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## Mod Money, Mod Problems: A Critique of Copyright Restrictions on Video Game Modifications and an Evaluation of Associated Monetization Regimes

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# MOD MONEY, MOD PROBLEMS: A CRITIQUE OF COPYRIGHT RESTRICTIONS ON VIDEO GAME MODIFICATIONS AND AN EVALUATION OF ASSOCIATED MONETIZATION REGIMES

CARL “OTT” LINDSTROM\*

## ABSTRACT

*Video game modifications (mods) have had a tremendously positive impact on the game industry, both in terms of commercial success and evolution of the medium. But the present court doctrine, enabled by Micro Star v. Formgen and abetted by restrictive End User License Agreements, greatly underserves the mod community and undermines the principal tenet of copyright law: the fundamental right to reap the benefits of what one has created. This Note examines and critiques the current doctrine and its ethical pitfalls. It also explores the pros and cons of current methods of mod monetization, including remakes, developer partnerships, and donation systems. Finally, it advocates for a more equitable and ethically sound paradigm of mod rights through a proposed open licensing standard modeled after the tabletop gaming industry.*

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## INTRODUCTION

In the video game industry, modding is “the act of changing a game, usually through computer programming, with software tools that are not part of the game.”<sup>1</sup> These resulting alterations are known as modifications, or “mods.”<sup>2</sup> Mods add new content to existing games and manifest in many forms and sizes, ranging from minor bug fixes,<sup>3</sup> to complete overhauls rendering the underlying game all but unrecognizable.<sup>4</sup> Mod creators, or “modders,” are typically fans of the underlying game unaffiliated with the developer<sup>5</sup> and may make mods using official tools provided by developers expressly for that purpose,<sup>6</sup> or by unofficial third-party applications or, in the cartridge-based era of the medium, unofficial hardware.<sup>7</sup> Mods have been a part of gaming since the earliest days of the medium<sup>8</sup> and have had a massive impact on the

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<sup>1</sup> Nathaniel Poor, *Computer Game Modders’ Motivations and Sense of Community: A Mixed-Methods Approach*, 16 *NEW MEDIA & SOC’Y* 1249, 1250 (2014).

<sup>2</sup> *Id.*

<sup>3</sup> See, e.g., *Unofficial Skyrim Legendary Edition Patch*, NEXUSMODS (Apr. 29, 2018), <https://www.nexusmods.com/skyrim/mods/71214> [<https://perma.cc/B4PH-T5HE>] (download page for a mod fixing technical problems with the popular role-playing game, *The Elder Scrolls V: Skyrim*) [hereinafter *Skyrim*].

<sup>4</sup> See, e.g., *Crusader Kings 2: A Game of Thrones (CK2: GOT)*, MODDB (2012), <https://www.moddb.com/mods/crusader-kings-2-a-game-of-thrones-ck2agot> [<https://perma.cc/EE8T-PYFT>] (a mod that converts historical strategy game *Crusader Kings 2* into an adaptation of the *Game of Thrones* TV series).

<sup>5</sup> Poor, *supra* note 1, at 1250 (“But modding is not an activity taken on by those at game companies—developers release patches and downloadable content, not mods. Modding is instead done by players and fans of the game.”).

<sup>6</sup> See, e.g., *CREATION KIT FALLOUT 4*, [https://www.creationkit.com/fallout4/index.php?title=Main\\_Page](https://www.creationkit.com/fallout4/index.php?title=Main_Page) [<https://perma.cc/7653-MRH2>]; *CREATION KIT SKYRIM*, [https://www.creationkit.com/index.php?title=Main\\_Page](https://www.creationkit.com/index.php?title=Main_Page) [<https://perma.cc/MS3B-GNUT>] (tutorial database for Bethesda Softworks’ official modding tools for *Skyrim* and *Fallout 4*).

<sup>7</sup> See, e.g., *OPENIV*, <https://openiv.com> [<https://perma.cc/5VJU-DXHP>] (website for a popular unofficial modding tool for recent *Grand Theft Auto* games); *Cheating Device*, GLITCH CITY LABORATORIES (Nov. 2014), [https://glitchcity.info/wiki/Cheating\\_device](https://glitchcity.info/wiki/Cheating_device) [<https://perma.cc/A9WB-F36P>] (an overview of unofficial hardware devices that “lets [sic] somebody do things on a game that may not be possible in normal game play, through measures such as editing the memory ... or making temporary patches”).

<sup>8</sup> See Andy Dyer, *From Smurfs to Counter-Strike and Beyond!*, GEFORCE (Mar. 18, 2016), <https://www.nvidia.com/en-us/geforce/news/history-of-pc-game-mods> [<https://perma.cc/M4R5-BMKU>] (“One of the very first popular mods was a parody of the original *Castle Wolfenstein* on the Apple II in the

industry, with many current blockbuster games tracing their lineages directly to unofficial mods.<sup>9</sup> Furthermore, many of the most successful modern games feature thriving mod communities,<sup>10</sup> with mod tools often included as selling points.<sup>11</sup> Developers widely support mods, providing tools to modders and often supporting, highlighting, and rewarding quality community creations.<sup>12</sup> But

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early 1980s, called *Castle Smurfenstein*. The mod replaced the Nazi enemies in the game with Smurfs.”).

<sup>9</sup> Christopher Livingston, *The Biggest Games in the World Wouldn't Exist Without Modders*, PCGAMER (Sept. 24, 2018), <https://www.pcgamer.com/the-biggest-games-in-the-world-wouldnt-exist-without-modders/> [https://perma.cc/9TKS-2UKQ].

<sup>10</sup> For example, *Skyrim* has sold over 30 million copies as of 2016. Chris Suellentrop, 'Skyrim' Creator on Why We'll Have to Wait for Another Elder Scrolls, ROLLING STONE (Nov. 21, 2016), <https://www.rollingstone.com/culture/culture-features/skyrim-creator-on-why-well-have-to-wait-for-another-elder-scrolls-128377/> [https://perma.cc/DF3T-LTBJ]. Just one mod database for the game features almost 60 thousand individual mods, with over 1.4 billion cumulative downloads as of late 2018. NEXUSMODS, <https://www.nexusmods.com/> [https://perma.cc/37PR-FFBA]. For another example, *Grand Theft Auto V* is the “most profitable entertainment product of all time.” James Batchelor, *GTA V is the most profitable entertainment product of all time*, GAMESINDUSTRY.BIZ (Apr. 9, 2018), <https://www.gamesindustry.biz/articles/2018-04-09-gta-v-is-the-most-profitable-entertainment-product-of-all-time> [https://perma.cc/Y7T2-T56Y]. Just one mod database for the game features over 38,000 individual mods, with the most popular single file downloads being downloaded over four million times. *Most Downloaded*, GTA5-MODS, <https://www.gta5-mods.com/all/most-downloaded> [https://perma.cc/HHV6-3BD8].

<sup>11</sup> See, e.g., *Divinity Original Sin II—Definitive Edition*, STEAM, [https://store.steampowered.com/app/435150/Divinity\\_Original\\_Sin\\_2\\_Definitive\\_Edition/](https://store.steampowered.com/app/435150/Divinity_Original_Sin_2_Definitive_Edition/) [https://perma.cc/KJ5F-8WFY]; *The Elder Scrolls V: Skyrim Special Edition*, STEAM, [https://store.steampowered.com/app/489830/The\\_Elder\\_Scrolls\\_V\\_Skyrim\\_Special\\_Edition/](https://store.steampowered.com/app/489830/The_Elder_Scrolls_V_Skyrim_Special_Edition/) [https://perma.cc/KRN5-MFU9] (“Skyrim Special Edition also brings the full power of mods to the PC and consoles. New quests, environments, characters, dialogue, armor, weapons and more—with Mods, there are no limits to what you can experience.”) (part of Steam product page description).

<sup>12</sup> See, e.g., *supra* note 6; Alex Calvin, *How modding can land you a career in games*, MCV (Jan. 5, 2015), <https://www.mcvuk.com/development/how-modding-can-land-you-a-career-in-games> [https://perma.cc/B5R2-B5SF] (describing how developers often hire modders based on the strength of their creations); Luke Plunkett, *PC Zombie Darling Causes Sale Explosion*, *Arma Devs Happy To Help*, KOTAKU (May 15, 2012), <https://kotaku.com/5910279/pc-zombie-darling-causes-sale-explosion-arma-devs-happy-to-help> [https://perma.cc/HZ49-552L] (describing efforts by a developer to support a popular mod for their game); *Fallout 4 & Skyrim Special Edition—November Featured Mods*, BETHESDA (Nov. 2, 2018), <https://bethesda.net/en/article/2lOpmTGrVqCKaEK>

for all their storied history and positive effects on gaming, mods and modders are subject to inconsistent and discouraging interpretations of copyright law. As a result of restrictive End User License Agreements (EULAs) abetted by underinformed and outdated court rulings, modders cannot claim copyright to their own hard work, unable to easily monetize or control the use of their creations or easily protect against misappropriation by bad actors.<sup>13</sup> Even absent the restrictions imposed by most EULAs,<sup>14</sup> mods are considered derivative works that do not fall under fair use.<sup>15</sup> While modders are generally allowed to create mods and distribute them for free, modders can neither assert ownership over the mods they create nor can they legally profit from their work without infringing the underlying game's copyright.<sup>16</sup> This Note critiques this unfortunate paradigm by highlighting the unique value-added relationship between games and mods, exposing the shortcomings and contradictory aspects inherent in an application of traditional copyright infringement analysis in this area and exploring the concerning, exploitative implications of the current doctrine. It also encourages a reconsideration of the court holdings that have relegated mods to such a limited legal position. However, it is unlikely that such a change is forthcoming. The present language of copyright statutes, the courts' holdings, and the heavy restrictions of typical game EULAs offer very little opportunity for

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mow6ia8/fallout-4-and-skyrim-special-edition-november-featured-mods-2018 [https://perma.cc/5F77-UZ6J] (monthly roundup of popular mods for Bethesda's flagship role-playing games). However, developers tend to not support or allow mods that give players advantages in multiplayer or allow them to bypass paid content. See, e.g., *infra* note 116 (lawsuit involving a multiplayer mod for *Grand Theft Auto V* that bypassed paid content); Matt Morgans, *Fallout 76 Modders Persisting Despite Likelihood of Being Banned*, VGR (Jan. 2019), https://www.vgr.com/fallout-76-mods-likelihood-banned/ [https://perma.cc/SP93-GVAM] (detailing how a usually mod-friendly developer likely takes a less friendly approach with a multiplayer-only game).

<sup>13</sup> See *infra* notes 30–32.

<sup>14</sup> See, e.g., *The Elder Scrolls V: Skyrim Creation Kit EULA*, STEAM, https://store.steampowered.com/eula/eula\_202480 [https://perma.cc/KW2B-CG72] (granting the copyright holder sole ownership over user-created mods).

<sup>15</sup> See generally *Micro Star v. Formgen Inc.*, 154 F.3d 1107 (9th Cir. 1998) (holding mods to be derivative works that do not fall under fair use); *Midway Mfg. Co. v. Artic Int'l, Inc.*, 704 F.2d 1009 (7th Cir. 1982) (holding minor mods to be already encompassed by the original work's copyright, even if not explicitly enumerated, because of their triviality).

