998:8, p. 3.

<sup>135</sup> TN 2002:18, pp. 9–10. A similar conclusion concerning a summary of a business handbook was reached in TN 2005:16 (see, in particular, pp. 8–9).

features, and ideas from them, it is still protected as an independent work under copyright law.<sup>136</sup> Such a vague connection to pre-existing works is, in other words, ignored for all intents and purposes. Conversely, a more substantial connection to a pre-existing work is likely to render the latter creation a derivative work made based on the pre-existing work.

How, then, should a relevant connection between two creations be identified? There are a few theoretical constructions which may be utilized for this task. Firstly, an intellectual creation's connection to pre-existing works may be described with the help of two variables – the “inner form” and “outer form.” In this mode of analysis, a derivative work is, primarily, deemed to be at hand when the “inner form” of a pre-existing work is given a new “outer form” by another person.<sup>137</sup> Logically, an independent work would, in turn, be characterized by a distinct inner *and* outer form, whereas in the case of a non-original alteration both the inner form and the outer form of the pre-existing work are preserved.

Clearly, the weakness of the mode of analysis which focuses on the inner and outer form of a work lies in the ambiguity that surrounds those concepts. For example, it would be necessary to distinguish the “inner form” of a work not only from its expression (“outer form”), but also from the “abstract idea” of the work (which is not protected by copyright).<sup>138</sup> This makes it challenging to arrive at a satisfactory conclusion based solely on these concepts.<sup>139</sup>

In practice, it may therefore be more utilitarian to use the “test of similitude” for distinguishing between derivative works and independent works. According to that test, if a creation invokes (in an observer) an *experience of similitude* with a pre-

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<sup>136</sup> KM 1953:5, p. 50. This results from the fact that copyright protection only extends to forms of expression, not ideas. As an example of a practical application of this rule, the Kouvola Court of Appeals has found that the reuse of the themes, concepts, and methods of a course material package was not sufficient to render the subsequent creation a derivative work in the meaning of Section 4.1 of the Copyright Act. See Kouvola Court of Appeals decision of 31 December 1998, No. 1531, DNo. R 97/713.

<sup>137</sup> SOU 1956:25, p. 136. However, *Kivimäki* proposes that a derivative work can also be created by altering the inner form of a pre-existing work, while leaving its outer form mostly intact. See *Kivimäki* 1948, pp. 105–106.

<sup>138</sup> Similarly, see Nordell 1991, p. 374.

<sup>139</sup> To this effect, see also KM 1953:5, p. 50.



existing work, that creation is either a non-original alteration or copy of the pre-existing work or, at most, a derivative work in the meaning of Section 4.1 of the Copyright Act.<sup>140</sup> Conversely, if no experience of similitude arises, the later creation is likely to constitute an independent work.<sup>141</sup> Out of necessity, the test of similitude must take into account not only legal but also *aesthetical considerations*.<sup>142</sup> Further, it needs to take into consideration not only the similarity between the objects of comparison as wholes, but also the *differences in detail* between them. If significant differences are found in the details of the objects of comparison, a mere experience of “association” between them does not give rise to an “experience of similitude.”<sup>143</sup>

In practice, it seems like the threshold above which an experience of similitude presents itself is that of “substantial similarity.” In this regard, one may, in particular, reference the decision of the Supreme Court of Finland in KKO 64 II 59. In that case, the Supreme Court needed to consider whether or not a certain textbook was a derivative work made on the basis of a pre-existing textbook. In so doing, the Supreme Court admitted that the latter textbook was indeed “substantially similar” (*huomattavassa määrin samanlainen*) to the earlier one as regards structure and content. Despite this similarity, the court found that the later textbook was not derivative of the earlier one for the reason that the similarities between the two textbooks de facto resulted from shared influence and

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<sup>140</sup> See TN 2012:3, p. 6 and Honkasalo 2012, p. 68 (with citations). See also Kivimäki 1948, pp. 106–107 and Levin 2011, p. 175, where the respective authors refer to the “effect” a derivative work has on a viewer or listener as the crucial factor in distinguishing derivative works from independent works. In fact, *Kivimäki* explains that the original author’s *personality* is central to this assessment: if a later creation is essentially a manifestation of the personality of the author of a pre-existing work, the copyright in that later creation cannot be independent of the original author’s work. – Further, it must be noted that the “similitude test” is unable to distinguish between *copies* and *derivative works*, as they both conjure up an experience of similitude with the original work. Thus, the distinction between non-original alterations and derivative works must, again, be made based on the concept of originality (see *supra* at notes 130–131).

<sup>141</sup> As *Kivimäki* explains, an intellectual creation cannot be regarded as derivative of another if the original work is altered to such extent that the “identity” shared between the derivative work and the original work is reduced to nothing (Kivimäki 1948, p. 104). A case addressed by the Copyright Council (TN 2012:3) which specifically demonstrates this type of analysis relates to a theater prop of the Sibelius Monument. In that case, the Copyright Council found that even though an observer might *associate* the prop with the Sibelius Monument, she would not identify it as a *copy* of the Sibelius Monument, if the two were to be placed next to each other. The prop had been created by utilizing the idea and general impression of the Sibelius Monument, but no protected parts of the Monument had been copied. Thus, the prop was not derivative of the Sibelius Monument in the meaning of Section 4.1 of the Copyright Act, but rather an independent work.

<sup>142</sup> Levin 2011, p. 175.

<sup>143</sup> TN 2012:3, p. 7. See also KKO 1979 II 64.

inspiration drawn from foreign textbooks. The case nonetheless seems to suggest that “substantial similarity” could have sufficed for a finding of similitude, if the other facts of the case had not warranted a different result.

As a practical tool for assessing similitude between works, it may be useful to make use of the mode of analysis proposed by *Deichmann*. Namely, *Deichmann* proposes that similitude should be determined by focusing on the quantity of *elements* that an intellectual creation borrows from a pre-existing work. To be considered a “derivative work,” a later creation needs to make use of a multitude of the elements of a pre-existing work – that is, its “concept,” which *Deichmann* defines as a “structured combination of elements.”<sup>144</sup> Although it is clear that *Deichmann* primarily had literary works in mind when formulating her proposition, it might well be applied to other types of works as well (such as pictorial works).

It may, thus, be proposed that whether or not an author made use of pre-existing works in making an intellectual creation is inconsequential, as long as the resulting creation is such that it satisfies the condition set by the double creation test.<sup>145</sup> In this way, the end may justify the means in the context of intellectual creation. If an intellectual creation is such that it is practically impossible that another person would have made an identical thing (double creation test) and if it does not invoke an experience of similitude with a pre-existing work, it should be protected as an independent work regardless of whether pre-existing works were involved in the author’s creative effort.<sup>146</sup>

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<sup>144</sup> See generally Deichmann 2004, pp. 115–117.

<sup>145</sup> See Nordell 1991, pp. 381 and 383 (at note 75). This also means that it makes no difference whether or not the creation under scrutiny could have been created without knowledge of pre-existing works which inspired or influenced the author in her creative efforts. See also KKO 1979 II 64.

<sup>146</sup> In this respect, see KM 1987:8, pp. 121–122. The Copyright Committee states that if the digital information pertaining to a photograph is altered with the help of a computer, the outcome may constitute an independent work, provided that its general impression deviates significantly from that of the original photograph (as opposed to it merely being a retouched version of the original photograph). According to the Committee, this conclusion is not affected by the fact that “clearly recognizable” similarities may exist between the original photograph and the edited version of it. Although the Committee’s opinion refers to photographs in particular, it is difficult to see why the same principle should not be applied to all kinds of works. – It is, however, also possible to argue to the contrary. For example, the opinion of the Copyright Council in TN 1998:16 (concerning the protection of computer programs) seems to point towards the opposite approach. In that opinion, the Copyright Council stated that a new computer program could be protected by copyright independently of a pre-existing computer program, if the new computer program was create in an original manner *without using such elements of the pre-existing computer program as reach the threshold of protection*. See TN 1998:16, p. 10. In this

### 3.3 Applying the Framework: Game Mods, Meet Copyright Doctrine

#### 3.3.1 *Introductory Remarks*

Having covered the key principles relating to copyright protection in the previous section, it is time to present some remarks about their application to the various products of game modding. For that purpose, this section makes use of *Sihvonen's* typology of modding.<sup>147</sup> Accordingly, the following presentation is structured so that each of the four types of modding recognized by *Sihvonen* is discussed in a subsection of its own. Again, the reader should be warned that this discussion cannot conjure definitive answers to the issue of copyright in game mods. Due to the reliance of the doctrine on copyright protection on facts, the copyright status of any game mod ultimately needs to be determined *in casu*. Thus, the purpose of this discussion is, instead, to identify and assess arguments that might be invoked in evaluating game mods from the viewpoint of copyright law.

#### 3.3.2 *Reinterpreting or Configuring a Game*

As we have seen, a player may reinterpret or configure a computer game through the "assembly and fabrication of game elements from a selection of existing parts and items."<sup>148</sup> In this context, the discussion is limited to the *aesthetic characteristics* of the original game.<sup>149</sup> Further, it is understood that the player's interaction with the game is, on this level, limited to the functionality provided by the in-game graphical user interface (GUI). This limits the types of works that the player may potentially create. For one, this kind of reinterpretation and configuration does not involve the creation of new code or alteration of the underlying game engine. Instead, it is understood primarily as an activity that can result in pictorial creations

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approach, the nature of the outcome (the end) clearly does not justify the exploitation of another work in the creative process (the means).

<sup>147</sup> See section 1.1.2 *supra*, in particular Figure 1.

<sup>148</sup> *Ibid.*

<sup>149</sup> For reasons stated earlier, the interpretation and configuration of a game's operational characteristics is found to constitute non-creative gameplay, which lacks the potential to be protected under copyright law. See *supra* at note 25.

(for example, in-game avatars) or literary creations (for example, character names). Therefore, the following discussion will focus on these types of creations.<sup>150</sup>

Internationally, the topic of copyright in *in-game avatars* has piqued some interest amongst legal commentators, resulting in the unanimous conclusion that in-game avatars can, at least in some circumstances, attract protection under copyright law. For example, *Ochoa* proposes that (under U.S. law) an avatar “must be considered to be the product (at least in part) of the user’s creative authorship,” if the “degree of freedom that the program provides to the player” in creating that avatar is sufficient.<sup>151</sup> Similarly, *Van Den Bulck* and *de Bellefroid* conclude that copyright can subsist in an avatar (under French law), if it satisfies the condition of originality. They propose that avatar creation can constitute original expression, when it is done with the method of “modern crafting,” in which the player is provided with a “real modelling and creative tool for the avatar in three dimensions.”<sup>152</sup> Thus, it is evident that the commentators have focused on the player’s *freedom to make choices* as a basis for protecting an avatar.

This approach seems to translate quite well into the Finnish system. As a starting point, it is recognized that copyright can subsist in an avatar, if it constitutes an independent work. In my understanding, there are two prospective forms of protection for an avatar: it may be protected as a compilation or, alternatively, an independent work. Protection for an avatar as a *compilation* requires that the avatar consists of a combination of works or parts of works, which are arranged or selected in an original manner. It is evident that compilation protection could only be

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<sup>150</sup> To the extent that the player is able to create other things, their status under copyright law should be subject to similar considerations in any case. This may not, however, apply to considerations on whether copyright could subsist in the player’s gameplay as such. This side of the matter is, however, excluded from the scope of study here.

<sup>151</sup> *Ochoa* 2012, pp. 974–975 and 982. See also *Burk* 2010, under “Copyright.” However, *Burk* approaches the topic from the viewpoint of the computer game as an audiovisual whole to which the player contributes to not only by creating an avatar, but also by the way in which she modifies the way the game plays out by controlling that avatar. Thus, *Burk’s* approach in particular may not be fully compatible with Finnish doctrine, in which a computer game is not deemed to constitute an audiovisual (cinematographic) work.

<sup>152</sup> *Van Den Bulck – de Bellefroid* 2009, pp. 262–263. According to the authors, this kind of tool “offers the player enormous possibilities to model [her] avatar and to determine the shape, the size, the style or even the color of the object which [she] wishes to create.” In this, “modern crafting” is distinguished from “traditional crafting,” which involves “the gathering and merging of objects pre-existing in the concerned universe.”

associated with avatar creation in the style of “traditional crafting” as referred to by *Van Den Bulck and de Bellefroid*.<sup>153</sup> However, it is uncertain whether a protected compilation can arise when using that method of creation.<sup>154</sup> One issue is that avatar creation tools that subscribe to the style of traditional crafting are typically not very complex and, consequently, may not provide a sufficient number of choices to allow the player to make an original arrangement or selection of the available options.<sup>155</sup> It may also be difficult to construe the player’s activity in this context in terms of acting according to an intellectual, original plan.<sup>156</sup> More likely, a player will make her selection based on an impromptu determination of “what looks good.” In this light, it may be reasonable to advocate the presumption that an avatar is not a compilation in the meaning of Section 5 of the Copyright Act.<sup>157</sup>

*Nordell’s* distinction between “active” and “passive” combinations of works also seems to support this conclusion.<sup>158</sup> Quite clearly, the purpose of an avatar is not merely to “passively” present an arrangement or selection of works. Instead, by devising an avatar, the player seeks to create something “more” than what is apparent in the combination of works as such – that is, her virtual representation. Thus, the works included in that “compilation” have an “active” function, which, according to *Nordell*, should point towards protection as an independent work (if anything), not a compilation.

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<sup>153</sup> See *supra* at note 152.

<sup>154</sup> It may be noted that *Van Den Bulck and de Bellefroid* expressly discard this possibility, stating that if “an avatar [is] created from objects pre-existing in the database of the software, the concerned player will not be granted any intellectual property right on [her] avatar.” See *Van Den Bulck – de Bellefroid*, p. 263.

<sup>155</sup> For example, this kind of an avatar creator may allow a player to make the choice between a number of options for each body part in order to build her avatar. In these cases, the player does not exercise any real discretion in determining the *arrangement* of the pre-existing creations (they are always arranged so as to form a representation of a body). It is doubtful whether the mere act of *selecting* from the limited available options could attract protection for the avatar as a compilation.

<sup>156</sup> See *supra* at note 122.

<sup>157</sup> If an avatar were to be construed as a compilation, this would, of course, additionally presuppose that the combined creations are “works” or, at least, parts of works – i.e. that they are original in their own right. That may not always be the case, if the options presented to the player consist of generic textures or meshes. – In theory, a combination made of non-protected subject matter may still be protected by virtue of the originality of its selection or arrangement under Section 1 of the Copyright Act. However, similar considerations to those presented here – such as the lack of an “original plan” – are likely to exclude that form of protection for an avatar as a combination of material as well.

<sup>158</sup> See *supra* at note 124.

However, the argument that an avatar created through “modern crafting” could be protected as an independent work seems quite justified in the Finnish copyright system. As long as the creation tool leaves sufficient room for the player to make “free and creative choices” in creating a personal avatar, I see no real reason why the resulting avatar could not constitute its author’s own intellectual creation. Ultimately, it comes down to an estimation of the probability that another person (player) would have created an identical work.<sup>159</sup> Further, a developer who provides the player with sophisticated tools for creating avatars cannot claim ownership of the avatars solely based on the fact that the avatars were made with those tools. After all, copyright is not vested in the person who *made tools* that another subsequently uses for creative expression.<sup>160</sup> Thus, it seems entirely possible that copyright can subsist in a player-made avatar as a pictorial work, provided that the player enjoyed sufficient creative freedom in its creation.<sup>161</sup>

*Character names*, on the other hand, are practically always subject to a limitation with respect to their maximum length. Typically, a player will be allowed to enter a name that consists of two to three short words (or a corresponding amount of characters).<sup>162</sup> Given this starting point, it needs to be considered whether such a short expression can constitute an independent work. For example, it is understood that “words as such” do not constitute copyrighted works. Only through the “choice, sequence, and combination” of words is an author able to “express [her] creativity in an original manner.”<sup>163</sup> In this light, while it might be theoretically possible that a character name could, in some situations, constitute its author’s own intellectual

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<sup>159</sup> See *supra* at note 111.

<sup>160</sup> Similarly, see KM 1987:8, pp. 65–66. See also Ochoa 2012, pp. 974–975, Van Den Bulck – de Bellefroid 2009, p. 262, and Connors 2010, pp. 422–423. The analogy that *Ochoa* makes is particularly insightful in this regard: just because a word processing program is copyrighted does not mean that copyright in any literary works created with that program should vest in the programmer.

