

NOTE

GAMEPLAY VIDEOS AND FAIR USE IN THE AGE OF TRICKS, GLITCHES AND GAMER CREATIVITY

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¹ J.D. Candidate, Boston University School of Law, 2019. I would like to thank the JOSTL staff and Adam Wald for their hard work and insightful suggestions. Thanks also to my family and friends for their love and support.

INTRODUCTION

The video game industry is big business. In 2016, the global market for video games was worth over \$90 billion.² Ever since technology has allowed them to do so, people have recorded themselves playing video games and uploaded those recordings to the Internet.³ This trend does not seem to be nearing an end anytime soon. In 2011 live streaming provider Justin.tv launched Twitch, a website primarily devoted to livestreaming — the simultaneous recording and broadcasting of video games.⁴ A mere three years later, Amazon would acquire Twitch for \$970 million dollars, evincing this form of entertainment’s meteoric rise.⁵ By 2015, almost 500 million people around the world watched gaming content,⁶ and recent data shows that these recordings (“gameplay videos”) drew more online viewers than HBO, Netflix, and Hulu combined.⁷ Moreover, Twitch has ranked fourth place in Internet traffic, ahead of Facebook, Amazon, and Hulu.⁸ As the purchase of Twitch shows, watching people play video games has also become increasingly lucrative. Both uploaders and streamers can monetize their videos. For example, YouTube’s Partner Program allows users to

² Dean Takashi, *Worldwide Game Industry Hits \$91 Billion in Revenues in 2016, with Mobile the Clear Leader*, VENTUREBEAT (Dec. 21, 2016, 7:00 AM), <https://venturebeat.com/2016/12/21/worldwide-game-industry-hits-91-billion-in-revenues-in-2016-with-mobile-the-clear-leader/> [<https://perma.cc/87B2-SQ9R>].

³ See Patrick Klepek, *Who Invented Let's Play Videos?*, KOTAKU (May 6, 2015, 5:00 PM), <https://kotaku.com/who-invented-lets-play-videos-1702390484> [<https://perma.cc/33DS-TW7X>] (claiming that evidence of gameplay videos dates back to 2007). Felix Kjellberg, known online as PewDiePie, is one such example. Kjellberg is one of YouTube’s most popular content creators, with over 20 billion views and 84 million subscribers as of February 2019. PewDiePie, YOUTUBE, <https://www.youtube.com/user/PewDiePie/> [<https://perma.cc/KCM8-BYMR>] (last visited Feb. 23, 2018).

⁴ Alex Wilhelm, *TwitchTV: Justin.tv's Killer New Esports Project*, THENEXTWEB (June 6, 2011), <https://thenextweb.com/media/2011/06/06/twitchtv-justin-tvs-killer-new-esports-project/> [<https://perma.cc/2KBJ-JM9C>].

⁵ Felix Gillette & Spencer Soper, *How Twitch Turned Video Game Voyeurism into Big Business*, BLOOMBERG BUSINESSWEEK (Nov. 19, 2015), <https://www.bloomberg.com/features/2015-the-big-business-of-twitch/>.

⁶ *Id.*

⁷ Dustin Bailey, *Gaming Videos Are Bigger Than HBO, Netflix, and Hulu Combined*, PCGAMESN (Oct. 19, 2017), <https://www.pcgamesn.com/twitch-youtube-netflix-subscribers> [<https://perma.cc/NJ3G-GE59>].

⁸ Matthew DiPietro, *Twitch is 4th in Peak US Internet Traffic*, TWITCH (Feb. 5, 2014), <https://blog.twitch.tv/twitch-is-4th-in-peak-us-Internet-traffic-90b1295af358> [<https://perma.cc/7G62-DZU7>]. Internet traffic is “all data communications on a computer or computer network at a given point.” *Traffic*, COMPUTER HOPE, <https://www.computerhope.com/jargon/t/traffic.htm> [<https://perma.cc/8E3N-2RRG>] (last updated Nov. 13, 2018).

share in ad revenue that increases based on the number of views a video gets.⁹ The famous streamer PewDiePie, for example, earned \$15 million before taxes in 2016.¹⁰ Even the relatively less-popular theRadBrad, known as “the king of the YouTube walkthrough,” has over 4 billion views and earns around \$1 million a year.¹¹

Types of Gameplay Videos

Gameplay videos vary widely in terms of length and content.¹² One of the most popular types is the walkthrough, also known as a “Let’s Play.”¹³ These videos consist of a player recording herself playing an entire game while simultaneously offering humorous commentary or criticism.¹⁴ Because video games usually take several hours to complete,¹⁵ Let’s Play videos are generally divided into multiple video segments.¹⁶

“Speedruns” are another popular type of gameplay video. These consist of players using various techniques to complete games as quickly as possible, such as exploiting glitches or errors in the game’s programming which allow them to bypass required items or areas.¹⁷ Some games are more suited to speedrunning

⁹ See Christopher Zoia, *This Guy Makes Millions Playing Games on YouTube*, THE ATLANTIC (Mar. 14, 2014), <https://www.theatlantic.com/business/archive/2014/03/this-guy-makes-millions-playing-video-games-on-youtube/284402/> [<https://perma.cc/3P7W-K7VF>].

¹⁰ Madeline Berg, *The Highest-Paid YouTube Stars 2016: PewDiePie Remains No. 1 with \$15 Million*, FORBES (Dec. 5, 2016, 2:20 PM), <https://www.forbes.com/sites/maddieberg/2016/12/05/the-highest-paid-youtube-stars-2016-pewdiepie-remains-no-1-with-15-million/#4b4654ff7713> [<https://perma.cc/X8ZZ-Y3MD>].

¹¹ Julian Watesh, *How Much Money TheRadBrad Makes on YouTube - Net Worth*, NAIBUZZ, <http://naibuzz.com/2016/04/06/much-money-rad-brad-makes-youtube/> [<https://perma.cc/NNU8-JYL>] (last updated Jan. 10, 2019).

¹² See *The Different Types of YouTube Gaming Videos*, MEDIKIX (Oct. 22, 2015), <http://mediakix.com/2015/10/youtube-gaming-videos-the-different-types/#gs.aaBJJWE> [<https://perma.cc/P3FN-GLND>].

¹³ See David Finnis, *What Is a “Let’s Play?”*, YAHOO (Nov. 18, 2009), <https://web.archive.org/web/20140729024203/http://voices.yahoo.com/what-lets-play-4901264.html> [<https://perma.cc/N6D2-8CBA>].

¹⁴ *Id.*

¹⁵ See HOWLONGTOBEAT, <https://howlongtobeat.com/forum.php> [<https://perma.cc/2V4T-UDR6>] (listing the average completion times for many popular games).

¹⁶ For example, theRadBrad’s Let’s Play for the best-selling game *The Last of Us* consists of fifty-five videos, each lasting about ten to fifteen minutes. See theRadBrad, *The Last of Us*, YOUTUBE, <https://www.youtube.com/playlist?list=PLs1-UdHIwbo5MzTZwWfhL49b2hzvb-50E> (last updated July 2, 2014).

¹⁷ Stealinbread, *What Is Speedrunning?*, SPEEDRUN HISTORY (June 18, 2016), <https://speedrunhistory.wordpress.com/2016/06/18/what-is-speedrunning/> [<https://perma.cc/C6DW-24CM>]. A glitch occurs when “a program achieves an unexpected state as a result of programming errors.” *What Is a Speedrun?*, SPEED DEMOS ARCHIVE (last modified May 28, 2014, 12:48 AM),

than others. For example, the greater the freedom a player has to explore the game's "world," the more likely the game will be the subject of speedrun videos.¹⁸ This is because such freedom of exploration allows more options for a player to move from one area of the game to another, including even skipping certain parts.¹⁹ The length of speedrun videos thus varies widely depending on the player's mastery of tricks, as well as the type of game played: they can be as short as a few seconds or as long as several hours.²⁰

Finally, there are pure physics or glitch exploitation videos which simply show the player fooling around with game's mechanics or glitches in humorous ways, without speed as an animating factor.²¹

https://kb.speeddemosarchive.com/What_is_a_speedrun%3F [https://perma.cc/BQ7V-YWZP]. The difference between a glitch and a bug is that the latter occurs when a game situation intended by the developers is unachievable due to a code error (e.g., the inability to complete a level), while the former occurs when an in-game situation is achievable due to programming error (e.g., the ability to advance to a stage of a game not normally reachable without meeting additional objectives) despite the game's developers not intending for that to be the case. *What's the Difference Between Bug and Glitch?*, ARCADE (Feb. 26, 2016, 5:36 PM), <https://gaming.stackexchange.com/questions/256801/whats-the-difference-between-bug-and-glitch> [https://perma.cc/5NCK-3WBS].

¹⁸ See Kat Bailey, *How Nintendo Embraced Speedrunning with Metroid: Zero Mission*, USGAMER (Jan. 15, 2016), <http://www.usgamer.net/articles/how-nintendo-embraced-speedrunning-with-metroid-zero-mission> [https://perma.cc/UC35-JFBB] (stating that games with this feature were "built to encourage speedruns").

¹⁹ For example, games such as the *Metroid* series (see *infra* Part I for a description of their role in the speedrunning community) or *Legend of Zelda* series are some of the most popular games to be speedrun because they give players these options. *Id.*; see also Bitmob, *Metroidvania: Super Metroid and the Definition of a Genre*, VENTUREBEAT (Apr. 24, 2010), <https://venturebeat.com/2010/04/24/metroidvania-super-metroid-and-the-definition-of-a-genre/> (stating that speedrunners were attracted to *Metroid* games because they had abilities that allowed players to skip levels).

²⁰ A speedrun for the Super Nintendo game *Clue* lasts only three seconds. SpeedDemosArchiveSDA, *Clue (SNES) Speed Run - Watch It, the Shortest Speed Run Ever!*, YOUTUBE (May 26, 2009), <https://www.youtube.com/watch?v=XCij4x9cLEo>. Some of the longest speedruns ever made are ten or more hours in length. See EZScape, *Top 10 Longest any% Speedruns*, YOUTUBE (Oct. 30, 2016), <https://www.youtube.com/watch?v=dUFxaQc7B8k>.

²¹ For example, the YouTube user PizzaSlice's entire channel consists of videos showing how characters' bodies in the game *Grand Theft Auto 5* react upon falling from great heights (a phenomenon called "ragdoll physics"). PizzaSlice, YOUTUBE, <https://www.youtube.com/channel/UCCKFuo-dgZW9yKHu0zXSnrQ/videos>. See also *What Does the Term Ragdoll Mean?*, BLENDER: STACKEXCHANGE, <https://blender.stackexchange.com/questions/2882/what-does-the-term-ragdoll-mean> [https://perma.cc/CU33-WKC8] (last visited Feb. 28, 2019) (defining the term "ragdoll"). As for glitches, a particularly odd example from the game *Red Dead Redemption* shows characters that fly in the air like birds. See, e.g., Faperture, *Red Dead Redemption Birdmen*, YOUTUBE (June 1, 2010), <https://www.youtube.com/watch?v=PTaihZql-74>.

Legal Issues Raised by Gameplay Videos

Gameplay videos raise several legal issues. Since the Copyright Act protects audiovisual works,²² which according to *Stern Electronics, Inc. v. Kaufman* include the “repetitive sequence of a substantial portion of the sights and sounds of a game,” the underlying subjects of gameplay videos are copyrightable.²³ As YouTube uploads could be considered public performances,²⁴ which according to the Copyright Act rights-holders have exclusive rights to authorize,²⁵ uploaders or streamers of gameplay videos may be infringing on video game companies’ copyrights.

Currently, there is no case law on copyright and gameplay videos, which only increases their uncertain legal status.²⁶ Companies may not have a strong incentive to initiate legal action because they get free advertising from the videos and may incur fan backlash if they attempt to enforce their copyrights.²⁷ Any case involving gameplay videos will therefore be a case of first impression and would likely profoundly affect the attitude and perception of millions of gameplay video creators and their fans towards the video game industry. In the meantime, a number of commentators have already analyzed the legality of these videos under copyright law.²⁸

While these commentators generally concede that gameplay videos violate copyright law, they differ in applying Copyright’s “fair use” doctrine.²⁹ Codified

²² 17 U.S.C. § 102(a)(6) (2012).

²³ *Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 856 (2d Cir. 1982).

²⁴ 17 U.S.C. § 101 (2012). The Copyright Act defines public performance as transmission of a “performance or display of the work . . . 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 at different times.” *Id.*

²⁵ 17 U.S.C. § 106(4) (2012).

²⁶ Jonathan Ore, *Is Playing Video Games on Youtube a Copyright Infringement? No One Wants to Find Out*. CBC: NEWS (Oct. 7, 2017, 5:00 AM), <https://www.cbc.ca/news/entertainment/youtube-gaming-pewdiepie-fair-use-1.4309312> [<https://perma.cc/7YRG-FTF4>].

²⁷ See, e.g., Conrad Postel, Note, “Let’s Play”: YouTube and Twitch’s Video Game Footage and a New Approach to Fair Use, 68 HASTINGS L.J. 1169, 1188 (2017).

²⁸ See generally, e.g., Sebastian C. Mejia, *Fair Play: Copyright Issues and Fair Use in YouTube Let’s Plays and Videogame Livestreams*, 7 AM. U. INTELL. PROP. BRIEF 1 (2015); Elizabeth Brusa, Comment, *Professional Video Gaming: Piracy That Pays*, 49 J. MARSHALL L. REV. 217 (2015); Nicholas Ribaldo, Note, *Youtube, Video Games, and Fair Use: Nintendo’s Copyright Infringement Battle with Youtube’s “Let’s Plays” and Its Potential Chilling Effects*, 6 BERKELEY J. ENT. & SPORTS L. 114 (2017); Ivan O. Taylor, Jr., Note, *Video Games, Fair Use and the Internet: The Plight of the Let’s Play*, 2015 U. ILL. J.L. TECH. & POL’Y 247 (2015); Postel, *supra* note 27.

