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FAIR USE, FAIR PLAY: VIDEO GAME PERFORMANCES AND "LET'S PLAYS" AS TRANSFORMATIVE USE

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ABSTRACT

With the advent of social video upload sites like YouTube, what constitutes fair use has become a hotly debated and often litigated subject. Major content rights holders in the movie and music industry assert ownership rights of content on video upload platforms, and the application of the fair use doctrine to such content is largely unclear. Amid these disputes over what constitutes fair use, new genres of digital content have arrived in the form of "Let's Play" videos and other related media. In particular, "Let's Plays"—videos in which prominent gamers play video games for the entertainment of others—are big business in the streaming and video upload world. Many video game producers vigorously assert the right to prevent the publishing of Let's Play videos or to demand a cut of the revenues. This article discusses who legally possesses the right to distribute or profit from Let's Play content under current law, and the way that courts ought to approach these disputes consistent with the principles of copyright protection. I conclude that the nature of video game content produces conceptual challenges not necessarily present in movies and music, and that these differences have a bearing on fair use analysis as it applies to Let's Play videos.

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[*] Dan Hagen is a J.D. candidate at the University of Washington, class of 2018. Thank you to Professor Bob Gomulkiewicz for his helpful edits, suggestions, and guidance in developing this article. Thanks also to Professor Zahr Said for her detailed review of an early draft of this article.

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INTRODUCTION

If someone makes a recording of themselves playing a video game, who owns the resulting content and what may they legally do with it? The answer is not as straightforward as some video game producers presume. Video games are different from movies and music in significant ways, and the limits of copyright protection in the context of interactive media have yet to be comprehensively judicially tested. However, some case law provides insight into how courts will, or ought to, approach the repurposing of video game content consistent with the principles of copyright law.

"Let's Play" videos are a relatively new genre of media, and the

application of copyright protection to these videos presents potential challenges. A "Let's Play" is a recording of gameplay footage made for the benefit of an audience.[1] These videos are often streamed live over the internet or recorded and uploaded to social media sites like YouTube. The Let's Play content creator often provides running commentary, usually related to the game being played.[2] Let's Play videos can be broken into sub-categories depending on the player's purpose.[3] For example, a "speedrun" video is a type of Let's Play in which a player attempts to finish a game as fast as possible. Other types of videos may involve or focus on competitive demonstrations of skill against multiplayer opponents, humorous reactions or mockery of video game content, or socializing between the player and the viewers. Though the lines are not defined with perfect clarity, a Let's Play video is typically understood as a recording of a gameplay performance, in contrast to a gameplay "stream" which is a live transmission of a that performance as it is happening.[4]

Over the last couple of years, Let's Play videos have grown into a billion dollar per year industry.[5] Streamers and Let's Play content creators receive money through donations during their live-streams and ad revenue from videos watched after the fact by hundreds of millions of consumers.[6] People watch Lets Plays for a variety of reasons, including entertainment, information as to whether a game is worth purchasing, and tips for progressing or improving their own gameplay experience.[7]

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[1] *See What is a Let's Play on YouTube?*, MEDIAKIX (Feb. 3, 2016), http://mediakix.com/2016/02/what-is-a-youtube-lets-play-video/#gs.kNvLoUE.

[2] *Id.*

[3] *See infra* Section I.A.

[4] *See* Michael Sawyer, *Three Reasons Streaming is Replacing the Let's Play Industry*, POLYGON (Mar. 29, 2017), https://www.polygon.com/2017/3/29/15087012/streaming-vs-lets-play-twitch-youtube.

[5] *See Esports & 'Let's Play' Revenues to Reach $3.5 Billion by 2021, Driven by Surge in Ad-spend*, JUNIPER RESEARCH (Mar. 14, 2017), https://www.juniperresearch.com/press/press-releases/esports-'let's-play'-revenues-to-reach-$3-5-bill.

[6] *See* Leo Mirani, *500 Million People are Watching Videos of Video Games* QUARTZ (Jul. 9, 2015), https://qz.com/449161/500-million-people-are-watching-videos-of-video-games/.

[7] *See* Jake Muncy, *Why I Watch People Play Videogames on the Internet*, WIRED (Aug. 21, 2016), https://www.wired.com/2016/08/why-i-watch-lets-

Some video game copyright holders claim to own some, or all of the rights to the footage produced by a Let's Player, the same way the rights-holder of a movie or song would if someone else made a copy or a derivative work and published it.[8] This conception of video game copyright protection relies on an understanding of video game content as being equivalent to that of a movie or a song. However, the strength of that position will depend on the level of copyright protection afforded to video games. Furthermore, the legitimacy of a video game copyright holder's assertion of copyright in a Let's Play context will depend on whether a Let's Play is sufficiently "transformative" to qualify as fair use.

There are several elements that may complicate a legal analysis of a Let's Play recording or performance, such as in-game music and extended non-interactive cut-scenes. In addition, the level of interactivity in the game as well as the purpose and function of the recording or performance may lead to different conclusions about whether a specific Let's Play constitutes fair use. The ways in which courts choose to conceptualize video game and Let's Play content will undoubtedly affect the analysis.

I. BACKGROUND AND GAMEPLAY OVERVIEW

The precise origin of Let's Play videos is unclear. People have likely been recording themselves playing video games since video games were introduced to the public. However, mass public consumption of such secondary media is a relatively new phenomenon.[9] The term "Let's Play" was probably first coined in the *Something Awful* forums in the year 2003, but applied to still images with text, and bore little resemblance to what we think of today as a Let's Play.[10] Video game review sites relied on captured

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plays/; *see also* Mijntje Boon, *Let's Plays: Why are They so Popular?*, CREDO MAGAZINE (Jun. 29, 2016), http://www.credomagazine.nl/lets-play/.

[8] *See e.g.*, Chelsea Stark, *Nintendo Will Get Revenue From All YouTube Videos Featuring its IP*, MASHABLE (May 17, 2013), http://mashable.com/2013/05/17/nintendo-youtube/#GwDavkEC_PqX.

[9] *See* Harrison Jacobs, *Here's Why PewDiePie and Other 'Let's Play' YouTube Stars are so Popular*, BUSINESS INSIDER, (May. 31, 2015), http://www.businessinsider.com/why-lets-play-videos-are-so-popular-2015-5.

