

**THIS VERSION DOES NOT CONTAIN PAGE NUMBERS.
PLEASE CONSULT THE PRINT OR ONLINE DATABASE
VERSIONS FOR THE PROPER CITATION INFORMATION.**

NOTE

FAIR PLAY: ECONOMIC JUSTIFICATIONS FOR APPLYING FAIR USE TO THE ONLINE STREAMING OF VIDEO GAMES

James Puddington[†]

INTRODUCTION

Video games have become a dominant force in the entertainment industry over the last few decades, with revenues from software sales alone expected to reach \$100 billion by 2018.¹ With the advent of digital distribution, consumers are now able to forego large retailers and purchase games with the press of a button, opening the door for smaller companies to try their hand at video game creation.² Games of every type and genre are now available for every gaming platform, from phones to personal computers. Today, nearly ninety-seven percent of American children between the ages of twelve and seventeen play video games.³ Along with the increased accessibility of video games, demand for associated media has grown astronomically. Popular YouTube pages showcasing videos of gameplay attract millions of viewers and “subscribers,”

[†] J.D. 2015, Boston University; B.S. Business Management 2011, Rutgers, the State University of New Jersey. I would like to thank Professor Hylton for his help and guidance from the earliest stages of drafting this note. I would also like to thank the JOSTL Staff, in particular Alex Nagorniy, for their help in editing. Finally, I would like to thank my parents, Jim and Jeanne, for their support throughout the years, and my brothers, Matthew and Ryan, who helped to research this note by playing far too many video games with me over the years.

¹ Jenna Pitcher, *Games industry revenue may hit \$100 billion by 2018, says research firm*, POLYGON (June 25, 2014, 2:48 AM), <http://www.polygon.com/2014/6/25/5840882/games-industry-revenue-hit-100-billion-by-2018-dfc-Intelligence> (archived at <http://perma.cc/4XHC-7AWT>).

² See Erik Kain, *Why Digital Distribution Is The Future And GameStop Is Not: Taking The Long View On Used Games*, FORBES (May 30, 2013, 2:19 PM), <http://www.forbes.com/sites/erikkain/2013/05/30/why-digital-distribution-is-the-future-and-gamestop-is-not-taking-the-long-view-on-used-games/> (archived at <http://perma.cc/2LGZ-Y5X8>).

³ Martha Irvine, *Survey: Nearly every American kid plays video games*, ABC NEWS, <http://abcnews.go.com/Technology/story?id=5817835> (last visited Dec. 27, 2014) (archived at <http://perma.cc/JR3Z-KJB5>).

with the most popular “YouTuber” earning \$4 million per year from the advertising revenue brought in by gameplay videos.⁴ Gamers are increasingly able to earn livable yearly wages by combining advertising revenue with winnings from tournaments and leagues.⁵ An entire industry has developed around showcasing gameplay through online media, with individual content creators dominating the field.

As consumers continue to watch gameplay footage online, legal questions have arisen as to whether such videos can be posted without express permission from developers. Users of popular video-sharing websites such as YouTube and Twitch.tv often post footage of video games on their channels along with their own commentary, sometimes earning substantial advertising revenue from commercials played before and after the user’s video. In response, several developers have had footage of their games removed through Digital Millennium Copyright Act (“DMCA”) “takedown” notices, sometimes with the goal of silencing critics who have posted short reviews of their games.⁶ Hoping to avoid the threat of litigation, popular video hosting sites have engaged in widespread preemptive removal of game content, in some cases removing videos to which developers had not objected. This approach has been met with controversy, as the public has continued to protest the removal of videos that present legitimate criticism of developers’ products.⁷ Rather than removing videos under the DMCA’s safe harbor provisions, video-sharing websites should justify gameplay videos under copyright’s fair use doctrine, where such videos contain sufficient original and transformative content, discuss strategies or methods of playing games, or where the video focuses on criticism or review without taking large portions of the original work.

⁴ Eddie Makuch, *YouTube Video Game Star PewDiePie Earns \$4 Million Per Year*, GAMESPOT NEWS (June 17, 2014), <http://www.gamespot.com/articles/youtube-video-game-star-pewdiepie-earns-4-million-per-year/1100-6420544/> (archived at <http://perma.cc/3QW3-Y2L8>).

⁵ Erica Fink, *I make six figures playing video games*, CNN MONEY (Oct. 13, 2014, 12:47 PM), <http://money.cnn.com/2014/10/09/technology/six-figures-to-play-video-games/> (archived at <http://perma.cc/39JA-SNAH>).

⁶ See *infra* Part III.A.1.

⁷ See, e.g., William Usher, *Copyright Block Removed On TotalBiscuit’s Day One: Garry’s Incident Review*, CINEMABLEND, <http://www.cinemablend.com/games/Copyright-Block-Removed-TotalBiscuit-Day-One-Garry-Incident-Review-60043.html> (last visited Dec. 28, 2014) (archived at <http://perma.cc/MSU2-AQNS>).

2015]

FAIR PLAY

EXISTING PRACTICE AND THE DIGITAL MILLENNIUM COPYRIGHT ACT

The Digital Millennium Copyright Act as a Method for Regulating Video Game Content

The DMCA grants a statutory exemption from copyright liability to service providers who, upon being notified or otherwise acquiring knowledge of infringing content, “[act] expeditiously to remove, or disable access to” such content.⁸ The statute provides that “[a] service provider shall not be liable . . . for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system . . . controlled or operated by or for the service provider” if the service provider complies with certain requirements.⁹ In particular, the service provider seeking protection from liability must not have actual or “red flag” knowledge of the infringing activity on its website, must not receive a financial benefit from infringing activities over which the provider exercises control, and upon receiving sufficient notification of infringing activity, must act quickly to remove infringing material.¹⁰

For the DMCA’s takedown requirement to apply, a service provider must have knowledge of specific infringing material; general awareness of the presence of infringing material on a provider’s servers will not suffice.¹¹ A provider may be deemed to have knowledge for purposes of the statute under the ‘willful blindness’ concept if the service provider “was aware of a high probability of the fact in dispute and consciously avoided confirming that fact.”¹² A developer can also affirmatively put a service provider on notice of infringing material available on the provider’s website by submitting a “notification of claimed infringement,” which must, among other things, identify the copyrighted work and the material that is claimed to be infringing.¹³

Use of the DMCA’s Safe Harbor Provisions by Popular Video-Sharing Websites

Video-sharing websites, often hosting user-generated content utilizing footage from thousands of different video games, typically use the DMCA’s

⁸ 17 U.S.C. § 512(c).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 30-31 (2d Cir. 2012) (“[T]he nature of the removal obligation itself contemplates knowledge or awareness of specific infringing material, because expeditious removal is possible only if the service provider knows with particularity which items to remove.”).

¹² *Id.* at 35 (quoting *United States v. Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003) (internal citations omitted)).

¹³ 17 U.S.C. § 512(c)(3) (2012).

safe harbor as a primary tool for dealing with copyright claims submitted by developers in order to avoid costly litigation. For example, YouTube notifies game developers: “If you believe your copyright-protected work was posted on YouTube without authorization, you may submit a copyright infringement notification.”¹⁴ Twitch.tv, a website which allows users to display live streaming video of themselves playing video games while simultaneously interacting with other Twitch members, has a policy of “respond[ing] to notices of alleged infringement that comply with the Digital Millennium Copyright Act.”¹⁵ By implementing a default practice of responding to infringement notices sent by game developers, these websites have at times taken down user content in order to qualify for the DMCA’s protections and preemptively avoid copyright infringement liability.

The DMCA’s “notice and takedown” approach stands in contrast to the fair use alternative, which seeks to justify and protect “actual copying [that] should be permitted even though it violates the prohibition against unauthorized reproduction.”¹⁶ Rather than taking down gameplay footage upon demand, video-sharing sites could argue that, in certain cases, user-generated works that would otherwise infringe on developer copyrights are protected by fair use. This would allow YouTube and Twitch to continue to host otherwise infringing videos, and user content with value to the public would remain freely accessible.