²⁹ Some conclude that gameplay videos do not meet the requirements for fair use, Postel, *supra* note 27, at 1185; Brusa, *supra* note 28, at 254-55, while others either conclude that they do or that judgments must be made on a case-by-case basis. Ribaldo, *supra* note 28, at 127-28; Taylor, Jr., *supra* note 28, at 259-66. Mejia, *supra* note 28, at 44 argues that no clear

in Section 107 of the Copyright Act, the fair use doctrine permits the use of copyrighted material without the copyright owner's authorization for purposes such as commentary, criticism, and research.³⁰ Whether an allegedly infringing work qualifies as a fair use of the original also depends on factors including, *inter alia*, the amount and substantiality of the original work used, as well as the allegedly infringing work's potential effects on the market for the original.³¹

This Note analyzes gameplay videos through the lens of the fair use doctrine. Part I examines the background and development of these videos. Part II analyzes gameplay videos according to the four factors of fair use. I argue that these videos form conceptually distinct categories that vary widely in how much copyrighted content they take from the underlying game, with each category getting a different amount of fair use protection. Let's Play videos are less likely to meet the fair use requirements, while the opposite is true for speedrun videos. The fourth factor of effect on the market for the original games has the additional nuance of likely being affected by the budget advertising for the recorded game, with sales for games having smaller budgets being more negatively impacted by gameplay videos. Finally, Part III proposes possible solutions to the status quo and weighs their benefits and drawbacks to both game companies and video creators.

PART I: THE ORIGIN AND GROWTH OF GAMEPLAY VIDEOS

Gameplay videos can be viewed as a form of "fan labor," *i.e.*, fan produced creative works that interpret or are otherwise based on popular media.³² Take, for example, possibly the most popular type of fan labor, fan fiction — which is a form of literature that builds upon a published work by inserting new characters or storylines into the original's "universe."³³ In the context of video

answer is currently possible both because of the "highly subjective" nature of the fair use factors.

³⁰ 17 U.S.C. § 107 (2012).

³¹ *Id.*

³² See Mel Stanfill & Megan Condis, Editorial, *Fandom and/As Labor*, TRANSFORMATIVE WORKS & CULTURES, no. 15, 2014, <http://journal.transformativeworks.org/index.php/twc/article/view/593/421> [<https://perma.cc/6TPL-TCLH>]. The legality of fan labor is questionable, but courts seem to have moved toward greater acceptance of it. See Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 L. & CONTEMP. PROBS. 135, 141-42 (2007).

³³ Stephen Downes, *Column: What Is Fan Fiction—And Why Is It Making People Nervous?*, THE JOURNAL.IE (Mar. 1, 2014, 7:00 PM), <http://www.thejournal.ie/readme/what-is-fan-fiction-and-why-is-it-making-people-nervous-1334505-Mar2014/> [<https://perma.cc/3LCV-N4XN>]. For example, the best-selling novel *Fifty Shades of Grey* originated as fan fiction based on the *Twilight* series. *'Fifty Shades of Grey' Started Out As 'Twilight' Fan Fiction Before Becoming an International Phenomenon*, BUSINESS INSIDER (Feb. 17, 2015, 1:22 PM), <http://www.businessinsider.com/fifty-shades-of-grey-started-out-as-twilight-fan-fiction-2015-2> [<https://perma.cc/V99U-S7SZ>]. Other examples of fan labor include fan art and fan videos. Tisha Turk, *Fan Work: Labor, Worth, and Participation in*

games, fan labor can consist of modifications, or “mods,” which are changes to a game’s code in order to fix bugs, add new features, or improve graphics.³⁴ Those who create video game mods (“modders”) make changes, such as tweaking configuration files and replacing graphics texture files,³⁵ to the original game.³⁶ Modders then save the mods onto a program that players download and install.³⁷ Mods can run the gamut from “total conversion” mods, which add entire areas and quests to the original game,³⁸ to “add-ons,” which typically add only minor elements to a game like new items or characters.³⁹ While modders enjoy wide acceptance throughout the video game community — including from the developers whose intellectual property they alter — modders’ ability to profit from their mods is subject to monitoring and limitation.⁴⁰

In contrast, gameplay videos contain far less fan-generated content as a matter of law. In *Midway Mfg. Co. v. Artic Intern, Inc.*, the Seventh Circuit found that playing a game is not itself sufficiently creative to be considered “the work of the player” because a player merely chooses to display a sequence of images already programmed into the game.⁴¹ Yet the player’s unique involvement is central to both the purpose and effect of gameplay videos. While viewers certainly watch gameplay videos to enjoy the underlying game itself, they also

Fandom’s Gift Economy, TRANSFORMATIVE WORKS & CULTURES, no. 15, 2014, <http://journal.transformativeworks.org/index.php/twc/article/view/518/428> [<https://perma.cc/BL74-4BB9>].

³⁴ Rafi Letzter, *Online Communities Are Changing Video Games to Make Them Better, Weirder, and Much More Wonderful*, BUS. INSIDER (July 20, 2015, 11:49 AM), <http://www.businessinsider.com/video-game-modding-2015-7> [<https://perma.cc/DPY4-SJE9>].

³⁵ Kevin Casper, *How to Install PC Game Mods: A Beginner’s Guide*, PCWORLD (Nov. 17, 2017, 6:00 AM), <https://www.peworld.com/article/3237246/gaming/how-to-install-pc-game-mods.html> [<https://perma.cc/5KE4-GUNG>].

³⁶ Letzter, *supra* note 34.

³⁷ *Id.*

³⁸ Brad Chacos, *10 Influential Game Mods That Truly Changed PC Gaming*, PCWORLD (Feb. 17, 2017, 3:00 AM), <https://www.peworld.com/article/3171292/gaming/10-influential-game-mods-that-truly-changed-pc-gaming.html#slide6> [<https://perma.cc/4SV7-TJ3P>]; Walt Scacchi, *Computer Game Mods, Modders, Modding, and the Mod Scene*, FIRST MONDAY (May 3, 2010), <http://firstmonday.org/article/view/2965/2526> [<https://perma.cc/7MDR-JLAQ>]; Ron Whitaker, *8 of the Coolest Total Conversion Mods Ever Made*, THE ESCAPIST (June 9, 2017, 7:00 AM), <http://www.escapistmagazine.com/articles/view/features/galleryoftheday/13909-8-of-the-Best-Total-Conversion-Mods-of-All-Time> [<https://perma.cc/NG35-5TSY>].

³⁹ Scacchi, *supra* note 38.

⁴⁰ Michela Fiordo, *Moral Rights and Mods: Protecting Integrity Rights in Video Games*, 46 U.B.C. L. REV. 739, 745-746 (2013).

⁴¹ 704 F.2d 1009, 1011-12 (7th Cir. 1983). *Midway* dealt with the copyright implications of an early example of modding — defendant-modder sold circuit boards that could be inserted into the plaintiff’s game machines, speeding up the rate of gameplay. *Id.* at 1010-11.

watch the videos to enjoy or admire the player's skills and personality.⁴² Viewers already familiar with the game being played may focus less on the game itself and more on the player's perhaps novel strategy in beating the game (and in the case of multiplayer games, on the strategies a player uses to beat his opponents).⁴³ In this respect, watching gameplay videos can be compared to watching a physical sport, since in both cases fans (especially those who are experienced) may derive more enjoyment from the unique skills and flair of a particular player than from the game story.⁴⁴ This analogy may explain the recent surge in the popularity of eSports, which is organized professional or amateur competitive gaming.⁴⁵

Moreover, there are reasons to watch gameplay videos outside of the game itself. Some have argued that because gameplay videos' popularity largely is due to audience interest in player reactions, the player is akin to an actor.⁴⁶ One commentator has gone so far as to call such players a mix of "reality stars, critics, and comedians."⁴⁷ This might be something of a general divide: millennials seem to find nothing unusual about watching people play video games on the Internet, because they have been watching their relatives and friends play them since they were children.⁴⁸ Additionally, watching a player play a game while

⁴² See Patricia Hernandez, *The Twitch Streamers Who Spend Years Broadcasting to No One*, THE VERGE (July, 16, 2018, 9:50 AM), <https://www.theverge.com/2018/7/16/17569520/twitch-streamers-zero-viewers-motivation-community> [<https://perma.cc/6WM6-NTZP>] ("Many streamers I spoke to said that they initially became interested in Twitch after finding a personality that entertained them through a tough time"); Mark Peterson, *Fan Fair Use: The Right to Participate in Culture*, 17 U.C. DAVIS BUS. L.J. 217, 236-37 (2017) (asserting that viewers watch professional gamers in eSport tournaments primarily to admire the players' skills, not the game itself).

⁴³ See Peterson, *supra* note 42, at 236-37.

⁴⁴ See Paul Tassi, *2012: The Year of eSports*, FORBES (Dec. 20, 2012, 9:59 AM), <https://www.forbes.com/sites/insertcoin/2012/12/20/2012-the-year-of-esports/#f173b7e7e114> [<https://perma.cc/L7WP-RZ48>] (asserting that familiarity with the game being played at an eSport competition makes the experience like that of a traditional sports fan's).

⁴⁵ Juho Hamari & Max Sjöblom, *What Is eSports and Why Do People Watch It?*, 27 INTERNET RES. 211, 211 (2017).

⁴⁶ See Mark Peterson, *Fan Fair Use: The Right to Participate in Culture*, 17 U.C. DAVIS BUS. L.J. 217, 237 n.92 (2017) (citing Karl Evers-Hillstrom, *Why Do People Watch Other People Play Video Games?*, N.Y. STATE OF MIND (Nov. 23, 2016), <https://web.archive.org/web/20170420162157/http://kevershillstrom.areavoices.com/2016/11/23/why-do-people-watch-other-people-play-video-games/>).

⁴⁷ Julie Muncy, *Why I Watch People Play Videogames on the Internet*, WIRED (Aug. 21, 2016, 7:00 AM), <https://www.wired.com/2016/08/why-i-watch-lets-plays/> [<https://perma.cc/NFU9-KALS>].

⁴⁸ Robinson Meyer, *It's Totally Normal to Watch Other People Play Video Games*, THE ATLANTIC (Sept. 3, 2014), <https://www.theatlantic.com/technology/archive/2014/09/its-totally-normal-to-watch-other-people-play-video-games/379476/> [<https://perma.cc/N6B9->

listening to the player's comments and jokes can also create a sense of companionship, albeit virtual.⁴⁹

A Historical Primer on Gameplay Videos

A. Let's Play Videos

Befitting their varied nature, gameplay videos have a variety of origins. Let's Play videos follow conceptually from the early 2000s practice of writing commentary on screenshots of games, and were first documented in the United States in 2007.⁵⁰ Michael Sawyer, one of the first players to create video commentaries, stated that he viewed his videos like a director's DVD commentary track.⁵¹ The response to these "Let's Play videos" was positive because the player's voice increased his connection with the audience, prompting viewers to recall childhood memories and frustrations of playing the game.⁵² As YouTube grew, Let's Play videos migrated from online forums to YouTube⁵³ and became very popular soon thereafter.⁵⁴

B. Speedrun Videos

Speedrun videos emerged from gaming communities dedicated to finishing the 1996 video game *Quake*, which allowed players to record their progress directly into files called demos that other players could download and view⁵⁵ in the fastest times possible.⁵⁶ Two prominent speedrunners soon launched a website called *Speed Demos Archive*, which still serves as a platform where players can upload recorded runs.⁵⁷ Speedrunning really came of age with

ANHU] (implying a generational divide to the appreciation of watching people play video games based on the puzzlement of New York Times journalists).

⁴⁹ See Muncy, *supra* note 47.

⁵⁰ Klepek, *supra* note 3.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See JAMES GETOMER, MICHAEL OKIMOTO, & BRAD JOHNSMEYER, GOOGLE: THINK INSIGHTS, GAMERS ON YOUTUBE: EVOLVING VIDEO CONSUMPTION 1-4 (2013), http://ssl.gstatic.com/think/docs/youtube-marketing-to-gamers_articles.pdf [<https://perma.cc/M5E3-QHBZ>] (reporting on "[t]he rapid growth of game content consumption on YouTube[.]" with "Game Powered Entertainment" — i.e., fan-made content such as Lets Plays — amounting to 47% of that content).

⁵⁵ *Id.*

⁵⁶ Stealinbread, *Quake – Know Your Roots*, SPEEDRUN HISTORY (June 20, 2016), <https://speedrunhistory.wordpress.com/2016/06/20/quake-know-your-roots/> [<https://perma.cc/66L5-9EVS>].

⁵⁷ *Id.*; see also SPEED DEMOS ARCHIVE, <http://www.speeddemosarchive.com/> (last updated Mar. 28, 2018).

