

**FROM ARCADES TO ONLINE: UPDATING COPYRIGHT TO  
ACCOMMODATE VIDEO GAME STREAMING**

*Nicholas Robinson* \*

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**I. INTRODUCTION**

On March 14, 2018, a super group consisting of a few extremely popular musicians, an online personality, and a professional football player joined to play the video game Fortnite. The professional gamer, Ninja, hosted the group on his Twitch stream and it became the most concurrently viewed live video game stream ever with over

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\* Nicholas Robinson is the Director of Accountancy and Assistant Professor of Accounting and Law at Eastern Illinois University. MBA, 2011, Rochester Institute of Technology; LL.M., 2007, University of Miami School of Law; JD, 2006, Buffalo School of Law. I would like to thank the efforts of my research assistants, Meghan Grimes, T'shawnda Kitchen, and Sierra Weber. I would also like to thank the editorial contributions of Marc Robinson, Sara Wallitt, and Emily Robinson.

628,000 views.<sup>1</sup> Superstar rapper, Drake, and superstar gamer, Ninja, had conversations ranging from pizza toppings to in-game strategy.<sup>2</sup> The popularity of the stream was a result of the popularity of the people involved. This new form of entertainment, where people watch others play video games, is growing immensely. It is subject to a plethora of unknown and indistinct legal foundations based on the copyrights of video games established almost forty years ago. Ninja and Drake are creating a unique, creative work through their interaction between each other, their team members, and the audience. This creative work is in a state of uncertainty and effectively held hostage by the video game developers who have been afforded the right to determine if the stream can even exist. This article will address the historical copyright development of video games and call for a reassessment of the definitions to allow video game streamers the right to stream and make a living off the popularity of their creations.

Video game developers have enjoyed an incredibly strong set of rights that are unmatched by both conventional game producers and other software manufacturers. The landmark ruling in *Midway Manufacturing Co. v. Artic International, Inc.*<sup>3</sup> allowed for video game publishers to have their works classified as an “audiovisual” work without eliminating the right to register as a “literary” work.<sup>4</sup> The Copyright Office soon followed the ruling by allowing audiovisual and literary registration in a single application.<sup>5</sup> As the *Midway* court admits, the plain meaning of “audiovisual” work makes one think of a television show or movie but goes on to strain the definition to allow video games to qualify because players do not have unlimited control over the sequencing of the images displayed.<sup>6</sup> The court came to this tortured definition by operating

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<sup>1</sup> James Vincent, *Drake Drops in to Play Fortnite on Twitch and Breaks the Record for Most-Viewed Stream*, VERGE (Mar. 15, 2018, 8:04 AM), <https://www.theverge.com/2018/3/15/17123424/ninja-drake-fortnite-twitch-stream-record-travis-scott-juju>.

<sup>2</sup> *Id.*

<sup>3</sup> *Midway Mfg. Co. v. Artic Int’l, Inc.*, 704 F.2d 1009 (7th Cir. 1983).

<sup>4</sup> *Id.* at 1012.

<sup>5</sup> Registration and Deposit of Computer Screen Displays, 53 Fed. Reg. 21,817, 21,817 (June 10, 1988).

<sup>6</sup> *Midway*, 704 F.2d at 1011–12.

under the auspices of the reasoning in *WGN Continental Broadcasting Co. v. United Video, Inc.*,<sup>7</sup> which permitted courts a liberal interpretation of the Copyright Act of 1976.<sup>8</sup> This flexibility allows for legal applications to new technologies to advance through the nimbler court systems as opposed to waiting for Congress to act and write new laws with each new piece of technology. The opinion in *WGN* states:

The comprehensive overhaul of copyright law by the Copyright Act of 1976 was impelled by recent technological advances, such as xerography and cable television, which the courts interpreting the prior act, the Copyright Act of 1909, had not dealt with to Congress's satisfaction. This background suggests that Congress probably wanted the courts to interpret the definitional provisions of the new act flexibly, so that it would cover new technologies as they appeared, rather than to interpret those provisions narrowly and so force Congress periodically to update the act. The House Report states: "Authors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods will take. The bill does not intend either to freeze the scope of copyrightable technology or to allow *unlimited* expansion to areas *completely* outside the present congressional intent."<sup>9</sup>

Unfortunately, neither the courts nor the legislators have interpreted the copyright laws to fully embrace the computer age.

If Xerox machines and cable television were enough of a technological advancement to finally rewrite a 65-year-old law, how have computers, the Internet, or artificial intelligence not reached a similar level? The Copyright Act was written with the anticipation and expectation that the courts would work to fit new technologies into the structure of the law, absolving legislators from difficult and time-consuming overhauls.<sup>10</sup> Technology has evolved to even blur the line between board games and video games. Many modern board games incorporate elements which would categorize them, under the Copyright Act's plain language definition, as "audiovisual works."<sup>11</sup> The court rulings on video games are failing to meet their

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<sup>7</sup> *WGN Cont'l Broad. Co. v. United Video, Inc.*, 693 F.2d 622 (7th Cir. 1982).

<sup>8</sup> *Id.* at 627.

<sup>9</sup> *Id.* at 627–28 (emphasis in original) (citing H.R. REP. NO. 94-1476, at 51 (1976)).

<sup>10</sup> *Id.*

<sup>11</sup> See *infra* Part III.D.

Congressionally designed obligation to adequately categorize new technologies. Congress did not intend to “freeze the scope” of copyrightable technology.<sup>12</sup> The courts need to understand that forcing video games into the existing definitions of more antiquated technologies is unnecessary, as they have the freedom to expand and create new definitions.

The reasoning behind *WGN* and *Midway* may have had some validity with the video games of 1983, but the current technology of video games does not support any such reasoning. The level of creativity in the hands of the player is immense, so much so that video games have been considered “art” by the Supreme Court.<sup>13</sup> They are afforded First Amendment protections in the same way as other expressive art forms.<sup>14</sup> If the interactivity of video games affords players and developers First Amendment rights, the conclusions drawn in *Midway*, and employed by the Copyright Office, are flawed and need to be updated.

Similarly, the difference between the protections afforded to conventional software and video games will eventually create an unnecessary definitional argument. A game is defined as an activity played for “entertainment.”<sup>15</sup> Any number of software developers would argue their programs are entertainment in an effort to gain the additional protections given to video games. Google often implements games in its home page doodle.<sup>16</sup> Should Google’s search engine be defined as an audiovisual work per copyright law? Creating a legal dichotomy between subjectively different computer

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<sup>12</sup> H.R. REP. NO. 94-1476, at 51 (1976).

<sup>13</sup> See *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790 (2011) (determining that the artistic value of video games afforded them First Amendment protections and that censorship requires strict scrutiny).

<sup>14</sup> *Id.*

<sup>15</sup> *Game*, THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY (17th ed. 1979).

<sup>16</sup> See *Doodle Archive*, GOOGLE, <https://www.google.com/doodles/> (last visited Oct. 3, 2018) (providing an archive of all past Google doodles, as well as a search function which allows users to find doodles such as a playable Pac-Man game using the Google logo as the game board, a soccer keeper game, and basketball free throw game).

programs only opens the floodgates for greater degrees of confusion in the field.

In addition to arguing video games should be treated the same way as conventional software programs, video games cannot be treated with the same protections as static audiovisual works, as the protections are too burdensome on the player. This paper will focus on the copyright issues of streaming video game play over services such as Twitch and YouTube and will detail the current state of confusion regarding the copyright protections of streaming video games. It will discuss the application of Fair Use under the Copyright Act of 1976 as it pertains to video games as a forum for creation of unique, creative works. Finally, it will call for a judicial solution, which has already been expressed in some cases, to create an environment that allows for the free expression of players and fosters growth in the industry.

## II. VIDEO GAME BACKGROUND

This section addresses the growth and size of the video gaming industry and the recent trends of streaming personal and tournament play. The video game industry rivals any other entertainment sector, with massive numbers of participants and revenue generated. It is irresponsible to allow such a large portion of the economy to operate without any reliable guidance in the realm of copyright protections.

### A. *Gaming Industry*

The video game industry is booming like few others in entertainment.<sup>17</sup> Global video-game-related revenues are nearly triple those of movies, reaching over \$116 billion in 2017.<sup>18</sup> Not only are the revenues of video games outpacing those of movies, the budgets to support the grandest offerings are on the scale of

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<sup>17</sup> See U.S. DEP'T OF COMM., INT'L TRADE ADMINISTRATION, 2017 TOP MARKETS REPORT MEDIA AND ENTERTAINMENT 1–2 (2017), <https://www.trade.gov/topmarkets/pdf/Top%20Markets%20Media%20and%20Entertainment%202017.pdf>.

<sup>18</sup> Tom Wijman, *New Gaming Boom: Newzoo Ups its 2017 Global Games Market Estimate to \$116.0Bn Growing to \$143.5Bn in 2020*, NEWZOO (Nov. 28, 2017), <https://newzoo.com/insights/articles/new-gaming-boom-newzoo-ups-its-2017-global-games-market-estimate-to-116-0bn-growing-to-143-5bn-in-2020/>.

Hollywood blockbusters. The most expensive game to date, *Destiny*, reportedly had a development and marketing budget of \$500 million and a production staff of about 500 people.<sup>19</sup> Even with expenses so high, the game recouped the costs in a single day.<sup>20</sup>

Gaming is undoubtedly big business, but it is also emerging from a small subculture into the mainstream. In the United States, more than 150 million people play video games and 67 percent of all parents play them with their children.<sup>21</sup> Worldwide, more than 1.8 billion people play video games.<sup>22</sup> For perspective, fifteen times more people actively participate in a common activity—playing video games—than passively participate in the largest United States television event every year—the Super Bowl.<sup>23</sup> Furthermore, only 265 million people play the most popular sport in the world, soccer.<sup>24</sup> The video game industry has coined the term ‘esports’ to describe the sporting aspect of player competitions. The largest esports tournament in 2017, the Intel Extreme Masters in Katowice, Poland, drew more than 46 million unique online viewers and 173,000 live attendees.<sup>25</sup> This surpassed viewership of all television broadcasts in

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<sup>19</sup> Jenna Pitcher, *Report: Destiny Costs Activision \$500 Million to Develop and Promote*, POLYGON (May 6, 2014, 3:03 AM), <https://www.polygon.com/2014/5/6/5686268/Destiny-costs-activision-500-million-to-develop-promote>.

<sup>20</sup> Eliene Augenbraun, *Destiny Celebrates Record-Breaking \$500 Million Franchise Launch*, CBS NEWS (Sept. 11, 2014), <https://www.cbsnews.com/news/destiny-celebrates-largest-video-game-launch-in-history>.

<sup>21</sup> *Industry Facts*, ENTMT. SOFTWARE ASS'N, <http://www.theesa.com/about-esa/industry-facts> (last visited Nov. 16, 2018).

<sup>22</sup> Jamie McKane, *There are 1.8 Billion Gamers in the World, and PC Gaming Dominates the Market*, MYGAMING (Apr. 26, 2016), <https://mygaming.co.za/news/features/89913-there-are-1-8-billion-gamers-in-the-world-and-pc-gaming-dominates-the-market.html>.

<sup>23</sup> Tom Huddleston, Jr., *Here's How Many People Watched the Super Bowl*, FORTUNE (Feb. 6, 2017), <http://fortune.com/2017/02/06/super-bowl-111-million-viewers> (noting that from 2015–2017, the Super Bowl received more than 111 million viewers each year).

<sup>24</sup> Matthias Kunz, *265 Million Playing Football*, FIFA MAG., July 2007, at 10.

<sup>25</sup> Paul Armstrong, *+46 Million Watched Live Esports Event (+10 Million More Than Trump Inauguration Broadcast)*, FORBES (Mar. 16, 2017), <https://www.forbes.com/sites/paularmstrongtech/2017/03/16/46-million-watched-live-esports-event-10-million-more-than-trump-inauguration-broadcast/#611d47aa91f4>.

the United States for the year except two: The National Football League's Super Bowl LI and AFC Championship games.<sup>26</sup>

There is an old adage that the first automobile race promptly followed the first two people owning them. Naturally, with so many people playing games, there is a desire to compete against others to see who is better. In 2007 a critically-acclaimed documentary was released about two men's decades-long struggle to be the world record holder for the best score in Donkey Kong.<sup>27</sup> This contest was so widely followed it made worldwide news when the official video game record keeper, Twin Galaxies, stripped the antagonist, Billy Mitchell, of his records for cheating.<sup>28</sup> Almost 40 years later, the competitions have significantly moved beyond the grimy arcades and garages as depicted in the movie.<sup>29</sup>

Old World Cup soccer stadia in South Korea are becoming filled to capacity for video game competitions, which began with a professional StarCraft Brood War league in 2003.<sup>30</sup> These organized esports competitions generate revenues consistent with their popularity. The business and commercial composition of esports is significantly different from the major conventional sports such as baseball or soccer, however. The esports leagues, such as Intel Extreme Masters mentioned above, are each privately owned and

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<sup>26</sup> *Tops Of 2017: Television and Social Media*, NIELSEN (Dec. 18, 2017), <http://www.nielsen.com/us/en/insights/news/2017/tops-of-2017-television-and-social-media.html>.