<sup>161</sup> To a similar effect, the Copyright Council has supported the interpretation that a character as a pictorial work can enjoy protection under copyright law in TN 2006:16 and TN 1993:25. However, as was seen in the latter mentioned case (concerning the characters Laurel and Hardy), a *character* as such is not protected, only the visual depiction of that character as an original expression is.

<sup>162</sup> The developer is naturally free to determine the maximum length of a character name, but typically they are strictly limited to short combination of letters (comprising e.g. 12 or 16 characters).

<sup>163</sup> See *Infopaq*, at paras 45–46. In the case in question, the CJEU was not directly opposed to the idea of construing an 11-word extract a “work,” although it left the final determination to the national court (at para 48).

creation, the chance of that being the case must be *extremely slim* given the limitations a player must work within.<sup>164</sup>

### 3.3.3 *Reworking a Game*

Modding as a process of reworking a game can be targeted at either the aesthetic or the operational characteristics of a game – or a combination of both. Due to the functional difference between them, each of these alternatives is discussed separately of each other in the following.

Firstly, a modder can rework the *aesthetic characteristics* of a game. To facilitate this, a game typically allows players to access its *data libraries*. The extent to which the aesthetic characteristics of a game may be modded varies based on inter alia the file format used by the game's libraries.<sup>165</sup> As we may recall, a player's interaction with the game in this regard is described as "alteration" of the game's visual assets such as textures or object models.<sup>166</sup> It is also possible to *create new spaces* (aesthetically speaking) such as gameplay maps or levels. With regard to this "aesthetic reworking," it becomes imperative to distinguish between *derivative works*, *independent works*, and, finally, "alterations" which do not feature original contribution on the modder's part and are thus mere *copies* of the original game's assets. For this purpose, it seems warranted to further make a distinction between the practices of "altering" the original game's assets and "creating new spaces."

As a kind of presumption, it seems reasonable to propose that, of the two types of "aesthetic reworking," the practice of *altering* of a game's assets has the lesser

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<sup>164</sup> The Copyright Council has given several opinions on the copyright protection of short phrases. In those opinions, the Council has consistently refused to find copyrightable expression. See e.g. TN 2010:11 ("Kuningas kutsui narrin kilistimellä luokseen"), TN 2001:12 ("Puhdas Elämä Lapselle"), and TN 1995:16 ("Save the Wildlife"). In light of these opinions, the possibility that a character name could constitute original expression indeed appears almost nonexistent. This is, of course, an understandable solution, as the monopolization of single words or short phrases through copyright law would be both unsustainable and undesirable.

<sup>165</sup> Sihvonen 2009, p. 49. Non-standard file formats (e.g. proprietary formats) limit the moddability of a game due to the constraints they impose on a modder's access to the contents of the data files.

<sup>166</sup> Although it was not mentioned in Sihvonen's classification system, I would argue that a game may also offer modders the capability to alter its *audio assets* (sound effects, music). Nonetheless, as this kind of alteration would be subject to a very similar form of analysis, it is not deemed necessary to consistently distinguish between visual and sound assets in the following presentation.

inherent capacity for originality. Often, the purpose of these alterations is simply to modify the properties of a game's assets – for example, by changing colors, adjusting shapes, adding details, or improving graphical fidelity. Where this is the case, the modder's activity clearly pertains to the *outer form* of pre-existing assets, which, in this mode of analysis, would prevent the creation of anything that is independent and original in its own right.<sup>167</sup> Applying the "similitude test," it could be proposed that an experience of similitude is likely to arise between such alterations and the original assets. Thus, the relevant distinction to make would be between "derivative works" and "mere copies" – a decision which depends on whether the modder's contribution in altering the game assets is "original."

Despite the above, the possibility that altering a game's assets could result in the creation of an independent work cannot be entirely ruled out. As discussed above, the mere fact that pre-existing works were used or knowledge of them was required to create a subsequent work does not preclude the possibility that the subsequent work be protected as an independent work.<sup>168</sup> Thus, if a player alters game assets in a way that is original to the effect that the altered assets no longer appear "similar" to the original versions, it must be concluded that those "alterations" are, in fact, independent works. In this regard, whether or not the player made use of (modding) tools provided by the game developer is, again, inconsequential.<sup>169</sup>

With respect to *creating new spaces*, on the other hand, a modder's activity has significantly greater potential to demonstrate originality. Although the original game's assets may be utilized in creating these "new spaces," the modder's activity is in this context directed towards creating new content (new gameplay maps, levels, or areas), not just modifying the properties of existing assets. Thus, it seems

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<sup>167</sup> See *supra* at note 137. Applying *Deichmann's* terminology, it could perhaps be said that these "alterations" are merely "remakes" of the original assets, and thus the "distance" between the alteration and the original asset is rather insubstantial. It seems quite clear that alterations to the outer form of a pictorial work are unlikely to sever the connection to the original work in a way that would call for protection as an independent work. In this regard, see e.g. HE 161/1990, p. 56 (concerning the breadth of protection for photographs).

<sup>168</sup> See *supra* at note 145.

<sup>169</sup> See section 3.2.1 *supra*. Thus, a game developer's claim to player-made alterations is no stronger in cases where it provides the editing tools instead of simply allowing the modder access to game assets in a common file format (such as bitmaps), which the latter may edit using generic editing software.



reasonable to suggest that the new spaces are more likely to have an “inner form” of their own and, correspondingly, less likely to trigger an experience of similitude in an observer. The potential stumbling block of this approach is, however, the fact that it presumes that a “new space” is, in fact, a single “work.” Perhaps that presumption can nonetheless be justifiable by thinking of a gameplay map as a (sometimes three-dimensional) “picture collage,” in which pre-existing works are combined in order to create something new and original.

Alternatively, the aesthetic reworking of a game could, in some instances, at least in theory, result in something that resembles a compilation. For example, modding tools which allow the player to create new gameplay maps (“level editors”) may provide ready-made textures, characters, objects, and other assets as “building blocks,” which the player then “places” on a template so as to form a new gameplay map. In these cases, the player arguably has a greater freedom to make creative choices than in the creation of avatars (discussed in the previous section).<sup>170</sup> Further, a gameplay map typically needs to have a certain logic or progression to allow “gameplay” to happen, which would support the notion that the player must act according to a specific, more detailed plan instead of just operating by “what looks good.” It would thus appear that in the context of “creating new spaces,” the counterarguments to copyright protection as a compilation pertaining to the creation of avatars are less convincing. However, it might again be noted that a modder’s activity lacks a *compiling function*.<sup>171</sup> Instead of “compiling existing assets,” they aim to “create new gameplay maps.” As a result, it may, once again, be more appropriate to consider such modding in light of the requirements for independent works.

With respect to reworking the *operational characteristics* of a game, this is done by altering the functionality of the game. In my understanding, there are two methods that can be used to accomplish this. Firstly, a game’s modding tools can

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<sup>170</sup> In creating an avatar, the player is essentially constricted to “assembling” a creature, which needs to conform to a certain prototype (typically, it needs to have feet, legs, arms, a torso, a head, etc.). By contrast, the template onto which the player creates a gameplay map is often more like an “open canvas,” which is malleable to the player’s vision. Here, the restrictions are much less severe. For example, the “essential elements” of a real-time strategy map are limited to the existence of “spawn positions” (designated locations where the player’s start the game) and, usually, certain resources on the map. Everything else is left to the modder’s discretion.

<sup>171</sup> See *supra* at note 124.

allow a player to modify a game's functionality by interacting with a specific GUI *without* needing to de facto write any (source) code. From a copyright perspective, this type of alteration is irrelevant, as mere interaction with a GUI does not, as such, constitute a "work" that can be protected by copyright. Alternatively, however, a game may allow a player to alter its functionality by executing *custom scripts* with the game engine. This interaction is achieved by interacting with a special application programming interface (API), which is, in this context, often referred to as a "modding API" or a "plug-in API." Considering that the player is usually not granted access to the source code of the game (the game engine),<sup>172</sup> this means that those scripts are created independently of the game's source code. Thus, it is evident that any code prepared by the modder for this purpose is *subjectively original* in relation to the source code of the original game.<sup>173</sup> As a result, it may be protected by copyright as an independent work, provided that it constitutes its author's own intellectual creation.<sup>174</sup> It may, however, be presumed that many of the scripts in question here are trivial enough to not pass the test of originality, although this presumption can definitely be disproved *in casu*.<sup>175</sup>

A further thing to note about game mods that rework the operational characteristics of a game is that the developer may not even have a need to acquire rights in them, if its wishes to exploit what they represent. This is because the value that such a mod may represent is in the way it modifies the end user (player) experience, for example by implementing new mechanics to the game or by fixing

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<sup>172</sup> See *supra* at note 19.

<sup>173</sup> As mentioned above, the concept of originality applies a subjective standard (see *supra* at note 112). By analogy, see also *SAS Institute*, at para 44. In the very limited number of situations where a developer allows modders to access the source code of a game directly, a player may be able to make derivative works based on existing code. As it is incredibly rare for a developer to publish the source code of its game, this possibility is not discussed further here.

<sup>174</sup> See section 3.2.2 *supra*.

<sup>175</sup> According to the Finnish Copyright Committee, simple computer programs, which consist of a sequence of solutions (code components) that are "mostly" self-evident to a person skilled in the art, do not meet the requirement of originality. The same applies to solutions that are widely used. See KM 1987:8, p. 177. Although this rule as such is likely to be serviceable, the Committee's reference to a "person skilled in the art" (*alan ammattilainen*) in this context is quite confusing, as it seems to point towards the "inventive step" doctrine applied in patent law. The concept of originality known in copyright law is distinct from the requirements of patentability – also with regard to computer programs. Despite this oversight in terminology, the Committee's argument is probably acceptable with regard to its substance.

bugs in the existing mechanics (restorative patches). However, copyright only protects the player-written code as a literary expression. Thus, the developer may freely implement the player-designed functionality, as long as it does so without copying the code written by the player.<sup>176</sup>

### 3.3.4 *Redirecting a Game*

Finally, a player may redirect a game by using it to create things such as gamics (“game comics”) or machinima (“machine cinema”). This type of modding is different from the others in that the purpose of any modifications done to the original game is to facilitate the making of those creations. In this way, the game is “redirected” from providing gameplay experiences to functioning as a tool for creating expression. From a copyright perspective, a notable characteristic of game redirecting is thus the fact that such activity often aims to convey a message (or “story”) which is distinct from that of the original game. The outcome can be a pictorial (in the case of screenshots or gamics) or audiovisual (in the case of machinima) creation.

Game redirections are often comparable to spin-offs. Typically, they *expand* on the game universe by introducing alternative storylines or placing the game’s characters in the midst of different events. At the same time, they undeniably borrow significantly from the original game – including many of the “elements” of the original game, such as its characters, scenery, and other things. It is, however, unclear whether this should lead to the conclusion that such creations are derivative works. For one, it may be noted that the borrowing of details, stylistic features, and ideas from pre-existing works is explicitly permitted under copyright law.<sup>177</sup> Further,

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<sup>176</sup> See, by analogy, *SAS Institute*, at paras 39–46.

<sup>177</sup> See *supra* at note 136. In the United States, *Wallace* has argued (in support of the current U.S. doctrine) that “[b]y choosing to mod a game, as opposed to creating a stand-alone original work, modders are inherently acknowledging that they are, in reality, deriving something from the copyrighted work.” As a result, he considers it appropriate to classify mods as derivative works. Without taking a stand on the merits of this argument in the U.S. context, it is, in my understanding, impossible to accept a similar argument under Finnish law. The sentiments of a modder on the original game are largely irrelevant with regard to the copyright protection of a game mod. Further, Finnish copyright law quite clearly approves of authors “deriving something” from pre-existing works, as long as that “something” is not concrete and substantial enough to render the subsequent work a derivative work made based on the pre-existing work.

in a comparison between, for example, a machinima and the original game, an observer would hardly mistake the machinima for a “copy” of the original game.<sup>178</sup> Certainly, an association is likely to arise – as is, in fact, the intention with such “spin-off” creations. Whether the similarity goes beyond association into the realm of relevant similitude (“substantial similarity”) is a matter of judgment *in casu*. In making the final determination, the *purpose* of the game redirection may, in particular, be central to the outcome, where it deviates significantly from the original game – such as in the case of parodies and travesties.<sup>179</sup>

Again, it may be pointed out that the mere fact that the engine of the original game is used to realize a game redirection such as a machinima is, from a copyright perspective, without significance.<sup>180</sup> Whether or not a technical tool such as a game engine is used to render (or, essentially, project) a work onto a display has no effect on the ownership interests pertaining to that work. Thus, the game developer has no claim to original authorship of such creations based solely on this fact.

### 3.4 Summary and Conclusions: Game Mods and Copyright Law

“Game modding” as a phenomenon encompasses various practices through which a player contributes to a computer game by creating content. Players who engage in modding contribute to a game either by altering existing content in a manner that alters the game experience or by creating content that is *de facto* new altogether. Generally speaking, a game may allow players to contribute content either by using in-game functionality or by making use of special software tools provided by the game developer. In this study, I have adhered to a typology of modding, which divides game modding into four types of activities: *reinterpretation*, *configuration*,

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<sup>178</sup> Cf. with the opinion of the Copyright Council (TN 2012:3) *supra* at note 141.

<sup>179</sup> As stated by, for example, the Swedish Copyright Committee, the making of parodies and travesties is customarily allowed under copyright law (SOU 1956:25, p. 124). They are typically deemed *works made in free connection with a pre-existing work* (Haarmann 2005, p. 67). See also Kivimäki 1948, p. 108.

<sup>180</sup> An analogy between computer games and cinematographic works made by *Baldrice* is particularly illustrative in this regard. He argues that a game mod can “more logically be thought of as placing a different reel of film [ - - ] into the same projector” (Baldrice 2007, p. 704). Cf. with Wallace 2014, pp. 241–242.

*reworking*, and *redirection*.<sup>181</sup> Based on that typology, I have evaluated how the principles of Finnish copyright law could apply to those practices.<sup>182</sup>

A study of the Copyright Act does not provide any unequivocal answers to the question of whether and to what extent game mods may qualify for copyright protection. Further, there is no court practice on issues relating to game modding. Ultimately, game mods are subject to the same requirements for protection as any other subject matter. This means that copyright can vest in a player's contribution to a game, provided that the contribution is "original." In essence, a player-made creation is likely to be deemed original where the player enjoyed sufficient freedom to make creative choices when making it. Originality is thus closely connected to statistical uniqueness: where a creation is the outcome of numerous choices, it is less likely that another person would have created an identical thing.<sup>183</sup>

However, it may be complicated to determine whether the copyright subsisting in a game mod can be *independent* of the copyright in the original game, or whether game mods are always *derivative* creations. I have noted that the established position in the United States is to regard game mods as derivative works.<sup>184</sup> Under Finnish law, it is not possible to make a similar conclusion categorically. In fact, it seems entirely plausible to suggest that the products of modding can sometimes be regarded as independent works in the meaning of Section 1 or 4.2 of the Copyright Act.<sup>185</sup> This is, in principle, possible in two types of circumstances:

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<sup>181</sup> See section 1.1.2 *supra*, in particular Figure 1.

<sup>182</sup> See generally sections 3.3.2–3.3.4 *supra*.

<sup>183</sup> See section 3.2.2 *supra*.

<sup>184</sup> See section 3.1 *supra*.

<sup>185</sup> The implications of Sections 1 and 4.2 are de facto identical (see Honkasalo 2012, pp. 68–69 with citations). As *Honkasalo* points out, if a new work is created in free connection with an original work (as stated in Section 4.2 of the Copyright Act), the connection between those two works is "insomuch loose that it is deemed to have no relevance to the matter in terms of copyright." Thus, the same outcome would be reached by simply referring to Section 1 of the Copyright Act. In the preparatory works of the Copyright Act, it was also noted that Section 4.2 was added "for the sake of completeness" (KM 1953:5, p. 50).

- 1) where a player does not, as such, make use of the protected content of the original game, but instead merely uses the software tools provided by a developer to make her own intellectual creation; or
- 2) where a player does make use of the protected content of the original game in making her contribution, but those original assets are altered to such extent that no experience of similitude arises between the player's creation and the original assets.

