

NOTE

THE QUEST TO QUELL THE LET’S PLAY CONTROVERSY: A STRATEGY GUIDE ON RESOLVING TENSIONS BETWEEN DEVELOPERS AND GAMERS

I. INTRODUCTION

Click. With a sigh of relief, you sit back in your chair.¹ After days of recording, editing, and quality assurance, you finally uploaded the next video in the installment of your Let’s Play² series.³ It has not been easy, but your fanbase has been collecting momentum.⁴ Your relief is short-lived, however.⁵ Without question or investigation,⁶ YouTube⁷

1. See Kaya Yurieff, *YouTube Burnout Is Real. Creators Are Struggling to Cope*, CNN, <https://www.cnn.com/2019/12/18/tech/youtube-creator-burnout/index.html> [https://perma.cc/A3Y4-9P96] (Dec. 19, 2019, 9:35 AM) (explaining that the cycle of creating content can be very overwhelming for creators because there is a constant pressure for creators to continue to post frequently). “Over the past few years, creators have started openly discussing feeling burnt out, which often comes from the pressure to constantly churn out new videos for their thousands—sometimes millions—of fans.” *Id.*

2. *Let’s Play*, BULBAGARDEN: BULBAPEDIA, https://bulbapedia.bulbagarden.net/wiki/Let%27s_Play [https://perma.cc/24MF-EX84] (Dec. 2, 2022, 8:05 AM) (“A Let’s Play video . . . is a type of user-created video often posted on video-sharing sites such as YouTube. Let’s Play videos offer recorded walkthroughs of gameplay for various video games, including commentary by the video’s creator(s).”).

3. Vidya Narayanan, *How Long Does It Take to Create a YouTube Video?*, MEDIUM (Sept. 25, 2019), <https://medium.com/rizzle/how-long-does-it-take-to-create-a-youtube-video-266ae3496bf3> [https://perma.cc/N7XP-KCWK]. There are many steps to creating a YouTube video, including research, scripting, recording, editing, audio mixing, thumbnail creation, and uploading. *Id.* For some particularly passionate perfectionists, this process can take anywhere from days to weeks. *Id.* On average, roughly seven hours of work is needed to create one to five minutes of video content. *Id.*

4. See Nick Statt, *YouTube Gaming Had Its Best Year Ever with More Than 100 Billion Hours Watched*, VERGE (Dec. 8, 2020, 2:43 PM), <https://www.theverge.com/2020/12/8/22163728/youtube-viewers-100-billion-hours-gaming-videos-2020> [https://perma.cc/NE3C-LN5T] (showing a YouTuber whose follower base increased exponentially in a few short years).

5. See Katharine Trendacosta, *Unfiltered: How YouTube’s Content ID Discourages Fair Use and Dictates What We See Online*, ELEC. FRONTIER FOUND. (Dec. 10, 2020), <https://www.eff.org/wp/unfiltered-how-youtubes-content-id-discourages-fair-use-and-dictates-what-we-see-online> [https://perma.cc/CFZ4-BHQN], for a discussion on how YouTube’s Content ID system invokes fear within content creators and discourages them from challenging copyright

decided that your video violated copyright through its automated screening system.⁸ Within mere hours, your video is taken down—all of that hard work, now futile.⁹ To make matters worse, YouTube, the platform that houses all of your content, has decided to impose a “copyright strike”¹⁰ against your channel.¹¹

You reach out to the website to fight this copyright infringement claim, only to be met with radio silence.¹² Instead, it is the copyright holder who steps in, leaving the same entity that filed a claim against

strikes. Going a step further, Trendacosta also discusses how YouTube has leveraged fear of the law to discourage video creators from challenging Content ID. *Id.*

6. See Julia Alexander, *YouTubers and Record Labels Are Fighting, and Record Labels Keep Winning*, VERGE (May 24, 2019, 10:37 AM), <https://www.theverge.com/2019/5/24/18635904/copyright-youtube-creators-dmca-takedown-fair-use-music-cover> [<https://perma.cc/QYW3-QGB6>] (“YouTube is obligated to take down copyrighted content that’s been uploaded by users, with little incentive to question ambiguous cases once they’ve been identified by a label.”); see also Lindsay Dodgson, *YouTube Channels Are Being Held Hostage with False Copyright Claims, but the Platform’s Hands Are Tied*, BUS. INSIDER (June 2, 2020, 11:16 AM), <https://www.insider.com/youtubers-channels-are-being-held-hostage-with-fake-copyright-claims-2020-6> [<https://perma.cc/XS95-MRLY>] (“YouTube assumes the party receiving the incoming strike is in the wrong.”).

7. *What Is YouTube?*, GCFGLOBAL, <https://edu.gcfglobal.org/en/youtube/what-is-youtube/1> [<https://perma.cc/A387-EG3F>] (last visited Apr. 15, 2024). YouTube is a popular free-to-use video-sharing platform where individuals can both create and watch videos. *Id.*

8. See Peter Balonon-Rosen & Kimberly Adams, *YouTube and Content Creators Clash Over the Platform’s Automated Copyright Tool*, MARKETPLACE (Nov. 22, 2022), <https://www.marketplace.org/shows/marketplace-tech/youtube-and-content-creators-clash-over-the-platforms-automated-copyright-tool> [<https://perma.cc/Q6YY-QST3>] (“YouTube, and its owner, Google, have an automated technology called Content ID that regularly scans for copyrighted material—including music—and flags it for copyright holders.”); see also Trendacosta, *supra* note 5 (“[V]ideos uploaded to YouTube are scanned against a database of files that have been submitted by rightsholders. . . . A Content ID claim occurs when the automated algorithm that powers Content ID detects a match between a YouTuber’s video and the database of material submitted by rightsholders.”).

9. Alejandro Medellin, *Why Did YouTube Take Down My Video?*, VIDEVO (June 21, 2022), <https://www.videvo.net/blog/why-did-youtube-take-down-my-video> [<https://perma.cc/V3HG-MKB7>] (“[The Digital Millennium Copyright Act of 1998 (“DMCA”)] gives copyright owners the power to request YouTube to remove videos that infringe on their intellectual property rights. YouTubers know this process as a DMCA takedown.”).

10. *Copyright Strike Basics*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2814000> [<https://perma.cc/TT48-P3BD>] (last visited Apr. 15, 2024) (“If you get a copyright strike, it means that a copyright owner submitted a legal copyright removal request for using their copyright-protected content. When a copyright removal request is submitted to [YouTube], it reviews the request. If the removal request is valid, [YouTube] has to remove your video . . . to comply with copyright law.”); Trendacosta, *supra* note 5.

11. Trendacosta, *supra* note 5 (expounding on how “getting three copyright strikes . . . within [ninety] days will lead to a creator losing their account, having all their videos removed, and losing the ability to make new channels”).

12. Dodgson, *supra* note 6 (presenting an anecdote from an interviewee who said: “I reached out to YouTube about [their copyright strike] and they said they’d look into it and I never heard anything again”).

you to decide whether your work is fair use.¹³ Realizing that your livelihood rests on less stable grounds than initially thought, you begin to wonder if you are willing to continue down this path without protection.¹⁴ After conducting research into ways to protect your future work, you hit a wall: there is no binding authority on the intersection between Let's Play videos and copyright.¹⁵ All that is left are questions and uncertainty Now what?¹⁶

Many YouTubers have found a career through streaming or recording gameplay of video games while providing entertaining or insightful commentary.¹⁷ It is an incredibly popular video format, dubbed "Let's Play."¹⁸ Most video game developers know better than to dismiss the power of Let's Play videos, as they draw in millions of viewers from around the world.¹⁹ One of the most popular Let's Players, known as PewDiePie, has surpassed 111 million subscribers and has an estimated cumulative total of over twenty-nine billion video views.²⁰ Wary of their power, video game developers sit on the fence when it comes to their

13. See Trendacosta, *supra* note 5 ("A big problem . . . is the appeals process. Where if you say, 'No, this is fair use,' the person who holds the copyright gets to decide if it is fair use . . .").

14. See Julia Alexander, *YouTube CEO Addresses Top Creator Issues Including Copyright Claims and Trending Section*, VERGE (Apr. 30, 2019, 5:00 PM), <https://www.theverge.com/2019/4/30/18524426/youtube-ceo-creators-copyright-claims-infringement-trending-section-comments> [<https://perma.cc/GK4J-RL7B>]. The most forefront concern for the content creator community on YouTube is the copyright claims system. *Id.*; Patrick Klepek, *YouTube's Approach to Copyright Claims Could Scare Off Streamers*, KOTAKU (Aug. 26, 2015), <https://kotaku.com/youtubes-approach-to-copyright-claims-could-scare-off-s-1726757133> [<https://perma.cc/KC3Y-VTR7>].

15. Howard S. Chen, Note, *Gameplay Videos and Fair Use in the Age of Tricks, Glitches and Gamer Creativity*, 25 B.U. J. SCI. & TECH. L. 675, 679 (2019) ("Currently, there is no case law on copyright and gameplay videos, which only increases their uncertain legal status."); Jonathan Ore, *Is Playing Video Games on YouTube a Copyright Infringement? No One Wants to Find Out*, CBC NEWS (Oct. 7, 2017, 5:00 AM), <https://www.cbc.ca/news/entertainment/youtube-gaming-pewdiepie-fair-use-1.4309312> [<https://perma.cc/JH42-XZAG>].

16. See Dodgson, *supra* note 6 (quoting an interviewee who stated, "I'm very grateful to YouTube for being the platform that's given me my career But being a creator, even after growing a sizeable audience, is a constant guessing game").

17. See 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> [<https://perma.cc/M4EQ-ZFNV>] (showing examples of how successful a content creator of this genre can be).

18. See *id.*

19. See Laura Hudson, *Using YouTube as an Accelerant for Video Games*, N.Y. TIMES (Aug. 16, 2017), <https://www.nytimes.com/2017/08/16/technology/personaltech/using-youtube-as-an-accelerant-for-video-games.html> [<https://perma.cc/GBM2-U55G>].

20. Chen, *supra* note 15, at 676 n.3 ("Felix Kjellberg, known online as PewDiePie, is . . . one of YouTube's most popular content creators . . ."); PewDiePie, YOUTUBE, <https://www.youtube.com/user/pewdiepie> [<http://perma.cc/X75T-5NZ5>] (last visited Apr. 15, 2024) (showing that PewDiePie has over 111 million subscribers and over twenty-nine billion views on YouTube as of April 2024).

general tolerance toward Let's Play videos, which blatantly post or stream their allegedly copyrighted content.²¹ If game developers persecute content creators too harshly, there is a huge community backlash.²² If they are too lenient, they fear suffering monetary losses.²³

Currently, content creators are offered very little protection for their work.²⁴ The average YouTube Let's Player is held at the whims of these developers, and their content is only offered protection from takedowns²⁵ when those same companies feel benevolent enough to grant it.²⁶ Whether a Let's Player's content stays up or comes down hinges largely on the developer's preferences.²⁷ For example, Nintendo has been incredibly strict with its copyrighted games, subjecting Let's Play videos featuring their products to intense scrutiny.²⁸ On the other hand, developers like Microsoft and Ubisoft are more lenient, as long as Let's Play creators follow their outlined restrictions for game usage.²⁹ However, little protection exists outside the grants of the developers, and the fair use doctrine is ill-equipped to handle YouTube as it stands.³⁰

Content creators need the tools to protect their own work, and it is high time for the fair use doctrine to catch up and accommodate them.³¹

21. Megan Carriker, *Are Let's Play Videos Legal?*, ODIN L. & MEDIA (Jan. 31, 2018), <https://odinlaw.com/are-lets-play-videos-legal> [<https://perma.cc/2B7W-JRZD>].

22. See Andy Chalk, *Firewatch Is Getting Review-Bombed on Steam*, PC GAMER (Sept. 12, 2017), <https://www.pcgamer.com/firewatch-is-getting-review-bombed-on-steam> [<https://perma.cc/V5Y3-ZBAT>] ("Firewatch developer Campo Santo . . . disassociate[d] itself with [a] streamer by filing a DMCA takedown notice against all of his Firewatch content. . . . [T]hat in turn has resulted in a thorough and ongoing review-bombing campaign against the game on Steam."); see also *Deconstructing Let's Play, Copyright, and YouTube Content ID Claim System: A Legal Perspective*, IE L. GRP. (July 14, 2020), <http://ielawgroup.net/lets-play> [<https://perma.cc/58AZ-FBNJ>] ("Nintendo for instance, after receiving backlash on their [Creators] Program, has reexamined their official stance regarding the matter to allow for more flexibility amongst the streaming community . . . and have even gone as far as to allow their content in Let's Play videos as supported by their updated Content Guidelines.").