<sup>27</sup> See *THE KING OF KONG: A FISTFUL OF QUARTERS* (New Line Cinema 2007).

<sup>28</sup> See Kyle Swenson, 'Video Game Player of the Century' Stripped of Records After Donkey Kong Scandal, WASH. POST (Apr. 16, 2018), [https://www.washingtonpost.com/news/morning-mix/wp/2018/04/16/video-game-player-of-the-century-has-his-records-removed-after-donkey-kong-scandal/?noredirect=on&utm\\_term=.6fdccb6726c9](https://www.washingtonpost.com/news/morning-mix/wp/2018/04/16/video-game-player-of-the-century-has-his-records-removed-after-donkey-kong-scandal/?noredirect=on&utm_term=.6fdccb6726c9); Eike Kühl, *Der King of Kong ist Gestürzt.*, ZEIT ONLINE (Apr. 17, 2018, 5:03 PM), <https://www.zeit.de/digital/games/2018-04/donkey-kong-billy-mitchell-games-rekorde-aberkannt; Donkey Kong Champion Loses Title for 'Using Emulator'>, BBC (Apr. 13, 2018), <http://www.bbc.com/news/technology-43752171>.

<sup>29</sup> See *THE KING OF KONG*, *supra* note 27.

<sup>30</sup> Henry Young, *Seven-Figure Salaries, Sold-Out Stadiums: Is Pro Video Gaming a Sport?*, CNN (May 31, 2016, 8:00 AM), <http://www.cnn.com/2016/05/31/sport/esports-is-professional-gaming-a-sport/index.html>; Oliver Herrmann, *Why Korea's StarCraft II Scene Crumbled*, PC GAMER (Oct. 19, 2016), <https://www.pcgamer.com/why-koreas-starcraft-ii-scene-has-crumbled/>.

thus fragmented.<sup>31</sup> One crowdsourced website has over 500 different leagues documented.<sup>32</sup> Just as each country has its own professional soccer league, geography, as well as personal game preferences factor into the plethora of leagues, which, in turn, creates difficulty in tracking data. Many studies have tried to estimate the revenues of these leagues with wildly different results.<sup>33</sup> The average revenue across the studies comes in at about \$600 million with the high estimates about 2.5 times those of the low estimates.<sup>34</sup> This positions esports, as a whole, as larger than Major League Soccer, which has regular games on ESPN and Fox networks, and the fifth largest league by revenue in the world.<sup>35</sup> To further promote an interest in esports, Epic Games, the maker of Fortnite, has promised \$100 million in prize money and funding for competitions in the 2018–2019 season in an effort to attract the best players.<sup>36</sup>

Esports athletes have all the same perks and perils as do professional athletes in other sports. The money surrounding esports is equivalent to other professional sports and so are the abilities of the best players. Studies have shown the coordination and reaction times of the top players surpass many other athletes and in the heat of competition reach heart rates and cortisol production equal to

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<sup>31</sup> See Irwin A. Kishner, *Esports Leagues Set to Level Up with Permanent Franchises*, FORBES (Oct. 3, 2017, 8:00 AM), <https://www.forbes.com/sites/kurtbadenhausen/2017/10/03/esports-leagues-grow-up-with-permanent-franchises/#4b72d3aa21d6>.

<sup>32</sup> See *Browse Leagues*, E-SPORTS EARNINGS, <https://www.esportsearnings.com/leagues> (last visited Oct. 3, 2018).

<sup>33</sup> Manny Anekal, *The Reality of eSports vs. Sports Revenues: The Next Level 004*, MEDIUM (May 3, 2016), <https://medium.com/@mannyanekal/esports-weekly-4-may-3-f6350dac24ef>.

<sup>34</sup> *Id.*

<sup>35</sup> Chris Smith, *Major League Soccer's Most Valuable Teams*, FORBES (Aug. 16, 2017, 10:00 AM), <https://www.forbes.com/sites/chris-smith/2017/08/16/major-league-soccer-s-most-valuable-teams-2/#52bbf528b815>.

<sup>36</sup> The Fortnite Team, *Epic Games Will Provide \$100,000,000 for Fortnite Esports Tournament Prize Pools in the First Year of Competitive Play*, EPIC GAMES (May 21, 2018), <https://www.epicgames.com/fortnite/en-US/news/epic-games-will-provide-100-000-000-for-fortnite-esports-tournament>.



marathon runners.<sup>37</sup> Practices can run for 6 to 12 hours a day.<sup>38</sup> Teams have employees such as coaches, support, and medical staff on hand.<sup>39</sup> Degenerative neuro-muscular injuries can also prematurely end top careers.<sup>40</sup> Perhaps the most surprising similarity is that colleges are beginning to offer scholarships for esports teams.<sup>41</sup> While the rewards may be there for the athletes who put in the effort, there are many lingering legal questions that threaten to stifle this burgeoning industry and jeopardize the trade of the dedicated professional video gamers.

The four major professional sports in the United States (football, baseball, basketball, and hockey) have an unconquerable legal advantage in the marketplace.<sup>42</sup> Through various court rulings and lax antitrust enforcement, these sports have been granted effective monopoly status, allowing for anticompetitive behavior resulting in economic harm to the public.<sup>43</sup> The public harm results in a massively inflated revenue stream for these four leagues predominantly from selling their exclusive television rights which would otherwise be hard to achieve without the protections afforded them.<sup>44</sup> The limited number of teams, the result of the legal

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<sup>37</sup> Martin Schütz, *Science Shows That Esports Professionals are Real Athletes*, DEUTSCHE WELLS (Dec. 3, 2016), <http://www.dw.com/en/science-shows-that-esports-professionals-are-real-athletes/a-19084993>.

<sup>38</sup> *Id.*

<sup>39</sup> Young, *supra* note 30.

<sup>40</sup> Matt Brian, *One of Esports' Biggest Stars Retires with Repetitive Strain Injury*, ENGADGET (Apr. 27, 2015), <https://www.engadget.com/2015/04/27/hailam-league-of-legends-retirement>.

<sup>41</sup> Hallie Detrick, *Skilled at Esports? There's Now a University Offering Scholarships to Top Fortnite Players*, FORTUNE (Apr. 23, 2018), <http://fortune.com/2018/04/23/fortnite-scholarship-esports-ashland-university/>; *see also* Sean Morrison, *List of Varsity Esports Programs Spans North America*, ESPN (Mar. 15, 2018), <http://www.espn.com/espn/print?id=21152905> (providing a list of colleges who sponsor a varsity esports program).

<sup>42</sup> The four leagues that run these sports are the National Hockey League (NHL), Major League Baseball (MLB), National Basketball Association (NBA), and National Football League (NFL), respectively.

<sup>43</sup> Nathaniel Grow, *Regulating Professional Sports Leagues*, 72 WASH. & LEE L. REV. 573, 575–77, 582–86 (2015).

<sup>44</sup> *See* Maury Brown, *Exclusive Infographics Show NFL, MLB, NBA and NHL Sponsorship Growth Over Last Decade*, FORBES (Aug. 25, 2017, 2:35 PM), <https://www.forbes.com/sites/maurybrown/2017/08/25/exclusive-infographics->

monopolies, results in an average revenue of 252 million dollars per year, per team, across the NFL, MLB, NBA, and NHL.<sup>45</sup> As discussed above, the esports leagues are numerous and fragmented.<sup>46</sup> Being divided as such, the industry as a whole has little bargaining power or influence compared to the unified major leagues.<sup>47</sup> This division also makes esports leagues easily susceptible to potential manipulation by their stakeholders.

Just as the four major leagues can prevent or allow new teams entering the league, Activision Blizzard is trying to do the same by initiating a league of its own.<sup>48</sup> Activision Blizzard has created a league around its game *Overwatch*, which had a \$20 million per team entry fee.<sup>49</sup> The players earn a minimum salary of \$50,000 with benefits and a share of a \$3.5 million prize pool.<sup>50</sup> The league has been successful enough to expand, with the new expansion teams required to buy in for up to \$60 million.<sup>51</sup> This wholly controlled league brings the author to the crux of this article: the method of creation dictating the act of creation. Activision Blizzard, while a massive player in the video game industry, is still only providing a forum through which tournament players and streamers can express their skill and opinions.<sup>52</sup>

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show-nfl-mlb-nba-and-nhl-sponsorship-growth-over-last-decade/#3446067bd907 (providing that the 2016–17 seasons saw revenues of the NFL, MLB, NBA, and NHL leagues reach about \$32 billion).

<sup>45</sup> *Id.*; Grow, *supra* note 43, at 576.

<sup>46</sup> See *Browse Leagues*, *supra* note 32.

<sup>47</sup> Daniel Rapaport, *What to Expect from the Booming Esports Industry in 2017*, SPORTS ILLUSTRATED (Feb. 9, 2017), <https://www.si.com/tech-media/2017/02/09/esports-industry-expectations-billion-dollar>.

<sup>48</sup> Jacob Wolf, *Overwatch League Expansion Will Face Serious Stumbling Blocks Overseas*, ESPN (Feb. 11, 2018), [http://www.espn.com/esports/story/\\_/id/22386533/overwatch-league-expansion-face-serious-stumbling-blocks-overseas](http://www.espn.com/esports/story/_/id/22386533/overwatch-league-expansion-face-serious-stumbling-blocks-overseas).

<sup>49</sup> *Id.*

<sup>50</sup> Nathan Hill, *The Overwatch Videogame League Aims to Become the New NFL*, WIRED (Dec. 5, 2017, 6:00 AM), <https://www.wired.com/story/overwatch-videogame-league-aims-to-become-new-nfl/>.

<sup>51</sup> Wolf, *supra* note 48.

<sup>52</sup> Integer Investments, *The Future of Gaming: Activision Blizzard*, SEEKING ALPHA (Sept. 1, 2017, 2:44 PM), <https://seekingalpha.com/article/4103698-future-gaming-activision-blizzard> (stating that Activision Blizzard is one of only

The National Football League does not own the game of football. It does not have the ability to prevent high schools or colleges from creating tournaments. Activision Blizzard does have the legal ability to eliminate any competition to its Overwatch League as it can prevent any other group from hosting an Overwatch tournament.<sup>53</sup> Granted, it needs players to learn the game in a competitive setting to be skilled enough for the premiere league the developer is running. The other leagues exist merely due to the good nature of and at the whim of Activision Blizzard. If an independent league managed to threaten the supremacy of Overwatch League in talent or commercial success it would surely be shut down. As revenues and participation increase in amounts, more people are at risk of losing their livelihood as a result of video game manufacturers exerting their power against the individual players and effectively holding the industry hostage.

#### B. *Live Video Game Streaming*

Organized tournaments are only a part of the larger spectrum of video games as sport and entertainment. The focus of this paper will be on the individual's ability to stream his or her playing live to anyone through one of many different online platforms. There are many different sites that streamers can use to host their videos, though the market is dominated by only two.<sup>54</sup> Twitch and YouTube Gaming are the largest platforms and served around 665 million viewers in 2017.<sup>55</sup> Compare this to the approximately 134 million

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two video game companies on the S&P 500 with a market cap of about \$47 billion as of September 1, 2017).

<sup>53</sup> Snivy, *Editorial: The Great Overwatch LAN Drought*, OVER.GG (Apr. 23, 2017), <https://www.over.gg/3656/editorial-the-great-overwatch-lan-drought>.

<sup>54</sup> See John Herrman, *With Twitch, Amazon Tightens Grip on Live Streams of Video Games*, N.Y. TIMES (June 17, 2018), <https://www.nytimes.com/2018/06/17/business/media/amazon-twitch-video-games.html>; Akram Izimi, *Besides Twitch: Top 10 Streaming Websites Like Twitch!*, GAMING LIFE NEWS (Apr. 9, 2017), <https://medium.com/gaming-life-news/besides-twitch-top-10-streaming-websites-like-twitch-27757d8fcc5b>; Jordan Minor, *Twitch and Beyond: The Best Video Game Live Streaming Services*, PCMAG (Apr. 3, 2017, 3:44 PM), <https://www.pcmag.com/article/342888/twitch-and-beyond-the-best-video-game-live-streaming-servic>.

