

# Avatars and Derivative Works: Harmonizing the Interests of Creators and Consumers

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*As we spend more of our days online, we are seeing a shift in content moving towards a progressively simulated reality. The virtual worlds of video games and other online communities have become a norm for many, with an influx of creative content derived from those spaces being widely shared and enjoyed by millions across the country. As instances of works featuring virtual worlds and our virtual representations within those worlds become more frequent, it becomes imperative that there be a clear delineation on what protections govern those expressions within and concerning those virtual spaces. Can an avatar be copyrighted? When a user creates an avatar and uses that avatar to create a separate work, is that work separately protectable? Between End User Licensing Agreements, Terms of Use, and social practices that govern virtual spaces, it is an increasingly complex landscape for those who want to create original content to navigate.*

*This note explores these questions and suggests a preliminary response regarding what the law should be with respect to the use of avatars in derivative and original works of authorship. First, avatars are copyrightable, to a certain extent and within certain circumstances. Copyright ownership of avatars and virtual representations should be clearly defined to account for the creation of content that feature avatars as the primary subjects. Second, regardless of whether an avatar can be copyrighted in its virtual space of origin, content creators should be given the right to ownership over works that they create using avatars taken out of their respective virtual worlds. To avoid stifling creativity in the new age of virtual creation, there must be clear guiding principles that allow for creators to make use of the virtual representations they inhabit without running the risk of retaliation from the creators of those virtual spaces.*

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## INTRODUCTION

The dictionary defines the term “avatar” as “an incarnation in human form” or “an embodiment (as of a concept or philosophy) often in a person.”<sup>1</sup> However, today, many understand the term “avatar” to mean something wholly different. The creator of the multiplayer online virtual world *Second Life*, Philip Rosedale, defines avatars as “the representation of your chosen embodied appearance to other people in a virtual world.”<sup>2</sup> *Second Life* is perhaps the game that popularized the understanding of “avatars” in a virtual sense, but the term “avatar” as we understand it today was coined by the creators of the game *Habitat* in 1986, who thought of the avatar as “the incarnation of a deity, the player, in the online world.”<sup>3</sup> In the modern era, use and understanding of the term are widespread with any graphical representation of a user referred to as an avatar.<sup>4</sup> But as outlets for people to create and present themselves as their avatars increase, questions of ownership and rights begin to arise.

Today, games and virtual worlds offer infinite possibilities for customization and you could spend hours just building your character before you even get into the game. But what is all that work for? Terms of Service and End-User Licensing Agreements often stipulate that despite hours of customization efforts put into a character, that avatar you have created to represent yourself in the virtual realm belongs to someone else.<sup>5</sup> Although some game developers have instituted “fan content” policies, in many cases, reproducing or using an avatar you have created in a game can land you in hot water if you decide to use it in a derivative work that you intend to make publicly available.<sup>6</sup> As our society leans more heavily on virtual interactions and simulated reality, these questions of who owns the rights to an avatar and who should be allowed to use an avatar and how, become more pertinent.

If you built a character in a game unlike any character you, or anyone, had ever seen before, wouldn't you think that is something you have created? If you spent hours customizing every aspect of the character, from the shape and tone of their muscles to the distance between their eyes and the subtle highlights in their hair, don't you think you deserve to have some kind of stake in that

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1. *Avatar*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/avatar> (last visited Mar. 21, 2022).

2. Aaron Britt, *On Language: Avatar*, N.Y. TIMES (Aug. 8, 2008), <https://www.nytimes.com/2008/08/10/magazine/10wwln-guest-t.html>.

3. *Id.*

4. *Id.*

5. See, e.g., *Rockstar Games End User License Agreement*, ROCKSTAR GAMES, <https://www.rockstargames.com/eula> (last updated July 11, 2019) (“Licensor retains all right, title, and interest to the Software, including, but not limited to, all copyrights, trademarks, trade secrets, trade names, proprietary rights, patents, titles, computer codes, audiovisual effects, themes, characters, character names, stories, dialog, settings, artwork, sounds effects, musical works, and moral rights.”).

6. See *Terms of Use*, NINTENDO, <https://www.nintendo.com/terms-of-use> (last updated May 24, 2016); see also *Fan Content Policy*, EPIC GAMES, <https://www.epicgames.com/site/en-US/fan-art-policy> (last visited Mar. 21, 2022).

character? And if you feel proud of the work you put into that character, don't you think you should be able to use it in videos, photos, and any other content?

Questions of who owns an avatar aside, there is also a growing need to address who can use an avatar and how they can use it, regardless of who owns it. As much of our communication moves online, and the ways in which we share content with one another become more public, restrictions on what people can and cannot distribute publicly become a growing concern. Imagine, for instance, a consumer playing the game *EVE Online*, a massively multiplayer online role-playing game set in outer space,<sup>7</sup> decides to create an avatar of themselves and avatars of their friends to control within the game. They spend hours customizing the avatars to be replicas of their friends to make the game feel more realistic. They then create a space-themed sitcom using the avatars to act out scenes and post these to YouTube, where they gain traction and become massively popular. As the law stands today, CCP Games, the creator of *EVE ONLINE*, could use clips from the consumer-created sitcom in advertisements and on their homepage, and could make use of the avatars of the consumer and their friends in any way they see fit, without approval from the creator of the videos, because the *EVE Online* End-User License Agreement stipulates that CCP Games retains the right to publish any information related to a character in a user account without notice or compensation.<sup>8</sup> Similarly, the *EVE Online* Content Creation Terms of Use makes clear that any user-generated content born from *EVE Online* must make clear that the origins of the intellectual property (IP) are CCP's IP and not the creator's own IP or the IP of a third party.<sup>9</sup> Despite whatever effort and creativity a content creator may put into developing such a space sitcom, the end result would ultimately belong to the game company in one way or another.

Perusing platforms such as Instagram and YouTube, it is clear that many people are creating original content that features characters and avatars from games.<sup>10</sup> The future of these content creators and their relationships with game companies would be well-served by the development of clear rules and guidelines that would allow creators to retain ownership over their creative expressions, while balancing their ownership interests with the interests of the game providers in ownership of their IP. There is potential for the development

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7. See generally *EVE ONLINE*, <https://www.eveonline.com> (last visited Mar. 21, 2022).

8. *EVE Online - End User License Agreement*, EVE CMTY, <https://community.eveonline.com/support/policies/eve-eula-en> (last updated May 24, 2018) ("Without limiting its rights in any way, and subject to the other terms of the EULA, CCP shall have the right to display and publish any information (except certain personal information in your Account) relating to any character in your Account, for example, in charts, lists and other compilations, without notice or any compensation to you whatsoever.").

9. *EVE Online Content Creation Terms of Use*, EVE CMTY, <https://community.eveonline.com/support/policies/eve-online-content-creation-terms-of-use-en> (last updated Nov. 2020).

10. See, e.g., Rooster Teeth Animation, *Season 1, Episode 1 – Why Are We Here? | Red vs. Blue*, YOUTUBE (Mar. 6, 2015), <https://www.youtube.com/watch?v=9N8IpxO6rKs&t=1s> (a video series created using machinima technology to synchronize gameplay footage from *Halo* to voice over effects to tell a cohesive story).

of an equitable policy to ensure game developers receive proper remuneration for the investment, while rewarding the creativity of game consumers.

This Note will explore questions of whether an avatar is copyrightable and if it is, what various arguments exist for determining authorship, and in what ways a user may be able to, and should be able to, make use of an avatar outside of the game context. The next chapter will discuss the laws that govern avatars, including copyright laws and the contract terms of Terms of Service and End-User Licensing Agreements that set the boundaries for copyrightability, authorship, and potential models for collaborative ownership of avatars. Part II will broach the law that governs derivative works and the status of derivative works in the absence of authorship, and will explore how the game industry has chosen to approach derivative works. Finally, Part III of this Note will propose guidelines and solutions that may help harmonize the creative interests of users with the commercial interests of companies and create incentives for both parties to nurture the creation of avatars and avatar-based content. Between amendments to the law, creation of new laws, and the development of a self-regulation scheme, it seems that there may be a way to balance competing interests and incentivize the creation of original, game-based content.