<sup>16</sup> See *Micro Star*, 154 F.3d; *Midway*, 704 F.2d.

change.<sup>17</sup> Recognizing these likely insurmountable difficulties that inhibit any sea-change in the copyright doctrine around modding, this Note additionally enumerates and examines the ways in which modders presently may still profit from their work without infringing copyright law or violating EULAs. This Note also gives a brief look to the future, advocating for a new paradigm of game licensing to expand synergistic profit capability for modders and copyright holders alike. For while ownership rights may remain out of reach, monetary compensation is a fine balm indeed.

## I. PART ONE

Video games are copyrightable works and are subject to the protections of United States copyright law.<sup>18</sup> Specific copyright concepts relevant to the video game mods discussion are derivative works and fair use.<sup>19</sup> A derivative work is a work “based upon one or more preexisting works.”<sup>20</sup> The right to prepare derivative works is encompassed within the copyright protection for an original work.<sup>21</sup> Unlike original works, derivatives do not require fixation—that is, being rendered in a “tangible medium of expression”<sup>22</sup>—in order to be actionable.<sup>23</sup>

The fair use doctrine allows the unauthorized use of copyrighted works in specific circumstances, such as for criticism or comment.<sup>24</sup> When considering whether an unauthorized use is fair, courts use four prongs of analysis.<sup>25</sup> The two prongs most important to mod analysis are the first, the nature of the use and whether it is commercial in nature, and the fourth, how the use affects the “potential market for or value of [a] copyrighted work.”<sup>26</sup>

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<sup>17</sup> See *infra* note 33.

<sup>18</sup> *Id.*

<sup>19</sup> See 17 U.S.C. § 101, 107 (1976).

<sup>20</sup> *Id.*

<sup>21</sup> 17 U.S.C. § 106(2) (1947).

<sup>22</sup> *Id.* § 101.

<sup>23</sup> Fixation is not referenced in the Copyright Act’s definition of derivatives, and courts have held that non-fixed derivatives may still infringe. See, e.g., *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 61 (1911) (holding that a film adaptation of the novel *Ben Hur* was an infringing derivative, even when films were not yet legally a method of fixation for purposes of copyright).

<sup>24</sup> § 107.

<sup>25</sup> Specifically, “[t]he purpose and character of the use,” “the nature of the copyrighted work,” the amount of the work used, and the market effect of the use. *Id.*

<sup>26</sup> *Id.*

The current copyright doctrine for mods is clear cut and blunt.<sup>27</sup> Though the Supreme Court has yet to rule on the subject and there is not an especially lengthy history of mod litigation, lower circuits have nonetheless ruled on the mod question on several occasions.<sup>28</sup> The resulting doctrine is crystal clear: game mods are derivative works and cannot be copyrighted in their own capacities.<sup>29</sup>

The three major cases involving game modifications are *Midway Manufacturing Co. v. Artic International, Inc. (Midway)*,<sup>30</sup> *Lewis Galoob, Inc. v. Nintendo of America, Inc. (Galoob)*,<sup>31</sup> and *Micro Star v. Formgen, Inc. (Micro Star)*.<sup>32</sup> These circuit holdings affirm or establish the following key principles: video games are copyrightable works,<sup>33</sup> video game mods can be derivative work,<sup>34</sup> impermanent mods that do not affect underlying game code do not necessarily constitute infringement,<sup>35</sup> and permanent modifications that do affect underlying code likely constitute infringement.<sup>36</sup>

In *Midway*, an arcade manufacturer sued a company that sold circuit boards that changed the plaintiff's arcade games when installed in a compatible arcade cabinet.<sup>37</sup> One board sold by the defendant acted as a primitive mod for the shooter game *Galaxian*,

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<sup>27</sup> See *infra* notes 30–31.

<sup>28</sup> *Id.*

<sup>29</sup> See *id.*

<sup>30</sup> 704 F.2d 1009 (7th Cir. 1982).

<sup>31</sup> 964 F.2d 965 (9th Cir. 1992).

<sup>32</sup> 154 F.3d 1107 (9th Cir. 1998).

<sup>33</sup> *Midway*, 704 F.2d at 1012 (“[V]ideo games are copyrightable as audiovisual works under the 1976 Copyright Act”). See generally *Williams Elecs., Inc. v. Artic Int'l, Inc.*, 685 F.2d 870 (3d Cir. 1982); *Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607 (7th Cir. 1982); *Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852 (2nd Cir. 1982); *Midway Mfg. Co. v. Dirkschneider*, 543 F. Supp. 466 (D. Neb. 1981).

<sup>34</sup> *Midway*, 704 F.2d at 1013 (“[T]he speeded-up ‘Galaxian’ game that a licensee creates with a circuit board supplied by the defendant is a derivative work based upon ‘Galaxian.’”); see also *Micro Star*, 154 F.3d at 1112 (“Because the audiovisual displays assume a concrete or permanent form in the MAP files, *Galoob* stands as no bar to finding that [the files] are derivative works.”).

<sup>35</sup> *Galoob*, 964 F.2d at 968 (“[T]he Game Genie cannot produce an audiovisual display; the underlying display must be produced by a Nintendo Entertainment System and game cartridge .... It cannot be a derivative work.”).

<sup>36</sup> *Micro Star*, 154 F.3d at 1112 (“Because the audiovisual displays assume a concrete or permanent form in the MAP files, *Galoob* stands as no bar to finding that they are derivative works.”) (emphasis added).

<sup>37</sup> *Midway*, 704 F.2d at 1010–11.



speeding up the rate of play.<sup>38</sup> The defendants argued that the *Galaxian* board did not amount to an infringing derivative, analogizing the *Galaxian* mod to a sped-up record.<sup>39</sup> Though the court agreed that a sped-up record would likely not infringe a record company's rights, it disagreed that the *Galaxian* mod was analogous.<sup>40</sup> Its opinion turned on markets: "[T]here is an enormous demand for speeded-up video games but there is little if any demand for speeded-up records."<sup>41</sup> Accordingly, "[v]ideo game copyright owners would undoubtedly like to lay their hands on some of that extra revenue."<sup>42</sup> Because this market demand exists, the court held that defendants' primitive mods were derivative of plaintiff's arcade games and that its unlicensed sale of the boards amounted to infringement.<sup>43</sup>

*Galoob* appeared to be something of a rejoinder to *Midway*, with the court holding for the third-party creator over the game's rights holder.<sup>44</sup> But while the court held for the purported infringer in *Galoob*, the case proved a narrow holding and a Pyrrhic victory for modders.<sup>45</sup> *Galoob* concerned the Game Genie, a line of third-party physical devices used to alter cartridge-based video games.<sup>46</sup> *Galoob* specifically concerned the device compatible with the Nintendo Entertainment System.<sup>47</sup> Using the Game Genie, players could "alter ... features of a Nintendo game," such as "the number of lives of the player's character" and "the speed at which the character moves."<sup>48</sup> Nintendo sued the maker of the Game Genie, Lewis Galoob Toys, claiming that the alterations created using the device constituted derivative copyright infringement.<sup>49</sup>

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<sup>38</sup> *Id.* at 1010.

<sup>39</sup> *Id.* at 1013.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 1014.

<sup>44</sup> *Lewis Galoob, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 972 (9th Cir. 1992) ("Galoob has not violated the Copyright Act.").

<sup>45</sup> *Id.* See *infra* notes 59–78 and accompanying text.

<sup>46</sup> *Galoob*, 964 F.2d at 967. For an in-depth description of the Game Genie and how it works, see Brian Benchoff, *How the Game Genie Works*, HACKADAY (Oct. 7, 2013), <https://hackaday.com/2013/10/07/how-the-game-genie-works/> [<https://perma.cc/Q6NE-GL9Y>].

<sup>47</sup> *Galoob*, 964 F.2d at 967.

<sup>48</sup> *Id.*

<sup>49</sup> *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 780 F. Supp. 1283, 1286 (N.D. Cal. 1991) (lower court holding).

Galoob responded by asserting that the Game Genie did not violate Nintendo's copyrights, either directly or contributorily.<sup>50</sup> The district court held in favor of the defendant,<sup>51</sup> and the Court of Appeals affirmed.<sup>52</sup>

The circuit court's analysis turned on two fronts.<sup>53</sup> First, the Game Genie did not constitute an independent derivative work because it was a separate device that only worked when used in conjunction with a compatible game.<sup>54</sup> Even when the Game Genie changes a game, its changes are non-permanent, disappearing when the device is removed.<sup>55</sup> This stands in sharp comparison to the permanence of the *Midway* chips.<sup>56</sup> Though fixation is not necessary to find a derivative work, no work was actually created in the first place—the Game Genie merely gave instructions to the underlying game to behave in certain ways.<sup>57</sup> Second, even if the Game Genie's changes did create derivative works, Galoob would still succeed under fair use analysis, under the “most important”<sup>58</sup> fourth prong of commercial use.<sup>59</sup> In their analysis, the court focused on the consumer's behavior, not Galoob's.<sup>60</sup> The court likened the audiovisual changes made by the Game Genie's users to the non-infringing, non-commercial time-shifting of Betamax, at issue in *Sony Corp. of America v. Universal City Studios, Inc.*<sup>61</sup>

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 1298.

<sup>52</sup> *Galoob*, 964 F.2d at 972.

<sup>53</sup> *Id.* at 967, 969.

<sup>54</sup> *Id.* at 968 (“[T]he Game Genie cannot produce an audiovisual display; the underlying display must be produced by a Nintendo Entertainment System and game cartridge.”). However, the court also noted that that fixation is not a necessary quality for a work to be derivative. *Id.*

<sup>55</sup> *See id.* at 969.

<sup>56</sup> *See id.* (“It does not contain or produce a Nintendo game's output in some concrete or permanent form.”).

<sup>57</sup> *Id.*

<sup>58</sup> *Stewart v. Abend*, 495 U.S. 207, 238 (1990).

<sup>59</sup> *Galoob*, 964 F.2d at 971 (“Nintendo's main argument on appeal is that the test for market harm encompasses the potential market for derivative works. Because the Game Genie is used for a noncommercial purpose, the likelihood of future harm may not be presumed.”).

<sup>60</sup> *Id.* at 970 (“The district court properly focused on whether consumers ... would be infringing Nintendo's copyrights.”).

<sup>61</sup> *Id.* at 971 (“Consumers may use a Betamax to view copyrighted works at a more convenient time. They similarly may use a Game Genie to enhance a Nintendo Game cartridge's audiovisual display in such a way as to make the

Following the *Sony* holding, the *Galoob* court held that the Game Genie implicates a market that Nintendo is not competing in (that is, the market for at-home, non-commercial alterations) and cannot reasonably be anticipated to compete in.<sup>62</sup> Thus, even if the created alterations were found to be derivative works, *Galoob* would still have succeeded under fair use.<sup>63</sup>

Unfortunately, the *Galoob* holding brings little comfort for modern modders because of fundamental differences in how modern mods operate. Compared to the Game Genie's transient alterations, most mods are much more fixed, permanently altering a game as long as the player keeps them installed.<sup>64</sup> Second, by and large, unlike the Game Genie's alterations, modern mods are not created on an individual level by consumers.<sup>65</sup> Instead, they are created by third parties and then distributed to consumers over the internet.<sup>66</sup> Thus, the relevant market for the fourth prong of fair use analysis is fundamentally different than the one considered in *Galoob*.<sup>67</sup> These distinctions are reflected in the Ninth Circuit's *Micro Star v. Formgen* holding against a commercial mod distributor.<sup>68</sup>

Though decided in the late 1990s, *Micro Star v. Formgen*'s holding still remains the final word on the legal status of mods, specifically software mods developed using developer-furnished tools.<sup>69</sup> Even as technology and means of mod distribution have iterated since *Micro Star*'s 1998 holding, the basic concepts are still familiar and applicable to the current landscape: mods, created by fans, using a developer-provided tool, and distributed

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experience more enjoyable.”). See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984) (holding that time-shifting of copyrighted works by Betamax users did not constitute copyright infringement).