<sup>55</sup> SUPERDATA RESEARCH, TRENDS AND INSIGHTS ON GAMES AND INTERACTIVE MEDIA 15 (2017), <http://progamedev.net/wp-content/uploads/2017/>

subscribers of HBO, 93 million of Netflix, and 90 million of ESPN.<sup>56</sup> Twitch is the most prevalent of such sites, attracting 82% of the viewership of the most popular games, and allows users to stream their playing to anyone willing to watch.<sup>57</sup> Twitch's commercial relevance is further demonstrated by its purchase by Amazon in 2014 for \$1 billion.<sup>58</sup> It proved a savvy business investment as it generated \$1.7 billion in revenues in 2017.<sup>59</sup> The business models of Twitch and YouTube are unique outside of the Internet. They each rely on users to produce content for the site to attract viewers and generate advertiser participation.<sup>60</sup> To induce the participation of the most skilled content creators, each site has programs to allow the streamers a share of the revenue generated by their content.<sup>61</sup>

In 2016, the top 14,000 streamers brought in about \$60 million.<sup>62</sup> While the overall average revenue generated per streamer is small, the initial "professional" level players make, on average, upwards of \$75,000 annually.<sup>63</sup> The money from streaming and the number

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08/Games\_and\_Interactive\_Media\_Report\_2017\_SuperData\_Research.pdf [hereinafter SUPERDATA RESEARCH].

<sup>56</sup> *Id.*

<sup>57</sup> Jurre Pannekeet, *Five Key Insights into Twitch and YouTube Gaming and the 2.4Bn Viewing Hours They Generated in Q1 2018*, NEWZOO (Apr. 18, 2018), <https://newzoo.com/insights/articles/five-key-insights-into-twitch-and-youtube-gaming/>.

<sup>58</sup> Matt Greco, *Watch Me Play Video Games! Amazon's Twitch Platform Draws Users and Dollars*, CNBC (May 14, 2016, 11:03 AM), <https://www.cnbc.com/2016/05/13/amazons-twitch-streamers-can-make-big-bucks.html>.

<sup>59</sup> App Economy Insights, *Huya: The 'Twitch of China' Is A Bet On Gaming And E-Sports*, SEEKING ALPHA (May. 21, 2018, 12:52 PM), <https://seekingalpha.com/article/4175878-huya-twitch-china-bet-gaming-e-sports>.

<sup>60</sup> See Ryan Lawler, *YouTube Has Found its Business Model, and is Paying Out Hundreds of Millions of Dollars to Partners*, TECHCRUNCH (July 19, 2012), <https://techcrunch.com/2012/07/19/youtube-business-model/>.

<sup>61</sup> See *Twitch Partner Program*, TWITCH (Oct. 17, 2018, 11:59 AM), <https://help.twitch.tv/customer/portal/articles/735069-partner-program-overview>; *YouTube Partner Program Overview*, YOUTUBE, <https://support.google.com/youtube/answer/72851?hl=en> (last visited Oct. 3, 2018).

<sup>62</sup> Greco, *supra* note 58.

<sup>63</sup> Carl Christensen, *Esports & Gaming Video Content (GVC)—Industry Overview*, INVESTMENTBANK, <https://investmentbank.com/esports-gaming-video-content/> (last visited Oct. 3, 2018).

of those able to capitalize from it is growing at a staggering rate.<sup>64</sup> The \$75,000 annual income is just the starting point for professional streamers. The top streamers make upwards of \$4 million annually.<sup>65</sup> The streamers are numerous, but again, they are only individuals or small teams. They are fragmented, without a common voice, similar to major sports leagues.

The major sports leagues have player unions, but no such collective power exists for the video game streamers of the world.<sup>66</sup> Other creators of original content, like musicians and authors, have organizations like the Recording Industry Association of America (RIAA) and the American Society of Composers, Authors and Publishers (ASCAP) to group together and exert unified influence and money over legislation that benefits their members.<sup>67</sup> Congress has legally recognized the role of these organizations in the Fairness in Music Licensing Act of 1998, which amended the Copyright Act, by defining a “performing rights society” as an “association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc.”<sup>68</sup> Similarly, the power balance between the major sports leagues and the players of the respective sports rests in the players’ ability to speak and act with a single voice. Streamers lack the

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<sup>64</sup> See Sarah Perez, *Twitch Now Has 27K+ Partners and 150K+ Affiliates Making Money from their Videos*, TECHCRUNCH (Feb. 6, 2018), <https://techcrunch.com/2018/02/06/twitch-now-has-27k-partners-and-150k-affiliates-making-money-from-their-videos/>.

<sup>65</sup> Christensen, *supra* note 63.

<sup>66</sup> See *Labor Relations and the Sports Industry: Sports Unions + Leagues*, RUTGERS UNIV. LIBR., <https://libguides.rutgers.edu/c.php?g=336678&p=2267003> (last visited Oct. 3, 2018) (providing a list and description of the professional player and referee unions for the various major sports in North America).

<sup>67</sup> See *Recording Industry Assn of America*, OPENSECRETS, <https://www.opensecrets.org/orgs/lobby.php?id=D000000581> (last visited June 7, 2018) (providing a public record data of the RIAA’s lobbying and political contributions); *ASCAP*, OPENSECRETS, <https://www.opensecrets.org/lobby/clientsum.php?id=D000000432&year=2017> (last visited June 7, 2018) (providing a public record data of the ASCAP’s lobbying and political contributions).

<sup>68</sup> 17 U.S.C. § 101 (2018).

economic power of a collective, unified voice speaking on their behalf. Streamers are numerous but are still only a disparate group of individuals. The largest video game publishers, wishing to stifle the rights of the streamers, have a combined market cap in the trillions of dollars with game revenues in the many billions.<sup>69</sup> This is a one-sided fight that needs legal intervention to protect the market and the rights of streamers.

Live streaming occurs in one of two ways: live video, or replays of recorded streams. The player can use different tools depending on his game platform to stream real time video of his game play and other elements such as audio or additional, direct video of himself, or a chat stream.<sup>70</sup> The second form of live streaming is recorded videos of previous game play. These could be either recorded ahead of time and uploaded or recorded live as they happen on the site and saved for viewing again in the future.<sup>71</sup> Currently, Twitch has a greater focus on live streaming while YouTube acts more as a repository for previously recorded content.<sup>72</sup>

The amount of time viewers spend on these sites is remarkable. The thirty day period ending June 5, 2018, saw the top 10 games on Twitch combine for 449.6 million hours of viewership, a total of more than 51,000 years.<sup>73</sup> The full year of 2017 saw more than 355

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<sup>69</sup> See *Top 25 Public Companies by Game Revenues*, NEWZOO, <https://newzoo.com/insights/rankings/top-25-companies-game-revenues/> [<https://web.archive.org/web/20180623040004/https://newzoo.com/insights/rankings/top-25-companies-game-revenues/>].

<sup>70</sup> David Nield, *The Best Setup to Live Stream Your Video Games*, POPULAR SCI. (Aug. 6, 2017), <https://www.popsci.com/live-stream-video-games-twitch-youtube>.

<sup>71</sup> See *Videos on Demand*, TWITCH (Aug. 13, 2018, 12:44 PM), <https://help.twitch.tv/customer/portal/articles/1575302-videos-on-demand>.

<sup>72</sup> See Izimi, *supra* note 54; see also SUPERDATA RESEARCH, *supra* note 55; Sarah Perez, *Twitch's Concurrent Streamers Grew 67% in Q3, As Youtube Gaming Declined*, TECHCRUNCH (Oct. 30, 2017), <https://techcrunch.com/2017/10/30/twitchs-concurrent-streamers-grew-67-in-q3-as-youtube-gaming-declined/> (YouTube has nearly five times the number of viewers as does Twitch, but Twitch has far more concurrent streamers and concurrent viewers. This discrepancy is explained by YouTube's recorded content versus Twitch's live content).

<sup>73</sup> See *Statistics for All Games on Twitch*, TWITCHTRACKER, <https://twitchtracker.com/games> (last visited Oct. 3, 2018).

billion minutes of watched content over more than 124 million unique clips.<sup>74</sup> More than a quarter of this time is during the early evening hours on weekdays.<sup>75</sup> This has traditionally been the “primetime” network television period, but people are increasingly scheduling their game watching around the streamer’s schedule.<sup>76</sup>

Live streamers make a living through their streaming in several ways.<sup>77</sup> The most popular streamers can become Twitch partners, which allows them to earn revenue based on viewers and even host advertisements on their channel.<sup>78</sup> Twitch has seen participation in this program more than double in the past year to over 27,000 partners in 2017.<sup>79</sup> YouTube channels have a similar structure. When a channel gets a large enough viewership, it can enroll in the partnership program and begin earning ad revenue from its videos.<sup>80</sup> More viewers equates to more money for the streamer. The structure is analogous to television shows where higher ratings draw higher advertisement rates. While there are a lot of viewers, competition is high as there are a lot of streamers too. The top three hundred streamers on Twitch each have at least 25 million all-time views, with the top 17 having over 200 million.<sup>81</sup>

What may be most surprising is what makes a person successful in this live and recorded industry. Unlike most other sports, the most successful streamers are not objectively the best players at their

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<sup>74</sup> *2017 Year in Review*, TWITCH, <https://www.twitch.tv/year/2017/factsheet.jpg> (last visited Oct. 3, 2018).

<sup>75</sup> See SUPERDATA RESEARCH, *supra* note 55, at 20.

<sup>76</sup> See *id.*

<sup>77</sup> Greg Rozen, *Streamer Economics 101: The 5 Ways Streamers Earn a Living*, GAMEWISP (May 2, 2016), <https://blog.gamewisp.com/streamer-economics-101-the-5-ways-streamers-earn-a-living-4886e73e5f50>.

<sup>78</sup> *Partner Program Overview*, TWITCH (Oct. 6, 2017), <https://help.twitch.tv/customer/portal/articles/735069-partner-program-overview>.

<sup>79</sup> Perez, *supra* note 64.

<sup>80</sup> Tom Huddleston Jr., *YouTube is Making it Harder for Fake Channels to Make Ad Money*, FORTUNE (Apr. 6, 2017), <http://fortune.com/2017/04/06/youtube-partner-rule-change-10000/> (explaining that YouTube set the minimum threshold at 10,000 views for compensation as an authenticity review safeguard).

<sup>81</sup> See *Streamers by All Time Views*, TWITCHSTATS, <https://twitchstats.net/streamers-all-time-views> (last visited Oct. 3, 2018).

respective games.<sup>82</sup> Arguably, the most successful streamer, Felix Kjellberg (known online as PewDiePie),<sup>83</sup> does not put in the time in any one game to be as good as tournament players. His Wikia fansite lists nearly 400 different games he has streamed on his channel.<sup>84</sup> People watch because of the player, not strictly because of the game.<sup>85</sup>

The streamer Tyler “Ninja” Blevins is currently setting records after record for popularity on Twitch.<sup>86</sup> A new Twitch viewer, Nosoup911, described the appeal of Ninja’s stream:

“I found myself watching him for hours . . . . Not sure what it was, exactly, but the combination of great gameplay, raw emotion, and comedy just appealed to me. It’s not scripted. He’s extremely passionate about the game and his performance. Many people say he’s ‘cringey,’ and I can see that, but he’s extremely passionate about what he is doing and how well he performs.”<sup>87</sup>

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<sup>82</sup> The common thread between the different types of streamers is that they have a personality that people enjoy. Some are very skilled, but their ability to connect with viewers is what makes them successful. For profiles on the different types of streamers see Taylor Clark, *Revenue Streaming*, THE NEW YORKER, Nov. 20, 2017, at 38–39; Stephan Bisaha, *Games Are Taking a Back Seat to Players on Video Game Streaming Sites*, NPR (Mar. 12, 2017, 8:01 AM), <https://www.npr.org/sections/alltechconsidered/2017/03/12/514107238/are-taking-a-backseat-to-players-on-video-game-streaming-sites>; *10 Best Twitch Streamers You Should Know*, FILMORA, <https://filmora.wondershare.com/live-streaming/best-twitch-streamers.html> (last visited June 7, 2018).