23. See Hudson, *supra* note 19.

24. See Trendacosta, *supra* note 5; Carriker, *supra* note 21.

25. *Learn About Scheduled Copyright Takedown Removal Requests*, YOUTUBE HELP, <https://support.google.com/youtube/answer/9167045?hl=en> [<https://perma.cc/U6WC-6ADP>] (last visited Apr. 15, 2024). Defining a takedown, YouTube explains:

If a copyright owner finds their copyright-protected content on YouTube without their permission, they can submit a copyright removal request. As part of this process, they may select the option to schedule the removal of the copyright-protected content. This means, after YouTube validates the removal request, the uploader is given [seven] days to take action before a copyright strike is applied to their channel.

Id.

26. Carriker, *supra* note 21.

27. See *id.*

28. See *id.*

29. See *id.*

30. See *infra* Part II.E.

31. See *infra* Part II.E.

However, content creators and game developers cannot be left to sit in ambiguity waiting for that day to come.³² A reasonable and feasible remedy rests within a blanket licensing scheme.³³ By implementing such a scheme, content creators, such as Let's Players, will hopefully add a tool to their arsenal when it comes to protecting both their content and themselves.³⁴

A Let's Player will usually add content of their own to the video game footage they post, whether it be editing, scripted dialogue, narration, or general walkthrough strategies.³⁵ Many of them believe that minimal commentary and the addition of their personal content will shield them from allegations of copyright infringement under the fair use doctrine.³⁶ It is a widely but falsely held notion because Let's Play videos are most likely not protected under the fair use doctrine.³⁷

Generally speaking, the fair use doctrine is an affirmative legal defense “that promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances.”³⁸ However, there is no set formula for determining whether the fair use doctrine applies to a given use of copyrighted material.³⁹ Instead, a court must balance four factors: (1) purpose and character of the use; (2) nature of the work; (3) amount copied; and (4) market effects.⁴⁰ Because each case turns on an analysis of the specific facts involved, there is neither a set nor predetermined amount of usage that will guarantee a “fair use” determination by courts.⁴¹ Although flexible in nature, the fair use doctrine was established in 1976, well before everyday computer technology and

32. Ore, *supra* note 15.

33. *See infra* Part IV.B.

34. *See infra* Part IV.B.

35. Elizabeth Brusa, Comment, *Professional Video Gaming: Piracy That Pays*, 49 J. MARSHALL L. REV. 217, 220 (2015) (“[V]ideo gamers . . . add[] voice overs, transpos[e] the video gameplay onto a new medium, and uniquely edit[] the content to create walk-throughs and tutorials.”).

36. *See Zoia, supra* note 17 (“Players often face such threats of legal action. Although their videos help promote companies like Nintendo, and Let's Players argue that they're protected by fair use, the gaming industry isn't thrilled about Let's Players siphoning ad dollars from its intellectual property. . . . [P]layers believe that because they repurpose an original work, they should be allowed to continue.”).

37. *See id.*

38. *U.S. Copyright Office Fair Use Index*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/fair-use> [<https://perma.cc/Y2RD-ABH9>] (Nov. 2023).

39. *See id.* (“Courts evaluate fair use claims on a [case-by-case] basis, and the outcome of any given case depends on a fact-specific inquiry. This means that there is no formula . . .”).

40. 17 U.S.C. § 107.

41. *U.S. Copyright Office Fair Use Index, supra* note 38 (explaining that “there is no formula to ensure that a predetermined percentage or amount of a work—or specific number of words, lines, pages, copies—may be used without permission”).

the internet.⁴² Like many other legal doctrines before it, it has fallen victim to the passage of time.⁴³ Technology has rapidly evolved at an alarming rate, and now the fair use doctrine exists in a technological era that surpasses even what its drafters could surmise.⁴⁴ As it was codified, and currently stands, the fair use doctrine cannot meet modern problems presented by internet platforms like YouTube.⁴⁵

To start, the purpose, character, and nature of Let's Play videos are all indicative of copyright infringement as opposed to fair use.⁴⁶ These videos display the full breadth of games to large audiences who have not paid the developer for entertainment; simultaneously, the Let's Player can generate advertising proceeds as well as revenue from potential sponsors.⁴⁷ As to the amount of copyrighted material used, typically, it is a full game from start to finish.⁴⁸ Many viewers develop a sense of investment and prefer YouTube channels that feature entire games as opposed to parts of one.⁴⁹ Recording and publicly posting such large segments of copyrighted material most likely goes beyond what any court has found to constitute fair use so far.⁵⁰ However, no exact threshold exists because courts tend to reject categorical rules regarding the amount

42. § 107 (original version at Pub. L. No. 94-553, § 107, 90 Stat. 2541, 2546 (1976)); *U.S. Copyright Office Fair Use Index*, *supra* note 38 (“Fair use is a judge-created doctrine dating back to the nineteenth century and codified in the 1976 Copyright Act.”).

43. See Kevin Davis, Comment, *Fair Use on the Internet: A Fine Line Between Fair and Foul*, 34 U.S.F. L. REV. 129, 132 (1999).

44. See *id.*

45. See *infra* Part II.E.

46. § 107. Because the factors of section 107 seem to weigh against Let's Plays, they are most likely not protected by fair use. *Id.*; see also Chen, *supra* note 15, at 686-89; Conrad Postel, “Let's Play”: *YouTube and Twitch's Video Game Footage and a New Approach to Fair Use*, 68 HASTINGS L.J. 1169, 1173 (2017).

47. Alexander Lee, *Everything You Need to Know About PewDiePie*, G FUEL (Jan. 15, 2021), <https://perma.cc/G8QW-TYHT> (highlighting and listing several sponsorships for the famous Let's Player PewDiePie). The list includes many well-known brands, such as Razer, and even YouTube itself. *Id.*

48. See Markiplier, *Superliminal (FULL GAME)*, YOUTUBE (Nov. 18, 2020), https://www.youtube.com/watch?v=F8jIP5SX5Kg&ab_channel=Markiplier [<https://perma.cc/P67G-UJZT>]. This is one of Markiplier's many videos that cover the full length of a game. *Id.*

49. See Postel, *supra* note 46, at 1173-74.

50. Video Game Story Time, *Why YouTube Let's Plays Are Technically Illegal*, YOUTUBE, at 02:47 (Nov. 13, 2020), https://www.youtube.com/watch?v=iSWgdhIKX1I&ab_channel=VideoGameStoryTime [<https://perma.cc/WP3G-WBWP>]; Fox News Network, LLC v. TVEyes, Inc., 883 F.3d 169, 179 (2d Cir. 2018) (“While ‘courts have rejected any categorical rule that a copying of the entirety cannot be a fair use,’ ‘a finding of fair use is [less] likely . . . when the copying is extensive, or encompasses the most important parts of the original.’”) (quoting Authors Guild v. Google, Inc., 804 F.3d 202, 221 (2d Cir. 2015)).

of copyrighted work used.⁵¹ To further complicate matters, there is currently no case law analyzing the intersection between copyright law and gameplay videos.⁵² Lastly, market effects, which vary across different game types, deserve consideration alongside other circumstances.⁵³ Because of these factors, this Note will argue that Let's Plays currently do not fall under the fair use doctrine.⁵⁴

Part II explores what makes Let's Plays popular and successful, as well as the circumstances in which they exist.⁵⁵ This includes background information on YouTube as a platform,⁵⁶ what constitutes a Let's Play,⁵⁷ and what has led to its prosperity.⁵⁸ This Part also examines game developers and their dynamics with Let's Players.⁵⁹ Finally, Part II provides historical and present-day information about the fair use doctrine.⁶⁰ Part III begins with an analysis of how the Supreme Court would most likely analyze Let's Plays under the fair use doctrine.⁶¹ After considering each factor of the fair use doctrine, this Note concludes that the Court would look unfavorably upon Let's Plays.⁶² However, this ultimately highlights the issue at hand.⁶³ It demonstrates the need for alternative methods outside the fair use doctrine, so that new forms of media are not analyzed under a dated doctrine that is not equipped to handle them.⁶⁴ Part IV proposes a solution—adopting a blanket licensing scheme.⁶⁵ That Part also explains how implementing a blanket license will help⁶⁶ and addresses counterarguments to those anticipated outcomes.⁶⁷ Part V

51. *Fox News Network*, 883 F.3d at 179 (quoting *Authors Guild*, 804 F.3d at 221).

52. Chen, *supra* note 15, at 679 (“Currently, there is no case law on copyright and gameplay videos, which only increases their uncertain legal status.”); Ore, *supra* note 15.

53. Hudson, *supra* note 19 (“[V]ideos featuring a complete play-through of a game . . . can potentially hurt sales, especially if the game is focused on a linear story.”).

54. *See infra* Part III.

55. *See infra* Part II. This Part covers external and contributory factors that created the ideal environment for Let's Play to gain the popularity it did. *See infra* Part II. While the content itself is praiseworthy and deserving of the prosperity it enjoys, such prosperity is not gained through merit alone. *See infra* Part II. Without the presence of outside considerations and other factors, Let's Play might never have gained the traction it did. *See infra* Part II.

56. *See infra* Part II.A.

57. *See infra* Part II.B.

58. *See infra* Part II.C.

59. *See infra* Part II.D.

60. *See infra* Part II.E.

61. *See infra* Part III.

62. *See infra* Part III.A–E.

63. *See infra* Part III.

64. *See infra* Part III.

65. *See infra* Part IV.

66. *See infra* Part IV.B.

67. *See infra* Part IV.C.

concludes with a general recapitulation of the key considerations and reiterates the need for a solution in light of the pressing issue.⁶⁸

II. LET'S PLAY LORE: UNVEILING THE ORIGIN STORY

Part II hones in on the media in question, Let's Plays.⁶⁹ A Let's Play is a relatively new form of media, so understanding its impact and cultural hold depends on understanding the circumstances that created its seedbed.⁷⁰ Subpart A presents information about the platform that hosts the most Let's Plays, YouTube.⁷¹ Subpart B focuses on what a Let's Play encompasses.⁷² Subpart C then examines Let's Plays and their relationship to YouTube.⁷³ Subpart D analyzes a different dynamic, looking specifically at the history between game developers and Let's Players.⁷⁴ Then, the focus shifts to the fair use doctrine.⁷⁵ Subpart E generally addresses the fair use doctrine,⁷⁶ its limits and shortcomings,⁷⁷ and how it exists in an internet-centric era.⁷⁸

A. YouTube and the Extent of Its Popularity

YouTube is a wildly popular platform that, as of 2023, houses 2.5 billion active users worldwide,⁷⁹ who spend an aggregated amount of one billion hours watching videos on the platform every single day.⁸⁰ With so many users spending so much time on the platform, YouTube offers an incredible reach over large global audiences.⁸¹ Thus, there is

68. See *infra* Part V.

69. See *infra* Part II.B–E.

70. See *infra* Part II.A–D. This Part is divided into two overarching topics for background information purposes: Let's Plays in general and the fair use doctrine. See *infra* Part II.A–D.

71. See *infra* Part II.A.

72. See *infra* Part II.B.

73. See *infra* Part II.C.

74. See *infra* Part II.D.

75. See *infra* Part II.E.

76. See *infra* Part II.E.

77. See *infra* Part II.E.1.

78. See *infra* Part II.E.2.

79. Maryam Mohsin, *10 YouTube Stats Every Marketer Should Know in 2022*, OBERLO (June 20, 2023), <https://www.oberlo.com/blog/youtube-statistics> [<https://perma.cc/SEQ6-UX2F>] (defining “[a]ctive YouTube [u]sers” as viewers who log in [at least once] each month”).

