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Fair Play: Copyright Issues and Fair Use in Youtube "Let's Plays" and Video Game Livestreams

FAIR PLAY: COPYRIGHT ISSUES AND FAIR USE IN YOUTUBE "LET'S PLAYS" AND VIDEOGAME LIVESTREAMS

SEBASTIAN C. MEJIA^{*}

INTRODUCTION

While videogames used to be a small, niche hobby, they have become a worldwide, multi-billion dollar industry.¹ Games like *Call of Duty: Black Ops II* and *Grand Theft Auto V* are not only the biggest sellers in the videogame industry, but are also among the biggest entertainment properties in the world, both reaching the \$1 billion sales milestone in record times.² The high level of success has caused the growth of a large

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1. See Ben Maxwell, *NPD: US Physical Videogame Sales Decline 22 Percent in 2012, Black Ops II Bigger Seller*, EDGE (Jan. 11, 2012, 11:34 A.M.), <http://www.edge-online.com/news/npd-us-physical-videogame-sales-decline-22-per-cent-in-2012-black-ops-ii-biggest-seller/>. In 2012 there may have seen a decline in overall sales, however the videogame industry still generated \$13.3 billion dollars in the United States in 2012.

2. See Ben Fritz, *New 'Call of Duty' Fastest Game in History to Reach \$1 Billion*, L.A. TIMES (Dec. 5, 2012), <http://articles.latimes.com/2012/dec/05/entertainment/la-et-ct-call-duty-black-ops-billion-20121205> ('Call of Duty: Black Ops II' crossed more than \$1 billion in retail sales by Nov[ember] 27, its 15th day on sale."); Erik Kain, *'Grand Theft Auto V' Crosses \$1B in Sales, Biggest Entertainment Launch in History*, FORBES (Sept. 20, 2013,

fan-base. Videogame franchises have grown to include not only the games themselves, but a wide variety of merchandise as well. Rovio Entertainment Ltd. provides an apt example. The company was a relatively small and unknown developer until December 2009, when it launched its massively successful *Angry Birds* franchise on the iPhone, which has since been downloaded over one billion times.³ In 2012, Rovio managed to double its revenue from \$98.25 million in 2011 to \$197.8 million.⁴ What is interesting about this figure is that forty-five percent of that revenue came from merchandise sales.⁵

Along with bringing publishers and developers larger income streams, another manifestation of the growing popularity of videogames has manifested itself in the advent of the Let's Play-style of videos hosted on YouTube as well as live game-streams on sites such as Twitch.tv.⁶ Let's Plays came to prominence through a forum on the popular comedy website, Something Awful, entitled "Let's Play!"⁷ These Let's Plays vary in length and content but almost all feature two common characteristics: gameplay footage and some form of simultaneous commentary by the Let's Play producer. The purposes of the Let's Plays also differ. Some streamers are more concerned with honoring the early days of videogames and only stream retro games (usually games from the late 1980s to early 1990s). Other videos focus on bringing attention to unknown "indie" titles, while

1:22 P.M.), <http://www.forbes.com/sites/erikkain/2013/09/20/grand-theft-auto-v-crosses-1b-in-sales-biggest-entertainment-launch-in-history/> ("[I]n its first three days, the game has crossed the \$1 billion mark. . . . And that's not just videogames. *Black Ops 2* topped all media launches, including blockbuster films [in 2012]. Grand Theft Auto V topped the previous record [\$500 million in day-one sales] by \$300 million.").

3. Ina Fried, *Rovio Passes a Billion Angry Birds Downloads, Still Mulling IPO*, ALL THINGS D (May 9, 2012, 7:30 A.M.), <http://allthingsd.com/20120509/rovio-ceo-when-to-go-public-is-up-to-dad-other-owners/>.

4. Matt Hartley, *Angry Birds Marker Rovio's Revenue Doubles as Merchandise Sales Climb*, FINANCIAL POST (Mar. 3, 2013, 9:12 A.M.), http://business.financialpost.com/2013/04/03/angry-birds-maker-rovios-revenue-doubles-as-merchandise-sales-climb/?__lsa=8336-7325.

5. *Id.*

6. For the purposes of the note, "Let's Play videos" refers to archived video footage (usually on YouTube) featuring a player providing commentary or walkthroughs while playing a videogame. In these videos, the majority of the screen is taken up by the video of the actual game with a video feed of the streamer provided in a corner. The streamer will play the game and provide either a literal commentary on the game and its mechanics, or the streamer may lean towards the comedic side, with the streamer lampooning the game itself.

7. SOMETHING AWFUL LET'S PLAY! FORUM, <http://forums.somethingawful.com/forumdisplay.php?forumid=191>. The view counts on some of the topics in the forum—sometimes higher than 1 million unique views—are indicative of the forum's popularity.

others try to grow a following by creating over-the-top personalities who focus on creating an entertaining way to play games vicariously.⁸ In many ways, as PBS Game/Show says, Let's Play videos are so popular because they have "reinvigorated [a] sense of community [amongst gamers]."⁹ The Let's Play producers, in some cases, have struck internet gold. The most prolific and famous of these is a YouTube user who goes by the name PewDiePie (born Felix Arvid Ulf Kjellberg) who currently has 14,596,559 subscribers to his channel with 2,662,372,429 views spread across his 1,518 uploaded videos.¹⁰ Many of these YouTube stars have become "professional fans" who hold a significant amount of sway in and outside the videogame industry.¹¹ They have turned the simple acts of playing a videogame while talking to an audience into a full-blown career.

But archived Let's Play videos are not the only booming phenomenon in the gaming industry; Twitch.tv—an online streaming service—has seen massive growth in the past two years,¹² with a business model deeply tied to the eSports community.¹³ During the Evo fighting game championships held in the summer of 2013, Twitch attracted a record-breaking 1.7 million unique viewers over the course of the weekend in which the tournament was held,¹⁴ and more recently, the Dota 2 International had several million

8. Jason Schreier, *The Joy of Playing Video Games Without Actually Playing Them*, KOTAKU (Jul. 19, 2012, 9:00 A.M.), <http://kotaku.com/5927191/the-joy-of-playing-video-games-without-actually-playing-them>.

9. PBS Game/Show, *Why Is Let's Play So Huge?*, YOUTUBE (Sept. 3, 2013), http://www.youtube.com/watch?v=pQ9bpcdMd_U.

10. *PewDiePie YouTube Channel Stats*, VIDSTATSX (Oct. 19, 2013, 8:12 P.M.), <http://vidstatsx.com/PewDiePie/youtube-channel>.

11. Danny Wadeson, *Gamertube: Pewdiepie and the Youtube Commentary Revolution*, POLYGON (Sept. 6, 2013, 12:00 P.M.), <http://www.polygon.com/features/2013/9/6/4641320/pewdiepie-youtube-commentary>. In some cases, these individuals have capitalized on their fame and have managed to raise significant amounts of money for charity. Felix "Pewdiepie" Kjellberg recently raised \$450,529 for Charity: Water to celebrate reaching 10 million subscribers. *Id.*

12. See Paul Tassi, *Talking Livestreams, eSports and the Future of Entertainment with Twitch*, FORBES (Feb. 5, 2013, 12:13 P.M.), <http://www.forbes.com/sites/insertcoin/2013/02/05/talking-livestreams-esports-and-the-future-of-entertainment-with-twitch-tv/>. In December of 2012, Twitch revealed that it had almost 25 million unique viewers in that month alone and more than 300,000 unique broadcasters. The average viewer on twitch watched more than 1.5 hours per day.

13. eSports refers to competitive tournaments amongst professional gamers for monetary prizes. Often these teams have corporate sponsorships, and the money they earn allows the players to devote their time solely to practicing and competing.

14. Michael McWhertor, *Evo 2013 Livestream Draw Record Numbers on Twitch with 1.7 Million Viewers*, POLYGON (Jul. 15, 2013, 9:23 P.M.), <http://www.polygon.com/2013/7/15/4526702/evo-2013-livestream-draws-record-numbers->

concurrent viewers watching teams compete for a prize pool of over \$18 million.¹⁵ But these large-scale events and tournaments are only a piece of the traffic that Twitch generates. The company has stated that these types of large tournaments create "huge spikes" in traffic, which Twitch has used to generate steady growth in its broadcasting base.¹⁶ These numbers are likely to continue to grow with the integration of Twitch streaming built into the new generation of console hardware as well as certain flagship videogame titles like *Call of Duty: Black Ops 2*.¹⁷

Unfortunately, the rise in popularity of Let's Plays and livestreams has brought its fair share of problems. The Digital Millennium Copyright Act ("DMCA") allows for the holder of a copyright to issue a takedown notice to an online "service provider," such as YouTube.¹⁸ The service provider must respond "expeditiously to remove, or disable access to, the material that is claimed to be infringing."¹⁹ To sidestep some of these issues, YouTube enacted its "Content ID" system, which allows copyright holders to register their content with YouTube in order to monitor use of their copyrighted material on that platform.²⁰ This issue was brought to the forefront of the videogame industry when Nintendo—the popular game developer and publisher known mostly for its popular mascot Mario—made "content ID match" claims to YouTube for Let's Play videos featuring its games.²¹ The main argument by Let's Play producers and their

on-twitch-with-1-7-million.

15. See Paul Tassi, *Evil Geniuses Take Home Record \$6.6M First Prize in Valve's 'Dota 2' International*, FORBES (Aug. 9, 2015, 10:48 A.M.), <http://www.forbes.com/sites/insertcoin/2015/08/09/evil-geniuses-take-home-record-6-6m-first-prize-in-valves-dota-2-international/>.

16. See Tassi, *supra* note 12.

17. See Tassi, *supra* note 12 at 2; see also Samit Sakar, *Twitch Secures \$20M investment to Prepare for PS4, Xbox One*, POLYGON (Sept. 30, 2013, 11:00 A.M.), <http://www.polygon.com/2013/9/30/4786450/twitch-series-c-20m-investment-ps4-xbox-one>. The next generation of consoles has made it so that any game can be easily streamed directly from the console straight to Twitch.tv. Whereas before, when streamers had to purchase capture kits or download specific capture programs to their computers, the consoles will allow all players to easily stream with the push of a button.

18. See generally 17 U.S.C.A. §512 (West 2010).

19. 17 U.S.C.A. §512 (b) (2) (E) (West 2010).

20. YOUTUBE CONTENT ID, <http://www.youtube.com/t/contentid>. The Content ID system that YouTube has in place allows a copyright holder to assert their copyrights in a video and derive advertising revenue from that content. The copyright holder is also entitled to block the video or to block the revenue an infringing person generates.

21. Ian Miles Cheong, *Nintendo Flexing Copyright Clout on YouTube Let's Play Channels*, GAMEFRONT (May 15, 2013), <http://www.gamefront.com/nintendo-flexing-copyright-clout-on-youtube-lets-play-channels/>; but see Luke Karmali, *Nintendo Helping to Resolve Some YouTube Issues*, IGN (Dec. 13, 2013),

fans was that Nintendo was usurping advertising revenue that the Let's Play producers had properly earned.²² Furthermore, some smaller, independent game developers stood by the Let's Play producers and claimed that without Let's Play streams their games would not have had success.²³ The backlash against Nintendo was immediate and led to an eventual reversal of the company's policies a few weeks later.²⁴ Nintendo released statements in the wake of this controversy that provide an apt synopsis of the competing viewpoints stating that the company "love[s] [its] fans" but that protecting their intellectual property is a necessary step for their business.²⁵ Another concern with YouTube, the DMCA, and the Content ID program is that developers may use these tools to censor unfavorable impressions of their games. That is precisely what happened in the case of YouTuber John Bain, more popularly known as TotalBiscuit. In late October 2013, Bain posted a very negative review of Wild Games Studio's *Day One: Garry's Incident* on YouTube.²⁶ In response, Wild Games filed a takedown notice alleging that, since Bain's video had an advertisement in front of it, Bain illegally appropriated the game's images and wrongfully gained advertising revenue through his video.²⁷ Wild Games quickly reversed their position and rescinded their takedown notice, but this type of behavior shows some

<http://www.ign.com/articles/2013/12/13/is-nintendo-claiming-copyright-on-youtube-videos-again>. On December 10, 2013, YouTube made some changes to its Content ID system that caused Let's Play producers to be inundated with content ID matches. These changes seem to have merely reflected the settings game publishers had already placed regarding their content; many publishers, Nintendo included, have attempted to work with Let's Play producers to stop these unwanted claims. However, it is still unclear if the content ID matches were intentional and if the subsequent measures to fix the problem were simply a reaction to negative press. *See id.*

22. *See* Cheong, *supra* note 21. One popular YouTuber, Zack Scott, became a rallying point for outspoken fans and Let's Play producers. Scott main contention was that Nintendo's actions "jeopardize[] [his] channel's copyright standing and the livelihood of all Let's Play producers."

23. *Id.* The developer of the hit independent game *Thomas Was Alone* took to Twitter claiming, "Thomas [Was Alone] – youtubers = flop."

24. *See* Stephen Totilo, *Nintendo's Turn For a 180? 'Let's Play' Drama Might Have Happy Ending*, KOTAKU (Jun. 24, 2013, 11:10 A.M.), <http://kotaku.com/nintendos-lets-play-drama-might-have-a-happy-ending-513818999>. Nintendo did not release a public statement that it would stop making Content ID claims, but Let's Play producers such as Zack Scott saw advertising revenue from their Nintendo videos resume.