<sup>83</sup> Christopher Zoia, *This Guy Makes Millions Playing Video Games on YouTube*, ATLANTIC (Mar. 14, 2014), <https://www.theatlantic.com/business/archive/2014/03/this-guy-makes-millions-playing-video-games-on-youtube/284402/>.

<sup>84</sup> See *PewDiePie Wiki*, WIKIA, <http://pewdiepie.wikia.com/wiki/PewDiePie> (last visited Oct. 3, 2018).

<sup>85</sup> Ivan Simic, *The Love Between the Streaming and Gaming Industries: Why Do We Watch Others Play Games?*, .ME (Apr. 13, 2017), <https://domain.me/videogame-streaming/>; Julie Muncy, *Why I Watch People Play Videogames On The Internet*, WIRED (Aug. 21, 2016, 7:00 AM), <https://www.wired.com/2016/08/why-i-watch-lets-plays/>.

<sup>86</sup> Nathan Grayson, *How Fortnite Streamer Ninja Suddenly Took Over Twitch*, KOTAKU (Mar. 9, 2018, 3:40 PM), <https://kotaku.com/how-fortnite-streamer-ninja-took-over-twitch-1823601394>.

<sup>87</sup> *Id.*



Ninja exclusively plays the most popular game on Twitch, Fortnite.<sup>88</sup> While it might seem logical that the most popular streamer is playing the most popular game, one must consider the competition Ninja has for his followers. Fortnite averages 7,523 concurrent streams at any given time over the course of 2018 and has peaked as high as 18,250.<sup>89</sup> The viewer quoted above explains that it is Ninja's personality that drives them to his channel over arguably better players. The top ranked Fortnite player, Sven "Svenness" Edelenbosch, only has the 2,599th most popular stream.<sup>90</sup> The few articles about him only discuss his incredible ability at the game, with virtually nothing about the actual person.<sup>91</sup> Again, ability to play the game is not what makes a streamer popular. Viewers want to see the personality of the player and the expression the player adds to the experience.

This is a key to the legal argument relating to the copyrights of the game as will be discussed in Part III *infra*. The viewers are interested in specific streamers because of the original content they are adding to the experience. Their expressions create a unique and original work of entertainment. Omeed Dariani, CEO of professional streamer talent company, Online Performers Group, describes the interactive viewer experience as "watch[ing] a television show and the show literally talks back to you, customized

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<sup>88</sup> *Id.*

<sup>89</sup> See *Fortnite*, TWITCHSTATS, <https://twitchstats.net/game/33214-Fortnite> [<https://web.archive.org/web/20180607045508/https://twitchstats.net/game/33214-Fortnite>].

<sup>90</sup> *Svenness*, TWITCHSTATS, <https://twitchstats.net/streamer/svenness> [<https://web.archive.org/web/20180607053331/https://twitchstats.net/streamer/svenness>]; *Leaderboards*, FORTNITE TRACKER, <https://fortnitetracker.com/leaderboards/pc/Top1?mode=all> [<https://web.archive.org/web/20180607053527/https://fortnitetracker.com/leaderboards/pc/Top1?mode=all>].

<sup>91</sup> See Luke Winkie, *Tips from the Fortnite Player with the Most Victory Royales in the World*, PC GAMER (Apr. 12, 2018), <https://www.pcgamer.com/tips-from-the-fortnite-player-with-the-most-victory-royales-in-the-world/>; Liz Lanier, *High School Esports League Adds Free Agent System, 'Fortnite' Summer League*, VARIETY (May 30, 2018, 5:00 AM), <https://variety.com/2018/gaming/news/high-school-esports-fortnite-1202822381/>.

to what you want to hear.”<sup>92</sup> While some games are clearly more popular than others,<sup>93</sup> the revenue-generating aspect of the industry is dependent on the player. Twitch has recognized it is the player that makes the channel. This is exemplified by the most recent expansion of the site with Twitch IRL (In Real Life), where the game streamers are given a forum to stream everyday life activities.<sup>94</sup>

The value individual streamers bring to their channel is based on their ability to connect to fans. An unfortunate illness has shown how connected the viewers of a channel feel towards the streamer. John Bain, known in the gaming world as TotalBiscuit, succumbed to his long and public battle with cancer on May 25, 2018.<sup>95</sup> His YouTube channel had 2.2 million subscribers and over 850 million all-time views.<sup>96</sup> His Twitch channel had him ranked as the 96th most viewed all-time with over half a million followers and over twenty-five thousand paid subscribers.<sup>97</sup> The majority of these followers watched prerecorded video game reviews and did not even interact with him. Despite the unilateral relationship, his followers felt a personal connection to him. A GoFundMe page was set up to support his family and it received over \$100,000 in the first 14 hours after launch.<sup>98</sup> Reading the comments on the page, the contributors speak of him as a friend even though they admittedly have never met let alone spoken with him.<sup>99</sup> This industry is far more than the video

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<sup>92</sup> Taylor Clark, *How to Get Rich Playing Video Games Online*, THE NEW YORKER (Nov. 20, 2017), <https://www.newyorker.com/magazine/2017/11/20/how-to-get-rich-playing-video-games-online>.

<sup>93</sup> *Statistics for All Games on Twitch*, *supra* note 73.

<sup>94</sup> Bisaha, *supra* note 82.

<sup>95</sup> Andrea Park, *YouTube Star John “TotalBiscuit” Bain is Dead at 33*, CBS NEWS (May 25, 2018, 2:51 PM), <https://www.cbsnews.com/news/youtube-star-john-totalbiscuit-bain-is-dead-at-33/>.

<sup>96</sup> TotalBiscuit, YOUTUBE, <https://www.youtube.com/user/TotalHalibut/about> (last visited May 26, 2018).

<sup>97</sup> *TotalBiscuit*, TWITCHSTATS, <https://twitchstats.net/streamer/totalbiscuit> [<https://web.archive.org/web/20180607060651/https://twitchstats.net/streamer/totalbiscuit>].

<sup>98</sup> *TotalBiscuit*, GOFUNDME, <https://www.gofundme.com/TotalBiscuit> [<https://web.archive.org/web/20180526064447/https://www.gofundme.com/TotalBiscuit>].

<sup>99</sup> *Id.*

games. The games are merely the backdrop and the streaming sites are the tool that brings the streamers and their fans together.

Protecting streamers' ability and rights to make and own their content is essential to the continued growth of the industry. The next section will discuss the current state of copyrights in video games from the publisher and streamer standpoints. It will also address the unique position video games have found themselves in, due to conflicting, questionable, and antiquated court rulings.

### III. THE COPYRIGHTS OF VIDEO GAMES

The question presented in this paper is: do the streamers have a right to not only stream themselves playing video games, but to monetize and profit from their dissemination? Federal courts have repeatedly held that video games are copyrightable.<sup>100</sup> However, there is not yet an explicit court ruling on the issue of streaming (arguably a public performance under the Copyright Act)<sup>101</sup> as fair use—an affirmative defense to such an infringement.<sup>102</sup> There is considerable complexity with the copyrights of video games, as courts have determined at least two separate aspects of a video game are copyrightable.<sup>103</sup> The point of contention is that the application

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<sup>100</sup> See generally *Stern Elec., Inc. v. Kaufman*, 669 F.2d 852 (2d Cir. 1982); *Atari, Inc. v. N. Am. Philips Consumer Elec. Corp.*, 672 F.2d 607, 617 (7th Cir. 1982); *Williams Elec., Inc. v. Artic Int'l, Inc.*, 685 F.2d 870 (3d Cir. 1982).

<sup>101</sup> 17 U.S.C. § 106(4) (2018).

<sup>102</sup> See Elizabeth Brusa, *Professional Video Gaming: Piracy That Pays*, 49 J. MARSHALL L. REV. 217, 235 (2015); Conrad Postel, “*Let’s Play*”: *YouTube and Twitch’s Video Game Footage and a New Approach to Fair Use*, 68 HASTINGS L.J. 1169, 1170 (2017); Ivan O. Taylor Jr., *Video Games, Fair Use and the Internet: The Plight of the Let’s Play*, 2015 U. ILL. J.L. TECH. & POL’Y 247, 257 (2015). See generally Kyle Coogan, *Let’s Play: A Walkthrough of Quarter-Century-Old Copyright Precedent as Applied to Modern Video Games*, 28 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 381 (discussing how the court cases that are to be applied to a fair use argument all relate to games and technology from the 1980s and modern games do not fit well into the old definitions of copyright as an audiovisual work).

<sup>103</sup> See MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 2.18[H][3][b] (2015) (“[O]ne who copies a video game through copying its copyrighted computer program has clearly engaged in copyright infringement . . . . [T]he display of images on a video game screen is itself separately copyrightable as an audiovisual work.” (emphasis omitted)).

of “audiovisual work”<sup>104</sup> status affords enhanced rights to that type of work as opposed to a literary work, as traditional software is classified.<sup>105</sup> If video games had the same status as conventional software, running the software (playing the game) would not constitute a performance or a display of the copyrighted work.<sup>106</sup> Stripping the audiovisual work definition from video games will make the application of a fair use defense far easier to assert, and allow for the thousands of video game streamers to have rights to their creative works. The first of these issues this paper will address is that of defining a performance or display in the context of both a literary and an audiovisual work, followed by its application to streaming gameplay, and the affirmative defense of fair use.<sup>107</sup>

#### A. *Performance and Display*

To perform a copyrighted work means “to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.”<sup>108</sup> Section 106(4) reserves the rights of the copyright holder to publicly perform the work. Classification of a work as an audiovisual work means it is far easier to qualify a use of such a work as a performance. A video game’s classification, as such, suggests that merely playing it is infringement because “[t]he exhibition of its images in sequence constitutes a ‘performance’ of an audiovisual work”<sup>109</sup> while “playing” any other type of game is explicitly excluded from the performance definition.<sup>110</sup> Lothar

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<sup>104</sup> 17 U.S.C. § 101 (2018).

<sup>105</sup> See *Atari Games Corp. v. Oman*, 888 F.2d 878, 885 n.8 (D.C. Cir. 1989) (citing *M. NIMMER & D. NIMMER, 1 NIMMER ON COPYRIGHT, § 2.04[C]* (1989)).

<sup>106</sup> *NIMMER & NIMMER, supra* note 103, at § 8.14[A]-[B][1].

<sup>107</sup> See *id.* at § 13.05 [H][2] (discussing the court confusion surrounding the affirmative defense status of fair use versus being a right holder’s claim).

<sup>108</sup> 17 U.S.C. § 101 (2018) (providing a definition of “perform”). *But see* *Allen v. Acad. Games League of Am., Inc.*, 89 F.3d 614, 616 (9th Cir. 1996) (stating that the term “play” is only to be applied to films and music, as playing is required for the use of games); *infra* Part III.D.

<sup>109</sup> *Red Baron-Franklin Park, Inc. v. Taito Corp.*, 883 F.2d 275, 279 (4th Cir. 1989).

<sup>110</sup> See *Allen*, 89 F.3d at 616; *infra* notes 186–95 and accompanying text.

Determann additionally argues the “rendering” or “reciting” of the video aspects of video games should qualify as a performance.<sup>111</sup> Conversely, conventional software is excluded from these performance definitions as it works as an internal function within a computer, imperceptible to humans with “[t]he text elements of a GUI . . . displayed statically for viewing and interacting with the program, but usually not shown in a sequence or made audible.”<sup>112</sup> Distinctly different treatment between conventional software and video games will only result in confusing litigation as to what software can be a video game and which cannot. While the easiest solution to this problem would be for the developers to grant suitable licenses to the streamers, the current regime grants developers such a strong legal basis to ownership of the public performance that they would refuse to surrender it. The more market-efficient solution is to exclude video games from the audiovisual definition completely.<sup>113</sup>

Somewhat surprisingly, Congress found the “playing” definition in *Red Baron-Franklin*<sup>114</sup> irrational and against the public interest and quickly amended the Copyright Act with Computer Software Rental Amendments Act of 1990, which explicitly allowed for the public performance of a video game to be allowed without the authority of the copyright holder.<sup>115</sup> Unfortunately, this provision was very limited as it only applied to “coin-operated” video games and was only in force until 1995.<sup>116</sup> As the coin-operated arcade business model had significantly dwindled by 1995, owing to the proliferation of technologically equivalent home video game

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<sup>111</sup> Lothar Determann, *What Happens in the Cloud: Software as a Service and Copyrights*, 29 BERKELEY TECH. L.J. 1095, 1113–14 (2014) (citing *United States v. Am. Soc’y of Composers, Authors and Publishers*, 627 F.3d 64, 73 (2d Cir. 2010)).