80. *Id.*

81. *Id.* (“YouTube is not only available but also localized in over 100 countries.”) (citation omitted).

plenty of room for new creators and great opportunities to earn advertising revenue from posted content.⁸²

All these factors ultimately attract new YouTube personalities with a passion for their projects;⁸³ they often create fresh and unique content that is unfettered by corporate strains.⁸⁴ They can speak freely without scripted dialogue or major network censorship and have full control over the direction of their content from start to finish.⁸⁵ These creators answer solely to themselves and their audiences, while other personalities stuck in the mainstream listen to agencies and managers.⁸⁶ Furthermore, traditional celebrities tend to act in accordance with public relations strategies rather than free will, only driving home the beloved authenticity of YouTube personalities.⁸⁷ As a result, YouTube personalities have earned a special place in the public's heart, while mainstream celebrities have seen their hold slipping away.⁸⁸ As it stands, YouTube, and the content creators it houses on its platform, have an ever-growing power over media as a whole.⁸⁹

YouTube is a service provider protected by the Digital Millennium Copyright Act ("DMCA") safe harbor provisions.⁹⁰ The safe harbor provisions were codified by Congress as part of the DMCA.⁹¹ They

82. See Zoia, *supra* note 17 (discussing several content creators on YouTube who receive ad revenue, such as Matthew Varrone, who "makes between \$600 and \$1,000 a month in ad revenue from his videos" at the young age of twenty).

83. See *id.* Let's Players are driven to create their content based on several factors, including their love of gaming. *Id.*

84. See Andrew Arnold, *Why YouTube Stars Influence Millennials More Than Traditional Celebrities*, FORBES (June 20, 2017, 3:16 PM), <https://www.forbes.com/sites/under30network/2017/06/20/why-youtube-stars-influence-millennials-more-than-traditional-celebrities> [<https://perma.cc/K7KM-N4G8>]. There are key differences between traditional celebrities and YouTube celebrities, namely, the way that traditional celebrities are more beholden to being widely palatable. *Id.* Conversely, YouTube stars are not backed by a corporate agenda, allowing them to be "goofy, funny, weird," or outspoken on "touchy and personal matters such as sex, divorce, domestic violence and racism." *Id.*

85. See *id.*

86. See *id.*

87. *Id.* ("Traditional celebrities always seem to act according to their PR strategies rather than free will, and people don't relate to them. It can feel hard to understand where a carefully staged image ends and the real person starts. . . . YouTube personalities, on the contrary, connect better with people by being approachable and building intimate experiences with their viewers.")

88. See *id.* ("Millennials are currently the largest consumer demographic with about \$1.3 trillion in buying power as at the end of 2015. This powerful demographic is a choice target for brands, but millennials in large part don't watch TV and don't care much what mainstream celebrities have to say about products or services.")

89. See *id.*

90. *Viacom Int'l, Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110, 123 (S.D.N.Y. 2013).

91. *Handbook on Multiple Listing Policy*, NAT'L ASS'N OF REALTORS (Jan. 1, 2024), <https://www.nar.realtor/handbook-on-multiple-listing-policy/participants-rights-section-16-digital-millennium-copyright-act-safe-harbor-policy-statement-7-99> [<https://perma.cc/R9UE-LJ8P>]; see

essentially grant copyright infringement exemptions to service providers who ultimately transmit or store copyrighted data.⁹² Specifically, 17 U.S.C. § 512 protects online service providers⁹³ in certain situations where their users transmit or store copyrighted material through their system or network.⁹⁴ If the criteria in the statute are met, then immunity to actions for monetary relief is granted.⁹⁵ YouTube meets the statutory criteria by “providing a notice and takedown remedy if a copyright owner alleges that the content in question was used without its authorization.”⁹⁶ As long as it does this, it washes its hands relatively clean from any contributory copyright infringement claims.⁹⁷

B. What Is a Let’s Play?

Some YouTube personalities have developed a following by posting a genre of video known as “Let’s Plays.”⁹⁸ In these videos, a YouTuber will usually record themselves playing a video game, and pair it alongside footage of their actual gameplay.⁹⁹ Many of these creators will incorporate their personal commentary and editing skills into their uploaded videos.¹⁰⁰ The commentary is usually funny, insightful, witty, or informative.¹⁰¹ More often than not, the creator will also feature footage of themselves in the corner of the screen, allowing the viewer to see their real-time reactions to in-game stimuli.¹⁰² The composition of these videos is meant to recreate the feeling of playing a video game alongside a friend, giving rise to the name of the genre.¹⁰³

also Davis, *supra* note 43, at 164-65 (“The Digital Millennium Copyright Act . . . is the most recent legislation intended to modify copyright law in the face of new technologies.”).

92. Davis, *supra* note 43, at 165.

93. *Handbook on Multiple Listing Policy*, *supra* note 91 (explaining that “[c]ourts construe the definition of ‘online service provider’ broadly”).

94. 17 U.S.C. § 512.

95. *Id.*

96. Jessica A. Magaldi et al., *All’s Fair in Love and War but Nothing’s Fair Use on YouTube: How YouTube Policies Favor Copyright Owners and Hinder Legal Fair Use*, 27 J.L. BUS. & ETH. 51, 58 (2020).

97. *Id.*

98. See Jessica Voegelé, *Where’s the Fair Use? The Takedown of Let’s Play and Reaction Videos on YouTube and the Need for Comprehensive DMCA Reform*, 33 TOURO L. REV. 589, 592 (2017).

99. See *id.* at 591.

100. See Voegelé, *supra* note 98, at 592; see also Dan Hagen, *Fair Use, Fair Play: Video Game Performances and “Let’s Plays” as Transformative Use*, 13 WASH. J.L. TECH. & ARTS 245, 253 (2018).

101. Voegelé, *supra* note 98, at 591.

102. *Id.*

103. Hagen, *supra* note 100, at 252.

The genre “Let’s Play” is an unofficial one, and therefore what constitutes a Let’s Play is somewhat unclear.¹⁰⁴ However, some distinguishing characteristics set Let’s Plays apart from other video game content.¹⁰⁵ Let’s Play videos differ from live-streamed gameplay performances like those on Twitch “because Let’s Play videos are curated.”¹⁰⁶ They are crafted with more intention and are even scripted on occasion.¹⁰⁷ A “live stream,”¹⁰⁸ on the other hand, is completely unedited and performed in front of a virtual audience.¹⁰⁹

Some content creators upload footage of just gameplay alone, with neither edits nor commentary, known as a “long play.”¹¹⁰ These videos lack any real input from the content creator and therefore lack any modification that the fair use doctrine seeks out.¹¹¹ Others add commentary solely to explain certain video game mechanics or instruct others on how to complete parts of a game, often called a “walkthrough.”¹¹² Occasionally, a walkthrough video shows how to complete the entirety of a game.¹¹³ These videos tend to have an educational quality to them, as

104. *See id.* at 250-54 (describing different types of videos showcasing gameplay experiences, including conventional Let’s Plays and streams).

105. *See id.* at 247 (“Though the lines are not defined with perfect clarity, a Let’s Play video is typically understood as a recording of a gameplay performance, in contrast to a gameplay ‘stream’ which is a live transmission of a that [sic] performance as it is happening.”).

106. Carriker, *supra* note 21; *What Is Curated Content and the Best Practices to Follow?*, ROCK CONTENT (Jan. 29, 2022), <https://rockcontent.com/blog/what-is-curated-content> [<https://perma.cc/ANR3-LY7D>] (defining curated content as “the process of selecting content from other sources to share on your channels . . . includ[ing] the process of searching, discovering, gathering, organizing, and presenting that content to your audiences”).

107. Carriker, *supra* note 21.

108. *Live Streaming*, PARENT ZONE (Nov. 15, 2023), <https://parentzone.org.uk/article/live-streaming> [<https://perma.cc/T28P-G5RR>] (“Live streaming is the broadcasting of real-time, live video to an audience over the internet. . . . [T]here is no editing process and viewers can follow along and comment in real-time.”).

109. Carriker, *supra* note 21.

110. *See* Hagen, *supra* note 100, at 250-51; e.g., Loopy Longplays, *The Elder Scrolls IV: Oblivion—Longplay (Main Quest) Walkthrough (No Commentary)*, YOUTUBE (May 29, 2019), https://www.youtube.com/watch?v=LM1IwZdpL2Y&ab_channel=LoopyLongplays [<https://perma.cc/VC9L-CZGA>] (showing an example of an eight-hour-long “long play” video featuring only gameplay and no commentary).

111. *See* Hagen, *supra* note 100, at 250-51; *see also* U.S. Copyright Office *Fair Use Index*, *supra* note 38 (explaining that the fair use doctrine favors modifications that constitute “‘transformative’ uses,” namely “those that add something new, with a further purpose or different character, and do not substitute for the original use of the work”).

112. *See* Voegelé, *supra* note 98, at 591; *see also* Hagen, *supra* note 100, at 251.

113. *See*, e.g., Hopezera Gaming, *Cult of the Lamb—Full Game Walkthrough Gameplay*, YOUTUBE (Aug. 14, 2022), https://www.youtube.com/watch?v=D_OKB0STc0Y&ab_channel=HopezeraGaming [<https://perma.cc/6TEK-ZZY8>]. This video shows how to complete most, if not all, in-game activities. *Id.* This includes demonstrations on how to acquire some in-game items, how to defeat certain in-game enemies, and how to complete certain in-game tasks. *Id.*

their main purpose is to teach.¹¹⁴ However, both of these video types are usually accepted as separate from Let's Plays within the YouTube community.¹¹⁵ Unlike "long plays" and "walkthroughs," Let's Plays are more subjective in nature and differ according to each creator's individuality and creativity.¹¹⁶

C. The Prominence of Let's Plays and Their Hold on YouTube

Let's Plays have been a dominant and stable genre on YouTube for many years now,¹¹⁷ becoming a multi-million dollar industry on the video platform since its inception.¹¹⁸ By some estimates, fifteen percent of all videos posted to YouTube concern video games.¹¹⁹ Viewers watched over 100 billion hours of this type of content in 2020 alone.¹²⁰ This was a roughly 100% increase in viewership from 2018, indicating that the Let's Play genre is growing.¹²¹ One such example of viewership growth comes from the Let's Player Dream, who saw channel subscriptions surge from one million to over thirteen million in just ten months.¹²²

Video game content creators are some of YouTube's most successful users.¹²³ In 2020, YouTube reported that it had an astonishing forty

114. Hagen, *supra* note 100, at 251.

115. See Voegelé, *supra* note 98, at 591-92.

116. See Carriker, *supra* note 21.

117. See Chen, *supra* note 15, at 676 ("[R]ecent data shows that these recordings ('gameplay videos') drew more online viewers than HBO, Netflix, and Hulu combined."); see also Rob Fahey, *Gaming YouTube Must Get Its House in Order*, GAMESINDUSTRY.BIZ (Sept. 15, 2017), <https://www.gamesindustry.biz/gaming-youtube-must-get-its-house-in-order> [<https://perma.cc/J9NK-HF2M>] ("Some of gaming YouTube's most popular channels can attract millions if not tens of millions of views for popular videos . . .").

118. Natalie Marfo, *Playing Fair: YouTube, Nintendo, and the Lost Balance of Online Fair Use*, 13 BROOK. J. CORP. FIN. & COM. L. 465, 465-66 (2019) ("Thus, the genre grew on YouTube, and produced with it a multi-million dollar industry."); see Zoia, *supra* note 17; see also Dougie Gerrard, *Let's Play: How YouTubers Are Making Millions Playing Video Games*, CITY A.M. (July 25, 2019, 7:40 AM), <https://www.cityam.com/lets-play-how-youtubers-are-making-millions-playing-video-games> [<https://perma.cc/H5Z9-XQL7>] ("YouTube funding is less straightforward, but the most popular creators can become eye-poppingly wealthy, especially once sponsors catch on. PewDiePie is worth somewhere between [\$35 million to \$50 million]; Markiplier, only the [fifty-third] most-subscribed YouTuber, has around [\$24 million] to his name.").