<sup>62</sup> See *Galoob*, 964 F.2d at 972 (“The existence of this potential market cannot be presumed.”).

<sup>63</sup> *Id.*

<sup>64</sup> See Poor, *supra* note 1, at 1250.

<sup>65</sup> Kyle Moody, *Modders: Changing the Game Through User-Generated Content and Online Communities* (2014) (unpublished PhD dissertation, University of Iowa) (on file at <https://ir.uiowa.edu/cgi/viewcontent.cgi?article=5217&context=etd> [<https://perma.cc/9G86-T4UZ>]).

<sup>66</sup> See Poor, *supra* note 1, at 1250. See also, e.g., MODDB, <https://www.moddb.com/> [<https://perma.cc/8GH5-PZBP>] (mod hosting and discussion site); NEXUSMODS, *supra* note 10 (mod hosting site).

<sup>67</sup> See *supra* note 58 and accompanying text.

<sup>68</sup> *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1114 (9th Cir. 1998).

<sup>69</sup> *Id.* at 1109.

online.<sup>70</sup> In *Micro Star*, the defendant company was engaged in the distribution and sale of fan-made levels for *Duke Nukem 3D*, an “immensely popular (and very cool)” mid-90s shooter with a vibrant user-created content scene.<sup>71</sup> Defendant, a software vendor, was sued for downloading free maps made by players and selling them on discs without permission from the copyright holder (nor, for that matter, permission from the fan creators).<sup>72</sup> Though the district court found that the mod files did not infringe (though the packaging was found to infringe),<sup>73</sup> the appeals court reversed, holding the maps infringed on derivative works.<sup>74</sup> Defendants made several arguments on appeal, most relevantly that the mod files were advanced versions of *Galoob’s* Game Genie and thus not derivatives;<sup>75</sup> that the mod files only contained instructions, no copyrighted assets, and thus could not be infringing;<sup>76</sup> and that the mod files were covered under fair use.<sup>77</sup>

To the first argument, the court distinguished *Micro Star’s* mod files from the Game Genie based on the source of the audiovisual display.<sup>78</sup> In *Galoob*, “the audiovisual display was defined by the original game cartridge” and “no one could possibly say that the data values inserted ... described the audiovisual display.”<sup>79</sup> By contrast, “[i]n the present case the audiovisual display ... is described ... by a N/I MAP file [mod file].”<sup>80</sup>

Secondly, the court rejected *Micro Star’s* noninfringement argument.<sup>81</sup> The relevant factor was not the presence of copyrighted assets in the mod files, but rather the copyright holder’s right to create sequels.<sup>82</sup> Thus, any “new ... tales of Duke’s fabulous

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<sup>70</sup> *See id.* (“The game also includes a ‘Build Editor,’ a utility that enables players to create their own levels .... [P]layers frequently post levels they have created on the Internet where others can download them.”).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 1114.

<sup>75</sup> *Id.* at 1111.

<sup>76</sup> *Id.* at 1112.

<sup>77</sup> *Id.* at 1111.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* (citing *Lewis Galoob, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965 (9th Cir. 1992)).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 1112.

<sup>82</sup> *Id.*

adventures” would constitute derivative works, regardless of the way they were told.<sup>83</sup> Notably, however, the mere fact that Micro Star was distributing files that altered *Duke Nukem 3D* was not a relevant factor in the court’s decision: it was relevant that the files created a derivative story, not that the files altered the game.<sup>84</sup>

Finally, applying fair use analysis, the court determined that Micro Star had no valid claim.<sup>85</sup> Resting largely on the fourth prong, the court observed that Micro Star used the mods for commercial gain and that “every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.”<sup>86</sup> In sum, the court held the game mods to be derivative, infringing works: a holding that remains unmodified and unchallenged more than twenty years later.<sup>87</sup>

In addition to the holdings in *Micro Star* and its brethren, modders also face significant barriers stemming from mandatory EULAs and other so-called “clickwrap” agreements.<sup>88</sup> Like with most software, in order to play a game or use development tools, players and modders must agree to these restrictive license agreements before using the software.<sup>89</sup> Under such agreements, the provisions governing modding and other forms of user-created content tend to be downright draconian.<sup>90</sup> A provision from Bethesda Softworks’ EULA for their Creation Kit modding tool typifies the modders’ plight:

If You distribute or otherwise make available New Materials, You automatically grant to Bethesda Softworks the irrevocable, perpetual, royalty free, sublicensable right and license under all applicable copyrights and intellectual property rights laws to use, reproduce, modify, adapt, perform, display, distribute and otherwise exploit and/or dispose of the New Materials

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<sup>83</sup> *Id.*

<sup>84</sup> *See id.* at n. 5.

<sup>85</sup> *Id.* at 1113.

<sup>86</sup> *Id.* (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984)).

<sup>87</sup> *Id.* at 1114.

<sup>88</sup> *See End-User License Agreement (EULA)*, TECHOPEDIA, <https://www.techopedia.com/definition/4272/end-user-license-agreement-eula> [<https://perma.cc/3TFW-HVVH>].

<sup>89</sup> *See id.*

<sup>90</sup> *See infra* notes 91 and 93 and accompanying text.

(or any part of the New Materials) in any way Bethesda Softworks, or its respective designee(s), sees fit.<sup>91</sup>

In other words, everything produced by modders using the Creation Kit is wholly owned by Bethesda Softworks.<sup>92</sup> A cursory examination of equivalent EULAs from other publishers shows that this is more-or-less standard language across the industry.<sup>93</sup> While the enforceability of EULAs might be debatable and typically considered on a case-by-case basis,<sup>94</sup> the language here is clear: even when they are allowed to create them and commercially exploit them, modders do not own their own creations.

## II. PART TWO

The present regime supported by the courts and industry-standard EULAs may be a dire one for modders, but the lack of any new cases in over twenty years shows little sign of this regime changing.<sup>95</sup> The intractability is problematic, for there are many problems with the current doctrine, ranging from short-sighted legal logic,<sup>96</sup> to philosophical concerns surrounding both derivative and non-derivative content.<sup>97</sup> As articulated through the history of American jurisprudence, the conception of copyright law as an

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<sup>91</sup> *The Elder Scrolls V: Skyrim Creation Kit EULA*, *supra* note 14.

<sup>92</sup> *See id.*

<sup>93</sup> *See, e.g., Electronic Arts Software End User License Agreement The Sims 4*, ELECTRONIC ARTS, <https://media.contentapi.ea.com/content/dam/eacom/en-us/eula/eula-the-sims-4-pc-row-07092014.pdf> [<https://perma.cc/XXQ9-B2B4>] (“In exchange for use of the Software, and to the extent that your contributions through use of the Software give rise to any copyright interest, you hereby grant EA an exclusive, perpetual, irrevocable, fully transferable and sub-licensable worldwide right and license to use your contributions in any way and for any purpose.”).

<sup>94</sup> *See, e.g., ProCD Inc. v. Zeidenberg*, 86 F.3d 1447, 1445 (7th Cir. 1996) (holding EULA enforceable); *Microsoft v. Harmony Computs.*, 846 F. Supp. 208, 214 (E.D.N.Y. 1994) (holding EULA enforceable). *But see, e.g., Vault Corp. v. Quaid Software, Ltd.*, 847 F.2d 255, 270 (5th Cir. 1988) (holding EULA unenforceable).

<sup>95</sup> There have as yet been no relevant overrulings or critiques of *Micro Star*. *See Micro Star v. Formgen Citing Decisions*, LEXIS ADVANCE, <https://advance.lexis.com/shepards/shepardspreviewpod/?pdmfid=1000516&crd=13062e60-777b-4cbd-9dd7-37acbb53febd&pdshepid=urn%3AcontentItem%3A7XWN-03F1-2NSF-C500-00000-00&pdshepcat=citingref&pdshepfilter=Analysis&pdshepfiltername=Questioned&pdshepfiltervalue=5&pdshepfieldname=treatgroup&comp=v311k&prid=2b454b60-1e73-4f5f-a38d-6523c5e1f678> [<https://perma.cc/EHL9-F2D9>].

<sup>96</sup> *See infra* notes 108 and 126 and accompanying text.

<sup>97</sup> *See infra* notes 147 and 153–55 and accompanying text.

avenue for “[securing] ... a fair return to an ‘author’s’ creative labor”<sup>98</sup> and “[stimulating] ... artistic creativity for the general public good”<sup>99</sup> is a practically non-existent consideration around game mods. Considering many mods’ artistic value<sup>100</sup> and how much the industry benefits from mod innovations,<sup>101</sup> *Micro Star*, the EULAs they embolden, and the exploitive behaviors they allow stand at unacceptable odds with the philosophical framework of copyright law.<sup>102</sup>

With *Micro Star* as a jumping off point, this Part shall explore the unique symbiosis of mods and games left unconsidered in *Micro Star*’s fair use analysis; the inconsistencies and blind spots resulting from *Micro Star*’s concept of what counts as a video game derivative; the legal questionability of enabling rights holders to claim ownership over all products of their game tool sets via EULA; and the de facto sanctioning of plagiarism by rights holders.<sup>103</sup>

To begin, the *Micro Star* court’s analysis of the defendant’s fair use claim misunderstands the unique quality of mods as value-adds to the original work.<sup>104</sup> *Micro Star*’s fair use holding hinges on the fourth prong of the fair use analytic framework: economic effects.<sup>105</sup> This fourth prong is considered the most important factor when considering fair use claims.<sup>106</sup> Perhaps uniquely among unauthorized derivative works, mods often increase the value and commercial success of the original work.<sup>107</sup> In particular, a popular mod will directly and quantifiably boost sales of the original work.<sup>108</sup> The reason is because, unlike fan works in other

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<sup>98</sup> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). *See also* *Mazer v. Stein*, 347 U.S. 201, 219 (1954); *Wheaton v. Peters*, 33 U.S. 591, 661 (1834).

<sup>99</sup> *Id.* This philosophy is also reflected in the U.S. Constitution, which enables Congress to pass copyright laws for the purpose of “[promoting] the Progress of Science and useful Arts.” U.S. CONST. art. I., § 8, cl. 8.

<sup>100</sup> *See, e.g.*, Alex Walker, *An Australian Skyrim Mod Has Won A Screenwriting Award*, KOTAKU AU (Oct. 17, 2016), <https://www.kotaku.com.au/2016/10/an-australian-skyrim-mod-has-won-a-screenwriting-award/> [<https://perma.cc/UU2Z-CKAB>].

<sup>101</sup> *See* Livingston, *supra* note 9.