<sup>112</sup> *Id.* at 1113; RAYMOND T. NIMMER, LAW OF COMPUTER TECHNOLOGY § 8.14[B][1] (3d ed. 2006)).

<sup>113</sup> See *infra* Part III.C.

<sup>114</sup> *Red Baron-Franklin*, 883 F.2d at 279–80.

<sup>115</sup> 17 U.S.C. § 109(e) (2018).

<sup>116</sup> See Act of Dec. 1, 1990, Pub. L. No. 101-650, § 804(c), 104 Stat. 5089 (that section provides that, although the balance of the amendments terminate on October 1, 1997, the provisions in 17 U.S.C. § 109(e) “shall not apply to public performances or displays that occur on or after October 1, 1995”).

systems,<sup>117</sup> there was little need to continue the provision. However, the immediate congressional action to correct the ruling in *Red Baron-Franklin* strongly suggests the ruling therein should not be relied upon.<sup>118</sup>

Section 106(5) of the Copyright Act grants additional rights to publicly display “literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work . . . .”<sup>119</sup> To “display” is defined as “to show a copy of [a work], either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images non-sequentially.”<sup>120</sup> For conventional software, the display provision would mean a display of the computer code itself.<sup>121</sup> For audiovisual works and video games, however, showing a single image constitutes a display.<sup>122</sup>

The definitions of the rights of performance and display create different legal treatments of video games and conventional software. Currently, video game streamers are constantly violating the rights of the game publishers, and someone creating tutorials of Microsoft Excel is not. The generous protections for video games may be remedied though § 107 of the Copyright Act, however.

#### B. *Fair Use*

Section 107 of the Copyright Act stipulates four factors for a court to use in determining if a particular usage falls under the fair use provision:

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<sup>117</sup> See Laura June, *For Amusement Only: The Life and Death of the American Arcade*, VERGE (Jan. 16, 2013, 10:00 AM), <https://www.theverge.com/2013/1/16/3740422/the-life-and-death-of-the-american-arcade-for-amusement-only>.

<sup>118</sup> NIMMER & NIMMER, *supra* note 103, at § 8.15(I).

<sup>119</sup> 17 U.S.C. § 106(5) (2018).

<sup>120</sup> 17 U.S.C. § 101.

<sup>121</sup> *Miller v. Facebook, Inc.*, 2010 U.S. Dist. LEXIS 61715, at \*13–14 (N.D. Cal. 2010).

<sup>122</sup> *Red Baron-Franklin Park, Inc. v. Taito Corp.*, 883 F.2d 275, 279 (4th Cir. 1989).

(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.<sup>123</sup>

The first factor has been applied under the lens of viewing the work as “transformative” of the original work.<sup>124</sup> The *Campbell v. Acuff-Rose Music, Inc.* Court looks at the work as either replacing (supplanting)<sup>125</sup> the original work “or instead add[ing] something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks . . . to what extent the new work is ‘transformative.’”<sup>126</sup> As this paper has already discussed, the popularity of the streams is largely determined by the streamer and not the particular video game he or she is playing.<sup>127</sup> The *Campbell* Court goes further stating “the goal of copyright . . . is generally furthered by the creation of transformative works . . . . [T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”<sup>128</sup>

The second factor looks at the commercial “value of the materials used.”<sup>129</sup> That is to say that “some works are closer to the core of intended copyright protection than others” based on the commercial application.<sup>130</sup> Video games can cost hundreds of

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<sup>123</sup> 17 U.S.C. § 107.

<sup>124</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–79 (1994).

<sup>125</sup> See *Harper & Row, Publs. v. Nation Enters.*, 471 U.S. 539, 562 (1985).

<sup>126</sup> *Campbell*, 510 U.S. at 579 (citing Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990)).

<sup>127</sup> See *supra* notes 82–99 and accompanying text. *But see* Shigenori Matsui, *Does it have to be a Copyright Infringement?: Live Game Streaming and Copyright*, 24 TEX. INTELL. PROP. L.J. 215, 231 (2016) (stating the commentary of streaming is likely secondary to the game itself and may not be deemed as “transformative” by a court).

<sup>128</sup> *Campbell*, 510 U.S. at 579.

<sup>129</sup> *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841).

<sup>130</sup> *Campbell*, 510 U.S. at 586 (citing multiple cases distinguishing between works of a more creative nature versus those that are more fact based, e.g. movies and fictional short stories versus news reports and published speeches).

millions of dollars to develop and create their new worlds.<sup>131</sup> While Matsui believes there is no public interest in allowing the copying of these works,<sup>132</sup> he fails to identify an important aspect of video game streaming: it is extremely likely that it would qualify as a parody or critique per § 107 of the Copyright Act. The *Campbell* Court states that relying on this factor is “not . . . ever likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works.”<sup>133</sup>

The third factor is particularly interesting and unique when it comes to analyzing fair use in the context of video games. While the *Campbell* Court suggests the analysis conducted in the first factor will directly relate to the third,<sup>134</sup> the problem with video games is they are not static, they are dynamic, constantly changing with endless variations. This means the streamer would not be able to stream all the possible content of a video game even if he or she wanted to. In a massive multiplayer online game (“MMOG”) like World of Warcraft there can be literally millions of other players to interact with.<sup>135</sup> It would be nearly impossible to replicate the same scene more than once, let alone every combination of players and scenes possible in the game. The content used in this factor must also be examined in connection with the analysis of the fourth factor.<sup>136</sup>

How does the content used “serve as a market substitute for the original?”<sup>137</sup> In addition to the immediate usage, an examining court must “consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also ‘whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the

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<sup>131</sup> See Pitcher, *supra* note 19.

<sup>132</sup> Matsui, *supra* note 127, at 231.

<sup>133</sup> *Campbell*, 510 U.S. at 586.

<sup>134</sup> See *id.* at 586–87.

<sup>135</sup> Jez Corden, *Should You Play World of Warcraft in 2018? Here are the Pros and Cons*, WINDOWS CENTRAL (Aug. 9, 2018), <https://www.windowscentral.com/starting-play-world-warcraft-2018>.

<sup>136</sup> *Campbell*, 510 U.S. at 587.

<sup>137</sup> *Id.*



potential market’ for the original.”<sup>138</sup> It is also important to note the Supreme Court believes “[t]he primary objective of copyright is not to reward the labor of authors, but ‘to promote the Progress of Science and useful Arts.’”<sup>139</sup> A practice allowing for the creation of video game streams to be considered as fair use would be compliant with this opinion.

As most developers have not yet stringently pursued streamers directly, it is likely the developers realize streaming is actually a boost to the marketability of their games rather than a detriment.<sup>140</sup> In fact, some developers actively seek streamers to boost their sales and have even named the marketing technique the “PewDiePie Effect.”<sup>141</sup> Under current law, it would be impossible to confidently predict how a case arguing fair use for video game streaming would be decided.<sup>142</sup> David Nimmer lays out an analysis of the reliance of these four factors in a series of fair use cases and determines that “the problem with the four factors is they are malleable enough to be crafted to fit either point of view.”<sup>143</sup> They are viewed only through the lens of the case at hand. There are no set guidelines that could adequately be applied to every situation and lead an interested party to a conclusion with much confidence.

Despite this complication, this paper will address the current, prevailing belief that video game streaming is, in fact, a copyright violation that needs to be addressed through compromise and agreements.<sup>144</sup> The solution to this brewing problem<sup>145</sup> should not be

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<sup>138</sup> *Id.* at 590 (quoting NIMMER § 13.05[A][4], p. 13-102.61 (1993)).

<sup>139</sup> *Feist Publ’n v. Rural Tel. Serv.*, 499 U.S. 340, 349 (1991) (citing U.S. CONST. art. I, § 8, cl. 8).

<sup>140</sup> *See Matsui, supra* note 127, at 227–28; *see also* Chris Kohler, *Why Does Nintendo Want This Superfan’s YouTube Money?*, WIRED (Mar. 27, 2015, 6:30 AM), <https://www.wired.com/2015/03/nintendo-youtube-creators/>.

<sup>141</sup> Laura Hudson, *Using YouTube as an Accelerant for Video Games*, N.Y. TIMES, Aug. 16, 2017, at B9.

<sup>142</sup> *Id.*; Matsui, *supra* note 127, at 231.

<sup>143</sup> David Nimmer, “*Fairest of Them All*” and *Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 287 (2003).

<sup>144</sup> *See generally* sources cited *supra* note 102.

<sup>145</sup> *See generally* Kohler, *supra* note 140 (discussing the issues with YouTube and developers who operate under an assumption that any degree of video game

a reliance on overly burdensome cooperation between video game developers and streamers<sup>146</sup> or a straining new definition for fair use.<sup>147</sup> Instead, the solution should be to simply address the outdated Court rulings of the 1980s and separate video games from the definition of an audiovisual work. Removing video games from this categorical definition eliminates the exclusive right to a public performance and, in turn, would create a much stronger case that a video game stream is a “transformative” work under the first factor of § 107.

### C. *The Audiovisual Definition*

Video games are a unique work in the realm of copyright.<sup>148</sup> Despite being a game that allows for unique improvisation on the part of the player, they are deemed an audiovisual<sup>149</sup> work in contrast to board games (discussed below), which allow for copyright of the design but not of the essence of the game or of the public playing it.<sup>150</sup> As an audiovisual work, copyright holders have the exclusive right to determine and control all public performances of it.<sup>151</sup> The public performance threshold for audiovisual works is much easier to reach than with the literary works classification of traditional software.<sup>152</sup> This right creates a higher hurdle to overcome for streamers who may assert the fair use defense as a “transformative”

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streaming is infringement and the proceeds are the property of the copyright holder).

<sup>146</sup> See generally Taylor, *supra* note 102 (concluding the solution to possible copyright issues between streamers and developers is to begin a licensing program).

<sup>147</sup> See generally Postel, *supra* note 102 (arguing a different definition for fair use needs to be created to apply to video games).

<sup>148</sup> See NIMMER & NIMMER, *supra* note 103.

<sup>149</sup> Williams Elec., Inc. v. Artic Int'l, Inc., 685 F.2d 870, 874 (3d Cir. 1982).

<sup>150</sup> Allen v. Acad. Games League of Am., Inc., 89 F.3d 614, 616 (9th Cir. 1996) (differentiating the Copyright Act § 106(4) definition of public performance from a public playing of a game because of the intended commercial nature in the Act).

<sup>151</sup> 17 U.S.C. § 106(4) (2018).

<sup>152</sup> 17 U.S.C. § 101 (providing a definition of “perform”).

work.<sup>153</sup> The legal problem is that video games should not be defined the same as the other works falling under the audiovisual heading.

While some accept the classification of video games as an audiovisual work without dispute,<sup>154</sup> others have argued it is fortunate the audiovisual aspect of a video game is copyrightable to protect developers whose code may not have been copied verbatim.<sup>155</sup> This logic is problematic because the ethereal idea behind a piece of software is not copyrightable, only the tangible code is.<sup>156</sup> Software developers are allowed to have similar or even the same idea, but they are not allowed to copy code that *expresses* those ideas in the same or similar ways.<sup>157</sup> Expanding video games to include the audiovisual aspect of protection that traditional software does not enjoy is simply too expansive. The differing potential copyright issues are illogical. If a movie, set in an office, had a scene where different computer screens are visible, the ones showing a traditional program like Microsoft Word or Excel would not risk a claim of copyright infringement, though the screens showing Solitaire or Tetris would be.<sup>158</sup>

Video games are distinct from all other forms of audiovisual materials. The law defines audiovisual work very broadly:

[W]orks that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.<sup>159</sup>

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<sup>153</sup> See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–79 (9th Cir. 1994).

<sup>154</sup> See Michael Larkey, *Cooperative Play: Anticipating the Problem of Copyright Infringement in the New Business of Live Video Game Webcasts*, 13 RUTGERS J.L. & PUB. POL'Y 1, 52, 60–61 (2015).

<sup>155</sup> See Drew S. Dean, *Hitting Reset: Devising a New Video Game Copyright Regime*, 164 U. PA. L. REV. 1239, 1252–53 (2016).

<sup>156</sup> *Feist Publ'n v. Rural Tel. Serv.*, 499 U.S. 340, 359 (1991).

<sup>157</sup> See generally *Apple Comput., Inc. v. Microsoft Corp.*, 35 F.3d 1435 (1994); see also NIMMER & NIMMER, *supra* note 103, at § 2A.14[C][3].