119. Bree Brouwer, *15% of All Videos on YouTube Are About Video Games*, TUBEFILTER (Dec. 19, 2014), <https://www.tubefilter.com/2014/12/19/15-percent-youtube-videos-video-game> [<https://perma.cc/6MJS-R9P5>]. These estimates are based on Tubular's assessments of statistics released by the YouTube analytics company. *Id.*

120. Statt, *supra* note 4.

121. See *id.*

122. See *id.*

123. See Caroline Womack, Note, *Revenge of the Retaliatory Takedown: Let's Plays, Fair Use, and an Unstable DMCA*, 37 QUINNIPIAC L. REV. 757, 758 (2019) ("In 2015, Felix Kjellberg [PewDiePie] was ranked by Forbes as the highest paid 'YouTube Star' of the year, having earned fifteen million dollars over the course of 2016."); see also Madeline Berg, *The Highest-Paid*

million active gaming channels.¹²⁴ Out of the top five YouTube channels with the most subscribers worldwide, two are gaming-related.¹²⁵ Even more notable, in 2021, *Forbes* disclosed that half of the ten highest-earning creators on YouTube centered their content on video games, with some of the most popular gamers earning roughly more than ten million dollars a year.¹²⁶

As a result, video game content has become a reliable source of income for YouTube.¹²⁷ YouTube allows creators to monetize their content, from which it takes a cut of the profits.¹²⁸ Advertisers typically pay for placement in a video on a per-view basis.¹²⁹ However, video views are not the same as advertisement views.¹³⁰ Because tools like ad-blockers¹³¹ exist, generally “half of [a creator’s] views across the board will be monetized.”¹³² For popular Let’s Play channels like PewDiePie, even one dollar per thousand video views can result in a huge revenue¹³³ stream when the channel’s subscriber base exceeds eighty million people.¹³⁴ While fifty-five percent of the net advertisement revenue goes to the content creators, YouTube retains the

YouTube Stars 2016: PewDiePie Remains No. 1 with \$15 Million, FORBES (Dec. 5, 2016, 2:20 PM), <https://www.forbes.com/sites/maddieberg/2016/12/05/the-highest-paid-youtube-stars-2016-pewdiepie-remains-no-1-with-15-million> [<https://perma.cc/U82K-YAWZ>].

124. Statt, *supra* note 4.

125. Ekaterina Petrova & Netta Gross, *4 Reasons People Watch Gaming Content on YouTube*, THINK WITH GOOGLE (June 2017), <https://www.thinkwithgoogle.com/marketing-strategies/video/statistics-youtube-gaming-content> [<https://perma.cc/U6SV-LGXS>].

126. Elad Schulman, *How Much Gamers Make on YouTube?*, THOUGHT LEADERS (June 5, 2023), <https://www.thoughtleaders.io/blog/how-much-gamers-make-on-youtube> [<https://perma.cc/37FU-X4DD>].

127. See Marfo, *supra* note 118, at 469 (“YouTube profited from hosting the popular content on their domain . . .”).

128. Maddie Martin, *How Much Money Do You Get Per View on YouTube? (2024 Stats)*, THINKIFIC (Dec. 22, 2023), <https://www.thinkific.com/blog/youtube-money-per-view> [<https://perma.cc/E2CM-XLHV>].

129. See *id.* Martin explains the monetization system on YouTube as follows:

In general, your CPM (cost per thousand views) can range between \$4 and \$24 (depending on your region and industry). But remember that 1,000 video views are not the same as 1,000 ad views. A good rule of thumb is assuming that only half of your views across the board will be monetized. For example, somewhere around \$5-7 per 1,000 views would be the average across all industries.

Id.

130. See *id.*

131. *How to Detect Ad Blockers*, PUBLIFT, <https://www.publift.com/blog/ad-blockers> [<https://perma.cc/7RWY-2KP9>] (Feb. 9, 2024) (“Ad blockers are browser extensions or plugins that disable ads on specific web pages. An ad blocker works by blocking communications to ad servers and then hiding the elements of the web page that are designed to display advertising content.”).

132. See Martin, *supra* note 128.

133. See Zoia, *supra* note 17 (“PewDiePie’s estimated *monthly* revenue from YouTube ads fluctuates between \$140,000 and \$1.4 million depending on viewership . . .”).

134. Womack, *supra* note 123, at 762.

remaining forty-five percent.¹³⁵ All these factors have led some to say that “[g]aming is YouTube’s bread and butter.”¹³⁶

In turn, many have started to wonder whether YouTube is treating Let’s Plays differently than other videos on its platform, as certain circumstances suggest.¹³⁷ For example, while a video containing a few minutes of either a copyrighted movie or song can be taken down from YouTube almost immediately, a Let’s Player can usually post hours of video game content without facing a take-down.¹³⁸ However, this is more likely the result of what some have called “tacit” permission from game developers.¹³⁹ It is unlikely that this is an act of benevolence toward Let’s Players; instead, this choice probably concerns the benefits that game developers can also derive from this arrangement, as well as the disadvantages they might suffer should they shun the Let’s Play community.¹⁴⁰

D. Video Games and Their Developers

A large majority of the games that Let’s Play YouTubers cover in their videos are copyrighted.¹⁴¹ These games are usually produced by developers that expect consumers to pay for the product they painstakingly created.¹⁴² When this expectation is not met, it leads to disappointment, and eventually, frustration.¹⁴³ This feeling only becomes exacerbated when developers realize that millions of people are still enjoying the games they made, but someone else entirely is profiting

135. Marfo, *supra* note 118, at 468-69; Martin, *supra* note 128.

136. Ore, *supra* note 15; *see also* Womack, *supra* note 123, at 762 (“The mass-viewership of these content creators also serves as a benefit for YouTube.”).

137. *See, e.g.*, Ore, *supra* note 15 (“Video games are rarely treated the same way as other copyrighted entertainment media.”). While other copyright holders are quick to protect their intellectual property, game companies behave differently when it comes to their games. *Id.*

138. *Id.*

139. Fahey, *supra* note 117 (explaining that most game companies “turn[] a blind eye out of consideration of the promotional value of being featured on high-audience channels”).

140. *See id.*

141. *See* Video Game Story Time, *supra* note 50.

142. *See* Gabe Carey, *Why Pay to Play When You Can Watch for Free? How YouTube Burns Indie Developers*, DIGIT. TRENDS (Mar. 28, 2016), <https://www.digitaltrends.com/gaming/that-dragon-cancer-and-lets-play-dispute> [<https://perma.cc/D3ME-M89T>]. This article includes an interview with Ryan Green, creator of the indie game *That Dragon, Cancer*, who stated:

“*That Dragon, Cancer* was created by a studio of eight, and for many of us it was a full-time effort that involved thousands of hours of work This huge effort required taking on investment, and we decided to pay off all our debt as soon as possible.”

Id.

143. *See* Marfo, *supra* note 118, at 469 (“Game developers became ‘frustrated by the millions of people watching their game on YouTube.’”).

from it.¹⁴⁴ As a result, some developers have started to harbor resentment toward Let's Players, who they feel "make revenue off [developers'] work."¹⁴⁵ In an act of defiance, some have gone so far as to completely prohibit any posting of footage of their games by third parties like Let's Players.¹⁴⁶

Some companies with stringent policies made it a point to take action against content creators who featured their games.¹⁴⁷ Nintendo, for example, launched a particularly infamous campaign against the Let's Play community, asserting that its copyrights were being infringed upon, and thus, that it was owed compensation.¹⁴⁸ To begin its crusade, Nintendo attempted to claim all advertising revenue from the content that featured its games, essentially demonetizing it for the Let's Player.¹⁴⁹ At the time, game developers still underestimated the power behind the Let's Play community.¹⁵⁰ The situation quickly changed following the massive backlash that ensued shortly after.¹⁵¹ Nintendo was widely criticized by content creators and fans alike.¹⁵² Nintendo, trying to alleviate some of the tensions created by its campaign, opted to develop what was known as the Creators Program.¹⁵³ Equally controversial with the gaming community for the strains it put on content creators, Nintendo shut down the program three short years later.¹⁵⁴ Few foresaw that the monolithic game developer¹⁵⁵ would be sent backtracking by the budding community.¹⁵⁶

144. *Id.*

145. Carey, *supra* note 142.

146. James Puddington, Note, *Fair Play: Economic Justifications for Applying Fair Use to the Online Streaming of Video Games*, 21 B.U. J. SCI. & TECH. L. 413, 417 (2015).

147. Carriker, *supra* note 21 ("Nintendo, for example, has historically asserted that they retain the copyright on their games and have requested Let's Play videos to be taken down as they violate their copyright.").

148. Marfo, *supra* note 118, at 469.

149. *Id.* at 469, 483.

150. *Id.*

151. Emma Kent, *Nintendo Scraps Controversial Creators Program, Making Life Easier for YouTubers*, EUROGAMER (Nov. 29, 2018), <https://www.eurogamer.net/nintendo-scraps-creators-program-making-life-much-easier-for-youtubers> [<https://perma.cc/AM38-5MFR>].

152. *See id.*

153. *Id.* (detailing how ineffective the Creators Program was, because "[w]hen it was launched, approval services were overwhelmed. . . YouTubers who wanted their entire channel approved were asked to remove any non-Nintendo videos first [and] YouTubers who didn't join the program had their videos demonetised, while those who did, saw their revenue significantly reduced").

154. *Id.*

155. Marfo, *supra* note 118, at 483 ("Nintendo is one of the world's oldest, largest and most well-known video game creators . . .").

156. Kent, *supra* note 151 ("Nintendo is finally shutting down its controversial Creators Program after three rocky years packed with criticism from YouTubers.").

However, not all game developers feel spurned by the Let's Play community.¹⁵⁷ Many developers, especially smaller ones, feel that being featured on one of these channels brings about great exposure.¹⁵⁸ Furthermore, they recognize that Let's Play channels provide fertile grounds for growing a community and a following around their games.¹⁵⁹ In fact, over fifty percent of gamers who also use YouTube say that they connect with their gaming communities over the video platform.¹⁶⁰ As a result, an interesting symbiotic relationship has flourished between video game developers and Let's Players.¹⁶¹ Larger developers, such as Blizzard, have even granted third parties like Let's Players express permission to use gameplay footage.¹⁶² Currently, large developers and small developers alike agree that being scouted, and eventually featured, by content creators is one of the easiest and cheapest ways to market a game.¹⁶³ Let's Players not only attract people to begin talking about a particular game, but they also foster communities that keep talking about it.¹⁶⁴

E. Fair Use Doctrine

A plaintiff seeking to establish copyright infringement must prove two elements: “(1) ownership of a valid copyright, and (2) [that the defendant] cop[ied] . . . constituent elements of the work that are original.”¹⁶⁵ In contrast, “fair use” is an affirmative defense asserted by defendants who are accused of copyright infringement.¹⁶⁶ It ultimately prevents a copyright holder from having exclusive and complete control

157. Puddington, *supra* note 146, at 417.

158. Morgan Shaver, *How YouTube Let's Players Help Indie Developers*, ALL GAMERS (Sept. 28, 2016), <https://ag.hyperxgaming.com/article/1906/how-youtube-lets-players-help-indie-developers> [<https://perma.cc/S52E-JF4E>] (“[Let's Players provide] a critical form of free promotion and marketing for an indie developer who may not have the means to put their game in front of an audience of millions.”).

159. *See* Petrova & Gross, *supra* note 125 (“By connecting socially through ‘let’s plays,’ walk-throughs, reaction videos, and reviews, gamers get the chance to double their love for the activity, for their favorite games, and for the gaming scene overall.”).

160. *Id.*

161. *See* Alanah Pearce, *Developers Say Twitch Is Hurting Single-Player Games*, IGN (June 19, 2018), <https://www.ign.com/articles/2018/06/19/developers-say-twitch-is-hurting-single-player-games> [<https://perma.cc/PM2B-GVC7>] (“For those third-party publishers, the relationship between content creators and game development is an interesting one, in that grabbing the attention of content creators is one of the easiest, cheapest ways to market games right now, according to two anonymous sources from Ubisoft and three independent developers.”).

162. Puddington, *supra* note 146, at 417.

163. *See* Pearce, *supra* note 161.

164. *See id.*; *see also* Petrova & Gross, *supra* note 125.

165. Voegelé, *supra* note 98, at 601.

166. Brusa, *supra* note 35, at 231.

over their copyrighted work.¹⁶⁷ This is achieved by allowing the use of copyrighted work without permission from the copyright owner for limited purposes.¹⁶⁸ The legislature, through section 107 of the Copyright Act, intended to balance the interests of copyright holders with the interests of the general public.¹⁶⁹ However, the concept of fair use in common law dates as far back as the eighteenth century.¹⁷⁰ The goal then was not dissimilar to the goal now: prevent the rigid application of copyright law, so that we might avoid the complete suppression of creativity, while still protecting intellectual property.¹⁷¹

Even though this goal is historic in nature, the Supreme Court still issues major decisions clarifying and reaffirming the fair use doctrine, doing so regularly since its codification in 1976.¹⁷² In 2021, the Court issued one of its most recent fair use decisions in *Google LLC v. Oracle America, Inc.*¹⁷³ The Court found that Google's copying of Sun Java API,¹⁷⁴ a vast library of prewritten code for carrying out complex programming, was an instance of fair use.¹⁷⁵ This decision prevented a result that many experts feared could have had an industry-wide "chilling effect"¹⁷⁶ on creativity in software development.¹⁷⁷ Ultimately, the Court maintained a favorable outcome for fair use, reaffirming that it is part of our law, and also reaffirming that Congress intended it to be so.¹⁷⁸

167. Voge, *supra* note 98, at 601.

168. Rich Stim, *Measuring Fair Use: The Four Factors*, STAN. LIBRS., <https://fairuse.stanford.edu/overview/fair-use/four-factors> [<https://perma.cc/VG8C-JN52>] (last visited Apr. 15, 2024).