#### I. COPYRIGHT AND THE AUTHORSHIP OF AVATARS UNDER CURRENT LAW

The current state of avatar ownership is a bit vague. To begin with, it is unclear whether an avatar stands alone as a distinctive and detailed copyrightable expression, separate from the game it originates from.<sup>11</sup> Terms of Service and End-User Licensing Agreements seem to indicate that the creator of the game owns both the software and any copyrightable expression that is generated by the game software.<sup>12</sup> This means that generally, if an avatar is copyrightable, we legally consider avatars and any other customizable features appearing in the game to be “copyrightable expressions” generated by the game, and thus IP owned by the company that created the game software. However, the lack of a bright-line rule stipulating whether an avatar is copyrightable and exactly who owns an avatar in the absence of a Terms of Service or End-User Licensing Agreement reveal a need for clear rules regarding avatars, copyright, and ownership.

If we consider this general idea of ownership to be the existing model of avatar ownership, the model seems to work, but comes at the expense of content creators who invest countless hours to customize their characters, only to find out that the game company can block any and all content they make using that character. To make matters worse, the game company may be able to freely use

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11. Tyler T. Ochoa & Jaime Banks, *Licensing & Law Who Owns an Avatar?*, in AVATAR, ASSEMBLED: THE SOCIAL AND TECHNICAL ANATOMY OF DIGITAL BODIES 291, 294–95 (Jaime Banks ed., 2018), <https://digitalcommons.law.scu.edu/facpubs/960>.

12. Tyler T. Ochoa, *Who Owns an Avatar? Copyright, Creativity, and Virtual Worlds*, 14 VAND. J. ENT. & TECH. L. 959, 964 (2012).

the character that they created due to the licensing language contained in the aforementioned Terms of Service and End-User Licensing Agreements.<sup>13</sup> Of course, character creation mechanisms force creators to work within the confines of selecting and manipulating pre-existing content, and the law is settled that “originality, not ‘sweat of the brow’ is the touchstone of copyright protection” when it comes to selection and arrangement.<sup>14</sup> However, the development of character creators that allow for a vast array of options for customization is beginning to blur the distinction between what constitutes a mere creative arrangement and what meets the threshold of an original creation. Creators may be discouraged from investing the time and effort to develop custom avatars, knowing that they will not own any interest in any avatar created. Perhaps there is potential for a more equitable and fair framework for collaborative avatar ownership, considering the efforts that users and players put into customizing and building on their avatars in game worlds.<sup>15</sup>

#### A. THE LAW GOVERNING AVATARS

The question of authorship and ownership of avatars is often addressed by the individual End User License Agreements (EULA) and Terms of Use (ToU) or Terms of Service (ToS) agreements that users of games agree to when they participate in a game. EULAs and ToUs define a game developer or publisher’s ownership of the underlying game code and the copyrightable expressions that users may produce during the course of gameplay.<sup>16</sup> Most games require a player to agree to a EULA and ToU that provides that all ownership rights and IP rights to the Game, including underlying code, themes, objects, characters, artwork, and animation, among others, are owned or licensed by the game developer or publisher.<sup>17</sup> At first glance, this may seem to settle the debate of who owns an avatar, as the EULA and ToU often clearly state that the creators and publishers of the game own all elements embodied in the game, the works underlying the game, and any expressions produced in the course of playing the game.<sup>18</sup> However, EULAs and ToU are not always ironclad. There may be instances where a user may not have agreed to the EULA before playing the game, or the

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13. See, e.g., *Blizzard End User License Agreement*, BLIZZARD ENT., <https://www.blizzard.com/en-us/legal/fba4d00f-c7e4-4883-b8b9-1b4500a402ea/blizzard-end-user-license-agreement> (last updated June 1, 2021) (“You hereby grant Blizzard a perpetual, irrevocable, worldwide, fully paid up, non-exclusive, sub-licensable, right and license to exploit the User Content and all elements thereof, in any and all media, formats and forms, known now or hereafter devised. Blizzard shall have the unlimited right to copy, reproduce, fix, modify, adapt, translate, reformat, prepare derivatives, add to and delete from, rearrange and transpose, manufacture, publish, distribute, sell, license, sublicense, transfer, rent, lease, transmit, publicly display, publicly perform, provide access to, broadcast, and practice the User Content as well as all modified and derivative works thereof and any and all elements contained therein, and use or incorporate a portion or portions of the User Content or the elements thereof in conjunction with or into any other material.”).

14. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 359–60 (1991).

15. See, e.g., Ochoa & Banks, *supra* note 11, at 296.

16. *Id.* at 292.

17. Ochoa, *supra* note 12, at 964.

18. See, e.g., *Blizzard End User License Agreement*, *supra* note 13.

EULA may be unenforceable because it is unconscionable, preempted, or otherwise violates public policy.<sup>19</sup> These and other questions regarding EULAs and ToU are beyond the scope of this Note, however, the unreliability of EULAs reveals a need to delineate the authorship and ownership of avatars in the absence of any agreements.

As a general rule, video games and virtual worlds are governed by the laws of copyright, specifically, the Copyright Act of 1976, which stipulates that copyright protection subsists “in original works of authorship fixed in any tangible medium of expression,” including literary, musical, dramatic, audiovisual, and architectural works, among others.<sup>20</sup> The requirement of originality has long been understood to mean “the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.”<sup>21</sup> Originality requires only a low level of creativity and does not signify novelty, meaning a work may be original even if it is similar to other works, so long as the similarity is incidental and not the result of copying.<sup>22</sup> The Copyright Act states that “[a] work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”<sup>23</sup> It goes on to specify that works that consist of sounds and images that are being transmitted, are considered “‘fixed’ for purposes of this title if a fixation of the work is being made simultaneously with its transmission.”<sup>24</sup> The Copyright Office categorizes video games as “audiovisual” works, which are works that consist of “a series of related images that are intended to be shown by the use of a machine or device, together with accompanying sounds, if any.”<sup>25</sup>

The three threshold requirements for copyright protection, originality, fixation, and authorship, have been defined through case law; however, their applicability to avatars has not yet been discussed in depth. The law is unclear as to whether an avatar in a video game may be protected separately from its game of origin as an original work of authorship, or whether an avatar is merely an unprotectable component of the video game.<sup>26</sup> Existing discussion of this issue focuses on drawing parallels to copyright in characters, and whether a

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19. See Ochoa, *supra* note 12, at 965; see, e.g., *Bragg v. Linden Rsch., Inc.*, 487 F. Supp. 2d 593, 611 (E.D. Pa. 2007) (video game ToS included an arbitration provision that was deemed unenforceable due to procedural unconscionability).

20. 17 U.S.C. § 102 (a).

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

22. *Id.*

23. 17 U.S.C. § 101.

24. *Id.*

25. See *Help: Type of Work*, COPYRIGHT.GOV, <https://www.copyright.gov/eco/help-type.html> (last visited Mar. 21, 2022); see also 17 U.S.C. § 101.

26. See Ochoa, *supra* note 12, at 970.

character is simply a copyrightable aspect of an underlying work or whether it is independently copyrightable as a separate work.<sup>27</sup>

The Compendium of U.S. Copyright Office Practices states that “[t]he original, visual aspects of a character may be protected by copyright if they are sufficiently original,” including the physical attributes of the character and any other visual elements.<sup>28</sup> The Copyright Act does not mention whether characters are eligible for copyright; however, the law regarding the copyrightability of characters has been sufficiently settled through case law. There are two standards that have been established, one applicable to literary characters and one applicable to characters in visual media.<sup>29</sup> The standard for literary characters requires that characters be sufficiently distinctive and developed beyond a stock character.<sup>30</sup> In *Warner Bros. Pictures v. Columbia Broadcasting System*, the court established that to be protected by copyright, a literary character must constitute the story being told, rather than be a mere “chessman in the game of telling the story.”<sup>31</sup> For characters in visual media, the visual depiction of the character warrants a more relaxed standard, as it is more likely that visual characters with physical as well as conceptual qualities, will “contain some elements of unique expression.”<sup>32</sup> The bottom line is that case law shows courts have repeatedly allowed copyright protection for characters that are especially distinctive.<sup>33</sup> Of course, characters must also meet the threshold requirements of copyright, and must be original to the author and fixed in a tangible medium.

## B. COPYRIGHTABILITY OF AVATARS

It is difficult to definitively state whether an avatar is copyrightable as a separate work of authorship outside of its game of origin. The Copyright Office allows registration of “a work that depicts or describes a particular character” so long as it contains a “sufficient amount of original authorship.”<sup>34</sup> As such, it is likely that an avatar and its distinctive characteristics could be protected as a depiction of a character within a video game, which constitutes an audiovisual

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27. *Id.* at 970–71.