<sup>158</sup> See NIMMER & NIMMER, *supra* note 103, at § 2A.14[C][2].

<sup>159</sup> 17 U.S.C. § 101 (2018).

It further uses motion pictures and the example of an audiovisual work fourteen times throughout the body of copyright laws.<sup>160</sup> The Compendium of U.S. Copyright Office Practices, Third Edition defines the categories of motion pictures and audiovisual works like a game of “one of these things is not like the other.”<sup>161</sup> The definition is stated as follows:

[f]ilms, documentaries, television shows, cartoons, videos, online videos, motion picture soundtracks, and similar types of motion pictures. Videogames, slide presentations, online audiovisual works (e.g., smartphone and tablet applications, online courses and tutorials, website content), and similar types of audiovisual works.<sup>162</sup>

Video games are not like any of the other works listed. They are the only ones that give the user influence over the output. The audiovisual aspects of the other works are static. In videogames, the user alters and changes the sequencing to the video. This suggests the original intention of audiovisual works being static in nature and video games were haphazardly thrown into the mix. A movie or television show runs the same way every time with each progressive frame always in the same order. The recorded soundtrack does not vary in tone, pitch, or duration (provided everything is in working order), while video games are dynamic and each playing produces a unique experience. Though the *Williams* court conceded the variability of a video game’s display was caused by the player, it was still allowed to be copyrighted as if it were static.<sup>163</sup> The technology of 1982, when *Williams* was decided, is incomparable to today. The public is done a disservice by not revisiting this definition written before open world and purely creative video games were commonplace.

The game at issue in *Williams* was Defender, an early version of the 2D, side-scroller genre.<sup>164</sup> The gameplay moves left and right across the screen. The player controls a space ship flying over a

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<sup>160</sup> U.S. COPYRIGHT OFFICE, CIRCULAR 92, COPYRIGHT LAW OF THE UNITED STATES (2016).

<sup>161</sup> Sesame Street, *Sesame Street: One of These Things*, YOUTUBE (June 7, 2011) <https://www.youtube.com/watch?v=rsRjQDrDnY8>.

<sup>162</sup> U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 503.1(B) (3rd ed. 2017).

<sup>163</sup> *Williams Elec., Inc. v. Artic Int’l, Inc.*, 685 F.2d 870, 874 (3d Cir. 1982).

<sup>164</sup> *Id.*

mountainous terrain shooting alien invaders and dodging attacks.<sup>165</sup> The capabilities of games have increased immensely in the years since the release of *Defender* in 1980. There are still games that are relatively basic in their variability and would probably fit comfortably into the *Williams* definition. However, the current trend is towards massive environments with nearly infinite possibilities. The game *Grand Theft Auto V* has an explorable world the size of many large cities.<sup>166</sup> The possible outcomes from all the interactions are incalculable in such a game. Other games, such as *The Sims*, give free reign to players to progress the story and game as they see fit. The game's creator, Will Wright, admits the purpose of video games is for players to "create their own stories" rather than be told one, as would be the case with all of the other audiovisual works.<sup>167</sup> A game purely built on the backbone of user creativity and creation, *Minecraft*, has become the second most successful video game of all-time<sup>168</sup> behind only *Tetris* (which had a twenty-seven-year head start).<sup>169</sup>

The creative output in *Minecraft* is extensive.<sup>170</sup> To say the players are simply acting within the limited confines of the game's code is akin to saying the works made with Adobe Photoshop or

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<sup>165</sup> SILKIE73, *Defender - 1980 Classic Arcade Game*, YOUTUBE (July 31, 2009), [https://www.youtube.com/watch?v=GdUIS\\_cSMoE](https://www.youtube.com/watch?v=GdUIS_cSMoE) (viewing an example of the *Defender* game play).

<sup>166</sup> Mario Aguilar, *GTA 5 Map Compared to the Google Maps of Major Cities*, GIZMODO (Sept. 12, 2013, 11:14 AM), <https://gizmodo.com/gta-5-map-compared-to-the-google-maps-of-major-cities-1300598028>.

<sup>167</sup> Mark Milian, '*Sims*' Creator: 'Games are Not the Right Medium to Tell Stories', CNN (Feb. 18, 2011, 6:54 AM), <http://www.cnn.com/2011/TECH/gaming.gadgets/02/18/will.wright/index.html>.

<sup>168</sup> Samuel Horti, *Minecraft Had 74 Million Active Players in December, A New Record for the Game*, PC GAMER (Jan. 21, 2018), <https://www.pcgamer.com/minecraft-had-74-million-active-players-in-december-a-new-record-for-the-game/>.

<sup>169</sup> Avinash Bhunjun, *Video Games Day – Here are the Top 10 Best Selling Video Games Ever*, METRO (Sept. 12, 2017, 12:21 PM), <http://metro.co.uk/2017/09/12/video-games-day-here-are-the-top-10-best-selling-video-games-ever-6921045/>.

<sup>170</sup> Matt Peckham, *The 15 Best Minecraft Creations (and Wildest Destinations)*, TIME (May 22, 2013), <http://techland.time.com/2013/05/23/the-15-best-minecraft-creations-and-wildest-destinations/>.

Premiere are only acting within the confines of the software's code. This logic implies the creator of the tool is the owner of the final product. Video games have advanced to the level of creation. The technology allows for limitless possibilities in video game output. Similarly, film processing has left the darkroom and entered the computer world. Just as Kodak does not have claim to the photographs of Ansel Adams,<sup>171</sup> neither does Adobe<sup>172</sup> own claim to the \$783 million box office take of 2016's hit *Deadpool*.<sup>173</sup> However, the court in *Midway* equated the creativity of playing a video game with that of changing the station on a television.<sup>174</sup> The few possibilities *Pac-Man*'s software allows for did not rise to the level of unique creation.<sup>175</sup> The *Midway* court wrote:

The player of a video game does not have control over the sequence of images that appears [sic] on the video game screen. He cannot create any sequence he wants out of the images stored on the game's circuit boards. The most he can do is choose one of the limited number of sequences the game allows him to choose. He is unlike a writer or a painter because the video game in effect writes the sentences and paints the painting for him; he merely chooses one of the sentences stored in its memory, one of the paintings stored in its collection.<sup>176</sup>

If the court was primarily concerned with the role of the user simply playing out a prescribed script in code of the game, then the audiovisual aspect of the game is, therefore, merely a derivative work of the underlying software code, void of originality and thusly noncopyrightable.<sup>177</sup> However, there will always be some degree of limitation imposed upon a creator by the medium in which she works. Literary writers do not have the unlimited freedom the court suggests. They cannot add videos to their books. They are limited to the words in the languages in which they write. Paintings are two dimensional, sculptures are three. The current interactions of multiple players in real time in video games surely cannot be viewed

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<sup>171</sup> See generally ANSEL ADAMS, *THE NEGATIVE* (2008).

<sup>172</sup> *How Hollywood is Turning to Premiere Pro*, MOTION ARRAY (June 16, 2016), <https://motionarray.com/blog/how-hollywood-is-turning-to-premiere-pro>.

<sup>173</sup> BOX OFFICE MOJO, <http://www.boxofficemojo.com/movies/?id=deadpool2016.htm> (last visited Oct. 3, 2018).

<sup>174</sup> *Midway Mfg. Co. v. Artic Int'l, Inc.*, 704 F.2d 1009, 1012 (7th Cir. 1983).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> NIMMER & NIMMER, *supra* note 103, at § 2A.14[C][2].

as simply a choice of prestored memories within the code of the game. Even as narrow-sighted as the definition was in 1982 in *Midway*, modern technologies always have been used to expand these artistic limitations.

The courts and the law need to remember “copyright represents a sustained reaction to developing technology.”<sup>178</sup> Despite this, it took over 260 years from the first protective law to the Copyright Act of 1976 to explicitly state copyright protections went beyond the traditional concept of a “book” to any type of written work.<sup>179</sup> Historical technological developments have pushed the boundaries of what has been possible with every type of artistic expression. Developments in paint tubes and synthetic colors allowed for the impressionists to paint landscapes they would otherwise not be able to capture in a studio.<sup>180</sup> Color photography, film paired with audio, the word processor, the electric guitar, and multitrack digital recording. All of these developments have positively augmented what was previously capable within the medium. In the computer realm, the rate of advancement is exponential.<sup>181</sup> The technology behind current video games and the ability of streamers to add their own input to the experience require a fresh legal review.

The advancements in video game software and hardware demand for reinterpretation of the copyright regulations under the guidelines set forth in *WGN*.<sup>182</sup> Congress wrote:

Authors are continually finding new ways of expressing themselves, but it is impossible to foresee the forms that these new expressive methods will take. *The bill does not intend either to freeze the scope of*

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<sup>178</sup> *Id.* at § 2A.02.

<sup>179</sup> *See id.* (providing a history about the Statue of Anne in 1710 only referencing “books” with the American acts in 1790 and 1909 only adding charts and maps. The Copyright Act of 1976 expanded the definition to “literary works” regardless of how they are made or presented).

<sup>180</sup> Perry Hurt, *Never Underestimate the Power of a Paint Tube*, SMITHSONIAN MAG. (May 2013), <https://www.smithsonianmag.com/arts-culture/never-underestimate-the-power-of-a-paint-tube-36637764/>.

<sup>181</sup> *See* Béla Nagy et al., *Statistical Basis for Predicting Technological Progress*, PLOS ONE, Feb. 2013, at 1 (statistically shows that Moore’s Law is the best predictor of advancing computer technology).

<sup>182</sup> *WGN Cont’l Broad. Co. v. United Video, Inc.*, 693 F.2d 622, 627 (7th Cir. 1982).

*copyrightable technology* or to allow unlimited expansion into areas completely outside the present congressional intent. *Section 102 implies neither that that subject matter is unlimited nor that new forms of expression within that general area of subject matter would necessarily be unprotected.*<sup>183</sup>

Congress admits in this report to the Copyright Act of 1976 that with technological advances, the Supreme Court needs to reevaluate the interpretation of the copyright laws.<sup>184</sup> The advent of YouTube and Twitch is a monumental technological change. The ability of content creators to reach millions of people within days is revolutionary.<sup>185</sup> The Court surely was not contemplating the chances that a person talking about playing Pac-Man in a smoke-filled arcade would be able to have millions of people hear his opinions as he expresses them live. The dynamic of modern videos game streaming as a group event, where the player is the main attraction and not the game, means the Court needs to revisit the rules.

#### D. Board Games

The technological developments discussed in the previous section are not unique to video games. Board games are integrating technology that makes them challenging to define under the current legal interpretations. As cited above, board games have been distinguished from video games where the “playing” of the board game cannot be a public performance because the “playing” is not copyrightable, only the literary aspects of the rulebook and game board or creative aspects of the artwork are.<sup>186</sup> The court in *Allen* has a rational interpretation of what a game is and its intended use after

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<sup>183</sup> H.R. REP. NO. 1476, at 51 (1976) (emphasis added).

<sup>184</sup> *Id.* at 53 (the report states that the definitions of copyrightable material shall be “sufficiently flexible” to free the courts of “outmoded concepts”).

<sup>185</sup> Hugh McIntyre, *Taylor Swift’s ‘Look What You Made Me Do’ Video Hit 100 Million Views in Less Than Four Days*, FORBES (Aug. 31, 2017, 5:42 PM), <https://www.forbes.com/sites/hughmcintyre/2017/08/31/taylor-swifts-look-what-you-made-me-do-hit-100-million-views-in-less-than-four-days/#668a07641ff1>.

<sup>186</sup> *Allen v. Acad. Games League of Am., Inc.*, 89 F.3d 614, 616 (9th Cir. 1996); *see also* NIMMER & NIMMER, *supra* note 103, at § 8.14[B][1].



a consumer purchase. Clearly, the purchaser intends to play the game and:

[A]llow[ing] the owner of a copyright in a game to control when and where purchasers of games may play the games and this court will not place such an undue restraint on consumers. Whether privately in one's home or publicly in a park, it is understood that games are meant to be "played."<sup>187</sup>

This seems to be a drastic shift in the conception of games and how they are to be used in the open market compared to the rulings on video games in the 1980s. The only case to have addressed this ruling in the context of video games and distinguish it has been *Valve Corp. v. Sierra Entm't, Inc.*<sup>188</sup>

The United States District Court for the Western District of Washington distinguished *Allen* in *Valve Corp.* on the grounds that gameplay in *Allen* was done in a non-profit setting that was not fee based.<sup>189</sup> However, it seems the court in *Valve Corp.* overstated the position in *Allen* by saying the *Allen* court concluded "that whether the performance is fee-based is an important factor in determining whether the performance is public."<sup>190</sup> What the *Allen* court wrote was "[t]here is no indication that [the] respondents are making the subject games available to the public for a fee"<sup>191</sup> as to distinguish the present case from *Red Baron-Franklin Park, Inc. v. Taito Corp.*,<sup>192</sup> that held the use of copyrighted circuit boards in arcade machines constituted a public performance because players paid a fee to play them.<sup>193</sup> The *Valve Corp.* court suggested *Allen* established a test for determining public performance by referring to fee-based performances as an important "factor" to the analysis.<sup>194</sup> Unfortunately, the *Allen* court never elaborated on any factors beyond distinguishing itself from *Red Baron*.<sup>195</sup> This distinction does suggest the *Allen* court believed the commercial aspects related

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<sup>187</sup> *Allen*, 89 F.3d at 616.

