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Natalie Marfo

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PLAYING FAIR: YOUTUBE, NINTENDO, AND THE LOST BALANCE OF ONLINE FAIR USE

ABSTRACT

Over the past decade, YouTube saw an upsurge in the popularity of “Let’s Play” videos. While positive for YouTube, this uptick was not without controversy. Let’s Play videos use unlicensed copyrighted materials, frustrating copyright holders. YouTube attempted to curb such usages by demonetizing and removing thousands of Let’s Play videos. Let’s Play creators struck back, arguing that the fair use doctrine protects their works. An increasing number of powerful companies, like Nintendo, began exploiting the ambiguity of the fair use doctrine against the genre; forcing potentially legal works to request permission and payment for Let’s Play videos, without a determination of fair use. As courts proved incapable of solving this issue, the copyright nature of Let’s Play videos remains in question.

This Note analyzes how a court could resolve a case concerning Let’s Play videos. This Note proposes that a fair use analysis regarding Let’s Play videos shows no conclusive determination. In turn, this ambiguity leaves Let’s Play videos at the mercy of copyright holders. With the introduction of the “Nintendo Creators Program,” Nintendo is overlooking the fair use defense and enforcing non-negotiable contractual obligations, an act which disregards judicial precedent and undermines the spirit of fair use. Changes to YouTube’s policies are necessary to protect Let’s Play users and content creators like them.

INTRODUCTION

Let’s Play (LP) videos are fan-created recordings that showcase popular video games.¹ LP videos feature a play-through of the mechanics of a video game, usually accompanied by a gamer’s commentary.² Gamers commonly upload LP videos to user-generated video hosting domains, such as Twitch or Google-owned YouTube.³ Originally, YouTube provided a hospitable climate for content creators as the ability to gain revenue generated by third-party advertisement incentivized YouTube users to keep creating the popular style of video.⁴ Thus, the genre grew on YouTube, and produced

1. See Evan Asano, *What is a Let’s Play on YouTube?*, MEDIKIX (Feb. 3, 2016), <http://mediakix.com/2016/02/what-is-a-youtube-lets-play-video/> [hereinafter Asano].

2. See *id.*

3. See *id.*

4. See Christopher Zoia, *This Guy Makes Millions Playing Video Games on YouTube*, THE ATLANTIC (Mar. 14, 2014), <https://www.theatlantic.com/business/archive/2014/03/this-guy-makes-millions-playing-video-games-on-youtube/284402/> (reporting that YouTube LP channel holder, Felix Kjellberg, has an “estimated monthly revenue from YouTube ads fluctuate[ing] between \$140,000 and \$1.4 million depending on viewership”).

with it a multi-million-dollar industry.⁵ As an unlicensed use of copyrighted video games, LP creators alleged an important exception of United States copyright law: fair use.⁶ For years since LP videos originated, the LP community was small enough to avoid scrutiny.⁷ However, with the increasing popularity, copyright holders took notice and called on federal regulators to help.⁸

In order for YouTube to comply with the Digital Millennium Copyright Act (DMCA), and remain free from copyright liability, YouTube implemented “Content ID,” an automated system that allows copyright holders to remove, demonetize, or redirect revenue from videos found to contain allegedly infringing material.⁹ Every potential case of copyright infringement identified by Content ID triggers an automatic copyright claim on behalf of the copyright holder.¹⁰ YouTube subsequently suspends advertisement revenue that the uploader was earning from the allegedly infringing video.¹¹ The revenue hold occurs without the uploader having the chance to defend herself, regardless of the legitimacy of the underlying claim.¹² The genre’s popularity made LP creators a target for copyright holders to aggressively implement the Content ID system.¹³ As a result, thousands of LP videos fell victim to Content ID claims.¹⁴

The question remains whether LP videos fall under the security of the fair use defense. Fair use is intended to ensure that the rights of copyright holders are properly balanced with the need to use copyrighted materials to

5. *See id.* (observing that in 2014, there was “950 players” active on LP YouTube channels, followed by more than “60 million subscribers,” whose estimated monthly revenue from YouTube was between “\$600 and \$1,000” a month).

6. *See Are Let’s Play Videos Illegal?* | Game/Show | PBS Digital Studios, YOUTUBE (Jan. 6, 2015), <https://www.youtube.com/watch?v=28NZxeViHZY> [hereinafter *Are Let’s Play Videos Illegal?*].