169. Brusa, *supra* note 35, at 231.

170. *Gyles v. Wilcox* (1740) 26 Eng. Rep. 489, 490 (Ch.) (establishing the doctrine of fair abridgment, which would later become the foundation for the fair use doctrine).

171. *Iowa State Univ. Rsch. Found. v. ABC*, 621 F.2d 57, 60 (2d Cir. 1980) ("The doctrine of fair use, originally created and articulated in case law, permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.").

172. 4 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 13F.03 (2024).

173. 141 S. Ct. 1183 (2021).

174. *Id.* at 1191 (explaining that API, as a tool, "allow[s] programmers to use . . . prewritten code to build certain functions into their own programs, rather than write their own code to perform those functions from scratch") (citation omitted).

175. *Id.* at 1209 ("[I]n this case, where Google reimplemented a user interface, taking only what was needed to allow users to put their accrued talents to work in a new and transformative program, Google's copying of the Sun Java API was a fair use of that material as a matter of law.").

176. *Chilling Effect*, DICTIONARY.COM, <https://www.dictionary.com/browse/chilling-effect> [<https://perma.cc/UEV7-HUSL>] (last visited Apr. 15, 2024) (defining a chilling effect as "a discouraging or deterring effect, especially one resulting from a restrictive law or regulation").

177. *See Google LLC*, 141 S. Ct. at 1209; *see also* Ephrat Livni, *US Supreme Court Holds Innovation in the Balance in Google v. Oracle*, QUARTZ (Nov. 20, 2019, 12:09 PM), <https://qz.com/1751975/in-google-v-oracle-scotus-holds-innovation-in-the-balance> [<https://perma.cc/6XWH-TEHH>].

178. *Google LLC*, 141 S. Ct. at 1208.

1. Limits to the Fair Use Doctrine Generally

Because the fair use doctrine functions as a balancing test, there is no cut-and-dry formula to apply, and no guarantee a party will reach their desired outcome.¹⁷⁹ As a result, courts analyze the application of the doctrine on a case-by-case basis.¹⁸⁰ This often creates feelings of unease for parties seeking legal remedies because they cannot truly predict with sufficient certainty how a court will rule on the issue.¹⁸¹ Addressing recent uncertainties concerning the fair use doctrine, the Court recognized that it has become increasingly “difficult to apply traditional copyright concepts in [this] technological world.”¹⁸² It has taken a rather resigned position on this problem, admitting that many of the issues cannot be addressed in a satisfactory matter until Congress chooses to act.¹⁸³ This resignation occasionally works, like in *Sony Corp. of America v. Universal City Studios, Inc.*¹⁸⁴ Following that case, Congress took action, and the resulting legislation overruled its undesirable holding.¹⁸⁵ However, those who are already litigating in court cannot afford to sit and wait for such legislation.¹⁸⁶

The fair use doctrine’s shortcomings are not limited to one field.¹⁸⁷ In the music industry, for example, juries must determine if there is a transformative use or “substantial similarity” to already existing copyrighted elements.¹⁸⁸ Jurors’ untrained ears may hear similarities between musical works, even when forensic musicologists insist that no

179. *U.S. Copyright Office Fair Use Index*, *supra* note 38.

180. *Id.*

181. *Stim*, *supra* note 168.

182. *Google LLC*, 141 S. Ct. at 1208.

183. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 500 (1984) (Blackmun, J., dissenting) (“Like so many other problems created by the interaction of copyright law with a new technology, [t]here can be no really satisfactory solution to the problem presented here, until Congress acts.”) (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 167 (Burger, C.J., dissenting)).

184. 464 U.S. 417 (1984).

185. *Realnetworks, Inc. v. DVD Copy Control Ass’n*, 641 F. Supp. 2d 913, 941 (N.D. Cal. 2009) (citing *Universal City Studio, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 323-24 (S.D.N.Y. 2000)) (explaining that the DMCA’s enactment resolved the copyright law deficiencies that the *Sony* Court refused to address).

186. *See Sony Corp. of Am.*, 464 U.S. at 500 (Blackmun, J., dissenting). While Congress later remedied, through the DMCA, the copyright law deficiencies that the Court refused to address, this was fourteen years after the *Sony* Court handed down its decision against the respondents. *Womack*, *supra* note 123, at 763. For fourteen years, the respondents were left with the ramifications of the unfavorable decision. *Id.*; *Sony Corp. of Am.*, 464 U.S. at 500 (Blackmun, J., dissenting).

187. *See* Kristin Bateman, Note, “*Distinctive Sounds*”: *A Critique of the Transformative Fair Use Test in Practice and the Need for a New Music Fair Use Exception*, 41 SEATTLE U. L. REV. 1169, 1178-79 (2018) (highlighting current issues with fair use and the music industry).

188. *Id.* at 1181.

infringement has occurred.¹⁸⁹ This has presented itself as an issue for music-centered communities, which feel the transformative use approach is notoriously unpredictable.¹⁹⁰ In the world of art, community members find that courts have offered inconsistent outcomes, leaving the community not only confused but also frustrated.¹⁹¹ This has become a particularly large problem because conflicting rulings tend to chill artistic expression.¹⁹² Many had hoped that the Court would grant new guidance in deciding the recent case of *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*.¹⁹³ Decided in May 2023, the case addressed artwork produced by artist Andy Warhol, who based his creations on copyrighted photos of the musician Prince.¹⁹⁴ The Court ruled against the Andy Warhol Foundation and its fair use defense, as it intensely scrutinized the commercial aspect of Warhol's artwork.¹⁹⁵ The majority found that the first factor weighed against the Andy Warhol Foundation primarily because Warhol licensed his work.¹⁹⁶ In her dissent, Justice Kagan stated that this approach "leaves [the] first-factor inquiry in shambles."¹⁹⁷ She added that under the majority's decision, all the creativity and transformation in the world cannot save a derivative piece from copyright infringement if there is a commercial purpose involved.¹⁹⁸ This bright-line rule is a stark contrast to the nuance that is typically employed during these analyses.¹⁹⁹ Interestingly enough, however, the Court still stated that a use of "commercial nature . . . is not dispositive."²⁰⁰ The Court's opinion has evoked mixed reactions, with experts stating that there is "a

189. *Id.* ("Armed only with the testimony of experts, it is unlikely that juries with no other musical training will be able to make a fair and reliable determination of whether outright copying has actually occurred . . .").

190. *Id.* at 1179 ("[T]he transformative fair use test is too inexact in the hands of any given fact-finder without the required music education to make reliably fair determinations that both maximize artistic freedom and protect the legitimate rights of music copyright owners.").

191. Azmina Jasani & Emelyne Peticca, *The Tension Between Copyright Law and Appropriation Art: Where Is the Line Between Artistic Innovation and Stealing?*, ART NEWSPAPER (Sept. 29, 2021), <https://www.theartnewspaper.com/2021/09/29/the-tension-between-copyright-law-and-appropriation-art-where-is-the-line-between-artistic-innovation-and-stealing> [<https://perma.cc/8XK3-TCRK>].

192. *See id.* Many artists are inspired by and even derive pieces of their work from others. *Id.* Artists who do not know whether they will be held liable for such practices will hesitate to create art; this will ultimately result in the chilling of artistic expression, and a lull in the production of art. *Id.*

193. 598 U.S. 508 (2023).

194. *Id.* at 514-16.

195. *Id.* at 545-50.

196. *Id.* at 546-47.

197. *Id.* at 559 (Kagan, J., dissenting).

198. *See id.* at 559-60.

199. *See id.*

200. *Id.* at 531 (majority opinion).

lot of room for conflicting interpretations,” thus failing to provide any clearer guidance.²⁰¹ “[I]nexact and inconsistent,” the fair use doctrine has a long way to go to appease the many who look forward to its reform.²⁰²

2. Fair Use Doctrine in Light of Let’s Plays

The fair use doctrine does not provide a cut-and-dry formula to apply, especially when it comes to modern technology.²⁰³ This becomes more concerning when considering the internet-centric era we live in.²⁰⁴ This issue is muddled even further when analyzed under the lens of copyright and gameplay videos, as there is currently no case law on the matter.²⁰⁵ Even lawyers who specialize in intellectual property law find the intersection of fair use and video game footage to be a legal quagmire.²⁰⁶ Many have come forward to offer advice to those seeking answers,²⁰⁷ but the truth is that this advice will remain conjecture at best until there is case law or further legislation to look to.²⁰⁸

III. CALL OF DUTY: MODERN MEDIA AND HOW CURRENT FAIR USE PRACTICES FAIL TO MEET ITS NEEDS

This Part analyzes the legal issues at hand, namely how the fair use doctrine fails to adapt to forms of media like Let’s Plays.²⁰⁹ Because the

201. Christopher Parker, *Supreme Court Rules That Andy Warhol Violated a Photographer’s Copyright*, SMITHSONIAN MAG. (May 24, 2023), <https://www.smithsonianmag.com/smart-news/andy-warhol-copyright-prince-fair-use-180982230> [<https://perma.cc/K55P-B6YT>]; see also Peter Balonon-Rosen, *When Is “Fair Use” Fair? In Warhol Copyright Case, Supreme Court Could Offer New Answers*, MARKETPLACE (Oct. 7, 2022), <https://www.marketplace.org/2022/10/07/when-is-fair-use-fair-in-warhol-copyright-case-supreme-court-could-offer-new-answers> [<https://perma.cc/95U7-9LMU>].

202. Bateman, *supra* note 187, at 1176.

203. *U.S. Copyright Office Fair Use Index*, *supra* note 38.

204. See generally Davis, *supra* note 43 (analyzing the trajectory of widespread internet usage in conjunction with judicial responses).

205. Chen, *supra* note 15, at 679 (“Currently, there is no case law on copyright and gameplay videos, which only increases their uncertain legal status.”); Ore, *supra* note 15.

206. Ore, *supra* note 15.

207. See Ian Corzine, *How to Follow the Doctrine of Fair Use in Copyright Law with Video Games*, IAN CORZINE (Sept. 25, 2020), <https://perma.cc/JLA4-59FG> (showing an example of a blog that explains how to conform one’s video game content to the fair use doctrine); see also Simon Pulman & Mikaela Gross, *Fair Use in Gaming Content—FAQS for Creators*, CDAS (Jan. 24, 2020), <https://cdas.com/fair-use-in-gaming-content-faqs-for-creators> [<https://perma.cc/NG3C-WYBP>] (showing another example of an informative blog post concerning fair use of gaming content).

208. See Chen, *supra* note 15, at 679 (“Currently, there is no case law on copyright and gameplay videos, which only increases their uncertain legal status.”); Ore, *supra* note 15.

209. See *infra* Part III.E.

fair use doctrine has not yet been adapted to protect transformative works like Let's Plays, they are most likely a form of copyright infringement.²¹⁰ We must find a tool for Let's Players to use to protect their works in light of the failures and shortcomings of the fair use doctrine.²¹¹

In this Part, each factor of the fair use doctrine is applied to Let's Play videos.²¹² Subpart A concerns the purpose and character of the use of copyrighted materials.²¹³ It analyzes how Let's Plays use copyrighted video games and for what purpose they use them.²¹⁴ Subpart B concerns the nature of the copyrighted material and what purpose it serves.²¹⁵ Here, the nature of copyrighted video games will be called into question.²¹⁶ Subpart C discusses the amount or substantiality of the portion used²¹⁷ by considering how much a Let's Play takes from a copyrighted video game.²¹⁸ Subpart D analyzes the market effects of a Let's Play.²¹⁹ Because these factors are weighed in a balancing test, Subpart E will consider all four in tandem and contemplate whether Let's Plays can be considered fair use.²²⁰ From there, Subpart E identifies the main issue at hand: the fact that fair use does not protect Let's Plays, and content creators are currently left without any legal protection.²²¹

A. Choose Your Character: Analyzing the Purpose and Character of the Use

One of the first factors the Court considers is the purpose and character of the use.²²² When doing so, the Court will look at how a party asserting a fair use defense used the copyrighted work.²²³

210. Video Game Story Time, *supra* note 50.

211. See Davis, *supra* note 43, at 149, 151-52, 161-63.

212. See *infra* Part III.A–D.

213. See *infra* Part III.A.

214. See *infra* Part III.A.

215. See *infra* Part III.B.

216. See *infra* Part III.B.

217. See *infra* Part III.C.

218. See *infra* Part III.C.

219. See *infra* Part III.D.

220. See *infra* Part III.E.

221. See *infra* Part III.E.

222. 17 U.S.C. § 107(1); NIMMER, *supra* note 181, at § 13F.05.