<sup>188</sup> *Valve Corp. v. Sierra Entm't, Inc.*, 431 F. Supp.2d 1091 (W.D. Wash. 2004).

<sup>189</sup> *Id.* at 1097.

<sup>190</sup> *Id.*

<sup>191</sup> *Allen*, 89 F.3d at 617.

<sup>192</sup> *Red Baron-Franklin Park, Inc. v. Taito Corp.*, 883 F.2d 275 (4th Cir. 1989).

<sup>193</sup> *Id.* at 278–79.

<sup>194</sup> *Valve Corp.*, 431 F. Supp.2d at 1097.

<sup>195</sup> *Allen*, 89 F.3d at 616.

to playing a game should be considered in determining a public performance but it never went as far as to create a test. In the context of video game streaming, a court would have to distinguish these fee rules because the fees being generated are not from playing the video game and often are not even from the privilege to watch the playing of the video game. Instead, the money generated by the streamers is often through advertisements.<sup>196</sup> No fee is being paid to either watch or play. A fee is being paid by advertisers to be part of the stream, not even part of the game itself, but the transformative creation of the streamer.<sup>197</sup>

Board games have this greater amount of leeway in the definition of public performance because they do not have the added protections of being an audiovisual work.<sup>198</sup> But as was alluded to, modern board games are strongly bringing that conclusion into question. Hasbro's 2017 game DropMix is a board game incorporating technology like that of video games but in a board game format. The game consists of a playing board, cards, and a smart phone or tablet loaded with the game app. The general objective of the game is to use the cards to create musical mixes that match beat and "[k]eep the flow going."<sup>199</sup> The game requires the physical interaction of placing the cards on the gameboard, which will illuminate the board when the cards are placed in the correct position. Playing cards in a strategic and calculated manner is a typical aspect of many board games. This one is different because the board is "smart" and reads the card through radio-frequency identification (RFID) chips imbedded in the cards, so it knows which card is played. Different cards will produce different music, beats, or lyrics to be produced by the connected smartphone or tablet. This board game has audio (from the phone's speakers or connected speaker), a display (phone's display as well as the indication lights on the board), and underlying software that controls the whole thing (the phone app and the game board). By the

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<sup>196</sup> Adriyan King, *Get Rich with Twitch: Tips on How to Make Money Streaming*, MEDIUM (Jan. 21, 2018), <https://medium.com/@andreae.king1991/get-rich-with-twitch-tips-on-how-to-make-money-streaming-e18a0e2397cd>.

<sup>197</sup> *Id.*

<sup>198</sup> See NIMMER & NIMMER, *supra* note 103, at § 2A.14[C][1].

<sup>199</sup> DROPMIX, <https://dropmix.hasbro.com/en-us> (last visited Oct. 3, 2018).

definition in *Williams*, DropMix would likely be defined as a video game as opposed to a board game.<sup>200</sup> The only thing that might distinguish it is the players must physically place the cards on the board as opposed to using some “hand controls,” but they must touch the controls on the smartphone in order to set up the game and the play modes.<sup>201</sup>

This paper is not arguing that technology interactive board games should be considered video games and thus be given the audiovisual product status. Instead, this paper is arguing that the technological advancements of all games have moved the marketplace so far beyond what was conceived by the cases in the 1980’s that a new view and new definition needs to be created. Allowing the streaming of a conventional board game like Dungeons & Dragons while limiting streaming of a video game version of it is incongruent. Six friends can sit around a table, roll dice, move figures across a makeshift miniature dungeon, and record their successes and failures in notebooks all while streaming their adventures live to anyone willing to watch via the Internet.<sup>202</sup> They cannot do the same on a computer.<sup>203</sup> This undoubtedly qualifies as an “undue restraint on a consumer”<sup>204</sup> and “would clog the channels of commerce, with little benefit from the extra control.”<sup>205</sup>

The disparate treatment of the exact same game existing in two different versions, one on paper and one on a computer, does not seem just. The availability of new technology (streaming) should not be constrained to an older technology (board games) simply because

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<sup>200</sup> *Williams Elec., Inc. v. Artic Int’l, Inc.*, 685 F.2d 870, 871 (3d Cir. 1982).

<sup>201</sup> *Id.*

<sup>202</sup> The publishers of Dungeons & Dragons, Wizards of the Coast, actually encourage streaming playing sessions of the board game. They have a tab on their website’s homepage dedicated to streams so people can easily access them. Their homepage even advertised a streaming event as the main focus. *See* DUNGEONS & DRAGONS, <https://web.archive.org/web/20180520071956/http://dnd.wizards.com/> (last visited May 20, 2018).

<sup>203</sup> *See Neverwinter Nights, Enhanced Edition*, DUNGEONS & DRAGONS, <http://dnd.wizards.com/products/digital-games/pcmac/neverwinter-nights> (last visited Oct. 3, 2018).

<sup>204</sup> *Allen v. Acad. Games League of Am., Inc.*, 89 F.3d 614, 616 (9th Cir. 1996).

<sup>205</sup> *Impression Prods. v. Lexmark Int’l, Inc.*, 137 S. Ct. 1523, 1532 (2017).

the courts are unwilling to recognize the odd position in which video games have been placed. The courts have not considered them traditional games or traditional software and instead placed them in the same category as films and television shows. This dynamic has granted rights in video games more than the sum of its parts. By combining games with computer software, the video game has the copyright protections of both *plus* audiovisual status that neither category had on its own. These illogical outcomes need to be resolved.

#### IV. RESTRICTIONS ON THE RIGHTS OF THE PLAYERS

Discussions about anyone other than the video game publishers possessing any rights to the game play have been dismissed with acquiescence to the end-user license agreements (EULA) or terms of service (ToS).<sup>206</sup> Erez Reuveni argues a player's participation in a video game's virtual world is insufficient to warrant copyrights for the players.<sup>207</sup> The intention of copyright is to foster a business environment of growth and technological advancement.<sup>208</sup> If each individual player in a MMOG were able to assert rights against the video game creator, business would become incredibly difficult.<sup>209</sup> Reuveni, however, argues against the rights of players *within* a game's virtual world.<sup>210</sup> The difference with streaming is that the game is merely the subject of a wholly unique derivative work. Reuveni's conclusion relating to virtual worlds is apropos to streaming as well:

Therefore, the emergence of virtual worlds and their continued growth and popularity requires courts and legislators to interpret and modify existing law in order to protect the interests of developers and players alike. To do otherwise is to overlook the Copyright Act's fundamental

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<sup>206</sup> See Tyler T. Ochoa, *Who Owns an Avatar? Copyright, Creativity, and Virtual Worlds*, 14 VAND. J. ENT. & TECH. L. 959, 964–65 (2012); see also Erez Reuveni, *On Virtual Worlds: Copyright and Contract Law at the Dawn of the Virtual Age*, 82 IND. L.J. 261, 286–90 (2007) (discussing the untenability of a business model where players could assert copyrights against a developer of a digital world).

<sup>207</sup> See generally Reuveni, *supra* note 207.

<sup>208</sup> See U.S. CONST. art. I, § 8, cl. 8.

<sup>209</sup> See Reuveni, *supra* note 207, at 286–90.

<sup>210</sup> *Id.* at 262.

purposes and to ignore the evolving nature of virtual worlds from mediums of play into venues for creation, commerce, and community.<sup>211</sup>

The difference here is that the streaming world relies on the rights of the streamers to be free from the control of the video game developers. The creations of the streamers, through their unique interactions with the video game world, their commentary, personalities, interactions with the game environments, and conversations with the online viewers form a unique and original work, worthy of copyright protection on its own.

#### A. *Authorship*

Many commentators have addressed the issue of authorship within the confines of playing a video game, in addition to the *Williams* ruling.<sup>212</sup> Streaming video games with commentary is a creative work that has not yet been thoroughly differentiated from internal game creations. Section 102 of the Copyright Act gives protection to “original works of authorship fixed in any tangible medium of expression.”<sup>213</sup> An original live stream is probably not copyrightable in real time as the expressions and words of the streamer are not in a fixed medium,<sup>214</sup> while the recording and thus the replays of the stream would be.<sup>215</sup> For the tangible recording to be copyrightable, the main question is that of originality. The *Midway* court held that playing a video game is insufficient to qualify as original, stating:

Playing a video game is more like changing channels on a television than it is like writing a novel or painting a picture. The player of a video game does not have control over the sequence of images that appears on the video game screen. He cannot create any sequence he wants out of the images stored on the game’s circuit boards. The most he can do is choose one of the limited number of sequences the game allows him to choose. He is unlike a writer or a painter because the video game in effect writes the sentences and paints the painting for him; he merely chooses one of

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<sup>211</sup> *Id.* at 308.

<sup>212</sup> See generally sources cited *supra* note 207.

<sup>213</sup> 17 U.S.C. § 102(a) (2018).

<sup>214</sup> See NIMMER & NIMMER, *supra* note 103, at § 1.08[C][2].

<sup>215</sup> See *Goldstein v. California*, 412 U.S. 546 (1973).

the sentences stored in its memory, one of the paintings stored in its collection.<sup>216</sup>

However, the Supreme Court held in *Feist* that “[t]he vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be.”<sup>217</sup> The addition of commentary and other expressions of a streamer outside of simply playing the game at hand would qualify the recording of the stream as original and thus copyrightable under the generous *Feist* definition.

As copyright owners have the right to all derivative works of their original work,<sup>218</sup> does the question of originality and copyrightability of the stream even matter? The Copyright Act does not allow for derivative protections for the original holder if the derivative use is deemed lawful.<sup>219</sup> As discussed above,<sup>220</sup> the commentary and critique allowances of fair use should certainly cover video game streaming and would necessarily require substantial copying of the original to be a derivative work.<sup>221</sup> Fair use being a legal use of the video game, the original owners would be prevented from asserting their exclusive rights to derivative works in these cases. As copyright law grants rights in the recorded stream to the streamer and not to the video game publisher, the question of remedies for the publishers now shifts to contract law.

#### B. *End User License Agreements*

Many software copyright suits have been decided on contractual issues.<sup>222</sup> Terms of service and EULAs have been held to be legally binding contractual agreements between the player and the publisher as to the limitations on the use of the software in cases that have had

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<sup>216</sup> *Midway Mfg. Co. v. Artic Int’l, Inc.*, 704 F.2d 1009, 1012 (7th Cir. 1983).

<sup>217</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (quoting *I M. NIMMER & D. NIMMER, COPYRIGHT § 1.08[C][1]* (1990)).

<sup>218</sup> 17 U.S.C. § 106(2) (2018).

<sup>219</sup> 17 U.S.C. § 103(a).

<sup>220</sup> *See supra* Part III.A.

<sup>221</sup> *Am. Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1, 13–14 (S.D.N.Y. 1992), *aff’d*, 60 F.3d 913 (2d Cir. 1994).

<sup>222</sup> *See Apple Comput., Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1447 (9th Cir. 1994) (refusing to expand upon the definitions of copyrightable material in an operating system and instead ruling on the licensing aspect of the case).

fact specific rulings.<sup>223</sup> Most people never read the terms of the agreement and simply click through the clauses as quickly as they can.<sup>224</sup> Despite player aversion to understanding the terms of user agreements, courts have found EULAs to be binding since 1996,<sup>225</sup> and have clarified them as binding as long as the player ‘agreed’ since 2001.<sup>226</sup> The courts have visited the issue of EULAs multiple times in the past two decades and have consistently upheld their enforceability as contracts as long as users are forced to perform some action, like clicking, to affirm agreements of the license.<sup>227</sup> The unique aspect of video game streaming being an external activity from the video game itself, however, demands a re-evaluation of the contractual renunciation of copyrights. The cases that have upheld the validity of EULAs have also tiptoed around the idea of preemption.<sup>228</sup> The question of legal supremacy arises as copyright is a federal right and contractual rights are dictated by state law.<sup>229</sup> Since the Seventh Circuit allowed for owners to increase their copyrights through the use of EULAs there have been questions as to the balance between copyrights and contractual rights.<sup>230</sup>

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<sup>223</sup> See, e.g., *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1455 (7th Cir. 1996). See generally Michael Terasaki, *Do End User License Agreements Bind Normal People?*, 41 W. ST. U. L. REV. 467, 468 (2014).