It is true that YouTube already recognizes the ability of users to post unauthorized gameplay footage to some extent. YouTube’s partner policies, which govern the terms by which YouTube users may monetize their videos on the website, state: “[w]ithout the appropriate license from the publisher, use of video game or software user interface must be minimal. Video game content may be monetized if the associated step-by-step commentary is strictly tied to the live action being shown and provides instructional or educational value.”¹⁷ These policies demonstrate YouTube’s willingness to defend certain types of gameplay videos based on fair use grounds where the footage is used for

¹⁴ *Submit a copyright takedown notice*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2807622/> (last visited Dec. 28, 2014) (archived at <http://perma.cc/Z7KN-SYED>).

¹⁵ *Terms of Service*, TWITCH, http://www.twitch.tv/user/legal?page=terms_of_service (last modified Jan. 15, 2015) (archived at <http://perma.cc/RQ2Q-SWBJ>) (“Please note that since we respect game designer, game publisher and other Content (as defined below) owner rights, it is Twitch’s policy to respond to notices of alleged infringement that comply with the Digital Millennium Copyright Act.”).

¹⁶ RONALD A. CASS & KEITH N. HYLTON, *LAWS OF CREATION: PROPERTY RIGHTS IN THE WORLD OF IDEAS* 109 (Harvard Univ. Press ed., 2013).

¹⁷ *Video game and software content*, YOUTUBE HELP, <https://support.google.com/youtube/answer/138161> (last visited Dec. 28, 2014) (archived at <http://perma.cc/D8GX-H2ML>).

2015]

FAIR PLAY

instructional purposes. However, as this paper will argue, the scope of the fair use defense may extend to protect user-generated content in scenarios not currently contemplated by service providers' policies. By implementing nuanced policies that defend certain types of content under the fair use doctrine while taking down others, these websites could avoid litigation in scenarios where fair use is unlikely to apply, without granting developers the ability to take down user-generated content at will.

Developer Licenses and Video-Sharing Policies

While several game developers generally prohibit third parties from posting footage of their games, many companies expressly grant permission to use gameplay footage under certain conditions. For example, Blizzard Entertainment, the maker of popular games such as *World of Warcraft* and *StarCraft*, allows customers to "create video productions using Blizzard's Content," as long as viewers have the option to view the content for free.¹⁸ Users are allowed to charge fees for "premium access" to their content, i.e. for making the content viewable without commercials, but may not require a fee as a prerequisite for viewing the video itself.¹⁹ While Blizzard generally prohibits "commercial uses" of video content from their games, an express exception is made for those who are partnered with YouTube or video streaming websites.²⁰ Bethesda Softworks, creators of the acclaimed *Fallout* and *Elder Scrolls* series, encourages players to share videos of gameplay, including monetized videos, with certain restrictions on videos featuring content protected by non-disclosure agreements or "wildly inappropriate" content.²¹ Blizzard and Bethesda are just a few of the vast majority of game companies who expressly allow sharing and monetization of videos featuring the developers' products.²² This demonstrates that in many cases, developers recognize the benefits associated with allowing players to create and share game-associated media on popular video-sharing websites.

ERROR AND CONTROVERSY IN THE DMCA TAKEDOWN SYSTEM

One of the main problems with websites' reliance on the DMCA to manage copyright issues is the incredible variety of gameplay videos that currently

¹⁸ *Blizzard Video Policy*, BLIZZARD ENTMT, <http://us.blizzard.com/en-us/company/legal/videopolicy.html> (last visited Dec. 28, 2014) (archived at <http://perma.cc/JB5A-KK68>).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Bethesda Video Policy*, BETHESDA BLOG, <http://www.bethblog.com/bethesda-video-policy/> (last visited Dec. 28, 2014) (archived at <http://perma.cc/3FH3-ZHMJ>).

²² *See, e.g., WHOLETSPLAY*, <http://www.wholetsplay.com/wiki/doku.php> (last modified Dec. 28, 2014) (archived at <http://perma.cc/PSH3-3K72>).

exist on video sharing websites. Videos created by YouTube and Twitch.tv partners can range from very short, critical reviews to entire series devoted to covering substantial amounts of gameplay.²³ YouTube users, for example, will often create a series of gameplay videos, collectively called a “Let’s Play,” which track the player’s progress throughout the course of a game, usually accompanied by the user’s commentary.²⁴ While developers may well be justified in their concern over “Let’s Play” videos for certain types of games, developers have also submitted copyright claims in order to remove less problematic works and silence public criticism of their products.²⁵ Without a mechanism in the law to decide which types of videos are permissible, video-sharing websites such as YouTube are left with no alternative but to comply with DMCA copyright notices in order to avoid costly litigation. This inefficiency in the law has often led to unjust results, as content creators have seen their work – often containing legitimate and valuable criticisms of games – removed or flagged as a “strike” against their YouTube partnership status.²⁶ Furthermore, efforts by service providers to preempt litigation by affirmatively removing monetization features of videos have been met with disapproval even from developers, who in many cases encourage the use of their games by content creators.

Copyright Notices as Censorship of Legitimate Criticism and Comment

Johnathan Bain’s “Garry’s Incident” Incident

A prime example of the problems associated with using DMCA “notice and takedown” provisions to regulate game-related content can be seen in the controversy surrounding John Bain’s review of the game *Day One: Garry’s Incident*. John Bain – or “TotalBiscuit,” the moniker he uses online and for his videos – regularly releases reviews of video games which use between twenty minutes to an hour of gameplay footage.²⁷ Calling himself “The Cynical Brit,” Bain is known for his harsh reviews of games he feels are poorly made, while

²³ See e.g., TobyGames, *Skyrim: Season 1*, YOUTUBE (July 2, 2014), <https://www.youtube.com/playlist?list=PL745D6312C159C4AC> (demonstrating the first 200 videos of a “Let’s Play” series.).

²⁴ See Patrick White, *Fan Fiction More Creative Than Most People Think*, Kansas State Collegian (April 18, 2013), <http://www.kstatecollegian.com/2013/04/18/fan-fiction-more-creative-than-most-people-think/>.

²⁵ See *infra* Part III.A.1.

²⁶ See *Copyright strike basics*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2814000?hl=en> (last visited Dec. 28, 2014) (archived at <http://perma.cc/9ZDR-K8VQ>).

²⁷ See, e.g., TotalBiscuit, *The Cynical Brit, WTF Is . . . - Day One: Garry’s Incident?* YOUTUBE (Oct. 1, 2013), https://www.youtube.com/watch?v=KjTa_x3rbJE (archived at <http://perma.cc/3FYN-YWXX?type=image>).

2015]

FAIR PLAY

remaining fair to those who make high-quality games. Over two million subscribers frequent his channel;²⁸ his popularity often causes developers to send him early versions of games in order to reach his extensive viewer base.²⁹

John Bain's review of *Day One: Garry's Incident* was particularly critical, pointing out problems with the game's coding and design, describing the game as "a disaster," "horrendously bad," and "a wasted concept" that should be "avoided at all costs."³⁰ Despite Bain's scathing review, the video was accompanied by a link to a page through which viewers could purchase the game if they chose to do so.³¹ YouTube took down the review shortly after the developer, Wild Games Studio, submitted a copyright infringement notice.³² The developer's CEO made a statement regarding the matter, claiming that the notice was submitted "because [Bain] has no right to make advertising revenues with our license."³³ Bain responded to Wild Games Studio in a fourteen-minute video that received nearly four million views and overwhelmingly positive feedback from viewers.³⁴ After Wild Games Studio voluntarily rescinded their copyright claim amidst widespread outrage from viewers, YouTube restored Bain's video.³⁵

Other Controversial Examples of DMCA Takedowns

Wild Games Studio is not the only developer that has caused controversy by submitting DMCA copyright notices to YouTube and other video hosting websites. Recently, Activision began issuing copyright notices in order to remove videos showcasing "exploits," or problems in coding which players can use to obtain an advantage in matches with other players, in its *Call of Duty* game.³⁶ Activision justified its copyright notices as an attempt to stop

²⁸ TotalBiscuit, The Cynical Brit, YOUTUBE, <https://www.youtube.com/user/TotalHalibut/featured> (last visited Dec. 28, 2014) (archived at <http://perma.cc/TX8R-D8FT>).

²⁹ Matt Growcott, *TotalBiscuit Reveals Shady Shadow of Mordor Review Code Deal*, GAMESREVIEWS (Sept. 29, 2014), <http://www.gamesreviews.com/news/09/totalbiscuit-reveals-shadow-mordor-code-branding-deal/> (archived at <http://perma.cc/4XN8-TVPU>).

³⁰ TotalBiscuit, The Cynical Brit, *supra* note 28.