223. See § 107 note (General Background of the Problem).

1. To Be or Not to Be Enumerated

The statute itself enumerates several uses that are amenable to fair use.²²⁴ These uses include, but are not limited to: “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research”²²⁵ It is important to note that these are not the only uses that will merit a fair use defense.²²⁶ The Court has emphasized that unenumerated uses must be considered alongside enumerated ones, claiming it would be an error to fail to apply the fair use doctrine simply because a type of use is unenumerated.²²⁷ The statute also requires considering whether the purpose of the use was commercial in nature, or instead for a nonprofit, educational purpose.²²⁸ The Court recognizes that nonprofit and educational uses are more likely to be instances of fair use than commercial uses.²²⁹ While the dichotomy between the two is significant in a fair use application, one cannot prevail against a copyright infringement claim just by having a nonprofit educational purpose.²³⁰ On the other hand, one whose use is commercial in nature can still prevail.²³¹ This consideration is not dispositive.²³² Courts must still consider the purpose in tandem with the other following factors.²³³

224. *Id.* § 107(1); NIMMER, *supra* note 181, at § 13F.05[A]. *But see* Kenneth D. Crews, *Fair Use*, COLUM. UNIV. LIBRS., <https://copyright.columbia.edu/basics/fair-use.html> [<https://perma.cc/R89H-FV6P>] (last visited Apr. 15, 2024) (“A finding of fair use depends on application of all four factors, not merely the purpose. However, limiting your purpose to some of these [enumerated] activities will be an important part of claiming fair use.”).

225. § 107; *U.S. Copyright Office Fair Use Index*, *supra* note 38 (“Section 107 of the Copyright Act provides the statutory framework for determining whether something is a fair use and identifies certain types of uses—such as criticism, comment, news reporting, teaching, scholarship, and research—as examples of activities that may qualify as fair use.”).

226. NIMMER, *supra* note 181, at § 13F.05[A][1].

227. *Id.* NIMMER ON COPYRIGHT explains the importance of enumerated uses:

It is important to stress that these purposes should be considered [by courts] among others that are not specifically enumerated; it has been held to be an error for the trial court to refrain from considering the four fair use factors on the ground that the use did not fall within the preambular enumeration.

Id. (footnotes omitted).

228. § 107(1) (enumerating “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes” as a factor to be considered when determining fair use).

229. *U.S. Copyright Office Fair Use Index*, *supra* note 38.

230. *Id.* (“This does not mean, however, that all nonprofit education and noncommercial uses are fair and all commercial uses are not fair”); Crews, *supra* note 224 (“[B]e careful: Not all nonprofit educational uses are ‘fair.’”).

231. Crews, *supra* note 224 (“[D]o not jump to a conclusion based simply on whether your use is educational or commercial.”).

232. *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 477 (2d Cir. 2004). The Second Circuit here explains:

The Supreme Court in *Campbell* rejected the notion that the commercial nature of the use could by itself be a dispositive consideration. The *Campbell* opinion observes that

2. Inspiration or Imitation

The Supreme Court has emphasized that this factor is incredibly important for determining fair use because it fosters a helpful analysis of whether the copyrighted material was used to create something new and “transformative” or merely copied another work.²³⁴ Courts tend to favor uses that are transformative in nature, as opposed to pure reproductions.²³⁵ This means that a fair use defense is more likely to succeed when the copyrighted work has been “‘transformed’ into something new or of new utility or meaning,” and can thus be described as having a different purpose or character.²³⁶ Measuring how transformative a new work is will ultimately affect how heavily other fair use factors are weighed.²³⁷ In instances of great transformation, other factors will be less significant.²³⁸ For example, in *Blanch v. Koons*,²³⁹ the Court found that the new work in question was “substantially transformative” enough to disqualify its commercial nature.²⁴⁰

3. Applying the First Factor to Let’s Plays

Using video game footage for online postings is not a use enumerated in the statute.²⁴¹ However, even though it is not an enumerated use, courts can still apply the fair use doctrine.²⁴² In their analyses, courts will decide the purpose and character of the use, as well as whether the

“nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research . . . ‘are generally conducted for profit’ . . .”

Id. (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994)) (citation omitted).

233. *U.S. Copyright Office Fair Use Index*, *supra* note 38 (“[C]ourts will balance the purpose and character of the use against the other factors . . .”); Crews, *supra* note 224 (“You still need to evaluate, apply, and weigh in the balance the nature of the copyrighted work, the amount or substantiality of the portion used, and the potential impact of the use on the market or value of the work.”).

234. Stim, *supra* note 168.

235. Crews, *supra* note 224; *U.S. Copyright Office Fair Use Index*, *supra* note 38.

236. Crews, *supra* note 224; *U.S. Copyright Office Fair Use Index*, *supra* note 38.

237. *See Campbell*, 510 U.S. at 569.

238. *Id.* (“[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.”).

239. 467 F.3d 244 (2d Cir. 2006).

240. *Id.* at 254. In this case, an artist was commissioned to create several pieces of work. *Id.* at 247. To do so, he scanned several copyrighted advertisements and digitally superimposed them together. *Id.* Upon these compilations, he based several photos that he then had his assistants use as templates for billboard-size paintings. *Id.* The court ultimately found that the artist’s goals were “sharply different” than the copyright holder’s goals, thus “confirm[ing] the transformative nature of the use.” *Id.* at 252.

241. 17 U.S.C. § 107.

242. *See NIMMER*, *supra* note 181, at § 13F.05[A][1].

use was commercial or noncommercial in nature.²⁴³ Courts do not look favorably upon a purpose or character of use that aims to merely substitute what the original copyrighted material offered.²⁴⁴ A use that only intends to “supplant[] or substitute[] for” the original copyrighted materials is unlikely to be protected by fair use.²⁴⁵

Typically, the main purpose of a Let’s Play video is to entertain.²⁴⁶ This infringes upon the purpose of video games, which also aim to entertain.²⁴⁷ However, it should be noted that while entertainment remains the main intention, the purpose of a Let’s Play is to be watched,²⁴⁸ as opposed to a video game, which is to be played.²⁴⁹ Therefore, it is not entirely clear whether Let’s Plays usurp the place of playing a video game when many still choose the latter.²⁵⁰

Considered in tandem, courts will look to whether or not a Let’s Play video is commercial in nature.²⁵¹ “Noncommercial use[s] are] more likely to be deemed fair use than commercial use[s].”²⁵² That being said, commercial uses are not intrinsically barred from being fair use.²⁵³ Ultimately, this factor will primarily depend on whether a content creator monetizes their videos.²⁵⁴ Monetization methods include accepting advertising revenue or being sponsored.²⁵⁵

Generally, content creators on YouTube will choose to monetize their work because doing so provides some financial security and thus

243. § 107(1).

244. See *Copyright and Fair Use*, HARV. UNIV. OFF. GEN. COUNS., <https://ogc.harvard.edu/pages/copyright-and-fair-use> [<https://perma.cc/S7WT-CAVP>] (last visited Apr. 15, 2024).

245. *Id.*

246. See James Duffy, *What Is a “Let’s Play,” and Why Are They So Popular?*, SMART WALLET, <https://thesmartwallet.com/what-is-lets-play> [<https://perma.cc/2UNU-NMKM>] (Feb. 10, 2022) (“The point of a let’s play is not to demonstrate skill, but rather to simply have fun playing. Often the commentary is as important as the game footage itself. Let’s play creators usually attempt to be funny or insightful to help draw people to their videos.”).

247. § 107(1); Phil Owen, *What Is a Video Game? A Short Explainer*, WRAP (Mar. 9, 2016, 9:42 AM), <https://www.thewrap.com/what-is-a-video-game-a-short-explainer> [<https://perma.cc/2ST9-CBHS>] (defining a video game as an “interactive digital entertainment that you ‘play’ via a computer, a game console (like the Xbox or PlayStation) or a phone or tablet”).

248. Duffy, *supra* note 246.

249. Owen, *supra* note 247.

250. Chen, *supra* note 15, at 699 (“[I]t seems that the gameplay videos—which do not permit the viewer to actually play the game itself—did not actually serve as a substitute for purchasing the game.”).

251. *Copyright and Fair Use*, *supra* note 244.

252. *Id.*

253. *Fair Use*, DIGIT. MEDIA L. PROJECT, <https://www.dmlp.org/legal-guide/fair-use> [<https://perma.cc/MMA4-ZKXN>] (Sept. 10, 2023).

254. *Copyright and Fair Use*, *supra* note 244; Martin, *supra* note 128.

255. Lee, *supra* note 47.

makes it easier to keep creating content.²⁵⁶ Furthermore, if a content creator can generate enough revenue, they are able to make a living from creating videos alone.²⁵⁷ Many creators hope to achieve that very goal.²⁵⁸ Because this is true, this Note will focus primarily on monetized videos with some commercial nature behind them.²⁵⁹

It is not impermissible for a content creator to profit from fair use.²⁶⁰ In fact, there are some widely known instances where individuals have made incredible profits through fair use.²⁶¹ Take, for example, the famous parody artist “Weird Al” Yankovic, who has sold more than twelve million records.²⁶² That being said, commercial uses are still generally disfavored.²⁶³ Taking both aspects of this factor into consideration, it is clear that Let’s Plays are commercial works that intrude on part of a video game’s potential market.²⁶⁴ While this factor is incredibly important, it is only one singular part of the analysis.²⁶⁵

B. The Source’s Spawn Point: Analyzing the Nature of the Original Material

This factor concerns the original material—the video game itself.²⁶⁶ “This factor centers on the work being used, and [how] the law allows

256. See Drew Gooden, *I Quit My Job to Do YouTube*, YOUTUBE (Dec. 29, 2017), https://www.youtube.com/watch?v=Zt2tusj0IGU&ab_channel=DrewGooden [<https://perma.cc/7QYX-KM2L>]. This is an example of a content creator who was able to make enough income through YouTube that he was able to quit his job to focus on creating videos. *Id.* In the description of the video, he states that he is now able to use all of his free time to create videos. *Id.*

257. See, e.g., Chris Stokel-Walker, *Meet the Workers Who Quit Their Jobs to Become Full-Time YouTubers*, FAST CO. (Dec. 21, 2022), <https://www.fastcompany.com/90828284/meet-the-workers-who-quit-their-jobs-to-become-full-time-youtubers> [<https://perma.cc/SB6L-DNP5>].

258. See, e.g., Gooden, *supra* note 256.

259. See *infra* Part IV.

260. See *infra* Part IV; *Fair Use*, *supra* note 253. The Digital Media Law Project expounds on the issue of profit:

Courts originally presumed that if your use was commercial it was an unfair exploitation. They later abandoned that assumption because many of the possible fair uses of a work listed in section 107’s preamble, such as uses for purposes of news reporting, are conducted for profit. Although courts still consider the commercial nature of the use as part of their analysis, they will not brand a transformative use unfair simply because it makes a profit.

Fair Use, *supra* note 253.

261. See Steve Vondran, *How Can You Get Rich Off Copyright Licensing?*, VONDRAN LEGAL (May 21, 2022), <https://www.vondranlegal.com/how-can-you-get-rich-off-copyright-licensing> [<https://perma.cc/25YV-TMQE>].

262. *Id.*

263. *Copyright and Fair Use*, *supra* note 244.

264. *Id.*

265. *Id.*

266. 17 U.S.C. § 107.

for a wider or narrower scope of fair use, depending on the characteristics or attributes of the work.²⁶⁷ Great consideration is given to whether a work is original, creative, and imaginative in nature.²⁶⁸ Courts tend to be more protective of inventive art such as movies, poetry, and music—more so than they would be of nonfiction or informational works, like a phonebook.²⁶⁹ In contrast, courts have applied fair use more broadly to nonfiction than fiction.²⁷⁰ Generally speaking, this is because courts believe that certain factual information is in the public interest.²⁷¹ Therefore, nonfiction work and factual information garner less protection under the fair use doctrine.²⁷²

Each video game is usually a product that was copyrighted for its creative material and ultimately sells an experience.²⁷³ As a whole, it is an “original expression” and “has more in common with fiction than with works based on facts, such as, for example, biographies or telephone directories.”²⁷⁴ As works that are closer to fiction, video games are primarily based on and created from the innovation and imagination of their development teams.²⁷⁵ Therefore, the nature of video games greatly limits the application of fair use.²⁷⁶ While it would be possible for a content creator to prevail, it is unlikely the Court would find this factor in a content creator’s favor.²⁷⁷

267. Crews, *supra* note 224.

268. *Rogers v. Koons*, 960 F.2d 301, 310 (2d Cir. 1992).