28. U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 911 (3d ed., 2021), <https://www.copyright.gov/comp3/chap900/ch900-visual-art.pdf>.

29. *See Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1295–96 (C.D. Cal. 1995).

30. Suzanne E. Rogers, *Transforming with Avatars: Video Game Developer Licensing Considerations*, 65 J. COPYRIGHT SOC'Y U.S.A. 57, 76–77 (2018); *see also Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

31. *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945, 950 (9th Cir. 1954).

32. *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978).

33. *Olson v. Nat'l Broad. Co.*, 855 F.2d 1446, 1452 (9th Cir. 1988); *see also Titan Sports, Inc. v. Turner Broad. Sys., Inc.*, 981 F. Supp. 65, 68 (D. Conn. 1997) (“Only a uniquely developed character with some degree of novelty is copyrightable.”).

34. U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.4(H) (3d ed., 2021), <https://www.copyright.gov/comp3/chap300/ch300-copyrightable-authorship.pdf>.



work within the meaning of the Copyright Act.<sup>35</sup> However, it remains unclear whether an avatar would qualify as a separate work of authorship, based on the Copyright Office's "minimum size principle" that forbids registration of short phrases, slogans, names, and titles among other things.<sup>36</sup> With that being said, as previously mentioned, it may be possible that if an avatar is especially distinctive and sufficiently delineated as a unique expression, it may be protectable.<sup>37</sup>

Assuming that an avatar may be protectable as a separate work of authorship, it must be determined whether an avatar would meet the threshold requirements of originality, fixation, and authorship to qualify for copyright protection. Fixation, especially in the context of a video game, can be difficult to ascertain. While the visual appearance and general characteristics that make up an avatar may be considered fixed in the form of underlying data that is stored on a server or computer, determining the fixation of the actions and behavior of an avatar is more complex.<sup>38</sup> These more dynamic elements of an avatar are created during the course of gameplay and, unless they are recorded as an audiovisual work, are often transient and impermanent in nature, making it difficult to justify as "fixed."<sup>39</sup> However, it could be considered a "public performance" that is transmitted to the public, and could be considered "fixed" if the transmission of the performance is simultaneously fixed through some form of permanent recording.<sup>40</sup>

Based on the principles laid out above regarding the copyrightability of characters, it seems that for an avatar to be original, it must be distinctive and detailed enough to be distinguished from a stock character.<sup>41</sup> Further, in *Feist Publications Inc. v. Rural Telephone Service Co.*,<sup>42</sup> the Court determined that originality may subsist in selection, coordination, and arrangement of uncopyrightable elements in an original way.<sup>43</sup> In this sense, even if individual features of an avatar are considered "stock" or uncopyrightable, an avatar consisting of original selection, coordination, and arrangement of various customizable features may meet the requirement of originality within the meaning of the Copyright Act.<sup>44</sup> Of course, not all avatars will meet this

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35. See Ochoa, *supra* note 12, at 971–72.

36. *Id.* at 971.

37. See *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978); see also *Olson v. Nat'l Broad. Co.*, 855 F.2d 1446, 1452 (9th Cir. 1988); *Titan Sports, Inc. v. Turner Broad. Sys., Inc.*, 981 F. Supp. 65, 68 (D. Conn. 1997).

38. Ochoa, *supra* note 12, at 972.

39. *Id.*

40. *Id.* at 972–73.

41. See *Olson*, 855 F.2d at 1452; see also *Titan Sports*, 981 F. Supp. at 68.

42. 499 U.S. 340 (1991).

43. *Id.* at 362.

44. Ochoa, *supra* note 12, at 975–76.

threshold of originality, including those avatars that are “generic” or uncustomizable, or avatars based on preexisting copyrighted characters.<sup>45</sup>

Authorship is perhaps the most difficult requirement of copyright to be parsed out in the context of an avatar. Determining who is the author of an avatar is a lengthy debate, as is determining what form that authorship will take, which shall be discussed in depth in the next section. The very basic notion is that a game developer will claim authorship of an avatar because an avatar is based on elements that were programmed and created by the game’s designers, thus the avatar cannot be “original” to a player because its appearance and characteristics are dictated by those who created the software.<sup>46</sup> However, in many instances and game worlds, the game code sets the boundaries for what an avatar can and cannot do, but there is still room for some freedom for the user to add some elements of originality in the avatar’s appearance and behaviors.<sup>47</sup> Of course, whether the amount of freedom given to a user in a given game is enough to entitle the user to a claim of authorship would depend on the circumstances of the game; however, where there is a wide range of choices afforded to the user, it is likely the resulting product is a product of the user’s creative authorship to a certain extent.<sup>48</sup>

It is worth noting that there are many types of avatars, which range from those that are playable but uncustomizable characters in a game, and those that are fully customizable representations of the player within the game.<sup>49</sup> These can be thought of as open and closed categories of avatars, with open avatars being player-created and customized avatars akin to an “alter ego” of the player, and closed avatars being primarily developer-devised characters with appearances and attributes set solely by the developer.<sup>50</sup> Within this spectrum, open avatars are more likely to provide a wide range of choices to the user, including choices regarding appearance, skills, and behaviors, among others, making it likely that open avatars afford users a certain level of creative authorship.<sup>51</sup> Examples include games such as *EVE Online* and *The Sims 4*, which feature extensive character creation programs that allow users to customize virtually every feature of their avatars.<sup>52</sup> Closed avatars, on the other hand, leave little room for the user to have the freedom of choice, making it less likely that users would be entitled to creative authorship.<sup>53</sup> Examples of games featuring closed avatars include any Nintendo games in the Mario franchise, which only allow a user to pick a

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45. *Id.* at 973.

46. *Id.* at 974.

47. *Id.*

48. *Id.*

49. Rogers, *supra* note 30, at 62.

50. *Id.* at 63–65; see also Daniel Kromand, *Avatar Categorization*, 4 SITUATED PLAY 400 (2007) (Proceedings of DiGRA 2007 Conference), <http://www.digra.org/dl/db/07311.16435.pdf>.

51. Rogers, *supra* note 30, at 64.

52. See, e.g., *The Sims 4: Create A Sim Demo*, EA: THE SIMS 4, <https://www.ea.com/games/the-sims/the-sims-4/pc/create-a-sim-demo> (last visited Mar. 21, 2022).

53. Rogers, *supra* note 30, at 64.

character to play, with limited customization options.<sup>54</sup> An analogy can be drawn to software programs that allow users to exercise creative expression, such as word-processing programs, which are copyrightable as software, but do not extend the copyright claims of the software developers to any literary or artistic works created using the software.<sup>55</sup> Courts have addressed whether a copyright in software can extend to its output in a few recent cases, concluding that the copyright may extend to a software program's output where the program does the "lion's share" of the creating and that the end-user's role in creating the final product is "marginal."<sup>56</sup> It is clear with word-processing programs how the program does not perform the "lion's share" of the creation and the ultimate output of the program is entirely dependent on the end-user's creativity, however, video games and character creation programs seem to exist in a gray area where one may be able to argue either way, depending on the format of the character creation process and the opportunities for creative input given to the end-user (i.e., open avatar customization, as opposed to closed avatar customization).

EULAs and ToU further complicate the debate on authorship, as many of these agreements require users to waive any claims to IP rights in connection with any in-game creations.<sup>57</sup> However, as previously mentioned, there is some support for objections to the enforceability of EULAs based on unconscionability, preemption, or improper contract formation.<sup>58</sup> Games featuring open avatars leave open the possibility and the potential for a user to claim creative authorship of an avatar that is deemed to be sufficiently original and fixed in a tangible medium.

### C. AUTHORSHIP AND OWNERSHIP OF AVATARS

Authorship of a work can take many forms, including sole authorship and the many forms of collaborative authorship that allow for more than one author to have a claim to a work.<sup>59</sup> It is debatable whether an avatar has one sole author (i.e. the game developer) or whether users who customize or create avatars have a claim as a collaborative author.<sup>60</sup> Game developers and publishers, as the creators of the software code that enables a user to customize and create avatars, would argue that because the code dictates an avatar's appearance, they should be considered authors of any avatars created using their software.<sup>61</sup> However, as mentioned, there is a compelling argument that individual users do add original

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54. See, e.g., *Super Mario 3D World*, NINTENDO, <https://supermario3dworld.nintendo.com> (last visited Mar. 21, 2022).