Nintendo's *Metroid* series.⁵⁸ These sci-fi adventure games had a number of features that made them especially well-suited to speedruns. Games in the *Super Mario* series, for example, tend to have discrete areas and are fairly linear.⁵⁹ This means that the game forces the player to follow a fixed path throughout each area.⁶⁰ In contrast, the *Metroid* series gives players freedom to explore a vast world, the areas of which are interconnected but usually accessible only after finding items or upgrades.⁶¹ The protagonist also has a wide array of moves that allows them a considerable degree of flexibility in how to traverse each area. Some of these moves require practice to master, such as jumping off walls to travel vertically in areas containing no footholds.⁶² In allowing skilled players to traverse areas as quickly as possible or to skip items that novice players would have to obtain in order to proceed, these features made *Metroid* games perfect for speedrunning. In addition, speedrunners used *Metroid*-specific code glitches to cut even more time off their runs.⁶³ Last, *Metroid* games also display completion times and reveal better endings the faster they are completed, as if the developers themselves were encouraging players to complete the games as quickly as possible.⁶⁴ All of these features made the *Metroid* series the ideal context for the expansion of the speedrunning community.⁶⁵

⁵⁸ Ryan Rigney, *For the World's Fastest Gamers, Failure Is Just One Bad Jump Away*, WIRED (Oct. 16, 2013, 6:30 AM), <https://www.wired.com/2013/10/zelda-wind-waker-speedrun/> [<https://perma.cc/5N34-N69V>].

⁵⁹ See CM30, *Were Early 3D Mario Games Really That Less Linear?*, GAMINGREINVENTED (June 15, 2013), <https://gamingreinvented.com/nintendoarticles/were-early-3d-mario-games-really-that-less-linear/> [<https://perma.cc/7H7Z-N47M>] (arguing that recent *Mario* games are no more linear than older games). See also *What Does It Mean for a Game to Be Linear?* ARCADE (July 28, 2010, 9:23 PM), <https://gaming.stackexchange.com/questions/3776/what-does-it-mean-for-a-game-to-be-linear> [<https://perma.cc/B4TM-42SE>] (defining linearity in games as allowing for little deviation from a fixed path).

⁶⁰ *Id.*

⁶¹ Bailey, *supra* note 17.

⁶² *Speedrun Your Way Through Metroid Prime*, O'REILLY (2007), <http://archive.oreilly.com/pub/h/3852>. The term "sequence breaking" for getting items out of intended game order seems to have arisen from the *Metroid* speedrun community. Roland Li, *Making Money As a Zelda Speed Runner*, POLYGON (Jan. 9, 2014), <https://www.polygon.com/features/2014/1/9/5280786/making-money-zelda-speed-runner> [<https://perma.cc/DW7D-U8LK>].

⁶³ See Rigney, *supra* note 58.

⁶⁴ Bailey, *supra* note 17.

⁶⁵ See *id.*

The two most popular *Metroid* games for speedrunning, *Super Metroid* and *Metroid Prime*, were released in 1994⁶⁶ and 2002⁶⁷ respectively — both before YouTube’s 2005 launch.⁶⁸ At the time, the *Metroid* speedrunning community was posting videos on forums in order to share tips and tricks to achieve faster times.⁶⁹ With the advent of YouTube and Twitch, speedrunners gravitated toward these outlets in order to share playing techniques and reach a wider audience.⁷⁰ As the speedrunning community grew, speedrunners branched out by moving to games that did not explicitly reward players for faster completion times.⁷¹ This suggests that the practice was sufficiently self-sustaining to the point where speedrunners were willing to practice on games that did not have built-in rewards for it.

These two factors likely contributed to speedrunning’s place as more than a single community’s means of demonstrating skill, but rather as spectator activity in its own right. People can watch speedrunners, who may have practiced for thousands of hours, spend in excess of two hours trying to complete runs — with the specter of one mistake ruining the entire effort.⁷² The knife’s edge between a possible new world record and defeat is comparable to the thrill of watching physical sports. For example, one Twitch community manager said that the experience of watching speedruns is “authentic” because the spectators are watching the player “physically perform[ing] . . . and meet[ing] new obstacles” live.⁷³ Such visceral reactions help explain the growth in popularity of eSports, which has a viewership and cultural legitimacy that is starting to rival that of physical sports.⁷⁴ One speedrunner commented that speedruns are not inherently

⁶⁶ Ian Simmons, *Super Metroid: Gamer Grid Takes on the Classic 1994 Nintendo Title*, SANTA BARBARA INDEPENDENT (May 30, 2008), <https://www.independent.com/news/2008/may/30/emsuper-metroidem/> [<https://perma.cc/899G-XQ7Z>]

⁶⁷ *Metroid Prime – Release Details*, GAMEFAQS, <https://gamefaqs.gamespot.com/gamecube/447244-metroid-prime/data> [<https://perma.cc/PZP3-VUF6>].

⁶⁸ Laura Fitzpatrick, *Brief History YouTube*, TIME (May 31, 2010), <http://content.time.com/time/magazine/article/0,9171,1990787,00.html> [<https://perma.cc/GK83-A4CC>].

⁶⁹ *Id.*

⁷⁰ See Kat Brewster, *A Brief History of Speedrunning: How Doom and Zelda Became Stages for an Exhilarating Internet Subculture*, READ-ONLY MEMORY, <https://readonlymemory.vg/a-brief-history-of-speedrunning/> (last updated 2018) [<https://perma.cc/P5T3-B2HF>].

⁷¹ Rigney, *supra* note 58.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See, e.g., Syracuse Staff, *With Viewership and Revenue Booming, Esports Set to Compete with Traditional Sports*, SYRACUSE ONLINE BUSINESS BLOG (Jan. 18, 2019), <https://onlinebusiness.syr.edu/blog/esports-to-compete-with-traditional-sports/> (citing a consulting firm estimating that 70 million people may be watching a single eSports final, a

meaningful, but become so because they capture the attention of audiences.⁷⁵ Such attraction is increased by players' verbal humor and interaction with fans.⁷⁶

PART II: FAIR USE APPLIED TO GAMEPLAY VIDEOS

Courts have held that video games are copyrightable works.⁷⁷ The game developer, as author of the game, thus has the “exclusive rights to do and to authorize” public performance thereof.⁷⁸ Reproducing the game on YouTube or Twitch is therefore likely a public performance under the Copyright Act.⁷⁹ As a theoretical matter, then, gameplay videos — which necessarily draw heavily from copyrighted works — can therefore infringe a video game studios' copyright. Section 107 of the Copyright Act, however, describes the fair use doctrine, which exempts certain uses of copyrighted material which might otherwise amount to infringement.⁸⁰ Such exempted uses include criticism, comment, teaching, and research purposes.⁸¹ The Copyright Act lists four factors that a court may consider when determining whether the use of copyrighted material constitutes fair use:

- (1) the purpose and character of use, including whether the use is for commercial or noncommercial educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the copyrighted work taken, relative to the copyrighted work as a whole; and

number greater than the viewership of the MLB, MLS, NHL, and NBA finals); *see also Paris 2024 Olympics: Esports 'In Talks' to be Included As Demonstration Sport*, BBC SPORT (Apr. 25, 2018), <https://www.bbc.com/sport/olympics/43893891> (stating that Paris 2024 Olympic committee members wish to discuss with the IOC the possibility of introducing eSports).

⁷⁵ *Id.*

⁷⁶ *See* Rigney, *supra* note 58.

⁷⁷ *See* Atari Games Corp. v. Oman, 979 F.2d 242 (D.C. Cir. 1992) (holding that a video game is copyrightable because an audiovisual work is similar to a compilation of facts, and thus need only meet the *Feist Publications, Inc. v. Rural Tel. Serv. Co.* standard of creativity in authorial selection of images and sounds).

⁷⁸ 17 U.S.C. § 106(4) (2012).

⁷⁹ *See id.*

⁸⁰ 17 U.S.C. § 107 (2012). The Supreme Court in *Campbell v. Acuff-Rose Music, Inc.* held that fair use is an affirmative defense. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994). However, a recent article argues that Congress intended fair use to be merely a defense, not an affirmative defense. Lydia Pallas Loren, *Fair Use: An Affirmative Defense?*, 90 WASH. L. REV. 685, 688 (2015). The difference lies mainly in procedure: the defendant bears the burden of proof for an affirmative defense after the plaintiff shows her prima facie case. *Id.* at 690. A recent Ninth Circuit case held that fair use is not an affirmative defense but is a non-infringing use, “authorized by the law,” noting the similarities between the language of § 107 and § 112 on compulsory licenses. *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1153 (9th Cir. 2016).

⁸¹ 17 U.S.C. § 107 (2012).

(4) the effect of the use on the potential market or value of the copyrighted work.⁸²

Fair use is intended to be flexible in application and should therefore be applied on a case-by-case basis.⁸³ The factors are not to be treated in isolation, but weighed in combination and with regard to both the purposes of copyright law⁸⁴ — incentivizing authorship — and the policy behind fair use — preserving certain materials as “input for cumulative creativity” as well as a “safety valve for freedom of expression.”⁸⁵

The First Factor: Purpose and Character of Use

The first fair use factor — the purpose and character of the potentially infringing use — is central to the fair use inquiry.⁸⁶ In *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court ruled that this factor focuses on whether the allegedly infringing work is transformative, meaning whether it changes the original with “new expression, meaning, or message,” instead of merely superseding the original.⁸⁷ The more transformative the secondary work, the less important the other three factors are in the fair use analysis.⁸⁸ Thus the transformativeness of the two major types of gameplay videos — Let’s Plays and speedruns — is crucial to determining whether their use of the underlying source material is “fair.”

1. Let’s Play Videos

Let’s Play videos in which the player is silent would clearly not satisfy the first factor, because they lack any criticism or commentary.⁸⁹ However, Let’s Play videos containing player commentary or criticism of the game may not be as clear-cut.⁹⁰ One commentator cited *NXIVM Corp. v. Ross Institute* in support of the notion that Let’s Play videos containing criticism are transformative of the underlying copyrighted game.⁹¹ In *NXIVM*, the Second Circuit ruled that posting copyrighted quotations from a manual onto a website in order to analyze

⁸² *Id.*

⁸³ *Campbell*, 510 U.S. at 577.

⁸⁴ *Id.* at 578. Courts have generally held that the first and fourth factors are the most important. *See infra* pp. 14, 28.

⁸⁵ PETER S. MENELL, MARK A. LEMLEY & ROBERT P. MERGES, *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 755 (2018).

⁸⁶ *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013).

⁸⁷ *Campbell*, 510 U.S. at 579.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Craig Drachtman, *Do “Let’s Play” Videos Constitute Fair Use?*, INTELL. PROP. L. SOC’Y: RUTGERS SCH. OF L. – NEWARK (Jan. 26, 2014), <https://iplsrutgers.wordpress.com/2014/01/26/do-lets-play-videos-constitute-fair-use/> [https://perma.cc/4F9P-NB3E].

⁹¹ *Id.*

and critique the manual was transformative under *Campbell*.⁹² Another commentator disagreed, deeming that the quality of commentary in Let's Play videos is generally not high enough to meet this standard.⁹³

However, in order to be transformative a new work may not need to critique or comment on the original work.⁹⁴ In *Cariou v. Prince*, the Second Circuit used a reasonable person standard to judge whether a work was transformative, regardless of the artist's intentions.⁹⁵ Compared to *NXIVM*, the more objective *Cariou* standard thus allows the transformativeness of Let's Play videos to be judged according to audience's reception thereof rather than the authorial intention. The *Cariou* standard therefore encourages case-by-case analysis of each video, as players can vary widely in the personality they project and thus the kind of commentary they produce.⁹⁶ A reasonable person might even judge that someone playing a horror game while cracking jokes would meet the *Campbell* standard of "new expression, meaning, or message," turning it from a nerve-wracking experience into a comical one. Yet offering *ad hoc*, impromptu comments while playing the game is still qualitatively different than the facts of *NXIVM*. Rather, such comments are more akin to game reviews — the main purpose of which is to evaluate a game's individual features such as graphics, gameplay, and difficulty.⁹⁷ As a result, game reviews will thus only show short gameplay clips so as to display these features, with the reviewer's voice often replacing the in-game sound and music.⁹⁸ In contrast, the main purpose of Let's Play videos is to entertain viewers through the player's personality and reactions to gameplay.⁹⁹ Let's Play videos would thus likely have to incorporate

⁹² *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 475, 477 (2d Cir. 2004).

⁹³ See Stephen Carlisle, *The Strange World of "Let's Play" Videos and the Copyright Problems They Create*, OFFICE OF COPYRIGHT, NOVA SOUTHEASTERN U. (Apr. 2, 2015), <http://copyright.nova.edu/lets-play-videos/> [<https://perma.cc/BG52-SU4H>] (stating that PewDiePie's comments mostly amounted to "an unmediated stream of blurted jokes, startled yelps, goofy voices, politically incorrect comments, and pretty much nonstop profanity.").

⁹⁴ *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013).

⁹⁵ *Id.* at 707.

⁹⁶ See Josef Nguyen, *Performing As Video Game Players in Let's Plays*, TRANSFORMATIVE WORKS & CULTURES, no. 22, 2016, <http://journal.transformativeworks.org/index.php/twc/article/view/698/615> [<https://perma.cc/G2U5-DGJ4>] (arguing that Let's Play videos' commentary is a form of constructed performance).

⁹⁷ See Keith Stuart, *Has Video Game Reviewing Become an Impossible Task?*, THE GUARDIAN (Nov. 25, 2015, 8:37 PM), <https://www.theguardian.com/technology/2015/nov/25/video-game-reviewing-critics-industry> [<https://perma.cc/UFW4-NH8D>].

⁹⁸ In the eleven minute and forty-eight second YouTube review of the recent game *Far Cry 5* by GameSpot, the length of each cut of gameplay footage is about five seconds. GameSpot, *Far Cry 5 Review*, YOUTUBE (Mar. 29, 2018), <https://www.youtube.com/watch?v=llr-SKjWyRI>.

⁹⁹ Carlisle, *supra* note 93.

substantial amounts of commentary or criticism that significantly changes the gameplay experience in order to meet the *Campbell* standard of transformativeness.