³¹ *Id.*

³² Luke Plunkett, *Studio Accused Of Blocking YouTube Vid Over Criticism [UPDATE]*, KOTAKU (Oct. 20, 2013, 6:35 PM), <http://kotaku.com/studio-accused-of-blocking-youtube-vid-over-criticism-1448796126> (archived at <http://perma.cc/967K-348B>).

³³ *Id.*

³⁴ TotalBiscuit, The Cynical Brit, *This video is no longer available: The Day One Garry's Incident Incident*, YOUTUBE (Oct. 20, 2013), <https://www.youtube.com/watch?v=QfgoDDh4kE0> (archived at <https://perma.cc/6LXJ-GRQ9?type=source>).

³⁵ Usher, *supra* note 7.

³⁶ Kyle Orland, *Activision using copyright notices to take down Call of Duty exploit*

cheating in order to ensure a positive experience for its players in multiplayer matches.³⁷ However, some industry commentators have argued that Activision's reasons could serve as a pretext for "going after certain types of embarrassing or damaging depictions of its games while allowing thousands of other videos that are more neutral or positive about the game."³⁸ As this paper will argue, the protection of works engaged in valuable comment and criticism, such as the videos taken down at the request of Wild Games Studio and Activision, lies at the heart of the fair use doctrine.

Content creators have also run into trouble dealing with YouTube's "Content ID" system, which regularly searches the website for content containing copyrighted works.³⁹ Nintendo, the company famed for its *Super Mario Bros.* series and the Wii gaming console, began working with YouTube in May of 2013 to place advertisements in videos featuring Nintendo games, diverting advertisement revenue from users who had posted videos of such games.⁴⁰ Nintendo accomplished this by becoming a "partner" with YouTube and registering its content with YouTube's Content ID database, allowing the site to automatically locate Nintendo gameplay and include advertisements in videos of certain length.⁴¹ Although it may be reasonable for a developer to place restrictions on users posting video of entire games, some YouTube content creators have noted that the Content ID system may be over-inclusive in the videos it flags for copyrighted content.⁴² Automated processes such as YouTube's "Content ID Match" system, which redirects revenue from content creators to developers when the system detects copyrighted material,⁴³ may be inadequate to account for parody, criticism, and other nuances in copyright law. By relying on the safe harbor provisions of the DMCA without engaging

videos, ARSTECHNICA (Nov. 24, 2014), <http://arstechnica.com/gaming/2014/11/activision-using-copyright-notice-to-take-down-call-of-duty-exploit-videos/> (archived at <http://perma.cc/976V-RRSV>).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *How Content ID works*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2797370?hl=en> (last visited Apr. 10, 2015) (archived at <http://perma.cc/26LZ-T5Q3>).

⁴⁰ Luke Plunkett, *Nintendo Forcing Ads On Some YouTube "Let's Play" Videos*, KOTAKU (May 15, 2013, 9:45 PM), <http://kotaku.com/nintendo-forcing-ads-on-some-youtube-lets-play-video-507092383> (archived at <http://perma.cc/69M9-63X3>).

⁴¹ *Id.*

⁴² Joe Mullin, *Nintendo kicks "Let's Play" videos off YouTube then slaps ads on them*, ARSTECHNICA (May 16, 2013, 8:10PM), <http://arstechnica.com/tech-policy/2013/05/nintendo-kicks-lets-play-videos-off-youtube-then-slaps-ads-on-them/> (archived at <http://perma.cc/DYZ7-LNF8>).

⁴³ See Danny Cowan, *Nintendo mass-claims revenue from YouTube "Let's Play" videos*, ENGADGET, <http://www.engadget.com/2013/05/16/nintendo-mass-claims-revenue-from-youtube-lets-play-videos/> (archived at <http://perma.cc/7VGN-SQR8>).

2015]

FAIR PLAY

in case-by-case review of videos, service providers undermine the goals of the fair use doctrine and risk silencing valuable criticism and original content posted by content creators that consumers have grown to rely upon and enjoy.

YouTube's Mass Copyright Claim "Wave"

While the *Day One: Garry's Incident* takedown brought the problems of DMCA reliance into the limelight, certain unsolicited actions taken by service providers have also caused significant concern among content creators and viewers. For example, in early December of 2013, YouTube engaged in a widespread "crackdown" of videos that included copyrighted material, sending out "thousands upon thousands of copyright notices on gameplay videos to content creators both famous and amateur."⁴⁴ Industry commentators speculated that YouTube took these measures to "cover themselves in case these game companies ever do try to enforce their copyright[s]."⁴⁵ By affirmatively taking down infringing videos without waiting for developers to send in notices, YouTube would theoretically have a stronger argument in any future litigation that it was seeking in good faith to remove infringing material when it had "red flag" notice of such content's infringing nature.⁴⁶

The problem with YouTube's unilateral action in flagging thousands of videos as "infringing" is that, in many cases, game developers themselves disapproved of YouTube's actions. Facing widespread confusion from consumers and fans who were used to watching their favorite "YouTubers" play their favorite games through monetized videos, companies such as Blizzard and Capcom issued statements saying they did not instigate the copyright claims issued by YouTube.⁴⁷ In some cases, the developers offered to specifically authorize the use of each video that was flagged.⁴⁸ The public relations nightmare that these notices caused for developers was apparent from the reactions of several such companies. Deep Silver, maker of games such as

⁴⁴ Paul Tassi, *YouTube Releases Strange Storm Of Copyright Claims On Video Game Content Producers*, FORBES (Dec. 11, 2013, 9:15 AM), <http://www.forbes.com/sites/insertcoin/2013/12/11/youtube-unleashes-strange-storm-of-copyright-claims-on-video-game-content-producers/> (archived at <http://perma.cc/92N7-3WDY>).

⁴⁵ *Id.*

⁴⁶ See 17 U.S.C. § 512(c)(1)(A)(ii) (2012).

⁴⁷ See Capcom_Unity, TWITTER (Dec. 10, 2013, 3:59 PM EST), https://twitter.com/Capcom_Unity/status/410559475959885824 (archived at <http://perma.cc/XHQ9-SN52>) (noting that the company was investigating copyright claims that Capcom did not instigate); StarCraft, TWITTER (Dec. 10, 2013, 4:20 PM EST), <https://twitter.com/StarCraft/statuses/410534433536483328> (archived at <http://perma.cc/Z9AE-T5QW>) (noting that Blizzard would quickly approve YouTube content that had been flagged as a copyright violation).

⁴⁸ Capcom_Unity, *supra* note 47; StarCraft, *supra* note 47.

the *Saints Row* series, issued the following statement regarding the situation:

Deep Silver has no intention of preventing players, who like to create gaming content on YouTube using our games, from doing so . . . This includes Let's Play, Walkthrough, Review, or other edited or commentated videos that are monetized by a player. Whether your opinion of our games is positive or negative in your YouTube video, it is not our right as a games publisher to infringe on your basic right to voice your opinion freely⁴⁹

After the dust settled, it was determined that many of the copyright "flags" on the affected videos were caused by third parties, such as music publishers, who had registered their content with YouTube's Content ID system.⁵⁰ Journalists noted that these flags may have been caused by miscommunication inherent in the Content ID registration process.⁵¹ By registering music with the system, any videos using the music are potentially subject to a copyright flag, causing the video to lose monetization features.⁵² This can happen even though artists had granted licenses to the video game developer, sometimes resulting in game developers' own videos being flagged.⁵³ The December 2013 YouTube debacle underscores the problems associated with relying on automated software to prevent copyright liability; a method that may be even more damaging to creativity and criticism than blind reliance on DMCA notifications.

APPLYING FAIR USE TO STREAMING VIDEO GAME CONTENT

Rather than relying on compliance with DMCA copyright notifications and automated software to combat and prevent copyright infringement, service providers such as YouTube should claim the fair use defense in many situations, using measured and careful investigations to detect true violations of developers' intellectual property. The fair use doctrine provides the flexibility necessary to protect valuable and original contributions by content creators while weeding out otherwise infringing derivative works.

⁴⁹ Philippa Warr, *Deep Silver, Bossa support Let's Play-ers in YouTube copyright*, WIRED.CO.UK (Dec. 12, 2013), <http://www.wired.co.uk/news/archive/2013-12/12/youtube-copyright-deep-silver> (archived at <http://perma.cc/4NK4-U4WX>).