[10] Patrick Klepek, *Who Invented Let's Play Videos?*, KOTAKU, (May. 6,

video as early as 2001, but the use of video recordings of gameplay footage by amateurs did not become popular until around 2007 when YouTube became more popular.[11] It was around this time that people began posting gameplay clips for entertainment. For example, the "Angry Video Game Nerd" became one of the first YouTube celebrities for videos in which he played particularly frustrating or mediocre games and then commented on them for humorous effect.[12] Others like "JonTron" are cited as being among the first to popularize Let's Plays in the form they exist in today.[13]

When it became clear that people enjoyed watching others play video games as much as they enjoyed playing them, many more YouTube channels dedicated to Let's Play videos sprang up.[14] Today, the most popular Let's Play content creators produce Let's Plays as a career. The YouTube user PewDiePie has by far the most popular channel on YouTube, boasting over sixty-two million subscribers, and the channel is primarily dedicated to Let's Plays.[15] Based on ad revenue his channel brings in, PewDiePie's yearly income is estimated at between $4 and $7 million dollars.[16] Many other prominent YouTube content creators, such as "Angry Joe" and "TotalBiscuit" have millions of subscribers.[17] The popularity of Let's Play videos eventually led to the production of a website in 2011 called Twitch.tv dedicated to live streaming of gameplay

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2015), https://kotaku.com/who-invented-lets-play-videos-1702390484.

[11] *Id.*

[12] James Rolfe, *The Angry Video Game Nerd*, YOUTUBE, https://www.youtube.com/user/JamesNintendoNerd (last visited May 10, 2018).

[13] Jon Jafari, *JonTronShow*, YOUTUBE, https://www.youtube.com/user/JonTronShow (last visited May 10, 2018).

[14] *See supra* note 10.

[15] Felix Kjellberg, *PewDiePie*, YOUTUBE, https://www.youtube.com/user/PewDiePie (last visited May 10, 2018).

[16] Jessica Conditt, *YouTube Star PewDiePie Made $7 Million in 2014*, ENGADGET (Jul. 6, 2015), https://www.engadget.com/2015/07/06/pewdiepie-youtube-star-7-million-dollars/.

[17] Joe Vargas, *The Angry Joe Show*, YOUTUBE (last visited May 10, 2018) https://www.youtube.com/user/AngryJoeShow; John Bain, *TotalBiscuit, The Cynical Brit*, YOUTUBE (last visited May 10, 2018) https://www.youtube.com/user/TotalHalibut (immediately prior to publication of this article, John Bain passed away).

footage.[18] Many YouTube Let's Players maintain both YouTube and Twitch accounts, using Twitch for the livestream, and later uploading the recording to YouTube.[19] The livestream is a more interactive affair for the audience, as Twitch chat allows the audience to chime in and make suggestions, criticize, or encourage the player as they play.[20] Twitch also permits its users to donate money to their favorite streamers.[21]

A. Overview of Gameplay Types

While a Let's Play is, broadly speaking, a video of someone's gameplay experience, there are non-arbitrary ways of differentiating gameplay videos based on function, purpose, and content. For the purpose of legal analysis, understanding the type of Let's Play at issue helps to determine whether the content may be viewed as "transformative," and whether the game has strong underlying copyright protection. In addition, the genre of game and the characteristics of its content may also be relevant. As streaming and publication of gameplay footage continues to gain popularity, it is important to understand these differences.

1. Long Plays and Walk Throughs

A "long play," is a video of a complete gameplay experience from beginning to end.[22] Their purpose is to capture everything the game has to offer for the purpose of entertainment, preservation, or providing helpful information to potential players interested in completing the game.[23] Though player input will always be unique,

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[18] *See* Alex Wilhelm, *TwitchTV: Justin.tv's Killer new Esports Project*, TNW (Jun. 6, 2011), https://thenextweb.com/media/2011/06/06/twitchtv-justin-tvs-killer-new-esports-project/.

[19] *See e.g.*, Octavian Morosan, *Kripparian*, TWITCH, https://www.twitch.tv/nl_kripp (last visited May 10, 2018).

[20] TWITCH, www.twitch.tv (last visited May 10, 2018).

[21] *See* Brad Stephenson, *How to set up Donations on Twitch*, LIFEWIRE (Apr. 10, 2018), https://www.lifewire.com/set-up-donations-on-twitch-4150141.

[22] WORLD OF LONGPLAYS, http://www.longplays.org/news.php (last visited May 10, 2018).

[23] *Id.*

there is typically nothing that occurs in a long play that goes beyond what the game designer intended. Consistent with its purposes, a long play does not generally contain commentary; instead, capturing as pure a gameplay experience as possible.

Video walkthroughs can appear similar to long plays, but are produced for the purpose of helping other players learn how to complete a game.[24] For example, players may consult a video walkthrough when they find themselves unable to clear a particularly difficult section of a game. A walkthrough may include commentary aimed at assisting players, but in most cases the visuals convey the necessary information. While it is possible for people to watch walkthroughs as entertainment, their primary purpose is to provide useful information to players.

2. Speedruns

A "speedrun" is an attempt by the player (the "runner") to finish a game under various conditions as fast as possible.[25] Speedrunning has a competitive element, as runners attempt to set speed records for whatever category they are running.[26] Speedrunners often stream live, accept donations, and monetize their videos on YouTube. One popular organization of speedrunners, "Awesome Games Done Quick," conducts bi-annual speedruns streamed live for charity and has raised over $14 million dollars to date.[27]

Unless prohibited by agreement, runners often make use of glitches and other exploits not intended by game designers to improve their clear time.[28] So long as a glitch is exploitable within the game's code, requiring no outside intervention, it is usually fair game. In addition to witnessing the skill of the runner, seeing players expertly exploit glitches is part of the appeal of watching speedruns,

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[24] Jordan Maison, *How Walkthrough Videos Can Grow Your Gaming Channel*, YOUTUBER MAGAZINE (Jun. 1, 2017), https://youtubermagazine.com/how-walkthrough-videos-can-grow-your-gaming-channel-e4d66e4e6c46.

[25] SPEEDRUNSLIVE, *Frequently Asked Questions*, http://www.speedrunslive.com/faq/ (last visited May 9, 2018).

[26] *Id.*

[27] GAMES DONE QUICK, https://gamesdonequick.com/ (last visited Apr. 22, 2018).

