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## Public Performance? How Let's Plays and Livestreams May Be Escaping the Reach of Traditional Copyright Law

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PUBLIC PERFORMANCE?  
HOW LET'S PLAYS AND LIVESTREAMS MAY BE ESCAPING  
THE REACH OF TRADITIONAL COPYRIGHT LAW

*Brianna K. Loder\**

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ABSTRACT

*Let's Plays and livestreams are popular online videos of videogames being played. The Copyright Act protects videogames as audiovisual works, and therefore provides videogames with the exclusive right of public performance. The Supreme Court issued a ruling in ABC, Inc. v. Aereo, Inc. which clarified that performances in an online setting can be public even if the individuals receiving the content are doing so privately. However, the Court's holding did not provide guidance on who is a performer, and therefore is liable for the infringing conduct, beyond the specific context by which Aereo transmitted content to its subscribers.*

*Let's Plays and livestreams are public performances of videogames because they involve the playing of the videogame and are made to be viewed by the public. There are several categories of people who may be performers of a Let's Play or livestream: the creator of the video, the poster of the video, the website that hosts the video, and the person who causes the video to be played. The creator, poster, and website hosting the video are all public performers, and therefore are liable for the infringing*

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*conduct. However, the person who causes the video to be played generally causes a private performance instead of a public performance, and therefore is not liable for the infringing public performance.*

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#### INTRODUCTION

Videogames have moved from being solely a form of entertainment enjoyed by people in private homes to widely broadcast entertainment brought to a global audience through pre-recorded Let's Plays posted to websites such as YouTube and

through livestreams posted to services such as Twitch.tv.<sup>1</sup> A Let's Play is a video of a player playing through all or part of a game that may or may not have commentary.<sup>2</sup> Videogames are not per se copyrightable,<sup>3</sup> but most easily meet the “modicum of creativity” standard necessary to obtain copyright protection as audiovisual works.<sup>4</sup> One of the exclusive rights vested in videogames as audiovisual works under 17 U.S.C. § 106 is the right to public performance.<sup>5</sup> In order to succeed in a claim for copyright infringement, the copyright holder must assert he or she has a valid copyright and show that one of the exclusive rights granted under § 106 has been violated.<sup>6</sup> Let's Plays and livestreams may violate the public performance right, but the law is not entirely clear on this matter.<sup>7</sup> This is partially because determining who is a performer is

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<sup>1</sup> See *The Evolution of Online Gaming*, PC TECH MAG (May 17, 2018), <https://pctechmag.com/2018/05/the-evolution-of-online-gaming/> [<https://web.archive.org/web/20180517173542/http://pctechmag.com/2018/05/the-evolution-of-online-gaming/>]; see Patrick Klepek, *Who Invented Let's Play Videos?*, KOTAKU (May 6, 2015), <https://kotaku.com/who-invented-lets-play-videos-1702390484>.

<sup>2</sup> See PC MAG, *Definition of: Playthrough*, <https://www.pcmag.com/encyclopedia/term/66863/playthrough> (last visited Feb. 13, 2019).

<sup>3</sup> See *Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 857 (2d Cir. 1982) (explaining that a repetitive sequence of images in an audiovisual display is not necessarily copyrightable if it amounts to an abstract idea or is not sufficiently creative).

<sup>4</sup> See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991). Videogames can also be protected as literary works (the source code) and musical works (the soundtrack), but this Article focuses on videogames as audiovisual works in order to analyze the public performance right. See 17 U.S.C. §§ 102, 106 (2012).

<sup>5</sup> Section 106 (“[I]n the case of . . . motion pictures and other audiovisual works, to perform the copyrighted work publicly[.]”).

<sup>6</sup> See *id.*; see also *Feist*, 499 U.S. at 361.

<sup>7</sup> See *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2504 (2014) (Scalia, J., dissenting) (“This case requires us to answer two questions: First, in operating in the manner described above, does Aereo ‘perform’ at all? And second, if so, does Aereo do so ‘publicly?’”). Let's Plays and livestreams may constitute fair use of a videogame, but that analysis is not undertaken in this Article. Compare Dan Hagen, Comment, *Fair Use, Fair Play: Video Game Performances and “Let's Plays” as Transformative Use*, 13 WASH. J.L. TECH. & ARTS 245 (2018) (concluding that Let's Plays are likely fair use), with Elizabeth Brusa, Comment,

difficult in the context of the internet and the identity of the performer can affect whether or not the performance is public.<sup>8</sup>

The Supreme Court provided some guidance as to streaming of copyrighted content online in *ABC, Inc. v. Aereo, Inc.*, but the question of who is initiating the performance of a work, and therefore who will be liable if said performance is public, is still the subject of debate.<sup>9</sup> *Aereo* concluded that both the service provider, which provides television content through streaming, and the user perform, but the liability of each party for public performance is not settled.<sup>10</sup> If the service provider initiates the performance, then that performance at least has the potential to be public because that performance may be transmitted to the public.<sup>11</sup> *Aereo* only held that service providers that behave like a cable television company can be liable in this way.<sup>12</sup>

Let's Plays and livestreams are undoubtedly performances of the underlying videogame and are likely public performances because they are transmitted to members of the public.<sup>13</sup> Several parties could potentially be liable for the public performance of the work, either directly or indirectly, through a theory of vicarious or contributory liability.<sup>14</sup> If a party is a performer and the performance is public, the party is directly liable for the infringement.<sup>15</sup> The creator is a public performer of a livestream or a Let's Play if the

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*Professional Video Gaming: Piracy That Pays*, 49 J. MARSHALL L. REV. 217 (2015) (concluding Let's Plays and livestreams are likely not fair use).

<sup>8</sup> See *Aereo*, 134 S. Ct. 2504.

<sup>9</sup> See *id.* at 2510-11 (finding that *Aereo* performed the copyrighted works by transmitting them to its subscribers but reserving the question of whether service providers who do not behave like a cable company would be liable for direct infringement).

<sup>10</sup> See *id.* at 2506 (“[B]oth the broadcaster and the viewer of a television program ‘perform,’ because they both show the program’s images and make audible the program’s sounds.”) (emphasis in original).

<sup>11</sup> See *id.* at 2510.

<sup>12</sup> See *id.* at 2511.

<sup>13</sup> See 17 U.S.C. § 101 (2012) (defining performance of an audiovisual work as “show[ing] its images in any sequence” and performing a work publicly as transmitting a performance to “members of the public”).

<sup>14</sup> See *Gershwin Publ’g Corp. v. Columbia Artists Mgmt, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

<sup>15</sup> See 17 U.S.C. § 106(4) (2012).

creator intends the performance of the Let's Play to be public.<sup>16</sup> The poster of a Let's Play or livestream and the hoster of a livestream are public performers because the poster and the hoster are engaging in the process by which the content makes its way to the public.<sup>17</sup> The hoster is a public performer of a Let's Play because the hoster makes channels aggregating Let's Plays available to the public like a cable television company.<sup>18</sup> The person who initiates the playing of a Let's Play or livestream is not a public performer because that person's conduct generally amounts to a private, rather than a public, performance.<sup>19</sup>

Part I of this Article provides a brief introduction to statutory copyright law and discusses the history of copyright law as applied to videogames. Part II examines the bases of liability for copyright infringement and explores the contours of the public performance right. Finally, Part III finds that Let's Plays and livestreams constitute public performances of videogames.<sup>20</sup> This Article concludes that the creator of the content, the poster of the content, and the website hosting the content are all performers of the work and therefore are directly liable for the public performance. The initiator of the content is a performer but engages in a private performance rather than a public performance, and therefore is not liable for public performance.

## I. COPYRIGHT LAW AS APPLIED TO VIDEOGAMES

Copyright law has existed since the Constitution was enacted and is constantly being called upon to adapt to new forms of

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<sup>16</sup> See 17 U.S.C. § 101 (2012); see *Aereo*, 134 S. Ct. at 2512 (Scalia, J., dissenting) (describing the volitional act requirement as necessary for a claim of direct infringement whereas the majority does not discuss volition).

<sup>17</sup> See *NFL v. Primetime 24 Joint Venture*, 211 F.3d 10, 13 (2d Cir. 2000) (holding a public performance includes every step in the process by which a work makes its way to the audience).

<sup>18</sup> See *Aereo*, 134 S. Ct. at 2511.

<sup>19</sup> See *id.* at 2506.

<sup>20</sup> See 17 U.S.C. § 101 (2012) (defining public performance).

expression.<sup>21</sup> Videogames have come a long way since the days of coin-operated arcade games, and an understanding of that history allows for an appreciation of the culture surrounding Let's Plays and livestreams.<sup>22</sup> Copyright law did not initially apply to videogames, but copyright law has adapted to include this new technology.<sup>23</sup>

#### A. A Brief Introduction to Copyright Law

The Copyright Act (the Act) defines what works are subject to copyright protection, and what constitutes infringement, among other things.<sup>24</sup> A person who creates an original work of authorship fixed in a tangible medium is entitled to protection of that work through a copyright.<sup>25</sup> Eight categories of works are eligible for copyright protection, including audiovisual works, literary works, and musical works.<sup>26</sup> These works are fixed when they are embodied in a medium of expression which is sufficiently permanent to allow the work to be “perceived, reproduced, or otherwise communicated

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<sup>21</sup> See U.S. CONST. art. I, § 8, cl. 8 (“To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]”).

<sup>22</sup> See *The Father of the Video Game: The Ralph Baer Prototypes and Electronic Games: Video Game History*, SMITHSONIAN, <https://www.si.edu/spotlight/the-father-of-the-video-game-the-ralph-baer-prototypes-and-electronic-games> (last visited Nov. 2, 2018).

<sup>23</sup> See *Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 856 (2d Cir. 1982) (“[T]he player's participation does not withdraw the audiovisual work from copyright eligibility. No doubt the entire sequence of all the sights and sounds of the game are different each time the game is played . . . Nevertheless, many aspects of the sights and the sequence of their appearance remain constant during each play of the game.”); see also *Williams Elecs., Inc. v. Artic Int'l, Inc.*, 685 F.2d 870, 874 (3d Cir. 1982) (“The [videogame's] display satisfies the statutory definition of an original ‘audiovisual work,’ and the memory devices of the game satisfy the statutory requirement of a ‘copy’ in which the work is ‘fixed.’”).

<sup>24</sup> See 17 U.S.C. §§ 102, 106 (2012).

<sup>25</sup> See 17 U.S.C. § 102(a). In order to qualify for copyright protection, the work must be either a literary work, a musical work, a dramatic work, a pantomime or choreographic work, a pictorial, graphic, or sculptural work, a motion picture or other audiovisual work, a sound recording, or an architectural work. *Id.*

<sup>26</sup> See *id.*

for a period of more than transitory duration.”<sup>27</sup>

A copyright grants the author a bundle of exclusive rights that vary depending on the work’s category.<sup>28</sup> For example, all copyrighted works have the right of reproduction, the right to prepare derivative works, and the right of distribution, but the right of public performance exists only in literary, musical, dramatic, choreographic, and audiovisual works.<sup>29</sup> To succeed in a claim for copyright infringement, the copyright holder must prove that he or she holds a valid copyright and that one or more of the exclusive rights was violated.<sup>30</sup> A party can either be directly liable for copyright infringement, or indirectly liable through vicarious or contributory liability.<sup>31</sup>

A person is directly liable for copyright infringement if the person violates any of the exclusive rights in a work with a valid copyright.<sup>32</sup> A person can be directly liable for copyright infringement only if the person engages in some volitional conduct with respect to the copyrighted work.<sup>33</sup> For example, a person who causes a copyrighted movie to be played in a public park by setting up the equipment, loading the movie, and pressing “play” violates the public performance right of that movie.<sup>34</sup> However, when more than one party is involved in the infringing act, the question arises as to which portions of the conduct are sufficient to hold that party

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<sup>27</sup> See 17 U.S.C. § 101 (2012).

<sup>28</sup> See 17 U.S.C. § 106.

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

<sup>30</sup> See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

<sup>31</sup> See *id.*; *Gershwin Publ'g Corp. v. Columbia Artists Mgmt, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (explaining the doctrines of vicarious and contributory liability). One scholar has argued that causal responsibility should also apply to intellectual property, but this concept is not analyzed in this Article. See Dmitry Karshedt, *Causal Responsibility and Patent Infringement*, 70 VAND. L. REV. 565, 572 (2017).

<sup>32</sup> See *Feist*, 499 U.S. at 361.

<sup>33</sup> See, e.g., *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004); see also *Religious Tech. Ctr. v. Netcom Online Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1370 (N.D. Cal.1995) (“Although copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant’s system is merely used to create a copy by a third party.”).