55. Ochoa & Banks, *supra* note 11, at 295.

56. *Rearden LLC v. Walt Disney Co.*, 293 F. Supp. 3d 963, 970 (N.D. Cal. 2018)

57. *Rogers*, *supra* note 30, at 101.

58. *Id.* at 102–05.

59. Ochoa, *supra* note 12, at 977.

60. *Id.* at 974.

61. *Id.*

elements to avatars through unique selection, coordination, and arrangement of the avatar's appearance or behavior.<sup>62</sup> If we are to consider users to also have a claim to authorship of avatars, we must look to the structure of collaborative authorship provided by the law. The Copyright Act provides definitions for four types of collaborative authorship: joint works, works made for hire, collective works, and finally, derivative works.<sup>63</sup>

Joint works are works "prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."<sup>64</sup> The authors of joint works hold undivided interests in the work, regardless of their contribution to the work; however, the contribution must represent an original expression that could stand on its own as a copyrightable work.<sup>65</sup> Additionally, the joint authors must have intended for their contributions to be merged with the contributions of other authors as inseparable parts of a unitary whole.<sup>66</sup> Any co-owner of a work, who goes on to make a derivative work based on the jointly owned work has sole ownership in that derivative work and the co-author does not have any claim to the derivative work.<sup>67</sup> Joint authorship in the context of an avatar would be difficult to justify, given the requirement that joint authors must intend to create a joint work.<sup>68</sup> While it could be considered that there was an intention for the game developers and users' contributions to be merged into a single audiovisual work, it seems unlikely a court would rely on a theory of joint authorship based on the fact that the game developer seems to have contributed most of the underlying work, with the user contributing mere original selection and arrangement.<sup>69</sup>

Works made for hire are works prepared by an employee within the scope of her employment or, more pertinent in this circumstance, works "specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."<sup>70</sup> The employer or other person for whom the work was prepared is considered the author of a work made for hire, unless the parties expressly agree otherwise in writing.<sup>71</sup> Categorizing an avatar as a work for hire would be advantageous for game developers and publishers on two levels: (1) it would give the developer and publisher ownership over any of their programmers' or designers' contributions as their employees, and (2) it would potentially give the developer a right to claim user contributions as those of independent

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62. *Id.* at 975.

63. 17 U.S.C. §§ 101, 103, 201.

64. *Id.* § 101.

65. *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1068, 1070 (7th Cir. 1994).

66. *Id.* at 1068–69.

67. Rogers, *supra* note 30, at 75.

68. *Id.* at 119.

69. Ochoa, *supra* note 12, at 979–80.

70. 17 U.S.C. § 101.

71. *Id.* § 201(b).

contractors.<sup>72</sup> However, while it is likely that a game developer does own their programmers' and designers' contributions as works made for hire, it is much more difficult to consider a user to be an "independent contractor" within the meaning of the Copyright Act.<sup>73</sup> Rather than being specially commissioned and paid to enter into a written agreement to render work for hire services, a user pays to access a licensed copy of a game where they can create and customize avatars.<sup>74</sup> Thus, it seems that the collaborative nature of avatar creation falls outside of the applicability of the work for hire form of collaborative authorship.

Collective works are works in which "a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole."<sup>75</sup> The copyright in each separate contribution is distinct from the copyright in the collective whole and is owned by the author of the contribution unless expressly transferred to the owner of the collective work as a whole.<sup>76</sup> This means the owner of the collective work is presumed to only have the right to reproduce or distribute the individual contribution as part of the collective work.<sup>77</sup> In considering an avatar to be a contribution to a collective work, we could consider the game developer to be the author of the underlying game software and the audiovisual displays that are generated by the software, while individual users retain authorship of their avatars, which are contributions to the game and audiovisual displays.<sup>78</sup> Users would maintain all rights afforded to copyright owners as they pertain to the avatar, and the game developer would retain the right to reproduce or distribute the avatar as part of the collective work of the game.<sup>79</sup> Defining an avatar as a compilation that is a contribution to a collective work could be one way to harmonize the ownership interests of game developers and game users.<sup>80</sup> Game developers would be afforded rights to reproduce and distribute the avatars, but users would also retain rights that would allow them to enjoy copyright protection of their avatars outside of the context of the game.<sup>81</sup>

Finally, derivative works are works "based upon one or more preexisting works, such as a translation, musical arrangement, dramatization . . . or any other form in which a work may be recast, transformed, or adapted."<sup>82</sup> The copyright in a derivative work extends only to the original material contributed by the author of the derivative work, and does not extend to any preexisting

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72. See Rogers, *supra* note 30, at 115–16; see also Ochoa, *supra* note 12, at 978.

73. Ochoa, *supra* note 12, at 978–79.

74. *Id.*

75. 17 U.S.C. § 101.

76. *Id.* § 201(c).

77. *Id.*

78. Ochoa, *supra* note 12, at 983.

79. *Id.* at 983–84; see also 17 U.S.C. § 201(c).

80. Ochoa & Banks, *supra* note 11, at 296.

81. *Id.*

82. 17 U.S.C. § 101.

material used in the work.<sup>83</sup> Further, the author of a derivative work must be authorized to create a second work based on the first work, as “protection for a work employing pre-existing material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.”<sup>84</sup> There is potential for all avatars to be considered derivative works, as all avatars are necessarily based upon pre-existing customization features conceived, created, and programmed into the game by the game developers and publishers.<sup>85</sup> However, the owner of a copyright in a derivative work is constrained by the rights of the owner of the underlying work in that use and exploitation of the derivative work must be authorized by the owner of the underlying work.<sup>86</sup> This means if a user were to hold a copyright to an avatar as a derivative work, they would still need permission from the game developer in order to reproduce, distribute, or use the avatar outside of the game context.<sup>87</sup>

## II. AVATARS AND DERIVATIVE WORKS UNDER CURRENT LAW

Regardless of whether an avatar is copyrightable and whether a creator may share in the ownership of said copyright, if a creator incorporates an avatar into their own original work, they may be creating a derivative work. As mentioned above, a derivative work, as defined by the Copyright Act, is a work based upon one or more preexisting works, in which a work may be recast, transformed, or adapted.<sup>88</sup> Any work that consists of modifications which, as a whole, represent an original work of authorship, is considered a “derivative work.”<sup>89</sup> As applied to avatars, works based on and incorporating avatars created in a video game, such as videos, screenshots, fan-made games, illustrations, or any other works fixed in a tangible medium, may be considered derivative works.<sup>90</sup>

### A. THE LAW GOVERNING DERIVATIVE WORKS

The right to prepare derivative works based on a copyrighted work is an exclusive right granted to the owner of the copyright.<sup>91</sup> Although a derivative work can be independently copyrightable, such a copyright would only cover any new and original contributions by the author, as separated from the pre-existing and underlying work it builds on.<sup>92</sup> As previously mentioned, in order to be protectable, a derivative work must be lawfully created, meaning the

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83. *Id.* § 103(b).

84. 17 U.S.C. § 103(a).

85. Ochoa, *supra* note 12, at 982.

86. *Id.*

87. *Id.*

88. 17 U.S.C. § 101.

89. *Id.*

90. See, e.g., Rooster Teeth Animation, *supra* note 10. See generally Elodie Cohen (@alderhoney), INSTAGRAM, <https://www.instagram.com/alderhoney> (last visited Mar. 21, 2022) (the Sims 4 roleplaying Instagram account featuring edited and modified Sims 4 avatars).

91. 17 U.S.C. § 106.

92. *Id.* § 103(b).

creator of the derivative work must be authorized to create a derivative of the pre-existing work.<sup>93</sup> In the avatar context, this would mean that in the absence of some form of ownership in the avatar itself, any creator of a derivative work featuring an avatar must obtain a license or other permission, perhaps through a fan-content policy or similar provision in the EULA/ToS, from the game developer or publisher to create derivative work based on or featuring the avatar.