25. *Id.*

26. Kris Ligman, *Developer Accused of Using Copyright Takedown to Censor Critic (updated)*, GAMASUTRA (Oct. 21, 2013), http://www.gamasutra.com/view/news/202810/Developer_accused_of_using_copyright_takedown_to_censor_critic_updated.php.

27. *Id.*

of the legitimate fears that Let's Play producers—particularly those who make a living off of their YouTube channels—face.

While Nintendo challenged Let's Play producers by claiming advertising revenue, some publishers have taken a more direct approach by exercising their rights under the DMCA in regards to livestreaming. On October 18, 2013, UMG Gaming (a tournament organizer) was broadcasting its Dallas tournament for *Call of Duty: Black Ops 2* through Twitch.tv with all proceeds from the Twitch stream to be donated to Children's Miracle Network Hospitals.²⁸ However, a few hours into the tournament, the livestream was blocked by Twitch after receiving a DMCA takedown notice from Activision, the game's publisher.²⁹ Since a livestream's success is predicated upon the number of concurrent viewers, it poses a unique set of problems different from pre-recorded Let's Play series. If a copyright holder issues a takedown against someone livestreaming, it effectively nullifies the streamer's creative efforts. In the case of a charity livestream, a copyright holder asserting its rights could cut funding being raised for noble causes, such as the massively successful Extra-Life charity, which gets users to play games (and in many cases livestream them) for a period of twenty-four hours to raise money for the Children's Miracle Network.³⁰ More livestreaming issues will continue to arise as Google has recently launched its YouTube Gaming platform, which is subject to automatic ContentID claims for streamers who do not have the option to edit their videos to avoid the system.³¹

However, while the game industry has finally become a mainstream form of entertainment, and advances in technology have allowed gamers to connect and create in unprecedented ways, the law has lagged behind. This note will address the various copyright issues surrounding Let's Play videos and videogame livestreams. Part I³² will address the statutory rights of display, public performance, and distribution that a copyright holder is entitled to, and it will focus on analyzing whether Let's Plays and

28. *UMG Dallas Live Stream Taken Down for DMCA Violation*, PRO GAMING TOURS (Oct. 19, 2013), <http://www.progamingtours.net/callofduty/umg-dallas-live-stream-taken-down-for-dmca-violation/>.

29. *Id.*

30. EXTRA-LIFE, <http://www.extra-life.org/index.cfm?fuseaction=donorDrive.event&eventID=520> (last visited Dec. 12, 2013).

31. See Paul Tassi, *Can YouTube Gaming Survive the 'Protection' of Content ID?*, FORBES (Aug. 26, 2015, 10:37 A.M.), <http://www.forbes.com/sites/insertcoin/2015/08/26/can-youtube-gaming-survive-the-protection-of-content-id/>.

32. See *infra* pp. 7-16.

livestreams violate these rights. Part II³³ will look at the statutory right of creating derivative works and whether Let's Play videos and livestreams are, in fact, derivative works of the games they show. Part III³⁴ will provide a detailed analysis of Let's Plays and livestreams under the doctrine of fair use. Finally, Part IV³⁵ will conclude with proposed recommendations for allowing a more flexible fair use standard that takes into consideration the beneficial effects the videogame industry receives from Let's Plays and livestreams while still protecting developers and publishers interests.

PART I – LET'S PLAYS AND LIVESTREAMS UNDER THE RIGHTS OF REPRODUCTION, DISPLAY, PUBLIC PERFORMANCE AND DISTRIBUTION

The Constitution of the United States provides content creators copyrights in their works in order to “promote the Progress of Science and useful Arts.”³⁶ The Copyright Act of 1976 went on to codify some of the exclusive rights alluded to in Article I; these include the rights of reproduction, display, public performance, distribution, and the right to create derivative works.³⁷ However, in order to successfully prevail in a copyright infringement claim plaintiffs need to show ownership of the allegedly infringed material as well as some violation of the copyright holder's exclusive rights.³⁸ The creation of YouTube videos and livestreams that use the images of a videogame become problematic because it is then necessary to determine whether videos with no interactive qualities violate any statutory rights. The first four rights—reproduction, display, public performance and distribution—may be addressed with a more straightforward, objective analysis. This is in contrast with an evaluation of whether a work is a derivative due to the highly subjective factors (substantiality of the previous work and whether it is sufficiently transformative) that are contemplated when making that determination.³⁹

33. *See infra* pp. 16-21.

34. *See infra* pp. 22-42.

35. *See infra* pp. 42-45.

36. U.S. Const. art. I §8, cl. 8.

37. 17 U.S.C.A. §106 (1-6) (West 2002).

38. *Therapeutic Research Faculty v. NBTY, Inc.*, 488 F. Supp. 2d 991, 994 (E.D. Cal. 2007). For the purposes of this note, it is assumed that publishers and developers have ownership of the games displayed in the Let's Play videos or game livestreams.

39. *See infra* Part II pp. 16-21.

A. *Right of Reproduction*

The most basic of the exclusive rights codified in the Copyright Act of 1976 is the right of reproduction, which is concerned with making copies of an original work.⁴⁰ However, Congress has recognized that while the original 1976 Copyright Act was drafted in order to be flexible, "technology has a habit of outstripping even the most flexible statutes."⁴¹ Therefore, while the statute provides an appropriate starting point for analysis, case law is the best way to assess what constitutes a reproduction in such a new medium of expression. For example, in *Twin Peaks*, the court held that the right of reproduction, essentially, grants the copyright owner the exclusive right to control how and when a work is reproduced in different forms.⁴² In *Twin Peaks*, the issue at hand was whether direct quotations of a teleplay in Defendant's guidebook to the popular television show, *Twin Peaks*, constituted a violation of Plaintiff's exclusive right to reproduce.⁴³ The District Court found (and the Second Circuit affirmed) that "literally similar" works constitute copyright infringement.⁴⁴ Since the guidebook contained direct quotations from the teleplay, it was "literally similar" and was an infringement of the Plaintiff's exclusive right of reproduction.⁴⁵ More recently, in *Advance Magazine*, the court found that digital copies made without permission constitute copyright infringement.⁴⁶ While Let's Play videos do provide a direct copy of a game's visual images, they are not likely to be in violation of a copyright holder's reproduction rights. There is certainly an argument to be made that the purpose and primary characteristic of a videogame is its interactive nature, and, since Let's Play videos deny this interactivity, there is no reproduction. However, this argument fails due to the fixed form of the Let's Plays. In order to be a copy, the work must be "fixed" in a way that allows it to be reproduced and

40. 17 U.S.C.A. §106 (1) (West 2002).

41. H.R. REP. NO. 101-735 1990 WL 200440, *reprinted in* U.S.C.C.A.N. 6935.

42. *Twin Peaks Prod., Inc. v. Pub'n Int'l*, 778 F. Supp. 1247, 1250 (S.D.N.Y. 1991), *aff'd in part and vacated in part* 996 F.2d 1366 (2d Cir. 1993).

43. *Id.* at 1249.

44. *Id.* at 1250

45. *Id.*

46. *Advance Magazine Publishers, Inc. v. Leach*, 466 F. Supp. 628, 637 (D. Md. 2006). In *Advance Magazine*, Plaintiff was the owner and publisher of more than 500 book-length stories which had been featured in pulp fiction serial magazines in the 1930s and 1940s. Defendant was the operator of two websites which distributed copies of these works that were obtained by scanning Plaintiff's stories and posting them online (or via CD or DVD) for sale. The court reasoned that scanning was essentially like copying, and thus Defendant violated Plaintiff's right to reproduce. *See id.*

communicated either as a standalone object or with the help of some device.⁴⁷ Furthermore, courts have held that videogames are copyrightable.⁴⁸ Therefore, it stands to reason that a video recording of gameplay in a fixed form, such as a YouTube video, could be seen as violating a copyright holder's right to reproduce in a similar fashion to *Advance Magazine*.⁴⁹

While pre-recorded Let's Play videos may violate the right of reproduction, videogame livestreams might not. This difference is due to the transitory nature inherent in a livestream of data. In *Cartoon Network*, the Second Circuit answered the question, "[i]f a work is only 'embodied' in a medium for a period of transitory duration, can it be 'fixed' in that medium, and thus a copy? And what constitutes a period 'of more than transitory duration'?"⁵⁰ This was a case of first impression for the court in *Cartoon Network*; while the district court initially ruled that *MAI Systems* was controlling precedent, the Second Circuit held that the facts in *Cartoon Network* were distinguishable.⁵¹ In *Cartoon Network*, the defendant, Cablevision, did not dispute that the material stored on its Remote Storage Digital Video Recorder ("RS-DVR") systems was copyrighted, only that the data buffer stream did not constitute a copy.⁵² The Ninth Circuit went

47. 17 U.S.C.A. §101 (West 2010).

48. *Incredible Technologies, Inc. v. Virtual Technologies, Inc.*, 284 F. Supp. 2d 1069, 1075-76 (N.D. Ill. 2003) (relying upon 17 U.S.C. §101 which states "Audiovisual works [are] works that consist of a series of related images which are intrinsically intended to be shown by use of machines or devices . . . together with accompanying sounds, if any, regardless of the material . . . in which the work is embodied."); see also *Midway Mfg. Co. v. Artic Intern. Inc.*, 704 F.2d 1009,1012 (7th Cir. 1983) ("Recording images and sounds in circuit boards does not destroy their copyrightability any more than does recording them on rolls of celluloid film.").

49. See *Advance Magazine*, 466 F. Supp. at 637.

50. *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 127 (2d Cir. 2008).

51. See *id.* at 127-130 (distinguishing from *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993)). *MAI* was different than the facts in *Cartoon Network* because of the nature in which the data was handled. In *MAI*, the data was stored directly on the computers' RAM while maintenance was done by a technician. In that scenario, the Ninth Circuit concluded that a copy was actually made and resided in the system. Because the data was stored in that way, the court in *MAI* did not have to answer the question of the "transitory duration" that was at issue in *Cartoon Network*.

52. *Id.* at 124-5. Cablevision, like other cable companies, gathers programming from many content providers and then transmits that content to subscribers via coaxial cable. The way this data is initially transmitted is through one unified data stream "processed and transmitted" to subscribers in real time. However, the RS-DVR modified this method by creating two separate streams. The first is funneled directly to customers, but the second goes to a Broadband Media Router ("BMR"), this buffers the data stream, formats it, and

on to hold that the term “fixed” connotes embodiment and durational requirements.⁵³ Due to the nature of the RS-DVR system (the ability for the BMR buffer to reformat or transmit and the primary ingest buffer's ability to be copied onto the Arroyo hard disks), the court determined that the embodiment of the work was permanent and stable in nature, falling within the statutory definition of a copy.⁵⁴ However, the data stored in the primary buffer and the BMR were found to be within the buffer for only a “transitory” period that did not meet the durational requirement.⁵⁵ Therefore, these data streams did not amount to unauthorized copies.⁵⁶ In the case of a livestream conducted via Twitch.tv or YouTube, a court might find that the streamer is not creating an unauthorized copy. Both services allow the person recording a particular event to choose whether or not a copy is archived. In this way, similar to the RS-DVRs in *Cartoon Network*, the stream data itself (the images and audio paired with or without the streamers' commentary) would be transitory in nature and not produce an unauthorized copy.⁵⁷ So, while a prerecorded Let's Play video hosted on YouTube (or a similar service) would constitute a violation of a copyright holder's right to reproduce because it embodies a fixed form that is not transitory in nature, a court may find that a livestream—provided the stream is not being archived—does not constitute an infringement of the right of reproduction.

sends it to an “Arroyo Server”. This server is comprised of two data buffers and many high-capacity hard drives. Then, the data stream moves to the “primary ingest buffer” which causes the serve to automatically check if any customers want to record any of the programming contained within the buffer. If a customer does want to record the program, the stream moves to the secondary buffer and is placed on a hard drive allocated to that customer. As new data is placed into the primary buffer, it overwrites a corresponding quantity of data so that the primary buffer never holds more than 0.1 seconds of each channel's programming. Meanwhile, the BMR holds no more than 1.2 second of programming at a time. Cartoon Network's main contention with this practice was the housing of the recorded programs on remote serves, rather than in the set top box. Furthermore, Cartoon Network only alleged direct infringement, not contributory infringement, limiting the scope of the court's opinion solely to whether the streams to the primary and secondary buffers constituted an unauthorized copy. *See id.*

53. *Id.* at 129.

54. *See id.*; *see also supra* note 39.

55. *Cartoon Network*, 536 F.3d at 130. The court reasoned that since the data resided in the buffer for no more than 1.2 seconds at a time before being overwritten that it was not sufficiently embodied for more than a “transitory duration”.