269. *See id.*; *see also* Crews, *supra* note 224.

270. *See* Crews, *supra* note 224.

271. *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1532-33 (S.D.N.Y. 1991) (“Factual works, such as biographies, reviews, criticism and commentary, are believed to have a greater public value and, therefore, uses of them may be better tolerated by the copyright law. Works containing information in the public interest may require less protection.”) (citations omitted).

272. *New Era Publ’ns Int’l, ApS v. Carol Publ. Grp.*, 904 F.2d 152, 157 (2d Cir. 1990) (“[T]he scope of fair use is greater with respect to factual than non-factual works.” (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985))).

273. 17 U.S.C. § 107; *see, e.g., About Tetris, TETRIS*, <https://tetris.com/about-us> [<https://perma.cc/NP43-KRBM>] (last visited Apr. 15, 2024).

274. *Rogers*, 960 F.2d at 310.

275. *What Is the Role of Creativity in Game Development?*, LINKEDIN, <https://www.linkedin.com/advice/1/what-role-creativity-game-development-skills-game-development-kc37c> [<https://perma.cc/ZTJ7-XTS5>] (last visited Apr. 15, 2024); *see also* Marshall Katheder, *What the Gaming Industry Can Teach Us About Creativity*, OGILVY (Sept. 16, 2019), <https://www.ogilvy.com/uk/ideas/what-gaming-industry-can-teach-us-about-creativity> [<https://perma.cc/P3LG-U4TF>].

276. *See Rogers*, 960 F.2d at 310.

277. *See id.*

C. Copy and Paste: Analyzing the Amount Copied

The third factor concerns “the amount and substantiality of the portion used.”²⁷⁸ When considering this, the Court examines “both the quantity and quality of the copyrighted material that was used.”²⁷⁹ The “quality” of the material used refers to its importance and whether it “constitute[s] the heart of the work.”²⁸⁰ The “amount” refers to the amount of copied material relative to the entirety of the original.²⁸¹ Like many aspects of the fair use doctrine, there is no bright-line rule that sets out exact quantity limits.²⁸² However, there is the general guiding principle that the more one uses relative to the entirety of the work, the more likely this factor will weigh against them.²⁸³ This is mere guidance at best and does not apply in every context.²⁸⁴ For example, copying an entire work can be acceptable in some instances, such as critique, comment, or parody.²⁸⁵

In many instances, a Let’s Play will cover the entirety of a game, from start to finish.²⁸⁶ There are two primary reasons for this: first, a goal of Let’s Plays is to mimic playing alongside a friend as if one were there playing with them.²⁸⁷ To realistically replicate that feeling, viewers want to be able to see everything the player does within the game.²⁸⁸ Second, viewers develop a sense of investment in the plots and gameplay they watch.²⁸⁹ While these are valid reasons for the content creator and audience, it is more likely that the general guiding principle will apply here.²⁹⁰ Let’s Plays are not really critique, comment, or parody—they are simply entertainment at their core.²⁹¹ If a content creator were to use the entirety of a video game for their Let’s Play, this factor would likely be weighed against them.²⁹²

278. § 107.

279. Benjamin Reiser, Note, *Anything You Can Use, I Can Use Better: Examining the Contours of Fair Use as an Affirmative Defense for Theatre Artists, Creators, and Producers*, 30 *FORDHAM INTELL. PROP., MEDIA & ENT. L.J.* 873, 930 (2020).

280. *See id.* (internal quotations omitted).

281. Crews, *supra* note 224.

282. *Id.*

283. *Copyright and Fair Use*, *supra* note 244.

284. *See* Crews, *supra* note 224.

285. *Id.*

286. *See, e.g.*, Markiplier, *supra* note 48.

287. *See* Hagen, *supra* note 100, at 252.

288. *See id.*

289. *See* Postel, *supra* note 49, at 1173-74.

290. *See Copyright and Fair Use*, *supra* note 244; *see also* Postel, *supra* note 46, at 1173-74.

291. Duffy, *supra* note 246.

292. *See Copyright and Fair Use*, *supra* note 244.

D. Mass Effect: Analyzing the Cumulative Impact on the Market

The fourth factor in the fair use analysis concerns “the effect of the use [on] the potential market.”²⁹³ If the use adversely affects the market for the copyrighted work, then it is less likely to be considered fair use.²⁹⁴ Courts often consider this to be one of the two most important factors in the analysis.²⁹⁵ When considering this factor, courts focus heavily on how the market value of the original work is or will be affected.²⁹⁶ The concern here is primarily economic harm.²⁹⁷ This factor will usually weigh against a user if, in the aggregate, uses like “the one in question would have a ‘substantially adverse impact’ on the potential market for the work.”²⁹⁸ In reality, this factor is deeply tied with the first factor, which considers whether the use “supplants or substitutes for the copyrighted work.”²⁹⁹ For example, if a use supplants the original work, then the market for that original is adversely affected.³⁰⁰ When “the infringer’s target audience and the nature of the infringing content [are] the same as the original,” and the copyrighted work suffers economic harm as a result, an impermissible market supplantation has occurred.³⁰¹

Because there are diverse genres of video games, market effects will vary greatly across game types.³⁰² Therefore, it is incredibly arduous to make generalized statements about whether the market effects of a Let’s Play will be categorically adverse or not.³⁰³ Instead, this needs to be approached on a case-by-case basis.³⁰⁴ For example, some video games offer “linear” experiences.³⁰⁵ This includes a single route to a predetermined outcome, and thus all playthroughs and events are

293. 17 U.S.C. § 107; *see also* Reiser, *supra* note 279, at 885 (“For years after the 1976 codification of 17 U.S.C. § 107, courts widely regarded the fourth statutory factor—the effect of a use on the market—to be undoubtedly the single most important element of fair use.”) (internal quotations omitted).

294. *Copyright and Fair Use*, *supra* note 244.

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *Copyright and Fair Use*, *supra* note 244.

300. *Id.*

301. *Cariou v. Prince*, 714 F.3d 694, 709 (2d Cir. 2013); *see also* *Copyright and Fair Use*, *supra* note 244.

302. *Stim*, *supra* note 168; 17 U.S.C. § 107.

303. *Stim*, *supra* note 168.

304. *U.S. Copyright Office Fair Use Index*, *supra* note 38.

305. Soham De, *What’s the Difference Between Linear and Nonlinear Video Games?*, MAKE USE OF (Dec. 13, 2021), <https://www.makeuseof.com/linear-non-linear-video-game-differences> [<https://perma.cc/CR3K-JG2Z>] (“A linear game is one that focuses on guiding the player through a set path, with largely similar gameplay.”).

essentially the same.³⁰⁶ One notable example of a linear game experience is *Super Mario Bros.*³⁰⁷ On the other hand, there are video games with endless replayability,³⁰⁸ where no playthrough is the same.³⁰⁹ Each non-linear gameplay experience is unique.³¹⁰ Some well-known examples of non-linear games are *Tetris*,³¹¹ *Fortnite*,³¹² and *Minecraft*.³¹³ In reality, games will fall on a spectrum between these experience types.³¹⁴

Games with greater replayability will ultimately be affected less negatively by the use.³¹⁵ Watching another individual play will not detract from the desire to play the game on one's own.³¹⁶ The opposite is true of linear games.³¹⁷ Once an individual watches the game from start to finish, there is nothing particularly new to experience by playing the game on their own.³¹⁸ Therefore, there is a real possibility that viewers of a Let's Play featuring a linear game will be less likely to purchase that game.³¹⁹ This would ultimately supplant that game, thus adversely affecting its potential market.³²⁰ However, there is also the strong and

306. *Id.*

307. Joshua Vu, *The Success of the Narrative of Super Mario Bros.*, NARRATIVES IN VIDEO GAMES & FILM, <https://perma.cc/D5FC-975A> (last visited Apr. 15, 2024).

308. John Spacey, *What Is Replay Value?*, SIMPLICABLE, <https://simplicable.com/IT/replay-value> [<https://perma.cc/UUP2-73K4>] (July 26, 2023) (defining replay value as “the number of times a game can be played before it becomes tiresome”). To state it more technically, it is the appeal and capability of a game to be played again after its first completion. *See id.* The question of replayability usually rests on how entertaining the game continues to be after that initial completion, and whether the game draws players back to continue engaging with it. *See id.* It also includes whether or not a game can truly be “completed” at all. *See id.*

309. *See* De, *supra* note 305; *see also* Spacey, *supra* note 308.

310. *See* De, *supra* note 305; *see also* Spacey, *supra* note 308.

311. *See, e.g., About Tetris, supra* note 273.

312. *Fortnite*, EPIC GAMES, <https://store.epicgames.com/en-US/p/fortnite> [<https://perma.cc/P7MH-VFRV>] (last visited Apr. 15, 2024).

313. Anastasia Maillot & Gabrielle Huston, *Minecraft Complete Guide and Walkthrough*, THEGAMER, <https://www.thegamer.com/minecraft-complete-guide-walkthrough> [<https://perma.cc/5R8P-PFT2>] (July 16, 2023).

314. De, *supra* note 305; *see* Vu, *supra* note 307 (providing an example of the linear end of the spectrum); *About Tetris, supra* note 273 (providing an example of a game that resides at the opposite end of the spectrum).

315. *See* Chen, *supra* note 15, at 700-01 (“[G]ames that are ‘more expansive’ or have better replayability, such as sandbox games, might benefit economically from the Let’s Play community.”).

316. *Id.* at 698, 700-01.

317. *See* Patrick Klepek, *Not Every Developer Is Convinced Let’s Play Videos Are a Good Thing*, KOTAKU (Mar. 25, 2016), <https://kotaku.com/not-every-developer-is-convinced-let-s-play-videos-are-1766985440> [<https://perma.cc/P9QD-5X64>].

318. Puddington, *supra* note 146, at 430 (“A lengthy ‘Let’s Play’ series spanning multiple playthroughs or covering several available endings to a particular game may take such a substantial portion of the work as to negatively impact ‘the potential market for or value of the copyrighted work,’ leaving potential purchasers with little remaining game content to explore on their own.”).

319. *See, e.g., Carey, supra* note 142.

320. *Copyright and Fair Use, supra* note 244; 17 U.S.C. § 107.

popular argument that a Let's Play can work to advertise and promote a game.³²¹ Game developers openly admit that being featured by content creators is currently the cheapest and easiest way to market a game.³²² For example, small developers reaching the audience of a large Let's Play channel would gain a monumental boon.³²³ Ultimately, it is impossible to make a general determination on which party this factor would weigh in favor of without considering case-specific facts.³²⁴

E. The Bug in the System

Many Let's Play content creators believe that their work is covered under fair use, but this is probably not true.³²⁵ Courts currently refuse to address whether or not Let's Plays constitute copyright infringement, but it is a question that will come knocking sooner or later.³²⁶ When the time comes, content creators will not have the legal means to protect their work.³²⁷ The fair use doctrine has failed to adapt to the era of the internet, and thus cannot be relied upon.³²⁸ Until adaptations occur, content creators and developers alike need and deserve other means to safeguard the products of their labor.³²⁹

IV. REWRITING THE CODE: IMPLEMENTING A BLANKET LICENSING SYSTEM TO ADDRESS CURRENT COPYRIGHT PITFALLS

Subpart A discusses the context of this Note's proposed solution.³³⁰ Subpart B addresses the solution itself—incorporating a blanket licensing system into platforms like YouTube.³³¹ Subpart C discusses potential counterarguments to this Note's solution.³³²

A. Who Is the Final Boss?

This Note neither argues that Let's Players should have free reign to use whatever copyrighted material they see fit for their channel

321. Brusa, *supra* note 35, at 260.

322. See Pearce, *supra* note 161.

323. See Shaver, *supra* note 158.

324. § 107; *U.S. Copyright Office Fair Use Index*, *supra* note 38.