7. For information on the history of Let’s Play videos, *see generally* Patrick Klepek, *Who Invented Let’s Play Videos?*, KOTAKU (May 6, 2015), <https://kotaku.com/who-invented-lets-play-videos-1702390484>.

8. *See Are Let’s Play Videos Illegal*, *supra* note 6.

9. *See* Copyright Act of 1976, 17 U.S.C. § 512 (1976); *see also* *HOW CONTENT ID WORKS*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2797370?hl=en> (last visited Dec. 31, 2018).

10. *See* 17 U.S.C. § 512; *HOW CONTENT ID WORKS*, *SUPRA* NOTE 9.

11. *See* Owen Good, *YouTube’s Content ID System Gets One Much-Needed Fix*, KOTAKU AU. (Dec. 13, 2013), <https://www.kotaku.com.au/2013/12/game-critic-says-youtube-copyright-policy-threatens-his-livelihood/> (reporting that in the instance of a YouTube Content ID claim, “the uploader can no longer run ads on the video, and the supposed rights-holder can even collect money by running their own advertisements unless they release the claim . . . The flagging does not remove a video from circulation, but it does prevent its owner from earning ad revenue from it until the claim is resolved.”).

12. *See id.*

13. *See* *YouTube Let’s Play celebrities hit by draconian Content ID claims*, CRITICAL HIT (Dec. 11, 2013), <http://www.criticalhit.net/gaming/youtube-lets-play-celebrities-hit-by-draconian-content-id-claims/> (“It’s no secret that YouTube content ID claims are a huge problem in the Let’s Play community.”).

14. *See id.*

foster innovation.¹⁵ If fair use applies, then copyrighted content may be used without payment or authorization from the copyright holders.¹⁶ LP content creators assert that LP videos contain original content, such as commentary, game-play strategies, critiques or reviews, and live-action responses.¹⁷ This original content, LP creators argue, alters the video game into a new, transformed work, protecting its appropriation under fair use.¹⁸ Still, there is no established legal precedent as to whether LP videos fall under the fair use exception of copyright law. Therefore, YouTube LP creators remain in the dark, uncertain of what is legal.

This legal ambiguity may have inadvertently allowed abuse of the copyright infringement system.¹⁹ Consider Nintendo Co. Ltd.²⁰ In 2015, Nintendo launched the “Nintendo’s Creators Program,” a restrictive licensing agreement that ostensibly circumvents a fair use defense by requiring permission and payment to the rights holders, without a determination of fair use.²¹ If LP creators do not agree to the provided terms, they potentially face pricey infringement claims or suits for uploading LP videos with Nintendo content.²²

This Note proposes that the likelihood of LP videos obtaining the threshold for fair use is inconclusive. Because of the ambiguity of an “online” fair use defense, an analysis does not provide clear determination if LP videos are protected or infringing. This places LP content creators and online service providers in an unsafe position. By strong-arming LP creators into a restrictive licensing agreement, Nintendo’s response demonstrates a frightening trend of copyright holders side-stepping the fair use defense entirely, a dangerous development that must be prevented.

This Note proceeds as follows. Part I will discuss the history and current state of YouTube LP videos. Part II will discuss the Copyright Act of 1976, including the introduction of the Digital Millennium Copyright Act. Part III will introduce and apply the fair use doctrine to LP videos, analyzing the uncertainty. Part IV will discuss the introduction of the Nintendo Creators Program. Part V will provide recommendations that allow YouTube to balance the rights of copyright owners and the rights of content creators.

15. See Copyright Act of 1976, 17 U.S.C. §107 (2018).

16. See *id.*

17. See *Are Let’s Play Videos Illegal*, *supra* note 6.

18. See *id.*

19. See Paul Sieminski, *Corporations Abusing Copyright Laws Are Ruining The Web For Everyone*, WIRED (Jan. 17, 2014), <https://www.wired.com/2014/01/internet-companies-care-fair-use/>.

20. See Patricia Hernandez, *Nintendo’s YouTube Plan Is Already Being Panned By YouTubers*, KOTAKU (Jan. 30, 2015), <https://www.kotaku.com.au/2015/01/nintendos-youtube-plan-is-already-being-panned-by-youtubers/>.