[28] *See supra* note 25.

as glitches can produce spectacular and bizarre results.[29]

Each game will usually have several categories of speedrun agreed upon by the gaming community which a runner may attempt.[30] For example, in an "any percent run," the runner is typically free to use warps, glitches, and sequence breaks to improve their clear time. In a "glitchless" run, the runner is prohibited from making use of such glitches. A 100 percent run might require that all levels be completed, or all items collected without skips.[31] At the highest levels, speedruns begin to closely resemble one another as the fastest methods of clearing a game under the various categories become known.[32] Recordings and performances of highly optimized speedruns will differ only slightly depending on how well executed the runs are.[33] The emphasis on technical execution rather than on individual or artistic input from the players, in addition to frequent monetization, will have implications for fair use analysis.[34]

3. Conventional Let's Plays

The most prominent type of Let's Play video is one in which a gamer emulates the experience of playing a game in front of friends for the benefit of an audience. However, instead of one or two friends on a couch, a Let's Player may be playing for an audience of thousands or even millions. This type of Let's Play is subject to wide variability, depending on the player.[35] An audience may watch a

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[29] ZFG, *AGDQ 2016 - Legend of Zelda: Ocarina of Time Glitch Exhibition* YOUTUBE (Jan. 12, 2016) https://www.youtube.com/watch?v=YrlqoGO2-BE.

[30] *See* Rami Ismail, *If Esports are the Sports of Video Games, This is the Parkour*, ROLLING STONE (Feb. 5, 2018), https://www.rollingstone.com/glixel/features/rami-ismail-speedrunning-w516376

[31] SpeedRunsLive, *Speedrunning Glossary*, www.speedrunslive.com/faq/glossary (last visited May 9, 2018).

[32] *See* Jake Swearingen, *The Decade-Long Struggle to Shave Seconds off Super Mario Bros. Speedruns*, NYMAG.COM (Jan. 19, 2017), http://nymag.com/selectall/2017/01/the-12-year-struggle-to-shave-seconds-from-a-mario-speedrun.html.

[33] *Id.*

[34] *See* discussion *infra* Part IV.

[35] *See* Jubilee Pham Xuan, *Let's Talk 'Let's Play': Why People Would Rather not Play Video Games*, ODYSSEY (Feb. 2, 2016), https://www.theodysseyonline.com/lets-talk-lets-play-why-people-would-rather-

player because they are charismatic, amusing, or skillful.[36] They may watch videos of a game or genre of game because they find it interesting, entertaining, or helpful.[37] A Let's Player may view themselves as an entertainer, a commentator, or a critic.[38] While the genre is not defined by commentary, Let's Play videos and streams typically include commentary by the player.[39]

4. E-Sports

E-sports have notably become more prominent and lucrative in the last few years.[40] Recognizing the growing audience and lucrative potential already present in large video game tournaments like EVO, DOTA2 and the League of Legends Championships, corporations like ESPN have begun reporting on and showcasing e-sports.[41] E-Sports videos typically display matches between two or more players in head-to-head competition. The entertainment purpose in displaying such matches is clear, and competition between players is certainly anticipated by game publishers, though unsanctioned public exhibition may not be.

The competitive scene has the potential to come into conflict with claims of copyright infringement in much the same way as conventional Let's Plays and speedruns. In such cases, the third-party publishing the recording or stream would be the potential primary infringer rather than the players. For example, in 2013 Nintendo asserted its copyright over the game *Super Smash Bros. Melee* against the EVO Fighting Games Championships, not only in an effort to block the competition organizers from streaming matches, but also to block EVO from using the game in their

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not-play-video-games.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Global Esports Market Report: Revenues to Jump to $463M in 2016 as US Leads the Way*, NEWZOO (Jan. 25, 2016) https://newzoo.com/insights/articles/global-esports-market-report-revenues-to-jump-to-463-million-in-2016-as-us-leads-the-way/.

[41] Matt Peckham, *Why ESPN is so Serious About Covering Esports*, TIME (Jan. 2, 2017) http://time.com/4241977/espn-esports/.

competition at all.[42] In the face of public criticism, Nintendo ultimately relented and permitted the competition to move forward.[43] As above with speedruns, the emphasis on technical execution in the e-sports context may impact a fair use analysis.

B. Video Game Interactivity

The level of interactivity present in any particular video game varies. On the low end of the interactivity scale, there are games which function as interactive stories with minimal player input. Examples include the recent Telltale *Game of Thrones* and *Batman* games.[44] In these games, players make choices, which determine how a story unfolds, but do not otherwise affect what appears on screen.

On the other end of the spectrum are games that invite players to be creative. Examples are games like *Mario Paint*, *Super Mario Maker*, and *Minecraft*.[45] These games give the player the tools with which to create and alter their own renderings or environments. As an analogy, the game developer has given the player a palette and tools to produce their own unique works. *Minecraft* is interesting for another reason, in that the worlds in which the player is empowered to build are produced procedurally by a computer, meaning that the designers themselves are unaware of the details of any individual

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[42] *See* Jenna Pitcher, *Nintendo Wanted to Shut Down Super Smash Bros. Melee Evo Event, Not Just Stream*, POLYGON (Jul. 11, 2013) http://www.polygon.com/2013/7/11/4513294/nintendo-were-trying-to-shut-down-evo-not-just-super-smash-bros-melee.

[43] *See* Inkblot, *Update: Smash is Back!! Changes to Evo 2013 Smash Schedule*, SRK (Jul. 9, 2013) http://shoryuken.com/2013/07/09/changes-to-evo-2013-smash-schedule/.

[44] *See* Jody Macgregor, *Telltale's Choices Aren't About Plot, but Something More Significant*, PC GAMER (Jul. 13, 2015), https://www.pcgamer.com/telltales-choices-arent-about-plot-but-something-more-significant/.

[45] *See* Derrik Lang, *Super Mario Maker Invites Players to Create Their own Levels*, THE CHRONICLE HERALD, (Sep. 10, 2015) http://thechronicleherald.ca/artslife/1310277-super-mario-maker-invites-players-to-create-their-own-level; *see also* Cathy Pryor, *Minecraft and Lego: the Building Blocks of Creativity?*, ABC (Nov. 30, 2015), http://www.abc.net.au/radionational/programs/blueprintforliving/minecraft-and-lego:-building-blocks-of-creativity/6070176.

player's game environment.[46]

Most games lie somewhere in between these extremes. They can range from simple puzzle-type games in which players manipulate two-dimensional objects on a single screen, like *Tetris* or *Bejeweled*, to complex 3-D games involving player avatars and pre-built worlds. Generally, the more complex a game is, the greater the range of potential options available to a gamer. While developers do not anticipate any exact set of inputs, generalized input patterns are anticipated and required for players to progress through the game.