<sup>102</sup> *See supra* note 98 and accompanying text.

<sup>103</sup> *See Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1114 (9th Cir. 1998).

<sup>104</sup> *See infra* note 108 and accompanying text.

<sup>105</sup> *See Micro Star*, 154 F.3d at 1107.

<sup>106</sup> *See Stewart v. Abend*, 495 U.S. 207, 238 (1990).

<sup>107</sup> *See infra* note 108 and accompanying text.

<sup>108</sup> *See, e.g.*, Moody, *supra* note 65, at 36 (“[S]ome researchers suggested that such content may increase a game’s sales and product longevity.”); Plunkett,

mediums, mods are unusable without the player owning and using the original game: one does not need to own a Harry Potter book to read Harry Potter fanfiction or own the Star Wars movies to watch a Star Wars fan film, but one does need to own an Elder Scrolls game to play an Elder Scrolls mod.<sup>109</sup> Additionally, a vibrant mod community can keep a game thriving, playable, and up-to-date long after its initial release,<sup>110</sup> or even long after the original developers have ceased supporting the game entirely.<sup>111</sup> The *Micro Star* court showed no understanding of this quality in its holding as it applies the rote fourth prong analysis.<sup>112</sup>

It does bear mentioning that this is not a universal rule, and not all mods have positive effects on the original work's commercial success.<sup>113</sup> For example, with the rise of the "games as service" paradigm<sup>114</sup> and microtransaction-based monetization<sup>115</sup> across the industry, mods exist that allow players to disrupt or bypass those mechanics that rest upon a foundation of real-money transactions.<sup>116</sup> Such mods do run afoul of the fair use prong, creating

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*supra* note 12 (sales of military shooter *ArmA II* quintupled after the release of its zombie mod *DayZ*).

<sup>109</sup> See Poor, *supra* note 1, at 1261.

<sup>110</sup> See, e.g., SAN ANDREAS MULTIPLAYER, <https://www.sa-mp.com/> [<https://perma.cc/J6MV-TASF>] (mod adding multiplayer functionality to *Grand Theft Auto San Andreas*, which was still being updated over ten years after the base game was first released).

<sup>111</sup> See, e.g., *Baldur's Gate II Fixpack*, THE GIBBERLINGS3, <https://www.gibberlings3.net/mods/fixes/bg2fixpack/> [<https://perma.cc/J8DW-WTVL>] (keeps the popular role-playing game *Baldur's Gate II* playable and updated for modern systems over 20 years after the initial release).

<sup>112</sup> See generally *Micro Star v. Formgen Inc.*, 154 F.3d 1107 (9th Cir. 1998).

<sup>113</sup> See *infra* notes 116 and 117 and accompanying text.

<sup>114</sup> Essentially, a way for developers to "make money off games for as long as possible, through downloadable content [additional content added to a game after its release, typically for a fee], cosmetic microtransactions, and good-old fashioned loot boxes [paid random draws for game-enhancing content]." Jason Schreier, *Top Video Game Companies Won't Stop Talking About 'Games As A Service,'* KOTAKU (May 30, 2017), <https://kotaku.com/top-video-game-companies-wont-stop-talking-about-games-1795663927> [<https://perma.cc/NRQ5-6MJ5>].

<sup>115</sup> Microtransactions are "anything you pay extra for in a video game outside of the initial purchase." Eddie Makuch, *Microtransactions, Explained: Here's What You Need to Know*, GAMESPOT (Nov. 20, 2018), <https://www.gamespot.com/articles/microtransactions-explained-heres-what-you-need-to/1100-6456995> [<https://perma.cc/G3B6-3KWB>].

<sup>116</sup> See, e.g., James Batchelor, *US Judge Blocks Man From Selling Grand Theft Auto Online Cheat Programs*, GAMESINDUSTRY.BIZ (Aug. 17, 2018),



a demonstrative negative impact on the underlying work's commercial success by providing direct substitutions for what would otherwise have to be paid for.<sup>117</sup> But such bad-faith cheats are a world away from mods produced using developer-released tools and promoted through developer channels.<sup>118</sup> Formulating a bright line rule is simple: does the mod bypass or disrupt what would otherwise be paid for? If it does, it would be struck down as copyright infringement; if it does not, no harm done.

In spite of this symbiotic relationship, it's important to note that *Micro Star's* holding is sound under traditional copyright doctrine, since many mods are derivative works that may compete with future products from the rights holders of the underlying games.<sup>119</sup> But looking at the actual market realities makes this analysis questionable. The marketplace for mods is already present and widely tolerated; it just so happens to be free.<sup>120</sup> If the concern is that mods will compete with new games from the rights holders, the worst case scenario already exists: tons of derivative content, available at no charge to all who wish to engage.<sup>121</sup> Indeed, mods with author rights and monetization attached might even command less attention and popularity than free mods,<sup>122</sup>

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<https://www.gamesindustry.biz/articles/2018-08-17-us-judge-blocks-man-from-selling-grand-theft-auto-online-cheat-programs> [<https://perma.cc/YN3G-D2LE>] (detailing a lawsuit between Take Two Interactive and a developer of modifications allowing players to cheat in *Grand Theft Auto Online* that cost Take Two an alleged \$500,000).

<sup>117</sup> See, e.g., *Take Two Interactive Software, Inc. v. Zipperer* No. 18 Civ. 2608 (LLS), 2018 U.S. Dist. LEXIS 151169, at \*1, \*11 (S.D.N.Y. Aug. 16, 2018) (enjoining modder from selling cheats that bypassed *Grand Theft Auto Online's* real-money economy).

<sup>118</sup> See, e.g., *supra* notes 6 and 11.

<sup>119</sup> See Ryan Wallace, Comment, *Modding: Amateur Authorship and How the Video Game Industry Is Actually Getting It Right*, 2014 B.Y.U. L. REV. 219, 249 (2014) (“[M]ods can have a negative market impact on a copyright holder even if they increase the market value of the original copyrighted work.”).

<sup>120</sup> See *supra* notes 14 and 16 and accompanying text.

<sup>121</sup> See *supra* note 66.

<sup>122</sup> See, e.g., Hayden Dingman, *Valve Now Allows Devs to Charge for Steam Workshop Mods, Community Riots*, PCWORLD (Apr. 23, 2015), <https://www.peworld.com/article/2914235/valve-now-allows-devs-to-charge-for-steam-workshop-mods-community-riots.html> [<https://perma.cc/VEW8-3KMW>] (documenting angry community reactions to an attempt by Valve Software to allow mod monetization on its Steam digital distribution platform); Graham Smith, *Nexus*

thus ironically reducing the potential conflicts in the market for the base game's rights holder compared to a fully free mod scene.<sup>123</sup>

*Micro Star's* analysis of what constitutes a derivative work in the mod context likewise shows a limited understanding of the nature of mods.<sup>124</sup> By holding that the key inquiry as to whether a mod is a derivative work is whether it creates a sequel, not just the fact that it alters a game,<sup>125</sup> *Micro Star* leaves the status of a wide swath of mods and other forms of user-created content in question, particularly that of total conversion mods and games based on creation and user-defined play.<sup>126</sup> Absent clarity, developers have taken the strictest default approach possible in their EULAs,<sup>127</sup> and in doing so circumvent a core tenet of copyright law: the bar on asserting copyright in systems, processes and procedures, and the products thereof.<sup>128</sup>

Total conversion mods “radically transform ... games into something different, with new and improved art, gameplay systems, locations, and adventures.”<sup>129</sup> For example, the popular total conversion mod, *Day Z*, turns the realistic military simulator *Arma 2: Combined Operations* into a zombie apocalypse survival game.<sup>130</sup> Total conversions tend to be entirely divorced from the story and setting of the underlying game, thus not fitting into *Micro Star's* conception of what creates a derivative work in the mod

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*Mods On Paid Mods: “This Would Have Caused a Rift in Skyrim Modding no Matter How it Was Done.”*, ROCKPAPERSHOTGUN (Apr. 28, 2015), <https://www.rockpapershotgun.com/2015/04/28/nexus-mods-on-paid-mods/> [<https://perma.cc/59QU-PPFV>] (quote from the founder of NexusMods: “Even if Bethesda came to me tomorrow and said ‘Hey, lets [sic] talk about setting up some paywalls on your site for any mod authors who want to earn some money’ I’d likely, respectfully, refuse.”).

<sup>123</sup> Smith, *supra* note 122.

<sup>124</sup> See *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1112 (9th Cir. 1998).

<sup>125</sup> See *id.*

<sup>126</sup> See *id.*

<sup>127</sup> See, e.g., *The Elder Scrolls V: Skyrim Creation Kit EULA*, *supra* note 14; *Electronic Arts Software End User License Agreement The Sims 4*, *supra* note 93.

<sup>128</sup> See *infra* note 147 and accompanying text.

<sup>129</sup> *The Best Total Conversion Mods*, PCGAMER (Aug. 28, 2017), <https://www.pcgamer.com/the-best-total-conversion-mods-ever/> [<https://perma.cc/C4RW-E2JV>].

<sup>130</sup> *Arma II: Day Z Mod*, STEAM, [https://store.steampowered.com/app/224580/Arma\\_II\\_DayZ\\_Mod/](https://store.steampowered.com/app/224580/Arma_II_DayZ_Mod/) [<https://perma.cc/A4MK-BHBP>].

context<sup>131</sup> and facially giving rise to non-infringing copyright interests under the present framework.<sup>132</sup> There are, however, arguments that total conversion mods can still be derivatives. For example, the total conversion uses copyrighted assets from the underlying game to create its otherwise unrelated content.<sup>133</sup> Regardless, the failure of the *Micro Star* court, or any subsequent proceeding, to consider the status of total conversion mods (or even acknowledge their existence) leaves them in legal limbo, a limbo ruled by the default EULA language assigning all rights in mods to the original developers, no exceptions.<sup>134</sup>

Games based on user-created content present similar problems. Considering the unique value-added relationship between mods and the works from which they derive, developers have often capitalized on this relationship, creating games predicated on facilitating the creation and play of player-created content.<sup>135</sup> Granted, the player-created content in these games are not exactly mods. Mods tend to be externally created using separate software, while the player-created content in such games is usually built with an internal, often simple toolset.<sup>136</sup> Examples include games like *Super Mario Maker*,<sup>137</sup> the *Little Big Planet* series,<sup>138</sup> and the *Trials* series,<sup>139</sup> all of which depend heavily upon player

<sup>131</sup> *Micro Star*, 154 F.3d at 1112 (“The work that *Micro Star* infringes is the [Duke Nukem 3D] story itself ... and the stories told in the N/I MAP files are surely sequels.”).

<sup>132</sup> For a more in-depth consideration of total conversion mod copyright issues, see generally Note, *Spare the Mod: In Support of Total-Conversion Modified Video Games*, 125 HARV. L. REV. 789 (2012).

<sup>133</sup> For instance, the *Skyrim* total conversion mod *Enderal* uses a lot of assets from the base game despite being set in an entirely separate universe. See *Enderal: Forgotten Stories*, STEAM, [https://store.steampowered.com/app/933480/Enderal\\_Forgotten\\_Stories/](https://store.steampowered.com/app/933480/Enderal_Forgotten_Stories/) [<https://perma.cc/H5RS-HLF4>] (promotional videos showcase assets shared with the underlying game, such as identical skeleton models).