<sup>34</sup> See 17 U.S.C. § 101 (2012); see generally MELVILLE B. NIMMER & DAVID NIMMER, 4 NIMMER ON COPYRIGHT § 13.08[C] (2018).



directly liable for copyright infringement.<sup>35</sup> A service provider who fully curates the content it provides is directly liable for infringement.<sup>36</sup> Curation occurs when the service provider controls what content it makes available to its subscribers, and selects and arranges that content in a particular way.<sup>37</sup> However, the level of curation necessary to hold the service provider directly liable is the subject of debate.<sup>38</sup>

A party can also be indirectly liable for copyright infringement through either vicarious liability or contributory liability.<sup>39</sup> Vicarious liability arises when a party has the right and ability to supervise the infringing activity of another and has a direct financial interest in that activity.<sup>40</sup> Contributory liability arises when a party has knowledge of the infringing activity of another and induces, causes, or materially contributes to that infringement.<sup>41</sup> For example, a computer system operator is contributorily liable for infringement if it has actual knowledge of specific infringing content and continues to provide access to that content even though simple measures could be taken to stop the infringement.<sup>42</sup> Merely

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<sup>35</sup> Compare *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2513 (2014) (Scalia, J., dissenting) (describing video-on-demand service providers that curate the content they provide as having the necessary volitional act required to hold them directly liable for copyright infringement), with *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 132 (2d Cir. 2008) (explaining Cablevision's discretion in choosing the channels it provided was not sufficient volitional conduct to hold it directly liable because Cablevision did not have control over the content of the channels).

<sup>36</sup> See *Aereo*, 134 S. Ct. at 2513 (2014) (Scalia, J., dissenting); Kimberlianne Podlas, *Linking to Liability: When Linking to Leaked Movies, Scripts, and Television Shows Is Copyright Infringement*, 6 HARV. J. SPORTS & ENT. L. 41, 58-59 (2015).

<sup>37</sup> See *Aereo*, 134 S. Ct. at 2513 (Scalia, J., dissenting); Podlas, *supra* note 36, at 58-59.

<sup>38</sup> See, e.g., *Cartoon Network*, 536 F.3d at 132 (holding Cablevision's discretion in choosing the channels was not sufficient control to hold Cablevision directly liable because Cablevision did not have control of the content on those channels).

<sup>39</sup> See *Gershwin Publ'g Corp. v. Columbia Artists Mgmt, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

<sup>40</sup> See *id.*

<sup>41</sup> See *id.*

<sup>42</sup> See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1172 (9th Cir.

linking to copyrighted content may be a sufficient basis for contributory infringement, but that question has not been settled.<sup>43</sup>

The invention of the internet along with the content hosting and streaming of copyrighted materials to websites have made it difficult to determine who is infringing a copyrighted work.<sup>44</sup> The right of public performance has a particularly difficult application to the digital age because of the difficulty in determining who is performing the work and whether that performance is public.<sup>45</sup> Content hosting and streaming over the internet may or may not be a public performance of a copyrighted work because this behavior may be neither a performance nor public.<sup>46</sup> The Act defines public performance as

(1) to perform or display [the work] at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.<sup>47</sup>

Copyright law grants the owner of a copyright a bundle of exclusive rights.<sup>48</sup> If those rights are infringed, either directly

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2007) (quoting *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001)); *Religious Tech. Ctr. v. Netcom Online Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1375 (N.D. Cal. 1995).

<sup>43</sup> See Podlas, *supra* note 36, at 49.

<sup>44</sup> See, e.g., *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2513 (2014) (Scalia, J., dissenting) (explaining that whether the defendant engaged in the act of infringement is not usually an issue in a direct infringement case).

<sup>45</sup> See *id.* at 2506 (finding that both Aereo and its subscribers perform).

<sup>46</sup> See *id.* at 2511 (reserving the question of public performance for other technologies until those technologies are before the court); see also Podlas, *supra* note 36, at 58.

<sup>47</sup> 17 U.S.C. § 101 (2012).

<sup>48</sup> See 17 U.S.C. § 106 (2012).

through some act of volitional conduct or indirectly, the copyright holder may bring a claim for copyright infringement.<sup>49</sup> These exclusive rights have been difficult to apply to new technologies.<sup>50</sup> In particular, the right of public performance has been difficult to apply in internet settings including both hosted content and livestreamed content, which videogames have ventured into through Let's Plays and livestreams.<sup>51</sup>

### B. A Brief History of Videogames

While individuals play certain games by themselves, games have been a social tool from the very start.<sup>52</sup> Whether it was card games, board games, billiards, or eventually videogames, people have used these games to interact with one another.<sup>53</sup> With the rapid advancement of the internet, computer games have progressed from clunky games played on one physical machine to massive multiplayer online experiences.<sup>54</sup> These social and technological

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<sup>49</sup> See *Gershwin Publ'g Corp. v. Columbia Artists Mgmt, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

<sup>50</sup> See, e.g., *Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 856 (2d Cir. 1982).

<sup>51</sup> Compare *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 124, 140 (2d Cir. 2008) (holding a system that stored individual copies of copyrighted works for subscribers did not violate the public performance right because the subscribers were engaging in a private performance), with *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2500-11 (2014) (holding an internet streaming service that had individual streams for each subscriber was engaged in a public performance of the copyrighted works).

<sup>52</sup> See generally Gillian Orr, *The Timeline: Board games*, THE INDEPENDENT (Aug. 31, 2011), <https://www.independent.co.uk/arts-entertainment/the-timeline-board-games-2346370.html> (describing the first known board game as Senet, an Egyptian game from 3500BC that required two players).

<sup>53</sup> See generally *id.* (detailing the history of board games and all games described require at least two players); see also *The Rules of Billiards and Snooker*, MASTERS OF GAMES, <https://www.mastersofgames.com/rules/billiards-snooker-rules.htm> (last visited Nov. 2, 2018) (describing billiards as requiring two players); SMITHSONIAN, *supra* note 22 (describing *Pong* as the first commercially successful coin-operated arcade game). While *Pong* did not require two players, there is something inherently social about going to an arcade. See *id.*

<sup>54</sup> See SMITHSONIAN, *supra* note 22; Brittany Vincent, *A Brief History of Online Gaming on the PC*, PC GAMER (Feb. 22, 2017), <https://www.pcgamer.com/a-brief-history-of-online-gaming-on-the-pc/>; see also

advances have connected people all over the world with the newfound ability to play a game with virtually anyone, anywhere.<sup>55</sup>

Commercially available videogames began with coin-operated, single-game arcade machines.<sup>56</sup> These single-game machines made their way into homes and were eventually replaced with multigame consoles containing a slot for removable game cartridges that would allow a user to build up a library of games and own only one console.<sup>57</sup> In early videogames, there was very little room for players to modify the gameplay in any meaningful way.<sup>58</sup> However, a new subset of videogames now exists where the whole purpose of the game is for the user to create his or her own new experience.<sup>59</sup>

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Riad Chikhani, *The History of Gaming: An Evolving Community*, TECHCRUNCH (Oct. 31, 2015), <https://techcrunch.com/2015/10/31/the-history-of-gaming-an-evolving-community/> (“The real revolution in gaming came when LAN networks, and later the Internet, opened up multiplayer gaming. Multiplayer gaming took the gaming community to a new level because it allowed fans to compete and interact from different computers, which improved the social aspect of gaming.”).

<sup>55</sup> See Chikhani, *supra* note 54 (explaining how massively multiplayer online role-playing games (MMORPG) like *Runescape* allowed players from all over the world to interact and compete through gameplay and a chat function).

<sup>56</sup> See SMITHSONIAN, *supra* note 22.

<sup>57</sup> See *id.* Early generation home game consoles, such as the Atari VCS (also known as the Atari 2600), Mattel’s Intellivision, and ColecoVision, featured interchangeable game cartridges that were retailed separately, instead of being preloaded in the unit. See SMITHSONIAN, *From Landfill to Smithsonian Collections: “E.T. the Extra-Terrestrial” Atari 2600 Game* (Dec. 15, 2014), [https://www.si.edu/object/landfill-smithsonian-collections-et-extra-terrestrial-atari-2600-game:posts\\_a3b1fa93074f1c565e74f3dd968e1688](https://www.si.edu/object/landfill-smithsonian-collections-et-extra-terrestrial-atari-2600-game:posts_a3b1fa93074f1c565e74f3dd968e1688). This advance allowed users to build a library of games. See *id.* These initial consoles were a flop and led to a crash in the early 1980s that was revived by Nintendo’s release of the Nintendo Entertainment System. See *id.*

<sup>58</sup> See, e.g., *Pong: Electronic Game*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/Pong> (last visited Sept. 23, 2018).

<sup>59</sup> See, e.g., *What is Minecraft?*, MICROSOFT, <https://minecraft.net/en-us/what-is-minecraft/>

[<https://web.archive.org/web/20181210044759/https://minecraft.net/en-us/what-is-minecraft/>] (last visited Nov. 4, 2018) (emphasis added) (“There’s no one way to play *Minecraft*. It’s an open-ended game where players decide what they want to do by themselves!”); *Super Mario Maker*, NINTENDO, <http://supermariomaker.nintendo.com/wii-u/> [<https://web.archive.org/web/20181017172350/http://supermariomaker.nintendo>

One type of game that is currently increasing in popularity is a Battle Royale game, wherein players are dropped on a large map with no resources and fight other players to be the last one standing.<sup>60</sup> These games are so popular in part because of the unpredictability of every playthrough.<sup>61</sup>

The enhanced abilities of the internet also allowed people to be involved in videogames in a new form through Let's Plays and, eventually, livestreams.<sup>62</sup> Let's Plays and livestreams are popular online videos that feature a person or several people playing a portion or the entirety of a videogame.<sup>63</sup> A Let's Play is a pre-recorded video of one or more people playing a videogame that is

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.com:80/wii-u/] (last visited Nov. 4, 2018) (describing the game with the tagline "Anyone can make it. Everyone can play it.").

<sup>60</sup> See Phil Hornshaw, *The History of Battle Royale: From Mod to Worldwide Phenomenon*, DIGITAL TRENDS (Apr. 10, 2018), <https://www.digitaltrends.com/gaming/history-of-battle-royale-games/>.

<sup>61</sup> See *id.* (statement of Brendan Greene, creator of *PlayerUnknown's Battlegrounds*) ("I think, you know, especially with *Battlegrounds*, there's no right way to play it . . . However you want to play it is up to you. It's a challenge, you know — it's against other people. It's not something you can predict, it's against another person, and I think those are the best kind of interactions.")

<sup>62</sup> See *Who Invented Let's Play Videos?*, *supra* note 1 ("Even though the term Let's Play has become a way of describing talking over a game, often from start to finish, it *began* as a way of rallying people to literally play a video game together.") (emphasis in original). The origin of the term "Let's Play" is debated, but it can be traced back to 2005 with comment threads and screenshots of gameplay in order to get people to play a game together. See *id.* The first Let's Play is often credited to Michael "slowbeef" Sawyer and can be traced to a thread in 2004 wherein Sawyer posts screenshots alongside commentary and instructions for how to play the game *Metal Gear 2: Solid Snake* on his website. See *id.*

<sup>63</sup> See Ben Gilbert, *Amazon's Streaming Service Twitch is Pulling in as Many Viewers as CNN and MSNBC*, BUS. INSIDER (Feb. 13, 2018), <https://www.businessinsider.com/twitch-is-bigger-than-cnn-msnbc-2018-2> (disclosing the average viewership on Twitch in January 2018 to be 962,000 people); PC MAG, *supra* note 2; 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> ("Let's Plays tend to be more curated experiences; there shouldn't be a lot of dead air. The videos are recorded in advance and edited to be watchable. Streams happen live and don't involve editing after the fact. For this reason they tend to be a bit more exciting. You never know what's going to happen, and you're watching it live with everyone else.").

heavily edited.<sup>64</sup> In contrast, a livestream is a simultaneous broadcast of one or more people playing a videogame that is not edited after the fact.<sup>65</sup>

Let's Plays and livestreams are broad umbrella terms encompassing a variety of different types of videos and game experiences.<sup>66</sup> The videos as a class include a wide variety of content as they feature games that are both new and old.<sup>67</sup> The amount of creativity that goes into a video varies between the types of videos as well as between the creators themselves.<sup>68</sup> Let's Plays and livestreams generally contain commentary, and they may or may not feature video footage of the gamer on the screen superimposed or alongside a video of the game itself being played.<sup>69</sup>

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<sup>64</sup> See PC MAG, *supra* note 2; Sawyer, *supra* note 63.