II. COPYRIGHT LAW AND ENFORCEMENT

A. Fair Use and the DMCA

The U.S. Copyright statute provides that the publishing of copyrighted materials in certain circumstances determined to be "fair use" is not an infringement of copyright.[47] The statute states the following:

> The fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including

[46] *See* Jon Fingas, *Here's How Minecraft Creates its Gigantic Worlds*, ENGADGET, (Mar. 4, 2015) https://www.engadget.com/2015/03/04/how-minecraft-worlds-are-made/.

[47] It is a matter of debate whether fair use ought to be treated as an affirmative defense, being an exception to a violation of applicable copyright law, or whether conduct falling under fair use is not a violation of the statute. The view currently expressed by the Supreme Court in dicta, that fair use is an affirmative defense, is not obvious from the text of the statute. Because of this, some circuit courts have departed from the dicta of the Supreme Court. *See*, *e.g.*, Lenz v. Universal Music Corp., 815 F.3d 1145, 1152 (9th Cir. 2016).

> whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.[48]

The United States Supreme Court holds that all four of these factors must be considered together in light of the purposes of copyright law when determining whether the use of copyrighted material constitutes "fair use."[49] "[A]s we apply copyright law, and the fair use doctrine in particular, we bear in mind its purpose to encourage "creative activity" for the public good."[50]

Congress passed the Digital Millennium Copyright Act ("DMCA") into law in 1998 to update copyright laws such that they adequately cover emerging technology.[51] The DMCA permits copyright holders to issue takedown notices to internet websites hosting copyrighted material under certain conditions.[52] Among these conditions is that the copyright holder first make a good faith effort to determine whether the content in question is "fair use." Failure to do so results in a violation of the DMCA.[53] It is through the DMCA notice and takedown procedures that companies can assert their copyrights with regard to Let's Play content on video hosting sites such as YouTube and Twitch.

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[48] 17 U.S.C. § 107 (2012).

[49] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

[50] Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 342 F.3d 191, 198 (3d Cir. 2003).

[51] The Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

[52] 17 U.S.C. § 512(c)(3) (2012).

[53] *See* Lenz v. Universal Music Corp., 801 F.3d 1126, 1130 (9th Cir. 2015).

B. Videogame Producer Actions Against Let's Plays

YouTube makes use of a Content ID matching system to monetize or remove potentially infringing material from its website.[54] The system allows copyright holders to upload visuals or music to a database.[55] When a YouTube user uploads a video, the content is checked against the database; if there is a match, the copyright holder determines what happens next.[56] A content match can result in immediate takedown of the potentially infringing video, monetization in the form of ads on the video for the benefit of the copyright holder, or portions of the video being muted or censored.[57] The process happens automatically, with no requirement that any person actually review the potentially infringing material before sanctions are implemented. Despite the DMCA's requirement that a good faith effort be made to determine whether potentially infringing material is fair use[58], the courts have ruled that algorithmic takedown processes are legally permissible.[59]

YouTube content creators whose videos are claimed can undertake a lengthy appeal process to have their video reinstated.[60] However, the process undoubtedly favors the claimant. The appeal is never seen by a third party, but simply goes to the copyright claimant for reconsideration. If the appeal is rejected, the content creator can appeal again; but if the appeal is rejected for a second time, it results in a copyright strike against the creator's channel.[61]

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[54] *See* YouTube Help, *How Content ID Works*, YOUTUBE, https://support.google.com/youtube/answer/2797370?hl=en (last visited May 10, 2018).

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *See Lenz*, 801 F.3d at 1158.

[59] *See* Disney Enterprises, Inc. v. Hotfile Corp. *et al.,* No. 11-20427-CIV, 2013 U.S. Dist. LEXIS 172339, 2013 WL 6336286, at *47 (S.D. Fla. Sept. 20, 2013).

[60] *See* YouTube Help, *What is a Content ID Claim?*, YOUTUBE, https://support.google.com/youtube/answer/6013276?hl=en (last visited May 10, 2018).

[61] *See* YouTube Help, *Dispute a Content ID Claim*, YOUTUBE https://support.google.com/youtube/answer/2797454?hl=en (last visited May. 10, 2018).

Copyright strikes can have a serious impact on a user's channel and depending on its popularity, the user's bottom line.[62]

Nintendo is one of the most aggressive video game publishers when it comes to asserting its copyright over Let's Players.[63] Nintendo makes use of YouTube's ContentID system and automatically monetizes the videos of anyone who makes use of their content, resulting in Nintendo receiving all of the advertising proceeds.[64] For this reason, many prominent YouTube content creators refrain from posting any videos of Nintendo content.[65] In response to public criticism, Nintendo instituted the Nintendo Creator's Program, which purports to share advertising revenues legally entitled to the copyright holder to those that sign up.[66] Taking part in the program is subject to many restrictions, including a prohibition on using any content outside of a specified list of games published by Nintendo.[67] Given Nintendo's assertiveness with regard to its legal position, their corporate policy or one like it is fertile ground for a legal dispute.

III. VIDEO GAMES AND COPYRIGHT

A. The Nature of Video Game Content

Video games incorporate digital assets including artwork, trademarks, software code, music, voice acting, and animated cut-

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[62] *See* YouTube Help, *Copyright Strike Basics*, YOUTUBE, https://support.google.com/youtube/answer/2814000?hl=en (last visited May 10, 2018).

[63] *See* Anthony Labella, *Nintendo Continues to Hate YouTube*, GAMEREVOLUTION (Sep. 10, 2015), http://www.gamerevolution.com/features/nintendo-continues-to-hate-youtube.

[64] *See* Chris Kohler, *Why Does Nintendo Want This Superfan's Money?*, WIRED (Mar 27, 2015), https://www.wired.com/2015/03/nintendo-youtube-creators/.

[65] *See* Owen S. Good, *YouTuber Says Enough is Enough; He Won't do Anymore Nintendo Videos (Update)*, POLYGON (Jan. 2, 2017), http://www.polygon.com/2015/4/4/8344341/angry-joe-nintendo-takedown-mario-party.

[66] *See About the Nintendo Creator's Program*, NINTENDO, https://r.ncp.nintendo.net/guide/ (last visited May 2, 2018).

