

COPYRIGHT’S FINAL BOSS ENCOUNTER: OWNERSHIP OF PLAYER-CHARACTERS IN ONLINE MULTIPLAYER ROLE- PLAYING VIDEO GAMES

*Jake Ritthamel**

TABLE OF CONTENTS

I.	Introduction.....	183
II.	Background.....	186
	A. The Rise of the Modern Video Game Industry	186
	B. Copyrightable Content and Video Games	188
	C. Originality of Video Game Characters.....	190
	D. Streaming Law and its Relationship to Copyright.....	191
	E. End User Licensing Agreements and Ownership Rights.....	192
III.	Analysis.....	194
	A. Ownership of Player-Character Personas	194
	1. World of Warcraft	194
	2. Final Fantasy XIV	200
	3. Combining the Worlds: Streaming and Beyond.....	204
	B. End-User Licensing Agreements.....	206
	C. End-User Licensing Enforcement	210
IV.	Recommendation	213
	A. Ownership of Player-Character Personas	213
	B. End-User Licensing Agreements.....	214
V.	Conclusion	217

I. INTRODUCTION

Whether you are slaying dragons or saving the galaxy, logging into a virtual world has become a primary form of entertainment for those seeking to escape reality and the monotony of everyday life. Your character, decked out

* J.D. Candidate, University of Illinois College of Law, 2022; B.S., University of Illinois at Urbana-Champaign, 2019. I would like to thank the many Twitch streamers and gamers in their chats alike that piqued my interest to explore this topic more thoroughly. As a self-proclaimed gamer, I believe that it’s important that we all understand how the law intersects with our jobs and/or hobbies. Without the support of my many friends who embrace their nerdiness and see the value in such discussions, this piece wouldn’t be possible. Before reading further, rest assured that this Note is Commander Shepard’s favorite on the Citadel.

with the highest stats possible and gear to match, can do the impossible, from defeating the strongest of foes to curing *you* of your boredom. Despite their heroic feats, a single question remains: Can they take on a corporation?

The gaming community has been forced to tackle simple questions, including whether they wanted to “date [another’s] avatar,”¹ but has yet to consider whether their limitless in-game fantasies are subject to administrative shackles set in place by the world builders themselves. Though the game developer’s whims seem remote to casual gamers, the recent development of streaming services has catapulted character-created content into mainstream media.² Streamers and their personas are intrinsically tied to characters they create in every game they play, with their “personality” being the common thread from one world to another.³ These personalities are created as a result of being a part of many online gaming communities, not just a single entity. As streamers diversify their game collections to avoid burnout⁴ and game sales encourage game hoarding en masse,⁵ a single gaming persona could soon be seen in every in-game world available.

The industry must address the intricacies of player-character ownership before inevitable clashes between gaming companies and the users they serve erupt. The influx of disputes between gamers, streamers, game developers, and streaming platforms underscores the growing tension between each party.⁶ Though no major altercation has had an extreme adverse effect on the market so as to halt growth,⁷ the likelihood of economic injury as a result of continued debates over a variety of game-related ownership issues increases as gamers and streamers become hesitant to work with game developers and streaming platforms.⁸ Assessing copyright ownership in light of and in the absence of licensing agreements related to player creations such as player characters may have drastic ramifications on who is entitled to slices of the pie when distributing game-generated and stream-related ad revenue and profits.

1. The Guild, *Do You Wanna Date My Avatar*, YOUTUBE (Aug. 17, 2009), <https://www.youtube.com/watch?v=urNyg1ftMIU>.

2. Eleanor Richardson & Paul Johnson, POLAR CAP. TECH., *Video Games: From Niche Pastime to Mainstream Entertainment*, QUOTEDDATA (June 8, 2020), <https://quoteddata.com/2020/06/video-games-niche-pastime-mainstream-entertainment>.

3. Nicholas Robinson, *From Arcades to Online: Updating Copyright to Accommodate Video Game Streaming*, 20 N.C. J.L. & TECH. 286, 299–301 (2018).

4. STREAMKICK, *The Inevitability of Switching Games—The Twitch Streamer’s Lament*, MEDIUM: STREAMER BASE CAMP (May 25, 2019), <https://medium.com/streamer-base-camp/the-inevitability-of-switching-games-the-twitch-streamers-lament-27d0a2639ea1>.

5. Angela Lashbrook, *Steam Sales Are the Ultimate Trap for Digital Hoarders*, MEDIUM: ONEZERO (Jan. 8, 2020), <https://onezero.medium.com/why-you-can-never-resist-a-good-steam-sale-48646d2a3fb7>.

6. Aaron Swerdlow, *The Emerging Legal Battle Over Video Game Streaming Rights*, VENTUREBEAT: GAMESBEAT (May 27, 2017, 6:00 AM), <https://venturebeat.com/2017/05/27/the-emerging-legal-battle-over-video-game-streaming-rights>.

7. See Torque eSports Corp., *Stream Hatchet Reveals Massive 98% Growth in Gaming Streaming in Q2 Report*, CISON: PR NEWSWIRE (July 1, 2020, 2:52 PM), <https://www.prnewswire.com/news-releases/stream-hatchet-reveals-massive-98-percent-growth-in-gaming-streaming-in-q2-report-301087177.html> (describing the uninhibited growth of the gaming and streaming industries).

8. See Swerdlow, *supra* note 6 (noting the natural inclination of developers to restrict the intellectual property rights of streamers).

Additionally, the advent of “Internet culture”⁹ has demonstrated the need for defining player persona ownership for all gamers, whether casual or professional. Memes transcend beyond games and have become a social media staple for everyday communication.¹⁰ Because gaming-adjacent memes often feature prominent streaming personalities and their content,¹¹ the expansion of “gamer culture” beyond its previous domain, the target demographic of young men,¹² into the mainstream signals a need for assessment. This expansion poses serious questions for gaming casuals, content creators, and developers interested in the social¹³ and monetary¹⁴ aspects of “meme-ing.”

To address these issues, this Note will apply the legal precedent and scholarly concerns to case studies to determine how some of the industry’s largest massively multiplayer online role-playing games (“MMORPGs”) including World of Warcraft and Final Fantasy XIV address the issue of player-character ownership. Understanding how blockbuster developers like Blizzard Entertainment (“World of Warcraft”)¹⁵ and Square Enix (“Final Fantasy XIV”)¹⁶ contemplate these concerns and build their business models as prominent streamers in each community grow their channels will provide insight into the severity of the ownership problem and the future remedies that may alleviate tension between players and developers. Likewise, examining how each developer and individual perceives the current copyright situation through their legal actions and business decisions may further uncover why the problem has yet to be resolved and when the metaphorical bubble may burst.

With that in mind, this Note seeks to determine, absent contractual arrangements, whether (a) game developers or (b) video game and streaming personalities hold copyright ownership of player-created characters when such entities transcend a single game and become a staple in the gaming and streaming industries. Additionally, this Note seeks to evaluate the efficacy of and issues related to end-user licensing agreements (“EULAs”) through their impact on (a) game developers and (b) video game and streaming personalities. This Note will argue that gamers should retain primary rights to their player-generated content because, despite the use of game developers’ assets, the final products are distinguishable, consented-to derivative works. Streamers should

9. Nathan Allebach, *A Brief History of Internet Culture and How Everything Became Absurd*, MEDIUM: THE STARTUP (Mar. 9, 2019), <https://medium.com/swlh/a-brief-history-of-internet-culture-and-how-everything-became-absurd-6af862e71c94>.

10. Courtney Chedid, *Communication Through Internet Memes*, MEDIUM (Oct. 27, 2016), <https://medium.com/@courtneychedid/communication-through-internet-memes-83ee3936117f>.

11. Christine Romero-Chan, *20 Popular Gaming Memes Explained: Barrel Rolls and More*, MUO (Dec. 12, 2017), <https://www.makeuseof.com/tag/popular-gaming-memes>.

12. See Richard Yao, *Gaming as a Cultural Force*, MEDIUM: IPG MEDIA LAB (Nov. 15 2018), <https://medium.com/ipg-media-lab/gaming-as-a-cultural-force-dc456f8a41ab> (explaining the cultural context of gaming targeting young men and the stereotypes it perpetuates).

13. Ryan Nair, *The Relevance of Memes in the Millennial Age of Social*, THE DRUM (Dec. 19, 2018), <https://www.thedrum.com/opinion/2018/12/19/the-relevance-memes-the-millennial-age-social>.

14. Ian Eck, *Money, Likes, and Memes Are All the Same Thing*, MEDIUM: ONEZERO (Feb. 13, 2020), <https://onezero.medium.com/money-likes-and-memes-are-all-the-same-thing-3d98ebb1834d>.

15. *World of Warcraft*, WORLD OF WARCRAFT, <https://worldofwarcraft.com/en-us/> (last visited Mar. 22, 2022).

16. *Final Fantasy XIV Online*, FINAL FANTASY XIV ONLINE, <https://www.finalfantasyxiv.com/> (last visited Mar. 14, 2022).

be free to “brand” themselves but may not inappropriately use the game’s assets without permission. Furthermore, this Note will argue that current contractual agreements in video game EULAs fail to recognize the multifaceted nature of player-characters that benefits developers in their singular in-game worlds and players across each game and service they play or use. Consequently, this Note will emphasize that EULAs should either be amended to address these flaws or invalidated in light of current video game and streaming politics.

Section II will discuss the cultural, technological, and legal history of the gaming and streaming industries as they relate to online video game character creation and ownership. Section III will apply the law to the current gaming and streaming landscape to determine whether game studios and players own the rights to created online personas. Section IV will guide game developers and gamers to lessen the rising tensions related to content ownership between the two groups as the gaming and streaming industries continue to flourish.

II. BACKGROUND

A. *The Rise of the Modern Video Game Industry*

Although video games have been a favorite since their debut in the 1970s,¹⁷ gaming has become more popular than ever before due to advances in technology that have corrected game mechanics,¹⁸ increased graphic quality,¹⁹ and normalized online interactions between players.²⁰ In 2020, U.S. consumers spent \$49 billion on video games.²¹ This number has more than doubled since 2010 when games suffered from era-based limitations.²² With game development technologies becoming more sophisticated, the demand for video games is expected to increase²³ as developers continue to invest in more games²⁴ and equipment to produce them.²⁵

17. *Video Game History Timeline*, THE STRONG: NAT’L MUSEUM OF PLAY, <https://www.museumofplay.org/about/icheg/video-game-history/timeline> (last visited Mar. 14, 2022).

18. CARLO FABRICATORE, *GAMEPLAY AND GAME MECHANICS DESIGN: A KEY TO QUALITY IN VIDEOGAMES*, OECD-CERI EXPERT MEETING ON VIDEOGAMES AND EDUCATION (Oct. 2007), <http://www.oecd.org/education/ceri/39414829.pdf>.

19. *Gaming: A Look Into the Gaming Industry Featuring Types of Video Games & Gaming Jobs*, BUILTIN, <https://builtin.com/gaming> (last accessed Mar. 14, 2022).

20. Katie Jones, *Online Gaming: The Rise of a Multi-Billion Dollar Industry*, VISUAL CAPITALIST (July 15, 2020), <https://www.visualcapitalist.com/online-gaming-the-rise-of-a-multi-billion-dollar-industry>.

21. J. Clement, *Consumer Spending on Video Game Content in the United States from 2010 to 2020*, STATISTA (Aug. 17, 2021), <https://www.statista.com/statistics/252457/consumer-spending-on-video-games-in-the-us>.

22. *Id.*

23. The Business Research Company, *TBRC Analysis Shows That Increased Demand for Video Gaming Is Driving the eSports Market*, CISION: PR NEWSWIRE (June 11, 2020, 11:30 AM), <https://www.prnewswire.com/news-releases/tbrc-analysis-shows-that-increased-demand-for-video-gaming-is-driving-the-esports-market-301074327.html>.

24. Andrew Beattie, *How the Video Game Industry Is Changing*, INVESTOPEDIA (Oct. 31, 2021), <https://www.investopedia.com/articles/investing/053115/how-video-game-industry-changing.asp>.

25. See Guillaume Boucher-Vidal, *What Does it Really Cost to Open an Indie Studio? All Your Money, Most of Your Life*, POLYGON (July 31, 2014, 2:51 PM), <https://www.polygon.com/2014/7/31/5949433/the-cost-of-a-game-studio> (highlighting the costs of opening a studio).

Unlike their predecessors, many modern gamers have turned their hobby into a career.²⁶ The rise of social media and content-sharing platforms have provided gamers a space to connect with one another and market their skills and knowledge to the gaming community.²⁷ Gaming gurus producing content related to video games have created an industry with a market value of \$10.1 billion in 2018 and rising.²⁸ The rise of platforms like Twitch, YouTube Gaming, and Facebook Gaming has directed the spending of these sums,²⁹ providing a direct link between casual gamers as consumers, professional gamers as stream entertainment, and third-parties as performance sponsors.³⁰

Prominent gaming creators such as YouTuber and streamer Felix “PewDiePie” Kjellberg and streamer Tyler “Ninja” Blevins have become the most famous personalities on their respective platforms,³¹ earning a living from creating their own characters in multiple games and monetizing them through royalty-based ads,³² merchandise sales,³³ and sponsorship deals.³⁴ Alone, their earnings amount to over \$120 million in 2019 alone.³⁵ These personalities have paved the way for smaller entertainers to build their own brands through programs tailored to monetize gamer and streamer content like that of Twitch Partnership, which allows gamers to earn money based on monthly viewer subscriptions similar to that of cable television.³⁶ Altogether, streamers entertained upwards of at least two million users concurrently in 2021, penetrating the wider “Internet community” not traditionally exposed to video

26. See Nary, *How I Turned Streaming from a Hobby into Becoming a Full-Time Streamer*, CREATOR MINDSET (Feb. 24, 2020), <https://www.creatormindset.co/contentcreator/nary> (discussing one streamer’s rise to stardom inspired by stories of other streamers).

27. Michael Nutley, *Social Media—A New Frontier for Gaming*, MKTG. WEEK (Jan. 19, 2011), <https://www.marketingweek.com/social-media-a-new-frontier-for-gaming>.