In theory, it is equally possible to create an independent work with the help of in-game functionality (as in the case of player avatars, for example) or separate software tools. However, the in-game functionality of a game may often be so rudimentary that the potential for original expression is, in practice, slight.<sup>186</sup>

While the possibility that a player's contribution may constitute original expression cannot be excluded, it is evident that often game mods are simply derivative creations. If, for example, a player alters the (visual) content of a game in an original manner, copyright may subsist in the outcome as a *derivative work* in the meaning of Section 4.1 of the Copyright Act.<sup>187</sup> A similar conclusion might be reached with respect to creations in which a game is redirected.<sup>188</sup> In these cases, a judgment call needs to be made *in casu* with regard to degree of alteration from the viewpoint of the "similitude test."<sup>189</sup> In certain circumstances, a game mod may even be considered a *compilation* in the meaning of Section 5 of the Copyright Act.<sup>190</sup> This is the case where a game mod is essentially created by combining (selecting or arranging) game assets in order to create "new" content (think of, for example, a simplistic level editor which only allows a player to place existing objects onto a template). Even in these cases it is justified to speak of "derivative creations" in the broad sense.

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<sup>186</sup> See generally section 3.3.2 *supra*.

<sup>187</sup> See section 3.3.3 *supra*.

<sup>188</sup> See section 3.3.4 *supra*.

<sup>189</sup> On the similitude test, see *supra* at notes 140–143.

<sup>190</sup> See sections 3.3.2 and 3.3.3 *supra*.

Lastly, it must be acknowledged that many player contributions are simply not liable to attract protection under copyright law. In particular, this may be the case in two types of situations:

- 1) where a player alters the content of the original game in a manner that is routine or mechanical instead of being original (for example, where the graphical fidelity of a game is enhanced in order to achieve a technically superior result); or
- 2) where a player nominally contributes to a game, but in such a way that no original expression is created as a result of that activity (for example, where a player merely changes certain game-affecting variables by interacting with a GUI).

Thus, in dealing with different modding practices, distinct issues relating to copyright protection are likely to arise. With regard to *game-provided modding* (where in-game functionality is relied on), the most relevant point of contention is likely to be the originality of the ensuing creation. In that context, the *creative freedom* enjoyed by the player constitutes the main object of analysis. Ultimately, the level of sophistication of the in-game tools for creation determines whether a player's contribution can be "original." As to *user-extended modding*, the distinction between independent works and derivative works is, in turn, pivotal. First and foremost, this is due to the fact that the originality criterion is more likely to be satisfied in these cases. As a result, it becomes relevant to determine whether and to what extent a player made use of the existing assets of the original game, and what relevance should be attached to that utilization under copyright law. Especially when *redirecting* a game, doctrinal views on parodies and travesties may also gain relevance.

To the extent that copyright does subsist in a game mod, the player must clearly be considered the original author. In this regard, it is, as a rule, irrelevant that the player utilized software tools provided by the developer. Similarly, the fact that the game engine is needed in order to put the player's contribution into effect (that is, in order to "play the mod") should be inconsequential. I have also argued that it is

neither consistent with established doctrine nor practical to construe the products of game modding as works of joint authorship in the meaning of Section 6 of the Copyright Act.<sup>191</sup>

Ultimately, accounting for the ownership of game mods is likely to be challenging. This is, first and foremost, a result of the fact that, just like a computer game in general, a game mod is often not de facto a “single work.” Instead, a game mod is typically a bundle of creations, which may or may not be individually protected by copyright. Thus, in order to reliably map out the copyright interests in a game mod, each individual work would need to be considered separately. This is, of course, a rather impractical endeavor.

In practical terms, the relevant distinction to make with regard to the ownership of game mods is that between creations which are *not protected by copyright* (separately of the original game), creations which are *derivative of the original game* (derivative works or compilations), and creations which are *original in their own right* (independent works). From the perspective of a game developer, the implications of this distinction may be summarized as follows:

- 1) The unprotected elements of a game mod – including non-original alterations as well as rules, mechanics, and functionality which are unprotected ideas – may be freely exploited, imitated, and/or copied by the game developer.<sup>192</sup>
- 2) Derivative elements are protected by copyright independently of the copyright in the original game, which is why a game developer needs to acquire rights from the player-creator if it wishes to exploit them (however, the opposite is equally true: namely, the player-creator cannot exploit such elements without authorization from the developer).<sup>193</sup>

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<sup>191</sup> See section 3.2.1 *supra*.

<sup>192</sup> On the flipside of the coin, a developer cannot acquire “exclusive rights” to these elements from a player, either, as the modder cannot have such rights in the first place.

<sup>193</sup> Thus, the rights of each interest holders are without prejudice to the rights of the other. This means that either copyright holder can effectively prevent any exploitation of the derivative creation (regardless of whether the derivative creation is a derivative work or a compilation). See Kivimäki 1948, p. 109 and Stray Vyrje 1987, p.



- 3) Original elements are protected by copyright independently of the copyright in the original game, which is why the game developer needs to acquire rights from the player-creator if it wishes to exploit them (and the player-creator is entitled to exploit such elements even without authorization from the game developer).

Of course, a game developer is free to determine the extent to which it feels compelled to acquire rights from players as far as the creations falling under the second or third category above are concerned. For instance, a developer may not strictly need to acquire rights to the products of game redirection solely for the purpose of managing its game, as those creations live out their existence outside the in-game environment. On the other hand, at least in the context of multiplayer games a game developer may in fact be forced to acquire rights from players to certain creations in order to avoid infringing the rights of players *inter alia* by making server copies or distributing modified content. For this reason, the next part of this study looks into the most common means through which developers in practice seek to acquire rights in game mods – namely, rights acquisition through the standard terms associated with their game product.

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135. As far as this “overlapping” of rights is concerned, derivative works and compilations behave similarly (KM 1953:5, p. 50).

## 4 GOVERNING SUBSEQUENT OWNERSHIP OF MODS THROUGH A EULA

### 4.1 Generally on the Nature of EULAs

For regulating the relationship between a game developer and a player, the End User License Agreement (EULA), which sets out the respective rights and obligations of the developer and the player, is the most significant contractual instrument.<sup>194</sup> Virtually every computer game available today comes with a EULA, which the player must assent to (by clicking “I Agree” or by similar means) when purchasing a game or installing it. An agreement of this kind is often referred to as a *click-wrap license* – the more recent iteration of the “shrink-wrap license,” which was (and still is to some extent) used particularly in connection with software distribution on physical media.<sup>195</sup>

In the United States, the practice of imposing click-wrap licenses (and before that shrink-wrap licenses) and enforcing them against licensees (often consumers) has attracted rather ample attention from legal commentators and has been scrutinized by courts on several occasions. While U.S. courts seem to lean towards accepting the enforceability of shrink-wrap and click-wrap licenses in general,<sup>196</sup> scholars’ opinions on the topic are markedly more skeptical.<sup>197</sup> Occasionally, scholars have all but demonized computer game EULAs, saying inter alia that by virtue of such

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<sup>194</sup> Scholarly descriptions of EULAs actually convey a rather omnipotent view of such documents in general. For example, some scholars have contended that, in addition to being constitutive of the legal relationship between the developer and player, EULAs “serve as the legislative backbone of digital play environments” (Grimes 2013, p. 685) by “[setting] the laws of the land for the virtual world” (Gilbert 2009, p. 238).

<sup>195</sup> See Rustad – Onufrio 2012, p. 1105. *Rustad* and *Onufrio* include both shrink-wraps and click-wraps in the more general category of “quick-wrap terms,” which additionally includes techniques such as browse-wraps and modern “terms of use.” On these techniques and their evolution, see generally Rustad – Onufrio 2012, pp. 1098–1116. Generally on click-wrap and shrink-wrap licensing, see also e.g. Smith 2007, pp. 821–824 and Classen 2013, pp. 323–327.

<sup>196</sup> This has been the general tendency following the 7th Circuit’s ruling in *ProCD, Inc. v. Zeidenberg* in 1996. In that case, the 7th Circuit found (applying the Uniform Commercial Code) that by *using* the purchased software instead of returning it after discovery and review of the shrink-wrap terms, Zeidenberg had accepted ProCD’s proposition to contract as embodied in those terms. Many courts have chosen to follow the *ProCD* precedent (see Lemley 2006, pp. 459–460). However, as *Terasaki* points out, some courts have in fact decided to reject the 7th Circuit’s mode of reasoning as well (see Terasaki 2014, pp. 471–473).

<sup>197</sup> See e.g. Terasaki 2014. With regard to EULAs in computer games, see generally Kunze 2008 and Gilbert 2009. In the social media context, *Hetcher* has argued that parts of Facebook’s terms of service should be deemed unconscionable (which roughly translates to “unfairness” in the European context) (Hetcher 2008, p. 842 onwards).

documents “the developer gets unilateral, unchecked, godlike power, while the customer has few or no rights.”<sup>198</sup> Despite academic critique, however, the EULA continues to be the instrument that de facto governs the relationship between a game developer and a player.<sup>199</sup>

It is worth mentioning at least one of the U.S. court decisions dealing specifically with the enforceability of a EULA in the context of computer game modding. That case is *Davidson & Associates v. Internet Gateway*<sup>200</sup>, which addressed the question of whether a EULA is enforceable, if it violates the fair use doctrine by setting a prohibition on reverse engineering. In its decision, the District Court simply found that “[p]arties may waive their statutory rights under law in a contract,” and that the defendants, who had indeed done so, “must be bound by that waiver.”<sup>201</sup> At the same time, it flatly rejected the notion that the EULA could be unenforceable due to its failure to conform to the “reasonable expectations” of the parties as a result of unequal bargaining power. Similarly, the terms of the EULA were not considered “so one-sided as to ‘shock the conscience.’”<sup>202</sup> The District Court’s decision was subsequently affirmed on appeal.<sup>203</sup>

What, then, does this infamous document going by the name of a EULA contain? Typically, a EULA associated with a computer game contains a number of standard terms on the use of a game product, among them a clause concerning the ownership of player-made content. Those ownership clauses are typically drafted to be very broad and all-inclusive (or “sweeping,” as *Grimes*<sup>204</sup> deftly puts it).<sup>205</sup> With the help of

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<sup>198</sup> Kunze 2008, p. 107.

<sup>199</sup> See Grimes 2013, p. 691.

<sup>200</sup> *Davidson & Associates v. Internet Gateway*, 334 F.Supp.2d 1164 (E.D. Mo. 2004).

<sup>201</sup> *Ibid.*, p. 1181.

<sup>202</sup> See Festinger – Metcalfe – Ripley 2012, p. 95. The finding was based inter alia on the fact that the defendants were, due to their professional expertise, considered to be “familiar with the language used in the contract” (see *Davidson*, p. 1179).

<sup>203</sup> See *Davidson & Associates v. Jung et al.*, 422 F.3d 630 (8th Cir. 2005). The Eight Circuit confirmed that parties are free to waive their fair use rights through a contract. According to certain legal commentators, the *Davidson* case made it “shockingly clear” that “contractual terms of EULAs [- -] can be used to overcome well established intellectual property rights” (Festinger – Metcalfe – Ripley 2012, p. 96).

<sup>204</sup> Grimes 2013, pp. 684–685.

<sup>205</sup> This conforms to the general trend noted by the working group assigned by the Finnish Ministry of Education and Culture to investigate the need to reform the provisions of Chapter 3 of the Copyright Act (on

such clauses, the game developer seeks to obtain rights in any eventual content created by the player.<sup>206</sup> In this regard, developers can make a choice between three alternative modes of rights acquisition: they may demand a non-exclusive or exclusive license or a full assignment of copyright in players' creations.<sup>207</sup>

To illustrate this, it may be helpful to briefly look at a few real-world examples of such clauses.<sup>208</sup> First, for an example of the strictest type of transfer clause (full assignment), one can refer to the "StarCraft II Custom Game Acceptable Use Policy" as provided by Blizzard Entertainment:

*"Custom Games are and shall remain the sole and exclusive property of Blizzard. Without limiting the foregoing, you hereby assign to Blizzard all of your rights, title and interest in and to all Custom Games, and agree that should Blizzard decide that it is necessary, you agree to execute future assignments promptly upon receiving such a request from Blizzard. Additionally, Blizzard shall have the right to maintain the Custom Game on Blizzard's Arcade service even if the developer of the Custom Game requests that Blizzard remove the Custom Game from the Arcade service."<sup>209</sup> (emphasis added)*

Secondly, an example of a transfer clause formulated as an exclusive license may be found in the general EULA of Rovio Entertainment:

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transfers of copyright): in today's environment, rights in copyrighted works are either in a very narrow and precise manner or, alternatively, *extremely broadly* (with little middle ground). See OKM 2010:9, p. 33.

<sup>206</sup> See e.g. Münch 2013, p. 2. These types of terms are, in fact, vaguely analogous to the "grant-back" terms used in the context of technology licensing, as they define that copyright in any additions or improvements to the content of a game product made by the "licensee" (the player) must be licensed or assigned back to the developer. In this manner, a game developer may seek to establish a monopsony over mods created for its game (Note 2012, pp. 794–795). Depending on one's point of view, this may be seen as either an exploitative practice or as part of normal business strategy. Interestingly, a clause on player-created content may, at the same time, be seen as *consent* from the game developer for the creation of mods and other content (see Wallace 2014, p. 229). The reason why it may be necessary to construct the game developer's consent to modding in such an obscure way is a result of the fact that EULAs are often written quite unintelligibly and may contain several, mutually contradictory clauses on "ownership" of various things relating to the game.

<sup>207</sup> For the sole purpose of acquiring sufficient rights to exploit the game mod in the normal course of business, either of these alternatives should *prima facie* suffice (provided that the clause is worded properly). Therefore, the choice mostly comes down to the preferences of the developer (for example, a developer with a more protectionist strategy with regard to intellectual property may try to effectuate broader assignments of rights to keep full control of assets relating to its game product).

<sup>208</sup> The reader should note that not all of the EULAs cited here are governed by Finnish law. However, due to the homogenous nature of these player-to-developer assignment or license clauses, I nonetheless consider the following examples quite illustrative of the general trends followed globally in drafting such terms.

<sup>209</sup> <http://eu.blizzard.com/en-gb/company/legal/acceptable-use.html> (accessed 7 April 2015).

*"In exchange for use of the Rovio Services, and to the extent that your contributions through use of the Rovio Services give rise to any copyright, design right or any other intellectual or industrial property right you hereby grant Rovio an exclusive, royalty-free, perpetual, irrevocable, fully transferable and sub-licensable worldwide right and license to use your contributions in any way and for any purpose including, but not limited to the rights to reproduce, copy, adapt, modify, perform, display, publish, broadcast, transmit, or otherwise communicate to the public by any means whether now known or unknown and distribute your contributions without any further notice or compensation to you of any kind for the whole duration of protection granted to intellectual and industrial property rights by applicable laws and international conventions."*<sup>210</sup> (emphasis added)

Lastly, a non-exclusive license clause may be found in inter alia the "Steam Subscriber Agreement" of Valve Corporation:

*"You grant Valve and its affiliates the worldwide, non-exclusive, right to use, reproduce, modify, create derivative works from, distribute, transmit, transcode, translate, broadcast, and otherwise communicate, and publicly display and publicly perform, your User Generated Content, and derivative works of your User Generated Content, in connection with the operation and promotion of the Steam site."*<sup>211</sup>

The global nature of the computer game business dictates that any assignment or license clauses included in a EULA need to be drafted in a broad fashion to cover a sufficient variety of exploitation methods and worldwide use. Further, the clauses invariably demand transfers of copyright against no remuneration (other than the use of the game product and/or modding tools provided by the developer). Thus, the "moving pieces" in such a clause are, essentially, the type of assignment or license demanded from the player as well as the reach of the clause (that is, which

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<sup>210</sup> <http://www.rovio.com/eula> (accessed 7 April 2015).

<sup>211</sup> [http://store.steampowered.com/subscriber\\_agreement/](http://store.steampowered.com/subscriber_agreement/) (accessed 7 April 2015).

types of creations it covers), the latter of which is often defined by the definitions given in the EULA.<sup>212</sup>

Based on this introduction to the topic, I now move on to discuss the formal and material enforceability of an assignment or license of copyright in game mods executed through a EULA. First, section 4.2 discusses the *formal enforceability* of such a clause by analyzing the requirements of enforceability deriving from the doctrine on standard form contracts. Section 4.3, in turn, focuses on the issue of *material enforceability* from the viewpoint of the doctrine on the adjustment of unfair contractual terms. Lastly, section 4.4 considers the implications of these two sides of the coin together in presenting some conclusions with respect to the general enforceability of standard form assignments or licenses of copyright in game mods under Finnish law.