<sup>65</sup> See Sawyer, *supra* note 63.

<sup>66</sup> See, e.g., *Guide: What are eSports?*, BBC (Apr. 5, 2017), <https://www.bbc.co.uk/newsround/37773832> (describing eSports as the short form for “electronic sports” wherein players play videogames against one another in the same way teams play sports against one another); Jordan Maison, *How Walkthrough Videos Can Grow Your Gaming Channel*, CREATOR HANDBOOK (June 1, 2017), <https://www.creatorhandbook.net/how-walkthrough-videos-can-grow-your-gaming-channel-e4d66e4e6c46/> (“Rather than only showcasing gameplay, a walkthrough aims to teach viewers how to maneuver through various stages of the game.”); *Frequently Asked Questions*, SPEEDRUNSLIVE, <http://www.speedrunslive.com/faq/> (last visited Nov. 3, 2018) (“Speedrunning is nothing more than playing a game with the intent of completing it as fast as possible. People speedrun to challenge themselves, to see a game pushed to the limits, and to get extra replay value out of a game.”).

<sup>67</sup> See, e.g., Let's Play Retro Games!, *Videos*, YOUTUBE, <https://www.youtube.com/user/nicktendowii/videos> (last visited Nov. 3, 2018) (listing all videos on the channel including Let's Plays for Mega Man 2 and Yoshi's Island); *Fortnite*, TWITCH, <https://www.twitch.tv/directory/game/Fortnite> (last visited Jan. 9, 2020) (listing all channels for the game *Fortnite* and citing the game as having more than 51 million “followers”).

<sup>68</sup> *Compare LetsPlay, Let's Play - Fortnite: Battle Royale - AH Live Stream*, YOUTUBE (Apr. 4, 2018), <https://www.youtube.com/watch?v=2ZJQzutxHww> (including video of player in lower left corner), *with LetsPlay, Let's Play Minecraft: Ep. 47 - Enchantment Level 30*, YOUTUBE (Apr. 19, 2013), <https://www.youtube.com/watch?v=9vifqDcxKYw&list=PL1cXh4tWqmsEQPeLEJ5V3k5knt-X9k043&index=48> (including video of gameplay but no video of player).

<sup>69</sup> See Sawyer, *supra* note 63.

Many videogame companies do not object to Let's Plays and livestreams because the videos are generally very good advertising for the game itself.<sup>70</sup> However, videogame giant Nintendo is notoriously unfriendly to such videos.<sup>71</sup> Nintendo's original policy was to place advertisements at the beginning of, next to, or near the end of Let's Plays of Nintendo copyrighted content with all of the advertising revenue accruing to Nintendo.<sup>72</sup> Nintendo then moved to a less stringent policy called the Nintendo Creators Program, wherein YouTube users had to register their channels or individual videos containing content belonging to Nintendo.<sup>73</sup> Nintendo then

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<sup>70</sup> See *Company Let's Play Policies*, WHO LET'S PLAY, <http://wholetsplay.com/> [<https://web.archive.org/web/20190219084041/http://wholetsplay.com/>] (last visited Nov. 3, 2018).

<sup>71</sup> See, e.g., Keza MacDonald, *Nintendo Enforces Copyright on YouTube Let's Plays*, IGN (May 16, 2013), <https://www.ign.com/articles/2013/05/16/nintendo-enforces-copyright-on-youtube-lets-plays> (“[T]his sets an uncomfortable precedent for Youtubers who make their living from Let's Plays and other self-created game content: they are now unlikely to feature Nintendo games, and if other publishers were to follow suit it would be a monumental shake-up.”); Gavin Sheehan, *Nintendo Still Going After YouTubers With Copyrights Over Switch Content*, BLEEDING COOL (Mar. 8, 2017), <https://www.bleedingcool.com/2017/03/08/nintendo-still-going-youtubers-copyrights-switch-content/> (“For over three years now, Nintendo has been one of the most aggressive content hunters on YouTube, demanding that gamers and Let's Players work with them and forfeit a portion of their received income from videos using Nintendo-created content, or be subject to having their content pulled due to copyright issues.”).

<sup>72</sup> See Brian, *Nintendo Responds to Concerns Over YouTube “Let's Play” Content Claims*, NINTENDO EVERYTHING (May 15, 2013), <https://nintendoeverything.com/nintendo-responds-to-concerns-over-youtube-lets-play-content-claims/> (citing Nintendo's original response to questions about Nintendo's Let's Play policy).

<sup>73</sup> See Julia Alexander, *Nintendo-Specific YouTube Channels May Feel YouTube's New Monetization Rules*, POLYGON (Feb. 20, 2018, 9:38 AM), <https://www.polygon.com/2018/2/20/17031540/nintendo-youtube-creators>. Users must register either individual videos or full YouTube channels, enroll in the YouTube Partner Program, and may only include content from an approved list of games. See *About the Nintendo Creators Program*, NINTENDO, <https://r.ncp.nintendo.net/guide/> [<https://web.archive.org/web/20180909035932/https://r.ncp.nintendo.net/guide/>] (last visited Nov. 3, 2018); *List of Supported Games*, NINTENDO, <https://r.ncp.nintendo.net/whitelist/>

received a portion of the advertising revenue rather than all of the revenue as it originally demanded.<sup>74</sup> If the users did not register with YouTube, the users would be dropped from the Nintendo Creators Program and would be ineligible to receive any advertising money for their videos.<sup>75</sup>

As of late 2018, Nintendo once again changed its policy to allow creators to monetize their videos according to methods specified by Nintendo.<sup>76</sup> This policy allows for creators to use Nintendo's content in videos.<sup>77</sup> However, Nintendo only allows videos that involve the creator's own creative content and commentary and not just gameplay footage.<sup>78</sup>

While Nintendo is the leading example of unfriendly conduct towards Let's Players, other companies also oppose the use of their works in Let's Plays or livestreams.<sup>79</sup> Let's Plays and livestreams are particularly problematic for small videogame companies that make games with a narrative storyline because Let's Plays and livestreams can effectively replace the videogame, and then the company does not receive the necessary revenue to continue making games.<sup>80</sup> The reason for playing narrative games is to interact with

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[<https://web.archive.org/web/20181004140723/https://r.ncp.nintendo.net/whitelists/>] (last visited Nov. 3, 2018).

<sup>74</sup> See Alexander, *supra* note 76.

<sup>75</sup> See *id.*

<sup>76</sup> See *Nintendo Game Content Guidelines for Online Video & Image Sharing Platforms*, NINTENDO, [https://www.nintendo.co.jp/networkservice\\_guideline/en/index.html](https://www.nintendo.co.jp/networkservice_guideline/en/index.html) (Nov. 29, 2018).

<sup>77</sup> See *id.*

<sup>78</sup> See *id.*

<sup>79</sup> See Patrick Klepek, *Not Every Developer Is Convinced Let's Play Videos Are A Good Thing*, KOTAKU (Mar. 26, 2016, 9:00AM), <https://www.kotaku.com.au/2016/03/not-every-developer-is-convinced-lets-play-videos-are-a-good-thing/> (explaining that game developers who create games with high narrative content are less likely to allow their games to be used in Let's Play videos because videos of the game effectively replace the market for the game).

<sup>80</sup> See Ryan Green, *On Let's Plays*, THAT DRAGON, CANCER (Mar. 24, 2016), <http://www.thatdragoncancer.com/thatdragoncancer/2016/3/24/on-lets-plays> (“[F]or a short, relatively linear experience like ours, for millions of viewers, Let's Play recordings of our content satisfy their interest and they never go on to interact with the game in the personal way that we intended for it to be experienced. If



the story, and therefore videos that give away a substantial portion or all of the story limit the revenue the company can receive from this kind of game.<sup>81</sup> Videogame companies struggle to speak out against Let's Plays or to receive revenue from Let's Plays because of the intense public backlash they face when they do.<sup>82</sup>

For example, the developers of the game *That Dragon, Cancer* were effectively forced to reverse their policy of issuing Content ID claims for videos containing their game because of the intense backlash from Let's Players who make a living from their videos.<sup>83</sup> The developers had to contend with making almost no money from sales of the game because of Let's Players giving away the content.<sup>84</sup> The developers hoped to be able to continue their work from the small amount of money they would receive from advertising and donations.<sup>85</sup>

Courts and experts originally doubted whether videogames were sufficiently fixed to be afforded copyright protection because, unlike other audiovisual works like movies, videogames require some participation from the players who slightly alter the output of

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you compare the millions of views of the entirety of our game on YouTube to our sales as estimated on SteamSpy, you can hopefully see the disparity.”)

<sup>81</sup> See *id.*

<sup>82</sup> See *Not Every Developer Is Convinced Let's Play Videos Are A Good Thing*, *supra* note 79.

<sup>83</sup> See *id.*

<sup>84</sup> See *id.* (“Green [the designer] made an appeal for people to use *That Dragon, Cancer* videos as a chance to share their personal stories. But more to the point, he hopes they will encourage their viewers to support the developers, so that they can make more games.”).

<sup>85</sup> See *id.* (“The developers ‘underestimated how many people would be satisfied with only watching the game,’ and became frustrated by the millions of people watching the game on YouTube translating into zero revenue for their years of work.”). Numinous Games (the studio that produced *That Dragon, Cancer*) began production on another game called *Untethered* that subsequently lost its funding. See *Untethered Hiatus*, NUMINOUS GAMES (Oct. 2, 2018), <http://www.numinousgames.com/blog/2018/10/2/untethered-hiatus>. Numinous Games recently announced that new funding has been secured for the project and it will continue under the name *AREA MAN LIVES*. See *Untethered is Back. With a New Name on New Platforms*, NUMINOUS GAMES (Feb. 10, 2020), <http://www.numinousgames.com/blog/2020/2/10/untethered-is-back-with-a-new-name-on-new-platforms>.

a game each time they play.<sup>86</sup> However, courts have clarified that while player participation will modify a particular run-through of a game, the underlying program is sufficiently fixed to warrant copyright protection.<sup>87</sup> Videogames can be protected by several categories of copyright law including literary works (the source code), musical works (to the extent that the music is an original work of authorship), and audiovisual works (the sequential displays created by the source code).<sup>88</sup>

As audiovisual works, videogames are granted the right to public performance, which may be infringed by the rising trend of Let's Plays and livestreams.<sup>89</sup> If Let's Plays and livestreams constitute a public performance, the copyright holder can have the videos removed because the videos are infringing the copyright holder's exclusive right to public performance.<sup>90</sup> However, when videogame companies request that Let's Plays and livestreams be removed, or take advertising revenue from these videos, the companies receive public backlash that can affect the sales of their games.<sup>91</sup>

## II. THE PUBLIC PERFORMANCE RIGHT AND THE INTERNET

The development of the public performance jurisprudence is imperative in analyzing whether Let's Plays and livestreams violate the public performance right. While the Act defines "public

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<sup>86</sup> See *Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 856 (2d Cir. 1982).

<sup>87</sup> See *Williams Elecs., Inc. v. Artic Int'l, Inc.*, 685 F.2d 870, 874 (3d Cir. 1982) (citing *Stern*, 669 F.2d at 855-56) ("Although there is player interaction with the machine during the play mode which causes the audiovisual presentation to change in some respects from one game to the next in response to the player's varying participation, there is always a repetitive sequence of a substantial portion of the sights and sounds of the game, and many aspects of the display remain constant from game to game regardless of how the player operates the controls.").

<sup>88</sup> See 17 U.S.C. § 102 (2012). This Article focuses on videogames as audiovisual works in order to analyze a violation of the public performance right. See 17 U.S.C. § 106 (2012).

<sup>89</sup> See 17 U.S.C. § 106. This Article does not address whether Let's Plays and livestreams are fair use of videogames. For an analysis of the fair use of Let's Plays and livestreams, see Brusa, *supra* note 8 and Hagen, *supra* note 8.

<sup>90</sup> See 17 U.S.C. § 512(c) (2012).

<sup>91</sup> See Brian, *supra* note 72; *Not Every Developer Is Convinced Let's Play Videos Are A Good Thing*, *supra* note 79.

performance,” the application of this definition to different technologies and situations has been challenging. Courts have struggled both with what it means to perform within the meaning of the Act and whether said performance is public. In order to be directly liable for violating the public performance right, the actor must have intended to perform and intended that the performance be public.<sup>92</sup> The invention of the internet and the increasing ability to post and stream copyrighted content has posed additional challenges to the courts in determining whether there was a performance, whether the performance was public, and who is a performer.<sup>93</sup>

### A. *What is a Performance?*

The Act defines performance with respect to an audiovisual work as showing the work’s images in any sequence or to make the sounds accompanying the work audible by any device or process.<sup>94</sup> However, if the images are shown in a nonsequential order the result may be considered a display rather than a performance, and therefore violates a different exclusive right.<sup>95</sup> In the context of the internet, there are four possibilities for when performance occurs.<sup>96</sup> These possibilities are when the content is created (assuming it is ultimately uploaded),<sup>97</sup> when the content is uploaded,<sup>98</sup> when the

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<sup>92</sup> See *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004).