<sup>134</sup> See, e.g., *supra* note 91 and accompanying text.

<sup>135</sup> See *infra* notes 137–39.

<sup>136</sup> Poor, *supra* note 1, at 1250.

<sup>137</sup> *Super Mario Maker*, NINTENDO, <http://supermariomaker.nintendo.com/> [<https://perma.cc/JL2B-YBYN>] (official website).

<sup>138</sup> *Little Big Planet*, MEDIA MOLECULE, <https://www.mediamolecule.com/games/littlebigplanet> [<https://perma.cc/BZ97-5JNE>] (official website for *Little Big Planet*, the first game in the series).

<sup>139</sup> *Trials Rising*, UBISOFT, <https://www.ubisoft.com/en-us/game/trials-rising/> [<https://perma.cc/GED9-G79P>] (official website for *Trials Rising*, latest game in the series).

content creation.<sup>140</sup> Though these games do sometimes include authored content,<sup>141</sup> the main draw is the creation tools.<sup>142</sup> To a similar degree, the same principle applies to free-form sandbox games, where there is no clear authored content beyond the assets and the underlying systems and rules that bound the modes of play—in other words, there is no base copyrighted work from which a sequel could be derived.<sup>143</sup> For example, in a game like *The Sims 4*, the most recent installment in the very popular *Sims* series of life simulation games, all the assets and underlying systems are the creation of the developer, but there is no set story, no set protagonist and no set goals or objectives.<sup>144</sup> All those are entirely the provenance of the player.<sup>145</sup>

Like mod tools, user content-driven and sandbox games more closely resemble canvases than paintings. Yet, like with mods, the reservation of copyright included in standard EULA language assigns all the user-made products of those canvases to the copyright holder, not the creator.<sup>146</sup> These contractual agreements run counter to a central tenet of copyright law: when beholden to EULAs reserving all copyright interests in the original developer, total conversion mods and games that rely on player-created content present an end run around the statutory ban against copyrighting systems, processes, and procedures.<sup>147</sup> By analogy, imagine if Microsoft Word contained a provision in its EULA

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<sup>140</sup> See, e.g., *Little Big Planet*, *supra* note 138 (“All imagination is here, and what you do with it all is entirely up to you. Build new levels and expand the environment, collect the many and varied tools and objects to make your mark on this world, or just simply enjoy the people and puzzles they’ve set.”).

<sup>141</sup> For example, *Trials Evolution* includes over sixty premade levels. *Trials Evolution Walkthrough*, IGN, <https://www.ign.com/wikis/trials-evolution/Walkthrough> [<https://perma.cc/CJ7N-YHYV>].

<sup>142</sup> See *Little Big Planet*, *supra* note 138.

<sup>143</sup> *Sandbox*, TECHOPEDIA, <https://www.techopedia.com/definition/3952/sandbox-gaming> [<https://perma.cc/AS2Y-2DZV>] (“A sandbox is a style of game in which minimal character limitations are placed on the gamer, allowing the gamer to roam and change a virtual world at will.”).

<sup>144</sup> See *The Sims 4*, ELECTRONIC ARTS, <https://www.ea.com/games/the-sims/the-sims-4/pc/store/mac-pc-download-base-game-standard-edition> [<https://perma.cc/MEV3-MBXD>] (product page containing game information).

<sup>145</sup> See *id.*

<sup>146</sup> See *The Elder Scrolls V: Skyrim Creation Kit EULA*, *supra* note 14.

<sup>147</sup> 17 U.S.C. § 102(b) (2012). Though, of course, the tools that create these systems of creation are copyrightable as software. *Lotus Dev. Corp. v. Borland*

stipulating that Microsoft gains the “irrevocable, perpetual, royalty free, sublicensable right and license under all applicable copyrights and intellectual property rights laws to use”<sup>148</sup> every novel written using the word processor.<sup>149</sup> While the underlying programs themselves are copyrightable material,<sup>150</sup> the restrictions put in place in game and mod tool EULAs, and abetted by the nebulous *Micro Star* holding, essentially allow copyright holders of underlying games to have ownership and control over the use and output of mod and other creation tools, regardless of whether the output actually infringes on the game copyright.<sup>151</sup> Such ownership over the products of a tool by the tool’s rights holder is a result that has been resoundingly rejected in other copyright cases.<sup>152</sup>

The consequence of this status quo is troubling, enabling rights holders to outright lift content from non-commercial mods and incorporate it into commercial games without attribution or compensation to the original modder.<sup>153</sup> For an industry heavily built on mods and where modding is a significant pathway into industry careers, this ever-present threat of exploitation and erasure can be devastating to individuals and chilling to creativity.<sup>154</sup> An illustrative example of this occurred in September 2015, when modder Baron VonChateau released a mod for the game *Fallout: New Vegas*.<sup>155</sup> Titled *Autumn Leaves*, the mod is a murder mystery telling the story of a sapient robot’s murder in a glamorous hotel.<sup>156</sup> In May 2018, Bethesda Softworks, developers and copyright holders of the *Fallout* franchise, released the *Far Harbor* expansion pack for *Fallout 4*, adding a raft of new content to consume and locations

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Int’l, 49 F.3d 807, 817 (1st Cir. 1995) (“Computer programs ... are copyrightable as literary works.”).

<sup>148</sup> *The Elder Scrolls V: Skyrim Creation Kit EULA*, *supra* note 14.

<sup>149</sup> *See, e.g., id.*

<sup>150</sup> *See Lotus Dev. Corp.*, 49 F.3d at 817.

<sup>151</sup> *See* *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1112 (9th Cir. 1998); *The Elder Scrolls V: Skyrim Creation Kit EULA*, *supra* note 14.

<sup>152</sup> *See, e.g., Baker v. Selden*, 101 U.S. 99, 104 (1879) (“The copyright of a book on book-keeping cannot secure the exclusive right to make, sell, and use account-books prepared upon the plan set forth in such book.”).

<sup>153</sup> *See The Elder Scrolls V: Skyrim Creation Kit EULA*, *supra* note 14.

<sup>154</sup> *See* Livingston, *supra* note 9; Plunkett, *supra* note 12.

<sup>155</sup> Baron VonChateau, *Autumn Leaves*, NEXUSMODS, <https://www.nexusmods.com/newvegas/mods/50146> [<https://perma.cc/J735-YGDM>] (download page for *Autumn Leaves* mod).

<sup>156</sup> *Id.*

to explore, set in a postapocalyptic Bar Harbor, Maine.<sup>157</sup> The added content included a quest entitled “Brain Dead,”<sup>158</sup> and players quickly noticed something suspicious: “Brain Dead” is a murder mystery telling the story of a sapient robot’s murder in a glamorous hotel, with a suspiciously similar architectural layout to the *Autumn Leaves* hotel.<sup>159</sup> *Autumn Leaves*’ creator then levied the expected accusations against Bethesda in an extensive post on the popular mod repository, ModDB.com, though he did not pursue any legal action.<sup>160</sup> The problem never rose above minor headlines, and a subsequent journalist’s investigation showed that the *Far Harbor* quest was far too attenuated from *Autumn Leaves* in its overall execution and plot to merit any serious scrutiny.<sup>161</sup> However, the *Autumn Leaves* incident tiptoed worryingly close to a situation which, if not technically illegal, is at the very least ethically troubling.<sup>162</sup> Such developer appropriation would not be without precedent either: during development of the game *The Elder Scrolls V: Skyrim*, Bethesda Softworks’ developers openly discussed relying on mods for inspiration and design influence.<sup>163</sup> To be clear, even absent the restrictive EULA or the court history, both of these instances are unimpeachable under present copyright doctrine; after all, general ideas and systems may not claim

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<sup>157</sup> *Fallout 4 Far Harbor*, STEAM, [https://store.steampowered.com/app/435881/Fallout\\_4\\_Far\\_Harbor/](https://store.steampowered.com/app/435881/Fallout_4_Far_Harbor/) [<https://perma.cc/KE7R-KAFB>] (online store page for *Far Harbor* expansion pack).

<sup>158</sup> See *Brain Dead*, NUKAPEDIA FALLOUT WIKI, [http://fallout.wikia.com/wiki/Brain\\_Dead](http://fallout.wikia.com/wiki/Brain_Dead) [<https://perma.cc/N47E-JW4B>].

<sup>159</sup> Patricia Hernandez, *Why Some People Have Accused Bethesda Of Ripping Off A Mod For Fallout 4*, KOTAKU (July 15, 2016), <https://kotaku.com/why-some-people-have-accused-bethesda-of-ripping-off-a-1783735999> [<https://perma.cc/92SR-29VS>].

<sup>160</sup> Baron VonChateau, *Big Publishers and a Small Mod*, MODDB (July 13, 2016), <https://www.moddb.com/mods/autumn-leaves/news/big-publishers-and-a-small-mod> [<https://perma.cc/44G8-UG46>].

<sup>161</sup> Hernandez, *supra* note 159.

<sup>162</sup> See *id.* (illustrating striking similarities between *Autumn Leaves* and *Brain Dead*).

<sup>163</sup> Matt Bertz, *Skyrim: Building Better Combat*, GAMEINFORMER (Jan. 24, 2011), [https://www.gameinformer.com/games/the\\_elder Scrolls\\_v\\_skyrim/b/x\\_box360/archive/2011/01/24/skyrim-building-better-combat.aspx](https://www.gameinformer.com/games/the_elder Scrolls_v_skyrim/b/x_box360/archive/2011/01/24/skyrim-building-better-combat.aspx) [<https://perma.cc/7Z42-H2SJ>] (“After playing an Oblivion mod that turned the bow and arrow into a formidable weapon capable of one-hit kills, Bethesda decided to adopt that approach.”).

copyright protection.<sup>164</sup> But more egregious appropriation is easily conceivable under the present regime for game mods, as the *Autumn Leaves* incident implies.<sup>165</sup> Granted, some checks on developer misappropriation do exist. For example, fan-base outcry has proved many times to be a powerful motivator in the gaming and tech industries, and social media firestorms rarely end well for developers.<sup>166</sup> But even the biggest outcry won't overcome compelling pecuniary interests.<sup>167</sup> Bad PR is no replacement for established legal processes.

### III. PART THREE

Considering the dual threat of the current copyright doctrine and the appropriating language of the average devkit EULA, it seems unlikely that, absent some major reconfiguration of copyright law or an industry-wide, voluntary reduction of draconian EULA language, modders will be able to assert copyright protection or control over their work products.<sup>168</sup> But even operating under the present regime, some options still exist for modders looking

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<sup>164</sup> 17 U.S.C. § 102(b) (2012) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”).

<sup>165</sup> See Hernandez, *supra* note 159.

<sup>166</sup> See, e.g., Erik Kain, *EA Removing ‘Star Wars Battlefront II’ Micro-Transactions Is a Victory, But the War Isn’t Over Yet*, FORBES (Nov. 17, 2017), <https://www.forbes.com/sites/erikkain/2017/11/17/rebels-destroy-star-wars-battlefront-ii-micro-transactions-but-the-war-is-far-from-over/#59a150d9d629> [<https://perma.cc/A5F3-DBVU>] (Electronic Arts revamped their loot-box monetization system for *Star Wars Battlefront II* after public outcry); Michael McWhertor, *Bethesda Responds to Blowback Over Skyrim Paid Mods on Steam, Says It’s Listening*, POLYGON (Apr. 27, 2015), <https://www.polygon.com/2015/4/27/8505513/bethesda-skyrim-paid-mods-valve-steam> [<https://perma.cc/U77R-9DRC>] (Bethesda Softworks backed off a proposed paid-mod system after fan complaints).