## 4.2 Formal Enforceability of a EULA

### 4.2.1 Standard Terms in the Theory of Contract

Initially, modern contract law was essentially built on two fundamental principles: freedom of contract and the binding effect of agreements (*pacta sunt servanda*).<sup>213</sup> In its purest form, this “liberal theory of contract” focuses exclusively on the concept of *private autonomy*, which emphasizes the freedom of an individual to pursue her ambitions. The notion of private autonomy is, in fact, based on the assumption that an individual is capable of rational action, which benefits not only the individual but ultimately also society at large.<sup>214</sup> Based on the individual’s assumed capacity for rationality, liberal theory of contract explains the birth, content, and binding effect

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<sup>212</sup> For example, in the examples cited above the reach of the assignment or license would depend on the definition attributed to “Custom Games” (first example clause) or “User Generated Content” (third example clause).

<sup>213</sup> See generally e.g. Hemmo 2007, pp. 49–50 as well as 69 *et seq*, Pöyhönen 1988, pp. 266–270, and Wilhelmsson 2008, pp. 1–4.

<sup>214</sup> See Hemmo 2007, pp. 70–71, Wilhelmsson 2008, p. 2, and Wilhelmsson 1979, p. 515.

of an agreement based on the individual's *contractual intent* – or the reasonable expectations of the counterparty with respect to the first individual's intent.<sup>215</sup>

However, focusing too greatly on private autonomy alone would lead to contract law becoming quite estranged to reality, as the assumptions liberal theory of contract is based rarely materialize in the actual circumstances in which agreements are formed.<sup>216</sup> Therefore, a third principle has emerged to take a position alongside the two leading principles of contract theory. This third principle (sometimes referred to as the “protective principle”) recognizes that there may sometimes be a need for outside intervention into a contractual relationship to the defense of an individual.<sup>217</sup> The emergence of the protective principle may, from a broader viewpoint, be connected to the rise of “social theory of contract.”<sup>218</sup>

In step with the “socialization” of contract law, *standard form contracts* have come to receive greater attention in the doctrine of contract law.<sup>219</sup> “Standard terms” are typically understood as a set of terms and conditions drafted in advance for use in

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<sup>215</sup> Hemmo 2007, pp. 16–19. If a party's intent is seen as the constitutive element of an agreement, she will, in theory, only be bound to the text of the agreement inasmuch as it corresponds to her intent at the time when the agreement was concluded. On the other hand, if one chooses to emphasize the reasonable expectations of the counterparty, the objectively appreciable indications of a party's intent are instead seen as constitutive of the binding content of an agreement. See generally Pöyhönen 1988, pp. 109–209.

<sup>216</sup> Mononen 2001, p. 135.

<sup>217</sup> Taxell 1984, p. 610. This represents a marked deviation from liberal theory, in which the individual was deemed capable of looking after her own interests, towards a more interventionist approach. As *Hemmo* explains, the conception of the “individual” under contract law changed in two fundamental respects in this connection. First, the individual is no longer viewed solely as an isolated being, but rather as a member of an abstract group (e.g. as a consumer or employee). Second, instead of viewing the individual as a predominantly rational being, her actual qualities – i.e. her expertise, skills, economic position, etc. – came to be accepted as factors that could be taken into account in a contract law based analysis. See Hemmo 2007, pp. 71–72. The “protective principle” is particularly weighty in consumer law, where the goal is to protect consumers against unfair deviations from a “reasonable balance” of rights and obligations (Mononen 1993, pp. 138 and HE 8/1977, p. 34).

<sup>218</sup> See generally e.g. Hemmo 2007, pp. 19–24 and Wilhelmsson 2008, pp. 9–12. However, even the “social theory of contract” recognizes freedom of contract and *pacta sunt servanda* as the cornerstones of contract law (Hemmo 2007, pp. 49 and 70 (in particular note 2); see also Oesch 2005, p. 288). Cf. with Aho 1982, p. 525.

<sup>219</sup> For much of its history, the focus of contract law was on *individually concluded agreements*. For example, *Hemmo* points out that the Finnish Contracts Act is built on the assumption that agreements are concluded based on an individual process, not following a standard form (Hemmo 2007, p. 144). *Wilhelmsson* links the rise of the standard form contract to the general tendency among industries towards larger-scale, concentrated production and distribution (Wilhelmsson 2008, p. 6).

multiple contractual relationships.<sup>220</sup> From a contract law perspective, the key issue with the use of standard terms is that the “expression of intent” of the counterparty (the party who was not involved in drafting the standard terms) becomes a rather fictional construction.<sup>221</sup> Typically, standard terms are offered on a “take it or leave it” basis, which eliminates the counterparty’s ability to meaningfully negotiate with the other party in order to achieve an outcome that corresponds to her contractual intent.<sup>222</sup>

A rather humorous demonstration of the fictiveness of contractual intent in standard form contracting was carried out by GameStation in 2010. As a prank for April Fool’s Day, it added a clause to its standard terms and conditions according to which ownership of the customer’s soul was transferred to GameStation, unless she opted out of that specific clause by clicking a box. GameStation subsequently revealed that 88 percent of customers had failed to opt out of the clause – probably due to not reading the terms.<sup>223</sup>

Despite this inherent flaw, the practice of using standard terms is accepted as a kind of “necessary evil” in the modern environment. In particular, standard form contracting brings with it the obvious advantage of lowered transaction costs due to simplified procedure (*rationalization*).<sup>224</sup> Arguably, the cost benefits attained in this manner generally carry over to the customers as well.<sup>225</sup> The acceptance regarding the use of standard terms is, however, by no means unconditional: instead, a great

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<sup>220</sup> To this effect, see Hemmo 2007, p. 148, Olsson 1968, p. 8, and Wilhelmsson 2008, p. 35. Standards terms are, in fact, further divided into *unilaterally prepared terms* and *agreed documents*, which two parties have drawn up together in preparation for future transactions (Hemmo 2007, pp. 146–147 and Wilhelmsson 2008, p. 37). However, in this study I focus exclusively on unilaterally prepared terms as EULAs are understood as such.

<sup>221</sup> Wilhelmsson 2008, pp. 6 and 66, Wilhelmsson 1979, p. 516, and Ramberg – Ramberg 2014, p. 135. Specifically with regard to terms of service in computer games, see also Burk 2010, under “Terms of Service.”

<sup>222</sup> Bernitz 2013, p. 17, Mononen 2001, p. 137, and Wilhelmsson 2008, pp. 55–56. In this respect, *Wilhelmsson* argues that the use of standard terms in fact limits the exercise of *substantive freedom of contract* (as opposed to *normative freedom of contract*) in contractual practices. In practice, the implication of this lack of substantive freedom of contract is, as *Mononen* points out, that the role of the counterparty in the formation of contract is *passive*.

<sup>223</sup> See <http://www.bit-tech.net/news/gaming/2010/04/15/gamestation-we-own-your-soul/1> (accessed 7 April 2015).

<sup>224</sup> Hemmo 2007, p. 145, Taxell 1984, p. 607, Ramberg – Ramberg 2014, p. 134, and Wilhelmsson 2008, pp. 65 and 103–104.

<sup>225</sup> Mononen 2001, p. 153.



deal of time and effort has been devoted to formulating the requirements subject to which standard terms can become *incorporated* into a specific agreement (and, with that, binding on the counterparty). These requirements are discussed in the following sections.

#### 4.2.2 Does a EULA Bind a Player?

The axiomatic starting point for a discussion on incorporation of standard terms is that neither party should have the unilateral right to dictate the terms of an agreement.<sup>226</sup> In fact, if one party were to have such a right, it would be patently inconsistent to describe the following situation as an “agreement” in the first place.<sup>227</sup> Therefore, in order for unilaterally drafted standard terms to become incorporated into an agreement, a particular justificatory fact (*basis for incorporation*) must be at hand to validate a finding of incorporation.<sup>228</sup> In theory, there are several means of varying effectiveness by which a basis for incorporation can be established.<sup>229</sup> Listed by level of effectiveness (descending), the following bases for incorporation are typically mentioned in legal literature:

- 1) The standard terms are included as full text in the contract document or its schedules.
- 2) The main contract expressly references the standard terms (either ones that are generally used by the particular company or widely used in the particular field of business).
- 3) The standard terms are neither included nor referenced in the contract document, but i) the parties have customarily contracted on those terms, ii)

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<sup>226</sup> Taxell 1972, p. 40.

<sup>227</sup> For example, according to the Merriam-Webster online dictionary, the word “agreement” means (among other things) “a situation in which people share the same opinion.” A situation in which one person unilaterally dictates the content of that “shared opinion” is, thus, not a real agreement in the colloquial sense of the word.

<sup>228</sup> Taxell 1972, p. 40.

<sup>229</sup> As *Nurmi* explains, the specific circumstances *in casu* will ultimately determine the degree of effectiveness required to justify the incorporation of standard terms into a contractual relationship (Nurmi 1997, p. 124). As *Hemmo* points out, the customer’s level of expertise is inversely proportional to the required degree of effectiveness of the incorporative fact (Hemmo 2007, p. 152). *Taxell*, in turn, states that if certain standard terms have a negative effect on the counterparty’s interests, their incorporation into the agreement needs to be subject to the existence of a “clear” basis of incorporation (Taxell 1972, p. 44).

the use of such standard terms is established business practice in the field, or iii) the use of such standard terms is otherwise a dominant practice in the context of a certain type of transaction.<sup>230</sup>

According to *Hemmo*, presenting standard terms to the customer in accordance with “protocols” established in the context of internet trade may be considered equivalent in effectiveness to the first basis of incorporation listed above. Further, *Hemmo* considers the details relating to the technical implementation of the basis of incorporation inconsequential; what is essential is that the customer is provided an easy-to-use means to familiarize herself with the trader’s standard terms.<sup>231</sup> In Sweden, legal commentators have, however, recommended that the customer be required to affirm her knowledge and acceptance of the standard terms by an express gesture (in practice: by clicking “OK” or “I Agree” similar on her display).<sup>232</sup>

Ultimately, the objective with requiring a “basis of incorporation” is to ensure that the relevant standard terms come to the counterparty’s knowledge prior to the conclusion of agreement. This is, in practice, the minimum requirement for the incorporation of standard terms.<sup>233</sup> To that end, the existence of a formal reference to the relevant standard terms is, however, insufficient as such. In addition, the

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<sup>230</sup> See e.g. Ramberg – Ramberg 2014, pp. 137–138 and Hemmo 2007, pp. 149–150. As *Mäkelä* recounts, the use of public transport is often mentioned as a textbook example of a situation described in point 3(iii) above. According to him, a person who lives in Finland cannot justifiably be unaware of the fact that the use of public transport is subject to a charge due to the highly established nature of that custom. For this reason, this “standard term” (the fee associated with using public transport) is presumed to bind public transport customers even if no (other) “basis for incorporation” may be found. See *Mäkelä* 2008, p. 38. It is, however, rather unclear to what extent terms may be incorporated based on a mere presumption of this kind. For example, in Sweden legal commentators have apparently reached the consensus that standard terms can only become incorporated into an agreement by express reference or as a result of established practice between the parties in question (Ramberg – Ramberg 2014, p. 139; cf. with Bernitz 2013, pp. 59–61). See also *Wilhelmsson* 2008, pp. 76–77; cf. with *Taxell* 1972, p. 42.

<sup>231</sup> Hemmo 2007, pp. 149–150 (in particular note 12).

<sup>232</sup> Ramberg – Ramberg 2014, p. 138. See also Bernitz 2013, p. 64. In fact, if this express “affirmative reaction” was not required from the customer, it would not be accurate to refer to “click-wrap” terms in the first place.

<sup>233</sup> Bernitz 2013, p. 63 and Hedwall 2004, p. 42. See also KKO 1993:45 (in which standard terms were not incorporated as the counterparty had no opportunity to become acquainted with them) and NJA 2011:53 (in which standard terms were not incorporated as the counterparty had neither been informed of them nor had access to them). To the same effect, *Hemmo* writes that the party who wishes to incorporate standard terms into an agreement must expressly indicate this desire to the counterparty (Hemmo 2007, p. 151). In that case, the end result is the same: with the “expression of desire” the existence of standard terms comes to the counterparty’s knowledge.

counterparty must have had a *real opportunity to become acquainted* with the contents of the standard terms after they were brought to her attention (and before the conclusion of the agreement).<sup>234</sup> It is important to note, however, that this obligation only extends to the provision of an *opportunity*: the fact that the counterparty may not wish to *seize* that opportunity to become acquainted with the standard terms does not inhibit the incorporation of the standard terms.<sup>235</sup>

In this light, it seems that while contract law does, in principle, object to the unilateral imposition of standard terms upon a contracting party, it does not set the bar very high when it comes to justifying the incorporation of such terms. In practice, standard terms which are presented to the counterparty in a manner that provides the counterparty a real opportunity to become acquainted with those terms before the conclusion of agreement should, as a rule, become incorporated into the agreement.<sup>236</sup> Granted, this does mean that attempts to impose a EULA upon a player *after* the acquisition of the game product via shrink-wrap or other similar techniques may fail to achieve binding effect.<sup>237</sup> However, click-wrap terms which are made available to a player in connection with an online transaction – or, in the case of free-to-play games, prior to allowing a player to download the game

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<sup>234</sup> See e.g. Taxell 1972, p. 41, Hemmo 2007, pp. 155–156, and Wilhelmsson 2008, p. 71. *Taxell* proposes that the existence of a real opportunity to become acquainted with certain standard terms should be presumed if the terms have been made publicly available. Further, *Hemmo* concedes that it might be possible to disregard this requirement, if, given the circumstances the agreement is made in, it would be overly difficult to present the terms to the customer. See Hemmo 2007, p. 154 (citing KM 1990:20, pp. 332–333). With regard to consumer agreements, the necessity of this “real opportunity” is, however, required in order to reach compliance with the Unfair Consumer Contract Terms Directive. Namely, according to point (i) of the Annex to that Directive, it shall be considered unfair pursuant to Article 3 of the Directive to “irrevocably [bind] the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract.”

<sup>235</sup> Nurmi 1997, p. 130, Hemmo 2007, p. 156, and Wilhelmsson 2008, p. 69. It would, of course, be unrealistic to require that the counterparty de facto acquainted herself with the standard terms (Bernitz 2013, p. 65). However, it is important to note that even if the counterparty neglected to acquaint herself with the standard terms, she may later object to terms that are surprising and harsh (see section 4.2.3 *infra*).

<sup>236</sup> See *supra* at notes 234–235. See also Mononen 2001, p. 299.

<sup>237</sup> See HE 161/1990, under section 1.3.4, where it is surmised that shrink-wrap terms usually cannot bring about a binding agreement between a copyright holder and an end user. Similarly, see also SOU 1985:51, p. 102. *Välämäki* has argued that even standard terms which are introduced to the end user of a computer program *ex post* upon installation of the program should become binding upon the end user. In this respect, he refers to the *ProCD v. Zeidenberg* precedent from the United States, which, according to him, is de facto followed also outside of the United States. See *Välämäki* 2006, p. 153. Unlike *Välämäki*, I find it problematic to accept the validity of shrink-wrap and other such techniques, as that interpretation seems to directly contradict the Unfair Consumer Contract Terms Directive (see *supra* at note 234).

software – are likely to become binding upon the player. As disclosure prior to the conclusion of agreement is, in the context of consumer trade, a requirement for validity in all of the European Union pursuant to the Unfair Consumer Contract Terms Directive (93/13/EEC), it is presumable that in most instances developers (or distributors) will not fail to meet the standard for incorporation applied in the Finnish doctrine for standard form contracting.

However, some further issues may arise with respect to the language of a EULA. Many game developers prepare their EULA primarily in English, although sometimes other language variants are also provided.<sup>238</sup> In the context of consumer trade, this practice is always slightly suspect.<sup>239</sup> *Loos et al* report that consumers from European countries with not widely used languages often cite the use of foreign language as the cause for not understanding information they were presented with.<sup>240</sup> In fact, *Wilhelmsson* even bluntly states (in 2008) that standard terms drafted in a “foreign language” can “hardly” be considered binding on a consumer.<sup>241</sup> However, I believe it may be unnecessary to intervene in the language question at the incorporation stage. Systematically, it would appear more appropriate – especially in light of the preparatory works to the most recent amendment to the Consumer Protection Act (38/1978) – to accept the incorporation of foreign language terms and only subsequently (if need be) reject their effect based on unfairness *in casu*.<sup>242</sup> Ultimately, it is nonetheless clear that, as

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<sup>238</sup> Preparing alternative language versions of a EULA is obviously a costly business and makes the administration of the EULA significantly more difficult for the game developer. Thus, only large game developers are generally able to manage more than a handful of parallel language versions of the EULA.