⁵⁰ Colin Campbell, *Who are the villains in the YouTube copyright debacle?*, POLYGON (Dec. 18, 2013, 8:30 PM), <http://www.polygon.com/2013/12/18/5225732/who-are-the-villains-in-the-youtube-copyright-debacle> (archived at <http://perma.cc/PS5K-NPNT>).

⁵¹ *Id.*

⁵² *See id.*

⁵³ *Id.*

2015]

FAIR PLAY

Applicability of the Fair Use Doctrine

Economic Arguments for Applying Fair Use

In determining whether fair use is the appropriate legal framework to apply to the online streaming of video game content, one should examine the economic justifications at the heart of the doctrine. As copyright law scholars have noted, fair use “provides a way of reaching socially desirable outcomes when negotiation costs are too high – when those who benefit from a particular use of copyrighted work are too numerous, scattered, and marginally affected to negotiate a price for using the work.”⁵⁴ Fair use may also be used as a proxy for determining whether the “dynamic costs” of copying – or the reduction in incentives that copying would cause to video game developers – are outweighed by the social benefits associated with allowing content creators to use gameplay footage.⁵⁵ The fair use factors can be considered means of assessing “whether the transaction cost of getting permission to reproduce a work is high . . . while the dynamic cost on authors’ incentives is insignificant relative to the external benefits of copying.”⁵⁶

Unlike large companies with internal legal departments, YouTube and Twitch.tv users typically operate individually, without the resources, business sophistication, or market power to negotiate with game developers on their own. The sheer number of content creators, with material ranging from short reviews to gameplay series spanning hundreds of videos, makes case-by-case negotiation nearly impossible from the developers’ perspective. While developers have offered payment for reviews of their games by popular video streamers in the past, such deals have been accompanied by strict conditions that the reviews cast the game in a positive light.⁵⁷ By removing the element of honest objectivity from reviews, these agreements have caused considerable controversy in the video game community, thwarting the fair use doctrine’s goal of promoting valuable criticism of copyrighted works.⁵⁸ Additionally, as this paper will argue in its final section, allowing users to post gameplay video

⁵⁴ CASS & HYLTON, *supra* note 16, at 114 (citing Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1982)); *see generally* William M. Landes & Richard A. Posner, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 115-23 (Harvard Univ. Press 2003).

⁵⁵ CASS & HYLTON, *supra* note 16, at 114.

⁵⁶ *Id.*

⁵⁷ Erik Kain, ‘Middle Earth: Shadow of Mordor’ Paid Branding Deals Should Have #GamerGate Up In Arms, FORBES (Oct. 8, 2014, 9:59 AM), <http://www.forbes.com/sites/erikkain/2014/10/08/middle-earth-shadow-of-mordor-paid-branding-deals-should-have-gamergate-up-in-arms/> (archived at <http://perma.cc/9EWY-VUX3>).

⁵⁸ *Id.*; *see generally* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

in popular reviews and “Let’s Play” walkthroughs has had an incredibly positive effect on revenue for many developers, and will likely not decrease the incentive for game companies to continue to produce new works.⁵⁹

Alternatively, fair use may be justified where, despite low transaction costs between the two parties, the rights holder is unwilling to provide the right to the party seeking to use it.⁶⁰ In this scenario, fair use should be allowed where: (1) the public *as a whole* benefits from secondary access to the copyrighted work but cannot *individually* negotiate with the holder and does not *individually* value the right to purchase access directly; and (2) the public *as a whole* either “subjectively value[s] the new access to infringing material in the aggregate enough to merit a (theoretical) purchase . . . or [is] going to be benefited in ways [it] can’t appreciate *ex ante* but that confer aggregate value in excess of the costs the uncompensated use would have for the rights-holder.”⁶¹

Video games are typically designed to appeal to a mass audience, and no individual consumer is in a position to negotiate for a copyright license short of purchasing the game itself. Reviews and “Let’s Play” videos provide significant benefits to players as a group by allowing consumers to discover new games that appeal to them and to assess the merits of games they are considering purchasing. While gameplay videos posted to YouTube by third parties may allow a viewer to experience a game to some extent, the user still does not receive the interactive experience that comes with buying the game. Unlike motion pictures and musical works, video games typically involve sufficient interactivity and variation of experience to ensure that each playthrough of a given game is somehow unique for the player. By considering all of the possible experiences a user can have while playing a single video game, gameplay videos can be seen as taking a very small portion of the total original work. Because gameplay videos allow consumers to acquire information regarding games without substituting for the game itself, consumers receive aggregated benefits that likely outweigh any loss to developers.⁶² Therefore, considering both economic justifications for the doctrine, fair use seems to be an appropriate and necessary legal framework to ensure that legitimate criticism and the transformative material of content creators is not indiscriminately subject to copyright demands by game developers.

Applying the Fair Use Factors to Streaming Video Game Footage

The fair use defense to copyright infringement is codified in 17 U.S.C. §

⁵⁹ CASS & HYLTON, *supra* note 16, at 115.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

2015]

FAIR PLAY

107, which states that copying “for purposes *such as* criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright.”⁶³ Four factors are considered in determining whether fair use applies in a particular case, including

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁶⁴

Works that are sufficiently transformative as to “add[] something new, with a further purpose or different character” are more likely to fall under fair use, as “the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.”⁶⁵ Furthermore, the use of a reproduced work is not precluded by its commercial nature; rather, the commercial nature of certain works “is only one element to be weighed in a fair use enquiry.”⁶⁶

While videos utilizing gameplay footage are often monetized, many such videos include valuable commentary or criticism of the game being shown. This creates a unique experience for viewers and consumers apart from the game itself. Although courts have held that the use of “screen shots,” or still images of video games, likely constitutes fair use when presented without alteration in comparative advertising,⁶⁷ courts have not yet ruled on the transformative nature of videos using lengthy portions of gameplay footage, such as “Let’s Plays.”

The “Best Case” Scenario – Criticism, Ideas, and “Replayable” Games

The first factor in the fair use analysis examines the “purpose and character of the use,” focusing on whether the new work “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks . . . whether and to what extent the new work is ‘transformative.’”⁶⁸ As the new work becomes more transformative, “the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”⁶⁹ The first factor analysis is “guided by . . .

⁶³ 17 U.S.C. § 107 (2012) (emphasis added).

⁶⁴ *Id.*

⁶⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

⁶⁶ *Id.* at 572.

⁶⁷ *See Sony Computer Entm’t Am., Inc. v. Bleem*, 214 F.3d 1022, 1029 (9th Cir. 2000).

⁶⁸ 17 U.S.C. § 107; *Campbell*, 510 U.S. at 579.

⁶⁹ *Campbell*, 510 U.S. at 579.

whether the use is for criticism, or comment . . . and the like.”⁷⁰

Since its inception, one of the fundamental goals of the fair use doctrine has been to protect fair criticism of earlier works. As Justice Story explained in the landmark case *Folsom v. Marsh*: “no one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism.”⁷¹ On the other side of the fair use spectrum, copying for purposes of review is impermissible where the defendant takes the “most important parts of the work, with a view, not to criticize, but to supersede the use of the original work, and substitute the review for it”⁷² Furthermore, where a use has an effect on the market for the original work by virtue of valid criticism, market harm is not inferred.⁷³ As the *Campbell* court stated, “when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act.”⁷⁴

Critical video reviews of games such as John Bain’s review of *Day One: Garry’s Incident*, though often harsh, do not create the kind of harm that is actionable under copyright law. While copyright is concerned with products and uses that “supersede[] the objects of the original and serve[] as a market replacement for it,”⁷⁵ reviews of video games, a uniquely interactive form of media, simply do not accomplish this. One cannot replicate the interactive experience of playing a game by watching a short excerpt of gameplay, accompanied with the content creator’s own critical comments. Furthermore, while an analysis of market effect must consider potential derivative markets for the original work,⁷⁶ these videos do not infringe on such markets, as developers would typically not voluntarily “license critical reviews or lampoons of their own productions”⁷⁷ Critical reviews of video games make up a large portion of the works at risk in the current notice-and-takedown system, with many channels specifically devoted to providing independent reviews of such games.⁷⁸ As the *Garry’s Incident* conflict demonstrated, copyright holders have the power under the current system to silence critical

⁷⁰ *Id.* at 578-79.