[67] *See List of Supported Games*, NINTENDO, https://r.ncp.nintendo.net/whitelist/ (last visited May 2, 2018).

scenes into a final playable product. Unlike other forms of media, full realization of the value and character of video games is entirely dependent on the unique input of individual players. Such input is anticipated by the game designer and is typically required for the story or progression of the game. Video games could be analogized to board games, in which the pieces are all included, and the input of the player dictates the progression of the game. However, the audiovisual component of video games, as well as the repeatability of in-game sounds and images under certain conditions may provide a basis for copyright protection. In addition to the audiovisual display, the "performance" of a video game could also provide a basis for copyright protection, just as it does with other performative works.

B. Video Game Output and Recordings

Many companies, including Nintendo, currently assert that they own the *product* of the interaction between the player and the digital assets as though they produced that product.[68] This conclusion is based on the notion that the audiovisual content of a game display, including displays created by players during gameplay, is wholly owned by the game's copyright holder. Case law suggests that a video game's audiovisual "fixed" content could in principle be copyright protected.[69] A fixed product is something that takes a final form, such as a recording, and doesn't change. A Let's Player, by making a recording of their gameplay experience is undoubtedly "fixing" that content. The copyrightability of such fixed content will, however, still depend on whether the underlying video output or gameplay performance is subject to copyright protection.

For the most part, the audiovisual display in recorded videogame content will almost always be unique due to the input of the player. Every minor decision a player makes contributes to a different audiovisual experience. Even absent any form of commentary or

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[68] *See* Brian (@NE_Brian), *Nintendo Responds to Concerns Over YouTube "Let's Play" Content Claims*, NINTENDO EVERYTHING (May 15, 2013), http://nintendoeverything.com/nintendo-responds-to-concerns-over-youtube-lets-play-content-claims/.

[69] *See* Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965 (9th Cir. 1992).

alteration of the audiovisual content, a Let's Play video will likely be totally unique. This makes it different from a copy of a music or song where the copyrighted material is a specific sequence of sounds or images. Nevertheless, the individual elements making up the game's audiovisual display exist in the game's code.

The law provides copyright protection for audiovisual content. Section 101 of the Copyright Act defines "audiovisual works" entitled to copyright protection as "works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices . . . together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied."[70]

In *Stern Elecs., Inc. v. Kaufman*, the Second Circuit held that copyrightability extends even to the audiovisual display resulting from interactions between the game code and the player. While acknowledging that a gameplay experience is not fixed in a conventional sense, "[t]he repetitive sequence of a substantial portion of the sights and sounds of the game qualifies for copyright protection as an audiovisual work."[71] Exactly how repetitive or substantial audiovisual sequences must be to qualify for copyrightability was not specified.

In *Midway Mfg. Co. v. Artic Int'l, Inc.*, the Seventh Circuit further elaborated on why copyright protection for the audiovisual output of video games is appropriate.[72] The Court first acknowledged two difficulties with attempting to include video games under the definition of audiovisual works: First, that "series of related images" as defined under the Statute, may be interpreted to refer "only to a set of images displayed in a fixed sequence."[73] Construed this way, videogames would not qualify as audiovisual works because a different sequence of images appears on screen each time the game is played.

The second difficulty identified by the *Midway* court is that the display of the arrangement of the digital assets stored within a game's code is in the control of the player:

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[70] 17 U.S.C. § 101 (2012).
[71] Stern Elecs., Inc. v. Kaufman, 669 F.2d 852, 856 (2nd Cir. 1982).
[72] *See* Midway Mfg. Co. v. Artic Int'l Inc., 704 F.2d 1009 (7th Cir. 1983).
[73] *Id.* at 1011.

> [T]he person can vary the order in which the stored images appear on the screen by moving the machine's control lever. That makes playing video games a little like arranging words in a dictionary into sentences or paints on a palette into a painting. The question is whether the creative effort in playing a video game is enough like writing or painting to make each performance of a video game the work of the player and not the game's inventor.[74]

The court ultimately concluded that, despite these difficulties, video game content is copyrightable.[75] The court reasoned that video game output was more akin to that of a television viewer pressing buttons on a remote control than it is like creative output.[76] Furthermore, the control that a player exercises in playing a game is somewhat illusory, as it is still dictated by the game's code. "He is unlike the writer or a painter because the video game in effect writes the sentences and paints the painting for him; he merely chooses one of the sentences stored in its memory, one of the paintings stored in its collection."[77]

These cases were decided when video games were still in their infancy. Along with technological advancements, the range of options available to a player in most games today is much greater than what existed in 1983. Thus, it is harder to argue that every specific combination of gameplay choices was necessarily anticipated by the creator, or that it is limited by the game's code in a legally relevant way. Furthermore, games in which assets are provided to the player for the purpose of creative activity, as well as games involving procedurally generated worlds displaying content that cannot have been anticipated by the game designer, cut against the reasoning underlying these holdings.

Regardless of where and how the line is to be drawn, video game developers are likely entitled to some degree of protection over the audiovisual content resulting from gameplay, and therefore have a copyright interest in the repurposing of that content. The primary

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[74] *Id.*
[75] *Id.* at 1011–12.
[76] *Id.* at 1012.
[77] *Id.* at 1013.

legal battleground is therefore to be fought over whether Let's Play output, videos, and performances qualify as fair use of that copyrighted material.

C. Video games as public performance

In addition to protecting copyright holders of "audiovisual works" from the repurposing or display of their content, the Federal Copyright Statute also grants the exclusive right to public performances of copyrighted material.[78] In the context of a protected work, the statute defines "perform" as "to recite, render, play, dance or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible."[79] The statute goes on to state that the definition of "public performance" includes " [the transmission of] a performance or display of the work to a place specified . . . or to the public, by means of a device or process, whether the members of the public capable of receiving the performance or display received it in the same place or in separate places and at the same time or at different times."[80]

The application of public performance copyright to the "performance" of video games is not immediately clear. Nevertheless, the use of the term "play" in the definition of "performance" could mean that the statute reaches the playing of games. However, in *Allen v. Academic Games League of Am.*, the Ninth Circuit held that the word "play" as referenced in the statute, "has generally been limited to instances of playing music or records."[81] *Allen* involved the assertion of copyright by a board game manufacturer over the public playing of their games at non-profit academic tournaments.[82] The court declined to extend copyright protection to the public performances of board games,[83]

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[78] *See* 17 U.S.C. § 106(4) (2012).

[79] 17 U.S.C. § 101 (2012).

[80] 17 U.S.C. § 101(2) (2012)

[81] Allen v. Academic Games League of Am. Inc., 89 F.3d 614, 616 (9th Cir. 1996).

[82] *Id.* at 615.