<sup>239</sup> For example, it may be noted that EU Directives relating to consumer matters often require the use of *plain and intelligible language* in consumer agreements. Although it is expressly mentioned in recital 15 of the preamble to the Directive on Consumer Rights (2011/83/EU) that the Directive “should not” harmonize language requirements as such, it should be understood as a general rule that a consumer should have a real opportunity to understand what is said in the terms presented to her. In assessing this, the language of the terms in question can arguably have a role.

<sup>240</sup> *Loos et al* 2011, p. 58.

<sup>241</sup> *Wilhelmsson* 2008, p. 73. *Wilhelmsson* essentially argues that the “real opportunity” to become acquainted with the standard terms cannot materialize if the terms are in a foreign language.

<sup>242</sup> In the mentioned preparatory works, the Government argues that language requirements are liable to (negatively) affect cross-border trade, which is why their inclusion in national law is not deemed appropriate. It is further noted that the Consumer Ombudsman continues to have the power to intervene in unfair contractual practices based on Section 3:1 of the Consumer Protection Act if language-related issues were to arise. See HE 157/2013, p. 13.

a rule, terms drafted in Finnish are more likely to be enforceable against a Finnish consumer than terms drafted in a foreign language.

#### 4.2.3 On the Incorporation of Surprising and Harsh Terms

Should a EULA as a whole pass the test of incorporation, the incorporation of individual terms included in the EULA still needs to be separately tested. Namely, the incorporation of *individual standard terms* may be rejected pursuant to the doctrine on *surprising and harsh terms*.<sup>243</sup> Pursuant to that doctrine, the counterparty's *a priori* weak expression of intent to be bound by standard terms cannot be artificially extended to cover surprising and harsh terms, which the counterparty was unaware of.<sup>244</sup> Therefore, the incorporation of surprising and harsh terms is made subject to the fulfillment of an additional condition: for them to have a binding effect on the counterparty, she must be *specifically notified* of them.<sup>245</sup>

The systematic relationship between the doctrine on surprising and harsh terms and the adjustment of contractual terms requires some specification. Initially, it seems that both of these doctrinal constructions are targeted at similar kinds of contractual terms.<sup>246</sup> If, however, they both were to be applied in identical fashion, the doctrine on surprising and harsh terms would be left with no independent meaning (and would, thus, be made redundant). For this reason, it is understood that the obligation to specifically notify the counterparty of a term must arise in a larger number of instances than in which a claim for adjustment could succeed.<sup>247</sup> However, due to the somewhat different perspective of adjustment (its focus is not only on the harshness of a term *ex ante*), it is conceivable that a term may be

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<sup>243</sup> The name of the doctrine is rather curious because, as *Hemmo* points out, the element relating to the "surprising" nature of a standard term has almost no independent significance. If the mere fact that a term is (subjectively) surprising to the counterparty were to cause the invalidity of the term in question, a party's ability to gain advantages through negotiation would be severely impaired if not altogether removed. See Hemmo 2007, p. 163.

<sup>244</sup> Wilhelmsson 2008, p. 92. In this way, the doctrine on surprising and harsh terms serves to emphasize the goal of transparency in contractual relationship (Mononen 2001, p. 304).

<sup>245</sup> Wilhelmsson 2008, p. 92. See also Hemmo 2007, p. 162 and Bernitz 2013, p. 69.

<sup>246</sup> Consequently, *Hemmo* argues that the list of unfair terms annexed to the Unfair Consumer Contract Terms Directive may serve as a rough starting point for determining which kinds of terms could potentially be considered surprising and harsh. See Hemmo 2007, p. 164.

<sup>247</sup> *Ibid.*

adjusted even if it was not subject to a notification obligation under the doctrine on surprising and harsh terms.<sup>248</sup>

As a rule, then, a surprising and harsh term is unenforceable (it is not incorporated into an agreement), unless the counterparty is specifically notified of that term. The formulation of this rule warrants two further inquiries. First, it needs to be investigated what makes a term “surprising and harsh.” Second, the scope of the obligation of notice pertaining to surprising and harsh terms needs to be determined. – For convenience’s sake I will simply refer to “harsh terms” (instead of “surprising and harsh terms”) in the following presentation.

Let us start by considering what constitutes a “*harsh term*.” Fundamentally, the harsh terms doctrine is designed to protect the “normal expectations” of the counterparty.<sup>249</sup> As the perspective is, thus, tied to the persona of the counterparty, it is only natural that her (subjective) expertise is taken into consideration (*in casu*).<sup>250</sup> As a rule of thumb, it is proposed that the more a contractual term deviates from the (legitimate) normal expectations of the counterparty, the greater its “inherent potential” for harshness is. If, however, this rule is to be followed, it is further necessary to define what the (legitimate) normal expectations of the counterparty might be. In this regard, it is often argued that non-mandatory law in particular may serve as a useful starting point for determining a balance of rights and obligations that could serve as a basis for a person’s “normal expectations.”<sup>251</sup> In the absence of non-mandatory law, the general principles of contract law together with the established practices of the particular field of business could be deemed

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<sup>248</sup> Wilhelmsson 2008, p. 96.

<sup>249</sup> Tulokas 1987, p. 451.

<sup>250</sup> Hemmo 2007, p. 168. For example, it may be that the counterparty is familiar with the field of business in question and thus is assumed to have some knowledge of the contractual praxis of that field (Hemmo 2007, p. 165).

<sup>251</sup> See e.g. Hemmo 2007, p. 164, Wilhelmsson 2008, p. 94, and Bernitz 2013, p. 69. According to Hemmo, the issue is thus concretely embedded in the determination of acceptable limits to deviation from the balance *a priori* prescribed by non-mandatory law. This kind of reasoning seems to find some support in the recent case-law of the Finnish Supreme Court, in which the court undertook a comparison of a limitation of liability clause and the non-mandatory provisions of the Sale of Goods Act. See KKO 2014:61, at paras 18–19.

indicative of normal expectations.<sup>252</sup> Within the agreement itself, terms which are “unusual and materially one-sided” in comparison to the agreement as a whole and the general distribution of rights and obligations implemented in it may be considered contrary to normal expectations and, by extension, harsh.<sup>253</sup>

In addition, *Hemmo* has analyzed the issue from the opposite perspective by attempting to outline terms which typically should not be considered harsh. In this regard, he identifies two types of terms in particular: i) terms which merely specify the balance of rights and obligations prescribed by non-mandatory law and ii) terms of a technical nature. The common denominator for these types of terms is their inability to sway the contractual balance between the parties. Thus, their “distributive effect” on the agreement as a whole is rather insignificant.<sup>254</sup>

It is, of course, not entirely clear whether a term that sets out an assignment or license of copyright in game mods can be considered “harsh” in this manner. Generally, a player should be aware of the fact that a developer may require something of the player in exchange for access to a game. It is, however, less obvious that the player should “normally expect” that copyright in whatever she creates in the game or with related software (modding tools) are transferred or licensed to the developer.<sup>255</sup> It might also be considered “normal” to expect that the developer needs the rights to exploit in-game creations to the extent necessary to administer the game (manage servers, distribute game files, etc.), while the acquisition of copyright in excess of that might go beyond a reasonable conception of “normality.” Then again, the fact that players who are involved with modding may generally have a better awareness of the practices of the industry might justify another conclusion. Ultimately, however, it may be safest for a developer to elect to specifically draw a player’s attention to the intended distribution of rights in game mods.

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<sup>252</sup> Hemmo 2007, pp. 164–165.

<sup>253</sup> See KKO 1997:4.

<sup>254</sup> Hemmo 2007, p. 166.

<sup>255</sup> For example, as *Van Den Bulck* and *de Bellefroid* point out, it is contrary to the logic of the copyright system to assume that the creator of software should have a claim of ownership to creations made with the help of that software. See *Van Den Bulck – de Bellefroid* 2009, p. 262.

Secondly, it should be considered what would need to be done in order to fulfill the "*obligation of notice*" pertaining to harsh terms. As a starting point, it seems reasonable to suggest that the notice given to the counterparty is effective in the sense that it brings about a *real improvement* in the counterparty's awareness of the harsh term. At the same time, however, the obligation should not excessively complicate the contracting process.<sup>256</sup> *Hultmark* notes that the digital environment facilitates the use of many effective, interactive methods of notifying a counterparty of individual standard terms. For instance, attention could be drawn to harsh terms with the use of special colors, sound effects, or tick-boxes.<sup>257</sup> *Pawlo* even proposes the use of e-mail confirmation or a special quiz in which the counterparty would need to demonstrate her awareness of the implications of harsh terms.<sup>258</sup>

It may, however, be that e-mail confirmations, quizzes, and other similar measures would only deter or drive away customers and, consequently, interfere with the contracting process in a way that makes it unreasonable to require the use of such techniques. As a minimum requirement, it seems reasonable to require that notice of a harsh term is given *outside the EULA itself* – for example, with a separate tick-box next to which the implications of the term are concisely described. As players rarely read EULAs, this is, in fact, the only effective way to achieve a "real improvement" in their knowledge of specific terms.<sup>259</sup> Considering that an agreement might be expected to contain a very limited number of harsh terms (so as to not raise concerns regarding unfairness in general), it should not be overly

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<sup>256</sup> See Hemmo 2007, p. 169. Similarly, see Hultmark 1998, p. 86. *Hemmo* further argues that generally applicable guidelines on the use of typographical techniques cannot be given. In this light, one cannot, for example, reasonably assume (without considering the circumstances at hand) that the use of underlining, bold typeface, capitalization, or other highlighting techniques as such would fulfill the obligation of notice.

<sup>257</sup> Hultmark 1998, pp. 85–86. At the same time, *Hultmark* remarks that the use of interactive techniques is not "particularly common" on the internet.

<sup>258</sup> Pawlo 1999, p. 154.

<sup>259</sup> In this context, one cannot accept the argument that highlighting terms *should* have increased the counterparty's awareness, because the counterparty *should* have reviewed the terms. While it is true that standard terms can be incorporated into an agreement based on a real opportunity – which, it is implied, *should* have been taken – to review the terms, the harsh terms doctrine is intended to protect the counterparty against certain terms regardless of whether she should perhaps have noticed that term on her own.



cumbersome to require the counterparty's express acknowledgement with respect to each of those terms individually.

### 4.3 On the Material Limitations to Acquiring Copyright in Game Mods

#### 4.3.1 *Setting the Scene: The Adjustment of Unfair Contracts*

The rise of the "social theory of contract" has brought with it a certain acceptance of a (limited) degree of judiciary control over the *substance of agreements*. This marks a transition from a purely formal conception of validity to a *material conception of validity*, which rejects the binding effect of an agreement if the content of the agreement is patently *unfair*.<sup>260</sup> In written law, the manifestation of this theoretical shift is found in provisions concerning the *adjustment of contracts*, which, according to *Karhu* (previously *Pöyhönen*), essentially provides a means to reconsider an affirmative finding concerning an agreement's binding effect.<sup>261</sup> However, instead of focusing solely on formal requirements, substantive and even ethical considerations are addressed in the adjustment context.<sup>262</sup> In this sense, adjustment is closely related to the so-called "principles of fairness" (*kohtuusperiaate*) prevalent in contract law – a principle which is, in turn, associated with social values such as contractual balance, independence, and privacy.<sup>263</sup> The connection with ethical and social values guarantees that courts dealing with adjustment related claims enjoy substantial freedom in seeking a "fair result."<sup>264</sup>

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<sup>260</sup> See Hemmo 2003, p. 47. As *Hemmo* explains, an agreement is no longer considered valid solely on the grounds that all formal requirements were observed in entering into the agreement; instead, the enforceability of an agreement is – at least to some extent – also dependent on the acceptability of its content.

<sup>261</sup> Pöyhönen 2000, p. 100.

<sup>262</sup> Taxell 1984, p. 618, Mononen 2001, pp. 332–333, and Wilhelmsson 2008, p. 109. According to *Taxell*, the institution of adjustment provides a means for courts to take the "rules of social life" into consideration when ruling on contractual matters (Taxell 1979, p. 491).

<sup>263</sup> Wilhelmsson 2008, p. 209 *et seq.* – For the sake of completeness, it should perhaps be mentioned that *Karhu* (previously *Pöyhönen*) in fact associates the adjustment institution with not only the principle of fairness, but also the principles of freedom of contract, the interest of exchange (*vaihdannan intressi*), and compensating the weaker party (*heikomman hyvittäminen*). See Pöyhönen 1988, pp. 261–274.

<sup>264</sup> Similarly, see Wilhelmsson 2008, p. 114. Thus, courts de facto have the power to determine the scope of application of Section 36 of the Contracts Act (HE 247/1981, p. 12). Despite this indeterminateness, *Hemmo*

While the Copyright Act still subscribes to the idea of freedom of contract,<sup>265</sup> it specifically acknowledges that unfair terms relating to transfers of copyright may be adjusted. For this purpose, Section 29 of the Copyright Act points to Section 36 of the Contracts Act (228/1929), according to which a contractual term may be adjusted or set aside if it is *unfair* or its application would lead to an *unfair result*.<sup>266</sup> According to the preparatory works for the Copyright Act, the purpose of Section 29 is to protect the weaker party to a copyright transfer agreement against exploitative practices.<sup>267</sup> There is, however, practically no court practice concerning the adjustment of unfair terms in the copyright context.<sup>268</sup> It would be wishful thinking

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points out that the situations in which a contractual relationship is liable to be or become unfair (the “risk zone”) are reasonably foreseeable based on court practice and a reading of the preparatory works of the Contracts Act (Hemmo 2003, p. 53). To the same effect, see also Kaisto 2008, p. 65. According to *Pöyhönen*, it is, in fact, imperative for the realization of equality before the law that decisions relating to the adjustment of contracts are made based on more or less fixed legal criteria and are, consequently, sufficiently foreseeable (see Pöyhönen 1988, p. 2 with citations). Cf. with Taxell 1979, p. 492.

<sup>265</sup> See e.g. Harenko – Niiranen – Tarkela 2006, pp. 281–282, Rosén 2006, p. 80, and Oesch 2009, p. 521. See also OKM 2010:9, p. 33. Due to the non-assignable nature of moral rights following from Section 3.3 of the Copyright Act, it would, perhaps, be more accurate to state that freedom of contract is still the leading principle with respect to transfers of the *economic rights* afforded by copyright law. Similarly, see Stray Vyrje 1987, p. 294. Given the scope of this study (in which moral rights are not separately considered), it is, however, sufficient to state that freedom of contract is the definitive starting point for transfers of copyright.

<sup>266</sup> Currently, Section 29 of the Copyright Act is scheduled for an amendment. Prior to 1982, the Copyright Act in fact featured an adjustment provision of its own (concerning copyright transfers specifically). With the institution of the general adjustment provision into the Contracts Act (in 1982), Section 29 of the Copyright Act was amended so that it merely contains a reference to the Contracts Act. In a recent Government Bill (HE 181/2014), the Government has proposed a return to the old system, in which the Copyright Act would have its own adjustment provision. According to the Government, this amendment would have a positive effect on the current state of things, in which Section 36 of the Contracts Act is rarely used in copyright-related cases and authors generally feel distanced from the adjustment system (HE 181/2014, pp. 20 and 28). The Legal Affairs Committee of the Parliament was not convinced of the benefits of the proposed amendment, but did not oppose it either, as the amendment does not appear to de facto alter current legal doctrine in any meaningful way (LaVL 22/2014; see also HE 181/2014, p. 31). In its statement, the Education and Culture Committee reached a similar result, and the Government Bill was subsequently approved by the Parliament. As the amendment is, as far as Section 29 of the Copyright Act is concerned, expected to have no actual substantive effect on the assessment of unfairness, it is not discussed in more detail here.

<sup>267</sup> KM 1953:5, p. 65. In this context, the “weaker party” is often synonymous of the author, although this is not necessarily the case in every situation. See e.g. HE 181/2014, p. 8, Haarmann 2005, pp. 304–305, and Harenko – Niiranen – Tarkela, pp. 288–289. As is often pointed out, the assumption that the author is the “weak party” needs to be supported by the facts at hand. The author is not always the weaker party, particularly in situations where an agreement is made between two companies. However, the presumption that authors are generally in a weak position is often valid. In Swedish literature, *Nordell* even goes so far as to draw a direct parallel between authors and consumers with respect to the strength of their position in contractual relationships (Nordell 2008, p. 310).