2. Speedrun Videos

Speedrun videos would likely fare better than Let's Play videos under both the *Campbell* and *Cariou* analyses, because the point of a speedrun is to complete the game as fast as possible using meticulous and often highly difficult tricks that require precise timing and coordination.¹⁰⁰ This frequently requires players to exploit code glitches that allow them to skip game levels or obtain the necessary items for progress ahead of their intended order.¹⁰¹ A novice player is highly unlikely to utilize or even discover such techniques or glitches, and in any case, developers who design linear games usually do not intend their games to be abbreviated in such a manner.¹⁰² Thus, speedruns add “new expression” or meaning to the original game that would probably satisfy at least the *Cariou* objective standard of transformativeness. While the player is not adding anything new to the game's source code by exploiting glitches in a speedrun, a viewer may perceive it as a new experience depending on the rarity or novelty of the glitches employed—all the more so if a speedrun drastically shortens the intended length or sequence of a normal playthrough.¹⁰³

In addition, speedrun videos might constitute abridgments.¹⁰⁴ An abridgment, a type of derivative work,¹⁰⁵ is an “epitome or compendium” of a work that

¹⁰⁰ Ernie Smith, *Gaming Association Gives “Speedruns” a Live-Event Twist*, ASS'NS NOW (Jan. 3, 2019), <https://associationsnow.com/2019/01/gaming-association-gives-speedruns-live-event-twist/> [<https://perma.cc/D2BL-GFFU>].

¹⁰¹ For example, typical playthroughs of *Metroid Prime* take ten to twenty-seven hours to complete, with an average of thirteen to sixteen hours (depending on pace and whether the player wants to collect all game items), whereas speedruns take one to seven hours, with an average of about three. *How Long Is Metroid Prime?*, HOWLONGTOBEAT, <https://howlongtobeat.com/game.php?id=5953> [<https://perma.cc/67YP-VFQ3>] (last visited Feb. 21, 2019).

¹⁰² Linear games follow a strict sequence of progression between gameplay areas and limit a player's ability to deviate from this sequence. The individual areas may also be linear in their adherence to a fixed sequence of progression. *What Does It Mean for A Game to be Linear?* ARCADE (July 28, 2010, 9:23 PM), <https://gaming.stackexchange.com/questions/3776/what-does-it-mean-for-a-game-to-be-linear> [<https://perma.cc/GV9H-JZ5Z>].

¹⁰³ Cf. Laura A. Heymann, *Everything Is Transformative: Fair Use and Reader Response*, 31 COLUMBIA J. OF L. & THE ARTS 445, 449-50 (2008) (arguing that whether a work is transformative should be judged by the reader or viewer's reaction to it rather than the secondary author's intention).

¹⁰⁴ See *Twin Peaks Prods., Inc. v. Publ'ns. Int'l, Ltd.*, 996 F.2d 1366, 1375-76 (2d Cir. 1993).

¹⁰⁵ 17 U.S.C. § 101 (2012).

summarizes the main ideas of the work.¹⁰⁶ In *Twin Peaks Productions, Inc., v. Publications Intern., Ltd.*, the Second Circuit held that the first fair use factor weighed against a book of teleplays (screenplays of a television series) containing a detailed summary of episodes, partly because the show took too much material from the book.¹⁰⁷ Likewise, a longer speedrun is less likely to satisfy the first fair use factor, because the player likely used fewer shortcut tricks and hence the video likely displayed more unadulterated game content in the video.

On the other hand, videos showing only individual tricks might fare better, especially in light of the recent decision in *Authors Guild v. Google, Inc.*¹⁰⁸ There, the court found that Google's use of "snippets" (segments about one-eighth of a page in length)¹⁰⁹ surrounding a word that users searched for in Google Books did not constitute copyright infringement.¹¹⁰ Instead, the snippets increased the transformative value of the search function.¹¹¹ Likewise, videos that only show techniques at specific and isolated points of a game might not contain enough of the copyrighted game to weigh against a finding of fair use.

However, one could argue that gameplay videos, especially those with humorous commentary, are a mere repackaging of the game for the purpose of entertainment, which would preclude such videos from being transformative.¹¹² In light of this view, speedrun videos still fare better than Let's Play videos, since they are arguably educational inasmuch as they demonstrate valuable techniques to the speedrun community as well as to the general gaming audience.¹¹³ This educational function is similar to gameplay videos of RTS ("real-time strategy") games such as Blizzard Entertainment's *StarCraft*. RTS games feature military campaigns with armies whose individual units players micromanage in real time, and are designed for multiplayer competition.¹¹⁴ These games combine the excitement of action games with the strategic potential of board games like chess or *Risk* in that they allow players considerable discretion to set up their own strategies, which in turn makes them almost tailor-

¹⁰⁶ *Twin Peaks*, 996 F.2d at 1375.

¹⁰⁷ *Id.* at 1376.

¹⁰⁸ 804 F.3d 202 (2d Cir. 2015).

¹⁰⁹ *Id.* at 209.

¹¹⁰ *Id.* at 217-18.

¹¹¹ *Id.*

¹¹² See *Castle Rock Entm't, Inc. v. Carol Publ'g Grp.*, 150 F.3d 132, 142-43 (2d Cir. 1998); see also *Cariou v. Prince*, 714 F.3d 694, 708 (2d Cir. 2013) ("A secondary work may modify the original without being transformative.").

¹¹³ See Postel, *supra* note 27, at 1187. Examples of such communities include speedrun.com and speeddemosarchive.com, which contain forums for users to share tips on speedrunning.

¹¹⁴ *StarCraft II*, BLIZZARD, <http://us.battle.net/sc2/en/game/guide/gameplay-overview> (last visited Feb. 28, 2019) [<https://perma.cc/JF9Z-UUE5>].

made for educational videos.¹¹⁵ While these videos might entertain fans of the game in their execution of advanced tactics, they (as well as speedrun videos) can also impart skills to less-advanced players. Such use is distinct from the mere entertainment value in watching a popular uploader crack jokes during a gameplay video.

Finally, the more transformative the secondary work, the less important the commercial nature of the use.¹¹⁶ The most profitable videos, such those made by PewDiePie or theRadBrad, tend to be Let's Plays.¹¹⁷ These videos gain millions of views due to the player's charismatic personality combined with the inherently entertaining spectacle of gameplay. The huge profits video uploaders like PewDiePie make are an additional aspect of the first factor which would weigh against gameplay videos falling under the protections of fair use.

However, many relatively unknown uploaders may not profit much from their Let's Play videos. The same holds for speedruns: famous speedrunners on YouTube and Twitch will profit from their videos, while less famous speedrunners may not.¹¹⁸ Despite these profits, speedruns have the flexibility of length in their favor. The more abridged a speedrun is compared to the original game and hence the more transformative, the less important the profit will be in determining whether the first factor weighs against fair use. Thus, even though speedrun videos are profitable, they may still satisfy the first factor.

In sum, the first factor of purpose and character of use likely weighs against Let's Play videos unless the commentary meets the *Campbell* standard of giving new expression or message to the game. Speedrun videos, however, are more likely to constitute fair use under both *Campbell's* transformative standard and *Cariou's* reasonable person standard. This is especially true if both types of videos demonstrate in-game techniques and code glitches to create unintended shortcuts, because such demonstration likely amounts to a "nonprofit educational" purpose under the Copyright Act.¹¹⁹

¹¹⁵ James Puddington, Note, *Fair Play: Economic Justifications for Applying Fair Use to the Online Streaming of Video Games*, 21 B.U. J. SCI. & TECH. L. 413, 428-29 (2015).

¹¹⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

¹¹⁷ See *supra* text accompanying notes 10, 11.

¹¹⁸ Chris Ip, *The Life of An Elite 'Super Mario 64' Speedrunner*, ENGADGET (Oct. 23, 2017) <https://www.engadget.com/2017/10/23/super-mario-64-speedrun-record-cheese05-puncayshun-interview/> [<https://perma.cc/J2SM-J35H>]("[H]e began streaming his Mario 64 speedruns every night on Twitch, pulling in about \$100 or \$200 per month. In only a year, Alvarez . . . landed \$1,000 in donations. . . . Today, he . . . earn[s] about \$2,500 per month from Twitch alone."). In addition to earning money from advertisements, Twitch pays streamers when fans subscribe to their channel for a minimum of \$4.99 per month. *How to Subscribe*, TWITCH, <https://help.twitch.tv/customer/en/portal/articles/2812403-how-to-subscribe> [<https://perma.cc/MC49-EZLN>] (last updated Jan. 16, 2019, 02:15 PM).

¹¹⁹ 17 U.S.C. § 107 (2012).

The Second Factor: The Nature of the Copyrighted Work

The second fair use factor concerns the nature of the original copyrighted work.¹²⁰ In *Campbell*, the Supreme Court held that use of a copyrighted work is less likely to be fair when the appropriated material is “closer to the core of intended copyright protection” are copied.¹²¹ The creative nature of fictional works allow them to meet this holding more closely than do factual works.¹²² The second factor is thus less likely to favor fictional works.¹²³ This doctrine is well-established in the case law.¹²⁴ As previously noted,¹²⁵ the second factor is generally unfavorable to gameplay videos because of their fictional content. However, if the secondary work is transformative, the second factor may be of limited utility in the fair use analysis.¹²⁶ Given that speedrun videos and RTS strategy videos are more transformative than Let’s Play videos, they are more likely to receive fair use protection under the second factor.¹²⁷

The Third Factor: Amount and Substantiality

1. Cases Against Gameplay Videos

The third factor deals with the amount and substantiality of the copyrighted material that is taken from the original work.¹²⁸ The amount taken must be analyzed in connection with the first factor, *i.e.*, it must be consistent with the purpose and character of the use.¹²⁹ In *Castle Rock Entertainment, Inc. v. Carol Publishing Group*, the Second Circuit ruled that a book of trivia questions about the television show *Seinfeld* took too much from the show for the third factor to favor the defendants.¹³⁰ The defendants had argued that the book served as a critique of the show and its social and moral ramifications.¹³¹ Citing statements

¹²⁰ *Id.*

¹²¹ *Campbell*, 510 U.S. at 586.

¹²² *Stewart v. Abend*, 495 U.S. 207, 237 (1990).

¹²³ *Id.*; *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp.*, 150 F.3d 132, 143 (2d Cir. 1993).

¹²⁴ *See Twin Peaks Prods., Inc. v. Publ’ns. Int’l, Ltd.*, 996 F.2d 1366, 1376 (2d Cir. 1993) (“[T]he second factor, if it favors anything, must favor a creative and fictional work, no matter how successful”); *cf. Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985) (“The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy”).

¹²⁵ *See, e.g., Postel, supra* note 27, at 1179.

¹²⁶ *Cariou v. Prince*, 714 F.3d 694, 710 (2d Cir. 2013) (quote omitted) (quoting *Bill Graham Archives v. Dorling Kindersley, Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006)).

¹²⁷ *See supra* Part II. Because speedrun videos and RTS strategy videos can be viewed as abridgments with educational components to their use, they would likely have greater fair use protection.

¹²⁸ 17 U.S.C. § 107 (2012).

¹²⁹ *Castle Rock*, 150 F.3d at 144.

¹³⁰ *Id.*

¹³¹ *Id.* at 142.

from the book's back cover, the court dismissed this argument, instead ruling that the authors' merely intended to "repackage *Seinfeld* to entertain *Seinfeld* viewers."¹³² As the court found no portion of the book criticizing the show, it ruled that the book did not have a transformative purpose.¹³³ In analyzing the third factor, the court seemed to imply that if the book was actually intended to critique *Seinfeld*, "exhaustive examples" of its humor would constitute acceptable taking.¹³⁴ The fact that the book contained over 600 trivia questions showed that the amount taken was excessive, and thus that the book's purpose was entertainment, not commentary.¹³⁵

Likewise, a court found that a book that copied ninety lines of dialogue from teleplays used too much of the original work to weigh in favor of the defendant, even though the defendant argued that such extensive taking was needed for the purpose of commentary.¹³⁶ As the Second Circuit stated in this case, the third factor does not automatically favor the commenter, no matter how much material he copies.¹³⁷ In this legal context, it might be difficult for Let's Play videos to satisfy the third factor. Even if the players' commentary were substantial, they still tend to show the entirety of a game.

2. *Galoob* As Supporting Gameplay Videos

Despite the holding in *Castle Rock*, a case specifically about video games may weigh the third factor in favor of Let's Play videos, in *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*, the Ninth Circuit held that derivative works¹³⁸ created via game-enhancing software deserved fair use protection even though they consisted almost entirely of the original copyrighted game.¹³⁹ Galoob manufactured software called Game Genie that, when attached to a Nintendo game cartridge, gave the player extra lives or increased speed — artificially decreasing the game's difficulty.¹⁴⁰ The court concluded that although such works "are comprised almost entirely of Nintendo's copyrighted displays," this fact "does not militate against a finding of fair use."¹⁴¹

The Ninth Circuit based its decision on *Sony Corp. of America v. Universal City Studios, Inc.*, in which the Supreme Court held that using Sony's Betamax

¹³² *Id.*

¹³³ *Id.* at 142-43.

¹³⁴ *Id.* at 144.

¹³⁵ *Id.*

¹³⁶ *Twin Peaks Prods., Inc. v. Publ'ns. Int'l, Ltd.*, 996 F.2d 1366, 1372 (2d Cir. 1993).

¹³⁷ *Id.* at 1377.

¹³⁸ A derivative work is one based on a preexisting work, including a "motion picture version . . . abridgment . . . or any other form in which a work may be recast, transformed, or adapted." *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 969-71 (9th Cir. 1992).

¹³⁹ *Id.*

¹⁴⁰ *Galoob*, 964 F.2d at 967.