21. See *id.*

22. See *id.*

I. LET'S PLAY VIDEOS

A LP video is a style of video documenting an individual playing a video game.²³ LP videos combine the uploaders' personal experience, through commentary and reactions from the gamer, with the play-through of a video game.²⁴ Commentary styles vary by individuals, ranging from humorous to intuitive, but the main focus of LP videos is the subjective personal perception of the gamer for the benefit of the audience.²⁵ Appropriately, LP videos can be "tools for education, criticism, and vicarious enjoyment."²⁶ Gamers fervently flocked to LP videos, as they helped to decide if they should purchase a game, and provided tips for a better game play experience.²⁷

LP videos are formatted one of two ways: (1) with the gamer and a recording of a video game sharing some division of visual split screen,²⁸ or (2) with the video game occupying the entire screen accompanied by the gamers audio commentary.²⁹ Thus, through a mixture of game play and gamer commentary, LP videos provide a comprehensive and enjoyable secondhand gaming experience.³⁰ By providing the incentive of monetization, LP videos found a home on user-generated video hosting websites, such as YouTube.³¹

YouTube allows uploaders to become "partners" and monetize their content.³² YouTube also profits from the monetization schema, providing fifty-five percent of advertisement revenue to content creators, and retaining

23. See Asano, *supra* note 1; see also Klepek, *supra* note 7.

24. See Asano, *supra* note 1; see also Klepek, *supra* note 23.

25. See Asano, *supra* note 1; see also Klepek, *supra* note 23.

26. Patrick Lee, *The Best Let's Play Videos Offer More Than Vicarious Playthroughs*, THE A.V. CLUB (Apr. 24, 2015), <https://games.avclub.com/the-best-let-s-play-videos-offer-more-than-vicarious-pl-1798279027>.

27. See *id.* (reporting that successful Let's Play creators "balance exploration of the games themselves with personal anecdotes about her own history with them.").

28. For a demonstration of split screen LP video, see *Deadpool Gameplay - Part 1 - Walkthrough Playthrough Let's Play | PewDiePie*, YOUTUBE (July 5, 2013), <https://www.youtube.com/watch?v=SULJh7cU8pg&list=PLYH8WvNV1YEK6pSuc9uiXSaUJ20Xspnzo>.

29. Rowan a Bodhi, *Pokémon Platinum - Episode 1: Rowan a Bodhi*, YOUTUBE (Dec. 19, 2015), <https://www.youtube.com/watch?v=IAY7auqg-w0>.

30. See Lee, *supra* note 26.

31. See Fred McConnell, *Let's Play - the YouTube phenomenon that's bigger than One Direction*, THE GUARDIAN (Jan. 2, 2014), <https://www.theguardian.com/technology/2014/jan/02/lets-play-youtube-pewdiepie-one-direction> (discussing that YouTube "runs a Partner Program which means that the owner of a video channel can earn a share of the money made from video ads on the site").

32. Monetization is the process by which uploaders of original content can earn revenue on YouTube. This is accomplished when users opt into the YouTube Partner Program, which allows content creators to generate revenue from third-party advertisements placed in videos. See *YouTube Partner Program overview*, YOUTUBE HELP (2017), <https://support.google.com/youtube/answer/72851?hl=en> (last visited Jan. 1, 2019).

the additional forty-five percent as a fee for hosting the uploaded material.³³ Hundreds of LP videos are uploaded to YouTube every day.³⁴

Initially, video game developers were excited by the “free exposure and publicity,” that LP videos provided.³⁵ The demand for LP videos grew astronomically and the popular video format subsequently went viral.³⁶ Originally the plan seemingly benefited every party involved: YouTube profited from hosting the popular content on their domain, LP video creators were able to earn a substantial amount of revenue from gaming, and video game developers received free advertising for their content.

Whether LP videos consisted of widespread infringement or protected fair use, video game developers largely chose a laissez-faire response. However, game developers underestimated the growing LP community.³⁷ Game developers became “frustrated by the millions of people watching their game on YouTube.”³⁸ In May 2013, Nintendo struck a blow against the budding community, asserting that the genre constituted infringement under the exclusive bundle of rights granted to copyright holders and, accordingly, demanded payment.³⁹

II. COPYRIGHT LAW

A. THE COPYRIGHT ACT OF 1976

The Copyright Act of 1976 (Act) remains the foundation of copyright law in the United States.⁴⁰ The Act provides protection to creators for “original works of authorship” that are fixed in a “tangible form of expression.”⁴¹ To qualify for copyright protection, the work must be independently created by the author, fixed in a tangible medium of expression, and possess a minimal degree of original creativity.⁴² Under the Act, when a person creates an original work, she automatically owns exclusive rights to the content.⁴³ For works published after 1977, copyright

33. In exchange for hosting the content, YouTube receives a portion of the uploaded content. *See also* McConnell, *supra* note 31.