28. Haydn Taylor, *Streamlabs: Live Streaming Industry Worth \$10.1bn*, GAMESINDUSTRY (Oct. 31, 2018), <https://www.gamesindustry.biz/articles/2018-10-31-live-streaming-industry-worth-usd10-1bn-says-streamlabs>.

29. Jordan Minor, *Twitch and Beyond: The Best Video Game Live Streaming Services for 2020*, PC MAG. (Aug. 3, 2020), <https://www.pcmag.com/picks/best-video-game-live-streaming-services>.

30. *Id.*

31. See Werner Geysler, *PewDiePie Net Worth—How Much Is PewDiePie Worth? (Updated 2021)*, INFLUENCER MKTG. HUB (Aug. 3, 2021), <https://influencermarketinghub.com/pewdiepie-net-worth> (noting PewDiePie’s accolades); see also Jamie Hore, *Who is Ninja? Net Worth, Earnings, Streaming Setup, and More*, THE LOADOUT (Jan. 26, 2021), <https://www.theloadout.com/streamers/ninja/net-worth-streaming-setup#:~:text=Ninja's%20net%20worth%20is%20estimated,and%20his%20various%20sponsorship%20deals> (noting Ninja’s accolades).

32. See James Hale, *Here’s a Candid Breakdown of Exactly How Much Money Twitch Streamers Earn per Month*, TUBEFILTER (Oct. 10, 2018), <https://www.tubefilter.com/2018/10/10/twitch-streamers-earn-per-month-breakdown-disguisedtoast> (emphasizing the amount creators earn from monthly ad revenue).

33. See Olga Kharif, *Inside the \$1.5 Billion Market for Streamer-Branded Merchandise*, BLOOMBERG: QUINT (Apr. 22, 2020, 5:15 PM), <https://www.bloombergquint.com/onweb/inside-the-1-5-billion-market-for-streamer-branded-merchandise> (emphasizing the growing demand for streamer merchandise and the market’s relatively lucrative current state).

34. Max Miceli, *eSports Essentials: How Twitch Streamers Make Money off of Sponsorships*, ESPORTS OBSERVER (Mar. 30, 2019), <https://esportsobserver.com/twitch-streamers-sponsorships>.

35. Adrian Lai, *Ninja and PewDiePie Are 2019’s Top-Earning Gamers*, IGN: SEA (Feb. 3, 2020, 3:27 PM), <https://sea.ign.com/ninja-richard-tyler-blevins/157396/news/ninja-and-pewdiepie-are-2019s-top-earning-gamers>.

36. *Twitch Partner Program*, TWITCH, <https://www.twitch.tv/p/partners> (last visited Mar. 14, 2022).

games.³⁷ As the industry continues to grow, streamer presence in memes and other everyday Internet uses underscore gaming's importance in the greater scheme of online interaction.³⁸

With such influence, marketers keep a close eye on popular video games and streamers. Though streamers first served as a vector for selling video games, outside companies have come to invest in gamers and their content.³⁹ Brands, including Red Bull⁴⁰ and Pepsi,⁴¹ have become regular sponsors of gaming-related content and events, emphasizing the industry's pull on the economy at large. These sponsorships permit game developers and streamers alike to host tournaments similar to regular sports for players to compete against one another.⁴² It is expected that online gaming leagues known collectively as "eSports," a large portion of the streaming industry generating 58% of game-related revenue via sponsorships, will continue to grow as brands continue to invest in games and their players.⁴³

B. Copyrightable Content and Video Games

The Copyright Act of 1976 protects authors of creative works such as video game visual assets, storylines, and other features unrelated to the hardware to produce them.⁴⁴ Any "original work of authorship fixed in any tangible medium of expression" may qualify a creator to copyright protection.⁴⁵ In recent times, these protections have seen wide application in literature, audiovisual arts, interpretive performances, and software.⁴⁶ Video games represent a combination of copyrightable works to produce a final product: such works include unique storylines; virtual assets to represent characters, actions, scenery, and other necessary plot devices; actor-provided vocals and visuals; and back-end scripts designed to allow interaction between players and the images and audio cues

37. Mansoor Iqbal, *Twitch Revenue and Usage Statistics*, BUS. APPS (Jan. 11, 2022), <https://www.businessofapps.com/data/twitch-statistics>.

38. See generally Mark R. Johnson & Jamie Woodcock, *The Impacts of Live Streaming and Twitch.tv on the Video Game Industry*, 41 MEDIA, CULTURE & SOC'Y 670 (2019) (commenting on the new industry and its rapid growth).

39. Robert Lindner, *eSports Sponsorship and Twitch – Why Brands Are Getting Their Stream on*, ZOOMPH (Oct. 15, 2019), <https://zoomph.com/blog/esports-sponsorship-and-twitch-why-brands-are-getting-their-stream-on>.

40. Luci Goodman, *Red Bull Sponsorship for Gamers*, STREAMSCHEME, <https://www.streamscheme.com/sponsors/red-bull-sponsorship> (last updated Dec. 17, 2020).

41. *Game on for Mountain Dew with Sponsorship of Three Powerhouse Global eSports Teams*, PEPSICO (June 6, 2017), <https://www.pepsico.com/news/press-release/game-on-for-mountain-dew-with-sponsorship-of-three-powerhouse-global-esports-tea06062017>.

42. Michael Gannon-Pitts, *eSports Sponsors: Building Lucrative Brand Partnerships*, MAGNETIC CREATIVE (May 9, 2019), <https://www.magneticcreative.com/journal/esports-sponsors>.

43. Uta Allenstein et al., *eSports and the Next Frontier of Brand Sponsorships*, MCKINSEY (July 31, 2020), <https://www.mckinsey.com/business-functions/marketing-and-sales/our-insights/e-sports-and-the-next-frontier-of-brand-sponsorships#>.

44. See Robinson, *supra* note 3, at 287–88 (discussing how the Copyright Act of 1976 came to apply to videogames).

45. The Copyright Act, 17 U.S.C. § 102(a).

46. *Id.* See also David Sye, *Literally Stealing the Show: A Brief (and Recent) History of Dance Copyright*, OFF. FOR INTELL. FREEDOM AM. LIBR. ASS'N (June 7, 2021), <https://www.oif.ala.org/oif/literally-stealing-the-show-a-brief-and-recent-history-of-dance-copyright> (describing the application of copyright law to dance choreography).

coming from their devices.⁴⁷ As such, video games may be seen as copyrightable work in their entirety and in their components,⁴⁸ with different parties interested in each analysis.⁴⁹

Questions remain, however, over who owns video game content such as player characters. Because game developers provide virtual assets for players to create their own characters, legal scholars have contended that player characters could qualify as developer property, player property, or joint property.⁵⁰ Based on these assertions, scholars have sought to define certain rules to determine when different ownership schemes should vest.⁵¹ Their criteria include the extent to which a character may edit their character, the extent to which the character is similar to other player-created characters, and the capability for the player to expand upon their character's identity and appearance through in-game actions both related and unrelated to the provided story.⁵² Despite this contention, courts have yet to clarify which stance is right, how ownership across multiple games may be facilitated, and in which situations copyright ownership should be delegated differently due to game-specific quirks.⁵³

A recent argument in the field has suggested that player-created works are subject to copyright protection through their status as derivative works under section 106(2) of the Copyright Act.⁵⁴ Copyright owners retain the exclusive rights to prepare and authorize others to prepare derivative works of their own copyrighted materials.⁵⁵ In the realm of derivatives by the original author, these pieces include sequels, prequels, and other forms of continuations of their first copyrighted work.⁵⁶ Derivatives by third-parties, however, typically take the form of adaptations through either implicit (seen when copyright owners provide assets to a third party for their own use) or explicit authorization (typically in the form of a license).⁵⁷ So long as the derivative work exists in a "concrete or permanent form"⁵⁸ and contains a "substantial amount of protected material"⁵⁹ from the original copyrighted material, derivative status is applied and the third

47. CLG Lazarus, *Copyright and Video Game "IP": The Story Being Told*, MEDIUM (July 11, 2017), <https://risenzlazarus.medium.com/copyright-and-video-game-ip-the-story-being-told-370c87276dc>.

48. *Id.*

49. Compare Lothar Determann, *What Happens in the Cloud: Software as a Service and Copyrights*, 29 BERKELEY TECH. L.J. 1095, 1119–21 (2014) (arguing for a pro-developer stance on copyright in which any reproduction of any asset infringes the whole work), with Robinson, *supra* note 3, at 302–04 (arguing for a pro-gamer stance on copyright that examines the game as a whole and extracts out the streamer-player and their contributions).

50. Tyler T. Ochoa, *Who Owns an Avatar? Copyright, Creativity, and Virtual Worlds*, 14 VAND. J. ENT. & TECH. L. 959, 977–86 (2012).

51. Suzanne E. Rogers, *Transforming with Avatars: Video Game Developer Licensing Considerations*, 65 J. COPYRIGHT SOC'Y U.S.A. 57, 82–84 (2018).

52. *Id.*

53. See generally Robinson, *supra* note 3 (highlighting the vague legal guidance streamers must interpret).

54. *Id.*

55. The Copyright Act, 17 U.S.C. § 103(b) (1976).

56. Mark Methenitis, *LGJ: Wait, it's not a Derivative?*, ENGADGET (Jan. 29, 2010), <https://www.engadget.com/2010-01-29-lgj-wait-its-not-a-derivative.html>.

57. *Id.*

58. *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 967 (9th Cir. 1992).

59. *Litchfield v. Spielber*, 736 F.2d 1352, 1357 (9th Cir. 1984).

party owns the rights of their new content.⁶⁰ A growing number of scholars have rejected this traditional analysis and claimed modern stream culture has generated new copyright-eligible materials and not derivatives of developer works to mitigate any interference by game developers due to their contribution of foundational assets.⁶¹

C. Originality of Video Game Characters

Copyrighted materials must be original to qualify for protection.⁶² Originality as referenced in section 102(a) of the Copyright Act entails “some minimal degree of creativity” on the part of the author.⁶³ Generally, characters are not eligible for copyright protection due to the repetitiveness of personality traits across genres of creative works.⁶⁴

The originality threshold has been acknowledged in the gaming context when discussing “stock” characters designed to conform to genre stereotypes: characters that could be inserted into any game of the same style fail to qualify for copyright protection.⁶⁵ The *scenes-a-faire* doctrine⁶⁶ that prohibits the copyright of tropes has begun to spill into gaming-related cases as similar games become popular. For instance, the Northern District of California defined “stock” characters in terms of generic themes seen across related works, such as a “fighting” character given typical character appearances associated with “fighting” games.⁶⁷ Likewise, the court has determined that fantasy characters including mages and warriors must have some “distinctive” characteristic in order to render them original enough to copyright.⁶⁸

In determining whether characters break genre norms, the *Towle* test for distinctness of characters has been applied to demonstrate that characters in modern media, like comics and video games, are copyrightable.⁶⁹ In *Towle*, the Ninth Circuit commented on whether the Batmobile was a copyrightable work despite its changing appearance over time.⁷⁰ The court reasoned that the work was copyright-eligible because it (1) had “physical as well as conceptual qualities;” (2) was “sufficiently delineated to be recognizable” through its “consistent, identifiable character traits and attributes” despite appearing in different productions; and (3) was “especially distinctive” and “contain[ed] some unique elements of expression.”⁷¹ Because the Batmobile was a cultural

60. *Module 2: Unprotected “Ideas” vs. Copyrightable Tangible Expressions*, LAWSELF, <https://lawshelf.com/videocourses/moduleview/unprotected-ideas-vs-copyrightable-tangible-expressions-module-2-of-5> (last visited Mar. 14, 2022).

61. Robinson, *supra* note 3, at 302–04.

62. The Copyright Act, 17 U.S.C. § 102(a) (1976).

63. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345–46 (1991).

64. *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1174–75 (9th Cir. 2003).

65. *Capcom U.S.A., Inc. v. Data E. Corp.*, No. C 93-3259 WHO, 1994 U.S. Dist. LEXIS 5306, *1 (N.D. Cal. Mar. 18, 1994).

66. *Apple Comput., Inc. v. Microsoft Corp.*, 799 F.Supp. 1006, 1020–21 (N.D. Cal. 1992).

67. *Capcom U.S.A., Inc.*, No. C 93-3259 WHO, 1994 U.S. Dist. LEXIS 5306 at *1.

68. *Blizzard Ent., Inc. v. Lilith Games (Shanghai) Co.*, 149 F. Supp. 3d 1167, 1173–74 (N.D. Cal. 2015).

69. *DC Comics v. Towle*, 802 F.3d 1012, 1021 (9th Cir. 2015).

70. *Id.* at 1019–20.

71. *Id.* at 1021.

staple, it could be easily identified by the public even when its appearance changed throughout the Batman narrative.⁷² Consequently, it met the distinctiveness criteria to separate itself from other comic cars.⁷³

Some opinions on distinctiveness in video games contrast copyrightable materials with those too generic to claim, exemplified by a recent action brought by Blizzard Entertainment and Valve.⁷⁴ In *Blizzard*, the game developers brought suit against a competitor for allegedly copying numerous assets from their Warcraft fantasy game franchise.⁷⁵ Blizzard asserted that the creation of their “Warcraft Universe” sufficed to meet the *Towle* standards for distinctness.⁷⁶ Because Blizzard did not enumerate specific details that were associated with their numerous Warcraft characters that appeared in Lillith’s works, the court found that no prong of *Towle* was sufficiently met.⁷⁷ Naming characters and providing a vague description of their relationship to a well-known story does not suffice to establish copyright-eligible characters.⁷⁸

D. Streaming Law and its Relationship to Copyright

Like much of the law related to video game copyrights, the common law provides little insight as to whether streamers are entitled to protections by the Copyright Act.⁷⁹ Though the Fourth Circuit has permitted streamers to broadcast video games on their respective platforms without fear of copyright infringement charges,⁸⁰ the judicial system has taken a developer-centric view of the law in granting copyright protection for only the developer’s product as opposed to the gamer’s product.⁸¹ Consequently, streamers may use developer-generated video game stills in their performances but have no indication whether their own characters and performances are worthy of copyright protection.⁸²

Scholars have argued that streaming is an artform deserving of copyright protection.⁸³ Breaking with the Fourth Circuit, pro-developer scholars argue that “rendering” or “reciting” video game developer content should qualify as performance of the game itself with no additional value; as a result, their show cannot constitute even an approved derivative work worthy of protection.⁸⁴ On the contrary, pro-streamer scholars assert that streamers engaging with video games embody many of the same attributes as musicians and traditional artists, advocating that their “unique” spin on playing a video game and creating a

72. *Id.* 1017–18.