Some game developers and publishers have chosen to include some form of a written policy outlining how players may use game content and what they may do with any derivative content they produce. These policies expressly authorize players to create derivative works using the pre-existing copyrighted IP, which presumably includes avatars, that belong to the creators and publishers of the game. For example, the EULA for the game *Cyberpunk 2077* includes the following provision: “1.3 Other Documents. Please make sure you also read our: (a) Fan Content Guidelines - which explain what you can and cannot do with content derived from or based on *Cyberpunk 2077*; . . . .”<sup>94</sup> This links to a separate Fan Content Guideline that gives an overview of the type of fan content that may be created using IP owned by CD Projekt Red, and who owns that fan content.<sup>95</sup> This specific fan content policy allows users to create gameplay videos, fanart, screenshots, community websites, and even software that works alongside the games, so long as they are not used for any commercial purpose and are clearly marked as “unofficial.”<sup>96</sup> However, the policy does allow for videos to be published on YouTube, Twitch, or other video sharing sites, and monetized through partner programs or passive advertising, as long as the content is not placed behind a paywall.<sup>97</sup> This and many policies expressly state that although users retain ownership of any new and original fan content they produce, in creating fan content, they agree to grant the game creator a “non-exclusive, permanent, irrevocable, worldwide, sub-licensable, royalty-free licence [sic] to use, modify, reproduce, create derivative works from, distribute, exploit, transmit, perform and communicate” the fan content in connection with their games.<sup>98</sup> Other game companies with similar policies include Epic Games

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93. *Id.* § 103(a).

94. *Cyberpunk 2077 – End User Licence Agreement*, CYBERPUNK 2077, <https://www.cyberpunk.net/en/user-agreement> (last updated Dec. 10, 2020).

95. *CD Projekt Red – Fan Content Guideline*, CD PROJEKT RED, <https://cdprojektred.com/en/fan-content> (last updated Dec. 10, 2020).

96. *Id.*

97. *Id.*

98. *Id.*; see, e.g., *Fortnite End User License Agreement*, EPIC GAMES, <https://www.epicgames.com/fortnite/en-US/eula> (last visited Mar. 21, 2022) (“If You make or have made available any UGC in the Services, You give Epic permission to host, copy, import, store, modify, adapt, display, publicly perform (including by means of digital audio transmissions), reproduce (and make mechanical reproductions of musical works embodied in sound recordings), create derivative works of (including synchronize to visual images), publicly display, transfer, sublicense, and distribute (collectively “Use”) that UGC, in whole or in part, including for commercial publicity and marketing purposes, in any country. This permission is perpetual and irrevocable and applies to any media, platform, or channel in connection with the Software and Services.”).

(creators of *Fortnite*), CCP Games (creators of *EVE Online*), Riot Games (creators of *League of Legends* and *Valorant*).<sup>99</sup>

Other game companies have more restrictive variations on the policies outlined above. For instance, Nintendo Co., Ltd., the creators of the popular *Super Mario* game franchise, has a fan content policy that solely addresses the use of gameplay footage and screenshots from games in uploaded videos and livestreams.<sup>100</sup> Krafton Inc., the company behind *PlayerUnknown's BattleGrounds*, maintains that “[a]ny and all content Users submit to the Company via the Game or the Service (“Player Content”), and any intellectual property rights in the Player Content belongs to the Company from the moment it is created.”<sup>101</sup> Electronic Arts, Inc. (EA), the creators of the ubiquitous *FIFA*, *Madden NFL*, and *The Sims* games, does not address user-generated content other than what can be uploaded and made available on EA services, but does provide guidelines on how users may request permission to use EA content.<sup>102</sup> As evidenced by these examples, it is clear that there is no uniform policy regarding user-made content and the use of game-related IP. Although this is favorable to game companies who may have differing opinions and interests in terms of their willingness to allow users to utilize game content in the creation of their own original derivative content, it does not favor users, who must look into each unique policy to determine what they can and cannot do with game content. Given that a majority of consumers, especially those in the age range of 18–34, agree to ToS or EULA without reading the terms,<sup>103</sup> it appears unreasonable to expect consumers to have an understanding of what user-made content is allowed under certain game policies. More so considering that much of the language of EULAs and ToS is drafted to be “unreadable” by the general public.<sup>104</sup> The lack of universal bright-line rules for how users can and cannot use content from the video games they play creates a landscape where users are at risk of having content taken down or even being banned by game companies, while game companies run the risk of alienating their fan bases by seeking to protect their IP.

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99. See *Fan Content Policy*, EPIC GAMES, <https://www.epicgames.com/site/en-US/fan-art-policy> (last visited Mar. 21, 2022); *EVE Online Content Creation Terms of Use*, *supra* note 9; *Legal Jibber Jabber*, RIOT GAMES, <https://www.riotgames.com/en/legal> (last updated Aug. 2018).

100. *Nintendo Game Content Guidelines for Online Video & Image Sharing Platforms*, NINTENDO, [https://www.nintendo.co.jp/networkservice\\_guideline/en/index.html?n](https://www.nintendo.co.jp/networkservice_guideline/en/index.html?n) (last updated Nov. 29, 2018).

101. *Terms of Service Playstation*, PUBG, <https://na.battlegrounds.pubg.com/tos-ps> (last updated Jan. 12, 2022).

102. *How to Request Permission to use EA Content*, EA, <https://help.ea.com/en-us/help/faq/how-to-request-permission-for-ea-games-content> (last updated Apr. 7, 2021).

103. Jessica Guynn, *What You Need to Know Before Clicking ‘I Agree’ on that Terms of Service Agreement or Privacy Policy*, USA TODAY (Jan. 29, 2020, 2:21 PM), <https://www.usatoday.com/story/tech/2020/01/28/not-reading-the-small-print-is-privacy-policy-fail/4565274002>.

104. KC Iheanyi, *This New Podcast Will Put You to Sleep Reading Company Terms of Service Agreements*, FAST CO. (Apr. 1, 2020), <https://www.fastcompany.com/90478337/this-new-podcast-will-put-you-to-sleep-reading-company-terms-of-service-agreements>; see also Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255, 2279 (2019).



## B. “RED VS. BLUE” AND EXCEPTIONS TO THE RULE

A good example of user-created content that exists within the gray area of copyright ownership and derivative work rights is the popular web series “Red vs. Blue,” created by laying dialogue over carefully choreographed and recorded game footage from the first-person shooter game *Halo*.<sup>105</sup> The series represents what is now known as “machinima,” a word combining “machine” and “cinema,” referring to animated films made within video games.<sup>106</sup> Episodes of “Red vs. Blue” were created entirely within *Halo*’s multiplayer mode on Xbox, featuring avatars within the game manipulated like puppets, and dubbed with voice-over dialogue.<sup>107</sup> When “Red vs. Blue” first gained prominence in popular culture, *Halo* was developed by the video game developer Bungie, Inc., which at the time was a subsidiary of Microsoft Corporation.<sup>108</sup> Despite being a blatant infringement and a seemingly unauthorized derivative work being used for a commercial purpose, neither Bungie nor Microsoft pursued a claim or attempted to take down the infringing content.<sup>109</sup> In fact, after observing the surge in popularity and the potential for content like “Red vs. Blue,” Microsoft agreed to grant the creators of the series, Rooster Teeth productions, a gratis license and even later hired the company to create machinima advertising content.<sup>110</sup> It seemed that in this case, Microsoft had recognized the value in derivative content such as “Red vs. Blue” and determined that suppressing the development of machinima would not be in their best interest.<sup>111</sup>

A couple of years after “Red vs. Blue” debuted, Microsoft issued their Game Content Usage Rules, which grant “a personal, non-exclusive, non-sublicensable, non-transferable, revocable, limited license for you to use and display Game Content and to create derivative works based upon Game Content,” for personal and non-commercial use.<sup>112</sup> The Rules further stipulate that creators cannot sell or otherwise earn any compensation from any derivative works.<sup>113</sup> Interestingly, the creators of “Red vs. Blue” sell *Halo*-inspired merchandise on their website, have sold over a million DVDs of the series, and the series can be streamed on Netflix and Amazon.<sup>114</sup> This seems to directly

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105. Julie Muncy, *Once the Darling of YouTube, Machinima Still Lives On—For Some*, WIRED (Apr. 23, 2017), <https://www.wired.com/2017/04/red-vs-blue-machinima>.

106. *Id.*

107. Clive Thompson, *The Xbox Auteurs*, N.Y. TIMES MAG. (Aug. 7, 2005), <https://www.nytimes.com/2005/08/07/magazine/the-xbox-auteurs.html>.

108. *Id.*

109. *Id.*

110. *Id.*

111. Christina J. Hayes, *Changing the Rules of the Game: How Video Game Publishers Are Embracing User-Generated Derivative Works*, 21 HARV. J.L. & TECH. 567, 569 (2008).

112. *Id.*; *Game Content Usage Rules*, XBOX, <https://www.xbox.com/en-US/developers/rules> (last updated Jan. 2015).