⁷¹ *Folsom v. Marsh*, 9 F.Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4,901).

⁷² *Id.* at 345.

⁷³ *Campbell*, 510 U.S. at 591.

⁷⁴ *Id.* at 591-92.

⁷⁵ *Id.* at 591 (citing *Folsom*, 9 F.Cas. at 348).

⁷⁶ *Id.* at 590 (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 568 (1968)).

⁷⁷ *Id.* at 592.

⁷⁸ See, e.g., *AngryJoeShow*, YOUTUBE, <https://www.youtube.com/user/AngryJoeShow> (last visited May 9, 2014) (archived at <https://perma.cc/6L3K-BTA9>); *Lazy Game Reviews*, YOUTUBE, <https://www.youtube.com/user/phreakindee> (last visited May 9, 2014) (archived at <https://perma.cc/33XX-4DZT>).

2015]

FAIR PLAY

reviews indefinitely, as long as they are prepared to withstand the ensuing onslaught of negative publicity.⁷⁹ In order to prevent developers from abusing the DMCA's notice-and-takedown system in order to silence public criticism, service providers must advance fact-specific, fair use arguments to protect legitimate critical works on a case-by-case basis.

Furthermore, there is increasing demand among consumers for discovering creative ideas and strategies associated with certain types of games that are not provided by the developers themselves. As other commentators have noted, "the 'open philosophy' of the gaming culture fosters a readiness to share strategies, secrets, and knowledge about secret areas or how to defeat difficult characters."⁸⁰ For example, "real-time strategy" ("RTS") games, such as Blizzard's *StarCraft*, often give players a wide variety of "units" from which armies can be built and balanced around the player's scarce in-game resources. Much like opening moves in chess, which can extend out into multiple turns, players in RTS games often come up with innovative "builds," or strategies that follow specific patterns designed to give the player the best possible chance to win.⁸¹ Players have even written standalone programs designed to calculate the most efficient ways to play the game in different situations.⁸² Some talented players have even built careers around creating guides for the game. Sean Plott, a *StarCraft* player known for his daily live-streamed guides showcasing gameplay and strategy, has over 425,000 subscribers on YouTube, with videos focusing mainly on strategic analysis of online *StarCraft* matches.⁸³ Furthermore, videos focusing on strategic plans and ideas within games typically only benefit players who have already purchased the game, with no negative effects on the "market for or value of the copyrighted work."⁸⁴

Strategic video games such as *StarCraft* have even become wildly popular televised sports in certain countries. A high-profile dispute broke out in 2010 when KeSPA, or the Korean e-Sports Association, almost lost the right to

⁷⁹ Plunkett, *supra* note 33 **Error! Bookmark not defined.**

⁸⁰ Corinne L. Miller, Note, *The Video Game Industry and Video Game Culture Dichotomy: Reconciling Gaming Culture Norms With the Anti-Circumvention Measures of the DMCA*, 16 TEX. INTELL. PROP. L.J. 453, 462 (2008).

⁸¹ See, e.g., HuskyStarcraft, *Terran Tutorial – Basic Opener – Starcraft 2*, YOUTUBE (April 3, 2010), <https://www.youtube.com/watch?v=WQe6UqvCOT4>.

⁸² Tom Senior, *Computer program finds devastating Starcraft 2 build orders*, PC GAMER (Nov. 1, 2010), <http://www.pcgamer.com/computer-program-finds-devastating-starcraft-2-build-orders/> (archived at <http://perma.cc/5K62-9FMG>).

⁸³ *Day9TV*, YOUTUBE, <https://www.youtube.com/user/day9tv> (last visited May 9, 2015) (archived at <https://perma.cc/H3RJ-EC2W>).

⁸⁴ 17 U.S.C. § 107(4) (2012).

license broadcasts of *StarCraft* matches in Korea.⁸⁵ Although litigation was avoided when KeSPA and Blizzard signed a licensing agreement in 2011,⁸⁶ the dispute and the negotiations that followed highlighted the problems associated with ignoring the fair use defense in the video game context. These problems are especially relevant where the use of gameplay footage had led to the creation of an exciting new sport followed by millions of South Korean and international fans. In any event, the typical YouTube or Twitch.tv user does not have the resources or negotiating power available to a powerful organization such as KeSPA.⁸⁷ Fair use is therefore economically justifiable as an affirmative defense to infringement.

Fan-created video guides for strategic, multiplayer video games transform short segments of gameplay into an entirely new product. By providing commentary on matches and teaching others how to play, skilled players are able to provide valuable insight that improves the experience for all viewers. Additionally, some of these videos have demonstrated independent artistic merit, developing into Internet sensations with cult followings large enough to support mainstream television shows and feature-length films.⁸⁸ The online communities that have grown around fan-made works based on popular video games constitute a prime example of the cultural “spillover effects” that have resulted from the sharing of video game footage.⁸⁹

Finally, in the case of “replayable” games, or games that can be enjoyed multiple times while providing a new experience for the player each time, analysis of the third fair use factor – the “amount and substantiality of the portion used”⁹⁰ – often weighs in favor of the second work. Replayable games are often focused around an online, multiplayer experience that varies with each iteration of gameplay, where players can experiment with a variety of strategies, perfect their skills, and compete with others. While RTS games typically have high “replayability” value, many other games are based around the multiplayer experience, as well. For example, *Counter-Strike*, a team-based

⁸⁵ Jihan Joo, Note, *Public Video Gaming as Copyright Infringement*, 39 AIPLA Q.J. 563, 565-567 (2011).

⁸⁶ *Id.* at 566.

⁸⁷ CASS & HYLTON, *supra* note 16, at 114.

⁸⁸ The Internet-based video series “PurePwnage” (pronounced “pure ownage”), which began in 2004 as a mock documentary about an aspiring “professional” video game player of the strategy game *Command and Conquer: Zero Hour*, has developed its own following, eventually getting its own television show on the Canadian Showcase channel. See *About Us*, PUREPWNAGE, <http://purepwnage.com/> (last visited May 9, 2015) (archived at <http://perma.cc/59KF-D3X3>).

⁸⁹ Spillover effects are often cited as a reason for modifying the fair use analysis in favor of the second work. See CASS & HYLTON, *supra* note 16, at 118 (“Cultural spillovers can provide a reason for tapering the property rights implied by copyright, at times.”).

⁹⁰ 17 U.S.C. § 107(3) (2012).

2015]

FAIR PLAY

tactical “first-person shooter”⁹¹ game released in 1999, is a classic example of an online game focused on replayability.⁹² Players can play with their friends in teams of five, squaring off in 30-round matches that typically last a little over an hour at a time. The rounds themselves last under two minutes, with players switching sides after the 15-round mark.⁹³ *Counter-Strike*’s competitive game mode has turned into its own “electronic sport,” with players from around the world contracted by international gaming organizations to play in leagues and tournaments.⁹⁴ If league organizers could not stream these games online, the phenomenon of video games played as a sporting experience would likely never have developed. Furthermore, many sports games allow the user to play electronic versions of their favorite sport. Value from these games is derived from gameplay mechanics that allow users to repeatedly mimic real-life games between professional teams by playing with their friends and is not typically dependent on telling a story.⁹⁵

In a fair use analysis of works focused around replayable video games, it seems clear that even using large amounts of gameplay can qualify as permissible use, as long as the work is sufficiently transformative. Unlike games that rely on telling a story through linear events in the same way motion pictures do, gameplay videos of replayable games typically only showcase a miniscule fraction of the possible experiences available to the player. In other words, the “amount and substantiality of the portion used in relation to the copyrighted work as a whole”⁹⁶ is typically insignificant. User-generated content based around criticism or analysis of strategic video games with “replayable” value therefore deserves the strongest protection from the fair use doctrine, in order to preserve transformative works that have independent value to the community of players as a whole.

“Let’s Play” Videos as a Mixture of Gameplay and Original Content

In addition to the public importance of legitimate criticism, video commentary often transforms or adds to a game to such an extent as to create a

⁹¹ A “first-person shooter” is defined as “a type of video game in which the player assumes the field of vision of the protagonist, so that the game camera includes the character’s weapon, but the rest of the character model is not seen.” *First-person shooter*, DICTIONARY.COM, <http://dictionary.reference.com/browse/first-person+shooter> (last visited June 16, 2015) (archived at <http://perma.cc/YZ64-DR54>).