56. *Id.*

57. *See id.*

B. Display Rights

The Copyright Act of 1976 also provides a rights holder the exclusive right to display their copyrighted work publicly.⁵⁸ Put simply, displaying a work means showing a copy directly or through other means such as film, television image, or through any other device or process.⁵⁹ Furthermore, displaying non-sequential images from a motion picture would also be considered a display.⁶⁰ The Ninth Circuit has narrowed this definition stating that the statute provides plain language that an image on a computer screen from a copy fixed in the computer's memory is also a display.⁶¹ However, the Court focused on the fixed nature and location of the stored copy, holding that because the computer in question did not actually store the images, the infringer did not have a copy of the images "for purposes of the Copyright Act."⁶² Like the right of reproduction, the question of whether Let's Plays and livestreams violate the right of display is split. Due to the fixed form inherent in archived Lets Plays that are later uploaded to YouTube (or a similar service), Let's Plays likely violate the right of display. The act of storing and displaying the image amounts to the Let's Play producer having material objects that put the work in a fixed form which can be perceived, reproduced or communicated.⁶³ Similar to the analysis under the right of reproduction,⁶⁴ a livestream might not be seen as violating this right to display. The statutory rights embodied in section 106 are allowed to overlap, and in some cases certain rights must be infringed before a claim of infringement can arise.⁶⁵ A video game livestream's lack of fixed form causes some difficulty in the analysis of whether a livestream could violate the right of display. If the livestream's images cannot be said

58. 17 U.S.C.A. §106 (5) (West 2002).

59. *U-Haul Int'l., Inc. v. WhenU.com, Inc.*, 279 F. Supp. 2d 723, 730 (E.D. Va. 2003) (citing 17 U.S.C. §101).

60. *Id.*

61. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160 (9th Cir. 2007) [hereinafter *Amazon*].

62. *Id.*

63. *Id.* at 1160-1 (quoting 17 U.S.C. §101).

64. *See supra* Part I. A.

65. *Amazon*, 508 F.3d at 1161 (citing *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d, 965, 967 (9th Cir. 1992)). The court referred to *Galoob* where it had previously held that a derivative work could not have been made since the alleged derivative work did not "incorporate a protected work in some concrete or permanent 'form' ". The court went on to explain that "in some contexts, the claimant must be able to claim infringement of its reproduction right in order to claim infringement of its right to prepare derivative works. *See id.*

to be violating the right of reproduction since they are not "copies" under the Copyright Act, it might be that a claim over violation of the right of display is precluded since the alleged infringer would not have a "copy" that is being shown.⁶⁶ However, this argument can be countered by stating that using a livestreaming service like Twitch qualifies as a device or process under the language of the statute.⁶⁷

C. Public Performance Rights

Whereas the right to display focuses on showing a copy of the copyrighted work,⁶⁸ a publically performed work requires performance in a location open to the public where a substantial number of people that are not family or friends are present.⁶⁹ A performed work is also public if the performance is communicated to a public venue regardless of whether the audience is receiving the display at the same or separate times and places.⁷⁰ The court addressed the issue of public performance in videogames in *Red Baron*.⁷¹ In that case, a Japanese corporation, Taito, sold videogames—specifically the coin-operated arcade game *Double Dragon*.⁷² Red Baron, a company that operated coin-operated arcades, purchased circuit boards that allowed *Double Dragon* to be played on its arcade cabinets.⁷³ However, these circuit boards were not purchased directly from Taito, and Red Baron had no license from Taito (or its American subsidiary) to use *Double*

66. See 17 U.S.C.A. §101 (West 2010); see also *supra* note 53. No 17 U.S.C. §101.

67. See 17 U.S.C.A. §101 (West 2010). No 17 U.S.C. §101.

68. See *supra* part I. B.

69. 17 U.S.C.A. §101 (West 2010) ("(1) . . . a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to place specified in clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or different times.").

70. *Id.* 17 U.S.C.A. §101 (West 2010) ("(1) . . . a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to place specified in clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or different times.").

71. See *Red Baron-Franklin Park, Inc. v. Taito Corp.*, 883 F.2d 275 (4th Cir. 1989).

72. *Id.* at 276-77.

73. *Id.* at 277.

Dragon for profit.⁷⁴ Taito claimed that its rights of distribution and public performance were violated by Red Baron's unlicensed use of its circuit boards.⁷⁵ The court determined that Red Baron's use of the *Double Dragon* circuit boards constituted a public performance.⁷⁶ The court focused on the repetitive visual and auditory sequences that the game produced to determine whether the game was being publicly performed.⁷⁷ The court also noted that the very nature of the arcade as a public place made the performance "public."⁷⁸ In the arcade setting, the distinction between a display and public performance rested on the sequence of the images.⁷⁹ The court also noted that the very nature of the arcade as a public place made the performance "public."⁸⁰

In *Valve*, the court looked to the question of whether a cyber-café that allows players to pay-for-play violated public performance rights.⁸¹ Ultimately, the court determined that this model—allowing users to play and "perform" the game in a store open to the public—indeed was a public performance.⁸² It held that a claimant has the burden to show that its copyrighted work is being transmitted to the public.⁸³ However, a claimant does not need to show that a transmission is being viewed by a substantial number of people, but rather that "the challenged transmission [is] *capable*

74. *Id.*

75. *Id.*

76. *Id.* at 279.

77. *Red Baron*, 883 F.2d at 278- 79 (internal citations omitted); *see also* Stern Electronics, Inc. v. Kaufman, 669 F.2d 852, 856 (2d Cir. 1982) ("The repetitive sequence of a substantial portion of the sights and sounds of the game qualifies for copyright protection as an audiovisual work.").

78. *Id.*; *see also* 17 U.S.C.A. §-101 (West 2010).

79. *See Red Baron*, 883 F.2d at 278-79. Whereas showing a non sequential set of images would violate a copyright holder's right to display, by showing "portions" of the audiovisual work in sequence, a performance is being acted out.

80. *Id.*; *see also* 17 U.S.C.A. §-101 (West 2010).

81. *Valve Corp. v. Sierra Entertainment, Inc.*, 431 F. Supp. 2d 1091, 1097 (W.D. Wash. 2004). In *Valve*, plaintiff brought an action against Sierra Entertainment for licensing some of its games to cyber-cafes. These cyber-cafes allowed patrons to pay for access to computers on the premises which had copies of Valve's games loaded onto their hard drives. The player would pay an hourly rate to play on the computers. Sierra argued that the cyber-cafes were simply "renting" the titles, like a video store would. However, the court made the distinction that a store that allowed patrons to watch moves "in-store" was not selling, renting or dispensing of the tape, and therefore the pay-for-play model did not constitute a rental either. *See id.*

82. *Id.*

83. *See Cmty. Broad. Co. v. Time Warner Cable, LLC*, 598 F. Supp. 2d 154 (D. Me. 2009) [hereinafter *Time Warner*].

of being viewed by a substantial number of people.”⁸⁴

Taking case law into account, it is likely that both archived Let's Plays and videogame livestreams both violate a copyright holder's right of public performance. Even if the Internet is not a public place, it still falls within §101's definition as a device or process that would allow members of the public to see the performance or display at same place and time or in separate places and times.⁸⁵ The repetitive visual and auditory sequences make Let's Plays fall within the public performance definition and violate display rights.⁸⁶ While livestreams may not violate display rights due to their lack of a fixed form,⁸⁷ they are sequential in nature and can be seen as a public performance.⁸⁸ Livestreams likely fall within the holding of *Valve* as well; they would not be seen as rentals, but more like the in-store performance of a video store that does not sell, rent, or dispose of the copyrighted material.⁸⁹ By using such large platforms like Twitch⁹⁰ and YouTube,⁹¹ it is likely that both Let's Plays and videogame livestreams are “capable of being viewed by a substantial number of people.”⁹²

D. Right of Distribution

In addition to the rights of reproduction, display, and public performance, §106 provides the exclusive right of distribution.⁹³ Specifically, this right entitles the copyright owner to decide when, how, and for what price, copies of his work will be released to the public.⁹⁴ However this is not an absolute right.⁹⁵ It is subject to the first sale doctrine

84. *Id.* at 161-2 (emphasis added). The court also addressed the holding in *L.A. News Service v. Reuters Television Int'l, Ltd.*, 942 F. Supp. 1265 (C.D. Cal. 1996), where summary judgment was granted when the plaintiff did not show evidence from which the court could determine that a substantial number of people could have seen the footage in question. The *Time Warner* Court specifically notes that in that the dispositive fact in *L.A. News* was that without proper evidence the court could only surmise that an insubstantial number could have viewed the transmission. *See id.*

85. *See* 17 U.S.C.A. § 101 (West 2010).

86. *See supra* note 73.

87. *See supra* part I. A.

88. *See supra* note 74.

89. *See Valve*, 431 F. Supp. 2d at 1096-97.

90. *See supra* note 12.

91. *See supra* note 10.

92. *Time Warner*, 598 F. Supp. 2d at 161-2.

93. 17 U.S.C.A. § 106 (3) (West 2002).

94. *Parfums Givenchy, Inc. v. C&C Beauty Sales, Inc.*, 832 F. Supp. 1378, 1388 (C.D. Cal. 1993).

95. *Id.*

that is codified in §109.96 Infringement can only be committed when copies are actually distributed.⁹⁷ Furthermore, the right of distribution would not be violated by making an unauthorized copy available to the public because the original copy had already been distributed.⁹⁸ The Supreme Court has recently held that under the first sale doctrine the owner of a copy receives first sale protection so long as the copy was lawfully made.⁹⁹

With this in mind, Let's Plays and videogame livestreams are probably not in violation of a game publisher or developer's right of distribution. As a medium, videogames are unique because they are not simply a "phono-record" that can be quickly copied and distributed. A videogame is defined as "an electronic game in which *players control* images on a television or computer screen."¹⁰⁰ Since a videogame requires "player control," a simple copy of a game's audiovisual components likely does not constitute a "distribution" of a game. Furthermore, without the control aspect, a Let's Play or livestream would, at most, be an unauthorized copy which cannot violate the right of distribution.¹⁰¹ However, even if the audiovisual components would be considered a distribution, the first sale doctrine likely applies.¹⁰² Assuming, *arguendo*, that a Let's Play producer or streamer purchased the game (or was given a lawfully made copy), the copyright owner already received the full value of the copy.¹⁰³ Additionally, there would be no actual "dissemination" present in a Let's Play or videogame stream.¹⁰⁴

96. 17 U.S.C.A. § 109 (a) (West 2008). An owner of a lawfully made copy of a copyrighted work, or anyone authorized by that owner, may sell or dispose of that copy without the authorization of the copyright holder.

97. *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 981 (D. Az. 2008).

98. *Id.* at 983; *see also Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1218-19 (D. Minn. 2008) ("'[D]istribution' does not includ[e] making available and, instead, requires actual dissemination.").

99. *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S.Ct. 1351, 1361 (2013) ("Section 109 (a) now makes clear that a lessee of a copy will *not* receive 'first sale' protection but one who *owns* a copy will receive 'first sale' protection, *provided*, of course that the copy was 'lawfully made' and not pirated.") (emphasis in the original).

100. *Video Game Definition*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/video%20game> (last visited Nov. 2, 2013) (emphasis added).

101. *See Atlantic Recording*, 554 F. Supp. 2d. at 983; *see also Capitol Records*, 579 F. Supp. 2d at 1221 ("Equating making available with distribution would undermine settled case law holding that merely inducing or encouraging another to infringe does not, alone, constitute infringement unless the encouraged party actually infringes.") (internal citations omitted).

102. *See supra* note 91.

103. *See Parfums*, 832 F. Supp. at 1389; *see also Kirtsaeng*, 133 S.Ct. at 1361.

104. *See Capitol Records*, 579 F. Supp. 2d at 1218-9.

PART II – LET'S PLAYS AND LIVESTREAMS AS DERIVATIVE WORKS

The rights of reproduction, display, public performance, and distribution are concerned with protecting a copyright holder's profits and rights in their current work. In contrast, a copyright holder's right to create derivative works is more concerned with protecting the rights-holder's monopoly on his own creations.¹⁰⁵ In order to constitute an infringement of this right, a work must, typically, incorporate a portion of the original work.¹⁰⁶ Unlike the requirement of fixation necessary to show infringement of the right of reproduction,¹⁰⁷ the Copyright Act does not explicitly reference fixation in determining whether a work is derivative.¹⁰⁸ The court in *Galoob* held that "[i]t makes no difference that the derivation may not satisfy certain requirements for statutory copyright registration itself."¹⁰⁹ While fixation is not necessary, in order to be a derivative work, the work must have "some concrete or permanent 'form'".¹¹⁰ As has been previously discussed, Let's Plays and livestreams both have permanent forms (even though Let's Plays are the only one to satisfy the durational requirement of a fixed form),¹¹¹ however the substantiality of the incorporated work and

105. *Castle Rock Entm't v. Carol Pub. Group, Inc.*, 150 F.3d 132, 146 (2d Cir. 1998) ("It would . . . not serve the ends of the Copyright Act—i.e., to advance the arts—if artists were denied their monopoly over derivative versions of their creative works merely because they made the artistic decision to not saturate those markets with variations of their original.") (internal citations omitted).

106. H.R. REP. NO. 94-1476 at 62 (1976). The legislative history provides some direction into what constitutes an infringing, derivative work. First, the derivative work must be "based upon the copyrighted work," and it must "incorporate a portion of the copyrighted work in some form; for example, a detailed commentary on a work or a programmatic musical composition inspired by a novel would not normally constitute infringements under this clause."