73. *Id.* at 1022.

74. *Blizzard Ent., Inc.*, 149 F. Supp. 3d at 1173–74.

75. *Id.* at 1169.

76. *Id.* at 1174.

77. *Id.*

78. *Id.*

79. *See generally* Robinson, *supra* note 3 (emphasizing no true legal standard that streamers can rely on).

80. *Red Baron-Franklin Park, Inc. v. Taito Corp.*, 883 F.2d 275, 278–79 (4th Cir. 1989).

81. Robinson, *supra* note 3, at 304–29 (discussing authorship concerns, board games, and recent streamer-related lawsuits).

82. *Id.* at 322.

83. *Id.* 289–90.

84. Determann, *supra* note 49, 1119–21.

character should constitute copyrightable art as a derivative work.⁸⁵ In a majority of cases, pro-streamer scholars recognize that viewers watch streamers for the persona they create as opposed to the games they play, emphasizing a new copyright endowment for streamers completely removed from the game itself.⁸⁶ Despite this recognition, legislators have moved towards redefining the law to better protect game studios as the streaming industry booms.⁸⁷ The rise in Digital Millennium Copyright Act (“DMCA”) complaints⁸⁸ and calls for stricter laws as to what qualifies for a DMCA violation⁸⁹ underscore a possible shift in attitudes in the near future.

E. End User Licensing Agreements and Ownership Rights

An end-user licensing agreement (“EULA”) sets forth the terms and conditions users must agree to prior to using a product designed by a game developer.⁹⁰ Game developers may design their EULA to be contractual in nature or simply a release of liability should their product or in-game service malfunction.⁹¹ Regardless of form, these agreements often release game developers from liability should other players cause harm to the user through a game’s online services.⁹² Depending on the game developer, these agreements can be well-refined and scrutinized by legal counsel typically supporting larger developers or simple boilerplate provided to a user through word-of-mouth in most indie development contexts.⁹³

Despite their disparity in length, quality, and contractual obligations, nearly every EULA contains a provision regarding the developer’s interest in intellectual property in their games.⁹⁴ In the eyes of a developer, EULAs are an important cost and time-saving part of a game’s policies that cover any creative product made in a given provider’s game, thus ensuring the issue of ownership does not arise.⁹⁵ These provisions have been a central part of game development since the genesis of the industry, mostly because of the economic burden placed on developers when creating games.⁹⁶ As the price of game development

85. Robinson, *supra* note 3, at 287.

86. *Id.* 302–03.

87. Sieeka Khan, *Stop DMCA: Petition to Ditch Copyright Bill That Could Imprison Twitch Streamers Now Online*, TECH TIMES (Dec. 20, 2020, 6:12 AM), <https://www.techtimes.com/articles/255231/20201220/stop-dmca-petition-ditch-copyright-bill-imprison-twitch-streamers-now.htm>.

88. Matt Kim, *Twitch DMCA Strike Causes Panic as Streamers Worry Their Channels Could Be Banned*, IGN (Aug. 16, 2021, 7:07 PM), <https://www.ign.com/articles/twitch-dmca-music-takedowns-what-streamers-can-do>.

89. Khan, *supra* note 87.

90. *EULA Definition*, THE LINUX FOUND. (Apr. 2, 2004), <http://www.linfo.org/eula.html> (last updated Feb. 28, 2006).

91. Alasdair Taylor, *Everything You Need to Know About Video Game EULAs*, SEQ LEGAL (June 19, 2019), <https://seqlegal.com/blog/everything-you-need-to-know-about-video-game-eulas>.

92. *Id.*

93. *Id.*

94. Robinson, *supra* note 3, at 321–22.

95. Rogers, *supra* note 51, at 100–06.

96. *Id.*

continues to skyrocket,⁹⁷ a game developer's interest in valuable content created through their product becomes important in netting returns.⁹⁸

With that in mind, EULAs have rarely been amended since they rose to prominence during the gaming revolution because of their boilerplate nature.⁹⁹ The all-inclusive nature of the EULA agreements resolves ownership disputes by authoritatively vesting all interests in the developer in exchange for allowing the player to use their services.¹⁰⁰ When players were restricted to playing games alone or with friends through LAN (local area network) connections, the possibility of player characters becoming larger than the games they existed in seemed dismal.¹⁰¹ However, recent advances in online multiplayer technologies,¹⁰² the increased availability of games,¹⁰³ and the rise of streaming¹⁰⁴ have created a copyright environment at-odds with these relatively strict provisions. When a user uses the same name or character design, EULAs pit developers who use similarly worded boilerplate against one another to determine who has the superior right to the player character.¹⁰⁵ Additionally, streamers often infuse themselves into their player characters to build their own personal brand that in itself becomes a separate product.¹⁰⁶ Courts have yet to reconcile these issues while casual gamers, professional streamers, and game companies all fight to determine how player character ownership (and thus profits from their use) should be allocated.¹⁰⁷

97. Christopher Dring, *IDG: Other Publishers are Considering Raising Game Prices for PS5 and Xbox Series X*, GAMESINDUSTRY.BIZ (July 2, 2020), <https://www.gamesindustry.biz/articles/2020-07-02-idg-other-publishers-are-considering-raising-game-prices-for-ps5-and-xbox-series-x>.

98. Rogers, *supra* note 51, at 83–84.

99. See, e.g., *Blizzard End-User License Agreement, part 4A - Ownership*, WORLD OF WARCRAFT, (last updated June 1, 2021) <https://www.blizzard.com/en-us/legal/fba4d00f-c7e4-4883-b8b9-1b4500a402ea/blizzard-end-user-license-agreement> [hereinafter *Blizzard EULA*]; *Electronic Arts User Agreement*, ELECTRONIC ARTS, <http://www.ea.com/terms-of-service> (last visited Feb. 22, 2022) [hereinafter *EA EULA*]; *Riot Games® Terms of Service*, RIOT GAMES, <https://www.riotgames.com/en/terms-of-service> (last visited Feb. 22, 2022) [hereinafter *Riot EULA*]; *End User License Agreement*, JAGEX, <https://www.jagex.com/en-GB/legal/eula-runescape-oldschool> (last visited Feb. 22, 2022) [hereinafter *RuneScape EULA*].

100. *Id.*

101. See Mike Bracco, *3 Apps to Check Username Availability Across all Sites at Once*, THE NEXT WEB (June 30, 2009, 9:26 AM), <https://thenextweb.com/2009/06/30/check-username-availability-sites> (likening usernames to brands and emphasizing that users desire consistency in their online presence).

102. Riad Chikhani, *The History of Gaming: An Evolving Community*, TECHCRUNCH (Oct. 31, 2015, 10:00 AM), <https://techcrunch.com/2015/10/31/the-history-of-gaming-an-evolving-community>.

103. See Ben Gilbert, *The Standard Price for Video Games Is Increasing to \$70 for the PlayStation 5 and Next-gen Xbox Consoles, Ending 15 Years of \$60 Games*, BUS. INSIDER (Sept. 16, 2020, 5:08 PM), <https://www.businessinsider.com/video-game-price-increase-60-70-nba-2k-xbox-ps5-2020-7> (highlighting low, stable costs for video games through 2020).

104. Nathan Edge, *Evolution of the Gaming Experience: Live Video Streaming and the Emergence of a New Web Community*, 4 ELON J. UNDERGRAD. RSCH. COMM'NS 1, 1 (2013).

105. See *Free Video Game EULA*, DOCULAR, <https://docular.net/documents/template/5675/free-video-game-eula> (last visited Mar. 14, 2022) (providing a template for video game developers to use for their games that emphasizes concerns related only to the game developer providing the agreement, not competitors and their agreements).

106. Robinson, *supra* note 3, at 300–04.

107. Rogers, *supra* note 51, at 82–84.

III. ANALYSIS

A. *Ownership of Player-Character Personas*

Player character creation cannot occur without contributions by both the game developer and the player, emphasizing the need to endow each party with some form of property right in their work.¹⁰⁸ The Copyright Act sets minimal requirements that confer ownership based on authorship¹⁰⁹ and originality;¹¹⁰ the law as applied further discriminates based on how much a party contributes to those respective requirements.¹¹¹ Copyright law must avoid shirking one creator in favor of another when both have put in the work for the quid-pro-quo (creativity in exchange for exclusivity) protection result.¹¹² Determining how much one party contributed is paramount in determining which type of copyright protection is granted.¹¹³ The law may recognize this relationship as an individual property right, granting ownership to one party, or as a joint property right, granting ownership to multiple parties.¹¹⁴ Because individual property rights are exclusive, they run the risk of failing to recognize contributions of parties who may not have contributed as much as the party granted ownership.¹¹⁵ On the other hand, the equal ownership between each party in joint property rights scenarios may fail to recognize differential contributions between each party creating the work in contest.¹¹⁶ Courts must balance the hardships between each party to see how the quid-pro-quo necessary for copyright protection is fulfilled.¹¹⁷

1. *World of Warcraft*

Blizzard's World of Warcraft ("Warcraft") provides a striking example of how players can fully immerse themselves in a predetermined story while building their own narrative. From the beginning, players have the ability to build their own character by choosing a faction, race, and class.¹¹⁸ Without customizing their character further, players have a total of 404 choices to create the initial class and race base of their in-game persona.¹¹⁹ Once foundational choices are made, players can select additional features to further alter their

108. Ochoa, *supra* note 50, at 964–66.

109. The Copyright Act, 17 U.S.C. § 201(a) (1976).

110. The Copyright Act, 17 U.S.C. § 102(a).

111. Ochoa, *supra* note 50, at 964–66.

112. See generally Dapeng Cai & Jie Li, *Quid Pro Quo and the Enforcement of Intellectual Property Rights Protection: A Bargaining Approach*, 21 J. INT'L COMP. REV. 755 (2011) (addressing the Lockean theory of intellectual property rights).

113. *Id.*

114. *Id.*

115. Ochoa, *supra* note 50, at 970–72.

116. *Id.*

117. *Id.*

118. World of Warcraft, *Creating Your Character! - New & Returning Player Guides* by Bellular, YOUTUBE (Aug. 4, 2018), <https://www.youtube.com/watch?v=bEVdTrbyCiw> [hereinafter *Character Creation*].

119. Calculations were performed using in-game data. *Dressing Room*, WOWHEAD, <https://www.wowhead.com/dressing-room> (last visited Mar. 14, 2022) [hereinafter *Customization Calculation*].

character's physical appearance.¹²⁰ Blizzard has been keen on expanding customization choices for players, recently introducing a plethora of new options for players to choose from in the most recent Shadowlands expansion.¹²¹ As of Fall 2020, players have over one million choices in total when customizing their character upon creation.¹²² As players continue throughout the game, they have the option to change race-specific and class-specific appearances through barber shops;¹²³ additionally, players can opt to pay extra alongside their game subscription to change their character's race or faction alignment.¹²⁴

When the player leaves character creation, they are given free rein to accept any quest, kill any mob, and participate in any type of content appropriate for their level.¹²⁵ For instance, players may choose to "level up" through storylines of different expansion packs,¹²⁶ player-versus-environment dungeon content,¹²⁷ or player-versus-player content¹²⁸ to gain power and reach end-game content. Though applications have been created to optimize leveling speed,¹²⁹ the introduction of "Chromie Time" in the Shadowlands expansion pack has given players even more choices in how they will reach maximum level.¹³⁰ As all content now scales to a character's current level, players may choose content they find more enjoyable or most fitting for their character.¹³¹ This change has been welcomed by players on role-playing servers that seriously consider how their characters will level and interact with Azeroth, the in-game world.¹³² Players in the role-playing community often never hit maximum level and instead choose to stay in large player hubs where they can socialize and build their character's backstory.¹³³

Through character creation and persona development, players invest a large amount of time and money to brand their character as their own.¹³⁴ Blizzard may spend years developing a specific expansion pack or asset to allow the player to

120. *Character Creation*, *supra* note 118.

121. Buuloki, *New Shadowlands Customization Options Guide Hub*, WOWHEAD (Oct. 12, 2020), <https://www.wowhead.com/guides/shadowlands-character-customization-options>.

122. Calculations were performed using in-game data. *Customization Calculation*, *supra* note 119.

123. *Barbershop*, WOWPEDIA, <https://wow.gamepedia.com/Barbershop> (last updated Nov. 20, 2020).

124. *Blizzard Shop*, BATTLE.NET, <https://us.shop.battle.net/en-us/family/world-of-warcraft> (last visited Mar. 14, 2022).

125. Steven Messner & Heather Newman, *World of Warcraft Beginner's Guide: How to Get into WoW*, PC GAMER (Oct. 22, 2020), <https://www.pcgamer.com/how-to-get-into-world-of-warcraft>.

126. Anshlun, *Chromie Time - How Shadowlands Leveling Works and Zone Expansion Level Ranges*, WOWHEAD (Oct. 13, 2020), <https://www.wowhead.com/guides/chromie-time-leveling-zone-expansion-scaling>.

127. Azortharion, *A Guide to Leveling in World of Warcraft: Shadowlands*, ICY VEINS (Sept. 4, 2020), <https://www.icy-veins.com/wow/a-guide-to-leveling-in-world-of-warcraft>.

128. *See Leveling Through PVP*, WOWHEAD (July 15, 2018), <https://ptr.wowhead.com/forums&topic=285619/leveling-through-pvp> (demonstrating player views on player-versus-player leveling experience).

129. Archimitros, *Level Up Faster in Shadowlands with Azeroth Auto Pilot*, WOWHEAD (Oct. 8, 2020), <https://www.wowhead.com/news=318439/level-up-faster-in-shadowlands-with-azeroth-auto-pilot>.