⁹² See *About CS:GO*, COUNTER STRIKE BLOG, <http://blog.counter-strike.net/index.php/about/> (last visited May 9, 2015) (archived at <http://perma.cc/6JYB-FBPX>).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See *Madden NFL – Features*, EA SPORTS, <http://www.easports.com/madden-nfl/features> (last visited May 9, 2015) (archived at <http://perma.cc/K9MB-TBV5>).

⁹⁶ 17 U.S.C. § 107(3) (2012).

completely new experience for the user. Indeed, online games have increasingly become an experience that is better when shared with others. Humorous “reaction” videos that show users playing scary or difficult games have become incredibly popular. Some videos showcasing a player’s reactions to frightful in-game moments have accumulated over 7.5 million views.⁹⁷ Gameplay videos are often accompanied by fanciful editing and entertaining play-by-play commentary by the content creator, which presents value to the user separate from the game itself.⁹⁸ Even before the surge of interest in gameplay footage on sites such as YouTube, commentators were arguing for the applicability of fair use to “machinima” – or artistic projects involving the use of in-game character models to create fan-made “films” within video games – under the theory that such works were highly transformative.⁹⁹ Furthermore, without allowing “YouTubers” to post and monetize video of themselves playing games, the incentive to create such works would deteriorate, depriving consumers of a unique and exciting product. By visiting YouTube or Twitch.tv to see how others are experiencing their favorite video game content, users are able to enjoy a social experience completely separate from playing the game itself.

An argument can certainly be made that “Let’s Play” series, which take hours of gameplay in order to present an entire “playthrough” of a game, are much more problematic than short, critical reviews. The fair use doctrine, however, is flexible enough to account for these concerns. Videos that take large portions of a game’s content without including commentary, rearrangement, or fanciful editing typically would not be considered transformative under the first fair use factor.¹⁰⁰ A lengthy “Let’s Play” series spanning multiple playthroughs or covering several available endings to a particular game may take such a substantial portion of the work as to negatively impact “the potential market for or value of the copyrighted work,”¹⁰¹ leaving potential purchasers with little remaining game content to explore on their own. However, many “Let’s Play” videos focus primarily on the personality of the YouTube or Twitch.tv user, featuring humorous or critical commentary associated with the events of the game as they appear, creating a new work sufficiently transformative in nature as to qualify for

⁹⁷ See, e.g., PewDiePie, *AMNESIA SCARY REACTIONS (and funny) moments with Subtitles! w/ PewDiePie EP3*, YOUTUBE (Oct. 8, 2011), <https://www.youtube.com/watch?v=ofQa6uHoppw>.

⁹⁸ See *id.*

⁹⁹ See Christopher Reid, Note, *Fair Game: The Application of Fair Use Doctrine to Machinima*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 831, 858 (2009).

¹⁰⁰ See, e.g., Alzu Gaming, *Borderlands The Pre-Sequel Walkthrough Part 1 Let’s Play No Commentary 1080p HD Gameplay*, YOUTUBE (Oct. 13, 2014), <https://www.youtube.com/watch?v=RiFtqxs8WTY>.

¹⁰¹ 17 U.S.C § 107(4) (2012).

2015]

FAIR PLAY

protection under the fair use doctrine.¹⁰² Because the nature of “Let’s Play” videos can vary between untouched depictions of full game content to transformative works featuring fanciful editing, commentary, and humor, a flexible, case-by-case analysis under the fair use doctrine is preferable to the DMCA approach.

The “Worst Case” Scenario – “Story Games” and Games without Commentary

In many cases, the fair use analysis weighs in favor of content creators who upload original commentary and criticism of video games. However, applying the fair use defense to gameplay videos would not grant YouTube users an unlimited license to use video game footage. Sometimes, a company’s unwillingness to allow users to post videos of gameplay is entirely justified by the original creator’s artistic or business concerns. In particular, content associated with “story” games, or games that follow a linear set of events from which players cannot deviate, may not be as amenable to fair use arguments. In story-driven games where players enjoy similar experiences with each playthrough, developers have a much stronger argument that those who post “Let’s Play” videos are taking an impermissibly large portion of the original work.

Quantic Dream, the developer behind the critically acclaimed titles *Heavy Rain* and *Beyond: Two Souls*, is the quintessential example of a company whose games are theatrical in nature and focused on telling a story. *Beyond: Two Souls* relies heavily on storytelling elements, utilizing the voices and likenesses of Academy Award-nominated actors Willem Dafoe and Ellen Page.¹⁰³ A tremendous amount of resources was invested in order to create a cinematic experience for the player, with production costs reaching \$27 million, not including significant marketing expenses.¹⁰⁴ While there are several possible endings to the game, players mostly experience the same events in every playthrough. Although there are many choices that the player must make, which may vary the user experience to an extent, players are limited in their ability to change the general course of the game.

Heavy Rain, an earlier game released by Quantic Dream, also focused on

¹⁰² See, e.g., Markiplier, *WARNING: SCARIEST GAME IN YEARS | Five Nights at Freddy’s – Part 1*, YOUTUBE (Aug. 12, 2014), <https://www.youtube.com/watch?v=iOztnsBPrAA>.

¹⁰³ Willem Dafoe, *Ellen Page Star in BEYOND: Two Souls October 8th*, PLAYSTATION.BLOG (Mar. 1, 2013), <http://blog.us.playstation.com/2013/03/01/willem-dafoe-ellen-page-star-in-beyond-two-souls-october-8th/> (archived at <https://perma.cc/NW7C-S9F3?type=image>).

¹⁰⁴ William Usher, *Beyond: Two Souls Cost \$27 Million To Develop*, CINEMABLEND, <http://www.cinemablend.com/games/Beyond-Two-Souls-Cost-27-Million-Develop-59285.html> (last visited May 9, 2015) (archived at <http://perma.cc/W8YP-5RWN>).

creating a cinematic experience for the player. *Heavy Rain* details a murder mystery in which the player must track down a serial killer and save one of his intended victims. The game cost about \$40 million to produce, market, and distribute.¹⁰⁵ Like *Beyond: Two Souls*, *Heavy Rain* focused primarily on telling a linear story. The player plays as different recurring characters throughout the game, some of which may live throughout the game or die along the way, depending on the player's choices. Although the game presents a multitude of decisions for the player, there are certain major events that occur in every playthrough of the game, and the overall plot remains the same. While the game prides itself on its wide variety of endings, some YouTube users have posted videos showcasing every available ending to the game.¹⁰⁶

Another prime example of works that can be classified as "story" games are those designed by game developer Telltale Games. Much like old "choose your own adventure" books, games such as *The Wolf Among Us* allow the player to make a series of choices that have an effect on the progression of the game.¹⁰⁷ These choices typically revolve around a moral quandary or a certain set of dialogue options available to the player. After each part of every "episode" of the game, players can review four or five of the major decisions they made, and compare their choices with the decisions made by the game's player base as a whole.¹⁰⁸ In addition to the choices presented by the game, players engage in "quick time events," or a series of actions the player must take given an on-screen prompt, such as to press a certain button at a given time. Although quick time events arguably require a certain amount of "skill" to complete, because the directions to complete the events are prompted on the player's screen, there is generally little value in watching YouTube videos in order to find guidance or strategic advice in defeating these in-game obstacles. Therefore, because the game relies heavily on linear story progression affected by the player's choices, and because each playthrough mostly features the same events with minor variations, *The Wolf Among Us* and other works by Telltale Games can be properly classified as "story games."

Games such as *Beyond: Two Souls*, *Heavy Rain*, and *The Wolf Among Us*

¹⁰⁵ William Usher, *Heavy Rain Cost \$40 Million To Make, Made \$100 Million In Sales*, CINEMABLEND, <http://www.cinemablend.com/games/Heavy-Rain-Cost-40-Million-Make-Made-100-Million-Sales-54813.html> (last visited May 10, 2015) (archived at <http://perma.cc/4YZY-WWDB>).

¹⁰⁶ SpottinGames, *Heavy Rain – All Endings HD*, YOUTUBE (July 19, 2012), <https://www.youtube.com/watch?v=8zh78iopqXA>.

¹⁰⁷ Telltale Games, *The Wolf Among Us*, <http://www.telltalegames.com/thewolfamongus/> (last visited May 10, 2015) (archived at <http://perma.cc/6Y28-LYMM>).