<sup>93</sup> See *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2511 (2014).

<sup>94</sup> 17 U.S.C. § 101 (2012); *Red Baron-Franklin Park, Inc. v. Taito Corp.*, 883 F.2d 275, 279 (4th Cir. 1989).

<sup>95</sup> See 17 U.S.C. § 106 (2012); MELVILLE B. NIMMER & DAVID NIMMER, 2 NIMMER ON COPYRIGHT § 8.14[B][[1] (2018) (“If the images are shown in nonsequential order, then a ‘display,’ rather than a performance, occurs.”).

<sup>96</sup> See *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 760-61 (7th Cir. 2012) (describing two possibilities for performance as performance by uploading and performance by receiving). In the context of Let’s Plays, more possibilities exist for performance because the potentially infringing content must first be created and the website that hosts the content, such as YouTube, does not continuously transmit the content to the receiver. See Sawyer, *supra* note 63. Therefore, the act of receiving the content can be split into the act of hosting the content and the receiver’s actions in causing the content to be played. See *id.*

<sup>97</sup> See 17 U.S.C. § 106.

<sup>98</sup> See *Flava Works, Inc.*, 689 F.3d at 760-61.

content is transmitted;<sup>99</sup> and when the recipient engages to receive the content, for example by pressing play.<sup>100</sup> When content is streamed, rather than prepared ahead of time, these categories can collapse into two basic types: uploading and transmitting.<sup>101</sup>

In *NFL v. Primetime 24 Joint Venture*, the Second Circuit held that a performance includes every step in the process by which the work makes its way to the audience.<sup>102</sup> A video transmission of copyrighted NFL games to be viewed in Canada was found to infringe the public performance right even though the ultimate performance was not within the United States and thus not subject to the Act.<sup>103</sup> The NFL games made their way to Canada through an uplink to a satellite by defendants and a downlink to the subscribers.<sup>104</sup> The uplink of the broadcasts was part of a continuous process that culminated in a public performance, and therefore the defendant was found directly liable for copyright infringement.<sup>105</sup> However, *Primetime 24* does not address whether the uploading of content would be a performance if the content was not directly streamed to another party, for example if the content was uploaded to YouTube.<sup>106</sup>

When content is not directly streamed to another party, not every step in the transmission may count as a performance.<sup>107</sup> While a user's ultimate act of playing a song is a performance, the Second Circuit found that the act of downloading a music file that could not be played during the download was not a performance.<sup>108</sup> In that case, the user would have to do something beyond initiating the

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<sup>99</sup> *See id.*

<sup>100</sup> *See* *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 132 (2d Cir. 2008).

<sup>101</sup> *See Flava Works, Inc.*, 689 F.3d at 760-61.

<sup>102</sup> 211 F.3d 10, 13 (2d Cir. 2000) (“We believe the most logical interpretation of the Copyright Act is to hold that a public performance or display includes ‘each step in the process by which a protected work wends its way to its audience.’”).

<sup>103</sup> *See id.*

<sup>104</sup> *See id.* at 11.

<sup>105</sup> *See id.*

<sup>106</sup> *See id.* at 11.

<sup>107</sup> *See* *United States v. Am. Soc’y of Composers*, 627 F.3d 64, 74 (2d Cir. 2010).

<sup>108</sup> *See id.* at 74, 85.

download in order to perform the song because 17 U.S.C. § 101 requires the transmission to be audible in order to be considered a performance.<sup>109</sup> Streaming the song would have been a performance because the song would have been perceived by the subscriber as it was transmitted.<sup>110</sup>

In *Allen v. Academic Games League of America*, an educational board game manufacturer sued a competitor for violating his public performance right by using his games in tournaments, and thereby asked the Ninth Circuit to expand the definition of public performance to include the playing of a board game.<sup>111</sup> In copyright terms, a board game is a pictorial work and possibly also a sculptural work, and therefore is entitled to the bundle of rights associated with those types of works which does not include the right of public performance.<sup>112</sup> The court held that playing a board game in public was not a public performance under the Act because the term “play” within the meaning of the Act was for music, records, and audiovisual works, and did not extend to playing a board game.<sup>113</sup>

Performance of a work includes every part of the process by which the work makes its way to the audience when the work is directly communicated to the audience as in through a livestream, but performance may not include every step in a process where the

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<sup>109</sup> See *id.* at 73 (“Music is neither recited, rendered, nor played when a recording (electronic or otherwise) is simply delivered to a potential listener.”).

<sup>110</sup> See *id.* at 74.

<sup>111</sup> See 17 U.S.C. § 106 (2012); *Allen v. Acad. Games League of Am., Inc.*, 89 F.3d 614, 615 (9th Cir. 1996).

<sup>112</sup> See 17 U.S.C. §§ 102, 106 (2012).

<sup>113</sup> See 17 U.S.C. § 101 (2012); *Allen*, 89 F.3d at 616 (“The term ‘play’ has not been extended to the playing of games.”). Unlike videogames which are protectable as audiovisual works, board game copyright holders are not granted the right to public performance. See 17 U.S.C. § 106(4). The court also said that to allow the owner of a copyright in a game to limit where a purchaser could play the game would put an undue restraint on consumers. See *Allen*, 89 F.3d at 616 (“Whether privately in one’s home or publicly in a park, it is understood that games are meant to be ‘played.’”); Bruce E. Boyden, *Games and Other Uncopyrightable Systems*, 18 GEO. MASON L. REV. 439, 475 (2011) (“[T]he rights of public distribution, performance, and display regulate only the transmission of works from one person to another, and not the experience of the work itself. Games are meant to be played, and playing one does not violate any of the rights of a game’s copyright owner.”).

work takes several discrete steps on its way to the audience.<sup>114</sup> The work must be able to be perceived during the transmission in order for the transmission to be a performance of the work.<sup>115</sup> Determining whether a work has been performed is only one part of the copyright analysis.<sup>116</sup> The work must also have been performed publicly in order to violate the owner's copyright.<sup>117</sup>

### *B. What is Public?*

The Act defines public as any place “open to the public” or “where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.”<sup>118</sup> A family within this context includes a single person living alone, and therefore a gathering including only that person and his or her social acquaintances is appropriately private.<sup>119</sup> The “open to the public” language in the Act means it does not matter how many people actually show up; what matters is that the public could show up.<sup>120</sup>

The internet generally is open to the public absent some security feature to keep the content private.<sup>121</sup> Additionally, sometimes public internet sites may not be open to the public in a copyright sense because of the difficulty in navigating to them.<sup>122</sup> For example, a YouTube channel that is not private is likely open to the public because anyone can navigate to the channel or its videos by using keywords related to the content of the video.<sup>123</sup> In contrast, a public Dropbox is likely not open to the public because it is difficult

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<sup>114</sup> See *Am. Soc’y of Composers*, 627 F.3d at 85; *NFL v. Primetime 24 Joint Venture*, 211 F.3d 10, 13 (2d Cir. 2000).

<sup>115</sup> See *Am. Soc’y of Composers*, 627 F.3d at 73.

<sup>116</sup> See 17 U.S.C. § 106.

<sup>117</sup> See *id.*

<sup>118</sup> See 17 U.S.C. § 101.

<sup>119</sup> See H.R. Rep. No. 94-1476, at 64 (1976) (“The term ‘a family’ in this context would include an individual living alone, so that a gathering confined to the individual’s social acquaintances would normally be regarded as private.”).

<sup>120</sup> See 2 NIMMER ON COPYRIGHT, *supra* note 95, at § 8.14[C][1].

<sup>121</sup> See 17 U.S.C. § 101.

<sup>122</sup> See *id.* However, while public internet sites could potentially be open to the public, the ability of the public to effectively access the work may make the work unavailable to the public. See *id.*

<sup>123</sup> See Podlas, *supra* note 36, at 76.

to access outside a person's family or social circle.<sup>124</sup>

The Act includes a clause within the definition of public performance referred to as the "Transmit Clause." The Transmit Clause states that a performance is public if it is transmitted or communicated to a place that is open to the public, or is transmitted to members of the public by any means regardless of whether those members are in the same place and whether they receive the transmission at the same time.<sup>125</sup> A transmission is still a performance regardless of whether subscribers are operating their receiving apparatuses at the time of the transmission.<sup>126</sup>

Determining whether a transmission is to the public is difficult in both the physical world and on the internet.<sup>127</sup> In the physical world the courts have to interpret what the proper audience of the performance is in order to determine whether the performance is public.<sup>128</sup> Whether transmissions to individuals over the internet may be aggregated such that the overall performance is to the public is the subject of debate.<sup>129</sup>

### 1. Performances in Semi-Public Settings

A public space in the copyright context does not necessarily track the common conception of a public space.<sup>130</sup> While the Act

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<sup>124</sup> *See id.*

<sup>125</sup> 17 U.S.C. § 101.

<sup>126</sup> *See* H.R. Rep. No. 94-1476, at 64-65 (1976) (explaining it does not matter whether members of the public actually receive the transmission, what matters is that the public is capable of receiving the transmission).

<sup>127</sup> *See, e.g.,* ABC, Inc. v. Aereo, Inc., 134 S. Ct. 2498, 2510-11 (2014) (analyzing whether a television streaming service was transmitting to the public); Columbia Pictures Indus. v. Redd Horne, Inc., 749 F.2d 154, 157-59 (3d Cir. 1984) (analyzing whether private viewing rooms at a video store were open to the public).

<sup>128</sup> *See Redd Horne*, 749 F.2d at 159 (holding the relevant place for purposes of the public performance analysis was the entirety of the two stores, not the individual viewing booths).

<sup>129</sup> *See Aereo*, 134 S. Ct. at 2510-11 (holding, implicitly, that individual transmissions can be aggregated to a public performance because of Aereo's similarity to a cable television company).

<sup>130</sup> *See Redd Horne*, 749 F.2d 154, 158 (3d Cir. 1984) ("[I]f the place is not public, the size and composition of the audience will be determinative."); Ackee

does its best to define the meaning of public, new technologies can stretch the definition and require the analysis of a court.<sup>131</sup> Case law is contradictory on whether places that can only be used by a private party at any given time are open to the public within the meaning of the Act.<sup>132</sup>

A video store was found to publicly perform when the employees played a pre-selected videocassette from the front of the store through circuitry to private viewing booths at the back of the store.<sup>133</sup> Each of the individual viewing booths held two to four people, but the Third Circuit held the performance was public because the relevant place was the entire store and not each individual viewing booth.<sup>134</sup> Another video store was found to publicly perform when it rented out private viewing rooms to patrons, and employees had no contact with the process.<sup>135</sup> The Third Circuit held that even though the patrons loaded the videos and pressed play, the video store was still a performer because it provided the means of performance including the viewing rooms and the equipment.<sup>136</sup> The viewing rooms were open to the public

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Music, Inc. v. Williams, 650 F. Supp. 653 (D. Kan. 1986) (“Moreover, the fact that a club may be ‘private’ under state law is no defense to its public character vis-à-vis the performance right under copyright law.”); H.R. Rep. No. 94-1476, at 64 (1976) (“[P]erformances in ‘semipublic’ places such as clubs, lodges, factories, summer camps, and schools are ‘public performances’ subject to copyright control.”).

<sup>131</sup> See, e.g., *Columbia Pictures Indus. v. Aveco, Inc.*, 800 F.2d 59, 63 (3d Cir. 1986).

<sup>132</sup> Compare *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787, 789-90 (N.D. Cal. 1991) (holding the transmissions of copyrighted works to the hotel rooms was to the public even though the individual rooms were private), and *Redd Horne*, 749 F.2d at 157-59 (holding private viewing rooms in a video store were open to the public because the proper audience is the entire store rather than the individual rooms), with *Columbia Pictures Indus. v. Prof'l Real Estate Inv'rs, Inc.*, 866 F.2d 278, 279, 282 (9th Cir. 1989) (holding that rental of videos from the hotel gift shop to be viewed in the hotel room was not a violation of the public performance right because the individual hotel rooms were private places).

<sup>133</sup> See *Redd Horne*, 749 F.2d at 157-59.