130. Anshlun, *supra* note 126.

131. *Id.*

132. Eric Switzer, *World of Warcraft's Chromie Time Is Breathing New Life into Leveling Toons*, THE GAMER (Oct. 27, 2020), <https://www.thegamer.com/world-of-warcraft-chromie-time-level-toons>.

133. DagersEdge, *How to Roleplay in World of Warcraft at All Levels*, WOWHEAD (Nov. 17, 2020), <https://www.wowhead.com/guide=6073/how-to-roleplay-in-world-of-warcraft-at-all-levels>.

134. *See* Fergus Halliday, *The Reason I Started Playing World of Warcraft Again*, PC GAMER (Mar. 13, 2020), <https://www.pcworld.idg.com.au/article/671854/reason-started-playing-world-warcraft-again> (acknowledging the time investment required to play World of Warcraft).

have such an experience, but the player spends an equal amount of time (if not longer)¹³⁵ developing their player-character's story, appearance, and role in Azeroth.¹³⁶ The law values authorship at the moment a given creative work is created.¹³⁷ Under the Copyright Act, both the game developer and the player could be seen as being the authors of Warcraft as an overall title and the specific character in Warcraft's world.¹³⁸ Blizzard provides an exuberant amount of choices for players to make and, when combined, present an infinite amount of options for players to utilize when crafting their character.¹³⁹ Granted certain appearances and gameplay choices may be more popular or preferred, no single player character has the exact same account history.¹⁴⁰ This facet alone satisfies the "minimally creative" standard¹⁴¹ further justified in *Micro Star*, emphasizing the derivative nature of user-created content.¹⁴² Analysis of the typical character emphasizes that players appear to meet the initial threshold for implicitly authorized derivative works under both the statutory¹⁴³ and common law¹⁴⁴ standards.

In this regard, World of Warcraft player-characters should be viewed as property of the player and not the game developer.¹⁴⁵ The player uses authorized assets provided by Blizzard to create their own persona that drives the game; without the player-character, Azeroth would empty, Warcraft's story would not continue, and Blizzard's subscription-based business model would fail.¹⁴⁶ Blizzard benefits from a subscription and rights to hardware, servers, and software used to generate the game whereas the player, in return for a monthly fee and time investment, is rewarded with rights to their character and the entertainment that comes with it.¹⁴⁷ Adequate distribution of assets in the gamer-developer relationship cannot exclusively benefit the studio providing the

135. See *Distribution of World of Warcraft Player in 2013 by Time Spent Playing*, STATISTA (Jan. 8, 2014), <https://www.statista.com/statistics/327295/time-spent-playing-world-of-warcraft> (noting that more than half of Warcraft's player base plays for at least 20 hours a week).

136. Ian Mosley, *Personality and Character Selection in World of Warcraft*, 6 MCNAIR SCHOLARS RSCH. J. 12 (2010).

137. The Copyright Act, 17 U.S.C. § 201(a).

138. Ochoa, *supra* note 50, at 970–72.

139. Because of choices in appearance, story progression, and end-game content participation, no one character is alike. See *Character Creation*, *supra* note 118 (discussing appearances); see also Azortharion, *supra* note 127 (discussing questing).

140. *Id.*

141. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345–46 (1991).

142. *Micro Star v. Formgen, Inc.*, 154 F.3d 1107, 1112–13 (9th Cir. 1998).

143. See The Copyright Act, 17 U.S.C. § 102(a) (for originality); The Copyright Act, 17 U.S.C. § 103(b) (for derivative works).

144. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345–46 (1991) (defining "minimally creative" originality standards); *Micro Star v. Formgen, Inc.*, 154 F.3d 1107 (9th Cir. 1998) (describing *Feist* standards relative to derivative works specifically).

145. See generally Robinson, *supra* note 3 (advocating for gamers).

146. Kim Phifer, *The Great Importance of Business Models to the MMO*, GAMESPRESSO (Nov. 22, 2016), <https://www.gamespresso.com/2016/11/business-models-to-mmo>.

147. See Wilson Peng, *Why World of Warcraft Is One of the Best Subscription Based Business Ever*, MEDIUM (Apr. 1, 2015), <https://medium.com/@wilsonpeng/why-world-of-warcraft-is-one-of-the-best-subscription-based-business-ever-c861c1612683> (detailing World of Warcraft's commercial success and player satisfaction); see also *Patents Assigned to Blizzard Entertainment, Inc.*, JUSTIA, <https://patents.justia.com/assignee/blizzard-entertainment-inc> (last visited Feb. 27, 2022) (describing Blizzard's protections for back-end systems).

game.¹⁴⁸ As players lack the bargaining power to fight large game developers, the law must acknowledge that some concessions must be made to encourage gamers to continue their stories without adverse backlash from game developers.¹⁴⁹ In drawing lines and conferring individual copyright protection to player-characters, the balance of power between gamers and developers is maintained.¹⁵⁰ The work that players put into developing their characters must in some way be recognized and compensated. When assessing which party puts in more work to develop the copyright-eligible player-character, the quid-pro-quo of intellectual property in a traditional developer-providing and player-creating dynamic thus favors gamers.¹⁵¹

On the contrary, when assessing how players fair in the quid-pro-quo of ownership in more complex gamer-developer dynamics, Blizzard's recent actions in story and mechanic development appear to target player creativity and shift analysis in favor of developers.¹⁵² Players deviate heavily from World of Warcraft's main story to optimize game play relative to their individual goals in game.¹⁵³ Blizzard has no control over how players choose to level nor what content they choose to pursue despite their guidance in tailoring end-game content to favor certain game features.¹⁵⁴ Though expansion packs have introduced required in-game choices in the form of legendary skills and subfaction alignments to add flavor to gameplay, players ultimately decide what options to choose and how they are incorporated into their everyday activities in Azeroth.¹⁵⁵ In response to this player feedback, Blizzard often tailors the game to warp the game's trajectory to cater to what the community sees as "fun."¹⁵⁶ Though Blizzard eventually responds to player feedback related to poor game design and content delivery, the developer is often criticized for not understanding the player-base, often refusing to "pull the ripcord" on game elements they believe will be "fun" for players despite the community advising against such features early on in content development for being either too generic, repetitive, or lacking in player options.¹⁵⁷

148. Cai & Li, *supra* note 112.

149. See generally Kelsey Ridenhour, *Traditional Sports and eSports: The Path to Collective Bargaining*, 105 IOWA L. REV. 1857 (2020) (noting how bargaining power follows money).

150. See generally Robinson, *supra* note 3 (arguing for player and streamer rights for the hard work in character development).

151. *Id.*

152. *Id.*

153. Archimtiros, *supra* note 129 in World of Warcraft.

154. Anne Stickney, *WoW Isn't Going Full Choose-Your-Own-Adventure—But Player Choice Is Definitely a Thing*, BLIZZARD WATCH (Jan. 11, 2019), <https://blizzardwatch.com/2019/01/11/wow-isnt-going-full-choose-adventure-player-choice-definitely-thing>.

155. See generally Samuel Stewart, *World of Warcraft Expansions List*, GAMINGSCAN (Sept. 28, 2020), <https://www.gamingscan.com/world-of-warcraft-expansions-list> (listing every expansion pack and their relevant features).

156. World of Warcraft, *Live Developer Q&A w/ Ion Hazzikostas- March 21*, YOUTUBE (Mar. 22, 2019), https://www.youtube.com/watch?v=RQzLcmD-1ZM&feature=emb_title.

157. See Taliesin & Evitel, *All The Ways Shadowlands Won't Be Finished in Time . . . Covenants, Levelling & PvP | The Weekly Reset*, YOUTUBE (Sept. 14, 2020), <https://www.youtube.com/watch?v=4yeg7Bdb6fg> (describing Blizzard's recent hesitations in game development based on what is deemed fun by the community).

Blizzard's eagerness to stick to their guns may simply be ignorance;¹⁵⁸ however, their design style aimed at restricting player choice also serves as a means to lessen the impact of the player on character creation and development.¹⁵⁹ When players are forced into selecting certain features or elements to satisfy game requirements, they contribute less to building the narrative of both Warcraft in general and their character.¹⁶⁰ Players invest less time in making tough choices and building the story and instead follow the pre-determined, static path created by Blizzard.¹⁶¹ Ensuring that players do not vary their gameplay makes it significantly harder for a single character to differentiate themselves from another.¹⁶² Although dedicated players will devote the same amount of time to playing their character no matter the game design,¹⁶³ Blizzard assures that the sense of being one's character is minimized by providing a homogenous gaming experience to conform to a "meta," or an optimized build.¹⁶⁴

The repeated criticism that Warcraft has become too cookie-cutter¹⁶⁵ has drastic implications not only for gamer interest, but also for derivative work status.¹⁶⁶ Should player characters become too similar because combinations of game assets become a set path, Warcraft players could see their interest in their online personas transfer from their hands to Blizzard. Though the quid-pro-quo of hardships remains unfettered favoring players, basic copyright law requirements dictate that indistinct characters cannot be conferred protections.¹⁶⁷ Only the building blocks themselves, developed by game studios, can be eligible for copyright protection when characters and their stories can be transferred from one game to another with little imaginative input.¹⁶⁸

These changes promoting developer copyright ownership are not new to the gaming giant: Blizzard frequents California courts to assert their intellectual property claims over competitors, emphasizing how the tycoon diligently monitors their assets.¹⁶⁹ However, Blizzard has yet to challenge player character copyright claims and instead relies on solidifying their grasp on non-player

158. See Chris Kaleiki, *Why I Left Blizzard*, YOUTUBE (Nov. 18, 2020), https://www.youtube.com/watch?v=iznL9e12iYI&feature=emb_title (emphasizing developer gripes with the current state of the game).

159. See *contra Robinson*, *supra* note 3 (placing an emphasis on player actions and choices defining characters deserving of an individual property right).

160. *Id.*

161. *Id.*

162. *Id.*

163. Daryl Hepting, *A Study of User Interface Modifications in World of Warcraft*, 12 GAMES STUD. 1 (2012).

164. See Cass Marshall, *World of Warcraft's Story Now Varies from Person to Person, for Better or Worse*, POLYGON (Jan. 24, 2020), <https://www.polygon.com/2020/1/24/21063847/world-of-warcraft-battle-for-azeroth-lore-interview-steve-danuser> (noting Blizzard's attempts to create a unified world despite players being in alternate timelines).

165. *Cookie Cutter*, WOW WIKI, https://wowwiki.fandom.com/wiki/Cookie_cutter (last visited Mar. 14, 2022).

166. See *Robinson*, *supra* note 3, at 300–04 (placing an emphasis on player actions and choices defining characters deserving of an individual property right).

167. *DC Comics v. Towle*, 802 F.3d 1012, 1024–25 (9th Cir. 2015).

168. *Micro Star v. Formgen, Inc.*, 154 F.3d 1107, 1112–13 (9th Cir. 1998).

169. See generally *Blizzard Ent., Inc. v. Lilith Games (Shanghai) Co.*, 149 F. Supp. 3d 1167 (N.D. Cal. 2015) (suing to protect Warcraft assets); *Blizzard Ent., Inc. v. Joyfun Inc. Co., Ltd.*, No. 19-1582 JVS, 2020 WL 1972284 (C.D. Cal. 2020) (suing to protect Overwatch assets).

character copyrights.¹⁷⁰ In place of suing players, Blizzard has taken a variety of non-judicial actions to ensure that players satisfy copyright law requirements.¹⁷¹

Early in the game’s history, Blizzard ran promotional ads using famous figures such as Mr. T to increase their player base.¹⁷² In creating assets such as the “Night Elf Mohawk,” Blizzard entered into contractual agreements with prominent celebrities to develop assets in their likeness.¹⁷³ These assets, despite being relics of cultural icons long removed from the spotlight, still exist in-game and can be used by players when creating their characters or partaking in related story quests.¹⁷⁴ Aside from free promotion from a plethora of celebrities acknowledging their love of the game, Blizzard demonstrated that any individual player that could prove “distinctive”¹⁷⁵ could be bargained with to deny any powerful player copyright protection.¹⁷⁶

Despite these deals, they exist as a small portion of Blizzard’s copyright assurance. The main method of player interest removal relates to incorporation of players into the main story and achievement system of the game.¹⁷⁷ The first prominent instance of player incorporation occurred in 2008 when the achievement “Leeeeeeeeeeeroy!” was added to the game.¹⁷⁸ The achievement references a popular meme of a Warcraft player attempting to save his party from a “wipe” on a boss, or an instance where the entire group dies.¹⁷⁹ The video became a popular meme¹⁸⁰ and has become a common saying amongst gamers in high-end content when going all-in for a particular encounter.¹⁸¹ Through end-game user licensing agreements¹⁸² that relegate all in-game content created by users to game developers like Blizzard, any content that becomes popular can immediately be repurposed by game developers to ensure the influence of players is minimized.¹⁸³

170. *Id.*

171. See Justin Massoud, *Which Celebrity Endorser of ‘World of Warcraft’ Doesn’t Really Play the Game?*, GUYSPED (Nov. 22, 2011), <https://guyspeed.com/which-celebrity-endorser-for-world-of-warcraft-doesnt-really-play-the-game> (commenting on the monetary nature of these ads even among those that play the game).

172. CiniCraft, *World of Warcraft - Mr. T Commercial*, YOUTUBE (Nov. 23, 2007), <https://www.youtube.com/watch?v=dd25eHGOTXA>.

173. *Night Elf Mohawk*, WOWHEAD, <https://www.wowhead.com/hpc=31111/night-elf-mohawk> (last visited Mar. 14, 2022).

174. *Id.*

175. *DC Comics v. Towle*, 802 F.3d 1012, 1024–25 (9th Cir. 2015).

176. Massoud, *supra* note 171.

177. Perculia, *Pop Culture References in Wow Achievements*, WOWHEAD (Jan. 11, 2014), <https://www.wowhead.com/news=226521/pop-culture-references-in-wow-achievements>.

178. *Leeeeeeeeeeeroy!*, WOWHEAD, <https://www.wowhead.com/achievement=2188/leeeeeeeeeeroy> (last visited Mar. 14, 2022).

179. DBlow2003, *Leeroy Jenkins HD (High Quality)*, YOUTUBE (Feb. 27, 2014), <https://www.youtube.com/watch?v=hooKVstzbz0>.