¹⁰⁸ Telltale Games, *The Wolf Among Us*, <https://www.telltalegames.com/thewolfamongus/faq/> (last visited July 8, 2015) (archived at <https://perma.cc/HGM8-FMNN>).

are not as amenable to fair use arguments as games that rely on “replayability.” By watching a single “Let’s Play” of the game, potential buyers experience a significant portion of the game’s content, and may decide that the game is no longer worth purchasing. In such a case, a developer would be entirely justified in issuing notices to have these videos taken down. In a fair use analysis, videos of storytelling games seem to operate along the same lines as video of other commercial works, such as theatrical movies and productions. The third fair use factor, which examines “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,”¹⁰⁹ seems to separate these works from other types of video games, in that a large portion of the work is taken by a “Let’s Play” series that reveals much of the story. These games often have a limited set of options available to players, and the existence of multiple “Let’s Play” videos or the interactive streaming of such games could exhaust these options by acting as a substitute to purchasing the product itself. This also implicates the fourth fair use factor, which examines “the effect of the use upon the potential market for or value of the copyrighted work.”¹¹⁰ While we have yet to see empirical studies on the effects of “Let’s Play” videos on developer revenue, the potential to deprive developers of sales after millions have been invested in high-budget story-based titles may preclude a fair use defense in these cases.

Furthermore, “Let’s Play” videos of story-based games are often less transformative in nature than other user-generated works. Although “the extent of permissible copying varies with the purpose and character of the use,”¹¹¹ “Let’s Play” videos of story games typically focus on showcasing a unique playthrough of a game with commentary by the player. These video series are often not meant to critique or parody the original work, or to offer strategic ideas to others playing the game. Therefore, fair use arguments would likely fail when considering “story games,” and content creators would have to continue to follow developers’ policies when creating videos based on these types of works.

Finally, the distinction between “replayable” games and “story-based” games is often clear and amenable to judicial interpretation. While almost every game has storytelling elements, “story-based” games are typically designed to convey an interactive cinematic experience, and are not dependent on the skill of the player. “Story games” are also inherently linear in progression. While other types of games, such as role-playing games (“RPGs”), may allow the player to choose where to go and what to do in an “open world” environment,¹¹² story-based games typically require the player to

¹⁰⁹ 17 U.S.C. § 107(3) (2012).

¹¹⁰ *Id.* § 107(4).

¹¹¹ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586-87 (1994).

¹¹² “The Elder Scrolls: Skyrim” by Bethesda Softworks is an example of an open-world game in which the game experience is primarily determined by player choice. *See* The Elder

complete a set series of tasks in succession. Finally, games such as *Beyond: Two Souls* and *The Wolf Among Us* have lower “replayability” value than other games, as players typically experience a vast majority of the game’s content in a single playthrough. These are only a few of the factors courts could examine in distinguishing “story-based” games from other types of works.

ECONOMIC JUSTIFICATIONS FOR FAIR USE IN VIDEO GAMES

In addition to providing a workable legal framework for determining what types of copying are permissible in the video game context, applying fair use to certain works also leads to significant benefits for consumers and developers alike. Gameplay videos by popular “YouTubers” provide free publicity to small developers, leading to higher overall revenues and allowing for new and innovative products that would not otherwise exist.¹¹³ The availability of a multitude of reviews and gameplay videos allows consumers to make informed decisions about which products to purchase, leading to a more efficient product market. While some developers may prefer a default notice-and-takedown system to efficiently remove videos that take too much of the original product, these concerns are outweighed by the clear market benefits of a case-by-case fair use analysis.

Video Sharing as Free Advertisement for Small Independent Developers

One of the strongest arguments for applying the fair use defense to reviews and “Let’s Play” videos is that such works greatly benefit independent game developers, allowing for new, innovative games to be brought to market. For example, the independent developer behind the game *Thomas Was Alone* noted that the game sold eight times as many copies as it did on its first day of sales as a result of a popular YouTube review by John Bain – the same reviewer who had his video taken down by Wild Games Studio in response to an unfavorable review.¹¹⁴ Other independent developers have reported greater spikes in sales after their games were featured by popular YouTube users, as compared to positive reviews in more traditional types of media.¹¹⁵ This shows that in many cases, these types of videos can have a significant *positive* effect

Scrolls, *Features*, SKYRIM <http://www.elderscrolls.com/skyrim> (last visited July 8, 2015).

¹¹³ See Katie Williams, *What does Nintendo’s claiming of Let’s Play videos mean for us PC gamers?*, PC GAMER (May 16, 2013), <http://www.pcgamer.com/what-does-nintendos-claiming-of-lets-play-videos-mean-for-us-pc-gamers/> (archived at <http://perma.cc/L3R5-5TCW>) (noting that Mike Bithell, creator of the game *Thomas Was Alone*, attributed increased sales of his game to a popular YouTube review of his game).

¹¹⁴ *Id.*; Plunkett, *supra* note 32.

¹¹⁵ See Erik Kain, *Phil Fish Is Wrong About Youtube And Revenue Sharing*, FORBES (June 19, 2014, 3:41 AM), <http://www.forbes.com/sites/erikkain/2014/06/19/phil-fish-is-wrong-about-youtube-and-revenue-sharing/> (archived at <http://perma.cc/N8LS-LJZV>).

2015]

FAIR PLAY

on “the potential market for or value of the copyrighted work,”¹¹⁶ weighing in favor of a fair use defense.

One might argue that even if fan-made videos generate great publicity for game developers, copyright holders generally have the exclusive right to decide for themselves how their works should be marketed and distributed.¹¹⁷ However, evidence of economic benefit shows that these videos incentivize new developers to create, which furthers the general purpose of intellectual property law to promote science and the arts.¹¹⁸ As the Supreme Court has noted, “a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author’s incentive to create.”¹¹⁹ While the fourth factor presumptively weighs against works that are commercial in nature,¹²⁰ it seems clear in many cases that YouTube users could prove that their content has a net *positive* effect on the market for the original game, if given the chance to do so.

Although one might argue that independent developers could simply provide an unconditional license for players to create videos using gameplay footage, this may not be the case under the current DMCA notice-and-takedown system. Gameplay videos may be flagged as copyright violations due to miscommunication and technological inefficiencies, even when such videos are encouraged and permitted by publishers.¹²¹ An affirmative defense must therefore be available to content creators who seek to create critical or transformative material based on the works of developers.

The Effects of Video Sharing on Large Developers, Consumers, and the Market

In addition to providing a free platform through which independent developers can market their games to the public, “Let’s Play” videos and critical reviews have several distinct benefits to consumers. First, the free availability of “Let’s Play” videos allows potential consumers to discover new products and to acquire information about products they are considering purchasing. When both buyers and sellers are informed, the market becomes more efficient, allowing products to reach the hands of those who value them the most. While any sale may benefit the game developer, transactions that

¹¹⁶ 17 U.S.C. § 107(4) (2012).

¹¹⁷ *Id.* § 106(3) (“[T]he owner of the copyright under this title has the exclusive rights. . .(3) 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.”).

¹¹⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

¹¹⁹ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984).

¹²⁰ *Id.* at 451.

¹²¹ *See Campbell*, *supra* note 50 (discussing that certain videos have been reported to YouTube as copyright violations by third parties, such as music publishers, even though the artist properly licensed music to the developer).

“take place between informed parties leave *both* better off.”¹²² Because consumers have limited resources and must decide which games to purchase, the abundance of information available on websites such as YouTube and Twitch.tv allows consumers to maximize value by purchasing the best games for their particular tastes and preferences.

Furthermore, certain types of online games have “network effects” in which the value to the consumer increases with the number of users playing the game. Blizzard Entertainment’s *World of Warcraft*, for example, is a “massively multiplayer online role-playing game,” which features its own in-game economy as well as content that can only be experienced by groups of players working together.¹²³ These essential game features work best, and the game is most enjoyable, when a large amount of players experience the game simultaneously on a single game server.¹²⁴ Because the number of users on each server is critical, Blizzard has begun to link certain features – such as the in-game market for virtual items – across its various servers.¹²⁵ The game developer said it was taking this action in order to “increase the number of players on low-population [servers].”¹²⁶ Outside of the game, players are able to meet and interact in chatrooms while watching gameplay streamed live on Twitch.tv, increasing the game’s public exposure and fostering a vibrant online community of players. Indeed, *World of Warcraft* was the sixth most-viewed game on Twitch.tv in August 2014, a month in which 60 million independent viewers watched gameplay footage on the site.¹²⁷

Evidence of “Let’s Play” videos’ positive effect on developer revenues can also be observed by examining the policies developers have independently adopted towards these practices. One group of developers and YouTube content creators led by game developer Lars Doucet has recently come together to compile a list of current “Let’s Play” policies through the website *Who Lets Play*.¹²⁸ Of the 245 companies that *Who Lets Play* examined, 183, or

¹²² CASS & HYLTON, *supra* note 16, at 24 (emphasis added).