¹⁴¹ *Id.*

to record entire television shows in certain contexts was not outside the scope of fair use.¹⁴² Crucially, the Ninth Circuit did not distinguish *Sony* from *Galoob* — even though *Sony* dealt with non-transformative copying whereas *Galoob* dealt with the creation of derivative works.¹⁴³ Instead, the court held that in both cases, a copyright owner “cannot dictate how that [copyrighted] work is to be enjoyed.”¹⁴⁴ Just as VCR owners could tape shows for convenient viewing, Game Genie owners could “enhance” Nintendo’s games in order to make them more enjoyable.¹⁴⁵

As the Copyright Act defines a derivative work as one based on a preexisting work,¹⁴⁶ gameplay videos are also derivative works. If *Galoob*’s reasoning is applied to these videos, Let’s Play videos could still satisfy the third factor even though they usually include a game’s entire gameplay. Speedruns would certainly satisfy the third factor because, much like Game Genie’s manipulation of game code so as to give players abilities not intended by the developer, they serve to enhance a player’s gameplay experience — in this case by displaying means of reducing game completion time. In both cases, that the derivative work is an alteration of the original game in order to promote greater enjoyment is paramount.

3. The Third Factor and the “Heart” of a Video Game

Moreover, different types of video games call for distinct analyses. In *Harper & Row Publishers, Inc. v. Nation Enterprises*, the Supreme Court ruled that although the defendant only took 300 of a book’s 200,000 words, the third factor still weighed against a finding of fair use.¹⁴⁷ This was because the appropriated material included some of the “most powerful passages” and “qualitatively embodied [the author’s] distinctive expression” — which the Court termed the “heart of the book.”¹⁴⁸ In determining the applicability of this case to the video game context, the question is then what constitutes the “heart” of a video game.

Some argue that the protected audiovisual elements are a game’s “heart.”¹⁴⁹ These commentators conclude that video games usually appropriate too much to count as fair use.¹⁵⁰ As under this viewpoint the “heart” of the game includes crucial plot elements,¹⁵¹ even a truncated speedrun that shows the climax or ending of a video game might take too much.¹⁵²

¹⁴² *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449-50 (1984).

¹⁴³ *Galoob*, 964 F.2d at 971.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ 17 U.S.C. § 101 (2012).

¹⁴⁷ *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 565 (1985).

¹⁴⁸ *Id.*

¹⁴⁹ Postel, *supra* note 27, at 1182.

¹⁵⁰ *Id.*

¹⁵¹ *See id.* at 1180.

¹⁵² *Id.*

Others argue that the heart of a game is the actual playing experience.¹⁵³ As gameplay videos don't allow viewers to play the game, they thus do not appropriate the game's heart.¹⁵⁴ In other words, these commentators argue that a game developer's "distinctive expression" lies predominantly in the gameplay and level design, rather than in the fictional elements.¹⁵⁵ A game's "heart" therefore consists of what is unique to the game, not the features it shares with strictly narrative media such as movies, television shows, or novels.¹⁵⁶

Even some game companies draw a distinction between the experience of playing a game and the audiovisual elements therein. For example, 2K Games allows fans to upload its copyrighted game material for non-commercial purposes,¹⁵⁷ but expressly prohibits uploads of the storytelling or "non-interactive" game elements, known as "cutscenes."¹⁵⁸ 2K Games permits uploading of cutscenes, however, if they are "part of a larger play-through (or in a narrated 'Let's Play' type video)."¹⁵⁹ In other words, the company prohibits reproduction of a video game's most filmic material, but does not so prohibit reproduction of gameplay, which is unique to the video game form and which can be substantially unique to the individual player.¹⁶⁰

Courts, however, have ruled that the audiovisual elements of a game are protected, seemingly precluding consideration of the actual player-generated

¹⁵³ Taylor B. Bartholomew, Note, *The Death of Fair Use in Cyberspace: YouTube and the Problem with Content ID*, 13 DUKE L. & TECH. REV. 66, 81-82 (2014).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 82.

¹⁵⁶ *Id.* While, most video games contain fictional elements found in movies and books — for example, overarching plots and a cast of characters, *see, e.g.*, SIMON EGENFELDT-NIELSEN ET AL., UNDERSTANDING VIDEO GAMES: THE ESSENTIAL INTRODUCTION 169-204 (2d ed. 2009) — video games differ in that their fundamental purpose is to be actively played instead of passively consumed. Bartholomew, *supra* note 153, at 82. Players thus "straddle the boundaries between . . . author, performer, and reader" in that they are necessary to the "full realization" of the game's purpose. Bruce E. Boyden, *Games and Other Uncopyrightable Systems*, 18 GEO. MASON L. REV. 439, 439, 453-54 (2011). While traditional media will display regardless of whether an audience is present to consume it, absent player input, a video game's storyline would not progress. Gameplay videos (especially speedruns that abridge a substantial amount of a game) are thus qualitatively different from a video that spoils a movie by showing plot twists or the ending.

¹⁵⁷ 2K David, *Policy on Posting Copyrighted 2K Material*, 2K SUPPORT, <https://support.2k.com/hc/en-us/articles/201335153-Policy-on-posting-copyrighted-2K-material> [<https://perma.cc/24W2-PYMV>] (last updated Jan. 25, 2019).

¹⁵⁸ *Id.* Cutscenes are purely "cinematic" sections of the game that advance the plot or show character interaction and dialogue without the opportunity for a player to input controls. Hugh Hancock, *Better Game Design Through Cutscenes*, GAMASUTRA (Apr. 2, 2002), https://www.gamasutra.com/view/feature/131410/better_game_design_through_php [<https://perma.cc/U6R3-KXRY>].

¹⁵⁹ 2K David, *supra* note 157.

¹⁶⁰ *Id.*

elements of gameplay videos from the third factor analysis.¹⁶¹ Thus, Let's Play videos showing all the sections of a game might take too much of the heart of a game to weigh this factor in favor of fair use, regardless of the degree to which 2K Games may have embraced the medium.¹⁶² The proper focus of this factor in the context of gameplay videos, then, should be on how much of the underlying game a video displays.

For example, *The Legend of Zelda: Breath of the Wild* is an open-world or "sandbox" game.¹⁶³ Open-world games give players unfettered access to visit any area of the game world at their own discretion, hence the term "sandbox."¹⁶⁴ Such games are set in vast worlds in order to give the player enough room for freedom of exploration.¹⁶⁵ Therefore, the amount of time needed to complete *Breath of the Wild* fluctuates widely depending on how long each player wants to spend exploring the "sandbox."¹⁶⁶ However, the open nature of *Breath of the Wild* also means that skilled players can actually complete the game after seeing only a minimal amount of the game world— with the fastest current speedrun, for example, clocking in at just under 40 minutes.¹⁶⁷ In this admittedly extreme example, the 40-minute-long speedrun video does not display the vast majority of the game world and thus excludes much of the audiovisual elements that some argue are the true heart of the game. An analogous video of another game involves a glitch warping a player from an opening level directly to the game credits, and in doing so, revealing few to none of the plot elements that would count as the "heart" of the original work under even some of the narrowest readings of *Harper & Row*.¹⁶⁸ Therefore, the length of a speedrun is necessarily correlated with the amount of material it draws from the original work.¹⁶⁹ The third factor would then weigh in favor of fair use.

¹⁶¹ See *Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 856 (1982); *Williams Elecs., Inc. v. Artic Intern, Inc.*, 685 F.2d 870, 874 (1982).

¹⁶² 2K David, *supra* note 157.

¹⁶³ Jose Otero, *The Legend of Zelda: Breath of the Wild Review*, IGN (Mar. 2, 2017, 2:58 AM), <http://www.ign.com/articles/2017/03/02/the-legend-of-zelda-breath-of-the-wild-review> [<https://perma.cc/J9D6-7CSX>].

¹⁶⁴ *Open World*, GIANTBOMB, <https://www.giantbomb.com/open-world/3015-207/> [<https://perma.cc/ZGT2-KJEC>] (last updated Oct. 18, 2017, 12:23 PM).

¹⁶⁵ *Id.*

¹⁶⁶ A playthrough at a normal pace can range anywhere from 45 hours to almost 170 hours. *How Long is The Legend of Zelda: Breath of the Wild?*, HOWLONGTOBEAT, <https://howlongtobeat.com/game.php?id=38019> (last updated Nov. 12, 2017) [<https://perma.cc/4GXD-E9DZ>].

¹⁶⁷ *Id.*; Orcastraw, *Breath of the Wild Any% Speedrun in 39:35 by Orcastraw*, YOUTUBE (July 27, 2017), <https://www.youtube.com/watch?v=WMDxV7YVnoM>.

¹⁶⁸ SethBling, *Super Mario World—4:49.8 Former World Record Speedrun w/Credits Warp Glitch*, YOUTUBE (Jan. 22, 2015), <https://www.youtube.com/watch?v=gECESoU8Es>.

¹⁶⁹ One would think that the worse (i.e., slower) the speedrun, the fewer views it would have and the less profit the uploader would make. The slower the speedrun, the more it approximates a typical Let's Play, which is likely not protected by fair use.

Moreover, although a player is not a game's co-creator (regardless of her interactivity),¹⁷⁰ speedruns may blur this hard line. In *Midway Mfg. Co. v. Artic Intern, Inc.*, the Second Circuit ruled that because players may only select from the limited sequence of images a game allows them to, playing games is more like changing television channels than making an independent artistic creation like a painting.¹⁷¹ While this channel-changing analogy may be true for gameplay videos in which a player follows the dictates and limitations of the game's world, it is inapposite for a speedrun — the purpose of which is subvert a game's intended limits.¹⁷² Speedrunning, therefore, may not be painting a picture from scratch, but it is undoubtedly more creative than the rote and formalistic activity of changing a television channels.

While the speedrunner certainly does not become a co-creator, she is no longer a completely passive recipient of the images produced by the game code. In fact, in discovering inventive means of completing a game, speedrunners “create” a fair amount of material that does not fit within the “repetitive sequence[s] of a substantial portion” of a game that “remain constant from game to game regardless of how the player operates the controls” — the dictates within which some courts have defined a video game's the protected audiovisual elements.¹⁷³ Thus if speedrun videos use such glitches extensively, they may not need to be as short as the *Breath of the Wild* speedrun mentioned above to satisfy the third fair use factor.¹⁷⁴

In summary, both video games and gameplay may have evolved, but precedent largely has not. Speedrun videos, especially those involving open-world games, might only display such a minimal amount of game material to weigh the third factor in favor of fair use. If *Galoob* is taken into consideration, Let's Play videos could also satisfy the third factor.

The Fourth Factor: Effect on the Market

The final fair use factor is the effect of the use on the potential market for the copyrighted work.¹⁷⁵ This is one of the most important factors.¹⁷⁶ A court must

¹⁷⁰ *Midway Mfg. Co. v. Artic Intern, Inc.*, 704 F.2d 1009, 1011 (1983).

¹⁷¹ *Id.* at 1011-12.

¹⁷² For example, in *Breath of the Wild*, exploiting a glitch allows the player to pass through solid objects such as mountainsides. Connor Sheridan, *This Zelda: Breath of the Wild Wall Clip Lets You Explore under Hyrule, Here's How to Do It*, GAMESRADAR (Mar. 7, 2017), <https://www.gamesradar.com/this-zelda-breath-of-the-wild-wall-clip-glitch-is-super-easy-heres-how-to-do-it/> [<https://perma.cc/ZUP4-3YP6>].

¹⁷³ *Williams Elecs., Inc. v. Artic Intern, Inc.*, 685 F.2d 870, 874 (1982); *see also* *Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 856 (1982) (containing similar language).

¹⁷⁴ Orcastraw, *supra* note 167.

¹⁷⁵ 17 U.S.C. § 107 (2012).

¹⁷⁶ *See* *Harper & Row Publishers, Inc., v. Nation Enters.*, 471 U.S. 539, 566 (1985) (holding it “undoubtedly” the most important factor); *cf.* *Campbell v. Acuff-Rose Music, Inc.*,

consider not only the effect on the market for the original work itself, but also on the market for derivative works.¹⁷⁷ Courts have interpreted the effect on the market to mean whether the secondary work “usurps” the original work’s market, not whether it suppresses or destroys the original work’s market or that of its derivatives.¹⁷⁸ In other words, a court must consider whether the secondary work is a market substitute for the original.¹⁷⁹

Market usurpation occurs when “the infringer’s target audience and the nature of the infringing content is the same as the original.”¹⁸⁰ For the purposes of the fourth factor, the target audience of those who upload or stream gameplay videos consists of two groups of people: individuals who are potentially interested in buying the video game, people who own the game, but hope to improve their gameplay experience.¹⁸¹

For those individuals in the first group, watching videos would either increase or decrease their chances of purchasing the games, depending on whether they liked the gameplay.¹⁸² Although this might result in a decrease in sales, instead of gameplay videos usurping the video game market, it could amount to a suppression or destruction of the market depending on audience reaction to the video (*i.e.*, the less that viewers like a game from watching a video of it, the less they would want to both watch other videos of the game as well as to purchase it). Whether the secondary work suppresses or destroys the work is not part of the fourth factor analysis.¹⁸³ On the other hand, that watching another player play a game is entertaining does not mean that the viewer would not want to try the game for herself. Instead, the video could encourage her to buy the game, which would strengthen the market for the original work.¹⁸⁴ For those in the second group, gameplay videos supplement or replace strategy guide books or websites such as GameFAQs — which have user-created walkthroughs and

510 U.S. 569, 578 (1994) (holding that all factors are to be “weighed together in light of the purposes of copyright”).

¹⁷⁷ *Harper & Row*, 471 U.S. at 568.