180. Maya Rhodan, *The World of Warcraft Leeroy Jenkins Meme Is 10 Years Old*, TIME (May 12, 2015), <https://time.com/3855242/leeroy-jenkins-world-of-warcraft-meme>.

181. Jamie Dubs & Keira, *Leeroy Jenkins*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/leeroy-jenkins> (last updated Sept. 3, 2020).

182. *Blizzard EULA*, *supra* note 99.

183. See Robinson, *supra* note 3, at 300–04 (placing an emphasis on player actions and choices defining characters deserving of an individual property right).

The Warcraft team repeatedly creates achievements, mounts, and other in-game assets that reference popular game-related memes to effectively claim rights to the contested content.¹⁸⁴ A recent example includes the incorporation of Byron “Reckful” Bernstein, a prominent Warcraft streamer, into the game during the Shadowlands expansion as a tribute after his passing.¹⁸⁵ Through immortalizing Bernstein, Blizzard consequently stole a major aspect of the late streamer’s identity by indoctrinating him into the developer’s intellectual property portfolio. The incorporation of Bernstein into the game stands as the most dramatic action taken by Blizzard to dissociate a character from their respective player;¹⁸⁶ though Bernstein can no longer physically log into his account, Blizzard has taken any opportunity away from his estate to control the Reckful character by transitioning the player character into a non-playable (NPC) trainer.¹⁸⁷ Should Bernstein’s estate continue to broadcast the late streamer’s content through live streams like those of independent artists like the late Bob Ross,¹⁸⁸ Blizzard may be entitled to a share of the profits: Reckful, though memorialized in the hearts of many, is now but another lifeless asset of the Warcraft franchise.

2. *Final Fantasy XIV*

Like Warcraft, Final Fantasy XIV (FFXIV) prides itself in providing players an immersive gaming experience through detailed character customization,¹⁸⁹ grandiose storytelling,¹⁹⁰ and community development.¹⁹¹ At the onset, players are given various race options for characters that can be further customized using presets, sliders, and color palettes.¹⁹² After choosing their character’s initial appearance and voice, players are directed to choose additional lore options such as their protecting god, birthdate, and national origin that bring life-like qualities to their character without affecting gameplay.¹⁹³

184. Perculia, *supra* note 177.

185. Andy Chalk, *Blizzard Pays Tribute to Streamer Reckful with World of Warcraft NPC*, PC GAMER (Aug. 6, 2020), <https://www.pcgamer.com/blizzard-pays-tribute-to-streamer-reckful-with-world-of-warcraft-npc>.

186. Reckful is the most prominent real-world NPC to be added to the game. Though other people have been added in memory post-mortem, none had as big of a social influence because none had platforms like that of Bernstein. See u/Admiralproudmoore, *NPC’s That Are Based of “REAL” Human Beings*, REDDIT (Jan. 4, 2014), https://www.reddit.com/r/wow/comments/1ue24g/npcs_that_are_based_of_real_human_beings/ (listing other examples of prominent players added to the game because of their role in the game, not outside the game).

187. See *NPC*, WOWPEDIA, <https://wowpedia.fandom.com/wiki/NPC> (last visited Mar. 14, 2022) (explaining NPCs are generated and controlled by the game server, not other human players).

188. See *BobRoss*, TWITCH, <https://www.twitch.tv/bobross> (last visited Mar. 14, 2022) (noting that the estate of Bob Ross chooses to stream his past content free on the Twitch platform).

189. Rythian, *Final Fantasy XIV: A Beginner’s Guide - Character Creation and Basic Combat [SPONSORED]*, YOUTUBE (Jan. 24, 2017), <https://www.youtube.com/watch?v=dg-Oe1C6d-s>.

190. *Final Fantasy XIV Storylines*, FINAL FANTASY WIKI, https://finalfantasy.fandom.com/wiki/Final_Fantasy_XIV_storylines (last visited Mar. 14, 2022).

191. See Zepla HQ, *Why is the FFXIV Community NOT TOXIC?*, YOUTUBE (May 9, 2020), <https://www.youtube.com/watch?v=-Fx7aFUfnkQ> (commenting on the relatively rare friendliness found in FFXIV that is not present in other MMORPGs).

192. Rythian, *supra* note 189.

193. *Character Creation*, GAMER ESCAPE, https://ffxiv.gamerescape.com/wiki/Character_Creation (last visited Mar. 14, 2022).

Though characters must choose their initial starting class, they may freely switch between other classes should they decide their character does not fit a certain “holy trinity”-style damage-healer-tank role.¹⁹⁴ Square Enix and community members alike boast that FFXIV’s character creation system dwarfs competitor games.¹⁹⁵ Many specifically note that the true “end-game” content relates not to the game at all and instead relates to making the perfect looking character.¹⁹⁶ In-game options such as FFXIV’s glamour system¹⁹⁷ and Aesthetician¹⁹⁸ permit players to change nearly every aspect about their character so long as original models are not altered.

FFXIV players have taken their own initiative in further expanding character creation and modification options through “modding” the game themselves by directly altering game files.¹⁹⁹ Though custom content is prohibited by the game’s terms and conditions,²⁰⁰ the FFXIV modding community has produced over 20,000 mods as of Spring 2022²⁰¹ to alter the game’s files and permit players to express themselves truly how they desire. In doing so, players often create their own meshes from scratch to design appearances that match the game’s style, but distinctly can be identified as content not derived from Square Enix’s Final Fantasy brand.²⁰² Such content without a doubt belongs to player content creators, one of the many reasons why the game studio likely prohibits altering of game files in such a manner.²⁰³ Regardless, Square Enix’s relatively hands-off approach on enforcing its stance on game modification²⁰⁴ underscores the predominate role that players have in shaping their own character’s identity in FFXIV as compared to Blizzard’s hawkish Warcraft model.

194. *Job Guide*, FINAL FANTASY XIV LODESTONE, <https://na.finalfantasyxiv.com/jobguide/battle/> (last updated Feb. 2, 2021).

195. See JoCat, *Final Fantasy XIV Character Creator Critique - Everyone Is Pretty*, YOUTUBE (Dec. 26, 2018), https://www.youtube.com/watch?v=mNAwSYy_oWY (describing the amount of style and quality placed on character models, though lacking grit to match the game’s lore).

196. See, e.g., Dyrus2, *DYRUS | FFXIV 5.1: GLAMOUR END GAME*, YOUTUBE (Nov. 5, 2019), <https://www.youtube.com/watch?v=4eVZucDtgrY> (testing the FFXIV running joke that end-game content relates exclusively to character customization).

197. Alahra, *A Guide to Glamour in FFXIV*, FASHION NINJUTSU (May 26, 2019), <https://fashionninjutsu.com/2018/09/24/a-guide-to-glamour-in-ffxiv>.

198. *Jandelaine de Dzemael*, FINAL FANTASY WIKI, https://finalfantasy.fandom.com/wiki/Jandelaine_de_Dzemael (last visited Mar. 14, 2022).

199. See *Tools & Resources*, XIV MOD ARCHIVE, <https://www.xivmodarchive.com> (last visited Mar. 13, 2022) (serving as a database for all Final Fantasy mods) [hereinafter *XIV Mods*].

200. u/xXRaineXx, *Full Translation on Yoshikda Talking About Mods/Third Party Tools and Penalties*, REDDIT (Feb. 7, 2020), https://www.reddit.com/r/ffxiv/comments/f0axyh/full_translation_on_yoshida_talking_about [hereinafter *Yoshida Comment*].

201. *XIV Mods*, *supra* note 199.

202. See *id.* (providing different categories related to modern streetwear in the same network hosting recreations of popular Final Fantasy characters).

203. See *contra* Kyle Orland, *Blizzard Now Claims Full Copyright for Player-Made “Custom Game” Mods*, ARS TECHNICA (Jan. 29, 2020), <https://arstechnica.com/gaming/2020/01/blizzard-now-claims-full-copyright-for-player-made-custom-game-mods> (demonstrating game developers extending their grasp onto player-created content despite its intrinsic ownership in the player-author).

204. *Yoshida Comment*, *supra* note 200.

Though FFXIV allows for endless character customization, gameplay provides fewer options for character development.²⁰⁵ Unlike Warcraft, players are not given complete freedom in how they choose to progress through content in Eorzea, FFXIV's virtual universe.²⁰⁶ To access later content, players must first tackle earlier quests in the game's "Main Story Quest" system.²⁰⁷ FFXIV differs drastically from other MMORPGs in that it focuses on its solo-player progression as opposed to multiplayer content.²⁰⁸ Many suggest that FFXIV is instead a single player game disguised as an MMORPG,²⁰⁹ emphasizing restrictions on players who wish to write their own story when playing online games.²¹⁰ Though the Main Story Quests are stagnant and must be performed in a specific order,²¹¹ side quests to unlock additional content, customization options, and events may be completed by the player at any point they wish provided they meet level requirements.²¹² Some of these quests provide a player an exuberant amount of choices to make, such as deciding which Grand Company (an in-game army) they want to join²¹³ or where they want their player character to live.²¹⁴ Other flavors of these quests merely give additional information about the game's lore and are often skipped.²¹⁵ Regardless, these choices allow players to further differentiate their characters as they experience the chaos ensuing throughout Eorzea through the game's forced narrative.

Despite these limitations, players find ways to further define their characters in Eorzea on their own accord.²¹⁶ FFXIV is home to one of the largest MMORPG role-playing communities.²¹⁷ Bred specifically through the game's unique housing system, players can customize communities and reenact game plots or stories similar to those in everyday life.²¹⁸ Square Enix has embraced this feature of the game, allowing players to denote that they prefer role-playing using an "RP" tag as opposed to other tags signifying an interest in Main Story Quest progression or end-game raiding content.²¹⁹ The studio's stance seems to

205. See Zepla HQ, *9 Things EVERY New FFXIV Player Should Know!*, YOUTUBE (June 15, 2019), <https://www.youtube.com/watch?v=zvkdFowY5zo> (emphasizing the required story for new players).

206. *Id.*

207. *Main Scenario Quests*, FINAL FANTASY XIV WIKI, https://ffxiv.consolegameswiki.com/wiki/Main_Scenario_Quests (last updated Sept. 21, 2020) [hereinafter *MSQ*].

208. Zepla HQ, *supra* note 205.

209. See Steven Strom, *Is It Too Late to Get into FF14? Well, It's Complicated...*, FANBYTE (June 20, 2019), <https://www.fanbyte.com/features/is-it-too-late-to-get-into-ff14-well-its-complicated> (noting how long single-player progression would take for new players to catch-up to multiplayer content).

210. Zepla HQ, *supra* note 205.

211. *MSQ*, *supra* note 207.

212. See Zepla HQ, *supra* note 205 (providing a list of "essential" side quests that the Youtuber finds the most engaging or important).

213. *The Grand Companies of Eorzea*, SQUARE ENIX: FINAL FANTASY XIV LODESTONE, <https://na.finalfantasyxiv.com/lodestone/special/grandcompany/> (last visited Mar. 15, 2022).

214. *Housing: Additional Plots and Purchasing Guide*, SQUARE ENIX: FINAL FANTASY XIV LODESTONE, https://na.finalfantasyxiv.com/lodestone/playguide/contentsguide/housing_land (last updated Oct. 13, 2020).

215. Zepla HQ, *supra* note 205.

216. See generally RACHEL TATE, USER-DRIVEN ROLE-PLAYING IN FINAL FANTASY XIV: IMMERSION, CREATIVE LABOR, AND PSYCHOSOCIAL WELL-BEING (2019), <https://mountainscholar.org/handle/10217/199868> (analyzing the complex nature of online interactions in FFXIV).

217. *Id.*

218. *Id.*

219. *Id.*

juxtapose their views on limiting user-created content in FFXIV in every other feature (such as character appearance and story) central to the game.²²⁰

That being said, players must spend a significant amount of time and money to create their character's identity and thus deserve protection for said intellectual property.²²¹ Main Story Quests take weeks of non-stop gameplay to complete and have been the target for time-investment "nerfs," or scale-backs, because of their tedious nature.²²² This investment, atop of a monthly subscription fee and charges for expansion packs, keeps Square Enix afloat when frequent content lulls occur.²²³ Though the studio, like others, dedicates a large amount of resources to creating the game, the player spends an equally absurd amount of time building their character to optimize their end-game status.²²⁴ Square Enix provides players building blocks to create unique characters;²²⁵ these characters satisfy the "minimally creative" *Micro Star* standard providing for protection of derivative works.²²⁶ Even should players use assets that allow for mimicry of popular in-game story characters, their work spent grinding experience to level up, fetching of virtual goods to complete quests, and creative energy dedicated to envisioning their own narratives underscores how the quid-pro-quo of intellectual property law²²⁷ should favor protection of their investment.

With that in mind, a legal battle for ownership of Eorzean characters would likely never come to fruition because players have an overwhelmingly positive and open relationship with Square Enix.²²⁸ Unlike Warcraft players, FFXIV players often express their gratitude for how responsive Square Enix is in addressing community concerns and feedback.²²⁹ This relationship that developed as the game saw its resurgence in 2012 underscores the possible willingness of the game studio to be more lenient towards players when addressing ownership concerns.²³⁰ When players have greater bargaining power, the probability of fighting legal battles drastically reduces.²³¹

Despite the game sharing many common features like character customization, role-playing, and time investment with other popular games,²³² a battle over ownership rights (or, particularly, any legal battle associated strictly

220. *Id.*

221. *Id.*

222. Cai & Li, *supra* note 112.

223. Dustin Bailey, *Final Fantasy XIV Devs Plan to Shorten the Monstrously Long Main Story for New Players*, PCGAMESN (Sep. 1, 2019), <https://www.pcgamesn.com/final-fantasy-xiv/story-skip>.

224. *Id.*

225. Rythian, *supra* note 189.

226. *Micro Star v. Formgen, Inc.*, 154 F.3d 1107, 1112–13 (9th Cir. 1998).