107. See 17 U.S.C.A. §101 (West 2010) (stating that a work is fixed "by any method . . . from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.").

108. See *Galoob*, 964 F.2d at 968

109. *Id.* ("[T]he [Copyright] Act does not require that the derivative work be protectable for its preparation to infringe.") (citing Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. Copyright Soc'y U.S.A. 209, 231 n. 75 (1983)).

110. *Micro Star v. Formgen, Inc.*, 154 F.3d 1107, 1110 (9th Cir. 1998) (citing *Galoob*, 964 F.2d at 967).

111. See *supra* Part I. A. Both mediums are fixed in a concrete form (as audiovisual display files), but due to the transitory nature of a livestream, it is not "fixed" in such a way to constitute a reproduction.

the transformative nature of that incorporation may not make these types of videos derivative works.

In addition to the "incorporation" of a part of the original work and the requirement of permanence, a derivative work must have substantially copied a previous work and not just have surface-level comparisons.¹¹² Just because a work is "based upon" other preexisting works does not make it a derivative work.¹¹³ Two works must be substantially similar in idea and mode of expression for the subsequent work to be considered derivative.¹¹⁴ This similarity of ideas may be shown by looking at objective details such as plot, theme, setting, mood, characters, or dialog; similarity in expression is more about if an ordinary, reasonable person would look at both works and decide they are substantially similar.¹¹⁵ Said in another way, the derivative work must take a preexisting work and "recast, transform, or adapt" it.¹¹⁶

In *Warner Bros.*, the court analyzed the issue of "recasting" the work of another. In that case, Steven Vander Ark (the defendant) created, owned, and operated a website called "The Harry Potter Lexicon," which served as an in-depth guide to the popular *Harry Potter* series written by J.K. Rowling.¹¹⁷ The site grew in popularity alongside the book series; it was even used by the creators of the *Harry Potter* movies in order to maintain continuity and by Ms. Rowling, herself, while she was finishing the series.¹¹⁸ When Vander Ark entered into a publication deal with RDR

112. See *Litchfield v. Spielberg*, 736 F.2d 1352, 1357 (9th Cir. 1984). In *Litchfield*, plaintiff sued defendant (popular film director Steven Spielberg) for, among other things, copyright infringement and the creation of a derivative work. Litchfield claimed that Spielberg's 1982 classic, *E.T. the Extra-Terrestrial* was based upon her play, *Lokey from Maldemar*. After reading scripts of both works, the court decided that there was not "substantial similarity." While there were some very general similarities between the two (both have aliens visiting Earth who have extraordinary powers), overall the two works had vastly different themes and execution. This degree of similarity was not nearly enough to constitute infringement. See *id.*

113. See *Warner Bros. Entm't, Inc. v. RDR Books*, 575 F. Supp. 2d 513, 538 (S.D.N.Y. 2008).

114. *Litchfield*, 736 F.2d at 1356.

115. See *Micro Star*, 154 F.3d at 1113.

116. *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301, 305 (S.D.N.Y. 2000). In explaining what the "recast, transform, or adapt" language, the court used photography as an example. "A photograph of Jeff Koons' 'Puppy' sculpture in Manhattan's Rockefeller Center, merely depicts that sculpture; it does not recast, transform, or adapt Koon's sculptural authorship." However, the court held that "[a] cropped photograph of an earlier photograph is a derivative work." As is the "[r]e-shooting [of] an earlier photographic work with some alteration of the expressive elements." See *id.*

117. See *Warner Bros.*, 545 F. Supp. 2d at 520.

118. *Id.* at 520-21.

Books, Rowling and Warner Brothers brought suit claiming copyright infringement in the form of a derivative work.¹¹⁹ The published Lexicon styled itself as an "A-to-Z guide" to the various characters, creatures, events, places, and overall mythology of the *Harry Potter* universe.¹²⁰ Thus, the Lexicon included encyclopedic entries covering spells, potions, creatures, and characters from the books, as well as citations (in some cases) to where the information is located within the books.¹²¹ However, the Lexicon also included direct quotation and close paraphrasing of Rowling's prose.¹²² When assessing the Lexicon's status as a derivative work, the court focused on the amount of material from Rowling's *Harry Potter* series and the Lexicon's transformative nature.¹²³ The court eventually held that the Lexicon was not a derivative work because:

[A]lthough [it] 'contain[s] a substantial amount of material' from the *Harry Potter* works, the material is not merely 'transformed from one medium to another.'" Instead, by "condensing, synthesizing, and reorganizing the preexisting material in an A-to-Z reference guide, the Lexicon [did] not recast the material in another medium to retell the story of *Harry Potter*, but instead gives the copyrighted material another purpose."¹²⁴

By changing the purpose and expression of the ideas contained within Rowling's *Harry Potter* books, Vander Ark's Lexicon was an original work of authorship in and of itself.¹²⁵ This standard demands a "distinguishable variation" but is "concededly a low threshold."¹²⁶ Furthermore, the only

119. *Id.* at 522-24.

120. *Id.* at 524.

121. *Id.* at 525.

122. *Id.* at 527.

123. *See Warner Bros.*, 454 F. Supp. 2d at 539.

124. *Id.*

125. *See id.*; *see also SimplexGrinnell, LP v. Integrated Systems & Power, Inc.*, 642 F. Supp. 2d 206, 210 (S.D.N.Y. 2009) ("[I]n order to qualify for protection as a derivative work, and be separately copyrightable, the new contributions must, 'when analyzed as a whole, . . . display sufficient originality so as to amount to an 'original work of authorship.'"); *see also Fred Riley Home Bldg. Corp. v. Cosgrove*, 864 F. Supp. 1034, 1037 (D. Kan. 1994) ("[In order to be a derivative work,] [t]he work must not consist of actual copying and must include more than mechanical copying. Fundamentally, the work must be the original product of the claimant.").

126. *See SimplexGrinnell*, 642 F. Supp. 2d at 210. The District Court went on to state that to be original in the copyright context simply requires that a work was created independently by a different author, and that there is "some minimal degree of creativity." In *SimplexGrinnell*, the court came to the conclusion that even slight alterations and iterations

protectable portion of a derivative work is for whatever incremental changes that are contributed by the author of the derivative work.¹²⁷

Therefore, in assessing Let's Plays and livestreams as derivative works one must look at the substantiality of the copying, the similarity in expression, and whether or not the new work is simply recasting the original work. As previously defined, video games are "game[s] in which *players control* images on a television or computer screen."¹²⁸ There is an argument to be made, then, that no amount of video capturing or streaming can ever truly replicate the videogame experience. While the court in *Williams* held that the images in a game like *Defender* were capable of repetition and thus copyrightable, Let's Plays and livestreams are distinguishable.¹²⁹ Unlike other audiovisual media—*i.e.*, television and movies—playing a videogame is much more than just the sights and sounds the player sees. The interaction itself is what the experience is derived from, therefore it's possible that there is no substantial copying because the full experience is not being copied. However, if viewed in a less flexible manner, substantial copying may be present. For example, a popular variant of the Let's Play genre is the speedrun; the goal of these videos is "to play a game from beginning to end as fast as you can."¹³⁰ Since the entirety of a game (usually older games or newer games that aren't more than a few hours) is shown during the course of the speedrun, one might argue that Let's Plays or livestream have "been substantially copied from the prior work."¹³¹ But not all Let's Plays and livestreams are complete runs of a game; in many instances a Let's Play or livestream can take a large game

of Plaintiff's fire alarm system software could be protected as derivative works, and that each version was potentially a separate, derivative work. *See id.*

127. *See Canal+ Image UK Ltd. v. Lutvak*, 773 F. Supp. 2d 419, 430 (S.D.N.Y. 2011); *see also Psihoyos v. Nat'l Geographic Soc'y*, 409 F. Supp. 2d 268, 278 (S.D.N.Y. 2005) ("Only the original elements of a derivative work, *i.e.* the *non-trivial additional matter transforming a prior work*, are protected by copyright.") (emphasis added).

128. *See supra* note 97 (emphasis added).

129. *See Williams Electronics, Inc. v. Artic Int'l, Inc.*, 685 F.2d 870, 873-74 (3d Cir. 1982).

130. Andrew Webster, *Don't Die: Livestreaming Turns Video Game Speedruns into a Spectator Sport*, THE VERGE (Jan. 21, 2013, 4:00 P.M.), <http://www.theverge.com/2013/1/21/3900406/video-game-speedruns-as-live-spectator-sport>. As an example of how popular this subset of Let's Plays and livestreams can be, on January 21, 2013, Adam_ak, a Twitch user, attempted a speedrun of *Amnesia: The Dark Descent*. The speedrun of the horror game brought in a live audience of 11,000 viewers. Jared Rea, community manager for Twitch, explains that live speedruns are compelling because they "humanizes inhuman abilities. . . . [I]t's not just about watching this flawless run anymore, it's about going on the journey towards it with this player." *See id.*

131. *See Litchfield*, 736 F.2d at 1357.

and condense it into highlights and smaller pieces. Moreover, some of the most popular games on the market in the past few years range from four to twenty hours.¹³² Substantial copying is likely present if the Let's Play producer or streamer captures footage of the whole game, but if they are simply capturing a small percentage, that would be likely be *de minimus*.¹³³ In that case, the archived or live video would be but a small portion of the total work, if one concedes that a videogame can be fully experienced simply by watching its audiovisual components.

The presence of substantial copying of a preexisting work, though, does not automatically make a secondary work derivative. To be derivative, the two works must be "substantially similar in both ideas and expression."¹³⁴ A derivative work will take these similarities and simply "recast, transform, or adapt" the original work.¹³⁵ In these ways, Let's Plays and livestreams are analogous to the *Harry Potter Lexicon* from Warner Bros. There, the Lexicon boiled down Rowling's seven book series into one encyclopedic book, and the court ultimately held that even though a "substantial amount of material" was copied, the Lexicon was not a derivative work.¹³⁶ In that case, and here, the expression is key. By repurposing Rowling's work, Vander Ark had created something new that did not "represent [the] original work[s] of authorship"; the Lexicon gave the copyrighted material a different purpose.¹³⁷ Let's Plays and livestreams are similar: they borrow elements of other works (in this case videogames) to create a new work. Let's Plays and livestreams might still be for entertainment purposes, like videogames are, however the expression is different in that the draw is as much the producer or streamer—and their personality—as it is the game itself.¹³⁸ In many instances, the commentary provided by a Let's Play

132. Timothy J. Seppala, *The Incredible Shrinking Game: The Truth of Game Length in the Modern Industry*, ARS TECHNICA (Apr. 14, 2011, 12:30 A.M.), <http://arstechnica.com/gaming/2011/04/the-incredible-shrinking-game-the-truth-of-game-length-in-the-modern-industry/>. This number refers to time average time played, not the actual length of the game. Furthermore, there are some outliers such as *Call of Duty: Black Ops* which clocked in at 67.1 hours or *Fallout: New Vegas* which averaged 27.5 hours of playtime per player.

133. *Newton v. Diamond*, 388 F.3d 1189, 1195-7 (9th Cir. 2003). In *Newton*, popular hip-hop group, The Beastie Boys, were sued over their sampling of a six second portion of James W. Newton's *Choir*. The court held that the Beastie Boys usage was *de minimus* because the infringing segment "last[ed] six seconds and [was] roughly two percent of the four-and-a-half minute 'Choir'." *See id.*

134. *See id.* at 1356.

135. *See SHL Imaging*, 117 F. Supp. 2d at 305.

136. *See Warner Bros.*, 575 F. Supp. 2d at 539.

137. *See id.*

138. *See supra* note 10. With over fourteen million subscribers and one billion views, it

producer or a streamer is in direct contradiction with the goal of a game's atmosphere.¹³⁹ It is in this way that the "total concept and feel of the works" is different.¹⁴⁰

PART III – LET'S PLAYS AND LIVESTREAMS VIEWED THROUGH A FAIR USE FRAMEWORK

Parts I and II focused on identifying whether Let's Plays and livestreams infringe the statutory rights embodied within 17 U.S.C. §106, however Part III will shift focus and address defending a claim against copyright infringement. One defense, discussed above, is the first sale doctrine.¹⁴¹ Once a videogame has been purchased, the copyright holder extinguishes certain rights: namely the right to distribute.¹⁴² Another defense that may be raised when addressing an issue of copyright infringement is *de minimis* use. The term *de minimis* is derived from the legal tenet "*de minimis non curat lex*" (commonly translated to mean "the law does not concern itself with trifles").¹⁴³ The concept of *de minimis* use is relevant to copyright law in three respects: (1) the technical violation is so trivial that there is no reason to attach legal consequences; (2) copying is present, but it does not meet the substantial similarity threshold necessary to maintain an action for copyright infringement; and (3) as a component of a fair use defense due to the amount being copied.¹⁴⁴ *De minimis* use may be a valid defense for other forms of copyright infringement, but it is doubtful that it provides much protection for the Let's Play producer or videogame livestreamer due to the significant amount of game footage typically needed in those works. However, *de minimis* use should certainly be kept in mind when assessing the Let's Play producer and livestreamer's strongest defense: fair use.¹⁴⁵

is clearly evident that Let's Play producers like Pewdiepie are the draw in their videos, more so than the games they record themselves playing.