[83] *Id.* at 616.

holding that "[t]o do so would mean interpreting the Copyright Act in a manner that would allow the owner of a copyright in a game to control when and where purchasers of games may play the games and this court will not place such an undue restraint on consumers."[84] The court went on to opine that whether in public or in private, "games are meant to be played," suggesting that the fundamental nature and purpose of games was relevant to their determination.[85]

The *Allen* court noted that even if the playing of a game could be classified as a public performance under copyright law, the "performance" of the games by tournament organizers would constitute fair use.[86] This conclusion was based on the non-profit status of the tournament, and the fact that the tournament likely had a positive impact on the market for the games, rather than a negative one.[87]

While on its surface the *Allen* decision would appear to apply to video games in a straightforward manner, the court in *Allen* cited to a case out of the Fourth Circuit reaching a contrary conclusion in the case of coin-operated arcade games.[88] In *Red Baron-Franklin Park, Inc. v. Taito Corp.*, the court found a video game's status as an audio-visual work involving a "sequence of images" to be the primary determining factor bringing the playing of a video game under the definition of "performance" under the Copyright Statute.

> [T]he exact order of images will vary somewhat each time a video game is played depending on the skill of the player, but there will always be a *sequence* of images . . . [w]e therefore conclude that the operation of a video game constitutes a performance as that term is defined in § 101.[89]

Since *Allen* did not involve video games, the court did not directly engage with the justification made by the court in *Red Baron*, except

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[84] *Id.*
[85] *Id.*
[86] *See id.*at 617.
[87] *Id.*
[88] *Id.* at 616.
[89] Red Baron-Franklin Park, Inc. v. Taito Corp., 883 F.2d 275, 279 (4th Cir. 1989).

to note the case as contrary authority. The sweeping language in *Allen*, however, appears to apply to video games as well as to board games.

Despite the clear conflict between these two cases, at least one district court in the Ninth Circuit sought to resolve the tension by essentially rejecting the reasoning used in *Allen*. In *Valve Corp. v. Sierra Entm't Inc*., the District Court for the Western District of Washington reinterpreted the *Allen* conclusion, finding that it was not in fact inconsistent with *Red Baron*.[90] The court ruled that "*[Allen]* held that whether the performance is fee-based is an important factor in determining whether the performance is public."[91] Of course, *Allen* held no such thing. The focus on the tournament's non-profit status in *Allen* was relevant only to the question of whether the "performance" was fair use. Further, what was at issue in *Allen* was whether the playing of a game constituted a "performance" at all, not whether it was public. Therefore, the *Valve Corp.* court's interpretation of the *Allen* holding is wrong twice. *Valve Corp.* also implies that *Allen*'s citation of *Red Baron* suggests agreement, neglecting to mention that it was cited as contrary authority.[92]

In the wake of *Red Baron*, Congress amended Section 109 to specifically permit "public performances" on arcade machines.[93] While essentially overturning the outcome of *Red Baron*, it did so without contradicting *Red Baron*'s conclusion that the playing of video games in public constitutes a public performance. Both *Red Baron* and *Allen* provide a plausible basis for argument on either side of the video game performance copyrightability divide. The courts will have to decide whether audiovisual content is a significant enough distinguishing factor to overcome the video game's status as a game, the purpose of which is to be played, as the most important variable in deciding whether the copyright statute protects against public gameplay.

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[90] *See* Valve Corp. v. Sierra Entm't Inc., 431 F. Supp. 2d 1091, 1097 (W.D. Wash. 2004).

[91] *Id.*

[92] *Id.*

[93] 17 U.S.C. § 109(e) (2012).

IV. THE PRINCIPLES OF FAIR USE APPLIED TO LET'S PLAYS

One reason that Let's Play videos represent an extreme test of copyright principles is that, assuming copyright applies to the product of video game output, many of the fair use factors are pushed to their limit. First, fair use above all requires that its purpose be one "such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."[94] This is not necessarily an exhaustive list, nor does it preclude a content creator from producing content for the purpose of monetary gain. Nevertheless, many Let's Plays would fall under one or more of these purposes. Most Let's Plays involve commentary of some kind, and many can also be said to be for purposes of teaching and criticism. Let's Play consumers will commonly cite all three of these purposes as a reason for watching, in addition to entertainment value.[95]

1. Purpose and Character of the Use

Whether a work containing copyrighted material is being produced for monetary gain is a relevant but not necessarily dispositive question in determining whether a work qualifies as fair use. In the case of Let's Plays, many prominent YouTube content producers publish their content as a career. Whether that content is monetized on YouTube through the running of ads, or by donations through Twitch or Patreon, Let's Plays can be a lucrative business. Nevertheless, a Let's Play need not necessarily be produced for monetary gain. There are many examples of Let's Play videos that are not monetized. It is important to note that companies such as Nintendo will make copyright claims against YouTube content producers who publish Let's Plays using their games regardless of whether that content is monetized or not.[96]

Although the use of copyrighted material for monetary purpose

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[94] 17 U.S.C. § 107 (2012).

[95] *See* Muncy, *supra* note 7; *see also* Boon, *supra* note 7.

[96] *See* Oria Madden, *Nintendo Claiming Ad Revenue on YouTube User-Generated Gameplay Videos*, NINTENDOLIFE (May 16, 2013), www.nintendolife.com/news/2013/05/nintendo_claiming_ad_revenue_on_youtube_user_generated_gameplay_videos.

invites heightened scrutiny from the court, such use is not dispositive in determining whether "purpose and character" weighs against the potential infringer.

> The commercial nature of the use does not by itself . . . determine whether the purpose and character of the use weigh for or against finding fair use. We look as well to any difference in character and purpose between the new use and the original. We consider whether the copy is "transformative" of the work it copied because it altered the first with new expression, meaning, or message.[97]

As noted by the *Allen* court, the purpose of a game is to be played. A Let's Play however, may have several different purposes, such as entertainment, education, ridicule, or criticism. The context in which Let's Plays are consumed indicates an altered purpose from the original to the new use.

The reference to "transformative" use, as quoted by the Third Circuit above, comes from the Supreme Court in *Campbell v. Acuff-Rose Music Inc*. In that case, the Court spoke of the transformative character of a use as having a bearing on the manner in which all four fair use factors are to be applied.[98] The Court held that "the nature of parody," which was at issue in that case, required the fair use factors be weighed with the parodic character of the use taken into consideration.[99]

> [T]he goal of copyright . . . is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright[.] . . . [T]he more transformative the work, the less will be the significance of other factors . . .

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[97] Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 342 F.3d 191, 198 (3d Cir. 2003).