<sup>268</sup> In 2005, *Haarmann* noted that there are no precedents on the application of Section 29 of the Copyright Act (Haarmann 2005, p. 298). In a more recent Government Bill, it was reported that Section 36 of the Contracts Act has, as far as transfers of copyright are concerned, been applied in a total of three court decisions, once by a District Court and twice by the Market Court (HE 181/2014, p. 20). The available court practice is, therefore, both scant and only comes from courts of first instance. Despite the lack of case-law, it is imaginable that the mere

to assume that this is the case because unfair terms are not used when transferring copyright. In reality, other reasons are likely to inhibit parties from seeking judicial intervention. For instance, one could argue that the very same reasons which allow a party to impose unfair terms on another prevent that other party from correcting those terms in court.<sup>269</sup> Nonetheless, the lack of court practice has the practical effect of forcing an analysis regarding the fairness of copyright transfers to mainly rely on general doctrine relating to the application of Section 36 of the Contracts Act.

#### 4.3.2 Defining “Unfairness” in the Context of Adjustment

The absolute prerequisite for adjusting a contract is a finding of “unfairness.” The wording of Section 36 of the Contracts Act recognizes two types of unfairness: unfairness in the substance of a contract (*ex ante*) and unfairness that results from the application of the contract (*ex post*).<sup>270</sup> The provision specifically mentions four factors which must be taken into consideration when assessing unfairness. Those factors are i) the agreement in its entirety, ii) the position of each party, iii) the circumstances in which the agreement was concluded, and iv) subsequent circumstances pertaining to the agreement. The list is, however, not exhaustive, which is why a finding of unfairness always needs to be justified based on an overall assessment in which all relevant factors are considered.<sup>271</sup>

In legal literature, factors which may influence an assessment of unfairness are systematized into internal and external factors based on their relation to the agreement. Thus, while *internal factors* relate to the actual substance of the agreement, *external factors* pertain to the relative positions of the parties as well as

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existence of the possibility that unfair terms be adjusted has a deterring effect (“under the hood”) on the most outrageous contractual practices (Bernitz 2009, p. 358).

<sup>269</sup> See Aurejärvi 1979, p. 744.

<sup>270</sup> See HE 247/1981, p. 12 and Hemmo 2003, pp. 54–56.

<sup>271</sup> HE 247/1981, p. 17. For clarity, it may be noted that adjustment does not require any guilt (*culpa*) on the party “responsible” for introducing unfair elements into an agreement, and thus that party’s culpability is not a relevant factor in the overall scheme of things (Taxell 1984, p. 617).

the circumstances and general context of the agreement.<sup>272</sup> From a dogmatic perspective, a contractual relationship may be considered “unfair” where the substance of the agreement indicates a need for adjustment (*internal factor*), and that unfairness in substance is presumably caused by *external factors* which are generally deemed to skew the contractual relationship.<sup>273</sup> In this light, neither the substance of an agreement nor its context is, as such, capable of justifying intervention into that agreement by means of adjustment.<sup>274</sup>

In the context of this study, the necessity of having both internal and external factors point towards unfairness in order to justify intervention via adjustment means that both types of factors need to be separately considered. Thus, the following two subsections are devoted to just that: the first of the subsections (section 4.3.3) discusses unfairness in substance, after which the external indicators of unfairness are briefly addressed (section 4.3.4). As far as unfairness in substance is concerned, it is essential to note that this study only considers the substance of a player-to-developer copyright transfer. In practice, a EULA may, of course, also contain other terms, which are liable to raise suspicions with respect to their fairness. As the external factors influencing a EULA are more general and affect all terms equally, there is, in that context, no need to address copyright transfer clauses independently of the other provisions usually found in EULAs.

#### 4.3.3 *Is a Player-to-Developer Copyright Transfer Unfair in Substance?*

The substance of an agreement is indicative of a need for adjustment in two situations. Firstly, the need for adjustment may be caused by an imbalance in the

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<sup>272</sup> For a general overview, see e.g. Aurejärvi 1979, p. 731 *et seq*, Pöyhönen 1988, pp. 286–295, and Hemmo 2003, pp. 57–58. The divide into internal and external factors originates in the text of the law, which refers to the contents of the legal act, on the one hand, and to the position of each party as well as the circumstances at large on the other.

<sup>273</sup> Hemmo 2003, pp. 57–58, Pöyhönen 1988, p. 291, and Aurejärvi 1979, pp. 736–737.

<sup>274</sup> To this effect, see e.g. Aurejärvi 1979, pp. 736–737, where the author states that even particularly harsh terms should, in principle, be considered fair and binding upon the parties, if those terms were arrived at between equals and under normal circumstances. A degree of interconnection may, however, exist between the two types of factors. For example, *Karhu* (previously *Pöyhönen*) contends that a particularly pronounced imbalance in the parties' performances usually implies the influence of external factors in the formulation of the agreement (Pöyhönen 1988, p. 292). *Mononen*, in turn, argues that the degree of contractual imbalance is, in fact, inversely proportional to the need for other arguments in favor of adjustment (Mononen 2001, p. 326).

rights and obligations allocated to each party under the agreement. Secondly, adjustment may be warranted due to the use of contractual terms which are considered unfair as such (*tyyppikohtuuttomuus*).<sup>275</sup> If a contractual term is unfair “as such,” its inclusion in agreements of a particular type is always considered unfair.<sup>276</sup> As there definitely are understandable and legitimate reasons (for instance, a need to make server copies or distribute files to other players) for why a developer would require players to grant (at least some) rights in game mods to it, I find it challenging to construe such assignment or license clauses unfair “as such” for the particular type of agreement. Therefore, unfairness “as such” is not considered in more detail in this context.

In practice, contractual imbalance is the primary indicator of a need for adjustment with respect to the substance of an agreement.<sup>277</sup> Due to the fact that minor imbalances must usually be tolerated by a contracting party, an imbalance only serves to indicate a need for adjustment if it reaches the state of being “significant.”<sup>278</sup> The balance of an agreement needs to be evaluated in light of an objective benchmark, which takes into account such things as the value of each

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<sup>275</sup> The blanket rejection of terms which are deemed unfair “as such” is a particularly interventionist feature of contract law, as it essentially limits private autonomy by directing a kind of “moral criticism” at the party who chose to include such a term into a contract (Hemmo 2003, p. 55). In the case of terms which are unfair as such, it might, however, be reasonable to conclude that those terms are, in fact, simply invalid, in which case adjustment of contract pursuant to Section 36 of the Contracts Act is not the appropriate *modus operandi*. See Kaisto 2008, p. 66. For instance, *Pöyhönen* appears to consider terms that may be considered unfair as such *invalid* instead of merely unfair (Pöyhönen 1988, pp. 361 and 364). Alternatively, *Kaisto* proposes that unfairness as such could be deemed to have effect *ex lege*, in which case the “adjustment” of such a term by a court would, instead of actively changing the material constitution of the particular agreement, merely “affirm” the valid construction of the agreement between the relevant parties (Kaisto 2008, p 67).

<sup>276</sup> See HE 247/1981, p. 12, where it is suggested that courts should indicate, whether a term or its application should be considered “generally unfair” in a particular type of agreement.

<sup>277</sup> See Hemmo 2003, pp. 58–64, Mononen 2001, p. 325, and Pöyhönen 1988, pp. 286–291. According to *Karhu* (previously *Pöyhönen*), contractual imbalance a factor of special nature in that it is not only a fact of circumstance weighing in favor of adjustment (*indicium of adjustment*) but also a sine qua non for adjustment (Pöyhönen 1988, pp. 287–288).

<sup>278</sup> Hemmo 2003, p. 58. In the context of consumer agreements, the requirement that the imbalance be “significant” is further supported by Article 3(1) of the Unfair Consumer Contract Terms Directive, which also refers to a “significant imbalance in the parties’ rights and obligations arising under [a] contract.”

party's performances under the agreement, the provisions of non-mandatory law, and the established praxis of the particular field of business.<sup>279</sup>

To acquire a rudimentary understanding of what the usual balance of rights and obligations in a EULA is like, it may be useful to consider which types of terms a EULA usually sets out. First and foremost, the purpose of a EULA is to grant the "end user" (the player) access to a game product or service (through what is, at least nominally, a license). Thus, a EULA needs to contain a grant of license from the developer to the player. In addition to that, it is typical for a EULA to impose a number of obligations on the player – relating, for example, to the use of the game product or the player's in-game conduct. Further, it is customary that a developer augments its EULA with a number of warranties, representations, and (usually) limitations of liability to the benefit of the developer, followed by an assortment of the usual "boilerplate" terms.<sup>280</sup>

In this light, the purpose of a EULA is to set out the terms of use concerning a game product or service between a developer and a player. Based on this conclusion, it could, firstly, be considered whether a player-to-developer assignment or license clause which *extends beyond* what is *necessary* in order to facilitate the use of the game could be liable to create an imbalance in the player–developer relationship. In this regard, a relevant "extension" can take place in one of two dimensions: either the type of transfer chosen is excessive for the purpose (*depth of transfer*) or the clause is formulated so as to apply to an excessively broad range of creations (*breadth of transfer*).

With respect to the "depth of transfer," it seems reasonable to suggest that, as a rule, demanding a non-exclusive license to make use of game mods is less likely to affect the balance of a EULA than effectuating an assignment of copyright. After all, a developer often has a legitimate reason to ask for a non-exclusive license to game

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<sup>279</sup> See Tolonen 2003, p. 137 and Hemmo 2003, p. 58. That the imbalance needs to be "objective" naturally implies that the parties' subjective conceptions of balance are not taken into consideration. As we may note, the benchmarks for "unfairness" are very similar to those used to identify "harsh" terms (see *supra* at notes 252–253).

<sup>280</sup> For examples of these terms, please refer to the EULAs cited *supra* at notes 210–212.

mods. It may, for example, need the license in order to store the content on the game servers and for making it available to other players from that server. By contrast, it is less obvious that an assignment clause is necessary (and, by extension, fair) in the context of a EULA. An assignment of copyright marks the greatest deviation from what would otherwise follow from the Copyright Act: it effectively overrides the principle according to which an author is rewarded for her creative labor with the grant of copyright to the fruits of that labor.<sup>281</sup> True enough, an author is, following the principle of freedom of contract, entitled to dispose of her copyright as she likes. However, the realization of freedom of contract in the context of a EULA is de facto rather questionable in the first place inter alia due to the reliance on unilaterally prepared standard terms. In those circumstances, it seems entirely reasonable to recognize that an assignment clause constitutes a more significant obligation than a non-exclusive license.

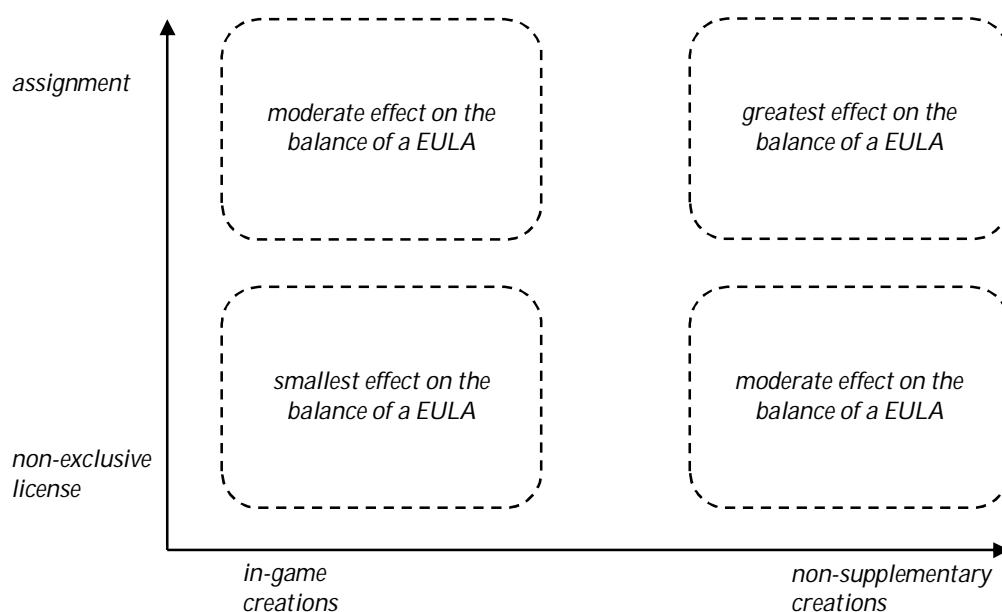
Similarly, it could, relating to the “breadth of transfer,” be argued that appropriating rights from players is inherently more “fair” where the object of those rights (the game mod) is closely connected with the game itself. Thus, a clause which applies only to creations which are most naturally exploited in-game (such as avatars or mods that rework the aesthetic characteristics of the original game) should represent a less cumbersome obligation on the player than one that extends to game mods which are created with the game software (including modding tools) but are not merely supplementary to the original game (for example, “gamics” or “machinima”). Namely, the first mentioned are more easily construed as counter-performance to the grant of access to the game product and related software tools.

To be able to cause a “significant imbalance” in the player–developer relationship, an “overextension” of the assignment or license clause would probably need to take

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<sup>281</sup> The grant of copyright is, of course, an effect prescribed by mandatory law. In this regard, it can be noted that, in addition to non-mandatory provisions of law, mandatory law can be used as a secondary source of reference when assessing unfairness. In particular, mandatory law may be the appropriate point of reference when a contract seeks to bypass the solution prescribed by it (HE 247/1981, p. 13). General principles of law may have a similar function (Wilhelmsson 2008, p. 152). The idea is to prevent the legislator’s policy decision from being ignored entirely (see HE 247/1981, pp. 13–14). *Wilhelmsson* also argues that a company should not be allowed create its own “legal order” by implementing standard terms which put the company in a more favorable position than what is prescribed by non-mandatory law (Wilhelmsson 2008, pp. 104–105).

place in both dimensions (depth and breadth). This is illustrated in the figure below.



As an alternative to resorting to adjustment of contract, it could, in theory, be plausible to achieve a similar result simply by applying the principles of interpretation established in copyright law. The most notable of those principles is the “rule of narrow interpretation” (*suppean tulkinnan periaate*), according to which a transfer of copyright should be construed narrowly so as to cover only such rights as are clearly enumerated in the agreement (while the transferor retains all other rights).<sup>282</sup> However, applying such principles may not be very effective with regard to standard terms. In particular, this is a result of the fact that standard terms are typically drafted meticulously so as to be as articulate as possible. As a result, the rights sought by the developer are clearly listed in the relevant clause, leaving little room for constrictive interpretation. In theory, a

<sup>282</sup> See e.g. KM 1953:5, p. 63 and Olsson 2009, p. 216. *Oesch* describes the rule of narrow interpretation (to the benefit of the licensor) as one of the key principles relating to transfers of intellectual property in general (see *Oesch* 2004, p. 925). The rule has also been reaffirmed in court practice several times (see e.g. KKO 2005:92 and KKO 1984 II 26). Nonetheless, a number of commentators have questioned the role of the narrow interpretation rule as a leading principle in copyright law (and, more broadly, in intellectual property law). For example, *Sund-Norrgård* has argued that instead of focusing on protecting the licensor, licensing agreements should be interpreted based on an overall assessment of the interests of both parties and the circumstances at hand (*Sund-Norrgård* 2012, p. 300). It could, however, be argued that the “rule of narrow interpretation” would – regardless of copyright doctrine – apply as a result of general principles of contract interpretation (by analogy, see *SOU* 1956:25, p. 277 and *Nordell* 2008, p. 316).



better result might be attained with the “rule of purpose-bound interpretation” (*ändamålsprincipen*), which stipulates that a transfer should include only the rights which are necessary in order to fulfill the purpose of the agreement at hand. In the case of a EULA, these rights might include only those that are necessary for the purpose of managing the game service. This rule has, however, not gained much ground in the Nordic copyright systems.<sup>283</sup>

From another angle, the fairness of a copyright transfer clause could be construed in light of the *value* of the performances of the developer and the player respectively. One issue with a copyright transfer clause included in a EULA is that a player must agree to it at the time of purchase of a computer game. At that point in time, it is practically impossible to assess the implications of the clause, as the player is de facto committing to grant rights to the developer in respect of *any future creations* fitting the description provided in the EULA.<sup>284</sup> As such, the fact that copyright to a work not yet created is transferred is unproblematic. In fact, it is widely recognized that such transfers are *a priori* valid.<sup>285</sup> By contrast, an agreement by which an author assigns the right to *all* of her future works is considered quite suspect due to its ambiguity and unforeseeable nature. Thus, the latter types of transfer agreements are often mentioned as “textbook examples” of cases where the adjustment provision of the Copyright Act might apply.<sup>286</sup> Generally, clauses of the type found in EULAs are situated somewhere between these extremes: they may

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<sup>283</sup> See Nordell 2008, pp. 311 and 329. Despite the fact that the principle has not received much attention in the Nordic copyright systems, *Nordell* argues that it should be equally applicable as the rule of narrow interpretation (p. 330).