¹⁷⁸ *Blanch v. Koons*, 467 F.3d 244, 258 (2d Cir. 2006) (quoting *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 481-82 (2d Cir. 2004)).

¹⁷⁹ *NXIVM*, 364 F.3d at 481.

¹⁸⁰ *Cariou v. Prince*, 714 F.3d 694, 709 (2d Cir. 2013).

¹⁸¹ Alex Stargame, *The Past, Present and Future of Video Game Streaming*, MEDIUM (Oct. 22, 2018) <https://medium.com/predict/the-past-present-and-future-of-video-game-streaming-a9c6193ab445> [<https://perma.cc/7UFB-FABV>]. A third group of viewers—those who watch just for entertainment or community without necessarily intending to purchase the game—may overlap with the first group, so their effect on the video game market is unclear.

¹⁸² *Id.*

¹⁸³ See *NXIVM*, 364 F.3d at 481-82 (citing *Campbell*, 510 U.S. at 1178).

¹⁸⁴ See *Authors Guild, Inc. v. Google, Inc.*, 954 F. Supp. 2d 282, 288 (S.D.N.Y. 2013) (holding that Google Books helps authors and publishers generate income by increasing reader access to books).

forums where players can ask questions.¹⁸⁵ As these viewers already own the games they are seeking tips for, viewing gameplay videos would likewise not impact the market for the original work.

For example, Nintendo, the developer of *The Legend of Zelda: Breath of the Wild*, gained record profits and booming sales¹⁸⁶ at the same time that the game became the subject of numerous gameplay videos on YouTube.¹⁸⁷ While it is certainly possible that sales of *Breath of the Wild* would have been even greater if it was not the subject of extensive gameplay video, that it holds the three-decades old franchise's sales record is undeniable.¹⁸⁸ As such, it seems that the gameplay videos — which do not permit the viewer to actually play the game itself — did not actually serve as a substitute for purchasing the game.

On a broader scale, the game industry as a whole has experienced explosive growth — with much of that growth occurring at roughly the same time that gameplay videos began appearing on YouTube.¹⁸⁹ Of course, one could argue

¹⁸⁵ For example, strategy guides by Piggyback Interactive. PIGGYBACK, <https://www.piggyback.com/en/> (last visited Feb. 22, 2019); see also GAMEFAQS, <https://www.gamefaqs.com/> (last visited Feb. 22, 2019).

¹⁸⁶ After simultaneously releasing its Switch console and *Breath of the Wild*, Nintendo revised its expected 2017 operating profit from \$572 million to \$1.06 billion. Sherisse Pham, *The Switch is Powering Nintendo Toward a \$1 Billion Profit*, CNN (Oct. 30, 2017, 6:45 AM), <http://money.cnn.com/2017/10/30/technology/nintendo-switch-sales-earnings/index.html> [<https://perma.cc/TZG2-S6WU>]. These were Nintendo's highest earnings since 2010 and its stock prices increased by 75% in 2017 due partly to Switch sales. *Id.* *Breath of the Wild* was likewise particularly popular — outpacing sales for the actual Switch console itself. Sam Byford, *Nintendo sold more copies of Zelda for Switch than actual Switch consoles*, THE VERGE (Apr. 13, 2017, 8:34 PM), <https://www.theverge.com/2017/4/13/15296874/nintendo-switch-zelda-sales-numbers-us> [<https://perma.cc/NKA8-GHNQ>].

¹⁸⁷ E.g., GameGrumps, *Breath of the Wild: Shirtless Hero – Part 1 – Game Grumps*, YOUTUBE (Mar. 3, 2017), https://www.youtube.com/watch?v=V82qSnN9eFE&list=PLRQGRBgN_EnqbmAguVJGpJuGx9NwP8ihN; TetraNinja, *Legend of Zelda Breath of the Wild Part 1 – Link's Awakening (Let's Play Commentary)*, YOUTUBE (Mar. 2, 2017), <https://www.youtube.com/watch?v=Ktjdg3zgRzk>; ZackScottGames, *The Legend of Zelda: Breath of the Wild – Gameplay Part 1 – Link Awakens! (Nintendo Switch)*, YOUTUBE (Mar. 2, 2017), <https://www.youtube.com/watch?v=1P7d2JNCtX4>; ZeldaMaster, *The Legend of Zelda: Breath of the Wild – Part 1 – Resurrection*, YOUTUBE (Mar. 3, 2017), <https://www.youtube.com/watch?v=sdGpGZXjRds&list=PLFdQ3YMJDN9jbWIFvmjgvolBLieiUkP2o&index=1&t=0s>.

¹⁸⁸ Tyler Fischer, *The Legend Of Zelda: Breath Of The Wild Is Officially The Best Selling Zelda Game Ever*, COMICBOOK.COM (Apr. 28, 2018), <https://comicbook.com/gaming/2018/04/29/the-legend-of-zelda-breath-of-the-wild-best-selling/> [<https://perma.cc/UK9L-KGDN>].

¹⁸⁹ See, e.g., Wayne Drehs, *How PewDiePie Gamed the World*, ESPN (June 11, 2015), http://www.espn.com/espn/story/_/id/13013936/pewdiepie-how-became-king-youtube [<https://perma.cc/XAM3-4DF6>]. U.S. video game sales grew steadily in the early 2000s, from \$5.5 billion a year in 2000 to \$7.3 billion a year in 2006. *Computer and Video Game Sales in*

that video game sales might have been even greater without the presence of gameplay videos. At the very least, though, it does not seem that they noticeably harmed the game industry.

1. Potential Market Harm to Smaller-Budget Games

While gameplay videos may not be harming major studios' bottom lines, there is some evidence indicating that smaller developers might incur negative effects. Ryan Green is the creator of *That Dragon, Cancer*, an independent video game that is an emotional tribute to his son's battle with cancer.¹⁹⁰ Green claimed that Let's Play videos contributed to the fact that his studio has not seen "a single dollar" from sales¹⁹¹ — *i.e.*, after production expenses, the game made no profit.¹⁹² Green cited data showing that the game had sold 14,500 copies on Steam, a popular digital distribution platform, while "millions" viewed gameplay videos of the game on YouTube.¹⁹³ Green thus concluded that watching others play the game satisfied a substantial number of people, and that while the increase in gameplay videos' popularity may not impact game industry revenues broadly, small developers may still incur negative results.¹⁹⁴

Interestingly, Green himself attributed some of this disparity to differences in game genres.¹⁹⁵ He believes that games that are "more expansive" or have better

the United States from 2000 to 2015 (in Billion U.S. Dollars), STATISTA, (Apr. 2016), <https://www.statista.com/statistics/273258/us-computer-and-video-game-sales/> [https://perma.cc/CS9Y-J38Z]. Sales increased two years later to \$11.7 billion a year before decreasing to \$10.1 billion a year in 2009, perhaps due to the Great Recession. *Id.*; Daniel Terdiman, *Is the Video Game Industry Recession-Proof?*, CNET, (Feb. 5, 2019) <https://www.cnet.com/news/is-the-video-game-industry-recession-proof/> [https://perma.cc/4RRL-HVJ3]. In 2010, however, sales skyrocketed to \$17.1 billion a year and stayed around this level until 2015. STATISTA, *supra*.

¹⁹⁰ *Our Team*, THAT DRAGON, CANCER, <http://www.thatdragoncancer.com/our-team/> [https://perma.cc/LR5K-F83B] (last visited Feb. 5, 2019). For the purposes of this Note, "independent video games" refers to "those [games] created by independent developers without the backing of a major corporate publisher." Will Fulton, *The best indie games for 2019*, Digital Trends (Jan. 7, 2019, 11:00 AM PST), <https://www.digitaltrends.com/gaming/best-indie-games/> [https://perma.cc/FN9Q-8KPK].

¹⁹¹ Ryan Green, *On Let's Plays*, THAT DRAGON, CANCER (Mar. 24, 2016), <http://www.thatdragoncancer.com/thatdragoncancer/2016/3/24/on-lets-plays> [https://perma.cc/2B99-ERAE].

¹⁹² Gabe Carey, *Why Pay to Play When You Can Watch for Free? How YouTube Burns Indie Developers*, DIGITAL TRENDS (Mar. 28, 2016, 2:05 PM), <https://www.digitaltrends.com/gaming/that-dragon-cancer-and-lets-play-dispute/> [https://perma.cc/XA44-B5FQ].

¹⁹³ Green, *supra* note 191.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

replayability,¹⁹⁶ such as sandbox games, might benefit economically from the Let's Play community.¹⁹⁷ His own game, however, a “short, relatively linear experience,” clearly did not.¹⁹⁸ Green’s genre differentiation speaks directly to the third fair use factor (the amount taken from the original work), since the shorter the game and the less varied the game world, the more content even a speedrun video necessarily shows, and the more likely the third factor would weigh against fair use.

Such effects bring the underlying purposes of copyright law to the forefront. The reason that copyright law exists is to solve the public goods problem.¹⁹⁹ The defining characteristics of public goods are that they are nonrivalrous and nonexcludable.²⁰⁰ A nonrivalrous good means that its consumption by one user does not reduce the possibility of its being consumed by another.²⁰¹ In contrast, nonexcludability means that it is impossible or prohibitively expensive to prevent someone from using the good after it has been produced.²⁰² Both video games and gameplay videos have these characteristics. Like books and movies, video games are mass-produced, and thus potentially millions of people have the ability to play or view the work simultaneously.²⁰³ Similarly, millions of viewers can watch game videos on a website like YouTube.²⁰⁴

The public goods problem is that, in the absence of copyright law, the nonrivalrous and nonexcludable nature of public goods allows the public such easy and cheap access to these goods that their creators will not be sufficiently compensated for them.²⁰⁵ Therefore, the creators lose the incentive to produce more works.²⁰⁶ While game companies like Nintendo are multinational

¹⁹⁶ Replayability refers to the quality or fact of being suitable for or worth playing more than once, primarily as it relates to video games. *Replayability*, OXFORD DICTIONARIES, <https://en.oxforddictionaries.com/definition/replayability> [https://perma.cc/7RH9-PWPU] (last visited Mar. 20, 2019).

¹⁹⁷ Green, *supra* note 191.

¹⁹⁸ *Id.*

¹⁹⁹ JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 6-7 (4th ed. 2015).

²⁰⁰ ROGER A. ARNOLD, MICROECONOMICS 394 (Jack W. Calhoun et al. eds., 9th ed. 2008).

²⁰¹ *Id.* at 395.

²⁰² *Id.*

²⁰³ See, e.g., Jessica Conditt, *Epic Games Has 250 Million 'Fortnite' Players and a Lot of Plans*, ENGADGET (Mar. 20, 2019), <https://www.engadget.com/2019/03/20/fortnite-250-million-epic-games-sweeney-interview-gdc/> (stating that the extremely popular game Fortnite’s studio claimed that 10.8 million players were playing Fortnite concurrently).

²⁰⁴ See YOUTUBE FOR PRESS (last updated 2019), <https://www.youtube.com/intl/en-GB/yt/about/press/> (claiming that over 1.9 billion viewers log in to YouTube each month, and over one billion hours of videos are viewed daily).

²⁰⁵ COHEN ET AL., *supra* note 199, at 6-7.

²⁰⁶ *Id.*

corporations with large development teams that can charge \$60 per game²⁰⁷ and sell millions of copies worldwide, *That Dragon, Cancer* was made by an eight-person studio²⁰⁸ and has sold comparably far fewer copies at \$9.99 each.²⁰⁹ As a result, Green's incentive to produce games in the future may be severely reduced.

Ryan Green is not the only independent developer to voice concerns about gameplay videos. Without mincing words like Green, Phil Fish, the creator of the independent game *Fez*, declared that YouTubers who generate income from gameplay videos should pay developers a "huge portion" of their revenue.²¹⁰ Unlike Green's game, *Fez* sold twenty thousand copies on its first day of release and one million copies a year and a half after release.²¹¹ Gameplay videos thus likely impacted Fish's game less dramatically than they did Green's, but he still spoke in strong terms against what he viewed as piracy.²¹²

In summary, the actual effect gameplay videos have on the primary market for their underlying video games varies widely. Large studios still generate considerable sales, while evidence exists that independent creators might lose major profits. A firm conclusion as to whether the fourth fair use factor favors game developers or gameplay content creators should thus await more in-depth statistics.

2. Potential Market Harm to Developers' Own Uploads

In addition, Let's Play videos could cut into game studios' promotion and development of their own uploads. For example, Microsoft has an active Twitch channel of over 1,500 gameplay videos on which it livestreams employees playing games developed for the Xbox (whether by Microsoft or by third party

²⁰⁷ Scott Butterworth, *Here's How Much Nintendo Switch Games Will Cost*, GAMESPOT (Jan. 13, 2017, 3:55 PM), <https://www.gamespot.com/articles/heres-how-much-nintendo-switch-games-will-cost/1100-6446908/>.

²⁰⁸ Green, *supra* note 191.

²⁰⁹ *Compare That Dragon, Cancer*, STEAMSPY, <https://steamspy.com/app/419460> [<https://perma.cc/3FEW-4WU4>] (last visited Feb. 22, 2019), with Fisher, *supra* note 188 (reporting that as of April 2018, "the Legend of Zelda: Breath of the Wild ha[d] sold 8.48 million copies on Nintendo Switch and another 1.5 million copies on Wii U").

²¹⁰ Chris Pereira, *Fez Creator Phil Fish: YouTubers Should Pay Game Devs a "Huge Portion" of Revenue*, GAMESPOT (June 18, 2014, 12:40 PM), <https://www.gamespot.com/articles/fez-creator-phil-fish-youtubers-should-pay-game-devs-huge-portion-of-revenue/1100-6420573/> [perma.cc/B8LW-BUK7].