113. *Game Content Usage Rules*, *supra* note 112.

114. Sahil Patel, *How the Longest-Running Web Series, Rooster Teeth’s ‘Red vs. Blue,’ Makes Money*, DIGIDAY (Sept. 11, 2017), <https://digiday.com/future-of-tv/how-the-longest-running-web-series-makes-money>.

contradict the Rules issued by Microsoft regarding permissible uses of derivative content.<sup>115</sup> Overall, it seems that even where game companies have established rules and policies regarding user-created content and restrictions around what kinds of derivative uses are authorized for creators, they are willing to make exceptions where they stand to benefit from the fan-created derivative works.<sup>116</sup>

Commentators have noted that by explicitly stating what user-generated derivative works they will permit, video game publishers are creating a legal landscape in which creators can freely participate in the creation of derivative works.<sup>117</sup> However, it has also been noted that regardless of the copyright law, video game publishers were unlikely to prohibit derivative works such as machinima for the following reasons.<sup>118</sup> First, due to the vastness of the Internet, it is practically impossible to enforce all copyright laws, and sending cease and desist notices is not economical where the infringing work is unlikely to harm the market for the copyrighted work.<sup>119</sup> Second, many content owners have recognized the beneficial potential of derivative works and have even actively encouraged such works by providing in-game tools to facilitate content creation.<sup>120</sup> Third, content owners have also recognized the potential for negative publicity that may stem from seeking legal action against users that often make up the loyal fan base of a game or company.<sup>121</sup>

It appears that game companies have just as much incentive to allow creators to utilize game content, including avatars and any other in-game content that may be customized or created by users, in the creation of original derivative content. After all, the purpose of granting copyrights is “[t]o promote the Progress of Science and useful Arts [ . . . ],”<sup>122</sup> and it can be understood that encouraging game users to create original content would fall within this purpose. To avoid stifling creativity, there is a need for the development of clear principles that will allow users to create freely without fearing legal repercussions, while maintaining the interests of game companies in protecting their IP assets.

### III. GUIDING PRINCIPLES TO HARMONIZE THE INTERESTS OF GAME DEVELOPERS AND CREATORS

Creating content based on or deriving from avatars and video games is nothing new. Whether with the intent to create derivative works or not, individuals have been taking screenshots in games, capturing video of gameplay,

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115. See *Game Content Usage Rules*, *supra* note 112.

116. Hayes, *supra* note 111, at 578–79.

117. *Id.* at 577.

118. *Id.*

119. *Id.*

120. *Id.* at 577–78.

121. *Id.* at 578.

122. U.S. CONST. art. I, § 8, cl. 8.

and drawing fan-art honoring their favorite characters and avatars for decades.<sup>123</sup> But in a swiftly evolving age where the possibilities and outlets for creating and sharing avatar-based and video game-based content seem endless, we are faced with rapid technological advances that are outpacing the law's ability to adapt with the times. The societal shift to virtual culture and community necessitated by the COVID-19 pandemic around the world has expanded the potential for avatar-based virtual workplaces, and many have turned to virtual worlds as a place to congregate with friends and coworkers, and build online communities.<sup>124</sup> As people spend more and more of their time online and in virtual spaces, it seems inevitable that there will be a direct correlation in increased opportunities for creating avatars in those spaces and sharing derivative works featuring and incorporating those avatars. Considering the current state of avatar ownership and the treatment of derivative works based on or incorporating avatars under U.S. copyright law, there is a growing necessity for bright-line rules or guidelines to help shape the future of content creators and their relationships with game companies.

#### A. AVATARS AS COMPILATIONS AND CONTRIBUTIONS TO A COLLECTIVE WORK

As a threshold matter, there is a need to clarify exactly how we will define avatar ownership moving forward. With the rise of avatar influencers such as Miquela Sousa<sup>125</sup>, prominent vtubers such as Projekt Melody<sup>126</sup>, and the aforementioned avatar-based virtual workplaces<sup>127</sup>, it is clear that avatars are becoming pervasive in our society. But as the creation of avatars becomes ubiquitous, we are faced with the growing issue of determining who owns these avatars. Especially in the workplace setting, where many are recreating themselves as avatars in the virtual workplace, does the user own their avatar likeness? Or does it belong to the company that developed and published the software that allowed these users to customize their avatars in the first place? If a user captures video or takes a screenshot of their avatar interacting with

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123. See, e.g., Jaz Rignall, *Back When Screenshots Really Were Screen Shots*, US GAMER (Feb. 1, 2017), <https://www.usgamer.net/articles/back-when-screenshots-really-were-screen-shots>.

124. See, e.g., Katie Deighton, *Miss Your Office? Some Companies Are Building Virtual Replicas*, WALL ST. J. (May 27, 2020), <https://www.wsj.com/articles/miss-your-office-some-companies-are-building-virtual-replicas-11590573600>; Gosia Glinska, *Virtual Reality in the Workplace: Communicating Through Avatars*, UVA DARDEN (Nov. 12, 2020), <https://ideas.darden.virginia.edu/virtual-reality-in-the-workplace>; Lori Ioannou, *Within a Decade You May be Working with an Avatar or a Digital Twin*, CNBC (Dec. 10, 2020), <https://www.cnbc.com/2020/12/10/within-a-decade-you-may-be-working-with-an-avatar-or-digital-twin.html>.

125. See generally Emilia Petrarca, *Body Con Job: Miquela Sousa Has Over 1 Million Followers on Instagram and was Recently Hacked by a Trump Troll. But She Isn't Real.*, THE CUT (May 14, 2018), <https://www.thecut.com/2018/05/lil-miquela-digital-avatar-instagram-influencer.html>.

126. See generally Jacob Kastrenakes, *What Happens When a Virtual Streamer Doesn't Own Her Body?*, THE VERGE (Nov. 24, 2020), <https://www.theverge.com/2020/11/24/21591488/projekt-melody-twitch-ban-copyright-strike-digitrevx-vtuber>.

127. See, e.g., SINESPACE BREAKROOM, <https://breakroom.tech> (last visited Mar. 21, 2022); SPATIAL, <https://spatial.io> (last visited Mar. 21, 2022).

coworkers in the virtual office, is that the creation of an unauthorized derivative work? Under the current interpretation of copyright law as examined in Section III, it seems that yes, a user would not have any ownership claim to an avatar created and customized using a software that they have licensed the right to use.

As legal scholars have noted, one way to harmonize the ownership interests of game developers and game users would be to categorize avatars as compilations and video games as collective works, such that an avatar is a contribution to a collective work.<sup>128</sup> In considering an avatar to be a compilation, users may have ownership rights in the original selection, coordination, and arrangement of pre-existing avatar creation elements that constitute their avatar.<sup>129</sup> As a contribution to a collective work, the game developer can be considered the author of the underlying game software and the audiovisual displays that are generated by the software, while individual users can retain authorship of their avatars as contributions to the collective work of the game and audiovisual displays.<sup>130</sup> Under this ownership configuration, the copyrights in each separate contribution would remain distinct from the copyright in the collective whole and would be owned by the author of the contribution, unless it is transferred to the owner of the collective work as a whole.<sup>131</sup> Thus, users would own their avatars as original compilations, and game developers would own the game as a whole. In this case, the owner of the collective work would only have the right to reproduce or distribute the individual contribution as part of the collective work.<sup>132</sup> Users would maintain the exclusive rights afforded to copyright owners as they pertain to the avatar, and the game developer would retain the right to reproduce or distribute the avatar as part of the collective work that is the game.<sup>133</sup> Game developers would be able to reproduce and distribute the avatars as part of the game, but users would have the right to copyright protection of their avatars outside of the context of the game.<sup>134</sup>

This would be the most harmonious solution that would balance the interests of both the users and the game companies. If users are given an ownership interest in an avatar, they can freely use avatars in any works they create and avoid running afoul of the game companies. Likewise, the game companies would be able to freely reproduce the avatars as part of the game and avoid the costs of monitoring online platforms for infringing works that feature avatars and pursuing costly legal claims against the creators of such works.

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128. Ochoa & Banks, *supra* note 11, at 296.

129. 17 U.S.C. § 101.

130. Ochoa, *supra* note 12, at 983.

131. 17 U.S.C. § 201(c).