<sup>134</sup> See *id.* at 157, 159.

<sup>135</sup> See *Aveco*, 800 F.2d at 61.

<sup>136</sup> See *id.* at 62 (quoting H.R. Rep. No. 94-1476, at 61 (1976)) (“In granting copyright owners the exclusive rights to ‘authorize’ public performances,



despite the fact they were only available to one person at a time.<sup>137</sup>

In *On Command Video Corp. v. Columbia Pictures Industries*, a system that allowed hotels to broadcast copyrighted works to guests from a central repository was found to violate the Transmit Clause.<sup>138</sup> On Command's system displayed a screen with a list of available movies to hotel guests who then selected a movie to view.<sup>139</sup> The court held that the transmissions were made to the public even though the individual hotel rooms were private because the relationship between the transmitter and the guests was a commercial or public one.<sup>140</sup> However, the Second Circuit has expressly rejected this contention because the language of the Transmit Clause does not make a distinction between commercial and non-commercial transmissions.<sup>141</sup>

The court in *On Command Video Corp.* implicitly held that the use of the system across the aggregate of hotel rooms made the

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Congress intended 'to avoid any questions as to the liability of contributory infringers[]' . . . . In our opinion, this rationale applies equally to the person who knowingly makes available other requisites of a public performance.”)

<sup>137</sup> See *id.* at 63 (“A telephone booth, a taxi cab, and even a pay toilet are commonly regarded as ‘open to the public,’ even though they are usually occupied only by one party at a time.”). Relatedly, a coin-operated videogame played by multiple people was found to be performed publicly even though only one person could conceivably play the game at a time. See *Red Baron-Franklin Park, Inc. v. Taito Corp.*, 883 F.2d 275, 278-79 (4th Cir. 1989).

<sup>138</sup> See 777 F. Supp. 787, 789-90 (N.D. Cal. 1991); see also *Warner Bros. Entm't, Inc. v. WTV Sys.*, 824 F. Supp. 2d 1003, 1006-07, 1010 (Cal. Central Dist. Ct. 2011) (holding that defendant's service of transmitting copyrighted DVDs to its subscribers was a violation of the transmit clause and therefore the transmission was to the public because the subscribers were members of the public).

<sup>139</sup> See *On Command Video Corp.*, 777 F. Supp. at 788.

<sup>140</sup> See *id.* at 790 (“[T]he relationship between the transmitter of the performance, On Command, and the audience, hotel guests, is a commercial, ‘public’ one regardless of where the viewing takes place. The non-public nature of the place of the performance has no bearing on whether or not those who enjoy the performance constitute ‘the public’ under the transmit clause.”); see also *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2508-09 (2014).

<sup>141</sup> See *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 139 (2d Cir. 2008) (“If Congress had wished to make all commercial transmissions public performances, the transmit clause would read: ‘to perform a work publicly means . . . to transmit a performance for commercial purposes.’”).

transmission public.<sup>142</sup> The court reasoned that the guests' volitional conduct in selecting the movie and initiating the performance did not affect the hotel's liability for public performance.<sup>143</sup> Therefore, the court held that the system itself had publicly performed despite the fact the performance necessarily involved the volitional conduct of hotel guests.<sup>144</sup>

Conversely, a hotel was found not to publicly perform copyrighted motion pictures by renting copies to hotel guests for viewing in their respective rooms.<sup>145</sup> The Ninth Circuit held that this was not a violation of the Transmit Clause because the copyrighted work was not being broadcast from one location to another.<sup>146</sup> The court reasoned that the individual hotel rooms were not open to the public once they were rented, and the guests' viewing of the works was private because it was as though the guests were viewing the works in the privacy of their own homes.<sup>147</sup>

Whether the performance of copyrighted works to individuals is a public performance has been the subject of debate. Some courts have held that transmissions to individuals viewing in private settings can be public because the aggregate of the transmissions is to the public. Conversely, some courts have held that transmission to individuals viewing in private settings are not public. The video store and hotel cases concern the local performance of copyrighted works, but what about the remote transmission of works, for example via the internet?

## 2. Performances via Remote-Storage Digital Video Recorders

Cablevision developed a remote-storage DVR (RS-DVR) that allowed customers to select television shows to be recorded that were then stored remotely on Cablevision's servers in individually

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<sup>142</sup> See *On Command Video Corp.*, 777 F. Supp. at 790.

<sup>143</sup> See *id.*

<sup>144</sup> See *id.*

<sup>145</sup> See *Columbia Pictures Indus. v. Prof'l Real Estate Inv'rs, Inc.*, 866 F.2d 278, 279, 282 (9th Cir. 1989).

<sup>146</sup> See *id.* at 282 ("A plain reading of the Transmit Clause indicates that its purpose is to prohibit transmissions and other forms of broadcasting from one place to another without the copyright owner's permission.").

<sup>147</sup> See *id.* at 281.

earmarked copies and played back at each customer's request.<sup>148</sup> In *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, Cartoon Network sued Cablevision on a theory of direct infringement of its right of reproduction and right of public performance.<sup>149</sup> The court held that the RS-DVR system did not violate Cartoon Network's exclusive rights.<sup>150</sup> The Second Circuit's holding with respect to the public performance right was subsequently overruled by the Supreme Court in *Aereo*.<sup>151</sup>

The Second Circuit examined the volitional conduct of Cablevision in connection with its alleged violation of the reproduction right.<sup>152</sup> When comparing Cablevision to a copy shop, the court concluded that there was a difference between the volitional act of asking a person to make a copy and directing a machine to make a copy because the person engages in the volitional act of making the copy whereas the machine does not engage in any volitional act.<sup>153</sup> While Cablevision selected which channels were available to its subscribers, Cablevision had no control over the content made available on individual channels, and therefore was not engaging in any volitional conduct with respect to the content of the channels.<sup>154</sup> The court found Cablevision's practice of selecting the available channels was not sufficiently proximate to the act of copying to hold Cablevision directly liable for copies made by its subscribers.<sup>155</sup> The Second Circuit expressly declined to decide whether there were cases wherein the defendant's contribution would be so great that it would be warranted to hold the defendant

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<sup>148</sup> See *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 124 (2d Cir. 2008).

<sup>149</sup> See *id.*

<sup>150</sup> See *id.* at 140.

<sup>151</sup> See *Aereo*, 134 S. Ct. at 2503, 2511 (holding *Aereo* liable for public performance despite the fact that *Aereo* had individually earmarked copies of each work for each subscriber); *Cartoon Network*, 536 F.3d at 139 (holding Cartoon Network did not perform to the public because each RS-DVR transmission was to an individual subscriber).

<sup>152</sup> See *Cartoon Network*, 536 F.3d at 130 (explaining the infringement analysis does not generally turn on whether the defendant engaged in the conduct, but rather on whether the conduct was infringing).

<sup>153</sup> *Id.* at 131.

<sup>154</sup> *Id.* at 132.

<sup>155</sup> *Id.* at 132.

directly liable for violating the reproduction right; the court merely decided Cablevision's conduct did not go far enough in this case.<sup>156</sup> The Second Circuit did not determine whether the volitional conduct test applies to the public performance right, but the dissent in *Aereo* concluded that it does.<sup>157</sup>

### 3. Performances by Television Streaming Services

Aereo was a company that offered internet-based broadcast television streaming services to its subscribers.<sup>158</sup> Each subscriber selected a show he or she wanted to watch, a subscriber-specific Aereo antenna would find the show, the show would be saved to a subscriber-specific folder, and the show was streamed to the subscriber a few seconds behind the live broadcast.<sup>159</sup> The Second Circuit found that Aereo was not performing publicly because each stream was a private performance of a distinct copy earmarked for each subscriber.<sup>160</sup>

The Supreme Court disagreed.<sup>161</sup> The Court concluded that the performance can be public whether the performance takes place through one transmission or multiple transmissions.<sup>162</sup> The majority

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<sup>156</sup> *Id.* at 133.

<sup>157</sup> *See ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2512 (2014) (Scalia, J., dissenting); *Cartoon Network*, 536 F.3d at 139.

<sup>158</sup> *See Aereo*, 134 S. Ct. at 2503.

<sup>159</sup> *See id.*

<sup>160</sup> *See id.* at 2504 (“In the Second Circuit’s view, Aereo does not perform publicly within the meaning of the Transmit Clause because it does not transmit ‘to the public.’ Rather, each time Aereo streams a program to a subscriber, it sends a *private* transmission that is available only to that subscriber.”). This is consistent with the Second Circuit’s opinion in *Cartoon Network* described above. *See* 536 F.3d at 137.

<sup>161</sup> *See Aereo*, 134 S. Ct. at 2504 (“An entity that engages in activities like Aereo’s performs.”). The subscriber also performs the work. *See id.* at 2506.

<sup>162</sup> *See id.* at 2509 (“The Transmit Clause must permit this interpretation, for it provides that one may transmit a performance to the public ‘whether the members of the public capable of receiving the performance . . . receive it . . . at the same time or at different times.’”). The Court also makes a point to note that it does not make a difference that Aereo was storing personal copies of the program for each subscriber who selected it. *See id.* (explaining that each copy contains the same work and therefore each transmission of a copy is a performance of that work).

drew parallels between Aereo's system and community antenna television (CATV) systems in order to reach this conclusion.<sup>163</sup>

CATV systems were used to bring local broadcast television to residents who could not otherwise receive the signals due to technological constraints.<sup>164</sup> The subscribers themselves could choose which broadcasts to view, and the service provider did not curate the content by choosing which content to broadcast nor provide any original content.<sup>165</sup> The Supreme Court held that such service providers did not perform within the meaning of the Act, and therefore the service providers did not infringe the broadcasters' copyrights because the broadcasters, not the service providers, had control over the content.<sup>166</sup> However, the subsequent passage of the Copyright Act of 1976 clarified that rebroadcasting content is a public performance of that content.<sup>167</sup> Aereo performed a similar service to CATV systems because it brought the content curated by broadcast television directly to subscribers.<sup>168</sup> The Court recognized that the conduct of CATV providers and, by extension, Aereo, was purposefully brought within the scope of the 1976 Copyright Act, and therefore found Aereo infringed the public performance right of the original broadcasters.<sup>169</sup>

The majority did recognize one difference between Aereo's service and CATV providers: CATV systems constantly broadcast materials whereas Aereo only broadcasted materials at the request of a subscriber.<sup>170</sup> The majority decided that this difference was not a major one because, even though the content was always available in the background, the subscriber of CATV systems could change

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<sup>163</sup> See *id.* at 2511.

<sup>164</sup> See *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 391-92 (1968).

<sup>165</sup> See *id.* at 392.

<sup>166</sup> See *id.* at 400 ("If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be 'performing' the programs he received on his television set. . . . The only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur.").

<sup>167</sup> 17 U.S.C. § 101 (2012); *Aereo*, 134 S. Ct. at 2500.

<sup>168</sup> See *Aereo*, 134 S. Ct. at 2503.

<sup>169</sup> *Id.* at 2511.

<sup>170</sup> *Id.* at 2507.

the channel to view different content similar to Aereo's subscribers selecting a particular program to record.<sup>171</sup> Congress deliberately brought CATV systems within the Copyright Act of 1976 despite the contribution of the subscribers.<sup>172</sup> The fact that the content in CATV systems was always available to subscribers whereas the content in Aereo's system was not available until there was some subscriber action was taken was not a meaningful difference to the majority and therefore the Court found that Aereo performed.<sup>173</sup>

Despite the fact that Aereo's subscribers each received an individual copy of a work, the Court decided that Aereo's performance was to the public because Aereo had the same commercial objective as the CATV providers and Aereo's subscribers did not have a meaningfully different viewing experience from the CATV subscribers.<sup>174</sup> The Court focused on Congress' intent to deliberately bring the conduct of CATV providers within the Copyright Act of 1976, as well as the Transmit Clause's inclusion of performances via multiple transmissions and to multiple places as infringing conduct.<sup>175</sup> Therefore, the Court implicitly found that Aereo performed to the public through an aggregate of private performances to individual subscribers.<sup>176</sup>

The Court was careful to reserve the question of whether technologies that do not behave like a cable television company would infringe the public performance right.<sup>177</sup> The Court's holding also did not extend to services wherein the subscriber "pays for

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<sup>171</sup> *See id.*

<sup>172</sup> *See id.*

<sup>173</sup> *See id.* ("But this difference means nothing to the subscriber. It means nothing to the broadcaster. We do not see how this single difference, invisible to subscriber and broadcaster alike, could transform a system that is for all practical purposes a traditional cable system . . .").