<sup>167</sup> A non-gaming example: defying overwhelming user outcry, the blog site Tumblr banned all adult content in late 2018 seemingly due to economic pressures by Apple, which had removed the Tumblr app from its app store following an isolated child pornography incident. See Shannon Liao, *Tumblr Will Ban All Adult Content on December 17th*, THE VERGE (Dec. 3, 2018), <https://www.theverge.com/2018/12/3/18123752/tumblr-adult-content-porn-ban-date-explicit-changes-why-safe-mode> [<https://perma.cc/36QV-GPQQ>].

<sup>168</sup> See 17 U.S.C. § 102(b) (2012); *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1114 (9th Cir. 1998); see also *The Elder Scrolls V: Skyrim Creation Kit EULA*, *supra* note 14.

to reap direct benefits from their hard work—in profits rather than outright ownership rights.<sup>169</sup> None of these methods are perfect, and they often rely on the unreliable kindness of copyright holders because of the inherently derivative, infringing nature of most mods.<sup>170</sup> Nonetheless, they present a starting point from which a better, more equitable future for modders' rights to ownership and profit may be forged.

### *A. Developer and Creator Collaboration*

Bethesda Softworks' Creation Club service was born out of the ashes of the first high-profile, full-throated attempt at monetized mods by a major publisher.<sup>171</sup> That attempt, a collaboration between Bethesda and digital merchant Steam, was poorly implemented and was met with such consumer furor that the initiative was pulled almost immediately.<sup>172</sup> The Creation Club is a softer, much more conservative approach to the same idea, but the central concept remains the same: modders can profit off their work with no fear of legal repercussion.<sup>173</sup> But while directly partnering with a copyright holder may provide more security than other monetization methods, in practice, it has so far proved creatively limited, a far cry from the anything-goes mentality that characterizes free mod sites.<sup>174</sup> This is a result of the Creation Club's structure and process: unlike the original paid mods implementation, the Creation Club involves an extensive application process<sup>175</sup> and all content produced is "fully curated" in order to be perfectly compatible with

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<sup>169</sup> See *infra* notes 187–88 and accompanying text.

<sup>170</sup> See *Micro Star*, 154 F.3d at 1114.

<sup>171</sup> *Creation Club*, BETHESDA, <https://creationclub.bethesda.net/en> [<https://perma.cc/F25S-6866>].

<sup>172</sup> Shaun Prescott, *Valve Has Removed Paid Mods Functionality From Steam Workshop*, PCGAMER (Apr. 27, 2015), <https://www.pcgamer.com/valve-has-removed-paid-mods-functionality-from-steam-workshop/> [<https://perma.cc/FF4R-TH6B>].

<sup>173</sup> See *Creation Club*, *supra* note 171.

<sup>174</sup> See Brian Crecente, *Bethesda: Creation Club More Like Outsourcing than Paid Mods*, POLYGON (June 16, 2017), <https://www.polygon.com/e3/2017/6/16/15815130/bethesda-creation-club-comment> [<https://perma.cc/D7ZR-84YB>] (“[I]t’s supposed to be small things you can add to your game.”).

<sup>175</sup> *Creation Club*, *supra* note 171 (“Creators are required to submit documentation pitches which go through an approval process. All content must be new and original. Once a concept is approved, a development schedule with Alpha, Beta and Release milestones is created.”).



the base game.<sup>176</sup> In addition, while external modders do produce Creation Club content, much of the content is still developed internally.<sup>177</sup> Bethesda also makes it very clear that the Creation Club is not meant to replace mods, and in fact specifically states that it does not consider Creation Club content to be mods.<sup>178</sup> While this statement is likely intended to serve in a public relations capacity to distinguish the Creation Club from the Steam paid mods fiasco,<sup>179</sup> the statement also rings quite true. The content distributed through Creation Club is very conservative, likely because Bethesda requires all content to be compatible with the core game's content.<sup>180</sup> The content mostly consists of minor additions, like new weapons or armor sets,<sup>181</sup> that more closely resemble microtransactions<sup>182</sup> than proper mods. Under the requirement of compatibility and the need for internal vetting, the sort of wide-ranging, innovative mods that have led to sea-changes in the industry are shut out from monetization; the notions of vetted compatibility and wild experimentation do not go well together.<sup>183</sup> While solutions like the Creation Club do give a select few modders a form of monetary and

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.* (“It features new items ... created by Bethesda Games Studios and outside development partners.”).

<sup>178</sup> *Id.* (“Is Creation Club paid mods? No. Mods will remain a free and open system where anyone can create and share what they'd like.”). It bears mentioning that in *Fallout 4* and recent re-releases of *Skyrim*, Bethesda has introduced in-game mod browsing (as opposed to unofficial external websites like Nexus Mods), so the language likely also serves to distinguish the paid Creation Club from the free mod database. See *Fallout 4 Mods*, BETHESDA, <https://Bethesda.net/en/mods/fallout4> (last visited Nov. 21, 2018); *Skyrim Mods*, BETHESDA, <https://bethesda.net/en/mods/skyrim> (last visited February 23, 2020).

<sup>179</sup> See Prescott, *supra* note 172.

<sup>180</sup> *Creation Club*, *supra* note 171 (“Creation Club content is ... compatible with the main game and official add-ons.”).

<sup>181</sup> At launch, the Club featured “two guns, a couple sets of power armor, a nice-looking customizable backpack, some Pip-Boy [in-game mobile device] skins ... and a pretty big set of modern furniture you can use in your settlements.” Christopher Livingston, *I spent \$15 on Fallout 4's Creation Club Content, and Here's What I Got*, PCGAMER (Aug. 31, 2017), <https://www.pcgamer.com/i-spent-15-on-fallout-4s-creation-club-content-and-heres-what-i-got/> [<https://perma.cc/ES9R-LMK6>].

<sup>182</sup> Schreier, *supra* note 114.

<sup>183</sup> See Prescott, *supra* note 172 (illustrating how paid mods that introduced industry change were silenced by consumer backlash forcing gaming companies to remove paid mods).

legal security unheard of elsewhere in the industry, such a careful, small-scope solution neuters mods' broader potential.<sup>184</sup>

### *B. Remakes*

Perhaps the most expensive solution, but also the most ironclad, is the standalone remake, where the content of a mod is wholly recreated in a separate form from the game from which it originally derived.<sup>185</sup> Many popular games originated as mods before being remade as standalone games.<sup>186</sup> These range from the small independent experiment, *The Stanley Parable* (originally a mod for shooter *Half-Life 2*),<sup>187</sup> to the popular multiplayer game *DOTA 2* (originally a mod for strategy game *Warcraft III*).<sup>188</sup> Such an undertaking is expensive and time-consuming, as building assets and systems from scratch and dreaming up entirely separate worlds and lore from the original game are daunting tasks.<sup>189</sup> But if these obstacles are overcome, the benefits reaped are bountiful. The creation is wholly severed from the original game.<sup>190</sup> While still derivative in inspiration, it no longer infringes on the original game's copyright under the *Micro Star* conception of derivatives.<sup>191</sup> As an original copyrighted work, it may be exploited in any way the creator wishes within the boundaries of copyright law.

But this solution may not be as secure as it seems. When a standalone game originates as a mod, created under the shackles

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<sup>184</sup> See *Creation Club*, *supra* note 171.

<sup>185</sup> For examples, see *infra* notes 187 and 188.

<sup>186</sup> See *infra* notes 187 and 188.

<sup>187</sup> Mike Rose, *Behind the Scenes with The Stanley Parable*, GAMASUTRA (Oct. 17, 2013), [https://www.gamasutra.com/view/news/202359/Behind\\_the\\_scenes\\_with\\_The\\_St Stanley\\_Parable.php](https://www.gamasutra.com/view/news/202359/Behind_the_scenes_with_The_St Stanley_Parable.php) [<https://perma.cc/NT3X-MG7G>]; *The Stanley Parable*, STEAM, [https://store.steampowered.com/app/221910/The\\_St Stanley\\_Parable/](https://store.steampowered.com/app/221910/The_St Stanley_Parable/) [<https://perma.cc/3Q4E-VRE9>] (digital store page for *The Stanley Parable*).

<sup>188</sup> Michael Walbridge, *Analysis: Defense of the Ancients—An Underground Revolution*, GAMASUTRA (June 12, 2018), [https://www.gamasutra.com/php-bin/news\\_index.php?story=18863](https://www.gamasutra.com/php-bin/news_index.php?story=18863); *DOTA 2*, STEAM, [https://store.steampowered.com/app/570/Dota\\_2/](https://store.steampowered.com/app/570/Dota_2/) [<https://perma.cc/7TZ5-AX57>] (digital store page for *DOTA 2*).

<sup>189</sup> For example, the standalone remake of the *DayZ* mod for *Arma II* took five years of development to reach a beta build. Tom Phillips, *Five Years On, DayZ Finally Hits Beta*, EUROGAMER (Nov. 7, 2018), <https://www.eurogamer.net/articles/2018-11-07-five-years-on-dayz-finally-hits-beta> [<https://perma.cc/9R4D-3MBN>].

<sup>190</sup> See *supra* note 188.

<sup>191</sup> *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1112 (9th Cir. 1998).

of a *Skyrim*-like restrictive EULA<sup>192</sup> which grants all relevant ownership to the developer, what results when a developer comes after the standalone remake claiming infringement and demanding satisfaction? After all, they own the original mod per the EULA! This remains an open question that courts have yet to scrutinize.<sup>193</sup> Considering the public relations disincentives that would come with such an anti-modder move,<sup>194</sup> the courts may never have occasion to do so. But, as with mod misappropriation, if the money outweighs the message, anything goes.

### C. Donations

Another form of profiting from mods comes from fan donations.<sup>195</sup> Though infringement penalties often require disgorgement of profits,<sup>196</sup> which likely includes donations attributable to the production of the infringing work,<sup>197</sup> donations may still be a valid way of profiting if the creation of mods is otherwise allowed under the EULA.<sup>198</sup> Two examples of high-profile donation frameworks

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<sup>192</sup> See *The Elder Scrolls V: Skyrim Creation Kit EULA*, *supra* note 14.

<sup>193</sup> The litigation surrounding the development and release of *DOTA 2* come closest to illustrating this fear. While far too complex to go into much here and mainly concerning trademark rather than copyright issues, the conflict between Valve Software and Activision-Blizzard over the use of the term “DOTA” roughly illustrates the way a third-party mod can nonetheless become the *de facto* property of the base game’s rights holder, creating severe problems when a standalone adaptation attempts to enter the market. In short, the original *DOTA* (short for *Defense of the Ancients*) was a fan mod for Blizzard’s *Warcraft III*. Valve hired the modder to spearhead development of a standalone iteration of the mod, using the name *DOTA 2*. Activision-Blizzard sued, claiming ownership of the *DOTA* trademark and, by extension, *DOTA* itself, despite it being a fan-made mod. For a more detailed overview, see Luke Plunkett, *Blizzard and Valve go to War Over DOTA Name*, KOTAKU (Feb. 10, 2012), <https://kotaku.com/blizzard-and-valve-go-to-war-over-dota-name-5883938> [<https://perma.cc/8W87-Z579>].