[98] *Id.*

[99] *Id.* at 588.

that may weigh against a finding of fair use.[100]

Circuit courts disagree over what precisely qualifies a use as transformative and the degree to which the transformative use weighs against the other statutory factors.[101] One side of the split takes a broad view of Campbell's "transformative" consideration, finding that a use of copyrighted material need only be for a new purpose distinct from the original to qualify as transformative. For example, in *Authors Guild v. Google, Inc.*, the Second Circuit held that Google's commercial activity of making digital copies of copywritten books without the authors' consent was "highly transformative" because the new purpose for which the copyrighted material was being used was to "enabl[e] a search for identification of books containing a term of interest."[102] The Supreme Court recently declined to take up the matter on appeal.[103] Cases coming out of the Fourth and Ninth Circuits take a similarly expansive view.[104]

The narrower application of *Campbell* takes the view that for a use to be transformative it must add some new meaning or expression to the original. For example, the Third Circuit held as such in *Video Pipeline v. Buena Vista Home Entertainment*, stating that "no added creative activity reveals a dearth of transformative character."[105] In that case, a company had compiled two-minute preview clips of copyrighted films and made them available online. The company argued that the video clips were not being displayed for aesthetic or entertainment purposes, as was the intent of the source videos, but rather, for providing consumers with information about the films.[106] The court held that the "absence of creative ingenuity" meant the clips lacked any "significant transformative

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[100] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1993).

[101] *See* Keinitz v. Sconnie Nation LLC, 766 F.3d 756, 758 (7th Cir. 2014) (expressing skepticism of the Second Circuit's application of *Campbell*.)

[102] Authors Guild v. Google, Inc., 804 F.3d 202, 216 (2nd Cir. 2015).

[103] *See* Authors Guild v. Google, Inc., 136 S. Ct. 1658 (2016).

[104] *See*, *e.g.*, A.V. ex rel Vanderhye v. iParadigms LLC, 562 F.3d 630, 639 (4th Cir. 2009); Kelly v. Arriba Soft Corp., 336 F.3d 811, 818 (9th Cir. 2003).

[105] Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc. 342 F.3d 191, 200 (3d Cir. 2003).

[106] *Id.* at 198.

quality."[107] The Sixth and Eleventh Circuits take a similar approach to that of *Video Pipeline*.[108]

As for what qualifies as "new meaning or expression," the Second Circuit has explicitly rejected the requirement that a fair use defense "must comment on, relate to the historical context of, or critically refer back to the original works."[109] Instead, the Court held that "[t]he law imposes no requirement that a work comment on the original or its author in order to be considered transformative, and a secondary work may constitute a fair use even if it serves some purpose other than those . . . identified in the preamble to the statute."[110] In *Cariou v. Prince*, the court found that making a collage consisting of copyrighted art was transformative of the original art, even though the artist making the collage did not intend to satirize, parody, or convey any particular message.[111] The Second Circuit nevertheless found "new expression" in the arrangement of the images. In addressing the *Cariou* decision specifically, The Seventh Circuit has questioned how such re-purposing can be principally distinguished from derivative works.[112]

How a court views the *Campbell* considerations could substantially impact whether gameplay is considered transformative. Even though fair use may not cover those who seek to emulate game code in most circumstances, the character of gameplay as a collaborative interaction between software and player could mean that gameplay "performances" are in some way intrinsically transformative. Could the character of video game content justify special consideration the same way that parody does?

The view that Let's Plays by their nature may be viewed as essentially transformative is consistent with the intrinsic tension of copyright protection—promoting the creative use of such assets by content creators, while protecting the rights of video game producers against those who might pirate their work. Unlike a movie or a song,

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[107] *Id.* at 200.

[108] *See* Princeton University Press v. Michigan Documents Service, Inc., 99 F.3d 1381 (6th Cir. 1996); Cambridge University Press v. Patton, 769 F.3d 1232 (11th Cir. 2014).

[109] Cariou v. Prince, 714 F.3d 694, 706 (2013).

[110] *Id.*

[111] *Id.* at 707.

[112] *See* Keinitz v. Sconnie Nation LLC, 766 F.3d 756, 758 (7th Cir. 2014).

the consumer is not meant to sit passively while the game operates. A video of an un-played video game is an uninteresting thing. Understanding that video games alone do not create audiovisual output is critical to a principled fair use analysis consistent with the purpose of copyright. The essential nature of a video game in producing unique audiovisual content, even while recognizing its status as entitled to copyright protection, should weigh heavily in favor of fair use.

Remembering that the purpose of copyright law is to promote creative activity, courts must ask whether creative activity would be stifled by the assertion of copyright protection in the case of Let's Plays, speedruns, or competitive e-sports. But if every gameplay experience is unique and "transformative" of the original, then this portion of the analysis must weigh in favor of the player regardless of whether commentary, editing, criticism, or any other content is added. The addition of commentary, a prominent feature of most Let's Play videos, should make the argument in favor of fair use that much more persuasive as a "transformative" work since it unquestionably adds the "creative" element that both sides of the circuit split acknowledge as transformative.

It is not always easy to identify when something involves creativity. Some sports, such as figure skating and gymnastics, combine technical and artistic elements. Thus, a gamer's efforts to rack up points or complete a game quickly may lack the sort of creative content at least one side of the circuit split is looking for to make the use transformative. Nevertheless, there are some games for which the creativity of the player is the core of the game's purpose. Even absent commentary, the performances and creations of such a game's users would seem to qualify as transformative under even the narrowest interpretation of *Campbell*.

2. The Nature of the Copyrighted Work

When courts have analyzed the "nature" of the unauthorized work being used, they have looked to whether the work is fiction, and whether it is published. Those works that are fictional or unpublished are "closer to the core of intended copyright

protection."[113] The Supreme Court has held that creative work typically meets this criterion whether it is published or not,[114] and video games are certainly creative works. As such, the "nature" prong of fair use analysis is easily met, and cuts against fair use.

3. Amount and Substantiality of the Portion Used in Relation to the Whole

The factor that has the most potential to weigh against a Let's Player is the sheer amount of content they typically make use of. Often, a Let's Player will record hours of video game content, sometimes the entire course of the game.[115] The use of such large amounts of content are an inherent part of a Let's Play video, as it is consumed by people who want to see a game played. Substantiality is not simply a redundant reference to quantity, but also requires an evaluation of the quality of the material used.[116]

The Supreme Court found in *Campbell* that the character of a parodic song may permit the parodist to fairly use more substantial portions of a popular song than might otherwise be permitted in other cases.[117] While specific to parody, the Court seemed to be acknowledging that factors such as amount and substantiality ought not be analyzed in a vacuum, but with reference to the character or purpose of the use itself. This is consistent with the Court's general requirement that the four factors be analyzed together, and with the purpose of copyright law in mind. If playing a game is understood to be transformative, then the amount of gameplay footage captured is ultimately irrelevant because it is a unique work.