132. *Id.*

133. Ochoa, *supra* note 12, at 983–84; *see also* 17 U.S.C. § 201(c).

134. Ochoa & Banks, *supra* note 11, at 296.

## B. FAN-MADE DERIVATIVE WORKS AS FAIR USE

If game companies are not willing to assent to a collaborative ownership model for avatars that are user-created, there is a need for the development of bright-line rules that will allow users more flexibility in their use of avatars in the creation of any original derivative works they may produce. There may be a blanket solution in the form of amendments to the Copyright Act itself, or industry-specific solutions in the form of compulsory licensing and self-regulation.

One interesting proposal that has been made in furtherance of the argument for protection of fan-made derivative works is to provide explicit statutory protections for non-commercial, transformative works.<sup>135</sup> Specifically, in response to legal uncertainty surrounding the efficacy of a fair-use claim for fan-made derivative works, scholars have proposed an amendment to the preamble of Section 107 of the Copyright Act, which codifies a list of types of works and uses that Congress intends to be considered fair use.<sup>136</sup> The addition of “non-commercial” and “transformative” works to the list of uses considered to be fair use would create a blanket solution that would likely encompass a majority of the types of fan-made derivative works that may be of concern for game companies and users, and help clarify the legal status of fan-made works without effecting a substantive change in the law.<sup>137</sup> Works that depict or feature user-created avatars, such as role-playing social media profiles<sup>138</sup> or video series like “Red vs. Blue,”<sup>139</sup> would certainly fall under this category. Of course, a fair use claim remains tenuous, as at the end of the day, it is a fact-specific balancing of the fair use factors laid out in Section 107 of the Copyright Act,<sup>140</sup> as interpreted by the court analyzing the case. As such, it may be more effective to develop rules or guidelines that are specific to the video game industry and address the nuanced issues and concerns that arise in the gaming context.

## C. COMPULSORY LICENSING FOR AVATARS AND GAME CONTENT

One such industry-specific solution may be statutory regulation of avatar licensing through a compulsory licensing scheme enacted by Congress. Legal scholars and critics have proposed the establishment of a compulsory licensing scheme in many facets of copyright law, including in the realm of music, where compulsory licensing originated.<sup>141</sup> Currently, the Copyright Act provides for

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135. Patrick McKay, *Culture of the Future: Adapting Copyright Law to Accommodate Fan-Made Derivative Works in the Twenty-First Century*, 24 REGENT U. L. REV. 117, 139 (2012).

136. *Id.* at 140.

137. *Id.*

138. Cohen, *supra* note 90.

139. Rooster Teeth Animation, *supra* note 10.

140. *See* 17 U.S.C. § 107.

141. *See generally* Peter S. Menell, *A Remix Compulsory Licensing Regime for Music Mashups*, in THE ROUTLEDGE COMPANION TO COPYRIGHT AND CREATIVITY IN THE 21<sup>ST</sup> CENTURY 13 (Michelle Bogre & Nancy Wolff eds., 2020).

compulsory licensing for mechanical reproduction of nondramatic musical compositions, jukebox performances of nondramatic musical compositions, cable television retransmissions, and satellite home dish reception.<sup>142</sup> A compulsory license is a limitation on the exclusive rights of copyright owners, allowing any person that complies with the statutory requirements to obtain a license for specified uses.<sup>143</sup> For instance, Section 115 of the Copyright Act provides that a person who applies for and obtains a license may make and distribute phonorecords of a nondramatic musical work and outlines the procedures for obtaining such a license.<sup>144</sup> Licensing rates are set by Copyright Royalty Judges, who do their best to set reasonable rates that represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.<sup>145</sup>

Of course, users could contact the game companies directly to negotiate a license for the use of an avatar or to obtain permission to use a game content in a derivative work that they intend to create. However, there are many problems inherent in negotiating one-off licenses. Peter Menell articulated many of these problems in the context of licensing music samples for remixes and mash-ups, but such problems are universal to any circumstance where a creator wishes to license a portion of a work for use in an original derivative work.<sup>146</sup> For one, the current licensing model does not provide for standardized pricing and in many cases, depending on the popularity of the underlying work, licensing costs could be prohibitive or outweigh any financial benefit that a licensee may derive from the use.<sup>147</sup> Furthermore, licensors may want to know how their works are going to be used and may potentially object to certain uses.<sup>148</sup> Lastly, negotiating one-off licenses may implicate complex licensing terms and may require the establishment of monitoring arrangements.<sup>149</sup> In the gaming context, many users and creators are unlikely to be legally savvy or to have the financial means to hire a legal expert to help them navigate the complexities of licensing media. It is more than likely that a system of à la carte licensing would stifle the creativity of many would-be creators who do not have the means or the patience to struggle through the licensing process for a non-commercial use or a silly video they intended to make and share just for fun.

A system for compulsory licensing in the video game industry could encompass a process for game users to obtain licenses for the use of an avatar or other game content in derivative content that they intend to create. Once a user

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142. 3 WILLIAM F. PATRY ON COPYRIGHT § 8.5 (2021).

143. Randy S. Kravis, *Does A Song by Any Other Name Still Sound As Sweet?: Digital Sampling and Its Copyright Implications*, 43 AM. U. L. REV. 231, 242 (1993).

144. 17 U.S.C. § 115(a), (b), (c).

145. *Id.* § 115(c)(1)(F).

146. Menell, *supra* note 141, at 13.

147. *Id.*

148. *Id.*

149. *Id.*

has identified an avatar or game content that they would like to license, they would serve a notice of intention to the relevant game company, or in the absence of a known copyright owner, to the Copyright Office.<sup>150</sup> So long as the game user does not intend to simply recreate the avatar as it would appear and operate within the game, if they use the avatar in a creative and original manner and pay a standardized rate for such use, any user could be entitled to license the use of an avatar. The game company would receive equitable remuneration in the form of a statutorily set rate that is deemed to be reasonable by market standards, and the user would have a simple, presumably low-cost, and straightforward mechanism to make sure any works they create do not infringe on the game company's exclusive rights.

One major point of contention for the establishment of a compulsory license for video game content may be that game companies want to control or restrict the type of use or the content of the derivative work to maintain the reputation of the company. For instance, Epic Games' Fan Content Policy provides that any fan content created using Epic Games IP "must not be obscene, sexually explicit, defamatory, offensive, objectionable, or harmful to others" and any reference made to Epic Games trademarks "must be used in a manner that will enhance and not damage the reputation and goodwill associated with the [m]arks."<sup>151</sup> From this, it is reasonable to believe that Epic Games and other game companies would want to restrict any uses covered by the compulsory licensing scheme to exclude "obscene, sexually explicit, defamatory, offensive, objectionable, or harmful" uses and ensure that any works created using IP licensed via a compulsory license maintains the goodwill and reputation of the company.<sup>152</sup> Perhaps this would be an opportunity for major gaming companies to bring forth their interests to lobby for carve-outs of certain uses that would be deemed prohibited under the compulsory licensing scheme. For instance, perhaps one may not be able to obtain a compulsory license for use of an avatar in pornographic content or in a feature film. Just as the Copyright Act currently limits compulsory licenses to specific categories of works and has built-in limits on uses, a compulsory scheme for avatars and game content could also be tailored to include certain limitations and restrictions.<sup>153</sup>

Further, a compulsory licensing scheme would need to take into account what kind of payment process is most equitable for both game companies and users. The current payment model focuses on royalty payments owed to the copyright holder at a statutorily set mechanical royalty rate.<sup>154</sup> For the music industry, with limited and tangible avenues for distribution, such as the

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150. See 17 U.S.C. § 115(b)(1), (2).

151. *Fan Content Policy*, EPIC GAMES, <https://www.epicgames.com/site/en-US/fan-art-policy> (last visited Mar. 21, 2022).