227. Cai & Li, *supra* note 112.

228. See Mike Fischer, *Bethesda and Blizzard Should Learn from how Square Enix Fixed its Final Fantasy XIV Problem*, VENTUREBEAT: GAMESBEAT (Dec. 9, 2018), <https://venturebeat.com/2018/12/09/bethesda-and-blizzard-should-learn-from-how-square-enix-fixed-its-final-fantasy-xiv-problem> (describing the close relationship between Square Enix and FFXIV players).

229. *Id.*

230. Brenna Hillier, *Final Fantasy 14: Yoshida's "Crazy" MMO Reboot*, VG24/7 (Aug. 2, 2013), <https://www.vg247.com/2013/08/02/final-fantasy-14-yoshidas-crazy-mmo-reboot>.

231. See generally Ridenhour, *supra* note 149 (noting differences in bargaining power).

232. Fischer, *supra* note 228.

with in-game concerns)²³³ in FFXIV seems unlikely. In a player-driven community like FFXIV, game studios acknowledge the power of their players and the rights they are entitled to.²³⁴ When bargaining power is equalized, players are not forced to succumb to demands and relinquish their work they invested heavily in.²³⁵ Should discourse arise, discussions could be had and compromises made. This is seen often through FFXIV's player feedback, Square Enix's interview responses, and final "live letters" that present the agreed upon compromise between Eorzeans and the game developer to progress the game forward.²³⁶ Square Enix's reluctance to generally pursue lawsuits²³⁷ and their commitment to maintaining customer morale²³⁸ through communication implies that the studio sees value in the player's creations, but also recognizes that these virtual creations are not theirs to police nor own.²³⁹ As games tend towards emulating FFXIV's in-game features after being elected Best Ongoing Game at the 2020 SXSW Gaming Awards,²⁴⁰ players can hope more game studios recognize that the game's power lies beyond the pixels and instead in customer service.

3. *Combining the Worlds: Streaming and Beyond*

Though each game has its own individual features that may suggest player characters should be endowed either individual or joint copyright protection, the rise of streaming and cross-game character development emphasizes the complex nature of copyright analysis.²⁴¹ Many players choose to identify as the same persona across multiple games and, in some cases, apply that character to their real life person.²⁴² Streamers, much like performers in related art such as film and music, often tend to refer to themselves by a chosen alias as opposed to their true name.²⁴³ In doing so, they bring the same character to life in every game they play for their audiences. These personas are bred from a combination of in-game and in-real-life ("IRL") interactions that ultimately culminate in a

233. *Yoshida Comment, supra* note 200.

234. *Id.*

235. *See generally* Ridenhour, *supra* note 149 (commenting on power dynamics between game developers and players).

236. *See, e.g.,* Final Fantasy XIV, *FINAL FANTASY XIV Letter from the Producer LIVE Part LXII*, YOUTUBE (Feb. 5, 2021), <https://www.youtube.com/watch?v=IMFyeO56uyY> (showcasing how production interacts with FFXIV players).

237. *Yoshida Comment, supra* note 200.

238. *See, e.g.,* Tyler Lee, *Square Enix Offers Temporary Reprieve For Final Fantasy XIV Players Who Cannot Afford To Pay Subscription*, UBERGIZMO (Mar. 29, 2020), <https://www.ubergizmo.com/2020/03/final-fantasy-xiv-home-demolishment-coronavirus> (highlighting customer support during COVID-19 in comparison to other game companies offering no assistance).

239. *Yoshida Comment, supra* note 200.

240. Gary Watkins, *Announcing the 2020 SXSW Gaming Awards Winners*, SXSW (Mar. 24, 2020), <https://www.sxsw.com/news/2020/announcing-the-2020-sxsw-gaming-awards-winners>.

241. Robinson, *supra* note 3, at 300–04.

242. *See* Lukas Blinka, *The Relationship of Players to Their Avatars in MMORPGs: Differences between Adolescents, Emerging Adults and Adults*, 2 CYBERPSYCHOLOGY 1, 1 (2008) (alluding to these choices relating to identity and the "immersion factor").

243. *See* Brittni Finley, *Pokimane Doesn't Like when Twitch Viewers use her Real Name*, GAMERANT (July 27, 2020), <https://gamerant.com/pokimane-real-name-twitch> (underscoring the need for aliases for privacy concerns).

new age piece of intellectual property that adjacent fields have yet to see before.²⁴⁴

For instance, World of Warcraft streamer Asmongold (“Asmon”) exclusively identifies as his streaming persona while broadcasting to his average audience of about 40,000 viewers.²⁴⁵ Asmon claims that he created his character in World of Warcraft in 2006, predating his stream career.²⁴⁶ Although Asmon predominantly streams Warcraft related content, he occasionally plays additional games like Path of Exile, New World, and Fall Guys under the same in-game alias.²⁴⁷ Though he no longer wields a sword and casts the same spells as he would in Warcraft, Asmon retains his stream “personality” and responds to his viewers in the same crass tone and vocabulary as he would if he were in Azeroth.²⁴⁸ With his stream’s rapid growth, Asmon has moved beyond virtual worlds and penetrated many IRL markets completely unrelated to gaming.²⁴⁹ Alongside his normal gaming content, he hosts many “reaction” streams, IRL streams (most notably, drives to Wendy’s), and a podcast “Allcraft” with his gaming friends to discuss the current state of World of Warcraft and the gaming industry.²⁵⁰

Contrast Asmon with zackrawrr, the streamer’s side channel where he claims to be his true self and not his Warcraft persona.²⁵¹ Comparisons between his main channel and side channel underscore how Asmon and Zack (the streamer’s true identity) differ drastically. While the devised character is hypersensitive and tries to rile up his fans, the “real” Zach is relatively calm and seeks to converse with his fans instead.²⁵² How can this Zach be separated from Asmon? The same person attracts viewers, but different personas put on separate shows. Likewise, can an Asmon in World of Warcraft be separated from an Asmon in another game? The online hero may behave universally the same no matter the virtual world, but podcast Asmon shines a different light on the character’s portrayal. Zach, under the guise of Asmon, further delineates from the personality bred in Azeroth.

Though joint ownership may reconcile the interests of game developers and players in the player-character ownership debate, examples like Asmon

244. Robinson, *supra* note 3, at 300–04.

245. *Asmongold*, TWITCHTRACKER, <https://twitchtracker.com/asmongold> (last visited Nov. 22, 2020).

246. *Asmongold*, TWITCH, <https://www.twitch.tv/asmongold> (last visited Nov. 22, 2020).

247. *List of Games Streamed by Asmongold*, TWITCHTRACKER, <https://twitchtracker.com/asmongold/games> (last visited Nov. 22, 2020).

248. Dylan Bishop, *What it Takes to be one of World of Warcraft’s Top Streamers*, NETWORK N (May 29, 2020), <https://www.pcgamesn.com/world-of-warcraft/asmongold-wow>.

249. See Daily Dose of Asmongold, *Asmongold IRL Highlights*, YOUTUBE, <https://www.youtube.com/playlist?list=PLbpzNAbfBmrLc6C7hBjsWVqdOE05dmrDv> (last updated Aug. 12, 2019) (providing a sample of Asmon’s non-gaming streams).

250. Assertonsin, *Asmongold Stream Reactions*, YOUTUBE, <https://www.youtube.com/channel/UCwGa9NeXgJuQ1w1u9KCcyayA> (last updated Dec. 11, 2019); Hotted89, *ALLCRAFT*, YOUTUBE, https://www.youtube.com/playlist?list=PLWAHv9_vAzO3W7U27UZ1efmBW6L1ybDVG (last updated Oct. 9, 2018).

251. *zackrawrr*, TWITCH, <https://www.twitch.tv/zackrawrr> (last visited Mar. 15, 2022).

252. u/Crypto2k, *Here’s a Video of Asmongold Without his Stage Persona. Turns out he’s Actually a Pretty Chill Dude!*, REDDIT (Nov. 23, 2017), https://www.reddit.com/r/wow/comments/7f5fg7/heres_a_video_of_asmongold_without_his_stage.

highlight how joint ownership would shirk individuals who grow beyond the boundaries of a single game.²⁵³ Games may give streamers their original platform, but the characters streamers create and sell to their audiences ultimately draw viewers back.²⁵⁴ Playing games and streaming both represent forms of performance that should be recognized by copyright law as their own individual arts just as publicity law has grown to do the same; as these characters are inseparable from the performances, they too must be allotted their own distinct form of copyright protection.²⁵⁵ Other alternative forms of gaming-related expression such as cosplay and character fan art also emphasize the player's influence on art creation and application.²⁵⁶ In the quid-pro-quo of intellectual property, the player and streamer put in far more work in marketing and branding their character as opposed to the developer that provides the initial asset.²⁵⁷ Consequently, the free-riding developer should not be able to profit from the increased publicity, monetary compensation in the form of payment by the gamer, and copyright protections allotted to all their assets provided to the gamer.²⁵⁸ By providing the gamer these assets and still profiting, the developer exhausts their enforcement rights to their copyright.²⁵⁹

B. End-User Licensing Agreements

EULAs are all-or-nothing provisions that serve as the final barrier between developers and gamers. Without assent to the terms, the player is not allowed into the developer's virtual world.²⁶⁰ Though EULAs contain many rules regarding a developer's stance on profane language,²⁶¹ editing of their game files to confer an unfair advantage²⁶² and other regulatory affairs related to maintaining the game itself,²⁶³ a common provision glossed over, pertains to intellectual property created by players in game. These provisions assure developers that even if copyright ownership of player-characters can be traced back to players, their consent to the creation of derivative works does not reallocate ownership rights.²⁶⁴ For instance, the Blizzard EULA provides:

You hereby grant Blizzard a perpetual, irrevocable, worldwide, fully paid up, non-exclusive, sub-licensable, right and license to exploit the User Content and all elements thereof, in any and all media, formats

253. Ochoa, *supra* note 50, at 970–72.

254. Robinson, *supra* note 3, at 300–04.

255. *Id.*

256. *See id.*, at 304 (“The games are merely the backdrop and the streaming sites are the tool that brings the streamers and their fans together.”).

257. *See generally* Cai & Li, *supra* note 112 (explaining quid pro quo enforcement in the context of intellectual rights protection).

258. Ochoa, *supra* note 50, at 970–72.

259. *See* Martin L. Beacham, *Can You Exhaust a Digital Video Game Copyright?*, HUTCHINSON L. (Apr. 13, 2020), <https://www.hutchlaw.com/blog/can-you-exhaust-a-digital-video-game-copyright> (recognizing the EU's acceptance of video game copyright exhaustion).

260. Annalee Newitz, *Dangerous Terms: A User's Guide to EULAs*, ELEC. FRONTIER FOUND. (Feb. 17, 2005), <https://www.eff.org/wp/dangerous-terms-users-guide-eulas>.

261. *See* Taylor, *supra* note 91 (addressing waiver of liability).

262. *Id.*

263. *Id.*

264. Robinson, *supra* note 3, at 321–22.

and forms, known now or hereafter devised. Blizzard shall have the unlimited right to copy, reproduce, fix, modify, adapt, translate, reformat, prepare derivatives, add to and delete from, rearrange and transpose, manufacture, publish, distribute, sell, license, sublicense, transfer, rent, lease, transmit, publicly display, publicly perform, provide access to, broadcast, and practice the User Content as well as all modified and derivative works thereof and any and all elements contained therein, and use or incorporate a portion or portions of the User Content or the elements thereof in conjunction with or into any other material. In the event you upload or otherwise transmit to Blizzard any concepts, ideas, or feedback relating to the Platform, you shall not be entitled to any compensation for any such submission, unless expressly agreed between you and Blizzard, and Blizzard may freely use any such submission in any manner it deems appropriate... Except to the extent that any such waiver is prohibited by law, you hereby waive the benefit of any provision of law known as “moral rights” or “droit moral” or any similar law in any country of the world.²⁶⁵

Because developers typically reuse their EULAs across all their games, these provisions seldomly change.²⁶⁶ For example, Blizzard’s EULA language related to intellectual property is the same for the Warcraft franchise,²⁶⁷ their Overwatch franchise,²⁶⁸ and their Diablo franchise.²⁶⁹ Notably, this boilerplate language is retained across games despite developer differences.²⁷⁰ Though Final Fantasy contains a drastically different amount of customization options²⁷¹ than World of Warcraft, Square Enix’s EULA agreement reads as:

Square Enix may offer you the opportunity to upload, transmit, or otherwise make available on the Services content you have created (“User-Generated Content”). Subject to your local law, you grant Square Enix the unrestricted, worldwide, irrevocable, perpetual, and cost-free right to use, copy, modify, distribute, disclose, sell, sublicense, display, publicly perform, publish, broadcast, translate, make derivative works of, promote, and otherwise exploit your User-Generated Content without any compensation, notice, or attribution to you, and to allow other third parties to do the same. To the maximum extent permitted by your local law, you waive any moral rights you have in User-Generated Content.²⁷²

265. *Blizzard EULA*, *supra* note 99.

266. *See* Newitz, *supra* note 260 (identifying the changing “time to time” nature of agreements and change in agreements in response to boycotts).

267. *See* *Blizzard EULA*, *supra* note 99 (explaining the information in the Blizzard standard EULA and establishing universal policies across all Blizzard games as of June 1, 2021).

268. *Id.*

269. *Id.*

270. *See* hicksbw, *That EULA is Barely Worth the Paper it’s Printed on*, UNIV. BRITISH COLUMBIA (Nov. 4, 2013), <https://videogamelaw.allard.ubc.ca/2013/11/04/worthless-eulas/> (listing companies that use the same boilerplate phrases in their agreements).

271. Rythian, *supra* note 189.

272. *End User License Agreement*, SQUARE ENIX CO., <https://companion-app.finalfantasyxiv.com/help/eu/about/terms.html> (last updated Aug. 8, 2020) [hereinafter *FFXIV EULA*].