325. See Zoia, *supra* note 17; see also *supra* Part III.A–C.

326. *Epic Games, Inc. v. Mendes*, No. 3:17-cv-06223-LB, 2018 U.S. Dist. LEXIS 98719, at *22 (N.D. Cal. June 12, 2018).

327. See Zoia, *supra* note 17; see also *supra* Part III.A–C.

328. See Davis, *supra* note 43, at 149, 151-52, 161-63.

329. Narayanan, *supra* note 3.

330. See *infra* Part IV.A.

331. See *infra* Part IV.B.

332. See *infra* Part IV.C.

without repercussion, nor that fair use would include Let's Plays.³³³ Video game developers invest incredible amounts of resources into their projects, whether it be time, labor, or money.³³⁴ As such, their work merits protection.³³⁵ This Note acknowledges that while Let's Play videos do use copyrighted material, they usually embody the labor and effort of their creator as well.³³⁶ In a developing world where large digital platforms immediately side with copyright holders, content creators deserve additional tools to help them protect their own work.³³⁷ To find this tool, we must stop pitting game developers against content creators.³³⁸ Instead, we should shift our attention to the party that always wins the game: the content platforms.³³⁹ Protected by safe harbor rules, and reaping the benefits of Let's Play monetization, platforms like YouTube have long enjoyed the middle ground between these two feuding factions.³⁴⁰ To create a truly beneficial and symbiotic relationship between Let's Players and game developers—that offers protection to both—YouTube must be pushed to broker that peace.³⁴¹

B. The Blanket License

This Note proposes the adoption of a blanket licensing system for platforms like YouTube, which deal significantly with video game content.³⁴² Instead of signing content creators on an individual basis, game developers can grant platforms like YouTube general access to their

333. See *infra* Part IV.B.

334. *How Much Does It Cost to Make a Game?*, AUROCH DIGIT. (Aug. 24, 2021), <https://www.aurochdigital.com/blog/2021/8/19/how-much-does-it-cost-to-make-a-game> [<https://perma.cc/7CFC-H7L5>] (“The lower \$50k amount is the total cost for a solo developer, on average, to work for a year on a game When it comes to AAA game development you are generally talking in the tens of millions of dollars. Most AAA games are made by teams of a few hundred people working for two or more years.”).

335. See Klepek, *supra* note 317 (“We did not intend to make copyright claims or to force anyone to take down their videos [W]e simply intended for Jon [who composed the score of *That Dragon, Cancer*] to be able to draw some income from the original soundtrack to our game that he poured his heart into.”). Without certain protections, the individuals behind video games cannot reap the benefits of their hard work. *Id.*

336. Narayanan, *supra* note 3.

337. See Alexander, *supra* note 6.

338. See Pearce, *supra* note 161; see also Klepek, *supra* note 317.

339. *Viacom Int'l, Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110, 123 (S.D.N.Y. 2013); see Marfo, *supra* note 118, at 469.

340. *Viacom Int'l, Inc.*, 940 F. Supp. 2d at 123 (holding that YouTube is protected by DMCA safe harbors); see Marfo, *supra* note 118, at 469 (“YouTube profited from hosting the popular content on their domain”).

341. See *infra* Part IV.B.

342. Brouwer, *supra* note 119 (estimating that about fifteen percent of all videos on YouTube concern video games or contain video game content).

intellectual property for a fee.³⁴³ Blanket licensing would simply be the most efficient way to grant content creators access to as many game titles as possible.³⁴⁴ The licensing fee would come straight from the revenue derived from the monetized video.³⁴⁵ However, the cost of the fee would be shared between both YouTube and the content creator.³⁴⁶ The financial burden for the blanket license should not be placed entirely on individual creators while YouTube continues to make unencumbered profits.³⁴⁷ The fee itself would be tied to a progressive rate system: videos that attract more viewership and thus generate more revenue will fall into a higher fee bracket.³⁴⁸ Alternatively, videos with low viewership will fall into a lower fee bracket.³⁴⁹ Incorporating a progressive fee system allows for smaller channels to enjoy the benefits of the blanket license without being required to pay the same fee as a YouTuber who, for example, earns millions of dollars from their videos each year.³⁵⁰

This blanket licensing system allows all three parties to simultaneously benefit.³⁵¹ First, content creators can continue to monetize their videos while also receiving legal protection they are not currently offered by fair use.³⁵² Furthermore, under the blanket license, game developers would be barred from attempting to claim all advertising revenue from content that features their games, essentially preventing the demonetization of the Let's Player.³⁵³ This system, of course, also benefits

343. See *Common Licensing Terms Defined*, ASCAP, <https://www.ascap.com/help/ascap-licensing/licensing-terms-defined> [<https://perma.cc/DU62-EC2U>] (last visited Apr. 15, 2024). A blanket license would provide access to a developer's library of work during the term of a license for a single fee, like how some parts of the music industry already operate. *Id.*

344. See Liam Duncan, *What Is a Blanket License, and How Does It Work with ASCAP, BMI, SESAC, and PRS?*, MUSIC INDUS. HOW TO, <https://www.musicindustryhowto.com/what-is-a-blanket-license-and-how-does-it-work-with-ascap-bmi-sesac-and-prs> [<https://perma.cc/YXF9-DANL>] (Dec. 29, 2020). Blanket licenses are already an incredibly efficient method of issuing licenses to businesses that have many copyrighted works. *Id.*

345. Martin, *supra* note 128.

346. *Id.* The cost would be taken from the advertising revenue but split equally between YouTube and the content creator. *Id.*

347. See Marfo, *supra* note 118, at 469 ("YouTube profited from hosting the popular content on their domain.").

348. See *Progressive Fee Structure*, ORG. BIOLOGICAL FIELD STATION, <https://perma.cc/XP74-X5AY> (last visited Apr. 15, 2024) (showing an example of a progressive fee structure).

349. See *id.*

350. See *id.* ("The progressive dues structure allows smaller or less-resourced field stations to join at a lower-than-current rate without compromising OBFS operational revenue."); Zoia, *supra* note 17.

351. See Greg Lastowka, *All Your Nintendo Let's Plays Are Belong to Nintendo?* [sic], GAME DEV. (May 17, 2013), <https://www.gamedeveloper.com/business/all-your-nintendo-let-s-plays-are-belong-to-nintendo-> [<https://perma.cc/B222-9AWE>]; see also Gerrard, *supra* note 118 (showing how Let's Players currently benefit); see also Klepek, *supra* note 317.

352. Gerrard, *supra* note 118; see *supra* Part III.E.

353. See Kent, *supra* note 151.

game developers, who currently feel scorned by the Let's Play community.³⁵⁴ They would derive just compensation for videos that feature their copyrighted content and would continue to also receive “eas[y] [and] cheap[]” advertising.³⁵⁵ Finally, YouTube can continue to reap the benefits that it already has, the caveat being that some of its profits would go to the licensing fee.³⁵⁶ However, there is also another added benefit for YouTube.³⁵⁷ If YouTube were able to negotiate a blanket license with several developers, and essentially offer content creators a more secure way to use copyrighted material, this would give them an advantage over their competitors.³⁵⁸ Content creators would most likely be attracted to the opportunity to safely use copyrighted material, and would thus post their videos on YouTube as opposed to rival content platforms like Twitch.³⁵⁹

The current system allows YouTube to exploit the conflict between game developers and Let's Players.³⁶⁰ Game developers feel as though they cannot protect their work, fearing that any copyright infringement claims against content creators will garner intense backlash.³⁶¹ Content creators feel as though they cannot protect their work, as YouTube's Content ID system actively works against them and discourages appeals.³⁶² In the middle of it all, YouTube is profiting.³⁶³ By pushing platforms like YouTube into adopting blanket licenses, both parties can safeguard the products of their labor.³⁶⁴ This, however, is more of a remedial solution to the larger issue at hand: fair use needs to adapt for digital purposes.³⁶⁵

C. Counter-Strike: Addressing Potential Counterarguments

One counterargument is that the fair use doctrine was created with flexibility in mind, and so it is already suited to adapt to new media

354. See Carey, *supra* note 142; see also Klepek, *supra* note 317.

355. Pearce, *supra* note 161; see also Carey, *supra* note 142; Klepek, *supra* note 317.

356. See Marfo, *supra* note 118, at 469.

357. See Tim Peterson, *Twitch, Facebook, YouTube and Mixer Fight Talent Wars for Top Gamers*, DIGIDAY (Dec. 11, 2019), <https://digiday.com/future-of-tv/twitch-facebook-youtube-mixer-fight-talent-wars-top-gamers> [https://perma.cc/GB99-D6WR]. The blanket license system will give YouTube an edge in the talent war for gamers. See *id.*

358. See *id.* (showing a need for content platforms to offer benefits to content creators).

359. See *id.*

360. Lastowka, *supra* note 351.

361. See Chalk, *supra* note 22; see also Kent, *supra* note 151 (stating that Nintendo faced intense backlash and criticism for trying to assert its rights over its intellectual property).

362. Trendacosta, *supra* note 5.

363. Marfo, *supra* note 118, at 469.

364. See Gerrard, *supra* note 118; see also Carey, *supra* note 142; Klepek, *supra* note 317.

365. See Davis, *supra* note 43, at 132.

forms.³⁶⁶ However, this has already been disproven.³⁶⁷ As it stands, no legal test exists for determining whether something is a “copy” for copyright infringement and fair use purposes.³⁶⁸ To analyze why this presents an issue in an internet-centric era, consider how data is transmitted over the internet.³⁶⁹ During the transfer, a computer will make a temporary copy of each piece of data; this has opened the door to the argument that every work transmitted via the internet is copied and infringed throughout the entire process.³⁷⁰ However, common sense assures us this is not the case, and Congress agrees.³⁷¹ Recognizing the need for some change, Congress passed legislation as part of the DMCA, granting copyright infringement exemptions to service providers that ultimately transmitted the copyrighted data.³⁷² This shows that even Congress has recognized that current copyright and fair use laws need an overhaul to meet today’s needs, and it is time to continue taking those steps.³⁷³

Another counterargument is that game developers will refuse to engage in blanket licensing, as they already dislike the general concept of Let’s Plays.³⁷⁴ This Note’s response is that game developers will likely welcome any new and amenable alternative to their current situation.³⁷⁵ From their perspective, they are now choosing between two evils: either endure the Let’s Play community and suffer the purported financial losses, or file copyright claims and suffer immense community backlash.³⁷⁶ If a third option were to become available—one in which they can derive revenue and assert their copyrights—it would seem very desirable to game developers.³⁷⁷ Furthermore, many game developers dislike Let’s Plays *because* of the current system.³⁷⁸ If a blanket licensing agreement

366. Crews, *supra* note 224.

367. Davis, *supra* note 43, at 133-34.

368. 17 U.S.C. § 101 (offering no legal test); *id.* § 102 note (Fixation in Tangible Form) (“The definition[] of [copy] in section 101, together with [its] usage in section 102 and throughout the bill, reflect a fundamental distinction between the ‘original work’ which is the product of ‘authorship’ and the multitude of material objects in which it can be embodied.”).

369. Davis, *supra* note 43, at 133-34.

370. *See id.*

371. *See id.*

372. *See id.* at 165.

373. *See id.* at 132.

374. Nicholas Ribardo, *YouTube, Video Games, and Fair Use: Nintendo’s Copyright Infringement Battle with YouTube’s “Let’s Plays” and Its Potential Chilling Effects*, 6 BERKELEY J. ENT. & SPORTS L. 114, 134 (2017).

375. *See* Chalk, *supra* note 22; *see also* Kent, *supra* note 151 (showing that developers currently suffer backlash and criticism when asserting their intellectual property rights).

376. *See* Chalk, *supra* note 22; *see also* Kent, *supra* note 151.

377. *See supra* Part IV.B; *see also* Pearce, *supra* note 161; Chalk, *supra* note 22; Kent, *supra* note 151.

378. *See* Pearce, *supra* note 161; *see also* Kent, *supra* note 151.

were implemented, this would alleviate many of the frustrations that developers hold against content creators.³⁷⁹

V. CONCLUSION

Ultimately, the fair use doctrine is not currently equipped to handle new forms of media like Let's Plays.³⁸⁰ To ensure that content creators and game developers are still afforded some legal certainty and protection, measures outside of the fair use doctrine must be taken.³⁸¹ An efficient method, for the time being, is a blanket license, which can protect and benefit all parties involved.³⁸²

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379. *See supra* Part IV.B.

380. *See supra* Part III.

381. *See supra* Part III.E.

382. *See supra* Part IV.

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