139. Pewdiepie, YOUTUBE (Nov. 12, 2013), <http://www.youtube.com/user/PewDiePie/videos?sort=p&view=0&flow=grid>. A look at PewDiePie's most popular videos shows that horror games are some of the most viewed titles. This is, in large part, because he has over-the-top reactions to the horror elements that lead to some comedic moments. Whereas the game developer seeks to invoke fear and unease in players, the Let's Plays are entertaining due to the fact that they can be quite funny.

140. See *Micro Star*, 154 F.3d at 1112.

141. See *supra* Part I. D.

142. See *Capitol Records*, 579 F. Supp. 2d at 1218-19.

143. See *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997).

144. See *id.* at 74-76.

145. See *id.* at 75.

Fair use is an affirmative defense that was formulated, in part, to “serve the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity.”¹⁴⁶ However, fair use presents some problems due to the fact-specific inquiry that is necessary for each dispute.¹⁴⁷ In order to grant some direction in undertaking these inquiries, Congress outlined examples that might fall within the scope of a fair use defense such as “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.”¹⁴⁸ However, this list is not exhaustive and serves only to provide an idea of the types of activities that the legislature had in mind when codifying the fair use defense.¹⁴⁹ With those examples in mind, Congress provided four factors that must be weighed together when assessing fair use:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.¹⁵⁰

The analysis is made more difficult, however, by the subjective nature of some of the factors. Determining how much is too much under the third

146. H.R. REP. NO. 102-836, at 3 (1992). The Judiciary Committee explains that when the 1976 Copyright Act was enacted courts had “considered and ruled upon the fair use doctrine over and over again, [however] no real definition of the concept ha[d] ever emerged. . . . [S]ince the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case . . . must be decided on its own facts.”

147. *See id.* at 4 (“[F]air use litigation will always be piecemeal: no legislative solution can answer in advance the outcome of a given dispute.”); *see also Sony Computer Entmt’t Am., Inc. v. Bleem, LLC*, 214 F.3d 1022, 1026 (9th Cir. 2000) [hereinafter *Sony*] (“The process of applying these fair use factors to the facts of any particular scenario calls for case-by-case analysis, and the ‘task is not to be simplified with bright-line rules.’”).

148. 17 U.S.C.A. §107 (West 1992).

149. H.R. REP. NO. 95-1476, at 65 (1976) (“The examples enumerated at page 24 of the Register’s 1961 Report [which was later codified within 17 U.S.C. §107], while by no means exhaustive, give some idea of the sort of activities the courts might regard as fair use.”); *see also Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (“The text employs the terms ‘including’ and ‘such as’ in the preamble paragraph to indicate the ‘illustrative and not limitative’ function of the examples given.”).

150. 17 U.S.C.A. §107 (West 1992).

factor becomes especially tricky because there is no bright line test. The same is true for market impact and when a use actually becomes "commercial".

To complicate matters more, the very nature of a Let's Play or videogame stream is often perplexing. These works are not just a means to generate money for their creators; they also serve as a creative outlet to express love for the medium as a whole.¹⁵¹ These types of fan-based activities serve an important purpose for many game developers—large and small—as well as fans of the medium.¹⁵² They can act as an additional, low-cost marketing arm for developers, while simultaneously informing the consumer as to what games are coming out and if they are worth their time and money. However, some companies have countered this argument saying that use of their copyrighted works by others can weaken the public perception of their intellectual property.¹⁵³ This tension has been addressed in cases like *Warner Bros.* where the court commented on a rights holder's interest in protecting their intellectual property weighed against subsequent authors, artists, and creators who might be trying to break into mainstream recognition by making reference to works that have inspired and are a point of reference.¹⁵⁴ That is why so much flexibility was built into the doctrine,

151. Greg Lastowka, *All Your Nintendo Let's Plays Are Belong to Nintendo?*, GAMASUTRA (May 17, 2013, 12:26 A.M.), http://www.gamasutra.com/blogs/GregLastowka/20130517/192424/All_Your_Nintendo_Lets_Plays_Are_Belong_To_Nintendo.php. In many cases, Let's Play producers are upset not only because of their loss of money when a company makes a ContentID claim, but they also feel "betrayed". For many Let's Play producers they feel as though they are helping "to sustain the community of enthusiasts," for these products. It seems a betrayal that the entities they are helping would turn around and attack their livelihood. *See id.*

152. *See generally* Nathaniel T. Noda, Note, *When Holding on Means Letting Go: Why Fair Use Should Extend to Fan-Based Activities*, 2008 DEN. U. SPORTS & ENT. L.J. 64, 84-88 (2008); Nathaniel T. Noda, *Copyrights Retold: How Interpretive Rights Foster Creativity and Justify Fan-Based Activities*, 20 SETON HALL J. SPORTS & ENT. L. 131 (2010). Nathaniel Noda first coined the term "fan-based activit(ies)" in 2008 and later expanded upon the concept in 2010. In analyzing the fan-conducted subtitling of anime and creation of doujinshi (fan-created comics that typically take from existing properties and introduce new stories), Noda posited that there are four characteristics that help delineate what a fan-based activity is: (1) shared interest between copyright holder and fan-creators; (2) fans acting as evangelists for the original works; (3) a shared community culture; and (4) the fans interest in separating canon from non-canon works. Noda then went on to define a fan-based activity as an activity that is "(1) undertaken as a complement to, rather than in competition with, the underlying work, and (2) enhances, in aggregate, the creator's economic and creative interests." *See id.*

153. *See* Totilo *supra* notes 23-24 and accompanying text.

154. *Warner Bros.*, 575 F. Supp. 2d at 540 ("The fair-use doctrine mediates between the two sets of interests, determining where each set of interests ceases to control.")

so that courts do not have to adhere to rigid standards that could curb the type of creative endeavors the Copyright Act is designed to promote.¹⁵⁵ Thus, the ultimate test for fair use is whether the law is fulfilling its constitutional mandate to promote "the Progress of Science and useful Arts."¹⁵⁶

A. *The First Fair Use Factor: Purpose and Character of the Use*

The first fair use factor is often times referred to as the "heart" of the fair use analysis.¹⁵⁷ This examination is focused upon whether the new work simply replaces the original creation—if it is a superseding work—or if it adds something new and transformative such as applying a different purpose or character, modifying the expression or message.¹⁵⁸ So long as a work is highly transformative, other factors weighed against it will have less significance and bolster the argument for fair use protection.¹⁵⁹ The question of whether a work is sufficiently transformative has been tackled by courts many times, however there is not one definitive answer.

One of the more recognized ways in which to prove transformative nature is to claim parody. Parody is "[a] transformative use of a well-known work for purposes of satirizing, ridiculing, *critiquing*, or *commenting* on the original work, as opposed to merely alluding to the original to draw attention to the later work."¹⁶⁰ While the more obvious forms of parody tend to be satire and ridiculing of an original, it is important to note that critique and comment are also both valid ways to fall within the definition of a protected parody. For example, in *Campbell*, when the court was considering the first factor it came to the conclusion that 2 Live Crew's *Pretty Woman* was a parody of the 1964 Roy Orbison original.¹⁶¹ This ruling was mainly due to the "critical element" in 2 Live

155. See *Stewart v. Abend*, 495 U.S. 207, 236 (1990).

156. *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 608 (2d Cir. 2006) [hereinafter *Graham*].

157. See *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013) (citing *Blanch v. Koons*, 467 F.3d 244, 251 (2d Cir. 2006)).

158. See *Campbell*, 510 U.S. at 579 (internal citations omitted).

159. See *Nunez v. Caribbean Int'l. News Corp.*, 235 F.3d 18, 21 (1st Cir. 2000); see also *Warner Bros.*, 575 F. Supp. 2d at 541. ("[A secondary work is protected if it] adds value to the original—if [the original] is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings,' because such a work contributes to the enrichment of society.")

160. *Black's Law Dictionary* 554 (4th pocket ed. 2011).

161. See *Campbell*, 510 U.S. at 582-4.

Crew's version; while the court claimed that it would "not assign a high rank to the parodic element" present in the song, the song could certainly be perceived as commenting and criticizing the original by "juxtapos[ing] the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility."¹⁶² This combination of reference and ridicule levied at the original's naïve conception of the world placed 2 Live Crew's parody in a markedly different form "from the other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works."¹⁶³

Another method of proving transformative nature is through using the previous work for a wholly different purpose. In *Nunez*, a copyright dispute arose from photographs taken by a photographer for use in the modeling portfolio of the winner of Miss Puerto Rico Universe 1997.¹⁶⁴ Due to the fact that at least one photo depicted the pageant winner either naked or nearly naked led to a controversy and the eventual loss of her crown.¹⁶⁵ The case came about when the photographer, Nunez, saw the pictures he took in a newspaper, *El Vocero*.¹⁶⁶ Nunez claimed that he did not authorize the reprinting and sued the newspaper.¹⁶⁷ The court ultimately held that the reprinting was fair use because the pictures served an informative purpose, evidenced by the articles and interviews which were published alongside the photographs.¹⁶⁸ But the fact that the pictures in this context were informative did not create an exception for newsworthiness.¹⁶⁹ Rather, it showed that the original photographs were intended to appear in modeling portfolios. The transformative function the newspaper employed—combining the photographs with commentary—reframed Nunez's work and created a "meaning, or message."¹⁷⁰

A similar issue was raised in *Hofheinz*, where the plaintiff brought suit against the television network, A&E, for copyright infringement in an episode of its *Biography* series on Peter Graves (widely known for his

162. See *id.* at 582-3. The court does point out that "[t]he threshold question when fair use is raised in defense of parody is whether a parodic character may be reasonably perceived." The question of whether the parody is in good or bad taste does not matter when assessing fair use.

163. See *id.*

164. See *Nunez*, 235 F.3d at 21.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 22.

169. *Id.* at 23.

170. See *Nunez*, 235 F.3d at 23.

work on the late 1960s television show *Mission Impossible*).¹⁷¹ During the course of the program, much of Graves' early acting work was shown, including footage from the 1956 science fiction film *It Conquered the World*.¹⁷² Hofheinz owned the rights to the film, and when A&E displayed footage, he brought suit.¹⁷³ Like in *Nunez*, the court decided that the use was transformative because it was a part of a "scholarly biography."¹⁷⁴ The court went on to say that the twenty seconds shown during the biography did not attempt to recreate the "creative expression" of Hofheinz's film, its transformative purpose was to enable the viewer to fully appreciate the trajectory of Graves' career and his humble beginnings.¹⁷⁵

The court in *Graham* took the idea of a historical or scholarly work a step further.¹⁷⁶ There, the defendant created a biographical work entitled *Grateful Dead: The Illustrated Trip* ("*Illustrated Trip*") which was a large, coffee table book that documented the history of the Grateful Dead with a continuously running timeline which combined over 2,000 images that represented significant dates in the bands history.¹⁷⁷ Plaintiff sued over the inclusion of seven event posters which were not licensed by the defendant.¹⁷⁸ There was a strong presumption in favor of fair use due to the biographical nature of the work, furthermore the Second Circuit affirmed the district court's finding of fair use due to the works being shown to celebrate historic events, the creative style in which the images were arranged, and the significantly reduced size of the pictures when compared to the originals.¹⁷⁹ In rebutting the argument that the use of the images was not transformative, the Court went on to explain that there are no presumed categories of fair use, but fair use protection is "frequently afforded" when a work appropriates copyrighted material to create biographies because they are works of scholarship, criticism, or comment that require incorporation of source material.¹⁸⁰ Moreover, the court held that the reduced size of the images was did not provide an adequate

171. *Hofheinz v. A&E Television Networks*, 146 F. Supp. 2d 442, 443-5 (S.D.N.Y. 2001).

172. *Id.* at 444.

173. *Id.* The court noted that although the footage that A&E showed of "It Conquered the World" was technically from the film's trailer, footage was from the film and therefore covered under Hofheinz registered copyright.

174. *Id.* at 446-7.

175. *See id.*

176. *See Graham*, 448 F.3d 605.

177. *Id.* at 607.

178. *Id.*

179. *Id.* at 609.

180. *Id.*

glimpse of the originals expressive value.¹⁸¹ When viewed alongside other decisions, a narrative starts to form that comment and critique is highly valued in society, and that at times the only way to create these types of works is to appropriate a certain amount of another individuals work. However unfair this framework might seem, it falls in line with the broad constitutional goals of promoting creativity in the arts and sciences.¹⁸²

While there are legitimate societal benefits tied to parody, editorial news content, biographies and historical scholarship, courts have also had to address whether something as workaday as a search engine appropriating copyrighted images in its search results is infringement.¹⁸³ In *Amazon, Perfect 10*—a company who markets and sells images of nude models—brought suit against Google and Amazon for infringing on its copyrighted works by producing thumbnail size images and linking to infringing websites.¹⁸⁴ Perfect 10 argued that this approach was not a transformative use, and that Google and Amazon should not be protected under fair use.¹⁸⁵ However, the court disagreed and argued that although an image's original purpose might have been for entertainment, aesthetic, or informative purposes, a search engine transforms the image to become a "pointer" that directs a user to a source of information.¹⁸⁶ This new function of incorporating an original work into an electronic reference provides a similar type of societal benefit that parody and scholarship do.¹⁸⁷ The court went on to point out that Google using the entirety of the copyrighted work was immaterial and did not diminish the transformative nature of the use because even an exact copy is capable of being transformative if it serves a different function than the original.¹⁸⁸

While the transformative nature of the fair use may be "at the heart"¹⁸⁹ of the inquiry, courts must also assess whether a work is commercial or non-commercial. While commercial nature is "an explicit part of the first fair-

181. *Id.* at 611.