The boilerplate nature of these provisions extends beyond MMORPGs and into the general online gaming and software development environment.²⁷³ Developers take advantage of this new standard: Games that offer little to no customization options such as League of Legends and the general Electronic Arts catalogue contain near identical provisions that reassign property rights to game developers.²⁷⁴ When games that offer no customization options include these provisions, scholars are left to question whether developers consider the importance of specific EULA provisions when shipping them to market.²⁷⁵ Given all EULAs are nearly identical, providing every possible EULA provision serves to cover every possible base for developers as opposed to considering how the EULA itself would specifically affect their game or their player base.²⁷⁶ When construed strictly, applying over-expansive EULAs to games lacking components mentioned creates problems as the modern gaming landscape evolves and players become more crafty; however, a broader EULA provides developers comfort should they decide to test new features in their games that provide players more creative outlets.²⁷⁷

That being said, in each scenario, game developers are granted an exclusive ownership or license to the content created as a derivative work from in-game activities.²⁷⁸ Although licensing poses less tension between competing game developers, studios that assert that in-game content created by players is owned rather than licensed to them fail to recognize the legal ramifications of the property status in a modern gaming environment favoring game spillovers in player choice.²⁷⁹ When the same creative works are made by players across multiple games, strict EULA intellectual property provisions dictate that each game developer has exclusive copyright protection on the character in contest.²⁸⁰ Because two parties cannot have an individual property right concurrently and this language disfavors joint ownership, developers fail to consider how a shift in the gaming and streaming industry has put studios and their intellectual property portfolios at odds.²⁸¹ Though the likelihood of contest between player-created works is low, cases like *Micro Star* emphasize that player-generated content has value and studios are interested in assuring derivative works assigned to studios remains marketable solely by the developer.²⁸²

273. See Newitz, *supra* note 260 (explaining issues that impact the entire digital landscape beyond MMORPGs).

274. *Blizzard EULA*, *supra* note 99; *Riot EULA*, *supra* note 99.

275. See Avast, *EULAs, Gamers, and Safety*, SEC. BOULEVARD (July 30, 2020), <https://securityboulevard.com/2020/07/eulas-gamers-and-safety-avast> (commenting on developers' interest in having EULAs generally for licensing purposes, not intricate deals between players and developers).

276. *Id.*

277. Robinson, *supra* note 3, at 321–22; Rogers, *supra* note 51, at 100–06.

278. See, e.g., *Blizzard EULA*, *supra* note 99; *Riot EULA*, *supra* note 99; *RuneScape EULA*, *supra* note 99.

279. See generally Robinson, *supra* note 3 (discussing the importance of recognizing player work in content development).

280. *Id.* at 311.

281. See, e.g., *id.* (discussing standing issues with intellectual property case law between game developers and streamers).

282. *Micro Star v. Formgen, Inc.*, 154 F.3d 1107, 1112–13 (9th Cir. 1998).

Another fundamental problem with mandated assignment of intellectual property relates to the purpose of creative protection.²⁸³ Developers bypass the quid-pro-quo of intellectual property and instead exercise their authority over players to bar them access to their games if they are unwilling to forfeit their interest in the characters they create.²⁸⁴ Though this shirking affects casual gamers, EULAs have drastic ramifications on streamers.²⁸⁵ Streamers create content derived from games; the game takes a backseat and provides nothing but an interactive experience for the streamer to meddle with.²⁸⁶ Strict readings of these provisions suggest that player-characters originally generated in-game would belong to game developers despite a majority of the streamer's work existing outside the game's virtual bounds.²⁸⁷

Streamers put in far more effort building a brand for themselves outside of games, especially when they play multiple games for their viewers, acknowledging the unfair dynamic between streamers and game developers.²⁸⁸ Streamers can never have content for their viewers unless they assign in-game intellectual property to developers.²⁸⁹ If streamers refuse to assign or license these property rights, they are excluded from streaming completely unless they build a brand unrelated to gaming.²⁹⁰ Though this may explain the rise of stream categories such as "IRL," "Just Chatting," and "Art," most prominent streamers in these categories use these as alternatives to branch out or to take a break from gaming as opposed to starting their careers there.²⁹¹ Unless the streamer caters to a niche market, they typically begin in some form of gaming-related stream category.²⁹² Streamers need games to prosper, and the law must acknowledge the unfair bargaining power undercutting copyright's main purpose of inspiring creativity.²⁹³

Additionally, these provisions undercut streaming services: as streaming services are subject to developer EULA provisions as well, stream providers often must favor developers over individual streamers to prevent legal action.²⁹⁴ Developers have recently begun to take a vested interest in how their intellectual property is streamed.²⁹⁵ Though a majority of these actions have come under EULA provisions related to in-game audio under the Digital Millennium

283. U.S. CONST. art. I, § 8, cl. 8.

284. Cai & Li, *supra* note 112.

285. Robinson, *supra* note 3, at 300–04.

286. *Id.*

287. *Id.*

288. *Id.*

289. Tyler Wilde, *Should Streamers Pay Game Developers to Stream their Games?*, PC GAMER (Oct. 22, 2020), <https://www.pcgamer.com/do-streamers-owe-game-developers-money>.

290. *Id.*

291. "Just Chatting" Streams Taking Over Twitch and Content Creation in General, GAMINGONPHONE (June 16, 2020), <https://gamingonphone.com/miscellaneous/just-chatting-streams-taking-over-twitch-and-content-creation>.

292. *Id.*

293. Wilde, *supra* note 289.

294. See Bijan Stephen, *Twitch Streamers Are Getting DMCA Takedown Notices (Again)*, THE VERGE (Oct. 20, 2020, 3:23 PM), <https://www.theverge.com/2020/10/20/21525481/twitch-streamers-dmca-takedown-notices-riaa-copyright> (describing the repeated nature of streaming services siding with developers).

295. *Id.*

Copyright Act,²⁹⁶ the inability for streaming services to act as a middle man between streamers and game developers highlights how the growing power of developers has given streaming services little room to grow and adopt their own rules and policies.

Streaming services cannot self-police. Despite depending on streamers to stay alive, their rules are fashioned to favor developers.²⁹⁷ Because streaming services pride themselves on giving streamers an outlet to perform and connect with their audiences, expanding developer intellectual property rights to any in-game asset created by a player suggests that developers' perpetual bullying in the streaming arena can effectively halt any means of self-imposed change by streaming services.²⁹⁸ Like streamers, streaming services depend on creativity generated in games.²⁹⁹ Though streaming services contribute less work than streamers, they facilitate a streamer's ability to broadcast their in-game creative pieces.³⁰⁰ Without any bargaining power against developers or resilience displayed by streaming services, developers will exclusively determine the future of the gaming industry and continually deny players the copyright protections they deserve over their own personas removed from gaming itself.³⁰¹

C. End-User Licensing Enforcement

Despite every game providing end-user licensing agreements, users rarely acknowledge their terms.³⁰² The popularity of click wrap licenses that provide lengthy terms to users in a small, scroll-enabled box has skyrocketed since their approval in 1998 in *Groff*.³⁰³ These agreements are traditionally appreciated by both developers, who can present their terms in an orderly fashion, and gamers, who can accept the terms instantaneously, alike.³⁰⁴ Click wrap agreements in the form of end-user licensing agreements expedite the forced bargaining process; since players cannot negotiate the agreement's terms, they can simply accept merely by pressing an acceptance button without reading the document in its entirety.³⁰⁵

296. *Id.*

297. See Tom Warren, *Microsoft Is Shutting Down Mixer and Partnering with Facebook Gaming*, THE VERGE (June 22, 2020, 2:30 PM), <https://www.theverge.com/2020/6/22/21299032/microsoft-mixer-closing-facebook-gaming-partnership-xcloud-features> (highlighting how a lack of viewers due to low streamer choices and policies forced a merger).

298. *Id.*

299. *Id.*

300. *Id.*

301. See generally Ridenhour, *supra* note 149 (noting the power imbalance between gamers and game developers).

302. Jeff Sauro, *Do Users Read License Agreements?*, MEASURINGU (Jan. 11, 2011), <https://measuringu.com/eula/>.

303. *Groff v. Am. Online, Inc.*, No. PC 97-0331, 1998 WL 307001, *3-4 (R.I. Super. Ct. 1998).

304. See Stephen Hodzic, *Decoding the Video Game End User License Agreement*, JURISMAGAZINE (May 5, 2019), https://sites.law.duq.edu/juris/2019/05/05/decoding-the-video-game-end-license-user-agreement/#_ftn2 (discussing developers' interest in conveying certain clauses and the condensed form of displaying such information); see also David Berreby, *Click to Agree with What? No one Reads Terms of Service, Studies Confirm*, THE GUARDIAN (Mar. 3, 2017, 8:38 AM), <https://www.theguardian.com/technology/2017/mar/03/terms-of-service-online-contracts-fine-print> (discussing how users "look through" agreements at most and instantaneously click to accept).

305. See generally Ridenhour, *supra* note 149 (highlighting power differences in the gaming industry).

Stylization of click wrap agreements, however, question their enforceability.³⁰⁶ When players are not forced to at least scroll through the agreement, developers are unaware if users have read the document to begin with.³⁰⁷ Courts have repeatedly emphasized that contracts cannot be enforced when there is no meeting of the minds: If players do not know the terms of an agreement, they cannot accept the offer posed by the developer.³⁰⁸ Recent debates between streamers, streaming services, and game developers³⁰⁹ underscore how players and streaming services do not fully comprehend game developer terms as a result of such click wrap designs.

Aside from stylization, the gaming community's disdain for EULAs shine a light on how the one-sided bargain occurs and should, consequently, be invalidated.³¹⁰ Studies find that 97% of players do not read the terms provided by game developers in their EULA policies.³¹¹ Players that read EULAs are often still caught off guard based on how game developers choose to enforce their rules.³¹² Though these provisions may not have adverse effects on casual gamers who can opt to not play games with strict EULA enforcement regimes, streamers who depend on gaming content to satisfy their viewers and generate revenue are hard pressed to agree to developer demands to continue their art.³¹³

Courts have long held that licensing agreements like EULAs may only be enforced when (1) the user had ample time to read and comprehend the agreement and (2) its terms did not "shock the conscience" of any party involved.³¹⁴ Though the click wrap agreement may be upheld even when users did not read the document,³¹⁵ the content of the agreement may render its enforcement null provided the terms are too rigid or unjust.³¹⁶ In the context of gaming, requiring complete reassignment of any in-game creation to game developers could serve as a means to challenge the EULA intellectual property provisions.³¹⁷

The recent push for game developers and their associated artists (specifically, composers and musicians) to assert their intellectual property rights on streamers has highlighted how current law and modern policymakers

306. Feldman v. Google, Inc., 513 F. Supp. 2d 229, 240 (E.D. Pa. 2007).

307. *Id.*

308. *Id.*

309. Winnie Clark, *The (Still) Uncertain State of Video Game Streaming Online*, ARSTECHNICA (Jan. 28, 2018, 8:00 AM), <https://arstechnica.com/gaming/2018/01/to-stream-or-not-to-stream-how-online-streaming-game-videos-exist-in-an-ip-world>.

310. See Christian Vaz, "Mute the Game Audio," *Twitch Recommends, to Avoid DMCA Issues*, PCGAMESN (Nov. 13, 2020), <https://www.pcgamesn.com/twitch/mute-game-audio> (highlighting recent player concerns of EULA provisions).

311. Berreby, *supra* note 304.

312. *Id.*

313. Wilde, *supra* note 289.

314. Feldman v. Google, Inc., 513 F. Supp. 2d 229, 240 (E.D. Pa. 2007).

315. *Id.*

316. Newitz, *supra* note 260.

317. See Jim Sterling, *EU Court Rejects EULAs, Says Digital Games Can Be Resold*, DESTRUCTOID (July 3, 2012), <https://www.destructoid.com/stories/eu-court-rejects-eulas-says-digital-games-can-be-resold-230641.phtml> (explaining how international courts have begun holding overbearing EULA provisions unenforceable).

sympathize with large studios over the average player.³¹⁸ Challenges to remove video game music from player-created content such as fan videos and live streams ramped up in late 2020, placing players on notice of developer ownership concerns.³¹⁹ Though streaming services have vowed to do better to alert players of shifts in both the law and developer attitudes,³²⁰ short three-day periods of forcing compliance through copyright-related cease and desist letters³²¹ provoked widespread outrage amongst streamers and their viewers concerned with the industry's audio-less future.³²² In response to gamer concerns, Congress doubled-down by introducing legislation to further increase game developer and music composer copyright enforcement measures related to online streaming content.³²³ A growing trend in legislation seems to place game developers in an even more favorable position than before when challenged by consumers staking claims to contents of their virtual worlds.³²⁴

At present, no federal law comments on video game characters or streamer identities.³²⁵ Current law provides protections for dissemination of clearly-defined existing copywritten materials such as clips from audiovisual works or snippets of audio.³²⁶ Despite this reassurance, streamers and gamers worry over the growing state of character ownership.³²⁷ Though game studios have provided insights as to how they plan to enforce their present copywritten materials, no comments have been made regarding whether developers plan to expand their portfolios through incorporating player-characters as developer-owned.³²⁸ Instead, studios and streaming services alike suggest gamers to read each game's EULA policy individually and to reach out should questions arise.³²⁹ Thus, gamers and scholars alike remain in the dark as to whether the status quo of player character ownership will be disrupted through further lobbying. At best, they can only hope such agreements will be invalidated.³³⁰

318. Khan, *supra* note 87.

319. Kim, *supra* note 88.

320. Zackerie Fairfax, *Twitch Apologizes for DMCA Takedown Mess & Promises a Legal Solution*, SCREENRANT (Dec. 16, 2020), <https://screenrant.com/twitch-town-hall-dmca-apology-legal-solution>.

321. Kim, *supra* note 88.

322. Khan, *supra* note 87.

323. Rebecca Tapscott, *Senator Tillis Releases Draft Bill to Modernize the Digital Millennium Copyright Act*, IPWATCHDOG (Dec. 22, 2020), <https://www.ipwatchdog.com/2020/12/22/tillis-draft-modernize-dmca/id=128552>.

324. *Id.*

325. See generally Digital Millennium Copyright Act, 17 U.S.C. §§ 512, 1201–1205, 1301–1332; 28 U.S.C. § 4001 (notably not including distinctions between streamer identities or video game characters).