²¹¹ Jeff Grubb, *How Fez's First-Day Sales Compare to Braid, Limbo, and Other XBLA Hits*, VENTUREBEAT (Apr. 14, 2012, 5:45 PM), <https://venturebeat.com/2012/04/14/fez-20000-units-sold-on-first-day/> [[http://perma.cc/R2TG-SGJL](https://perma.cc/R2TG-SGJL)]; David Hing, *Fez Hits 1 Million Sales*, BIT-TECH (Dec. 10, 2013, 9:29 AM), <http://www.bit-tech.net/news/gaming/fez-hits-1-million-sales/1/> [<https://perma.cc/BN7E-ZBFD>].

²¹² See Pereira, *supra* note 210.

studios)²¹³ — often displaying more than half an hour of each game.²¹⁴ Similarly, Nintendo livestreams significant portions²¹⁵ of upcoming games at the annual video game conference E3.²¹⁶ Such videos are officially sanctioned by game companies and feature games that are new releases or not available to the public at the time of the video upload.²¹⁷ Therefore, these gameplay videos likely form part of the studio's advertising campaign. Of course, unsanctioned videos can also serve as advertising for a game — and indeed, given the celebrity and humorous perspective of certain content creators, such videos may be more popular.²¹⁸ This can have the effect of decreasing the amount of views that a studio's sanctioned gameplay video might receive.²¹⁹ However, because of the lack of information as to game studios intent of expanding their own video streaming offerings, it is unclear whether Let's Play videos affects a potential market replacement for any rights-holder offerings.

To conclude, of the two main types of gameplay videos, Let's Plays are less likely to be found as fair use than speedrun videos. This is most evident with regard to the first and third factors: speedrun videos are more transformative and necessarily appropriate less of the game than Let's Plays. Let's Plays would likely have to include substantial amounts of player criticism or commentary even to meet the objective *Cariou* standard. On the other hand, speedrun videos, especially the fastest ones, are transformative in terms of providing a new experience as well as providing some educational value. Courts have also increasingly given weight to the transformativeness prong of the fair use analysis to the point that it seems to be nearly dispositive.²²⁰ This further strengthens the case in favor of speedruns and against Let's Plays.

²¹³ Xbox, TWITCH, <https://www.twitch.tv/xbox> [http://perma.cc/9KFW-ZFSD] (last updated Jan. 19, 2018).

²¹⁴ E.g., Xbox, *Xbox Evolved*, TWITCH (Jan. 18, 2018), <https://www.twitch.tv/videos/219882739> [http://perma.cc/9JK6-MEVH].

²¹⁵ See, e.g., NinEverything, *Super Mario Odyssey – Nintendo Treehouse: Live @ E3 2017*, YOUTUBE (June 13, 2017), <https://www.youtube.com/watch?v=3oaAxOBJaPY> (showing twenty-seven minutes of gameplay); see also Hylia Dreamer, *Breath of the Wild – Nintendo Treehouse E3 2016 [Full]*, YOUTUBE (June 18, 2016), <https://www.youtube.com/watch?v=UpsgkioaQms> (showing about four hours of gameplay).

²¹⁶ See, e.g., Dreamer, *supra* note 215.

²¹⁷ *InnerSpace* and *Full Metal Furies*, the games in *Xbox Evolved*, *supra* note 214, were released on January 16 and 17, 2018, respectively. *InnerSpace*, STEAM (Jan. 16, 2018), <http://store.steampowered.com/app/347000/InnerSpace/> [http://perma.cc/W6UR-F7YW]; *Full Metal Furies*, STEAM (Jan. 17, 2018), http://store.steampowered.com/app/416600/Full_Metal_Furies/ [http://perma.cc/A7YN-6H3D]. *Super Mario Odyssey*, the game in NinEverything, *supra* note 215, was released on October 27, 2017.

²¹⁸ Meyer, *supra* note 48.

²¹⁹ *Id.*

²²⁰ See Neil Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 745 (2011).

As for the third factor, even if a speedrun video displays a game's ending, it — by virtue of its goal — displays comparably less actual gameplay than a Let's Play. The *Galoob* decision indicates that Let's Plays can still amount to a fair use, but speedrun videos benefit even more from this decision. Moreover, the distinct nature of video games from noninteractive media alters what the legally defined “heart” of a copyrighted work is in the context of video games. The genre of a video game is an important consideration in this regard: the plot elements of an open-world game are comparatively meager in proportion to the entire gameplay experience.

The fourth factor, while inconclusive or even beneficial for both types of videos, is still better for speedruns. While viewers of Let's Play videos might well be sufficiently intrigued by their viewing experience to purchase the original game (thus benefiting the market for it), they could plausibly also be satisfied enough that they would not feel the need to purchase the game, especially if the game were heavily story-focused and linear in progression.

On the other hand, people who watch speedrun videos are likely to have already purchased or completed the game and would only be watching them to gain more proficiency for future playthroughs. Thus, speedrun videos probably would not appreciably affect the market for the original games either positively or negatively. In any case, the fourth factor has been less important relative to the first factor in recent fair use analysis than it used to be.²²¹ Furthermore, one of the rationales for fair use is to allow users to build creatively on existing works.²²² Speedrun videos showcase how dedicated players discover programming glitches and manipulate character movement to achieve ever-faster completion times. Lastly, in its accompanying notes to Section 107, Congress stated that “courts must be free to adapt” fair use “to particular situations on a case-by-case basis.”²²³ These remarks are not only useful in separating speedrun videos from other game videos, but also in judging each speedrun video according to how much the video “transforms” the original game.

PART III: SOLUTIONS

Given that Let's Play videos are popular but possibly infringing, the question is thus how the law should treat such videos moving forward. This Part offers a number of possible solutions: maintaining the status quo of uploaders following company guidelines on acceptable uses in exchange for uploaders keeping all ad revenue they earn from videos, having YouTube and other video-hosting

²²¹ See *id.* at 755 (finding that district courts considered transformativeness in 70.45% of cases in the late 1990s, while they considered it in 95.83% of cases the late 2000s; finding also that defendants won 32.14% of such cases in the late 1990s when the court considered transformativeness, as opposed to 60.87% of such cases in the late 2000s when transformativeness was considered).

²²² MENELL ET AL., *supra* note 85, at 755.

²²³ H.R. REP. NO. 94-1476, at 66 (1976).

websites use DMCA takedowns to remove videos, or having game studios granting licenses to uploaders in exchange for a fee. Maintaining the status quo is likely the most acceptable choice for all parties at the moment, due to its adoption by major game companies.

1. *Maintain the Status Quo*

The simplest solution is to maintain the status quo.²²⁴ The strongest argument in favor of this option is that companies like Nintendo should keep fans happy so as to ensure their continued patronage.²²⁵ Additionally, the current situation may benefit both game studios and video uploaders, since game companies obtain free advertising for their games from Let's Play videos, while players are free to upload their videos and make money doing so.²²⁶ A recent example illustrates the downside of game companies trying to change the current situation. In 2013, Nintendo announced that they had registered their intellectual property in YouTube's database, which allowed it to insert advertisements in videos "featuring Nintendo-owned content . . . of a certain length."²²⁷ This resulted in strong fan backlash²²⁸ because the advertising revenue from these commercials would go to Nintendo, not the video uploaders.²²⁹ Nintendo received this bad publicity even though they emphasized that they did not intend to actually block uploaders who used their content.²³⁰ After a month, Nintendo apparently rescinded this policy.²³¹

²²⁴ See, e.g., Postel, *supra* note 27, at 1188; Ribaud, *supra* note 28, at 133-34; Taylor, Jr., *supra* note 28, at 267-68.

²²⁵ See Taylor, Jr., *supra* note 28, at 267-68 (citing examples of video game companies receiving fan backlash due to various business decisions not involving gameplay videos). Another commentator views litigation as a possible "kiss of death" to a developer's business because angry fans will simply migrate to other comparable games. Brusa, *supra* note 28, at 261.

²²⁶ Postel, *supra* note 27, at 1188.

²²⁷ *Nintendo Comments on YouTube 'Let's Play' Situation, Adding Ads to Certain Videos*, GO Nintendo (May 15, 2013), https://www.gonintendo.com/?mode=viewstory&id=202693&utm_source=feedly [<https://perma.cc/6V7C-6KY3>].

²²⁸ Taylor, Jr., *supra* note 28, at 248; see Stephen Totilo, *Nintendo's Turn for a 180? 'Let's Play' Drama Might Have Happy Ending*, KOTAKU (June 24, 2013, 11:10 AM), <https://kotaku.com/nintendos-lets-play-drama-might-have-a-happy-ending-513818999> [<https://perma.cc/527U-WKT5>] (stating that a popular game video uploader whose videos of Nintendo games were blocked by Nintendo from generating ad revenue vowed to stop uploading videos of Nintendo games until the situation was "resolved").

²²⁹ Luke Plunkett, *Nintendo Forcing Ads on Some YouTube "Let's Play" Videos*, KOTAKU (May 15, 2013, 9:45 PM), <https://kotaku.com/nintendo-forcing-ads-on-some-youtube-lets-play-video-507092383> [<https://perma.cc/9E4Z-DVFQ>].

²³⁰ *Nintendo Comments on YouTube 'Let's Play' Situation*, *supra* note 227.

²³¹ See Totilo, *supra* note 228 (describing that after a week, the popular uploader's ad revenue returned).

This anger on the part of uploaders and their audiences even for a mere shift in revenue from the player to the company mirrors the backlash that the music industry received by cracking down on peer-to-peer file-sharing software in the early 2000s.²³² These efforts by the music industry did not halt piracy.²³³ Instead, the industry had to turn to business models that were more in tune with the reality of online music consumption, such as Apple's individual song purchase option or Spotify's subscription-based service.²³⁴

Interestingly, the history of Nintendo's behavior in this area has shown a gradual retreat in favor of uploaders. Nintendo had stood out among game companies for being more proactive in enforcing their rights, compared to other studios like Ubisoft or Microsoft.²³⁵ After the uproar it caused in 2013 by claiming all ad revenue from gameplay videos, two years later it announced the Nintendo Creators Program, through which it would receive 40 percent of ad revenue per video or 30 percent per entire channel.²³⁶ While this might seem like a compromise, the program still caused fan uproar because Nintendo stipulated that uploaders also had to join the YouTube Partner Program,²³⁷ which meant that Google also received a cut of the revenue in addition to Nintendo. Also, if an uploader chose not to join the Creators Program, Nintendo would pocket all ad revenue.²³⁸ Nintendo's tying membership in the Creators Program to that of YouTube's Partner Program also had a downside. When YouTube increased its watch time threshold (i.e., hours of video watched by viewers) for users in order to join the Partner Program, less popular uploaders whose videos accrued fewer watch time hours were concerned that their membership in the Creators Program would be at risk.²³⁹

²³² Ben Depoorter & Bregt Raus, *Who's Afraid of 3D Printing?*, 25 B.U. J. SCI. & TECH. L. 60, 77-78 (forthcoming 2019).

²³³ *Id.* at 78.

²³⁴ *Id.*

²³⁵ Willie Clark, *The (Still) Uncertain State of Video Game Streaming Online*, ArsTechnica (Jan. 28, 2018, 9:00 AM), <https://arstechnica.com/gaming/2018/01/to-stream-or-not-to-stream-how-online-streaming-game-videos-exist-in-an-ip-world/> [<https://perma.cc/8D8S-D6A9>].

²³⁶ Matthew Handrahan, *Nintendo Offers Revenue Share to YouTubers*, GAMESINDUSTRY.BIZ (Jan. 29, 2015), <https://www.gamesindustry.biz/articles/2015-01-29-nintendo-offers-revenue-share-to-youtubers> [<https://perma.cc/F6XF-MJ2S>].

²³⁷ Julia Alexander, *Nintendo Restricts Livestreaming Games for YouTubers in Nintendo's Partners Program*, POLYGON (Sept. 29, 2017, 11:35 AM), <https://www.polygon.com/2017/9/29/16384236/youtube-nintendo-livestream-monetization> [<https://perma.cc/4GU3-G84L>].

²³⁸ Julia Alexander, *YouTubers Are Calling Out Nintendo for Its Policy on Streaming Uploads*, POLYGON (Nov. 6, 2017, 10:29 AM), <https://www.polygon.com/2017/11/6/16612080/youtube-nintendo-super-mario-odyssey-demonetization> [<https://perma.cc/LF7W-QVRP>].

²³⁹ Julia Alexander, *Nintendo-Specific YouTube Channels May Feel YouTube's New Monetization Rules*, POLYGON (Feb. 20, 2018, 9:38 AM),

Eventually, Nintendo decided to cancel the Creators Program altogether.²⁴⁰ Uploaders now only need to follow new content guidelines. These guidelines state that Nintendo allows fans to upload gameplay videos with “creative input or commentary,” which includes Let’s Plays.²⁴¹ Uploaders may only monetize their videos through the YouTube Partner Program, Twitch, and a few other methods.²⁴² Nintendo still reserves the right to remove any content it believes to be unlawful, infringing, or in violation of its guidelines.²⁴³ Nintendo’s implementation of such guidelines closely matches Sony’s and Microsoft’s policies toward gameplay videos.²⁴⁴

Nintendo’s relenting from a “compromise” subscription model suggests that game companies are basically willing to settle for the status quo of allowing uploaders to keep all the revenue from possibly infringing on their copyright in exchange for setting boundaries on what material is acceptable or not. These boundaries, while not having legal status, are still informed by legal concepts: Nintendo’s guideline language on player input or commentary is reminiscent of the statutory definition of fair use as encompassing criticism or commentary,²⁴⁵ and the designating of Let’s Plays as permissible material suggests that the company takes a broad view of fair use.²⁴⁶ In return for allowing players the freedom to upload videos within expressly marked limits, guidelines give express notice to players that companies still have the final say on removing videos of their copyrighted work. A game company may still opt for taking legal

<https://www.polygon.com/2018/2/20/17031540/nintendo-youtube-creators>
[<https://perma.cc/X9TH-HPL2>].