182. *See* U.S. Const. art. I §8, cl. 8.

183. *See Amazon*, 508 F.3d at 1164-7

184. *See id.* at 1157. The claims against Google were focused on the popular search engine's ability to display thumbnail images that are posted throughout the internet. Perfect 10 claimed that some website publishers would post unauthorized copies of "members only" photographs online which Google would then index and display upon a user searching for the images. The claims against Amazon were different and centered around an advertising agreement between Google and Amazon in which Amazon would "in-line link" to Google's search results. These links would then route users to Google's search engine. *See id.*

185. *See id.* at 1165

186. *See id.*

187. *Id.*

188. *Id.*

189. *See Cariou*, 714 F.3d at 705.

use factor . . . courts 'often do not make much of this point.'"¹⁹⁰ The inquiry itself is not focused primarily on the lucrative potential of a work, but more on the potential for unfairness when a subsequent creator incorporates the work of another and gains financial benefit from the copying.¹⁹¹ The *Campbell* court discussed commercial uses in its opinion and noted that §107 uses the term "including" when addressing commercial use.¹⁹² The Supreme Court construed this choice of language to mean that commercial use is but one factor to be taken into account when determining the first fair use factor.¹⁹³ The Supreme Court also held that simply because a use is a not for profit, educational use does not shield it from a finding of infringement.¹⁹⁴

In light of these court decisions, the purpose and character of the use in Let's Plays and livestreams should fall in favor of their producers. While this type of program might seem superficial, it is actually multi-faceted, fitting within a wide range of the categories already discussed. This multi-faceted nature is due to the different dispositions of the creators themselves. Like 2 Live Crew's *Pretty Woman*, most would probably "not assign a high rank to the parodic element[s]" within the videos of a producer like PewDiePie, but there is certainly commentary on the games themselves and the state of the industry as a whole.¹⁹⁵ As a burgeoning medium that has finally become more than just an enthusiast market, many look to games to handle serious issues, and others are writing deep thought-provoking pieces on their meaning.¹⁹⁶ Against these discussions, PewDiePie's videos provide a stark contrast, they are silly and nonsensical, but that is part of the point: to focus on videogames as a fun, escapist medium.¹⁹⁷ Let's Plays and livestreams also serve similar societal purposes like those found within *Nunez*, *Hofheinz*, and *Graham*. While the popularity of the Let's Play and livestream producers may wane, they are

190. *Warner Bros.*, 575 F. Supp. 2d at 545 (citing *Castle Rock*, 150 F.3d at 141).

191. *Id.*; see also *Graham*, 448 F.3d at 612 ("[T]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.").

192. See *Campbell*, 510 U.S. at 584.

193. See *id.*

194. See *id.*

195. *Id.* at 583.

196. Leigh Alexander, *The Last of Us Is the Least We Should Ask of Games*, GAMASUTRA (Jul. 2, 2013), http://www.gamasutra.com/view/news/195423/The_Last_of_Us_is_the_least_we_should_ask_of_games.php.

197. See Wadeson, *supra* note 11.

contributing to the larger body of work that surrounds the industry. These videos—whether they are silly, informative, or provocative—are helping to curate a historical record of the medium in more ways than one. By providing criticism, Let's Plays and livestreams serve a similar purpose to book reviews which not only help present-day consumers make decisions, but may eventually provide a unique glimpse into what the medium was like in its current state of flux. They might also allow younger gamers to see older games from the past that they may not have access to so that they might further appreciate the medium. Furthermore, it is certainly arguable that Let's Plays and livestreams are similar to the incorporated images in *Graham*.¹⁹⁸ Just like the reduced size of the images in *Graham* did not properly convey the artistic expression of the original concert posters, by removing the interactivity from a videogame a Let's Play producer is merely presenting "a glimpse of their expressive value."¹⁹⁹

Much of the criticism levied at Let's Play and livestream producers is the inherent "unfairness" of deriving a profit off of someone else's work, but these are not just exploitative works attempting to "profit from [the] exploitation of the copyrighted material without paying the customary price."²⁰⁰ In fact, unless the game is a free release, players have already helped the game publisher realize the only profits they are entitled to.²⁰¹ These works are the result of many hours of planning, recording, and editing to deliver a product that then requires even more hours to find an audience receptive to the expressions the Let's Plays and livestreams contain. They are no more exploitative of the medium than any of the other types of widely accepted fair uses.

B. The Second Fair Use Factor: The Nature of the Copyrighted Work

The second factor looks to the nature of the copyrighted work and requires the court to decide the amount of protection that should be afforded to a person who engages in acts of creation or authorship that copyright seeks to promote, and whether the individual has a reasonable expectation for protection.²⁰² In other words, the court must determine if the original work is the type of work which is typically considered as being close to the

198. See *Graham*, 448 F.3d at 611.

199. See *id.*

200. See *id.* at 612.

201. See *supra* Part I. D.

202. See *Graham*, 448 F.3d at 612.

core of copyright protection.²⁰³ In *Graham*, for example, the court stated that this factor weighed against the defendant because the images which were incorporated into the secondary work were creative endeavors which are typically afforded copyright protection.²⁰⁴ However this did not prove fatal to the defendant's fair use defense because the posters in question had already been published.²⁰⁵ Furthermore, the second factor was granted limited weight because the subsequent use had a different goal than the original—emphasizing the historical significance of the original images rather than their artistic value.²⁰⁶ The court in *Amazon* provides additional insight into the issue of publication. There, the court held that authors of creative works have the right of first publication which grants creators control over the first public appearance of their work.²⁰⁷ This right, therefore, allows a content creator to choose when, where, and in what form their creative works will be published, but once the first publication is distributed, the right is exhausted for that specific medium.²⁰⁸ As has been previously noted, videogames are a large industry with an equally large reach,²⁰⁹ so it stands to reason that this factor would also have limited weight when assessing fair use in the case of Let's Plays and livestreams. Developers and publishers have the right of first publication, but once the product is out in the wild, they lose a considerable amount of control over what is done with the work. That said, this factor would still likely weigh against creators of Let's Plays and livestreams.

C. The Third Fair Use Factor: The Amount and Substantiality of the Portion Used

The third factor courts look at when assessing a fair use defense is the amount and substantiality of copying present from the original.²¹⁰ This

203. See *Amazon*, 508 F.3d at 1167.

204. *Graham*, 448 F.3d at 612.

205. *Id.*

206. *Id.* The court makes the distinction that had the images been used for the same decorative purposes as the original, then this factor would have weighed heavily against the defendant. However, the highly transformative use provides the subsequent work with protection because it is within the vein of what copyright is in place to protect. See *id.*

207. See *Amazon*, 508 F.3d at 1167 (citing *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 564 (1985)); see also *supra* Part I. D.

208. See *Amazon*, 508 F.3d at 1167.

209. See *supra* notes 1-5 and accompanying text.

210. 17 U.S.C.A. §107 (3) (West 1992).

factor is arguably the most subjective of the group, because it asks whether the portions of the original used are reasonable to the purpose of the copying.²¹¹ When assessing the amount and substantiality used, courts must scrutinize not only the quantitative amount of copying, but also the qualitative results of the copying.²¹² The quantitative analysis can be instructive because of the potential of revealing a lack of transformative character or purpose, which weighs against fair use.²¹³ However, too much importance cannot be placed on a simple quantitative analysis of how much of the original was borrowed, the "quality and importance" are of more significance because even a small portion—directly copied—can amount to "the heart of the [work]" *i.e.* the portion most likely to draw a consumer in and define the original work.²¹⁴ To further muddy the waters, a complete facsimile of the original does not preclude a finding of fair use.²¹⁵ That said, copying an entire work very rarely favors a ruling of fair use, although some courts have held that complete copying is sometimes necessary to create a new, original work.²¹⁶

Due to the highly subjective nature of this analysis, a few examples may be instructive. For example, in *Campbell*, the court found that the amount and substantiality of 2 Live Crew's use weighed in favor of fair use.²¹⁷ While the opening bass riff and first line of the Roy Orbison version were appropriated, these elements did not necessarily go to the heart of the original.²¹⁸ However, even if they did, "the heart" is also what calls the original to mind, and "the heart" is what the parody intends to lampoon.²¹⁹ In the case of 2 Live Crew's *Pretty Woman*, the distinctive portions taken

211. *Campbell*, 510 U.S. at 586; *see also Chicago Bd. Of Educ. v. Substance, Inc.*, 354 F.3d 624, 629 (7th Cir. 2003) ("The general standard, however, is clear enough: the fair use copier must copy no more than is reasonably necessary (not strictly necessary—room must be allowed for judgment . . .) to enable him to purpose an aim that the law recognizes as proper.").

212. *See Graham*, 448 F.3d at 613 (citing *Campbell*, 510 U.S. at 586).

213. *See Campbell*, 510 U.S. at 587

214. *See id.*

215. *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986); *see also Campbell*, 510 U.S. at 586-7 ("[The court] recognize[s] that the extent of permissible copying varies with the purpose and character of the use.").

216. *See Graham*, 448 F.3d at 613 (emphasis in the original); *see also Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820-1 (9th Cir. 2002) ("If the secondary user only copies as much as is necessary for his or her intended use, then this factor will not weigh against him or her. . . . It was necessary for Arriba to copy the entire image . . . [otherwise] it would be more difficult to identify, thereby reducing the usefulness of the visual search engine.").

217. *See Campbell*, 510 U.S. at 588-89.

218. *See id.*

219. *See id.* at 589.

were absolutely necessary to provide recognizability for their parodic purpose.²²⁰ Another case which required an analysis of substantiality in relation to parodic value involved Mattel's popular Barbie dolls.²²¹ Thomas Forsythe, a photographer, caught the attention of the popular toy manufacturer through his series of photos *Food Chain Barbie*.²²² In analyzing the substantiality of the original used, the court noted that Forsythe "did not simply copy the work verbatim with little added or changed," as Mattel alleged, because a verbatim copy would be an "exact three dimensional reproduction of the doll."²²³ Furthermore, unlike songs, video, or written works, the copyrighted material—the character of the Barbie doll—could not easily be severed so that Forsythe could somehow use less of Mattel's doll to create his photographs.²²⁴ The court went on to say that short of physically severing the doll, the only way for Forsythe to make a successful parody would be to add context and to capture the expression that context provides on film.²²⁵ Lastly, the court explicitly stated that there is no requirement for a parody to use the bare minimum possible, but—citing *Campbell*—a parodist may take what is necessary to ensure proper identification.²²⁶

This same rationale can apply when a complete work is appropriated without a parodic use, and led to the court holding in favor of the fair use in *Graham*, but not in *Warner Bros.* In *Graham*, the court noted that while the entire work was being appropriated—the Grateful Dead tour tickets and posters—the manner in which they were used negated the substantiality of the original that was copied.²²⁷ Because the copies were reduced to small versions that combined visuals, text and the original art, the visual impact of the originals was "significantly limited" due to reduction in size²²⁸

220. *See id.*

221. *Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2003).

222. *See id.* at 796-7. The series depicted the pop culture icon in "various absurd and often sexualized positions". The works, for the most part, involved a fully nude Barbie doll alongside kitchen appliances. For example, *Malted Barbie* was a photograph of a nude Barbie doll inside of a vintage malt machine; another *Fondue a la Barbie* displayed a group of Barbie heads in a fondue pot. In a declaration attached to a motion for summary judgment, Forsythe said his work was an attempt "to critique [] the objectification of women associated with [Barbie] and [] [to] lambast [] the conventional beauty myth and the societal acceptance of woman as objective because this is what Barbie embodies." *See id.*

223. *See id.* at 803-04 (internal citations and quotation marks omitted).

224. *See id.* at 804.

225. *Id.*

226. *See Mattel*, 353 F.3d at 804.

227. *See Graham*, 448 F.3d at 613.

228. *See id.*

Therefore, while there were exact copies being used, the limited visual impact combined with the transformative use to make a wholly new work, weighed in favor of the book publisher.²²⁹ A similar analysis occurred, in *Warner Bros.*, when the court looked to the substantiality of J.K. Rowling's *Harry Potter* series present within Steven Vander Ark's *Harry Potter Lexicon*.²³⁰ The court was tasked with determining how much copying was necessary in order for the Lexicon to properly act as a reference guide to the *Harry Potter* works.²³¹ While substantial copying was certainly necessary in order for the Lexicon to be as complete as possible, the court ultimately decided that this factor weighed against Vander Ark.²³² The court decided that Vander Ark went too far because of the amount of verbatim copying and minimal paraphrasing of passages from Rowling's works.²³³ However, it was not the act of copying, but rather specific "aesthetic expressions" that raised questions as to whether the amount copied was reasonably necessary to create a complete reference guide.²³⁴ Even more fatal to Vander Ark's argument was the "wholesale" copying from Rowling's companion books, where the court found little transformative purpose.²³⁵

One more small case of note concerned a software emulator of Sony's Playstation console.²³⁶ The suit revolved around the use of comparative

229. *See id.*

230. *Warner Bros.*, 575 F. Supp. 2d 513.