<sup>174</sup> *See id.* at 2508; *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787, 790 (N.D. Cal. 1991) (holding that the transmissions were to the public even though the individual hotel rooms were private because the relationship between the transmitter and the guests was a commercial or public one). *Contra Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 139 (2d Cir. 2008) (rejecting a distinction between commercial and non-commercial transmissions in determining whether a performance is public).

<sup>175</sup> *See* 17 U.S.C. § 101 (2012); *Aereo*, 134 S. Ct. at 2509.

<sup>176</sup> *See Aereo*, 134 S. Ct. at 2509.

<sup>177</sup> *See id.* at 2510.

something other than the transmission of copyrighted works, such as the remote storage of content.”<sup>178</sup> Finally, the Court specifically mentioned cloud computing and RS-DVRs as technologies that do not fall within its holding because those technologies were not considered.<sup>179</sup>

Justice Scalia’s dissent argued that because the plaintiff proceeded on a claim of direct infringement, it would have to prove that Aereo—and not its subscribers—engaged in a volitional act of performing the defendant’s work.<sup>180</sup> A volitional act requires the defendant to have done something that infringes the plaintiff’s copyrighted material; in this case, the defendant must be the one to perform the material.<sup>181</sup> One example of volitional conduct would be when a video-on-demand service selects and arranges content to be viewed by its subscribers.<sup>182</sup> The dissent concluded that in Aereo’s case the subscribers were the ones engaging in infringing conduct by choosing the content and activating the service, and therefore, Aereo should not have been held directly liable for the copyright infringement.<sup>183</sup> This approach would not fully absolve Aereo from liability, but would force the plaintiff to proceed on a claim of contributory infringement in order to find Aereo liable for

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<sup>178</sup> See *id.* at 2511.

<sup>179</sup> *Id.* Therefore, the Supreme Court’s analysis in *Aereo* did not decide whether Cablevision’s conduct was a public performance, but did overrule the Second Circuit’s holding that Cablevision’s performance was not public. See *id.* (declining to extend its holding to remote storage DVRs but concluding that transmission to individually earmarked copies is insufficient to make a performance private); *Cartoon Network*, 536 F.3d at 138 (2d Cir. 2008) (holding the transmission of a remote storage DVR were private rather than public).

<sup>180</sup> See *Aereo*, 134 S. Ct. at 2512 (Scalia, J., dissenting).

<sup>181</sup> See *id.*

<sup>182</sup> See *id.* at 2513.

<sup>183</sup> See *id.* at 2513-14 (“The key point is that subscribers call all the shots: Aereo’s automated system does not relay any program, copyrighted or not, until a subscriber selects the program and tells Aereo to relay it. Aereo’s operation of that system is a volitional act and a but-for cause of the resulting performances, but, as in the case of the copy shop, that degree of involvement is not enough for direct liability.”); see also *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 960 (2014) (Breyer, J., concurring) (“[T]he producer of a technology which *permits* unlawful copying does not himself *engage* in unlawful copying.”) (emphasis in original).

the volitional conduct of its subscribers.<sup>184</sup>

The meaning of public performance evolved by court determinations of what it means to perform and what it means to be public in specific contexts with new technologies.<sup>185</sup> While *Aereo* clarified the liability for public performance of copyrighted works by service providers that behave like cable television companies, the liability for other parties is still not clear.<sup>186</sup> This leaves room for an analysis of the liability that should be imposed for new applications of copyright law, such as Let's Plays and livestreams.

### III. LET'S PLAYS AND LIVESTREAMS AS PUBLIC PERFORMANCES AND LIABILITY FOR THAT INFRINGEMENT

An analysis of whether a given situation is a public performance of a copyrighted work involves both case law and the definition set forth in 17 U.S.C. § 101.<sup>187</sup> Let's Plays and livestreams are public performances of videogames, but the question of who is performing the work is not settled.<sup>188</sup> The creator of the video, the person who posted the video (the poster), the website hosting the video (the hoster), and the person who initiates the playing of the video (the initiator) may all be performers and may either be directly or indirectly liable for the infringement.<sup>189</sup>

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<sup>184</sup> See *Aereo*, 134 S. Ct. at 2513 (Scalia, J., dissenting).

<sup>185</sup> See, e.g., *Columbia Pictures Indus. v. Redd Horne, Inc.*, 749 F.2d 154, 157-59 (3d Cir. 1984).

<sup>186</sup> See *Aereo*, 134 S. Ct. at 2511.

<sup>187</sup> See *surpa* note 47 and accompanying text.

<sup>188</sup> See *Aereo*, 134 S. Ct. at 2511 (“[W]e have not considered whether the public performance right is infringed when the user of a service pays primarily for something other than the transmission of copyrighted works, such as the remote storage of content. . . . We cannot now answer more precisely how the Transmit Clause or other provisions of the Copyright Act will apply to technologies not before us.”); *Id.* at 2512 (Scalia, J., dissenting) (“[T]he question is who does the performing. . . . If *Aereo*’s subscribers perform but *Aereo* does not, the claim necessarily fails.”).

<sup>189</sup> See *Gershwin Publ’g Corp. v. Columbia Artists Mgmt, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).



*A. Let's Plays and Livestreams are Public Performances of Videogames*

The Act defines performance for audiovisual works as to show its images in any sequence or to make the sounds accompanying the work audible.<sup>190</sup> Any of the various forms of Let's Plays and livestreams would fit into this definition because a foundational requirement of such videos is to show the videogame being played.<sup>191</sup> However, only public performances of copyrighted works are prevented by the Act.<sup>192</sup>

A performance is public within the meaning of the Act if it is in a place open to the public, if it is in a place where a substantial number of persons are present, or if it is transmitted to members of the public regardless of whether those members receive the transmission in the same place or at the same time.<sup>193</sup> A livestream is undoubtedly a public performance because the playing of the videogame is being simultaneously broadcast to the public.<sup>194</sup> Additionally, eSports, a subcategory of livestream wherein players play a videogame against one another, are played in front of a live audience, and therefore are also public performances of the videogame.<sup>195</sup>

Let's Plays are public performances within the Transmit Clause because they are performances of videogames which are communicated to viewers who are members of the public and who may view the performances at the same time or at different times.<sup>196</sup> A string of cases has found that a performance can still be public even if the viewers are receiving the performance in private places.<sup>197</sup> Courts have found that performances in settings that

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<sup>190</sup> See 17 U.S.C. § 101 (2012).

<sup>191</sup> See *Who Invented Let's Play Videos?*, *supra* note 62.

<sup>192</sup> See 17 U.S.C. § 106 (2012).

<sup>193</sup> See 17 U.S.C. § 101.

<sup>194</sup> See *id.*

<sup>195</sup> See *id.*; *Guide: What are eSports?*, *supra* note 66.

<sup>196</sup> See 17 U.S.C. § 101.

<sup>197</sup> See, e.g., *ABC, Inc. v. Aereo, Inc.*, 134 S.Ct. 2498, 2503, 2511 (2014); *Columbia Pictures Indus. v. Redd Horne, Inc.*, 749 F.2d 154, 157, 159 (3d Cir. 1984); *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787, 789-90 (N.D. Cal. 1991).

would generally be considered private, such as semi-private viewing rooms in a video store and hotel rooms, are public within the meaning of the Act because the aggregate of performances in these private places is a public performance.<sup>198</sup> Therefore, a performance of a Let's Play is public even though the recipients are generally viewing the content in their private homes with a small enough group of people that the performance would otherwise be private because the aggregate of the performances is public.<sup>199</sup>

One court held that the viewing of copyrighted works in hotel rooms was not a public performance of the work even though the hotel rented physical copies of the works to the guests.<sup>200</sup> This case can be distinguished from the others which found the transmission of the work was a public performance because there was no central repository from which the audiovisual works were being transmitted to the viewers.<sup>201</sup> In the case of both a Let's Play and a livestream, the content is being sent to the viewer by one broadcasting entity, akin to a central repository, and therefore the performance is public rather than private.<sup>202</sup> Let's Plays and livestreams are public performances of videogames, and therefore one or more parties is a performer and is liable for that infringement.<sup>203</sup>

### *B. Liability for the Public Performances of Let's Plays and Livestreams*

Several parties may rightfully be performers of the underlying videogame, and therefore liable for the infringement caused by Let's Plays and livestreams. The creator of the Let's Play or livestream, the poster of the content, the hoster of the content, and the initiator

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<sup>198</sup> See *Redd Horne*, 749 F.2d at 157, 159; see also *On Command Video Corp.*, 777 F. Supp. at 789-90.

<sup>199</sup> See 17 U.S.C. § 101; see also *Aereo*, 134 S. Ct. at 2511.

<sup>200</sup> *Columbia Pictures Indus. v. Prof'l Real Estate Inv'rs, Inc.*, 866 F.2d 278, 279, 282 (9th Cir. 1989).

<sup>201</sup> Compare *id.* (holding that viewing videos rented from a hotel gift shop to view in individual hotel rooms was not a public performance), with *On Command Video Corp.*, 777 F. Supp. at 789-90 (holding that videos sent from a central repository to individual hotel rooms was a public performance).

<sup>202</sup> See *Aereo*, 134 S. Ct. at 2503, 2511.

<sup>203</sup> See 17 U.S.C. § 101.

of the content may all be said to be liable in different ways. One party may fit into more than one category of actor; for example, the same party may be both the creator and the poster.<sup>204</sup> However, this analysis splits the potential infringers into these four categories in order to analyze the level of responsibility that should be assigned to each type of conduct.

### 1. The Creator of the Let's Play or Livestream

The creator of the Let's Play or livestream is undoubtedly performing the work by playing the videogame because the creator is causing the images of the videogame to be displayed or is making the sounds accompanying the videogame audible.<sup>205</sup> The question becomes whether the creator is performing to the public.<sup>206</sup> If the performance is public, the creator would have to intend for the performance to be public in order to be held directly liable for the infringement because that intention is the volitional conduct that supports direct infringement.<sup>207</sup> For example, assume a person was playing a videogame in his or her apartment and was not recording his or her playthrough, but someone else was standing across the street and recorded the player's playthrough using a telephoto lens.<sup>208</sup> If the recording subsequently ends up on YouTube, the player cannot be held liable for public performance of the videogame because the player did not have any volitional conduct in making the playthrough public; the player did not cause or intend the performance to be public.<sup>209</sup> The same analysis stands if the bystander is livestreaming the player's playthrough rather than posting it after the fact.<sup>210</sup>

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<sup>204</sup> See *Let's Play – Fortnite: Battle Royale – AH Live Stream*, *supra* note 68.

<sup>205</sup> See 17 U.S.C. § 101.

<sup>206</sup> See 17 U.S.C. § 106 (2012).

<sup>207</sup> See *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004); *Religious Tech. Ctr. v. Netcom Online Comm'n Servs., Inc.*, 907 F. Supp. 1361, 1370 (N.D. Cal. 1995) (“Although copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party.”).

<sup>208</sup> See 17 U.S.C. § 101.

<sup>209</sup> See *CoStar Grp.*, 373 F.3d at 550.

<sup>210</sup> See *id.*

A livestream is a performance to the public by definition because the player is playing the game in front of a live audience either in person or over the internet, just like when a performer plays a musical work or acts in a play.<sup>211</sup> The creator knows and intends that the livestream is made available to the public, and therefore the creator has the volitional conduct necessary to hold the creator liable for direct infringement of the public performance right.<sup>212</sup> The Transmit Clause further clarifies that it makes no difference whether the audience is gathered in one place or is viewing the transmission from different locations.<sup>213</sup>

Whether a Let's Play is a *public* performance is an inherently more difficult question because a Let's Play is generally recorded ahead of time and edited before it is posted. As such, the creator may not have the necessary volitional conduct to hold him or her directly liable because the content is not initially performed in front of the viewers.<sup>214</sup> The mere act of editing a playthrough of a videogame is insufficient volitional conduct for a public performance because the creator may intend to only view the content privately or to only show it to people inside of the creator's family and social circle.<sup>215</sup> *Aereo*, *Cartoon Network*, and *On Command Video Corp.* all address whether a commercial objective is sufficient to hold a broadcaster directly liable for infringing the public performance right.<sup>216</sup> These

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<sup>211</sup> See 17 U.S.C. § 106.

<sup>212</sup> See *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2512-13 (2014) (Scalia, J., dissenting).

<sup>213</sup> See 17 U.S.C. § 101.

<sup>214</sup> See *NFL v. Primetime 24 Joint Venture*, 211 F.3d 10, 13 (2d Cir. 2000). This case involved the transmission of NFL broadcasts via satellite and therefore had a different process than for Let's Plays. See *id.* at 11.