²⁴⁰ Julia Alexander, *Nintendo’s New Content Guidelines Make It Easier for YouTube Creators to Get Paid*, THE VERGE (Nov. 28, 2018, 8:47 PM), <https://www.theverge.com/2018/11/28/18117172/nintendo-youtube-monetization-partner-program-super-smash-bros-ultimate-lets-play-livestream> [<https://perma.cc/R46S-ZYMG>].

²⁴¹ *Nintendo Game Content Guidelines for Online Video & Image Sharing Platforms*, NINTENDO (Nov. 29, 2018), https://www.nintendo.co.jp/networkservice_guideline/en/index.html?n [<https://perma.cc/UT9E-27YC>].

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ Richard Lawler, *Nintendo Ends ‘Creators’ Program That Restricted Video Sharing*, ENGADGET (Nov. 28, 2018), <https://www.engadget.com/2018/11/28/nintendo-content-lets-play-policy-creators-program/>. Microsoft’s guidelines are more permissive, since they lack the requirement to add player commentary to videos. *Game Content Usage Rules*, XBOX (last updated Jan. 2015), <https://www.xbox.com/en-US/developers/rules> [<https://perma.cc/Y2C9-NC3S>].

²⁴⁵ 17 U.S.C. § 107 (2012).

²⁴⁶ Microsoft’s rules do not mention a commentary requirement at all, which indicates that it is even more permissible than Nintendo. Their main requirement is that the material not be obscene, violent, or otherwise objectionable. *Game Content Usage Rules*, XBOX.

action in the future, but for now this industry-wide²⁴⁷ model seems to be acceptable for both fans and studios.

2. *The Digital Millennium Copyright Act*

Video game companies also have legal recourse in the Digital Millennium Copyright Act (DMCA).²⁴⁸ The DMCA allows online service providers (OSPs) such as YouTube to be designated “safe harbors” (meaning that they are exempt from liability for copyright infringement for materials that they host) as long as they meet certain requirements.²⁴⁹ Section 512(c) of the DMCA mandates that after an OSP is notified that it is hosting infringing content, it must remove or disable access to such content.²⁵⁰ The information in the notification must clearly and specifically identify the infringing material, and the sender of the notification must believe in good faith that the material is infringing.²⁵¹ This is known as the DMCA notice-and-takedown system.²⁵²

The legislative history of the DMCA suggests that it was a compromise between the creative industries and OSPs, granting OSPs safe harbor status if they expeditiously remove infringing material.²⁵³ YouTube also has Content ID — its own system for monitoring infringing content.²⁵⁴ Content ID works by checking uploaded videos against a database consisting of copyright owner-submitted files.²⁵⁵ If a video matches one of the files in the database, the content owner can either block the video or monetize run advertisements to monetize (and perhaps share the advertisement revenue with the uploader).²⁵⁶ YouTube seems to want to reassure uploaders that their content will not be blocked, adding that content creators often choose to monetize the video in question.²⁵⁷

²⁴⁷ The number of studios that approve of gameplay videos, even with conditions, may vastly outweigh the number that do not. See *Company Let’s Play Policies*, WHO LET’S PLAY (last updated 2016), <http://wholetsplay.com/> [<https://perma.cc/R2AX-DZ2H>] (a list of major and minor game studios showing that most of them approve of Let’s Plays with no conditions on uploading videos).

²⁴⁸ 17 U.S.C. § 512 (2012).

²⁴⁹ *A Guide to YouTube Removals*, ELEC. FRONTIER FOUND., <https://www EFF.org/issues/intellectual-property/guide-to-youtube-removals> [<https://perma.cc/28UR-4C5A>] (last visited Mar. 20, 2019).

²⁵⁰ 17 U.S.C. § 512(c)(1)(C); 17 U.S.C. § 512(c)(3).

²⁵¹ 17 U.S.C. § 512(c)(3)(A)(v); ELEC. FRONTIER FOUND., *supra* note 249.

²⁵² ELEC. FRONTIER FOUND., *supra* note 249.

²⁵³ Taylor, Jr., *supra* note 28, at 252-53.

²⁵⁴ *How Content ID Works*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2797370> [<https://perma.cc/VUU6-XXPZ>] (last visited Mar. 18, 2018).

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *What Is a Content ID Claim?*, YOUTUBE HELP, <https://support.google.com/youtube/answer/6013276> [<https://perma.cc/3NQK-QCD5>] (last visited Mar. 18, 2018).

However, there is some evidence that suggests that Content ID is open to abuse in the form of false positives.²⁵⁸ In 2013, dozens of video uploaders reported that Content ID had issued copyright claims against a number of videos, including those of theRadBrad.²⁵⁹ Many of these claims seem to have originated not from the actual owners of the game content, but from third parties that own the rights to music appearing in these gameplay videos.²⁶⁰

Sensing dissatisfaction with the Content ID policy, in 2016 YouTube began allowing videos to remain earning revenue while their copyright status is in disputed.²⁶¹ Once the dispute is settled, YouTube will disburse the revenue to the winner.²⁶² Previously, uploaders could not earn advertisement revenue while resolving copyright claims.²⁶³ However, a game reviewer who uploads unmonetized videos of his reviews onto YouTube was skeptical, noting that Content ID still reports such videos to game companies.²⁶⁴ YouTube has also promised to provide legal support to “a handful” of videos subject to DMCA takedowns that it thought were “clear[ly] fair use,”²⁶⁵ acknowledging that DMCA notification and the threat of litigation could be “intimidat[ing]” to content creators.²⁶⁶ The company has further said that it hoped to showcase such videos as exemplars to both uploaders and copyright owners of what Internet fair use ought to look like in order to “develop best practices as a community.”²⁶⁷ Gameplay videos are currently not among these videos, but this could be a way

²⁵⁸ Sam Gutelle, *YouTube Is Suddenly Flagging a Lot of Videos for Copyright Claims*, TUBEFILTER (Dec. 10, 2013), <https://www.tubefilter.com/2013/12/10/youtube-contentid-flag-gaming-videos/> [<https://perma.cc/2JFA-D4DQ>].

²⁵⁹ *Id.*

²⁶⁰ See Stephen Totilo, *YouTube Channels Crippled by Copyright Claims*, KOTAKU (Dec. 10, 2013), <https://kotaku.com/youtube-channels-crippled-by-copyright-claims-1480717110> [<https://perma.cc/P6GZ-YSXE>].

²⁶¹ *Improving Content ID for Creators*, CREATOR BLOG, YOUTUBE (Apr. 28, 2016), <https://youtube-creators.googleblog.com/2016/04/improving-content-id-for-creators.htm> [<https://perma.cc/R7VH-CAGW>].

²⁶² *Id.*

²⁶³ Allegra Frank, *YouTube Is Changing the Content ID System in an Effort to Help Creators*, POLYGON (Apr. 28, 2016, 4:19 PM), <https://www.polygon.com/2016/4/28/11531228/youtube-content-id-changes-copyright-dispute-jim-sterling> [<https://perma.cc/2M2Y-6R8H>].

²⁶⁴ *Id.*

²⁶⁵ Fred von Lohmann, *A Step Toward Protecting Fair Use on YouTube*, GOOGLE PUBLIC POLICY BLOG (Nov. 19, 2015), <https://publicpolicy.googleblog.com/2015/11/a-step-toward-protecting-fair-use-on.html> [<https://perma.cc/XJA7-Z4AT>]. YouTube pledged to pay up to \$1 million in fees. Allegra Frank, *YouTube to Help Protect Fair Use, Combat Copyright Claims by Paying Creators' Legal Fees*, POLYGON (Nov. 19, 2015, 2:30 PM), <https://www.polygon.com/2015/11/19/9761654/youtube-fair-use-protection-program-jim-sterling> [<https://perma.cc/NS5R-FZXY>].

²⁶⁶ Lohmann, *supra* note 265.

²⁶⁷ *Id.*

to reach a mutually beneficial arrangement between both sides without resorting to costly and time-consuming litigation.

3. *Licensing*

Licensing is a common solution in the scholarly literature on gameplay videos.²⁶⁸ Game companies can issue licenses to uploaders, granting them permission to produce videos in exchange for a licensing fee.²⁶⁹ These can either be voluntary (granted at the discretion of the company) or compulsory.²⁷⁰ Licensing seems like a mutually beneficial arrangement, because uploaders or streamers would be able to continue producing videos without fear of takedowns, while companies would gain additional revenue from licensing fees.²⁷¹ However, potential downsides also exist for both parties. For example, licensing grants a company sole discretion to allow a Let's Play video to be uploaded.²⁷² No legal precedent would be created, leaving uploaders perhaps feeling that companies are making arbitrary decisions as to which type of gameplay video they approve.

If YouTube's collection of exemplary fair use videos were to include gameplay videos, however, such uncertainty may decrease. Creators and companies would have models that would influence their conduct, the former in making videos and the latter in making claims against them. Of course, infringers would still exist, so enforcement would have to be strict. Also, game companies already have different standards of permitting fan-use of their games in gameplay videos. For example, 2K Games allows fans to upload Let's Play videos for noncommercial purposes.²⁷³ Thus, a video may seem unproblematic to one developer and not to another.

Compulsory licensing would remove this uncertainty and give uploaders free rein to produce videos. Besides requiring uploaders to pay game developers licensing fees, it would not differ from the status quo. Compulsory licensing is currently only available for subscription and non-subscription digital audio transmission²⁷⁴ and the recordings of nondramatic musical works.²⁷⁵ The latter are the most analogous to video games, and recordings of music are in many ways comparable to gameplay videos. The Copyright Act provision dealing with compulsory licenses of musical works allows arrangements of such works to be made that fit the style of performance in question, but the work's

²⁶⁸ See, e.g., Brusa, *supra* note 28, at 262-66; Postel, *supra* note 27, at 1190-91; Ribaldo, *supra* note 28, at 134-35; Taylor, Jr., *supra* note 28, at 269-70.

²⁶⁹ Taylor, Jr., *supra* note 26, at 269.

²⁷⁰ See Brusa, *supra* note 26, at 262-66 (proposing both kinds of licenses); see also Postel, *supra* note 26, at 1190-91 (proposing a compulsory license).

²⁷¹ Taylor, Jr., *supra* note 26, at 270.

²⁷² Ribaldo, *supra* note 28, at 134.

²⁷³ 2K David, *supra* note 157.

²⁷⁴ 17 U.S.C. §§ 114(d)(1)-(2) (2012).

²⁷⁵ 17 U.S.C. § 115 (2012).

“fundamental character” must remain the same.²⁷⁶ Let’s Play videos would probably fare better under this requirement, since typical criticism or commentary provided by streamers (such as humorous or sarcastic comments in a horror game) would probably not be substantial enough to fundamentally change a game’s nature.²⁷⁷ Ironically, speedruns might run into more trouble, depending on how much they truncate a game through gameplay tricks or code glitches. However, such techniques do not change the fundamental nature of the game code, only the audiovisual presentation. In any case, Congress is unlikely to make statutory changes to accommodate video games, so how a compulsory license would apply to them would remain purely theoretical.

CONCLUSION

Gameplay videos have exploded in popularity with the rise of YouTube, and their growth shows no signs of abating. The two most popular types of gameplay videos, Let’s Plays and speedruns, differ in the amount of fair use protection they deserve. The latter, due to its transformative nature, educational purpose and the relative lack of material taken from the game, merits far more protection than the former. Generally, the interactive nature of video games tilts the third and fourth factors in favor of fair use. However, videos of small-budget or narrative-heavy games complicate the analysis because they discourage viewers from purchasing the games. Gameplay videos are thus not a monolithic group that can be brought under one legal umbrella, but need nuanced, individual analysis depending on the type of video and the genre of game on which they are based.

Likewise, with the amount of gameplay videos already available on the Internet and the possibility of fan backlash if game companies order these videos to be taken down, the best solution for now seems to be the status quo — which provides free advertising to game companies, and permits uploaders (and their fans) to continue to profit from and enjoy gameplay videos while setting down express rules for acceptable and unacceptable use of video game content. In this way, game companies may have already accepted the current gameplay video landscape, with some acknowledging their presence or even encouraging them.²⁷⁸ Even without courts or Congress expressly weighing in on the matter,

²⁷⁶ 17 U.S.C. § 115(a)(2).

²⁷⁷ See Part II *supra*.

²⁷⁸ For example, Valve expressly permits uploaders to monetize their videos with YouTube, but otherwise allows only noncommercial use of its content. *Valve Video Policy*, STEAM, http://store.steampowered.com/video_policy [https://perma.cc/4MP6-BKRX] (last visited Feb. 10, 2019). Double Fine Productions permits the creation of Let’s Play videos, while Frictional Games does not block gameplay videos as long as they are for noncommercial use. *Frequently Asked Questions*, DOUBLE FINE PRODUCTIONS, <http://www.doublefine.com/about> [https://perma.cc/K726-64RR] (last visited Feb. 10, 2019); Jens, *YouTube Monetization, Permissions to Do Creations Based on Our Work and the Alike*,

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it seems that gameplay videos are here to stay as an example of how the Internet has transformed the way fans interact with creative media.