231. *See id.* at 546.

232. *Id.* at 547.

233. *See id.*

234. *See id.* Specifically, the court looked to Vander Ark's use of literary and descriptive phrases used in the original works to describe a character, object, or spell. In his entry for "clankers," Vander Ark used Rowling's exact language "like miniature hammers on anvils" as well as "a number of small metal instruments that when shaken made a loud, ringing noise." The court held that these uses went too far because there were other ways to describe the objects. Certainly many items could not be described without using direct reference to Rowling's works, however the use of the exact language is what ultimately weighed against Vander Ark. *See id.*

235. *See id.* at 548-9. The two companion books in question, *Quidditch Through the Ages* and *Fantastic Beasts & Where to Find Them*, are real-life equivalents of the same texts referenced in *Harry Potter*'s fictional universe. Each reads in a textbook-like nature, not in narrative form. Therefore, when Vander Ark was copying directly from these books, his transformative purpose was slight because he was using reference materials to create a larger reference material. *See id.*

236. *Sony*, 214 F.3d 1022. The software emulator developed by Bleem allowed users to play Playstation games on their PCs as opposed to the console. Additionally, the software allowed for higher graphical fidelity. When the suit was initially filed in 1999, televisions were not able to produce the same resolutions as computer monitors could, which resulted in games on a computer screen looking better. This satisfied two markets: (1) those who

screenshots in Bleem's advertising.²³⁷ On appeal, the court only looked at the issue of whether Bleem's use of screenshots from Sony videogames was a violation of Sony's copyright.²³⁸ The court began its analysis of the third factor by emphasizing that "the greater degree of copying involved and the closer those copies are to the essence of the copyrighted work, the less likely the copying is fair use."²³⁹ The court stated noted that, in cases involving screenshots, the third factor will tend to weigh against the videogame publisher since a screenshot is a minimal portion of as a whole, complex copyrighted work.²⁴⁰

One of the strongest criticisms against Let's Plays and livestreams as fair use is that they appropriate so much of the original work in order to create their own. In the case of a Let's Play that only shows off a portion of a game,²⁴¹ one could argue that the Let's Plays are similar to the facts of *Bleem*. This small portion of an otherwise large game could be seen as having some temporal similarities to the screenshots which were the subject of that case.²⁴² While a ten-to-fifteen-minute video may seem long, in the greater context of a large game that can span tens (or even hundreds, in the case of massively multiplayer online role playing games such as *World of Warcraft*) of hours, a Let's Play may actually fall within the "insignificant portion" language articulated by Ninth Circuit.²⁴³ Assuming one understands the inherent parodic value that Let's Plays contain,²⁴⁴ then, like with 2 Live Crew's *Pretty Woman*, the Let's Play producer needs to be able to show enough of the game in order to provide a level of recognizability.²⁴⁵ The Let's Play or livestream producer can then provide

wanted to play Playstation games but not pay for the console and (2) those who owned Playstations but wanted to play them on their PCs. *See id.*

237. *See id.* at 1024.

238. *See id.* at 1025.

239. *Id.* at 1028. The court noted that each screenshot was about 1/30th of a second's worth of the game, and that "temporally . . . there can be no doubt that a screen shot [*sic*] is a small amount of a video game." Furthermore, since games involve interactive plots that take place over a span of several hours, a screenshot is "of little substance to the overall copyrighted work."

240. *Id.*

241. For example, a game like the recently released *Grand Theft Auto V* has generated a pretty significant Let's Play community where producers simply drive around aimlessly cause chaos and avoiding police for as long as possible. During these videos the main narrative of the game is abandoned and viewers rarely see any significantly large portion of the map.

242. *See Sony*, 214 F.3d at 1028.

243. *See id.*

244. *See discussion supra* Part III. A. on the purpose and character of use.

245. *See Campbell*, 510 U.S. at 589.

sufficient context around the footage in order to provide whatever commentary they wish to disseminate, not unlike the photographer in *Mattel* and his *Food Chain Barbie* series.²⁴⁶ In this way, the commentary itself would be the draw, not necessarily the gameplay footage, in a way that would ensure that the Let's Play did not become a superseding work that replaces demand for the original.²⁴⁷

But this does not address the question of Let's Play or livestream series that encompass the entirety of a game. However, as the various courts have stated, a verbatim copy does not preclude the assertion of fair use as a defense.²⁴⁸ The very nature of some of these online programs necessitates complete copying of the original. Certainly, some Let's Play series or livestreams may only show a portion of a game, but it's not uncommon to see a producer of these programs create a series of videos devoted to one game. By watching these playlists, a viewer could, in theory, experience the whole game. It is for this reason why it is important for to weigh the transformative nature of the use against the amount and substantiality of the use.²⁴⁹ Viewed with the transformative use present in most Let's Plays and livestreams,²⁵⁰ these programs are like *Graham*, in which the entire work is indeed being taken, but where that fact is mitigated by the manner in which the original work is being used.²⁵¹ There is a danger of not providing a sufficient amount of transformative use, in the case of a Let's Play with no commentary. However, producers are likely not going to fall within the holding of *Warner Bros.* because their "wholesale copying" actually has a transformative effect since the purpose of the original (providing interactive media for entertainment) is very different from the purpose of the Let's Play (providing entertainment via an audiovisual program with parodic qualities).²⁵²

D. The Fourth Fair Use Factor: The Effect of the Use Upon the Market

The final factor in a fair use inquiry requires an analysis of the effect of

246. See *supra* notes 218-223.

247. See *Campbell*, 510 U.S. at 587-88.

248. See *Hustler*, 796 F.2d at 1155; see also *Graham*, 448 F.3d at 613; *Kelly*, 336 F.3d at 820-21.

249. *Warner Bros.*, 575 F. Supp. 2d at 546 (internal citations and quotation marks omitted).

250. See discussion *supra* Part III. A. on the purpose and character of use.

251. See *Graham*, 448 F.3d at 613.

252. See *Warner Bros.*, 575 F. Supp. 2d at 548-49.

the use upon the market or value of the original, copyrighted work.²⁵³ While the purpose and character of the use is the "heart" of a fair use analysis,²⁵⁴ the market effect of a subsequent work is the most important element of fair use.²⁵⁵ Courts must consider not only the market harm caused by an alleged infringer, but also the potential for an adverse impact on the potential market for the original if the type of copying in question is left unrestricted and becomes widespread.²⁵⁶ However, the main focus is not on the secondary use's potential suppression, or destruction, of the market for the original, but instead if it "usurps" the original's market.²⁵⁷ To further complicate the analysis, these inquiries must be balanced with the public benefit that comes from permitting the secondary use.²⁵⁸ There is a direct relationship between the amount of adverse effect on the original copyright owner's expectation of gain and the amount of public benefit that must be shown to validate a secondary use.²⁵⁹ As fair use is an affirmative defense, the party asserting fair use has the burden to prove that their secondary work does not usurp the market for the original or its derivative works.²⁶⁰

While some may argue that a commercial purpose would create a "presumption" that a likelihood of future harm exists, the Supreme Court has held that no such presumption is created.²⁶¹ That was the reasoning the Court of Appeals outlined in its opinion for when it weighed the fourth factor against 2 Live Crew.²⁶² But Justice Souter rebutted that argument by saying it was a misreading of a previous Supreme Court opinion; what that previous case said was that "when a commercial use amounts to mere duplication of the entirety of an original, it clearly "supersede[s] the objects of the original and serves as a market replacement for it," which will probably result in market harm to the original."²⁶³ Therefore, unless the secondary use truly replaces the original, there cannot be a finding of

253. 17 U.S.C.A. §107 (4) (West 1992).

254. *See supra* Part III. A.

255. *See Harper & Row*, 471 U.S. at 266; *see also Stewart*, 495 U.S. at 238 ("The fourth factor is the most important, and central fair use factor.") (internal citations and quotation marks omitted).

256. *Campbell*, 510 U.S. at 590 (internal citations and quotation marks omitted).

257. *See Cariou*, 714 F.3d at 708.

258. *Mattel*, 353 F.3d at 805 (citing *Dr. Seuss Enter., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1403 (9th Cir. 1997)).

259. *See id.*

260. *See Campbell*, 510 U.S. at 590.

261. *See id.* at 591.

262. *See id.*

263. *See id.* (citing *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984) [hereinafter *Universal*]).

"cognizable" market harm within the definition of §107.²⁶⁴ Thus, in certain circumstances, it is entirely possible for a secondary work to kill the market for the primary work and not cause cognizable harm.

But, a secondary work can also avoid cognizable harm by operating in a completely new market from the original.²⁶⁵ In the case of *Cariou*, the defendant, Prince, was creating art by taking the plaintiff's photographs from his *Yes Rhasta* series and adding different elements to make wholly new works.²⁶⁶ When analyzing the fourth factor, the court noted that Prince's works had a "very different" audience than Cariou; this helped Prince's case because it led to an absence of evidence to show that Prince's work affected the market for Cariou's at all.²⁶⁷ Whereas Prince's work was highly sought after—attracting wealthy and famous individuals such as Robert DeNiro and Tom Brady—and could sell for more than two million dollars per piece, Cariou did not attempt to market or sell his work for any significant sum.²⁶⁸ The disparity in their respective audiences led to the court weighing this factor in favor of Prince; however the result may have been different if Cariou's work had been in the same market as Prince's—commanding impressive guest lists to art exhibits and generating significant profits.²⁶⁹

This factor, in many ways, defines the contemporary discussions of fair use in not only Let's Plays and livestreams, but in the ever-growing remix culture thriving on YouTube.²⁷⁰ For this reason, it is helpful to revisit the definition of a fan-based activity.²⁷¹ The second and fourth principles outlined by Noda are particularly instructive: the fan as a proselytizer and

264. *See id.* ("[When analyzing the potential of market harm,] [w]e do not, of course, suggest that a parody may not harm the market at all, but when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm *cognizable* under the Copyright Act. Because parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically, the role of the courts is to distinguish between [b]iting criticism [that merely] suppresses the demand [and] copyright infringement[, which] usurps it.") (citing *Fisher v. Dees*, 794 F.2d 432, 4387 (9th Cir. 1986)) (internal citations and quotation marks omitted) (emphasis added).

265. *See Cariou*, 714 F.3d 694.

266. *See id.* at 699-700. The exhibits attached to the opinion show the types of changes that Prince made to the original photos.

267. *See id.* at 709.

268. *See id.*

269. *See id.*

270. *See generally* Mathew Ingram, *Copyright and Remix Culture: The New Prohibition?*, GIGAOM (Dec. 12, 2011, 9:28 A.M.), <http://gigaom.com/2011/12/12/copyright-and-remix-culture-the-new-prohibition/>.

271. *See Noda supra* note 149 and accompanying text.

the fan's desire to contribute to and be part of a larger community.²⁷² Fan-based works, such as Let's Plays, aim to grow the greater community surrounding the medium, not only by providing an outlet for discussion and community, but also in showcasing oftentimes lesser-known titles.²⁷³ In this way, the Let's Play producers are not trying to claim that their videos are somehow a part of or a substitute for the actual videogame, rather they are simply trying to spread the word and share the medium that they are passionate about. However, even videos that portray particular games in a negative light have value. As the courts have pointed out, this factor is focused not on the harm to the primary market so much as it is the danger of the secondary work usurping the market for the original.²⁷⁴ Furthermore, there is a recognition that comment or parody may kill demand for the original work, but that is irrelevant in the fair use analysis so long as no cognizable harm arises.²⁷⁵ Therefore a Let's Play may very well be dismissive of, or openly hostile to, a game and still not cause cognizable harm, which is exactly what happened in the case of Let's Play producer TotalBiscuit's videos of Wild Games Studio's *Day One: Garry's Incident*.²⁷⁶ However, the argument propounded by those in favor of a strict interpretation of the fair use doctrine is that these types of extended videos can disincentivize consumers from purchasing a game for themselves. While there very well may be a portion of the consumer base that does prefer watching games, rather than playing them, it is likely that these consumers were never going to purchase the game in the first place.

Another strong argument against Let's Plays and livestreams causing cognizable harm is that they cater to an entirely new market with a

272. *See id.*

273. *See* Mike Rose, *The Blissfully Awkward Controls of Surgeon Simulator 2013*, GAMASUTRA (Apr. 25, 2013), <http://www.gamasutra.com/view/news/191120/>. On its face, *Surgeon Simulator 2013* does not seem like the type of game that would become widely popular. Initially developed during a 48 hour timespan during the 2013 Global Game Jam, the game places players in the shoes of a surgeon, requiring them to commit various procedures. The hallmark component of the game is its control scheme, players control move the surgeon's hand with the mouse and need to control the individual digits on the left hand in order to perform the surgery using the "A," "W," "E," "R," and "Space" keys. The result is a "bumbling" surgeon due to the game's awkward control scheme. Once gamers got their hands on the game and began streaming it, its popularity exploded. Luke Williams, one of the games designers states, "YouTube is the reason the game is where it is," adding that "part of the appeal of watching . . . is that non-gamers can easily understand the absurdity of the game." This then makes it more likely that videos of the game will be shared, creating a viral campaign for the game itself. *See id.*

274. *See Cariou*, 714 F.3d at 708.