34. Over one hundred hours of content is uploaded onto YouTube every minute. *See* McConnell, *supra* note 31.

35. Paul Tassi, *PewDiePie Calls Nintendo's New YouTube Program 'A Slap In The Face'*, FORBES (Jan. 20, 2015) <https://www.forbes.com/sites/insertcoin/2015/01/30/pewdiepie-calls-nintendos-new-youtube-program-a-slap-in-the-face/#7d3439ed34d8>.

36. *See* Klepek, *supra* note 7.

37. *See id.*

38. *Id.*

39. *See* Andrew Middlemas, *The Legalties of Let's Play – Reader's Feature*, METRO (May 19, 2013), <http://metro.co.uk/2013/05/19/the-legalities-of-lets-play-readers-feature-3788322>.

40. *See* Copyright Act of 1976, 17 U.S.C. §§ 101–810 (2018).

41. Copyright Act of 1976, 17 U.S.C. § 102.

42. *See id.*

43. *Id.*

protection lasts for the life of the author plus an additional seventy years.⁴⁴ For an anonymous work or work made for hire, such as for a corporation, copyright protection last for a term of ninety-five years from the date of its first publication.⁴⁵ Copyright law protects works such as movies, paintings, software code, photographs, and video games.⁴⁶

B. THE DIGITAL MILLENNIUM COPYRIGHT ACT

“The Internet has been characterized as the largest threat to copyright since its inception.”⁴⁷ In response to this evolving threat, the Act was amended to include the Digital Millennium Copyright Act (DMCA).⁴⁸ Passed in 1998, the DMCA is the basis of most copyright law regarding digital rights.⁴⁹ The purpose of the DMCA is to prohibit the unlawful online distribution of a protected work.⁵⁰ Video-sharing websites often host user uploaded content, which often utilizes footage from different copyrighted materials. Accordingly, Section 512 of the DMCA contains a “safe-harbor” provision which grants a statutory exemption from copyright liability for online service providers.⁵¹ Online companies are not required to comply with the safe harbor provision, however, doing so helps preemptively avoid liability for hosting copyrighted material on their systems.⁵²

These safe harbor provisions mandate a notice and takedown regime, whereby copyright holders alert online companies of infringing works on their sites.⁵³ Once notified, online service providers are shielded from liability for storing infringing material, provided they promptly remove the potentially infringing content,⁵⁴ and have no “actual”⁵⁵ or effective

44. *id.*

45. *id.*

46. See *WHAT DOES COPYRIGHT PROTECT?*, COPYRIGHT.GOV, <https://www.copyright.gov/help/faq/faq-protect.html> (last visited Jan. 1, 2019) (defining copyright as “a form of intellectual property law, protects original works of authorship including literary, dramatic, musical, and artistic works, such as poetry, novels, movies, songs, computer software, and architecture”).

47. Virginia Montecino, *Copyright and the Internet*, GMU EDU. & TECH. RES., <https://mason.gmu.edu/~montecin/copyright-internet.htm> (last visited Jan. 1, 2019).

48. See 17 U.S.C. §§ 101–810 (2010).

49. See 17 U.S.C. § 512.

50. For further information about the purpose of the DMCA, see Edward Lee, Article, *Decoding the DMCA Safe Harbors*, 32 COLUM. J.L. & ARTS 233, 243 (2009) (stating that “the whole purpose of the DMCA safe harbors was to provide certainty for copyright owners and internet service providers with respect to copyright infringement liability online”).

51. See 17 U.S.C. § 512.

52. See *id.* (providing that an “online service provider shall not be liable for monetary relief, or . . . for injunctive or other equitable relief, for infringement of copyright by reason of the provider’s transmitting, routing, or providing connections for”).

53. See *id.*

54. *id.* (stating that an online service provider is shielded from liability providing that “upon notification of claimed infringement . . . responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity”).