326. *Id.*

327. Khan, *supra* note 87.

328. See, e.g., Kate Cox, *Twitch Blasts Streamers with Vague, Unhelpful DMCA Takedown Emails*, ARS TECHNICA (Oct. 21, 2020, 3:32 PM), <https://arstechnica.com/tech-policy/2020/10/twitch-blasts-streamers-with-vague-unhelpful-dmca-takedown-emails> (recognizing the uncertain nature of copyright infringement due to poor, indefinite wording by copyright holders and streaming services).

329. Twitch Support (@TwitchSupport), TWITTER (Nov. 11, 2020, 3:32 PM), <https://twitter.com/TwitchSupport/status/1326638989974106112> (“Hey there, thanks for reaching out. We recommend reading through any game’s EULA, and utilizing any option to turn music off if the game includes that option, or mute the game audio.”).

330. Cox, *supra* note 328.

IV. RECOMMENDATION

A. *Ownership of Player-Character Personas*

The industry must accept that players own certain aspects of the games they play and the characters they create instead of attributing every game asset to the developer. The law should treat player characters and streaming personas bred from them as their own pieces of work entitled to their own separate protections. Though different games have different degrees of player creativity, the multi-game nature of player character creation suggests that gamers should be entitled to individual copyright protection for their in-game creations so long as a minimal degree of customization is involved.³³¹ Assuming a player can name themselves in-game, they should be conferred copyright protections for that alias and all reasonably associated assets.

When assessing the quid-pro-quo exchanging creativity for exclusivity,³³² the value that consumers in the gaming industry place on players and their creations as opposed to developer's and their pixel assets emphasize the relative work each party places in player-character creation.³³³ While developers provide the building blocks, players rearrange those blocks, put those blocks into motion virtually, build a brand off of that arrangement, and transcend that brand beyond the virtual world and into other markets.³³⁴ The player character's identity and possible streaming persona is the copyrightable, non-derivative asset that belongs to gamers in that it is the piece that can be contributed to distinctly to the author as opposed to the game developer.³³⁵ Though the actual pixels that make this character is a means to convey this character to the world, it is not the creative piece providing a benefit to those tuned in.³³⁶ The game developer played no role in determining how the gamer-character acts, makes choices, or otherwise "lives their life."³³⁷ The valuable narrative and personality of the character is built and performed exclusively by the player and streamer.³³⁸

Game developers, however, should not be left in the cold when it comes to copyright protections. Assets created by the game that cannot be warped by players and that have definite beginnings and endings as defined by the developers should be allocated to their respective creators.³³⁹ Should a game developer restrict character choice in an MMORPG such that the player is forced to make the same decisions as every other player, no copyright protections should be conferred to the player or streamer.³⁴⁰ Individual copyright protections should be granted to game developers should the game provide no creative outlets to the player. As MMORPG game developers seek to give more choices

331. Robinson, *supra* note 3, at 300–04.

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

336. Robinson, *supra* note 3, at 300–04.

337. *Id.*

338. *Id.*

339. Determann, *supra* note 49, 1119–21.

340. *Id.*

to players,³⁴¹ modern games in this genre will likely fail to ever meet this standard in regard to player-created characters. If a developer is conscious of securing its copyrightable assets, it should look to instead design single player games that depend on a predetermined character and a definite story arc; alternatively, they should look to profit off non-playable, story-based heroes or villains that player characters are forced to confront.³⁴²

Though joint ownership would be an appropriate means to recognize both parties' involvement in player-character creation, the administrative burden of deciphering who contributed what to the character and the uncertainty surrounding standards far outweigh any advantage of splitting ownership rights. Deciding on a per-game basis whether each party contributed equally would flood the courts and leave developers uncertain of whether their model would sway in favor of developer ownership.³⁴³ As more games enter the market,³⁴⁴ the law would have to constantly adapt to different degrees of player-character customization. Developing a spectrum for copyright ownership would take decades and would rely on game developers and players battling in court to create precedent. Game studios may be willing to endure these costs; the everyday player, on the contrary, cannot afford to spend the time or money on developing this case law.³⁴⁵ Through creation of a set standard that recognizes the evolution in the gaming industry placing players at the forefront, developers can look to alternative means of funding to recoup their investments while players can rest at ease knowing the content they generated will always be used appropriately while in their hands.

B. End-User Licensing Agreements

Presuming validity despite their clickwrap and skippable nature, EULA statements granting all game-related content ownership should be edited to apply strictly to assets exclusive to their games. Current EULA statements conflict with one another and grant exclusive rights to property that exist in multiple games.³⁴⁶ If developers want their provisions to be enforceable, they need to loosen their grip on players or else risk losing all rights to player-generated content.³⁴⁷ Because current agreements force players to concede any game-related content to the developer, characters that exist in multiple gaming universes cannot be adequately accounted for when assessing the ever-elusive who-owns-what.³⁴⁸ Additionally, as these characters enter the real world and form a name for themselves outside of virtual platforms, game studios run the

341. Selen Turkay, *The Effects of Avatar-based Customization on Player Identification*, 1 INT'L J. GAMING & COMPUT.-MEDIATED SIMULATIONS 1–25 (2014).

342. *Id.*

343. Jennifer Lloyd Kelly & Nicholas Plassaras, *Copyrighting Player-Generated Content in Video Games*, VENTUREBEAT (Jan. 7, 2015), <https://venturebeat.com/2015/01/07/copyrighting-player-generated-content-in-video-games> (discussing the idea of giving users copyright rights in created characters).

344. Beattie, *supra* note 24 (noting that the video game market is expected to grow in the next 5 years).

345. *Id.*

346. Robinson, *supra* note 3, at 321–22; Rogers, *supra* note 51, at 100–06.

347. Rogers, *supra* note 51, at 100–06.

348. Ochoa, *supra* note 50, at 964–66.

risk of trying to own the rights to actual people who pay to use their services.³⁴⁹ Thus, vague language may invalidate such agreements and should be amended.³⁵⁰

To address these concerns, game developers should define what “user content” they can reasonably claim through licensing.³⁵¹ For instance, game developers may easily be entitled to content that players interact with but fail to manipulate.³⁵² An even broader reach could allow developers to claim specific user-generated content that is exclusive to their game, including modified content.³⁵³ Instead of owning a whole character’s identity, game developers could clarify their agreements to encompass only the virtual entity embodied in their given online universe.

Such agreements would not pit developers against one another and would allow them to retain full control over what is produced in and applied outside of their games.³⁵⁴ Though licensing agreements may coexist, tensions may rise when each game studio tries to market the same character.³⁵⁵ Minimizing the overlap between games ensures that game studios don’t intermingle and face concerns of their games becoming too similar.³⁵⁶ Likewise, as streamers exist far beyond the bounds of a single game, this would also protect rising personalities who depend on their online personas by allotting them ownership of the brands they build³⁵⁷ to allow the growing industry to flourish uninhibited.

Should EULAs remain as is, developers will soon be forced to fight for intellectual property that exists between games. To do so would square large studios against one another and would cost said companies exuberant legal costs to shut out their competitors.³⁵⁸ Indie developers would bear the biggest brunt of the burden, as they lack the resources to challenge big-name studios that have dominated the market since the turn of the century.³⁵⁹ A growing trend in indie game support suggests that attacking such small studios would deter players from continuing their subscriptions with developer tycoons of the present.³⁶⁰ Though broad EULAs net game studios profits in the short-term, staying resolute

349. *Id.*

350. Darren Skinner, *Boilerplate Blunders: A Reminder that “Standard” Contractual Provisions Should be Used with Care*, ARNOLD & PORTER (2005), https://www.arnoldporter.com/en/perspectives/publications/2005/01/boilerplate-blunders-a-reminder-that-standard-co__.

351. *See, e.g., Blizzard EULA, supra note 99; FFXIV EULA, supra note 272* (claiming “user” content).

352. Orland, *supra* note 203.

353. *Id.*

354. *See generally* Alice J. Won, *Exhausted? Video Game Companies and the Battle Against Allowing the Resale of Software Licenses*, 33 J. NAT’L. ASS’N. ADMIN. L. JUDICIARY 386 (2013) (analyzing the battle in a related field, software).

355. *Id.*

356. *Id.*

357. Robinson, *supra* note 3, at 300–04.

358. *See, e.g.,* *Blizzard Ent., Inc. v. Lilith Games (Shanghai) Co.*, 149 F. Supp. 3d 1167 (N.D. Cal. 2015) (describing a copyright war between large and comparatively small developers).

359. *See, e.g.,* Brandon J. Huffman, *Going Indie: Legal Considerations When Leaving a Game Studio to Form a New One*, ODIN LAW, <https://odinlaw.com/going-indie-legal-considerations-when-leaving-a-game-studio-to-form-a-new-one> (last visited Mar. 15, 2022) (describing common issues for indie developers and the typical attacks by big studios).

360. Zack Millsap, *How Digital Downloads Sparked the Rise of Indie Games*, CBR (June 13, 2020), <https://www.cbr.com/digital-downloads-sparked-indie-games-rise>.

in old ways would rake up monetary and social costs once a large developer decides to defect from the present player character armistice.³⁶¹

Even should legislation continue to favor game developer ownership rights,³⁶² EULAs should tread carefully so as not to alienate their playerbase.³⁶³ When game developers don't listen to their players, many leave and join different games that provide more support and feedback to game-related concerns.³⁶⁴ Game developers run the risk of losing massive profits should they continue to restrict player ownership rights, especially as the streaming industry grows.³⁶⁵ With the rise of gaming communities as streamers and viewers connect with one another, an attack on one player becomes an attack on all.³⁶⁶ Though legal precedent takes into account player interaction with game assets, it does not consider the drastic evolution of the social aspect of gaming as a result of the introduction of the Internet.³⁶⁷ Abiding by past legal standards and crafting newer, even more restrictive rules would devastate companies already desperately vying to encourage players to spend more on subscriptions and microtransactions.³⁶⁸ The current streaming copyright war between game developers, music composers, and streamers highlights the unacknowledged power that gamers have in shaping which developers succeed.³⁶⁹ Game developers must decide if protecting their supposed intellectual property is worth driving away players.³⁷⁰ Surely their players should their utmost priority. After all, what use is intellectual property rights if the owner can't turn them into revenue?

However, the system can only change if players are given more options. The modern gaming EULA climate appears stagnant as all game developers have relatively similar intellectual property provisions that severely restrict general gamers and streamers alike.³⁷¹ Frustrating the power dynamics between game developers and various player bases continually increases the odds of a company defecting and throwing the current EULA system into disarray.³⁷² With streaming services folding,³⁷³ it is only a matter of time until a major developer concedes to players and loosens their EULA restrictions.³⁷⁴ Until that time comes, streamers must continue to inspire gamers to challenge the status

361. See Dann Albright, *Big Game Studios Are Killing the Video Game Industry*, MUO (Apr. 11, 2015), <https://www.muo.com/tag/big-game-studios-killing-video-game-industry> (discussing the disconnect between game studios and gamers).

362. Tapscott, *supra* note 323.

363. Albright, *supra* note 361.

364. *Id.*

365. *Id.*

366. See Khan, *supra* note 87 (showing the push for gamer-centric reform through petitions).

367. Chikhani, *supra* note 102.

368. Albright, *supra* note 361.

369. Khan, *supra* note 87.

370. Albright, *supra* note 361.

371. See, e.g., *Blizzard EULA*, *supra* note 99; *Riot EULA*, *supra* note 99; *RuneScape EULA*, *supra* note 99.

372. See generally Ridenhour, *supra* note 149 (discussing power dynamics between developers and gamers).

373. See Fairfax, *supra* note 320 (highlighting Twitch's response to cater to both developers and streamers).

374. Some games already have relatively forgiving EULA provisions, such as Square Enix. See *FFXIV EULA*, *supra* note 272.

quo through emphasizing each game studio's social³⁷⁵ and economic dependence³⁷⁶ on their player bases. Generally losing one player maintains order; losing a player who streams to thousands of viewers could bankrupt even moderately sized studios.³⁷⁷ Fluctuations in eSport interest emphasize that developers are susceptible to minute shifts in player attitudes towards their games and policies.³⁷⁸ As developers continue to lose the intellectual property battle on nearly every front,³⁷⁹ it is in their best interest to reconsider the lengthy user agreements before their competitors react first.

V. CONCLUSION

In conclusion, the video game and streaming industries must recognize the intricate relationship between developer and player when assessing intellectual property ownership of game-related creative content. Without accounting for contractual obligations, game developers are entitled to protect the assets they provide players but should not impede on the players' separate derivative works produced using such assets. Additionally, streamer personalities should be considered outside of the scope of a single game and thus entitled to their own copyright protection. After assessing developer policies, their EULAs fail to acknowledge that player-generated content related to game assets may be so far removed from the game itself that such provisions conflict with those from (a) other developers and (b) the identity of gamers popularizing their "character" online. Restricting the scope of EULAs to content generated in-game as distinct characters under the *Towle* standard exclusively associated with the affected game world could mitigate the future damage that conflicting EULAs may have when developers and streamers inevitably begin to fight for the spotlight.

375. See generally Reyhaan King & Teresa de la Hera, *Fortnite Streamers as Influencers: A Study on Gamers' Perceptions*, 9 COMPUT. GAMES J. 349 (2020) (discussing the impact of Fortnite streamers on promotion of ads and the game's developer, Epic Games).

376. James Hale, *Game Publishers Pay Top Streamers Like Ninja \$50,000+ Per Hour to Play Their New Games*, TUBEFILTER (May 21, 2019), <https://www.tubefilter.com/2019/05/21/ninja-twitch-streamers-earn-per-hour-game-developers-pay-streamers>.

377. See, e.g., Danny Konstantinovic, *Google Stadia is Failing because its Leaders Don't Understand Games*, BUS. OF BUS. (Feb. 1, 2021), <https://www.businessofbusiness.com/articles/Google-stadia-failing-Twitch-streamer-DMCA-alex-hutchinson> (describing Google's problems with understanding streamers and their importance to marketing games affecting their revenues).

378. Cecilia D'Anastasio, *Shady Numbers and Bad Business: Inside the Esports Bubble*, KOTAKU (May 23, 2019), <https://kotaku.com/as-esports-grows-experts-fear-its-a-bubble-ready-to-po-1834982843>.

379. See Fairfax, *supra* note 320 (emphasizing game developers and soundtrack composers losing the DMCA copyright war to streamers).