<sup>224</sup> See Chelsea King, *Forcing Players to Walk the Plank: Why End User License Agreements Improperly Control Players’ Rights Regarding Microtransactions in Video Games*, 58 WM. & MARY L. REV. 1365, 1373–77 (2017).

<sup>225</sup> See *ProCD*, 86 F.3d at 1449 (holding that an EULA was valid and enforceable as a contract).

<sup>226</sup> See *Specht v. Netscape Commc’ns Corp.*, 150 F. Supp.2d 585, 588 (2001), *aff’d*, 306 F.3d 17 (2d Cir. 2002) (explaining that the plaintiffs, by simply downloading software, did not agree to an arbitration clause in a EULA and could not bound by it without an agreement).

<sup>227</sup> King, *supra* note 225.

<sup>228</sup> See NIMMER & NIMMER, *supra* note 103, at § 1.01[B][1][a][iii].

<sup>229</sup> *Id.*

<sup>230</sup> See William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 341–44 (1989) (providing an economic perspective); see Niva Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, 12 BERKELEY TECH. L.J. 93, 101 (1997) (questioning the legality of contracts to supersede copyright law).

While various courts have held that shrink-wrap EULAs associated with software are valid contracts,<sup>231</sup> others have also held the contract does not extend so far as to preempt the right to reverse engineer,<sup>232</sup> nor can a copyright holder “unilaterally invoke ‘a combination of contractual terms and technological measures, to repeal the fair use doctrine with respect to an individual copyrighted work.’”<sup>233</sup> The Court of Appeals for the Fifth Circuit in *Vault v. Quaid Software Ltd.*<sup>234</sup> suggests the federal right of fair use cannot be contracted away, meaning a streamer would have the right to create and record streams provided they satisfy the fair use requirements.<sup>235</sup> The Supreme Court clarified in prior rulings that fair use has constitutional underpinnings as a necessary accommodation to the First Amendment.<sup>236</sup> This strengthens the argument against contractual preemption, as a constitutionally founded right could not be abdicated through a licensing agreement.

The court in *ProCD*, however, had a different solution, stating:

Terms of use are no less a part of “the product” than are the size of the database and the speed with which the software compiles listings. Competition among vendors, not judicial revision of a package’s contents, is how consumers are protected in a market economy. ProCD has rivals, which may elect to compete by offering superior software, monthly updates, improved terms of use, lower price, or a better compromise among these elements.<sup>237</sup>

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<sup>231</sup> See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996); *Nat’l Car Rental Sys., Inc. v. Comput. Assocs. Int’l, Inc.*, 991 F.2d 426, 433 (8th Cir. 1993), *cert. denied*, 510 U.S. 861 (1993); *Taquino v. Teledyne Monarch Rubber*, 893 F.2d 1488 (5th Cir. 1990); *Acorn Structures, Inc. v. Swantz*, 846 F.2d 923 (4th Cir. 1988).

<sup>232</sup> See *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 269–70 (5th Cir. 1988).

<sup>233</sup> *NIMMER & NIMMER*, *supra* note 103, at § 1.01[B][1][a][iii] (citing *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1202 (Fed. Cir. 2004)).

<sup>234</sup> *Vault Corp.*, 847 F.2d at 269–70.

<sup>235</sup> See 17 U.S.C. § 107 (2018).

<sup>236</sup> *Golan v. Holder*, 565 U.S. 302, 327–28 (2012) (citing *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003)).

<sup>237</sup> *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1453 (7th Cir. 1996) (citation omitted).



The court is essentially saying the terms of licensing agreements will be negotiated by the free market. If users do not like the terms of the license agreement, a competitor can offer better ones to poach the customers. This would likely work with conventional software. There are dozens of options for every type of application, but it again illustrates how video games are an outlier on the copyright spectrum. Consumers lack the ability to shop for an alternative. There is only one Fortnite, World of Warcraft, or League of Legends available to players. The story and expression of the video game is explicitly protected because it is unique. Furthermore, giving creators the ability to restrict, through license, the possibility of a consumer creating a transformative work damages the public by increasing transaction costs.<sup>238</sup> Limiting fair use under § 107 of the Copyright Act for productive acts through license will only harm the larger public.<sup>239</sup> Individual contracts were not meant to be the structure by which the flow of information was to be managed.<sup>240</sup> This process assumes that every contested use of a copyrighted work has to pass through two different judicial levels. First, the use needs to be defended in state court to address the contractual agreements, then, in federal court to determine the application of fair use. This creates an untenable market for knowledge with far too much litigation. Leaving the solution to this matter in the hands of developers and their licenses will not result in any insight into what rights streamers actually have. The developers will naturally try to restrict the streamers as much as they can, with indifference to the myriad interpretations the courts and the legislature have thus far provided. However, much of this might change in the near future.

Recently, both the judicial and the legislative branches have shown indications that licensing agreements in relation to intellectual property rights may be up for analysis. The Supreme Court's ruling in *Impression Prods. v. Lexmark Int'l, Inc.* suggests the Court is beginning to question users' ability to sign away their

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<sup>238</sup> Landes & Posner, *supra* note 231, at 357–61.

<sup>239</sup> Elkin-Koren, *supra* note 231, at 111; see Haochen Sun, *Fair Use as a Collective User Right*, 90 N.C. L. REV. 125, 130 (2011) (arguing fair use is a collective right that exists to protect the public interest and promote the free flow of information knowledge).

<sup>240</sup> Elkin-Koren, *supra* note 231, at 111.

rights.<sup>241</sup> Additionally, at Mark Zuckerberg's April 10th, 2018, testimony before the Senate Judiciary and Commerce Committees, Sen. John Kennedy said that Facebook's service agreement "sucks . . . . [T]he purpose of the user agreement is to cover Facebook's rear end. It is not to inform [Facebook's] users about their rights."<sup>242</sup> While the Senator told Zuckerberg to fix the agreement on his own, there was a threat of regulation in this area if he failed.<sup>243</sup>

*C. Impression Prods. v. Lexmark Int'l, Inc.*

Lexmark is a printer company that designs, manufactures, and sells toner cartridges for laser printers to its customers around the world.<sup>244</sup> Lexmark holds multiple patents on the components to make up the cartridges and offers several pricing options to limit the likelihood that their customers will purchase refilled cartridges and will, instead, return their spent cartridges to Lexmark.<sup>245</sup> The main strategy of Lexmark at issue in this case was the implementation of a microchip on the cartridges to prevent remanufacturers from being able to refill the cartridges and resell them at a lower price than new ones.<sup>246</sup> The remanufacturers became more creative and developed ways to circumvent the effects of the microchip which led to Lexmark suing for patent infringement.<sup>247</sup>

The Court was interestingly vocal about the similarities between patents and copyrights. It analogized patent exhaustion and the first sale doctrine of copyright saying that differentiating them "would also make little theoretical or practical sense: The two share a 'strong similarity . . . and identity of purpose.'"<sup>248</sup> This connection is interesting because the Court goes on to use both patent and

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<sup>241</sup> *Impression Prods. v. Lexmark Int'l, Inc.*, 137 S. Ct. 1523, 1526 (2017).

<sup>242</sup> *Facebook CEO Mark Zuckerberg Hearing on Data Privacy and Protection*, C-SPAN at 3:35:10 (Apr. 10, 2018), <https://www.c-span.org/video/?443543-1/facebook-ceo-mark-zuckerberg-testifies-data-protection&live&start=12898>.

<sup>243</sup> *Id.*

<sup>244</sup> *Lexmark*, 137 S. Ct. at 1529.

<sup>245</sup> *Id.* at 1529–30.

<sup>246</sup> *Id.* at 1530.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 1527 (citing *Bauer & Cie v. O'Donnell*, 229 U.S. 1, 13 (1913)).

copyright provisions against post-sale restrictions of an item to rule against the actions of Lexmark.<sup>249</sup>

The Court said the case could have been decided on contract law and not patent law because Lexmark lost its patent rights once it sold its cartridges, but that issue was never argued.<sup>250</sup> *Lexmark* cannot be used to determine the ability of contract law to preempt copyright law or vice versa, but it does strongly state the Court's position that once the owner of a copyright sells that copyrighted material, its use by the customer is far more open than previously argued in the video game cases of the 1980s.<sup>251</sup> The Court wrote that the intellectual property rights are preserved "even when a patentee sells an item under an express restriction, the patentee does not retain patent rights in that product."<sup>252</sup> The congruencies between patent and copyright in this case suggest the Court would also stipulate copyright holders would be barred from retaining copyrights in the copy of the player, as Nintendo has often asserted, in streamed games.<sup>253</sup>

While *Lexmark* is not the perfect test case to explain the Court's opinion on the rights of video game streamers by any measure, it does show an opinion from the Court that would likely be drastically different from those of the *Williams*, *WGN*, and *Midway* courts of the 1980s. The Court recognizes the increasingly rapid pace with which technology is developing, and the risk courts face by upholding overly stringent rights against users.<sup>254</sup> If this Court were presented with the dilemma posed in Part III.C of two identical *Dungeons & Dragons* games, it is very likely that substantially different legal conclusions would be drawn. While varying only in the form of the gameplay, the two games produce drastically different rights if both are streamed over the Internet, creating a

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<sup>249</sup> *Id.* at 1532.

<sup>250</sup> *Id.* at 1533.

<sup>251</sup> *Id.* at 1526 ("[I]f an owner restricts the resale or use of an item after selling it, that restriction 'is void, because . . . it is against Trade and Traffique, and bargaining and contracting between man and man.'" (citing 1 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 223, § 360 (1628))).

<sup>252</sup> *Id.* at 1527.

<sup>253</sup> Kohler, *supra* note 140.

<sup>254</sup> *Lexmark*, 137 S. Ct. at 1532.

conflict of law. Correcting this disagreement would free the market from the murky rules to which the public is currently subjected.

## V. CONCLUSION

Current case law has left video game streamers to operate at the mercy of the video game publishers who are able to exert control over streaming services. The services have likely acquiesced to the copyright holders because they are the ones with deep pockets and the motivation to become litigious. Why get in the way of a multi-billion-dollar company with an army of IP attorneys when the only downside is upsetting a single user with no means of recourse? The threat of costly litigation from video game publishers is far more worrisome for Twitch and YouTube than upsetting a handful of relatively powerless streamers. This dynamic is antithetical to a free market supportive of new, creative works.

Video games are in limbo when it comes to being categorized as a copyrightable work. They pose a taxonomical conundrum when comparing the explicitly mentioned works in the Copyright Act. Video games have characteristics of movies, software, toys, and games. Despite the similarities video games have with each of these categories, there are significant differences that suggest they should not be categorized with any of them. The solution is not to drop video games in the proverbial catch-all category of audiovisual works. This haphazard assignment gives video games unique status over all other works in the category because they are additionally categorized as software and they possess the audiovisual public performance rights that software does not; they have the “playing” rights that traditional games lack. Effectively, video games are categorized with rights that are more than their sum.

The public wants to watch people play video games and they want to watch the people who have the greatest insight and personality. To hold this new market hostage due to ill-defined legal definitions and adversarial parties with significantly less than equal power will only work to stifle innovation and throttle the flow of knowledge. Courts must also address the preemption of copyrights over contract rights and clarify this muddled issue. Again, the copyright holders are using end user license agreements to restrict

the Constitutional rights of streamers to create new and original work. If such agreements were to hold, publishers could bring suits against any negative reviewer, completely negating the fair use right of critique and adversely affecting the marketplace.<sup>255</sup> New definitions and new interpretations specifically addressing the unique issues of video games need to be formulated. Video game streamers are operating under myriad legal interpretations. Consistency is necessary in a digital marketplace that is growing at such a rate. Hopefully, the Court's apparent eagerness to recognize exponential technological advancements in *Lexmark* is a sign of what is to come. The current regime is untenable and demands change.

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<sup>255</sup> Landes & Posner, *supra* note 231, at 358–60.