55. See *id.*

knowledge that the material in question is infringing.⁵⁶ If they do not adhere to these standards, online service providers can lose their safe harbor status and potentially face legal action for additional infringement.⁵⁷

To comply with the DMCA, YouTube took a proactive stance on identifying potential cases of copyright infringement.⁵⁸ Initially, YouTube used a “copyright takedown” system for the purpose of managing copyright infringement.⁵⁹ When a YouTube user had three strikes, YouTube revoked access to that user’s accounts, removed all videos, and refused further account registration on the domain.⁶⁰ YouTube copyright takedowns resulted in the mass removal of infringing material from the website.⁶¹ However, YouTube user’s and copyright holders alike felt as if this system was too punitive.⁶²

In response, YouTube employed “Content ID,” a “digital fingerprinting system” which allows copyright holders to identify and manage their content.⁶³ Registration is optional, and granted only to copyright holders who own “exclusive rights to a substantial body of original material” which is commonly uploaded to YouTube.⁶⁴ Once registered, content owners upload copyrighted content into a database of audio and video files, constructing a trackable digital fingerprint of their content.⁶⁵ Content ID then compares user uploaded videos against the database, seeking matches through the automated system.⁶⁶ If Content ID flags an uploaded video with an already registered digital fingerprint, the uploaded video will be flagged via a Content ID claim.⁶⁷ Once flagged, copyright owners are notified of the potentially infringing use.⁶⁸

Copyright holders can choose to remove, demonetize, or redirect future advertisement profits from the video for themselves.⁶⁹ When a claim is

56. *See id.*

57. *See id.*

58. Paul Tassi, *The Injustice of The YouTube Content ID Crackdown Reveals Google’s Dark Side*, FORBES (Dec. 19, 2013), <https://www.forbes.com/sites/insertcoin/2013/12/19/the-injustice-of-the-youtube-content-id-crackdown-reveals-googles-dark-side/#19259e9566c8>.

59. *See Copyright strike basics*, YOUTUBE HELP (2017), <https://support.google.com/youtube/answer/2814000?hl=en> (last visited Jan. 1, 2019).

60. *See id.*

61. *See id.*

62. *See* Russell Brandom, *YouTube’s complaint system is pissing off its biggest users*, THE VERGE (Feb. 1, 2016), <https://www.theverge.com/2016/2/1/10887120/youtube-complaint-takedown-copyright-community>.

63. *HOW CONTENT ID WORKS*, *supra* note 9.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

initially filed on YouTube, the uploader may dispute it.⁷⁰ YouTube holds advertisement revenue until the end of the dispute.⁷¹ Once the Content ID dispute is resolved, YouTube will provide the held advertisement revenue to the winning party.⁷² Since January 2014, Content ID claims “have outnumbered copyright takedowns by more than fifty to one.”⁷³

While Content ID ensures that infringing content is quickly removed from the website, thus protecting YouTube from liability under the DMCA, fair use is not implemented whatsoever. Every potential case of copyright infringement identified by Content ID triggers an automatic copyright claim,⁷⁴ regardless of the legitimacy of the claim. Consequently, thousands upon thousands of LP videos have been flagged under Content ID claims without a consideration of fair use.⁷⁵

III. FAIR USE

Fair use is a limitation on a copyright owner’s exclusive rights, and functions as a defense to an action for copyright infringement.⁷⁶ The fair use doctrine was first established by 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.”⁷⁷ The doctrine of fair use relies on the concept that the public has the right without permission “to freely use portions of copyrighted materials for certain purposes.”⁷⁸

Fair use defends freedom of expression when commenting on or critiquing the works of others.⁷⁹ Works derived from copyrighted content must have enough originality that the video changes, becoming its own potentially stand-alone being.⁸⁰ In *Blanch v. Koons*, the Second Circuit emphasized that a fair use of an original work does not “supersede” or duplicate “the objective of the original, but uses it as raw material in a novel

70. See *Dispute a Content ID claim*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2797454?hl=en> (last visited Jan. 1, 2019).

71. See *COPYRIGHT STRIKE BASICS*, *supra* note 59.

72. *WHAT IS A CONTENT ID CLAIM?*, YOUTUBE HELP (2017), <https://support.google.com/youtube/answer/2797454?hl=en> (last visited Jan. 1, 2019).

73. *THE DIFFERENCE BETWEEN COPYRIGHT TAKEDOWNS AND CONTENT ID CLAIMS*, YOUTUBE HELP (2017) <https://support.google.com/youtube/answer/7002106?hl=en> (last visited Jan. 1, 2019).

74. *WHAT IS A CONTENT ID CLAIM?*, *supra* note 72.

75. See Middlemas, *supra* note 39.

76. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580 (1994).