<sup>215</sup> See 17 U.S.C. § 101.

<sup>216</sup> Compare *Aereo*, 134 S. Ct. at 2508-09 (holding *Aereo* liable in part because *Aereo* shared the same commercial objective as community antenna television providers), and *On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787, 790 (N.D. Cal. 1991) (“[T]he relationship between the transmitter of the performance, *On Command*, and the audience, hotel guests, is a commercial, ‘public’ one regardless of where the viewing takes place. The non-public nature of the place of the performance has no bearing on whether or not those who enjoy the performance constitute ‘the public’ under the transmit clause.”), with *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 139 (2d Cir. 2008) (“If Congress had wished to make all commercial

cases do not address the situation particular to a Let's Play where the liability of the creator of the content is at issue.<sup>217</sup> However, creating the videos for the purpose of making them available to the public is a commercial objective because generally the creators receive compensation in the form of advertising revenue.<sup>218</sup> Therefore the creator is a performer and can be held directly liable for the infringing public performance.<sup>219</sup>

Under *Primetime 24*, a public performance includes every step in the process by which a work makes its way to the public.<sup>220</sup> That case involved the direct transmission of works to the audience via satellite which is distinguishable from Let's Plays that are edited before they are uploaded.<sup>221</sup> However, creating a Let's Play is the first step in the process by which the Let's Play reaches the audience, and therefore the creator is liable as a public performer.<sup>222</sup>

In the event the creator cannot be held directly liable for the public performance, the creator may be held liable through vicarious liability or contributory liability.<sup>223</sup> Vicarious liability requires the right and ability to supervise the infringing activity and a direct financial incentive in the infringing activity.<sup>224</sup> Therefore, the creator would have to be compensated for his or her work in order

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transmissions public performances, the transmit clause would read: 'to perform a work publicly means . . . to transmit a performance for commercial purposes.'").

<sup>217</sup> See *Aereo*, 134 S. Ct. at 2503 (assessing the liability of an internet video streaming service); *Cartoon Network*, 536 F.3d at 123-24 (assessing the liability of a remote storage DVR system); *On Command Video Corp.*, 777 F. Supp. at 788 (assessing the liability of an on-demand video streaming service for hotels).

<sup>218</sup> See Alexander, *supra* note 73. Generally, the creator and the poster are the same entity, but the poster would have to compensate the creator in some way if they were different entities and therefore the creator has a commercial objective regardless. See *Let's Play – Fortnite: Battle Royale – AH Live Stream*, *supra* note 68.

<sup>219</sup> See *Aereo*, 134 S. Ct. at 2512-13 (Scalia, J., dissenting); *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550 (4th Cir. 2004).

<sup>220</sup> See *NFL v. Primetime 24 Joint Venture*, 211 F.3d 10, 13 (2d Cir. 2000).

<sup>221</sup> See *id.* at 11; Sawyer, *supra* note 63.

<sup>222</sup> See *Primetime 24 Joint Venture*, 211 F.3d at 13.

<sup>223</sup> See *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

<sup>224</sup> See *id.*

to be held vicariously liable for the infringement.<sup>225</sup> The creator has the right and ability to supervise the infringing activity in one sense because the creator made the infringing video with the intention that the video be made public.<sup>226</sup> Alternatively, the creator does not have the right and ability to supervise the infringing activity because the creator does not make the Let's Play or livestream available to the public; the poster does.<sup>227</sup> Therefore, the creator cannot be held vicariously liable for the public performance.<sup>228</sup>

Contributory liability requires knowledge of the infringing activity of another and inducement, causation, or material contribution to that infringement.<sup>229</sup> The creator is undoubtedly materially contributing to the infringement by creating the Let's Play or livestream.<sup>230</sup> If the creator had the intention that the video become publicly available, then the creator likely had knowledge of the infringing activity of another in causing the performance.<sup>231</sup> However, the creator may not be said to have knowledge of the infringing activity because it has not happened yet.<sup>232</sup> Therefore, the creator can only be held contributorily liable after the Let's Play or livestream is made public and the creator has knowledge of the public nature of the video.<sup>233</sup>

The creator is a public performer of the underlying videogame because the creator plays the videogame and intends the Let's Play or livestream to be public.<sup>234</sup> Therefore, the creator is subject to

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<sup>225</sup> See *id.*

<sup>226</sup> See *Who Invented Let's Play Videos?*, *supra* note 62.

<sup>227</sup> See 17 U.S.C. § 106 (2012).

<sup>228</sup> See *Gershwin*, 443 F.2d at 1162.

<sup>229</sup> See *id.*

<sup>230</sup> See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); Sawyer, *supra* note 63 (explaining that both Let's Plays and livestreams involve the playing of a game, and Let's Plays additionally involve editing the playthrough).

<sup>231</sup> See Sawyer, *supra* note 63.

<sup>232</sup> See *Feist*, 499 U.S. at 361. The infringing conduct is the public performance which does not happen until the poster posts the video. See 17 U.S.C. § 106.

<sup>233</sup> See 17 U.S.C. § 106; *Gershwin*, 443 F.2d at 1162.

<sup>234</sup> See 17 U.S.C. § 101 (2012); *Who Invented Let's Play Videos?*, *supra* note 1; Sawyer, *supra* note 63.

direct liability for the infringement.<sup>235</sup> The next step in the process by which the Let's Play or livestream reaches the audience is the posting of the video.<sup>236</sup>

## 2. The Poster of the Let's Play or Livestream

The poster is directly responsible for making the infringing content available to the public if the website the content was posted to is open to the public.<sup>237</sup> The poster will generally make content from the same creator or content containing the same videogame available on a specialized channel, on YouTube for example.<sup>238</sup> However, making content available to the public is different from performing the work publicly.<sup>239</sup>

The Act defines perform as “to recite, render, play, dance, or act [a work], 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.”<sup>240</sup> The poster does not perform the videogame because he or she is not playing the videogame, and is not otherwise causing the videogame's images to be displayed or making its sounds audible.<sup>241</sup> However, the court in *Primetime 24* held that each step in the process by which a work makes its way to the audience is a public performance.<sup>242</sup> That case involved a transmission of NFL

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<sup>235</sup> See 17 U.S.C. § 106; *Feist*, 499 U.S. at 361.

<sup>236</sup> See Sawyer, *supra* note 63.

<sup>237</sup> See 17 U.S.C. § 101.

<sup>238</sup> See, e.g., *Let's Play - Fortnite: Battle Royale - AH Live Stream*, *supra* note 68; *Let's Play Minecraft: Ep. 47 - Enchantment Level 30*, *supra* note 68. Both videos are posted to the channel LetsPlay by LetsPlay, a division of Rooster Teeth. See *Let's Play - Fortnite: Battle Royale - AH Live Stream*, *supra* note 68; *Let's Play Minecraft: Ep. 47 - Enchantment Level 30*, *supra* note 68.

<sup>239</sup> Compare 17 U.S.C. § 106(3) (granting the exclusive right “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending”), with 17 U.S.C. § 106(4) (granting the exclusive right “in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly”).

<sup>240</sup> See 17 U.S.C. § 101.

<sup>241</sup> See *id.*

<sup>242</sup> See *NFL v. Primetime 24 Joint Venture*, 211 F.3d 10, 13 (2d Cir. 2000).

broadcasts to Canada from the United States via a satellite.<sup>243</sup>

In the case of a livestream, the poster could be held directly liable for the performance of the creator because the posting of the content is an integral part of the process by which the livestream makes its way to the audience.<sup>244</sup> A Let's Play is distinguishable from the circumstances in *Primetime 24* because a Let's Play is played, edited, posted, and viewed in discrete steps rather than as one continuous transmission of the underlying work.<sup>245</sup> However, *Primetime 24* does not state that its holding applies only to livestreams, and instead says that it was the intent of Congress that public performance involves every step in the process by which the work makes its way to the audience.<sup>246</sup> Therefore, the poster also performs a Let's Play by being part of the process by which the audience receives the work.<sup>247</sup>

The poster is a perfect example of vicarious liability for the conduct of the creator.<sup>248</sup> The poster has the right and ability to supervise the infringing activity of the creator by choosing whether or not to post the infringing content.<sup>249</sup> The poster would have a financial incentive in the infringing activity because the poster would receive the advertising revenue from the video.<sup>250</sup>

The poster can also be contributorily liable for the conduct of the creator.<sup>251</sup> The poster must have knowledge of the infringing content of the creator because the poster is taking that content and making it available to the public.<sup>252</sup> The poster materially contributes to the infringement of the creator by making the Let's Play or livestream available to the public.<sup>253</sup> While the creator can be held directly liable because of his or her intention to publicly perform the

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<sup>243</sup> See *id.* at 11.

<sup>244</sup> See *id.* at 13.

<sup>245</sup> See *id.* at 11; Sawyer, *supra* note 63.

<sup>246</sup> See *Primetime 24 Joint Venture*, 211 F.3d at 13.

<sup>247</sup> See *id.*

<sup>248</sup> See *Gershwin Publ'g Corp. v. Columbia Artists Mgmt, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

<sup>249</sup> See *id.*

<sup>250</sup> See *id.*

<sup>251</sup> See *id.*

<sup>252</sup> See *id.*

<sup>253</sup> See 17 U.S.C. § 106 (2012); *Gershwin*, 443 F.2d at 1162.



videogame, the game is not publicly performed until members of the public view the transmission.<sup>254</sup> The only way the work is publicly performed is through the poster's volitional conduct of posting the video, and therefore the poster contributes materially to the creator's infringement and is contributorily liable for public performance.<sup>255</sup>

The poster is a performer of the underlying videogame because posting the video is a part of the process by which the Let's Play or livestream reaches the audience.<sup>256</sup> Therefore, the poster is directly liable for the infringing public performance.<sup>257</sup> The next party in the process by which a Let's Play or livestream reaches its audience is the hoster.

### 3. The Hoster of the Let's Play or Livestream

The hoster can be one of a variety of different types of websites which have different aspects that affect the application of the public performance right.<sup>258</sup> A website that merely hosts content is not liable for the public performance of the work because further action needs to be taken in order to perform the work.<sup>259</sup> These types of websites are analogous to the websites hosting music in *United States v. American Society of Composers*, which were held not to publicly perform music that was downloaded from the websites

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<sup>254</sup> See 17 U.S.C. § 101 (2012); *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2512 (2014) (Scalia, J., dissenting).

<sup>255</sup> See *Aereo*, 134 S. Ct. at 2512 (Scalia, J., dissenting); *Gershwin*, 443 F.2d at 1162 (explaining one of the paths to contributory liability is to materially contribute to the infringing activity).

<sup>256</sup> See *NFL v. Primetime 24 Joint Venture*, 211 F.3d 10, 13 (2d Cir. 2000).

<sup>257</sup> See 17 U.S.C. § 106; *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

<sup>258</sup> See, e.g., TWITCH, *About*, <https://www.twitch.tv/p/about/> [<https://web.archive.org/web/20190208003214/https://www.twitch.tv/p/about/>] (last visited Feb. 14, 2019) ("Welcome to Twitch. We are a global community of millions who come together each day to create their own entertainment: unique, live, unpredictable, never-to-be repeated experiences created by the magical interactions of the many."); YOUTUBE, *About*, <https://www.youtube.com> [<https://web.archive.org/web/20190207235959/https://www.youtube.com/>] (last visited Feb. 14, 2019) (describing YouTube as a place for everyone to have a voice).

<sup>259</sup> See 17 U.S.C. § 101; Podlas, *supra* note 36, at 58.

because the music was not able to be played during the download.<sup>260</sup> If the website does not have some sort of playback mechanism to play the Let's Plays or livestreams, then the website cannot be directly liable for public performance because the website is not performing.<sup>261</sup> However, websites like YouTube that provide a playback mechanism for videos are performing the works by providing the means through which the works are performed.<sup>262</sup> Additionally, the hoster can either be public or private, but the hosters of Let's Plays and livestreams are public as the purpose of the videos is to be seen by the public.<sup>263</sup>

A hoster curates content by selecting and arranging which content is available to its subscribers.<sup>264</sup> For example, a hoster can choose whether to allow content from certain creators or content from certain videogames.<sup>265</sup> If a hoster curates the content available on its service, the hoster is directly liable for copyright infringement.<sup>266</sup> The hoster in this instance would have the necessary volitional conduct to merit holding the hoster directly liable because the hoster is choosing the content to include on its service.<sup>267</sup> Therefore, a hoster that curates content is directly liable for the infringement regardless of the conduct of its subscribers.<sup>268</sup>

In *Primetime 24*, the court held that every activity in the chain of conduct by which a copyrighted work reaches its audience is a public performance of that work.<sup>269</sup> Therefore, the uplink of a video transmission in the United States was held to violate the public performance right of the NFL's broadcasts even though the viewers were in Canada where the Act does not apply.<sup>270</sup> Under this framework, hosters that are hosting livestreams are liable for the

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<sup>260</sup> See 627 F.3d 64, 73, 85 (2d Cir. 2010).