152. *Id.*

153. See PATRY ON COPYRIGHT, *supra* note 142, § 8.5; see also 17 U.S.C. § 115(a)(1)(B), (a)(2).

154. Diana Mathangani, *Mechanical Royalties From Physical and Download Sales*, SONGTRUST (Dec. 19, 2021), <https://blog.songtrust.com/mechanical-royalties-from-sales>.

distribution of physical products (CDs, vinyl, etc.), digital downloads, and streaming, it makes sense for a royalty system based on a per song, per unit rate.<sup>155</sup> However, with the gaming industry and fan culture that surrounds the gaming industry, things may be a bit more complicated. Users may want to license the right to reproduce an avatar or other game content in a different medium, such as a fan-art drawing, or a video series. For mediums such as these, a royalty system may work, with a statutorily set royalty paid per unit sold or in the context of video streaming, a statutorily set royalty paid per view or a set percentage of advertising revenue derived from monetization on video streaming sites. But as the gaming industry and the culture that surrounds it continues to expand and technology continues to expand, so too do the avenues for creating and sharing derivative content based on avatars and pre-existing game content, and not all derivative content will have a clear-cut model for tracking sales or streams. Perhaps a tiered payment system that sets a one-time fee based on the type of use could be an alternative to a royalty-based system. A standard fee would be determined based on the type of content sought to be licensed and the type of use the license is sought for. For example, a landmark from a game may have a different price from a non-player character, which may differ in price from a player-created and customized avatar, and the fee to license for a YouTube video would differ from a fee for a hand-drawn illustration or an art piece incorporating photo and video from a game. This system could help to solve the problem above regarding limits on types of uses, by identifying certain uses and types of content that the Copyright Office will direct to the game company for negotiation of a voluntary license, rather than issue a compulsory license.

#### D. SELF-REGULATION OF THE GAMING INDUSTRY

In the alternative, with collective cooperation of the greater gaming industry, there may be a possibility for self-regulation through a regulatory body to create a unified policy for licensing game content. The video game industry already has a self-regulating body, the Entertainment Software Association (ESA), which was established in 1994 by video game companies including Sony Interactive Entertainment, Nintendo, Electronic Arts, Capcom, and others.<sup>156</sup> The ESA established the Entertainment Software Ratings Board (ESRB), which creates age-based ratings for games based on content, and also enforces advertising guidelines adopted in the video game industry.<sup>157</sup> The ESA has recently announced an initiative to make probability rates for loot boxes and in-

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155. *Id.*

156. *Membership: FAQs*, ENT. SOFTWARE ASS'N, <https://www.theesa.com/about-esa/#membership> (last visited Mar. 21, 2022).

157. *About ESRB*, ENT. SOFTWARE RATING BD., <https://www.esrb.org/about> (last visited Mar. 21, 2022).



game purchases more transparent through ratings disclosures.<sup>158</sup> Given that the ESA and ESRB together have a reputation with and the collective support of major video game companies, they may be the best bodies to either help regulate or create and enforce guidelines for licensing practices across the greater gaming industry.

The ESA could either establish a new regulatory body, similar to the ESRB, which would focus primarily on licensing matters, or choose to establish its own regulations and guidelines for the industry. One way in which the ESA may effectively establish guidelines and clear rules related to licensing and copyright matters would be to create a universal or uniform structure for EULA and ToS, for game companies to adopt. Currently, one of the issues with EULAs and ToS is that every company has different ideas for copyright ownership of in-game content and policies for fan-made content.<sup>159</sup> If there were a uniform standard for what game companies allow or disallow, users would have a much easier time navigating potential pitfalls of creating and sharing derivative works incorporating avatars or other game content.

As mentioned in Part II.B, after the release and subsequent explosion in popularity of “Red vs. Blue,” Microsoft issued “Game Content Usage Rules” as guidelines for personal and non-commercial use of Microsoft game content.<sup>160</sup> However, at the time they released the first version of the rules, Microsoft was met with backlash from the video game community, who misunderstood the legal significance of the rules.<sup>161</sup> Microsoft then enlisted the help and advice of Hugh Hancock, a longstanding member and advocate of the machinima community, and staff attorneys from the Electronic Frontier Foundation, the leading nonprofit organization defending civil liberties in the digital world.<sup>162</sup> This example of Microsoft working closely with advocates of the gaming community, representing the interests of gamers and content creators, to establish guidelines to harmonize the interests of both the community and the industry may serve as an ideal standard for self-regulation in the gaming industry. If the ESA, together with prominent game-based content creators, could work with game companies to negotiate and establish bright line policies harmonizing the interests of game creators and users that all game companies would agree to adopt, there may be a way to resolve the legal uncertainties of fan-made derivative works.

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158. *Video Game Industry Commitments to Further Inform Consumer Purchases*, ENT. SOFTWARE ASS'N (Aug. 7, 2019), <https://www.theesa.com/news/video-game-industry-commitments-to-further-inform-consumer-purchases>.

159. See, e.g., *Terms of Service*, LINDEN LAB, <https://www.lindenlab.com/tos> (last updated July 31, 2017) (“You retain any and all Intellectual Property Rights you already hold under applicable law in Content you upload, publish, and submit to or through the Servers, Websites, and other areas of the Service[.]”); *Fan Content Policy*, EPIC GAMES, <https://www.epicgames.com/site/en-US/fan-art-policy> (last visited Mar. 21, 2022) (copyrighted IP may be used for non-commercial fan-art purposes, subject to the Fan Content Policy).

160. *Game Content Usage Rules*, *supra* note 112.

161. Hayes, *supra* note 111, at 570.

162. *Id.*; *About EFF*, ELEC. FRONTIER FOUND., <https://www.eff.org/about> (last visited Mar. 21, 2022).

## CONCLUSION

Virtual communities, especially those existing within video and computer games, are becoming increasingly important to many who spend their time online, inhabiting these spaces. Virtual users put in time, creative effort, and thought into customizing and personalizing the avatars that represent them in these spaces, and often take great pride in their virtual representations. However, as the law stands today, it is unclear whether a user can claim any ownership over an avatar they have created in a game, regardless of how much or how little they have put into bringing that avatar to life. Furthermore, it is even more unclear whether a user can utilize an avatar they have customized in original creative work.

There is a need for copyright ownership of avatars and virtual representations to be clearly defined, and users who play a role in creating and customizing an avatar should have a stake in such ownership. While it seems possible for an avatar to be individually copyrightable based on principles of copyright law, EULAs and ToS agreements only broadly address the issue of whether a user may have any ownership rights. And as contracts of adhesion, the efficacy of EULAs and ToS are tenuous. Additionally, every gaming company seems to have a different policy on user-created content and derivative works, which only muddies the waters and increases uncertainty regarding user rights as they relate to avatars and the use of their avatars in creative content. To best accommodate the interests of game creators and game users, avatars should be defined as a compilation, and the users who select, coordinate, and arrange pre-existing avatar creation elements to create their avatar should have ownership rights to the particular selection that constitute their avatar. Avatars should further be defined as a contribution to the collective work that is the video game as a whole, with the game company having rights to reproduce or distribute the individual contribution as part of the collective work.

If avatars can be defined as compilations and contributions to collective works, with game users retaining ownership of the particular arrangement of an avatar they have created, they would also retain ownership of any original works they create using or incorporating that avatar. In the alternative, however, the future of content creation would be well-served by the development of bright-line rules to delineate what a user may and may not create using an avatar derived from a virtual world. There are a few options for how we can move forward with policies to balance the interests of the game users and game developers. The law may be amended to include a blanket provision to categorize non-commercial, transformative, fan-made derivative works as fair use. A new law may be created to establish a compulsory licensing scheme for avatars and game content. Or the game industry may self-regulate and create uniform policies for ownership of user-generated content and licensing of game content.

Ultimately, we must think toward a future in which virtual worlds and the virtual representations that exist within them become a fixture of our everyday

lives. Already, we are seeing virtual art galleries,<sup>163</sup> virtual art installations,<sup>164</sup> virtual influencers,<sup>165</sup> and even virtual workplaces<sup>166</sup> proliferate in society. As we move our lives into the virtual realm, questions of ownership and autonomy become increasingly important. Defining ownership potential for avatars and derivative works is imperative to building a strong foundation for the future of content creation and these proposals are just a few ways in which we may begin to think about how we can balance the interests of those who create virtual spaces and those who inhabit and celebrate them.

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163. See, e.g., *The Artist is Online*, KÖNIG GALERIE, <https://www.koeniggalerie.com/exhibitions/35679/the-artist-is-online> (last visited Mar. 21, 2022).

164. See, e.g., Andrew Webster, *The Latest Modern Art Installation is Inside Fortnite*, THE VERGE (July 1, 2020), <https://www.theverge.com/2020/7/1/21308391/fortnite-creative-manchester-international-festival-art-exhibition-laturbo-avedon>.

165. See, e.g., Alexa Tietjen, *Influencer Ex Machina*, WWD (July 11, 2018, 1:41 PM), <https://wwd.com/beauty-industry-news/beauty-features/influencer-ex-machina-shudu-lil-miquela-virtual-celebrities-instagram-1202755789>.

166. Deighton, *supra* note 124.

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