<sup>284</sup> For instance, it is estimated that the development of a M3 mod takes around three years of “continuous laborious effort” (Arakji – Lang 2007, p. 16). In that case, then, the player would have to see at least three years into the future to be able to weigh the importance of the copyright assignment or grant of license.

<sup>285</sup> See e.g. Kivimäki 1948, p. 262 and Haarmann 2005, p. 297.

<sup>286</sup> See Haarmann 2005, pp. 297–298. See also Weincke 1976, pp. 104–105, where the author notes that situations where an author was, under economic duress, forced to transfer all of her future rights to a company sometimes cropped up “in the past” and that such agreements could now be set aside based on the Danish version of the adjustment institution.

cover all future copyrights, but only for such works that fit the definition provided in the EULA.<sup>287</sup>

In Swedish literature, *Olsson* suggests that a need to adjust the terms of copyright transfer may arise, for example, when the author received negligible remuneration in exchange for the transfer of copyright and the work in question (against expectations) “becomes a success” later on.<sup>288</sup> In those circumstances, a need for adjustment could arise out of that change in circumstances, even if the transfer clause was considered fair *ex ante*.<sup>289</sup> In fact, the preparatory works for the Finnish Copyright Act specifically mention that transfers of copyright, which typically have a long term of validity, are susceptible to becoming unfair as a result of a change in circumstances.<sup>290</sup>

A situation of that kind could arise under the EULA, if a game mod, which the game developer seeks to appropriate against no particular remuneration, turns out to be commercially viable. In those circumstances, it might be considered unfair to allow the developer to gain exclusive rights in the game mod by enforcing a EULA, as that would allow it to, figuratively speaking, reap what the player has sown.<sup>291</sup> In this regard, it is, however, imperative to distinguish the value of the *copyrighted creations* created by a modder from the value of the game mod *as such*. Namely, the commercial value of a game mod (in particular, a total conversion mod) may depend on the ingenuity of its *concept*, which, as an idea (as opposed to an

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<sup>287</sup> Presumably, not even the broadest transfer clauses included in computer game EULAs attempt to claim copyright in works that are created without any kind of connection to the developer’s game product. Thus, while the terms of transfer provided in a EULA may be broad, they are always de facto limited in some way.

<sup>288</sup> *Olsson* 2009, p. 225. Similarly, see SOU 2010:24, pp. 113–114. The situation *Olsson* describes closely resembles one in which the German “bestseller rule” would apply. According to the bestseller rule, an author has the right to make an additional demand reasonable remuneration for the use of her work, if the amount of remuneration which was originally agreed upon between the parties is manifestly disproportional to the realized profits to the other party accrued based on the agreed use of the work (OKM 2010:9, p. 36).

<sup>289</sup> With regard to the relevance of a change in circumstances as a cause for unfairness, see Hemmo 2003, pp. 73–74 and Wilhelmsson 2008, p. 137. See also Pöyhönen 1988, p. 306 *et seq.*

<sup>290</sup> KM 1953:5, p. 65. Although the Committee referred to technological changes in particular, it is hard to see why the same logic would not apply to changes in other circumstances relating to a copyright transfer.

<sup>291</sup> This argument against “unfair enrichment” is, of course, more characteristic of Anglo-American copyright systems (see e.g. Stokes 2014, p. 6). As a value-based argument, it may, however, have some relevance even in the Finnish system for adjustment of contracts. See Wilhelmsson 2008, p. 210.

expression), is not protected by copyright. The “unfair” appropriation of ideas is naturally not something that can be interfered with pursuant to Section 29 of the Copyright Act. Nonetheless, it is not unimaginable that the player’s creations could, in themselves, represent (or come to represent) such value that applying an against-no-remuneration transfer clause could render the player–developer relationship “significantly imbalanced.”<sup>292</sup> However, this conclusion is probably justified only where the effect of the transfer clause turns out to be radically different from what is normally to be expected.<sup>293</sup>

As a counterargument, it could also be argued that – assuming that the terms of the EULA were appropriately brought to her attention – the player must have been aware of the “unfair” transfer clause and, therefore, took a *conscious risk* in choosing to agree to the EULA regardless. This line of argumentation emphasizes that contract adjustment should not serve as a “satisfaction guarantee,” through which a party can conveniently “undo” the negative outcomes resulting from normal risk-taking.<sup>294</sup> In other words, it highlights the binding nature of agreements (*pacta sunt servanda*). It is, however, clear that in an agreement between non-equals, the weaker party cannot always be forced to endure the negative effects of future events, which can be difficult to predict at the time of

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<sup>292</sup> To achieve this result, it would, however, likely be necessary to consider the *cumulative value* of a player’s potentially numerous protected creations instead of the change in value of a single work (which is probably what *Olsson* envisioned). This is a consequence of the fragmented manner in which computer games are protected, which calls for a focus on the *individual assets* that comprise a game mod (as independent works) instead of the audiovisual output of the game mod as a whole (as would be the case e.g. in the United States). Thus, it is, in theory, warranted to speak of the (copyright-related) value of a game mod only as a sum of the values (hypothetically) represented by the copyrighted assets it contains.

<sup>293</sup> This requirement derives from the general contract law doctrine on the effect of a change in circumstances on a previously concluded agreement. As *Hemmo* explains, a change in circumstance needs to have a substantial effect on the agreement in order to warrant its adjustment (Hemmo 2003, pp. 74–75). Cf. with KKO 1999:42, where the Supreme Court found cause to adjust an agreement where its implications had become “evidently deviated” (*ilmeisesti poikkeava*) from what was originally intended.

<sup>294</sup> In legal literature, *Sevón* has explored the implications of a party’s knowledge about the unfairness of a term as regards a (subsequent) claim of adjustment. He concludes that a party’s knowledge of the unfairness of a term may not preclude her from making a claim of adjustment at a later stage, if the effects of the term were not easily foreseeable or they were affected by later events. On the other hand, *Sevón* argues that adjustment as a legal institute cannot be used as a way to “undo” the negative effects caused by a risk that was consciously taken at the time of conclusion of an agreement. See *Sevón* 1985, pp. 164–170. See also *Hemmo* 2003, p. 75 and *Wilhelmsson* 2008, p. 138.

conclusion of the agreement.<sup>295</sup> Nonetheless, the “risk-taking” aspect may serve to further underline the point that adjustment should be an exceptional measure relied on only in the most glaringly unfair situations.

#### 4.3.4 External Factors Influencing the Unfairness of a EULA

The list of external factors which have the potential to skew a contractual relationship towards an unfair result is significantly lengthy, which is why it is not practical to even attempt to cover them all here. Instead, it is deemed sufficient to mention a number of the most relevant ones. For example, *Hemmo* emphasizes the significance of expertise, actual freedom of contract, and economic position.<sup>296</sup> Moreover, the use of standard terms in general may indicate that unfairness has the potential to manifest in a contractual relationship.<sup>297</sup> Overall, it is clear that all of these “external factors” gravitate around what may be understood as *bargaining power*. If there is a significant disparity in bargaining power between contracting parties, that disparity is often liable to explain any unfairness in the substance of an agreement concluded in those circumstances.

Considering the player–developer relationship in this light, it is, in fact, quite evident that the *potential for unfairness* is present in the circumstances pertaining to a EULA. This results from, at least, the following considerations:

- 1) the terms of a EULA are unilaterally drafted by the developer (*use of standard terms*);
- 2) as a company or other legal entity, a developer is typically in a better economic position than a player, who is a private person (*disparity in economic position*); and

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<sup>295</sup> Similarly, see Hemmo 2003, pp. 59–60. In more general terms, the adjustment doctrine is founded on the idea that the parties to an agreement cannot always be expected to act exactly as laid out in the terms of that agreement (HE 247/1981, p. 18).

<sup>296</sup> Hemmo 2003, pp. 64–71. The preparatory works for the Contracts Act also state that the knowledge, skills, and economic situation of each party must always be taken into consideration (HE 147/1981, p. 14). The idea behind this requirement is that the “weakness” of a contracting party has the inherent potential to induce an unfair result (Mononen 2001, p. 335).

<sup>297</sup> HE 247/1981, p. 16. See also Aurejärvi 1979, pp. 732–735 and Pöyhönen 1988, p. 298.

- 3) as a professional actor operating in the particular field of business (the gaming industry), it seems reasonable to expect the developer to have an advantage over a player when it comes to expertise (*disparity in expertise*).

At least in theory, these presumptions can, of course, be disproved *in casu*. Perhaps the most disputable of the three is the last one. It might, for example, be noted that the *Davidson* court in the United States gave notable weight to the “professional expertise” of modders.<sup>298</sup> Considering that modders do generally represent the more knowledgeable of players, similar reasoning could perhaps be applicable in other cases as well. Nonetheless, it is evident that the circumstances pertaining to a EULA do allow for a finding of unfairness, if a significant imbalance in substance is first detected.

#### 4.4 Summary and Conclusions: Incorporation and Unfairness

Typically, the standard terms associated with a computer game (the EULA) state that a player must license (on an exclusive or non-exclusive basis) or assign to the game developer copyright in any contributions to the game.<sup>299</sup> The validity of a practice in which copyright in game mods is acquired through a EULA may be examined from both a formal and a material perspective. Each viewpoint sets out its own distinctive requirements, which must be met in order to accomplish an enforceable transfer of copyright by such means.

From the *formal perspective*, the doctrine on standard form contracts comes into play. The effect of that doctrine pertains to the *incorporation* of standard terms, either at large or individually. Generally, standard terms become binding upon the counterparty, provided that she was provided a “real opportunity” to become acquainted with those terms prior to the conclusion of agreement.<sup>300</sup> Even so, however, the incorporation of individual clauses included in standard terms can be rejected based on the doctrine on surprising and harsh terms. Such terms only come

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<sup>298</sup> See *supra* at note 203.

<sup>299</sup> For examples of such EULA terms, see *supra* at notes 210–212.

<sup>300</sup> See generally section 4.2.2 *supra*.

to have binding effect on the counterparty, if she is specifically notified of the surprising and harsh term(s) in a manner which is liable to increase her actual awareness of them.<sup>301</sup>

Secondly, the validity of a transfer of copyright set out in a EULA may be examined from a *material perspective*. In this sense, the pivotal provision of law is Section 36 of the Contracts Act, which confers to courts the power to adjust contractual terms which are unfair or which, if enforced, would lead to an unfair result.<sup>302</sup> A finding of “unfairness” is always based on an overall assessment of the facts at hand. In legal literature, it is proposed that unfairness always needs to arise from a combination of internal and external factors which support that conclusion.<sup>303</sup> The circumstances pertaining to a EULA (the external factor) are typically such that they lend support to a finding of unfairness. This results from the fact that a EULA constitutes unilaterally drafted standard terms and from the disparity in expertise and economic position that, as a rule, characterizes the player–developer relationship.<sup>304</sup> Consequently, the adjustment of a transfer of copyright set out in a EULA is, above all, conditional on the detection of a “significant imbalance” between the rights and obligations of the respective parties. I have proposed that the impact of a player-to-developer copyright transfer clause could, in particular, be assessed based on the type of transfer it represents (non-exclusive or exclusive license or assignment) and the breadth of creations it captures as well as the value represented by the works to which the developer thus gains rights. For this purpose, the copyrighted elements of a game mod need to be clearly distinguished from its “idea,” which may represent much of its value or attractiveness.

Further, the formal and material sides of validity are distinguished not only by the fact that they impose distinct requirements on contracting practices, but also with respect to the effect that follows from a failure to meet those requirements. Namely,

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<sup>301</sup> See generally section 4.2.3 *supra*.

<sup>302</sup> See section 4.3.1 *supra*.

<sup>303</sup> See section 4.3.2 *supra*.

<sup>304</sup> See section 4.3.4 *supra*.

if standard terms fail to become incorporated into an agreement, they cannot be invoked against the counterparty (they do not bind her).<sup>305</sup> Thus, incorporation functions like a two-way switch: either a standard term becomes binding or it does not. By contrast, the effect of adjustment is more nuanced. A court may, mathematically speaking, “adjust” a term to any extent between zero and a hundred percent.<sup>306</sup> In fact, the court’s power is not even limited exclusively to such terms as are perceived “unfair:” it may also amend the agreement at large in order to achieve a balance which, overall, is considered “fair” in the circumstances.<sup>307</sup> What this means in practice is that the outcome of adjustment is hard to predict accurately.

The distinction between formal and material aspects of validity may have other implications as well. For example, it may affect the ability of a developer to invoke the existence of an *implied license* to use player-made game mods. As is well known, the idea of an implied license is that an author’s consent for the use of her work (on a non-exclusive basis) may, at times, be assumed based on objective circumstances – particularly in the “opt-out” online environment.<sup>308</sup> It might be

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<sup>305</sup> However, even non-incorporated standard terms can have an effect on a contractual relationship. Namely, the counterparty may, for her part, sometimes invoke non-incorporated standard terms to her advantage. See e.g. Taxell 1972, p. 45 and Wilhelmsson 2008, p. 68.

<sup>306</sup> See Aho 1982, pp. 528–529 and Pöyhönen 1988, p. 356. To be precise, the applicable scale must be understood to include values greater than zero, up to and including 100. If a term is “adjusted by 100 percent,” it is, in effect, set aside; on the other hand, if the degree of adjustment is less than 100 percent, one can speak of adjustment *sensu stricto*.

<sup>307</sup> This does not, however, apply to consumer agreements, which contain unfair terms that are *contrary to the requirement of good faith*. The reason for the rather complicated formulation of this rule lies in the details surrounding the national implementation of the Unfair Consumer Contract Terms Directive. The requirement that the agreement must continue to bind the parties derives from that Directive (see Article 6(1) in conjunction with Article 3(1)). The rule embodied in Section 4:2.3 of the Consumer Protection Act was artificially limited to situations where “good faith” is violated due to a certain disparity between definitions: in the Directive, an unfair term is, by definition, “contrary to the requirement of good faith,” while in national doctrine a clash with “good faith” is not considered a prerequisite for “unfairness” (see HE 218/1994, p. 8). That the agreement otherwise remains in force is understood as a type of “sanction” against the trader (HE 218/1994, p. 16). – Needless to say, it is mostly up to the court to decide what exactly is “required by good faith.” In the preparatory works of the Consumer Protection Act, it was proposed that drafting terms in a way that makes it difficult for the consumer to identify harsh terms should be considered contrary to good faith (HE 218/1994, p. 16).

<sup>308</sup> Lindberg – Westman 2001, p. 285. See also Pihlajarinne 2012a, p. 222 *et seq.* Generally on the development of the implied license doctrine in the United States, see Fischman Afori 2009, pp. 279–287 and Sieman 2007, pp. 898–906. On the internet as an “opt-out” environment and the conflict this entails with regard to copyright, see Sieman 2007, pp. 889–893. This kind of license cannot be construed to cover anything other than “transparent” and/or “reasonable” methods of use. See Hetcher 2008, p. 866 and Pihlajarinne 2013, pp. 700–701. To avoid making the “implied license” a de facto presumption through expansive interpretation, one must exercise caution in its application (to this effect, see Klein 2008, p. 480 and Pihlajarinne 2012a, p. 238). *Seshadri* further notes that it may be appropriate to construe the boundaries of an implied license in terms of technological (architectural) limitations, not legal rights (Seshadri 2007, section V.a).

that, despite a failure to incorporate an assignment or license of copyright through a EULA, a developer could argue that, by simply using the game service, a player de facto grants the developer an implied license to exploit her contributions at least for common purposes (server copies, making content available to other players, etc.). By contrast, it would be remarkably odd invoke an implied license in order to argue for the (partial) “revival” of a transfer of copyright that was specifically adjusted due to its unfairness.