<sup>261</sup> See 17 U.S.C. § 101.

<sup>262</sup> See *id.*; *NFL v. Primetime 24 Joint Venture*, 211 F.3d 10, 13 (2d Cir. 2000).

<sup>263</sup> See *supra* note 130 and accompanying text.

<sup>264</sup> See *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2512 (Scalia, J., dissenting).

<sup>265</sup> See Podlas, *supra* note 36, at 58-59.

<sup>266</sup> See *Aereo*, 134 S. Ct. at 2513; Podlas, *supra* note 36, at 58-59.

<sup>267</sup> See *Aereo*, 134 S. Ct. at 2513 (Scalia, J., dissenting).

<sup>268</sup> See *id.*; Podlas, *supra* note 36, at 58-59.

<sup>269</sup> See *NFL v. Primetime 24 Joint Venture*, 211 F.3d 10, 13 (2d Cir. 2000).

<sup>270</sup> See *id.* at 11, 13.

public performance of the underlying videogames because the hoster is an integral part of the process by which the livestream makes its way to the audience.<sup>271</sup>

However, *Primetime 24* involves a continuous transmission unlike Let's Plays where the process involves several disjointed steps of creating, posting, hosting, and receiving.<sup>272</sup> If the court's analysis is taken on its face, the hoster is liable for public performance by hosting the Let's Play because hosting the content is part of the process by which the work reaches the audience.<sup>273</sup> However, the hoster may not know that it is part of the process by which a given Let's Play reaches its audience.<sup>274</sup> Therefore, the hoster cannot be held directly liable for the public performance under *Primetime 24* because the hoster is not knowingly engaging in the process of transmitting the Let's Play.<sup>275</sup>

Under *Aereo*, a service provider that brings the content curated by a broadcast cable company to subscribers is liable for infringing the public performance right of the works contained in the stream because the service provider is behaving like a cable television company.<sup>276</sup> The Court found *Aereo* liable for violating the public performance right because *Aereo*'s practice of re-broadcasting television content was the same as the CATV companies who re-broadcasted the signals of cable companies to people outside of the service area.<sup>277</sup> The conduct of the CATV companies was brought explicitly within the Copyright Act of 1976, and therefore *Aereo* was liable for engaging in the same type of conduct.<sup>278</sup> This conduct is very similar to a hoster that hosts livestreams, and therefore the hoster is directly liable for infringement.<sup>279</sup>

A hoster that hosts Let's Plays can be said to behave like a cable

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<sup>271</sup> See *id.* at 13.

<sup>272</sup> See *id.* at 11; Sawyer, *supra* note 63.

<sup>273</sup> See *Primetime 24 Joint Venture*, 211 F.3d at 13.

<sup>274</sup> See *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2513 (Scalia, J., dissenting).

<sup>275</sup> See *id.*; *Primetime 24 Joint Venture*, 211 F.3d at 13.

<sup>276</sup> See *Aereo*, 134 S. Ct. at 2511.

<sup>277</sup> See *id.*

<sup>278</sup> See 17 U.S.C. § 101 (2012); *Aereo*, 134 S. Ct. at 2511.

<sup>279</sup> See *Aereo*, 134 S. Ct. at 2503; Sawyer, *supra* note 63 (explaining livestreams are playthroughs of videogames that are immediately broadcast to the audience without any editing).

television company because they are re-broadcasting someone else's content.<sup>280</sup> The creator's content is generally aggregated in one channel just like on cable television, and therefore the entirety of a hoster such as YouTube behaves like a cable television company.<sup>281</sup> Therefore, the hoster should be held directly liable for the public performance of the videogames.<sup>282</sup>

The hoster is not subject to vicarious liability for the public performance.<sup>283</sup> While the hoster is in the best position to know the content posted on its service generally, the hoster should not be responsible for the content posted by all of its users unless it is made aware of infringing content by the copyright holder.<sup>284</sup> Holding the hoster vicariously liable for the public performance of Let's Plays and livestreams is improper because the hoster does not bear the responsibility of ensuring that all content posted by users is proper.<sup>285</sup> In the context of videogames, the hoster would have to keep apprised of which companies allow Let's Plays and livestreams for which games and would have to filter that content out in removing infringing content.<sup>286</sup>

The hoster is not subject to contributory liability for the infringement.<sup>287</sup> The hoster cannot be said to have knowledge of the

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<sup>280</sup> See *Aereo*, 134 S. Ct. at 2506.

<sup>281</sup> See *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 391-92 (1968).

<sup>282</sup> See *Aereo*, 134 S. Ct. at 2511. Holding the hoster directly liable for copyright infringement provides the best recourse for videogame companies who do not want to allow Let's Plays of their videogames or who want to make money off of the Let's Plays. See Green, *supra* note 80. If hosters are liable for hosting infringing content, videogame companies may receive an ally in their restrictive Let's Play policies because the hosters may help shoulder some of the backlash. See *Not Every Developer Is Convinced Let's Play Videos Are A Good Thing*, *supra* note 79 (explaining that small videogame companies that make narrative games are the most likely to be harmed by the culture of Let's Plays).

<sup>283</sup> See *Gershwin Publ'g Corp. v. Columbia Artists Mgmt, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

<sup>284</sup> See *Aereo*, 134 S. Ct. at 2512 (Scalia, J., dissenting); *Gershwin*, 443 F.2d at 1162.

<sup>285</sup> See *Gershwin*, 443 F.2d at 1162.

<sup>286</sup> See *id.*; WHO LET'S PLAY, *supra* note 70 (listing videogame companies, their Let's Play policies, and which games the company allows to be used in Let's Plays).

<sup>287</sup> See *Gershwin*, 443 F.2d at 1162.

infringing activities of its subscribers, and therefore cannot be held contributorily responsible for infringement.<sup>288</sup> The mere fact that the hoster's service may be used for infringing purposes is not enough to impute knowledge of those infringing uses and hold the hoster liable for all infringement.<sup>289</sup>

The hoster is a performer of a videogame if it has knowledge of the Let's Play or livestream and has a playback mechanism because the hoster is knowingly engaging in the process by which the video reaches its audience.<sup>290</sup> Additionally the hoster is a performer of a videogame without knowledge because it behaves like a cable television company.<sup>291</sup> Therefore, the hoster is directly liable for infringing the public performance right.<sup>292</sup> The final step in the process by which a Let's Play or livestream reaches its audience is through the initiator.<sup>293</sup>

#### 4. The Initiator of the Let's Play or Livestream

*Aereo* made it clear that both the service provider and the user perform.<sup>294</sup> Initiators are generally engaging in a private performance when they press play on an infringing video to view in their own home, and therefore cannot be liable for violating the public performance right.<sup>295</sup> If the initiators cause the content to be played in a public place or cause it to be transmitted to the public, then they can be directly liable for infringing the copyright holder's right of public performance.<sup>296</sup> For example, if the initiator caused the work to be played in a movie theatre, the initiator would be

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<sup>288</sup> *See id.*

<sup>289</sup> *See id.*

<sup>290</sup> *See* 17 U.S.C. § 101 (2012); *NFL v. Primetime 24 Joint Venture*, 211 F.3d 10, 13 (2d Cir. 2000).

<sup>291</sup> *See ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2511.

<sup>292</sup> *See* 17 U.S.C. § 106 (2012); *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

<sup>293</sup> *See United States v. Am. Soc'y of Composers*, 627 F.3d 64, 73, 85 (2d Cir. 2010) (holding the mere download of a song file was not a performance of the song and explaining the user must take some further action to perform the song).

<sup>294</sup> *See Aereo*, 134 S. Ct. at 2506.

<sup>295</sup> *See* 17 U.S.C. § 106.

<sup>296</sup> *See* 17 U.S.C. § 101 (2012).

responsible for a public performance of the work because the initiator would be playing the work to the public.<sup>297</sup>

Initiators engage in the volitional conduct necessary to be performers of a Let's Play or livestream by pressing play on the video or otherwise engaging with the content and causing it to be played through some other mechanism.<sup>298</sup> However, initiators generally do not engage in volitional conduct relating to the public nature of the performances.<sup>299</sup> Therefore, the initiators cannot be held directly liable for the public performance of the videogames because the initiators do not intend to effectuate a public performance when they press play on a video.<sup>300</sup>

Let's Plays and livestreams are designed to be public performances of videogames because they are performances of videogames and are made to the public either after editing or as the performance is happening.<sup>301</sup> The creator of a livestream is a public performer and is directly liable for the infringement because he or she is transmitting a performance of the videogame in real time.<sup>302</sup> The creator of a Let's Play is a public performer of the videogame only if he or she intends the video to be public because Let's Plays are not publicly performed as they are created.<sup>303</sup> The poster of a Let's Play or livestream and the hoster of a livestream are public performers of the work because the poster and hoster are part of the process by which the work makes its way to the audience.<sup>304</sup> However, the hoster of a Let's Play is a public performer because the hoster curates channels containing the videos and makes those channels available to the public like a cable television company.<sup>305</sup> Finally, the initiator of the Let's Play or livestream is not a public performer of the videogame, unless the initiator plays the work in a public place or transmits the content to members of the public,

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<sup>297</sup> *See id.*

<sup>298</sup> *See Aereo*, 134 S. Ct. at 2512 (Scalia, J., dissenting).

<sup>299</sup> *See* 17 U.S.C. §§ 101, 106.

<sup>300</sup> *See* § 106.

<sup>301</sup> *See Who Invented Let's Play Videos?*, *supra* note 62.

<sup>302</sup> *See* 17 U.S.C. § 101.

<sup>303</sup> *See Aereo*, 134 S. Ct. at 2512 (Scalia, J., dissenting); Sawyer, *supra* note 63.

<sup>304</sup> *See NFL v. Primetime 24 Joint Venture*, 211 F.3d 10, 13 (2d Cir. 2000).

<sup>305</sup> *See Aereo*, 134 S. Ct. at 2511.

because the initiator generally engages in a private performance of the work.<sup>306</sup>

#### CONCLUSION

Let's Plays and livestreams are generally public performances of videogames because they are recordings of the videogame being played and the purpose of creating a Let's Play or livestream is for it to be seen by others.<sup>307</sup> The creator of a livestream is a public performer.<sup>308</sup> The creator of a Let's Play is a public performer if the creator intends the performance to be public.<sup>309</sup> The poster of a Let's Play or a livestream and the hoster of a livestream is a public performer because the poster and hoster are engaging in the process by which the content makes its way to the audience.<sup>310</sup> The hoster of a Let's Play is a public performer of the underlying videogame because the hoster makes channels of Let's Plays available to the public in a similar fashion to a cable television company.<sup>311</sup> Finally, the initiator of a Let's Play or livestream is not a public performer because the initiator's conduct effectuates a private rather than a public performance.<sup>312</sup>

Ultimately, assigning liability for public performance to creators, posters, and hosters does little to alleviate the burden Let's Plays and livestreams can create on videogame developers.<sup>313</sup> The public attitude favoring Let's Plays and livestreams essentially requires developers to allow their games to be used in order to avoid backlash.<sup>314</sup> If attitudes shift, videogame developers can use this liability schema to prevent their videogames from being exploited in Let's Plays and livestreams without their permission.<sup>315</sup>

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<sup>306</sup> See 17 U.S.C. §§ 101, 106 (2012).

<sup>307</sup> See 17 U.S.C. § 101; *Who Invented Let's Play Videos?*, *supra* note 62.

<sup>308</sup> See 17 U.S.C. § 101; *Aereo*, 134 S. Ct. at 2512 (Scalia, J., dissenting).

<sup>309</sup> See 17 U.S.C. § 101; *Aereo*, 134 S. Ct. at 2512 (Scalia, J., dissenting).

<sup>310</sup> See *Primetime 24 Joint Venture*, 211 F.3d at 13.

<sup>311</sup> See *Aereo*, 134 S. Ct. at 2511.

<sup>312</sup> See 17 U.S.C. § 106.

<sup>313</sup> See *Not Every Developer Is Convinced Let's Play Videos Are A Good Thing*, *supra* note 79.

<sup>314</sup> See *id.*

<sup>315</sup> See *id.*