275. *See Campbell*, 510 U.S. at 591.

276. *See Ligman supra* notes 25-26 and accompanying text.

completely different product, not unlike the art discussed in *Cariou*.²⁷⁷ Whereas games are an interactive medium best experienced by controlling the game itself, Let's Plays and livestreams are non-interactive works. The enjoyment is derived from the Let's Play producer or person running the livestream, not necessarily the game itself. The commentary and interaction via comments or live chat are the draw. In this way, Let's Plays and livestreams do not "supersede" the original work and create a "market replacement," instead they constitute a completely different type of product.²⁷⁸ These new works are analogous to Prince's art in *Cariou* where the audiences are "very different".²⁷⁹ It's unlikely that a person in the market to play a specific game would instead go to YouTube or Twitch.tv and watch footage of someone else playing rather than playing the game themselves. There are certainly some games whose primary draw is their narrative,²⁸⁰ and Let's Plays or livestreams of these games are more likely to be viewed as constituting cognizable harm. However, there is an argument to be made that the experience might be similar, but without the viewer actually making the narrative choices a Let's Play of this type would probably not serve as a superseding work.

PART IV – RECOMMENDATIONS

The ultimate question when addressing Let's Plays and livestreams and the many competing interests involved is finding a middle ground where all parties are hopefully satisfied, but, at the least, protected. The original purpose of the DMCA was to address the exponential growth of technology and safeguard rights holders' interest, it has been argued that the DMCA ultimately harms fair use.²⁸¹ Professor Miriam Bitton argues that the DMCA's protection measures are focused on technical measures to protect digital copyrighted information.²⁸² However, these measures were not

277. See *supra* notes 262-266 and accompanying text.

278. See *Campbell*, 510 U.S. at 590 (citing *Universal*, 464 U.S. at 450). There is an argument to be made that this new product/market theory raises a whole host of trademark issues, but that is not being addressed because it is outside of the scope of this article.

279. See *Cariou*, 714 F.3d at 709.

280. Certain games spring to mind such as TellTale's *The Walking Dead* episodic adventure series which focuses on providing an interactive story with the player making meaningful choices throughout. TELLTALE'S THE WALKING DEAD, <https://www.telltalegames.com/walkingdead/> (last visited Feb. 4, 2014).

281. See Miriam Bitton, *Modernizing Copyright Law*, 20 TEX. INTELL. PROP. L.J. 65, 73 (2011).

282. See *id.*

designed with fair use in mind.²⁸³ The DMCA's technical measures, Bitton argues, are enforced "without regard to what the law says."²⁸⁴ Certainly there are positive aspects to the DMCA—the safe harbor provision being one of them, allowing service providers and owners of content platforms that ability to rectify infringement on the part of a user so as to avoid liability—yet even these need revision. The safe harbor provision protects a third party service provider from monetary liability due to the infringement of another, but that protection is predicated upon the service provider complying with the takedown notice. This scheme works in theory, however, in practice it incentivizes content platforms like YouTube to find the most efficient ways to avoid liability, rather than actively policing content for truly infringing material. It also creates a presumption of culpability for the party who is allegedly infringing without any factual investigation.

Fine-tuning the safe harbor provision in a way that calls for actual policing is the first step in fixing the problem. By actually policing, rather than taking down anything that could be infringing, platform owners like YouTube would begin to create an environment where creativity could thrive without fear of liability. As the statute currently stands, a service provider is required to "expeditiously remove or disable access to" the allegedly infringing material or face potential penalties.²⁸⁵ This effectively forces a service provider like YouTube to act immediately without engaging in an inquiry to see if the content actually is infringing. The language of the statute requires "expeditious" action, but that term is never defined.²⁸⁶ This vague and subjective choice of language can lead to issues for a service provider because while the party seeking to have the material removed or disabled may think a day or two is expeditious, properly assessing whether something is a fair use may take longer. By not

283. *See id.*

284. *See id.* Professor Bitton main contention with the DMCA is not that it provides protection to digital information, but that it is so focused on technical measures—such as YouTube's automated Content ID system—that it can ultimately hinder fair use. Content owners could employ such measures prior to the DMCA, but once the DMCA was enacted it made the circumvention of these technical measures a criminal offense. Bitton argues that this is ultimately harmful not only to fair use, but the digital public domain as a whole. *See id.* (citing Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, 66 LAW & CONTEMP. PROBS. 147, 163-66 (2003)).

285. *See* 17 U.S.C.A. §512 (c) (1) (West 2010).

286. *See id.* The statute itself provides no definition, nor does Black's Law Dictionary. If one looks to the common meaning of the word, Webster's Dictionary defines expeditious as "marked by or acting with prompt efficiency." *See Expeditious Definition*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/expeditious> (last visited Feb. 22, 2014).

providing a bright line definition which clearly outlines how long a service provider has to comply, the statute places too much burden on not only the alleged infringer but the service provider as well. However, the safe harbor provision could be amended to provide protection to a service provider while an assessment is performed to see whether the material in question is actually an infringing use. This amendment would prevent some of the innate unfairness between a Let's Play producer or livestreamer who has limited funds and a large publisher that is able to leverage the possibility of litigation to seek prompt compliance from the service provider.

But the DMCA is not alone in needing an update to properly function in the post-YouTube world. A certain level of flexibility in how the law is interpreted is necessary to avoid rigid policies put into place that ultimately favor whoever has the deepest pockets. By tweaking the existing fair use standards to create more flexibility, innovation would have an opportunity to grow. Two of the fair use factors in particular—the purpose and character of the use²⁸⁷ and the effect of the use upon the market²⁸⁸—require more attention. Part of the reason Nintendo made copyright claims on YouTube videos containing their properties was because there a financial component involved.²⁸⁹ The analysis, in those instances, began and ended with the fact that the individuals were receiving advertising revenue, money that, in theory, was being siphoned away from Nintendo.²⁹⁰ While Nintendo was fully within its rights under YouTube's Terms of Service and copyright policies, this example exposes some of the deep-seated problems in the fair use doctrine as it currently stands.

The wording of the statute itself is problematic, and it should be amended to rid itself of the distinction between commercial and non-commercial use. Section 107 (1) states that the first factor in the analysis is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."²⁹¹ Even courts recognize that this distinction in the statute does not amount to much, and that they "often do not make much of [that] point,"²⁹² and the Supreme Court has held that commercial use is only one factor to be taken into account when assessing the purpose and character of use.²⁹³ By removing the second clause in §107 (1) courts would still be required to engage in the

287. See *supra* Part III. A.

288. See *supra* Part III. D.

289. See *supra* notes 20-24 and accompanying text.

290. See Cheong *supra* note 20.

291. See 17 U.S.C.A. §107 (1) (West 1992).

292. See *Warner Bros.*, 575 F. Supp. 2d at 545.

293. See *Campbell*, 510 U.S. at 584.

same inquiry, however the potential for commercial or non-commercial use to be given too much weight, simply for the fact that it is specifically referenced in the statute, would be lowered.

Subsection 4 would also benefit from a few changes to clarify what "market effect" means.²⁹⁴ This provision presents another situation where the language of the statute is contradictory to the way it has been interpreted.²⁹⁵ Rather than just tasking courts to look at the effect of the use on the market, the statute should be tailored to come closer into line with Justice Souter's definition which requires a negative finding against a subsequent user only when the new work supersedes the original.²⁹⁶ Furthermore, the analysis of the fourth factor should take into account when a subsequent use actually bolsters the original from which it borrows. In the case of Let's Plays and livestreams, the extra publicity generated from these videos has, at times, been shown to make up for the copying and whatever advertising revenue a video producer may make.²⁹⁷

The problem of fair use interpretation is compounded when viewed alongside the DMCA because a fair use inquiry is most often not "expeditious" as the DMCA requires. These time-consuming inquiries lead service providers to be as efficient as possible, and one solution which has come forth is the prevalence of automation in copyright policing. By putting the content provider in a constantly defensive position, it only makes sense that programs such as YouTube's Content ID—or any automated search program for that matter—would gain prominence. However, as should be evident, copyright infringement and fair use are anything but black-and-white issues. By automating the system, one removes the subjective component of the analysis and essentially replaces it with an if/then statement; "if there is copyrighted content, then it is certainly infringing and must be taken down." While in many situations this if/then statement is effective, it opens itself to abuse. As seen above, systems such as, YouTube's Content ID, can then be used to censor legitimate criticism,²⁹⁸ abruptly end charitable events,²⁹⁹ or silence any undesirable content.

The automation itself is not the problem, but rather the lack of oversight in the removals themselves. If the DMCA were amended to allow for a reasonable amount of time for inquiry, a component of discretionary

294. See 17 U.S.C. §107 (4).

295. See *supra* Part IV. D.

296. See *Campbell*, 510 U.S. at 591.

297. See *supra* note 22 and accompanying text.

298. See *supra* notes 25-26 and accompanying text.

299. See *supra* notes 27-28 and accompanying text.

oversight could be added which would serve the interest of all parties involved. By injecting a human element to the process, subjective determinations would be factored in, rather than the presence of copyrighted material being immediately flagged and removed. The problem is that this would likely be very expensive. But, added oversight would help protect a Let's Play producer's financial interests when she makes content covered by fair use and places it on YouTube in hopes of monetizing it. One way to accommodate the extension of time might be to cap a Let's Play producer's revenues to a certain limit while the fair use inquiry is being conducted. The Content ID system, like the DMCA, is not in and of itself bad, but currently, neither provides enough flexibility to address the spontaneous creativity that technology has afforded society.

Finally, the gaming industry, specifically, would benefit from actively seeking out partnerships with prominent as well as up-and-coming producers and streamers so that all parties may benefit. A large amount of Let's Play-friendly developers do exist,³⁰⁰ but some remain leery of the harm that could be done to their intellectual property rights. These are fair concerns, however, embracing these creative fans could lead to a mutually beneficial relationship. Videogame budgets are higher than they have ever been, thanks in no small part to massive marketing campaigns.³⁰¹ There are studies, though, that claim that YouTube videos can influence purchases, with one study showing that fifty-three percent of consumers claimed that a YouTube video had influenced their purchase.³⁰² By leveraging an

300. "LET'S PLAY"-FRIENDLY DEVELOPERS WIKI, http://letsplaylist.wikia.com/wiki/%22Let%27s_Play%22-friendly_developers_Wiki#Master_List (last updated Dec. 15, 2013). This list is helpful simply for the fact that it aggregates and lists a large number of publishers' and developers' publicly stated stances on the creation of Let's Plays and whether monetization is allowed.

301. See Brendan Sinclair, *GTA V Dev Costs Over \$137 Million, Says Analyst*, GAMES INDUSTRY INTERNATIONAL (Feb. 1, 2013, 4:19 P.M. GMT), <http://www.gamesindustry.biz/articles/2013-02-01-gta-v-dev-costs-over-USD137-million-says-analyst>; Cf. Mark Serrels, *Grand Theft Auto V is the Most Expensive Video Game Ever Made*, KOTAKU (Sept. 9, 2013, 10:30 A.M.) <http://www.kotaku.com.au/2013/09/grand-theft-auto-v-is-the-most-expensive-video-game-ever-made/> [hereinafter Serrels, *Grand Theft Auto V*]. Analysts projected that *Grand Theft Auto V* would have a development budget of approximately \$137.5 million back in February with an estimated marketing budget of between \$69 and \$109.3 million dollars; however, leading up to the game's release, information was obtained in September that the game's cost was more likely closer to \$266 million. While the exact marketing budget is unknown, if analysts conservative predictions are any indication, the game's actual marketing cost likely added between twenty-five to forty percent of the development costs to the total budget. See Serrels, *Grand Theft Auto V*.

302. See Christopher Rick, *53% Say a YouTube Video Influenced a Purchase at Least Once?*, REELSEO (Dec. 10, 2013, 2:00 P.M.), http://www.reelseo.com/youtube-video-influenced-purchase/#utm_content=buffer35710. While the study only makes one mention

enthusiastic, early-adopter group of players, developers could feasibly extend their marketing campaigns with very little cost, while Let's Play producers and livestreamers would be able to continue monetizing their efforts.

CONCLUSION

As with most copyright infringement issues—specifically those involving fair use—the question of whether Let's Plays and videogame livestreams infringe on their source material is not clear. In regards to the five exclusive rights granted to a copyright holder under the Copyright Act of 1976—the rights of reproduction, display, public performance, distribution, and creating derivative works—these types of video programming may infringe one or more rights. The fixed form of a Let's Play, for example, may cause it to infringe the right of reproduction, whereas a livestream's transitory nature may protect it from that same cause of action. There is simply no clear answer as to whether infringement is present. The same goes for a fair use analysis, especially in light of its highly subjective factors. While these programs tend to borrow substantially from the original works—under the second fair use factor—this may be mitigated by either the purpose or character of the secondary use or by the lack of cognizable market harm under the fourth factor. With technology's exponential rate of growth, a more flexible legal standard—one that allows for commercial uses, especially when the use bolsters the market for the original—is necessary to evaluate these issues. Otherwise there is a risk of stagnation of the very creative spirit copyright law was designed to foster.

of videos, and it is in relation to YouTube, if true the importance of the platform in consumer decision making cannot be discounted.