<sup>194</sup> For examples of gaming PR disasters, see *supra* note 166.

<sup>195</sup> See *infra* note 210.

<sup>196</sup> 17 U.S.C. § 504(a)(1) (2012).

<sup>197</sup> See *id.* § 504(b) (referring to “any profits of the infringer that are attributable to the infringement”).

<sup>198</sup> For example, optional donations to the creator of a freely distributed mod would not seem to facially violate commercial restrictions in *Skyrim*’s Creation Kit EULA. See *The Elder Scrolls V: Skyrim Creation Kit EULA*, *supra* note 14 (“You may not cause or permit the sale or other commercial distribution or

popular with the mod community are the NexusMods<sup>199</sup> and Patreon pages,<sup>200</sup> though other platforms such as Ko-fi,<sup>201</sup> Buy Me a Coffee,<sup>202</sup> and PayPal donations<sup>203</sup> have similar functionality.

NexusMods is a mod database, hosting free mods for over 625 games as of November 2018.<sup>204</sup> In May 2018, the owners of the site introduced what they describe as a Donation Points System.<sup>205</sup> The system combines funds put in by the site owners, as well as user donations through a Patreon page, into a central pool.<sup>206</sup> Once in the pool, the money is surfaced to beneficiaries in the form of Donation Points, with an exchange rate of one dollar per 1,000 points.<sup>207</sup> At the end of each month, modders with the most unique downloads of their files receive a payout from the Donations Point pool.<sup>208</sup> These points are exchangeable for cash, premium site memberships, charitable donations, and other forms of compensation.<sup>209</sup>

The chief problem with the donation system is how paltry it is: the site owners' total monthly investment into the Donation Points pool ranges from \$6,000 to \$10,000.<sup>210</sup> As for user contributions, as of November 2018, the total monthly user donations into the pool stood at less than a \$1,000.<sup>211</sup> Even at the maximum, \$11,000 a month split across just a few dozen high-profile modders is a diminishingly small amount, but NexusMods hosts creations from tens of

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commercial exploitation (e.g., by renting, licensing, sublicensing, leasing, disseminating, uploading, downloading, transmitting, whether on a pay-per-play basis or otherwise) of any New Materials without the express prior written consent of an authorized representative of Bethesda Softworks.”).

<sup>199</sup> NEXUSMODS, *supra* note 10.

<sup>200</sup> PATREON, <https://www.patreon.com> [<https://perma.cc/W392-C496>].

<sup>201</sup> KO-FI, <https://www.ko-fi.com> [<https://perma.cc/GPR6-F8TX>].

<sup>202</sup> BUY ME A COFFEE, <https://www.buymeacoffee.com> [<https://perma.cc/Z4DC-YUM7>].

<sup>203</sup> *Personal Fundraising*, PAYPAL, <https://www.paypal.com/us/webapps/mpp/fundraising> [<https://perma.cc/BA3T-EHA6>].

<sup>204</sup> NEXUSMODS, *supra* note 10.

<sup>205</sup> DarkOne, *Donation Points System Now Live For Mod Authors On Nexus Mods*, NEXUSMODS (May 22, 2018), <https://www.nexusmods.com/news/13611> [<https://perma.cc/SGQ3-5WN5>].

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *NexusMods*, PATREON, <https://www.patreon.com/nexusmods> [<https://perma.cc/HV5Z-RLGE>] [hereinafter *NexusMods Patreon*].

<sup>211</sup> *Id.*

thousands of modders.<sup>212</sup> In fairness, NexusMods apparently wishes to frame the Donation Points System less as a proper income stream for content creators and more as a method for users to show their appreciation for modders.<sup>213</sup> But, as a proper way for creators to significantly profit and live off of modding, it comes up far short.<sup>214</sup>

Patreon and similar services represent a more straightforward approach to mod monetization, allowing a direct donation link between consumers and creators.<sup>215</sup> Patreon in particular is a very malleable platform, and creators are able to shape their donation tiers however they see fit.<sup>216</sup> Malleability does have its problems, however. While Patreon is a much more direct and potentially far more lucrative way to monetize mods than NexusMods' method,<sup>217</sup> it has significant drawbacks. If a user is not careful, certain uses of the platform can easily violate EULAs and tread into full-scale infringement in ways that the indirect NexusMods approach would not.<sup>218</sup> In particular, the ability of Patreon users to gatekeep content behind subscription tiers likely would lead to a breach of certain EULA terms if used to create such a paywall in order to access mods.<sup>219</sup> While not necessarily a sale in

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<sup>212</sup> 85,929 individual modders, as of November 21, 2018. NEXUSMODS, <https://www.nexusmods.com/> [<https://perma.cc/A9HE-58QC>].

<sup>213</sup> *NexusMods Patreon*, *supra* note 210 (framing the system as a way of showing “appreciation”).

<sup>214</sup> *See id.*

<sup>215</sup> *NexusMods Patreon*, *supra* note 210 (“Membership allows ... you to have a direct relationship with your biggest fans, [and] get recurring revenue for your work.”).

<sup>216</sup> *Id.*

<sup>217</sup> *See, e.g.*, Patricia Hernandez, *Modder Makes Over \$4,000 A Month Adding A Lot Of Sex To The Sims*, KOTAKU (Apr. 19, 2017), <https://kotaku.com/what-its-like-to-make-a-sims-4-sex-mod-as-a-full-time-j-1794462936> [<https://perma.cc/65AU-4JTF>] [**warning: article contains explicit imagery**]; Gita Jackson, *Modder Makes \$6,000 A Month Adding Drugs To The Sims 4*, KOTAKU (Feb. 15, 2018), <https://kotaku.com/modder-makes-6-000-a-month-adding-drugs-to-the-sims-4-1823044123> [<https://perma.cc/9YJU-CYRW>]; Mastaklo, PATREON, <https://www.patreon.com/mastaklo> [<https://perma.cc/PZC8-DDNF>] (modder of fighting games on Patreon with a significant following).

<sup>218</sup> *See supra* note 198.

<sup>219</sup> For example, *Skyrim Together* is an in-development mod for Skyrim that adds multiplayer capabilities to the otherwise single-player game. SKYRIM TOGETHER, [https://docs.google.com/document/d/1zQKsZSSwDIe9zOuYRux0\\_BKXr6ojzXpYFsiYSk-ygXg/edit](https://docs.google.com/document/d/1zQKsZSSwDIe9zOuYRux0_BKXr6ojzXpYFsiYSk-ygXg/edit) [<https://perma.cc/Y4Y3-RU6F>]. At the time of

the sense associated with a standard marketplace (i.e., no discrete price tag on an individual mod), this approach nonetheless resembles a *de facto* sale for any content held behind the paywall and likely violates the commercial restrictions of many EULAs.<sup>220</sup>

## CONCLUSION

No matter how effective or potentially lucrative these monetization strategies can be, they do not address this central concern: the lack of ownership rights and the commercial exploitation that comes with ownership. But new approaches are viable, even short of legislative or judicial carve-outs, and may be developed unilaterally by rights holders without requiring court intervention.

A potential model for successful mod rights and monetization comes from the world of tabletop gaming: the Open Game License.<sup>221</sup> Taking inspiration from open source software, the Open Game License (OGL) was developed by *Dungeons & Dragons*' publisher Wizards of the Coast in the early 2000s.<sup>222</sup> The license and its various permutations<sup>223</sup> allowed third-party designers to publish and profit off game content using the basic rules and systems of *Dungeons & Dragons* with no royalties owed to the copyright

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writing, access to the beta version of the mod was only available to those who donated to the modders' Patreon. *Skyrim Together*, PATREON, <https://www.patreon.com/skyrimtogether> [<https://perma.cc/6SWX-QQET>] ("We have decided to give closed beta access to ALL former and future patreons, we do not care about the pledge amount, \$1 is enough to get in.").

<sup>220</sup> See, e.g., *The Elder Scrolls V: Skyrim Creation Kit EULA*, *supra* note 14.

<sup>221</sup> *System Reference Document 5.1*, WIZARDS OF THE COAST, [http://media.wizards.com/2016/downloads/DND/SRD-OGL\\_V5.1.pdf](http://media.wizards.com/2016/downloads/DND/SRD-OGL_V5.1.pdf) [<https://perma.cc/L268-A67U>] (distributed alongside the SRD).

<sup>222</sup> See *Open Game Definitions: Frequently Asked Questions Version 2.0—January 26, 2004*, WIZARDS OF THE COAST (Jan. 26, 2004), <http://www.wizards.com/default.asp?x=d20/oglfaq/20040123d> [<https://perma.cc/468E-HPXB>].

<sup>223</sup> During the publication of *D&D 4th Edition*, Wizards of the Coast adopted a more stringent variant of OGL. *The Dungeons & Dragons 4th Edition Game System License*, WIZARDS OF THE COAST (Mar. 2, 2009), <http://www.wizards.com/default.asp?x=d20/welcome> [<https://perma.cc/9A3Y-S98W>]. Since the release of *D&D 5th Edition*, the company has reverted to the original OGL language. *System Reference Document (SRD)*, WIZARDS OF THE COAST (Jan. 12, 2016), <http://dnd.wizards.com/articles/features/systems-reference-document-srd> [<https://perma.cc/CR8T-RM7R>].

holder.<sup>224</sup> The OGL has proved popular, resulting in the adoption of the standard, or similar, open licensing language by competitors,<sup>225</sup> and accompanied by a massive boom in tabletop gaming.<sup>226</sup>

Neither the analog OGL approach nor its open source software inspirations precisely translate to commercial game modding, however. While the open-ended, incorporeal nature of tabletop gaming gives plenty of opportunity to create third-party content without infringement,<sup>227</sup> using copyrighted assets and code provided by the developer is all but unavoidable for many moddable games, even if the mods do not distribute the assets themselves, but distribute only the instructions on how to use the assets.<sup>228</sup> A new licensing regime would have to address this reality. In addition, the impetus for creating such a licensing regime does not exist for games as yet.<sup>229</sup> The development of the OGL was largely spurred by financial hardships stemming from the decline of the tabletop gaming scene in the 1990s.<sup>230</sup> For video games, an industry with a market capitalization well over a hundred billion dollars,<sup>231</sup> wherein the most popular mod-supporting titles sell tens of

<sup>224</sup> See *supra* notes 222 and 223.

<sup>225</sup> *List of OGL Publishers*, WIKIPEDIA (Sept. 12, 2018), [https://en.wikipedia.org/wiki/List\\_of\\_OGL\\_publishers](https://en.wikipedia.org/wiki/List_of_OGL_publishers) [<https://perma.cc/7ZBP-46LH>].

<sup>226</sup> See Josh Weiss, *Dungeons & Dragons Had Its Biggest Sales Year in 2017*, SYFY (Mar. 14, 2018), <https://www.syfy.com/syfywire/dungeons-dragons-biggest-sales-year-2017> [<https://perma.cc/7KRQ-CAG3>].