77. *Id.* at 577.

78. *Copyright & Fair Use Basics for Nonprofits*, PUB. COUNSEL L. CTR. (May, 2010), <http://www.publiccounsel.org/tools/publications/files/fairuse.pdf>.

79. See *Campbell*, 510 U.S. at 569; see also *Equals Three, LLC v. Jukin Media, Inc.*, 139 F.Supp.3d 1094, 1107 (2015).

80. See *Campbell*, 510 U.S. at 569; see also *Equals Three*, 139 F. Supp. 3d at 1094.

way to create new information, new aesthetics, or new insights.”⁸¹ This principle recognizes that society can often benefit from the unauthorized use of copyrighted materials when the use furthers new education, informs the public, or changes the underlying work.⁸²

When determining fair use, the law requires balancing four factors.⁸³ These factors come directly from the fair use provision, Section 107 of the Act.⁸⁴ To determine whether use of a copyrighted work qualifies as fair use is based on the following factors: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.⁸⁵

The test “involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society’s competing interest in the free flow of ideas, information, and commerce on the other hand.”⁸⁶ Despite the lack of such language in the statute, the Supreme Court has characterized fair use as an affirmative defense, and has placed the burden of proving fair use on the defendant.⁸⁷ Before issuing a notice of infringement under the DMCA, copyright holders must first consider whether a work utilizing their copyrighted material is fair use, and must have a “good-faith belief” that the work in question is infringing.⁸⁸ However, this test has presented adjudicatory issues.

Courts struggled to determine how to consistently apply the fair use doctrine.⁸⁹ There is no presumption for or against the fair use of a work and there is no bright-line threshold.⁹⁰ Instead, courts conduct a case-by-case analysis to determine whether use of a copyrighted work qualifies as fair use.⁹¹ Rather than simply calculating the factors, courts evaluate them together, as well as any others it finds relevant, in arriving at a holistic

81. *Blanch v. Koons*, 396 F. Supp. 2d 476, 481 (2006) (holding that the copyrighted work was being used as “raw material” for a new commercial objective, and therefore, the use was transformative).

82. *See* Copyright Act of 1976, 17 U.S.C. § 107 (2018).

83. *Id.*

84. *Id.*

85. 17 U.S.C. §107.

86. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

87. *See Perfect 10 v. Amazon.com*, 508 F.3d 1146, 1158 (9th Cir. 2007) (noting that “[i]n a motion for preliminary injunction, once the moving party has shown a likelihood of success for a copyright infringement claim, the burden shifts to the nonmoving party to show a likelihood that the affirmative defense of fair use will succeed”).

88. *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1151–52 (2015).

89. *See Princeton Uni. Press v. Michigan Doc.*, 99 F.3d 138, 1392 (6th Cir. 1996).

90. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994).

91. *See id.* at 580.

conclusion.⁹² The application of fair use is presumed to be uncertain.⁹³ In *Princeton University Press v. Michigan Document Services*, the Sixth Circuit asserted that “fair use is one of the most unsettled areas of the law . . . the doctrine has been said to be so flexible as to virtually defy definition.”⁹⁴

Without a formal finding of fair use, YouTube, through Content ID, preemptively shifts the neutral assumption of fair use against the video uploader.⁹⁵ LP creators maintain that LP videos use the underlying work in a new, innovative way, transforming the underlying work and establishing its use as fair.⁹⁶

A. PURPOSE AND CHARACTER OF THE USE

The first factor in a fair use inquiry is “the purpose and character of the use.”⁹⁷ The purpose and character of the copyrighted content’s use under the first prong of the fair use analysis is comprised of two elements: (1) whether the use is commercial, and (2) whether the use is transformative.⁹⁸

1. Commercial Nature of the Use

The first factor asks whether an alleged infringer intended to gain commercial benefit from the appropriation of the underlying work.⁹⁹ Copies made for commercial or profit-making purposes are presumptively unfair.¹⁰⁰ Courts are more likely to find nonprofit, educational, and non-commercial uses as fair.¹⁰¹

LP videos are for-profit.¹⁰² YouTube monetizes videos uploaded to their domain, and uploaders can receive fifty-five percent of profits generated from advertisement revenue.¹⁰³ The growing popularity of the genre makes LP videos a lucrative venture.¹⁰⁴ YouTube LP video star Felix Kjellberg, known on YouTube as PewDiePie, made four million dollars in

92. See *Perfect 10 v. Amazon.com*, 508 F.3d 1146, 1163 (9th Cir. 2007).

93. See *Princeton Uni. Press*, 99 F.3d at 1392.

94. *Id.*

95. By eliminating the presumption of neutrality, Content ID undermines the fair use defense. See also Tassi, *supra* note 58 (asserting that the Content ID system “operates under a “guilty until proven innocent” system”).