¹²³ *What is World of Warcraft*, WORLD OF WARCRAFT, <http://us.battle.net/wow/en/game/guide/> (last visited May 10, 2015) (archived at <http://perma.cc/P598-T29F>).

¹²⁴ Blizzard Entertainment, *Patch 5.4 Feature Preview: Connected Realms*, WORLD OF WARCRAFT (Aug. 5, 2013), <http://us.battle.net/wow/en/blog/10551009> (archived at <http://perma.cc/UX4S-TTDP>).

¹²⁵ *Id.*

¹²⁶ Blizzard Entertainment, *Connected Realms – Update 8/20*, WORLD OF WARCRAFT (Aug. 21, 2014), <http://us.battle.net/wow/en/blog/11393305> (archived at <https://perma.cc/S265-WK62>).

¹²⁷ Jason Maestas, *Top Twitch Games for August 2014*, TWITCH THE OFFICIAL BLOG (Sept. 5, 2014), <http://blog.twitch.tv/2014/09/top-twitch-games-for-august-2014/> (archived at <http://perma.cc/M9V3-2J6V>).

¹²⁸ See WHO LETS PLAY, *supra* note 22.

2015]

FAIR PLAY

about seventy-five percent, grant players unconditional licenses for sharing video of their games.¹²⁹ Forty-three, or eighteen percent, of companies, including large developers such as Blizzard Entertainment, Square Enix, and Sony Online Entertainment, grant video sharing licenses to players with certain restrictions.¹³⁰ These companies require that videos be accompanied by a link to purchase the game, that the developer be e-mailed first for permission, or that a link be provided to the game's official website.¹³¹ Eighteen, or about 7.35% of companies are described as "maybe" allowing "Let's Play" videos with strict restrictions.¹³² These companies require that such videos may not be monetized by the content creator, that videos of "story" games cannot be made, or that video revenues must be shared with the developer.¹³³ Only one developer is listed as disallowing "Let's Play" videos in all circumstances.¹³⁴

Upon closer examination of specific companies' policies, some developers not only allow fan videos utilizing in-game assets to be made, but actively encourage it.¹³⁵ Microsoft, for example, issued a unilateral license in 2007 for "the limited use of copyrighted content from many of their video games to create new derivative works."¹³⁶ Microsoft issued this license in response to the popularity of "machinima," finding that users were creating computer-generated films using the in-game engines and character models of Microsoft video games such as *Halo*.¹³⁷ Even when developers have not expressly approved of "Let's Play" videos or other media featuring their games, many such videos remain on websites such as YouTube, left unchallenged by game creators despite being widely viewed.¹³⁸ The widespread acceptance of "Let's Play" videos by game developers likely shows, at the very least, that such videos are not having a significant negative impact on video game revenues. In other words, the dynamic costs of these videos on developers' incentive to

¹²⁹ *See id.*

¹³⁰ *Id.*

¹³¹ *See id.*

¹³² *Id.*

¹³³ *See id.*

¹³⁴ *Id.*

¹³⁵ *Blizzard Video Policy*, *supra* note 18.

¹³⁶ Christina J. Hayes, Note, *Changing the Rules of the Game: How Video Game Publishers Are Embracing User-Generated Derivative Works*, 21 HARV. J.L. & TECH. 567, 569 (2008).

¹³⁷ *Id.* at 568-69.

¹³⁸ *See, e.g.*, Christopher Odd, *Mr. Odd – Let's Play Beyond Two Souls – Part 1 – Jodie Aiden. Lifelong Companions.*, YOUTUBE (Oct. 7, 2013), https://www.youtube.com/watch?v=D3TVrMor5A8&list=PLj_Goi54wf0c-7op6d508mGiF50Yo-yak; PewDiePie, *The Walking Dead – Lets Play – Episode 1 (A New Day) – Part 1 – [Walkthrough/Playthrough]*, YOUTUBE (Sept. 5, 2012), <https://www.youtube.com/watch?v=2qozpQkUDFQ>.

create new games is likely very low.¹³⁹

While gameplay videos and “Let’s Play” series may have positive effects on independent developers with scarce marketing budgets, allowing such videos in certain instances may increase the “dynamic costs” on developers by reducing the incentive to innovate.¹⁴⁰ For example, developers such as Quantic Dream may be less willing to invest millions in high-quality cinematic titles with “A-list actors if potential customers would simply substitute free “Let’s Play” videos rather than purchasing the game itself. In some rare cases, even smaller, independent game makers have argued that developers should receive large portions of revenue from “Let’s Play” videos.¹⁴¹ However, this is likely not the dominant view among smaller developers; certain independent game makers have already expressed the view that fair use should apply to fan-created game walkthroughs.¹⁴² The differing viewpoints among developers highlight the importance of applying a flexible, case-by-case fair use analysis to “Let’s Play” videos.

CONCLUSION

The video game industry continues to develop around a unique form of entertainment media, relying on player interaction to provide a type of experience that is unavailable in more traditional forms of entertainment. Unlike musical compositions and motion pictures, video games can rarely be experienced the same way twice, as user experience varies with the decisions of the player. This distinction has led to widespread interest in game-related media, as players look to sites such as YouTube and Twitch.tv to discover how others are enjoying their favorite games and to learn new and interesting ways to experience game content. While service providers have so far relied upon the DMCA’s safe harbor provisions to resolve any conflicts that have arisen,¹⁴³ continued reliance on the notice-and-takedown regime risks giving developers the power to silence critics in a way that would be unacceptable if attempted in other forms of media.¹⁴⁴

¹³⁹ CASS & HYLTON, *supra* note 16, at 114.

¹⁴⁰ *See id.*

¹⁴¹ Phil Fish, developer of the independent game *FEZ*, has reportedly argued that developers are entitled to the revenues YouTube users earn from “Let’s Play” videos. Matthew Wilson, *Phil Fish had another Twitter meltdown*, KITGURU (June 19, 2014, 10:55 AM), <http://www.kitguru.net/gaming/matthew-wilson/phil-fish-had-another-twitter-meltdown/> (archived at <http://perma.cc/54AQ-QTGR>).

¹⁴² E. Zachary Knight, a developer that makes browser-based games, has commented that fair use should apply to “Let’s Play” videos. E. Zachary Knight, TWITTER (May 16, 2013, 9:25 AM), <https://twitter.com/ezknight/status/335068580339142656> (archived at <http://perma.cc/D2YY-WSDQ>).

¹⁴³ TWITCH, *supra* note 15.

¹⁴⁴ Plunkett, *supra* note 32; Orland, *supra* note 36.

2015]

FAIR PLAY

Rather than taking the “safe” DMCA approach of removing user videos whenever developers complain of unfavorable material, service providers such as YouTube and Twitch.tv should justify content under the fair use doctrine in appropriate circumstances. While the DMCA approach can be retained where a user posts an extensive “Let’s Play” series displaying the vast majority of a game’s content without noticeable transformative value, a case-by-case fair use analysis is appropriate for other types of content, including critical reviews and informative guides. Many of these videos build upon existing gameplay content by mixing innovative ideas or entertaining commentary with the gameplay experience, “altering the first [work] with new expression, meaning, or message.”¹⁴⁵ The fair use approach provides market benefits by allowing consumers to acquire the information necessary to judge different products in order to engage in informed, value-maximizing transactions.¹⁴⁶ “Let’s Play” videos and popular reviews also provide significant free publicity to independent game creators, allowing new and innovative products to enter the market to compete with larger developers.¹⁴⁷ By applying a measured fair use analysis to user-created videos, service providers can give proper respect to the rights of game creators while protecting forms of expression that give new life to game developers’ works.

¹⁴⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

¹⁴⁶ *CASS & HYLTON*, *supra* note 16, at 24.

¹⁴⁷ *See Williams*, *supra* note 113.