One issue that might also arise relates to the "substantiality" of the used portion of gameplay. Modern video games incorporate storytelling techniques similar to that of movies or television shows.

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[113] Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc. 342 F.3d 191, 200 (3d Cir. 2003).

[114] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1993).

[115] *See, e.g.*, The Impartialist, *Let's Play Halo Co-op Marathon! Halo 2 Full Playthrough Gameplay (stream)*, (Oct. 8, 2016) https://www.youtube.com/watch?v=PvtLfFlYi_g.

[116] *See Campbell*, 510 U.S. at 587.

[117] *Id.* at 588.

A video game copyright holder may argue that a gamer who plays through certain portions of the video game exposes to potential consumers "the heart" of the work. The Court notes that even a short portion of a work may be more qualitatively significant than a long portion depending on the context.[118] A conception of a video game output that analogizes it to a movie or a novel is likely to lead a court to consider the exhibition of certain story elements as weighing against fair use. The more a game resembles a movie, the stronger this argument will be. A hypothetical game with very little interactivity, perhaps requiring only binary inputs in a branching story with multiple endings would have a strong argument in this regard, though it's questionable whether such software would qualify as a game at all. It is safe to say that a game's overarching story is, at least for now, typically supplementary—not core—to most gameplay experiences; however, it is possible that extended cut-scenes with little or no interactivity complicate the analysis.

4. Effect on the Potential Market for or Value of the Copyrighted Work

As the Court noted in *Campbell*, the elements affecting the analysis of the third factor also have bearing on the fourth. "A work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original."[119] It is not enough to simply posit that a use will produce economic harm to the copyright holder to render it unfair, as only certain types of harm are legally considerable. "When a lethal parody, like a scathing theater review, kills demand for the original, it does not produce harm cognizable under the Copyright Act . . . the role of the courts is to distinguish between biting criticism that merely suppresses demand and copyright infringement, which usurps it."[120] Let's Players who criticize the games they stream may undoubtedly produce economic harm to the video game creator, but this is not the kind of harm that copyright protects against. Instead, the video game rights holder must argue that the Let's Play video or performance takes the place

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[118] Harper & Row v. Nation Enters., 471 U.S. 539, 564–66 (1985).
[119] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 588–589 (1993).
[120] *Id.* at 591–92.

of the video game to the average consumer. In other words, that people will refrain from purchasing the game if they can just watch someone else play it. This is why a rights holder might rely on the argument that the spoiling of story elements in gameplay videos might prevent potential purchasers from buying the game, because they can just watch the story unfold online.

Whether a Let's Play video or stream can be viewed as usurping the potential market for a protected derivative work may depend on whether the video game creator is likely to produce such a derivative work or license others to do so.[121] Once again however, a showing of harm is not enough unless the Let's Play is likely to be a substitution for a derivative work.[122] Even if it were likely that video game creators did intend to license others to produce Let's Plays, as Nintendo appears to be attempting with its content creator's program, it is not clear that such derivative works would be substitutionary. If every Let's Play is unique due to the combination of a player's idiosyncratic inputs along with their commentary or criticism, this may be enough to find that it is not a market substitute. Especially given that an independent Let's Player is free to criticize the game as they play, expose flaws, exploit glitches, engage in edgy humor, or discuss unrelated topics of the day. A non-independent, corporate-sponsored, official Let's Player would be unlikely to have the freedom to criticize or satirize the content. If a video game rights holder is also claiming that Let's Plays are diminishing the value of the original product, this would also seem to undermine any claim that the company intends to produce or license such derivative works.

In the end, it is a question of fact whether a Let's Play is likely to injure the market for the copyrighted work. While there will undoubtedly be arguments on both sides, there is substantial evidence that Let's Plays actually increase video games sales—particularly with smaller, lesser-known games.[123] This is why most

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[121] *Id.* at 592–93.

[122] *Id.*

[123] *See* Eli Hodapp, *'Piloteer' Gets the PewDiePie Bump*, TOUCHARCADE (Aug. 21, 2015), http://toucharcade.com/2015/08/21/piloteer-gets-the-pewdiepie-bump/.

game companies are supportive of Let's Plays.[124] Those that are not, such as Nintendo, Konami, and Capcom, may be doing themselves harm through their vigorous assertions of copyright protection, whether such assertions are legally justified or not. If this is indeed the case, such a fact weighs in favor of a finding of fair use, just as it did in *Allen* and *Google*.

CONCLUSION

Two considerations should lead to the conclusion that Let's Plays and other similar media ought to have a strong presumption in favor of fair use. First, that the underlying purpose of copyright, to encourage creative activity, would be undermined by permitting the assertion of copyright claims over Let's Play videos in most circumstances. Second, that the nature of Let's Plays as creative performances, taken in conjunction with the four fair use factors, weighs each factor in favor of fair use. *Campbell* provides precedent for framing the fair use factors through the lens of differing "characters" of media. Courts should recognize that video game output is unique in that it is the product of the interaction of the user with the underlying software, and presume in favor of fair use in copyright disputes. Furthermore, it is not usually in a copyright holder's interest to impede or litigate against Let's Players, which courts ought to take into account as they perform their analysis in light of the purpose of copyright law.

PRACTICE POINTERS

- Video game output is likely entitled to copyright protection.
- Case law is unclear on the question of whether a video game "performance" is copyrightable.
- Whether a Let's Play video or performance qualifies as fair use will depend on how courts balance the fair use factors in the context of different types of Let's Play, and the level of interactivity present in the game. Let's Play videos or performances incorporating commentary or criticism are

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[124] *See* WHO LET'S PLAY, *Company Let's Play Policies*, http://wholetsplay.com/ (last visited May 1, 2018).

more likely to qualify as fair use. In circuits adopting the requirement that a use must contain new meaning or expression to qualify as transformative, Let's Plays focused on technical execution, such as speedruns or e-sports, may have a weaker argument than Let's Plays emphasizing creativity or the personality of the player. Furthermore, the greater the potential input from the player, and the greater the range of options available to the player, the stronger the fair use argument.