<sup>227</sup> See *Open Game Definitions: Frequently Asked Questions Version 2.0—January 26, 2004*, *supra* note 222 (“[A] publisher may be able to add value to an Open Game in the form of non-Open Game material that enhances the Open Game content, provide various support services, or enhance the Open Game in other ways that will allow that publisher to charge for an Open Game, and cause people to be willing to pay for the Open Game material voluntarily.”).

<sup>228</sup> See *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1114 (9th Cir. 1998).

<sup>229</sup> See N.R. Kleinfield, *VIDEO GAMES INDUSTRY COMES DOWN TO EARTH*, N.Y. TIMES (Oct. 17, 1983), <https://www.nytimes.com/1983/10/17/business/video-games-industry-comes-down-to-earth.html> [<https://perma.cc/8QRX-S8YF>] (archive of print article).

<sup>230</sup> *Id.* (“The tabletop RPG business lost 60% to 70% of its unit sales from the period from 1993 to 1997. After a detailed study of the market data available, business managers at Wizards of the Coast decided that the primary reason for this decline was the dissatisfaction consumers had about the products game publishers made available for sale.”).

<sup>231</sup> Emma McDonald, *The Global Games Market Will Reach \$108.9 Billion in 2017 With Mobile Taking 42%*, NEW ZOO (Apr. 20, 2017), <https://newzoo.com/insights/articles/the-global-games-market-will-reach-108-9-billion-in-2017-with-mobile-taking-42/> [<https://perma.cc/QNW2-BY89>].

millions of copies,<sup>232</sup> the economic incentives do not exist, at least for now.<sup>233</sup>

Apart from developer will and lack of incentives, there are other hurdles facing any sort of change toward a rights-based or more broadly monetizable mod landscape. One major speed bump is the prevalence and popularity of mods based on copyrighted or otherwise protected materials that are not owned by the base games' copyright holders.<sup>234</sup> Though both the base game and third-party rights holders have demonstrated a fairly tolerant approach to unauthorized content in free mods,<sup>235</sup> when money gets involved with profit cuts going to the base game's copyright holder, it seems likely that this tolerant stance would change.<sup>236</sup> Thus, any sort of

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<sup>232</sup> See *supra* note 10.

<sup>233</sup> The gaming industry has crashed before. See Kleinfield, *supra* note 229.

<sup>234</sup> See, e.g., *Macho Dragons*, NEXUSMODS (Jan. 7, 2012), <https://www.nexusmods.com/skyrim/mods/5518/> [<https://perma.cc/7J3N-FNM8>] (novelty mod replacing *Skyrim's* dragon enemies with distorted digital models of wrestler "Macho Man" Randy Savage); *Star Wars Conquest*, MODDB (2010), <https://www.moddb.com/mods/swconquest> [<https://perma.cc/7GMC-43ML>] (total conversion of medieval role-playing game *Mount & Blade: Warband* into the *Star Wars* universe); *Third Age—Total War*, MODDB (2009), <https://www.moddb.com/mods/third-age-total-war> [<https://perma.cc/UBV4-J9EX>] (total conversion of historical strategy game *Medieval II: Total War* into the *Lord of the Rings* universe).

<sup>235</sup> See *id.* But see Kate Cox, *Gorgeous Lord of the Rings–Themed Skyrim Mod Project Ends After Cease & Desist Order From Warner Brothers*, KOTAKU (Aug. 30, 2012), <https://kotaku.com/5939383/gorgeous-lord-of-the-rings-themed-skyrim-mod-project-ends-after-cease--desist-order-from-warner-brothers> [<https://perma.cc/HFF9-XPVE>] (*Skyrim* mod based on *Lord of the Rings* received cease and desist order); Jordan Pearson, *'Star Wars: Knights of the Old Republic' Unreal Engine 4 Fan Mod Shuts Down After Legal Threats*, MOTHERBOARD (Oct. 11, 2018), [https://motherboard.vice.com/en\\_us/article/bj4bmm/star-wars-kotor-unreal-engine-4-mod-apeiron-shut-down-lucasfilm](https://motherboard.vice.com/en_us/article/bj4bmm/star-wars-kotor-unreal-engine-4-mod-apeiron-shut-down-lucasfilm) [<https://perma.cc/7F22-U25W>] (mod remaking *Star Wars* role-playing game *Star Wars: Knights of the Old Republic* received cease and desist order).

<sup>236</sup> For an analogous example in the gaming industry, the unauthorized use of potentially copyrighted dance moves in the popular game *Fortnite* has drawn several lawsuits. See Ryan Gilliam & Austin Goslin, *Epic and Fortnite's Dance Lawsuits*, POLYGON (Dec. 27, 2018), <https://www.polygon.com/fortnite/2018/12/18/18147009/epic-fortnite-dance-lawsuits> [<https://perma.cc/B8M6-WAYQ>]. While the suits are ongoing at the time of this writing, they have already had demonstrable effects across the industry, leading to other developers removing similar dances from their games. See Nick Statt, *Forza Horizon 4 Removes Dance Emotes at the Center of Ongoing Fortnite Copyright Lawsuits*, THE VERGE (Jan. 15, 2019), <https://www.theverge.com/2019/1/15/18184168/forza-horizon-4-dance-emotes-fortnite-lawsuits-removal> [<https://perma.cc/MZH7-UXVN>].



paid or rights-based mod system demands a high level of oversight to ensure compliance with copyright, as Bethesda currently embodies in their Creation Club system.<sup>237</sup> Such strenuous vetting limits the scope and type of content allowable on a mod marketplace, hindering modders' abilities to create anything outside of what the copyright holder wishes to sell.<sup>238</sup> But without such gatekeeping, would-be mod distributors run into a problem that already plagues digital marketplaces without strong vetting processes.<sup>239</sup> Algorithmic content policing in the vein of YouTube's Content ID system could prove to be a workable and cost-effective solution in the long term,<sup>240</sup> though the complex, multimedia nature of mod files compared to audio and video files makes such an approach more difficult than YouTube's Content ID system.<sup>241</sup> In addition, the lack of nuance demonstrated by algorithms when it comes to fair

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<sup>237</sup> See *Creation Club*, *supra* note 171 ("Creators are required to submit documentation pitches which go through an approval process. All content must be new and original. Once a concept is approved, a development schedule with Alpha, Beta and Release milestones is created. Creations go through our full development pipeline ... to [be] iterate[d] and polish[ed] ... along with full QA cycles.").

<sup>238</sup> See *supra* notes 180 and 183 and accompanying text.

<sup>239</sup> Sean Hollister, *Steam Says it Will Stop Censoring Games, Publish Anything that isn't Illegal or Trolling*, CNET (June 6, 2018), <https://www.cnet.com/news/steam-says-it-will-stop-censoring-games-publish-anything-that-isnt-illegal-or-trolling/> [<https://perma.cc/3ZAR-R2RW>] (detailing problems Steam has had with copyright violators); Paul Tamburro, *Steam is So Poorly Moderated That It's Selling an Empty Game Folder*, GAME REVOLUTION (Mar. 5, 2018), <https://www.gamerevolution.com/news/373453-steam-poorly-moderated-selling-empty-game-folder> [<https://perma.cc/GCL9-H9PS>] (detailing the Steam digital marketplace's lack of curation and resulting problems).

<sup>240</sup> See YouTube Creators, *YouTube Content ID*, YOUTUBE (Sep. 28, 2010), [https://www.youtube.com/watch?time\\_continue=5&v=9g2U12SsRns](https://www.youtube.com/watch?time_continue=5&v=9g2U12SsRns) [<https://perma.cc/YGT5-5ZV6>].

<sup>241</sup> Technology exists to compare code against pre-existing code to check for plagiarism and infringement. See, e.g., *Clone Doctor: Software Clone Detection and Reporting*, SEMANTIC DESIGNS, <https://www.semanticdesigns.com/Products/Clone/?site=Quora> [<https://perma.cc/39GC-ESTA>]. However, non-infringing code may still amount to audiovisual displays that infringe on others' copyrights. See, e.g., *Skywind FAQ*, TES RENEWAL PROJECT (Mar. 11, 2016), <https://tesr.skywind.com/faq/> [<https://perma.cc/B4HE-LDBM>] (information page for a work-in-progress mod remake of *The Elder Scrolls III: Morrowind* in *Skyrim* that doesn't infringe on any assets or code base but still copies almost every aspect of the game).

use determinations is a further concern, potentially creating a chilling effect on certain kinds of content.<sup>242</sup>

Finally, the most glaring and unpredictable obstacle comes from the players and modders themselves. Previous attempts to change the mod status quo have been met with astounding vitriol, both from gamers and the modding community itself.<sup>243</sup> Many of the current methods of mod monetization face steep criticism and inequities. Bethesda's Creation Club approach has been widely derided.<sup>244</sup> Remakes have become ensnared in legal battles.<sup>245</sup> And while some modders may find rapturous success through donation platforms,<sup>246</sup> other modders come up all but empty-handed, even when their mods are immensely popular and well-received.<sup>247</sup>

Much of this Note amounts to a likely futile complaint. Despite its numerous flaws and the exploitative and philosophical concerns birthed by *Micro Star*, the current paradigm seems intractable. Even absent the *Micro Star* holding, EULAs present a nearly insurmountable restriction, a contract concern that goes far beyond mere copyright considerations. The onus thus remains on the rights holders and the EULA drafters to effect immediate change. Though such a change may never come, for the sake of the philosophical and technical soundness of copyright doctrine, as well as the growth of the video game industry, it would be most welcome. Mods are the wellspring of the gaming industry, and their creators deserve the same respect and ownership rights as any other artist.

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<sup>242</sup> See Fred Von Lohmann, *YouTube's January Fair Use Massacre*, ELECTRONIC FRONTIER FOUNDATION (Feb. 3, 2009), <https://www.eff.org/deeplinks/2009/01/youtubes-january-fair-use-massacre> [<https://perma.cc/4G73-GLEY>].

<sup>243</sup> See *Take Two Interactive Software, Inc. v. Zipperer* No. 18 Civ. 2608 (LLS), 2018 U.S. Dist. LEXIS 151169, at \*1, \*11 (S.D.N.Y. Aug. 16, 2018).

<sup>244</sup> See Livingston, *supra* note 181 (“[A]t the moment the Creation Club isn't offering a heck of a lot worth paying for.”); Allegra Frank, *Fallout 4 Creation Club Complaints Prompt Bethesda Defense*, POLYGON (Sept. 11, 2017), <https://www.polygon.com/2017/9/11/16270482/fallout-4-creation-club-mods-issues-pete-hines> [<https://perma.cc/K2HE-W9TS>].

<sup>245</sup> See *Creation Club*, *supra* note 171.

<sup>246</sup> See *supra* notes 199–203 and accompanying text.

<sup>247</sup> Fewer than .01 percent of downloaders of the acclaimed *The Forgotten City* Skyrim mod donated to the modder. Nick Pearce, *The Pros and Cons of Bethesda's Creation Club*, GAMASUTRA (June 12, 2017), [http://www.gamasutra.com/blogs/NickPearce/20170612/299808/The\\_pros\\_and\\_cons\\_of\\_Bethesdas\\_Creation\\_Club.php](http://www.gamasutra.com/blogs/NickPearce/20170612/299808/The_pros_and_cons_of_Bethesdas_Creation_Club.php) [<https://perma.cc/GS9G-KKHU>].