In this light, it could be argued that the rules associated with standard form contracting and the abstract supervision of the material aspects of a copyright transfer represented by the adjustment institution impose a number of limitations on the practice of appropriating rights in player-made game mods through a EULA. It is, however, questionable whether they can effectively prevent or combat exploitative practices, which have the potential to arise in an inherently lopsided contractual relationship such as that between a player and a developer. For instance, *Guibault* has argued that there is a “growing tendency” to accept the validity of click-wrap licenses under European contract law.<sup>309</sup> While this tendency cannot be reliably confirmed in Finland due to the scarcity of relevant court practice, it is likely that Finnish courts would *prima facie* accept provided to the fulfillment of the minimum requirements discussed above.<sup>310</sup> On the other hand, courts have generally been very reserved or unwilling to adjust the terms of a copyright transfer, as witnessed by the fact that the number of decisions in which a claim for adjustment has de facto succeeded is almost nonexistent.<sup>311</sup> Considering these two trends, it is reasonable to presume that courts would, except in very exceptional circumstances, be disinclined to reject the validity of a transfer of copyright set out in a EULA.

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<sup>309</sup> See *Guibault* 2006, p. 97. It may, however, be that the tendency reported by *Guibault* has, since 2006, thwarted to some extent. For example, *Rustad* and *Onufrio* argue that U.S. style, one-sided terms of use “will increasingly be under scrutiny in European Union [- -] countries and other nations with radically different legal traditions” (see *Rustad – Onufrio* 2012, p. 1085).

<sup>310</sup> See *supra* at notes 300–301.

<sup>311</sup> In a recent Government Bill, it was reported that Section 36 of the Contracts Act has, as far as transfers of copyright are concerned, been applied in a total of three court decisions, once by a District Court and twice by the Market Court (HE 181/2014, p. 20). All of the available court practice thus comes from courts of first instance.



Further, it is likely that procedural impediments de facto inhibit players from challenging the validity of a EULA. As a practical matter, it is never particularly convenient for a private person to bring an action against a large corporation (and the gaming industry is stacked with those). In particular, the issue of time and cost may prohibit player-creators from seeking legal redress against unfair EULA terms.<sup>312</sup> Naturally, the option of bringing claim before a court is made even less attractive by established court practice, which seems to forecast a low likelihood of success. The negligible likelihood of court intervention may also encourage developers to adopt stricter copyright transfer terms than they otherwise would, since there appears to be no real downside to doing so.

At the same time, it is likely that some of the situations which could otherwise have the highest likelihood of creating an unfair result are dealt with by means other than a generic EULA. It was mentioned previously in this study that developers often take advantage of the products of their modding community by cherry-picking the best mods with the idea to appropriate those mods entirely and, consequently, perhaps refine the mod into a stand-alone game release.<sup>313</sup> In that connection, it is not uncommon for a developer to recruit the players who worked on that particular mod into actual employment.<sup>314</sup> It is probable that at least in those cases, where the economic interest is also the greatest for both parties, copyright transfers are executed in a way that is more tailored to the circumstances.

Overall, it thus seems that, in practice, developers enjoy rather substantial freedom in demanding licenses or assignments of copyright in game mods from players through their EULA, as long as certain formalities are observed and material extremities avoided. In other words, it seems likely that the practice of acquiring

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<sup>312</sup> Similarly, see Oesch 2009, pp. 542–543. As Oesch points out, the option of bringing an adjustment claim before a court is rendered even more unattractive by the fact that one cannot, as a preliminary matter, obtain an opinion from the Copyright Council on the unfairness of a copyright transfer.

<sup>313</sup> See *supra* at note 24.

<sup>314</sup> See Kücklich 2005, under “The Economy of Modding,” where the author notes that the “modding community is used as a recruiting pool for the games industry.” As a practical example, the modder who created the DayZ mod for ARMA II (see *supra* at note 9) was subsequently recruited by Bohemia Interactive to work on a stand-alone release based on the DayZ concept.

copyright from player through a EULA is, as a rule, entirely viable under Finnish law and can be challenged only in exceptional circumstances. It is, of course, a matter for discussion whether or not this constitutes sound policy. I will briefly touch upon that topic in the following section.

## 5 CONCLUDING REMARKS

### 5.1 Summary of Findings

This study discussed the phenomenon of player-driven content creation in the context of computer gaming – that is, game modding. As a concept, “game modding” captures many types of player activities on a broad spectrum. The various forms of game modding are, however, united by the fact that they serve as means for players to contribute to a computer game by either altering existing content or creating content that is entirely new. This is achieved by using either in-game functionality or software tools provided by the game developer.<sup>315</sup>

I have firstly examined whether, under Finnish law, copyright can subsist in game mods, and if so, whether game mods can be protected independently of the copyright in the original game. In the lack of specific regulation on the topic, the general principles of copyright law must apply to game mods just as they do to other subject matter. As a result, a product of game modding is protected under copyright law if it is original in the sense that it is a player’s intellectual creation. The essential element of this conception of originality is the freedom to make creative choices. Under that standard of originality, it is evident that both in-game and other forms of modding can *prima facie* result in an intellectual creation, although in-game functionality may often be so limited that the fulfillment of the originality criterion is made difficult. I have argued that a player’s original contributions may include in-game avatars, other aesthetic creations such as new visual objects or gameplay areas, source code, “game comics,” and “machine cinema.” However, just because these player contributions have the potential to satisfy the criteria for protection under copyright law does not mean that they always do so: in many cases, mods are likely to be unsuccessful at reaching the threshold for copyright protection due to a lack of originality caused by their technical nature or the insufficiency of the creative freedom enjoyed by the player. Further, many of the potentially innovative and, therefore, valuable features of game mods such as their functionality,

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<sup>315</sup> Generally on the concept of modding, see section 1.1.2 *supra*.

mechanics, and rules or general concept remain outside the scope of copyright protection.

In a modding context, it is possible to create both original and derivative creations. A game mod can be derivative of the original game in one of two ways: either as a derivative work (Section 4.1 of the Copyright Act) or as a compilation (Section 5 of the Copyright Act). The applicability of Section 5 is, however, clearly limited to specific circumstances, in which, for example, a new gameplay map is created by selecting and arranging existing game assets. Thus, the more typical situation is that the content of game mods may be considered as derivative works under Section 4.1 of the Copyright Act. The distinction between independent works and derivative works is, above all, done by applying the “similitude test.” This means that a modified game object, character, or other asset is derivative of the corresponding original asset, if the prior is liable to invoke an experience of similitude with the latter in an observer. By contrast, however, the use of software tools provided by the developer or a reliance on the engine of the original game are, in my understanding, generally inconsequential as far as ownership of content is concerned.<sup>316</sup>

I have argued that, to the extent that copyright subsists in game mods, a developer often needs or wishes to acquire rights in those player-made creations. This need is only heightened by the often large volume of modified content, which makes it practically impossible to track the various copyright interests pertaining to the various game mods. Rights acquisition is typically handled as a matter of license (non-exclusive or exclusive) or assignment through the standard terms associated with a computer game – that is, a EULA.<sup>317</sup>

With regard to rights acquisition, I have outlined both the formal and the material requirements subject to which copyright in game mods can validly be acquired through a EULA. The formal requirements derive from the general doctrine on standard form contracting, in which the central issue is the incorporation of terms.

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<sup>316</sup> See generally section 3 *supra*.

<sup>317</sup> See generally section 4.1 *supra*.

In that sense, it needs to be generally noted that standard terms only become binding on the counterparty, if she was provided a “real opportunity” to become acquainted with them prior to the conclusion of agreement. Should a copyright transfer clause be regarded as surprising and harsh, its incorporation would further be subject to the developer specifically notifying the player of the copyright transfer in a manner which is liable to increase her actual awareness of it.<sup>318</sup>

From the material perspective, a transfer of copyright may be adjusted pursuant to Section 36 of the Contracts Act. This is possible subject to the transfer being “unfair.” A finding of unfairness always needs to be based on an overall assessment. In the context of a EULA, it is, however, likely to depend mainly on whether the EULA is considered “significantly imbalanced.” I have proposed that, in assessing the effect of a transfer of copyright on the balance of a EULA, the scope of the transfer as a function of the type of license or assignment it sets out (*depth of transfer*) and the scope of creations it captures (*breadth of transfer*) should be taken into consideration. Moreover, an unfair result might be achieved where the commercial value of a game mod turns out to be exceptional, and the developer would consequently gain substantial economic benefits by enforcing the against-no-remuneration EULA against the player.<sup>319</sup>

While both formal and material requirements do thus impose certain limitations on rights acquisition through a EULA, the practice of acquiring rights in game mods in that manner is likely to be generally acceptable under Finnish law. On the one hand, it is probable that standard terms would de facto be widely accepted as enforceable in court practice (which, admittedly, is scant). On the other hand, courts have demonstrated significant reserve in their application of Section 36 of the Contracts Act to transfers of copyright. These two trends, combined with other procedural impediments resulting from the generally weak position of a player in relation to a developer company, are liable to make it difficult for a player to seek legal redress against a game developer. It is, however, unclear whether this is a de facto

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<sup>318</sup> See generally section 4.2 *supra*.

<sup>319</sup> See generally section 4.3 *supra*.

significant inadequacy in a player's legal position. For instance, it is likely that some of the most glaringly "unfair" situations (such as a situation in which a developer would attempt to appropriate all rights in a total conversion mod by enforcing the EULA) are addressed and resolved through other means, such as by the developer subsequently recruiting a particularly accomplished modder.<sup>320</sup>

## 5.2 Towards Stronger or More Streamlined Protection?

In this study, I have argued that the products of game modding can, under Finnish law, constitute intellectual creations, in which copyright subsists either secondarily or independently of the copyright in the original game.<sup>321</sup> Further, I have analyzed the validity of a practice in which a game developer seeks to acquire copyright in game mods through unilaterally drafted standard terms (EULA), concluding that there is no compelling reason to widely call into question the viability of that practice under Finnish doctrine on standard form contracting and adjustment of unfair terms.<sup>322</sup> Based on the considerations presented in this study, it would, consequently, appear that while players often contribute original expression to a developer's game product, it is largely left to the discretion of a developer to determine the fate of copyright interests pertaining to game mods.

It is fundamental to the interests of an author that she needs to have the ability to maintain sufficient control over her intellectual creations even in the digital environment. Only then can she be in a position to de facto receive fair remuneration for the economic benefits accrued through the use of her works.<sup>323</sup> The author's right to fair remuneration is, in turn, an integral part of the copyright system.<sup>324</sup> This is even confirmed in recital 10 to the preamble to the Information Society Directive (2001/29/EC), where it is stated that authors need to receive an

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<sup>320</sup> See generally section 4.4 *supra*.

<sup>321</sup> See generally section 3 *supra*.

<sup>322</sup> See generally section 4 *supra*.

<sup>323</sup> See e.g. OKM 2010:9, pp. 18 and 35.

<sup>324</sup> In this respect, see e.g. SOU 2010:24, p. 137. According to that report, an author should, in principle, always be entitled to a share of the profits generated by the commercial exploitation of her work.

“appropriate reward” for the use of their works and that the purpose of “adequate legal protection of intellectual property rights” is to “guarantee the availability of such a reward.” It is further worth noting that the author’s right to appropriate remuneration is consistently referenced by the CJEU in its decisions.<sup>325</sup>

Against this background, one could ask whether it is consistent with the objectives of copyright law that a developer can, in this fashion, acquire valuable content from its customers (the players) gratuitously, subject mainly to its own discretion. Namely, in that model the authors of that content are seemingly left without any – not to mention fair – remuneration. Of course, it is possible to argue that the grant of exclusive rights combined with freedom of contract ensures that authors *could have* bargained for fair remuneration should they have wished to do so.<sup>326</sup> This may not, however, be a realistic depiction of the actual circumstances in which the copyrights in player-made creations are disposed of. In practice, modders are typically limited to making a choice between abstaining from content creation or, alternatively, creating content on the terms dictated by the developer.

In this respect, it could be considered whether the Copyright Act should include a non-mandatory provision confirming an author’s right to fair remuneration in connection with any transfers (licenses or assignments) of her copyright. In Sweden, this kind of a proposal was (more or less) recently made in an official report investigating the need to amend the provisions on transfers of copyright as included in the Swedish Copyright Act.<sup>327</sup> The positive effect of such a provision on the position of content creators could be significant. For example, it may be noted that both the harsh terms doctrine and the doctrine on unfair terms expressly recognize non-mandatory law as a benchmark against which harshness and unfairness respectively are evaluated.<sup>328</sup> In this sense, non-mandatory law gains a “semi-

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<sup>325</sup> See inter alia *Peek & Cloppenburg*, at para 37, *SGAE*, at para 36, *Football Association Premier League*, at paras 108–116 and 186, *UsedSoft*, at para 63, and *Art & Allposters*, at paras 47–48.

<sup>326</sup> This kind of an argument was brought forth in e.g. OKM 2010:9, p. 36.

<sup>327</sup> SOU 2010:24, p. 137. In the Swedish report, it is pointed out that the existence of such a provision would, at least, force contracting parties to discuss the issue of remuneration when agreeing on a transfer of copyright.

<sup>328</sup> See *supra* at notes 252 and 280.

mandatory” effect: it can only be contracted out on justifiable grounds.<sup>329</sup> If the Copyright Act set out a non-mandatory right to fair remuneration, any deviations from that would, at least, have to be “justifiable” in order to avoid raising concerns with regard to harshness or unfairness.

However, this approach would have rather obvious drawbacks as well. Namely, there are numerous situations in which it is common for authors to dispose of their exclusive rights against no monetary compensation, especially in the digital environment.<sup>330</sup> Thus, the “main rule” of fair remuneration might, at least quantitatively speaking, de facto turn out to constitute an exception. Moreover, many modders (and, presumably, other enthusiast online content creators) are likely to be content with non-monetary rewards such as peer recognition or, simply, the enjoyment they get out of modding.<sup>331</sup> In this light, it would not make much sense that they would nonetheless have to “opt out” of their right to fair remuneration.

In fact, due to the notable disinterest of modders in commercial ambitions, concerns relating to the commercial exploitation of game mods may even be easily overestimated. If, however, this is the case, it needs to be asked whether the copyright system sets the bar for copyright protection too low. In the current system, copyright subsists in essentially anything that constitutes its author’s own intellectual creation.<sup>332</sup> As a result, the author is conferred with full exclusive rights (both economic and moral) to her work. If we accept that economic rights are essentially meaningless to many modders, then the grant of those rights is only liable to increase the transaction costs relating to the player–developer relationship due to a need to transfer those rights away from the player, who was not interested in receiving them in the first place. In this light, it could be asked whether it is necessary to automatically confer full exclusive rights to authors in the information

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<sup>329</sup> Mononen 2001, p. 308.

<sup>330</sup> Similarly, see OKM 2010:9, p. 37.

<sup>331</sup> With regard to the motivations of modders, see *supra* at note 8.

<sup>332</sup> See section 3.2.2 *supra*.



society. As alternatives, the merits of approaches such as “Creative Commons by default” or “Copyright 2.0” as proposed by *Ricolfi* could be considered. The characteristic feature of those alternative systems is that only “some” rights are vested in an author *ex lege*, while other rights are conferred only if expressly claimed.<sup>333</sup> In non-economically driven communities, the partial exclusion of copyright protection should logically not lead to decreased creative activity.<sup>334</sup>

As things stand, developers have to bear the risks associated with unsuccessful rights acquisition from players. In order to counterbalance the low threshold for copyright protection and to mitigate the risks relating to rights acquisition, courts are likely to feel pressured to maintain a lenient stance even towards what are, frankly, rather questionable rights transferring methods. Doing otherwise would effectively make business models which rely on decentralized content creation (such as game modding) unattractive or entirely unviable, leading to an unfavorable result for all involved parties.<sup>335</sup> Thus, it becomes practically necessary to, through largely fictional agreements, “undo” a part of the effects of unsolicited grants of copyright to modders in order to facilitate effective content creation and, by extension, the decentralized business model. In this light, it might certainly be asked whether applying copyright law as a system for the regulation of game modding actually leads to a serviceable result.

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<sup>333</sup> In this regard, see generally *Ricolfi* 2011.

<sup>334</sup> Of course, the exclusion of economic rights (only) would not get rid of all transaction costs relating to copyright in these communities, as moral rights would still need to be taken into consideration.

<sup>335</sup> That is to say, the developer’s activity would be rendered less profitable, the modders would lose the opportunity to do what they enjoy, and other players would be unable to consume the content created by modders.