96. See *Are Let’s Play Videos Illegal*, *supra* note 6.

97. Copyright Act of 1976, 17 U.S.C. § 107 (2018).

98. See *id.*

99. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994).

100. See 17 U.S.C. § 107.

101. See *Campbell*, 510 U.S. at 584.

102. See Zoia, *supra* note 4; see also Madeline Berg, *The World’s Highest-Paid YouTube Stars 2015*, FORBES (Oct. 14, 2015), <https://www.forbes.com/sites/maddieberg/2015/10/14/the-worlds-highest-paid-youtube-stars-2015/#275412903192>.

103. See McConnell, *supra* note 31 (discussing that YouTube “runs a Partner Program which means that the owner of a video channel can earn a share of the money made from video ads on the site”).

104. See *id.*

2013, a figure which sky-rocketed to twelve million dollars in 2015.¹⁰⁵ Smaller channels can still earn up to one thousand dollars a month, depending on viewership.¹⁰⁶ Since YouTube content creators garner revenue from LP videos, these videos are clearly commercial for the purpose of a fair use analysis. Therefore, this factor could favor copyright holders. However, even if a use is for profit, there is no presumption that a commercial use of copyrighted material necessarily precludes protection of fair use.¹⁰⁷ Other considerations can shift factor one in favor of fair use.¹⁰⁸

2. Transformative Nature of the Use

The central purpose of this secondary inquiry determines whether the allegedly infringing work merely displaces the original creation, or instead “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”¹⁰⁹ This prong rests on the change in the underlying work.¹¹⁰ The unauthorized work will be shielded by fair use if the alleged infringer changed the original material in a way that there is a new value added to the work.¹¹¹ In *Campbell v. Acuff-Rose Music*, the Supreme Court held that the sampling of a song, though clearly purposed for commercial gain, was in favor of fair use because the new song transformed the underlying work into a new, innovative product.¹¹² A finding of transformative use lowers the weight of the other fair use factors.¹¹³ For purposes of this analysis, whether LP videos are transformative will play a fundamental role in determining whether their works are fair use or infringing.

LP creators argue that by the inclusion of commentary, LP videos change into an entirely different work, deserving its own protection.¹¹⁴ In *Equals Three, LLC v. Jukin Media, Inc.*, the Ninth Circuit held that the use of additional “jokes, narration, graphics, editing, and other elements,” added a new meaning to copyrighted viral videos, with a different purpose and character, making its appropriation transformative.¹¹⁵ Similar to *Equals Three*, LP creators use humorous commentary to review, critique, or give hints on clever play-through. Further, the quality of commentary can be

105. See Zoia, *supra* note 4 (reporting that Felix Kjellberg obtains an “estimated monthly revenue from YouTube ads [that] fluctuates between \$140,000 and \$1.4 million”); see also Berg, *supra* note 102 (reporting that Felix Kjellberg “earned \$12 million” in 2015).

106. See Zoia, *supra* note 4 (reporting that smaller channels can earn an estimated “between \$600 and \$1,000 a month in ad revenue” a month depending on viewership”).

107. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994).

108. See *id.*

109. *Id.* at 579.

110. See *id.*

111. See *id.*

112. See *id.* at 584.

113. See *id.* at 579.

114. See *Are Let’s Play Videos Illegal*, *supra* note 6.

115. *Equals Three, LLC v. Jukin Media, Inc.*, 139 F.Supp.3d 1094, 1105 (2015).

vital to the success of an LP creator. A preferred few LP gamers have obtained virtual celebrity status, perhaps demonstrating that commentary provided by the LP gamer can be just as important as the gameplay itself.¹¹⁶ In this aspect, a LP video is clearly transformative.

Conversely, copyright holders argue against the first factor leaning towards a finding of fair use. Simply labeling something transformative does not automatically make its use fair.¹¹⁷ One has to evaluate the level of the alleged transformation.¹¹⁸ In *Castle Rock Entertainment, Inc. v. Carol Publishing Group*, the Second Circuit declined fair use protection to a trivia book based on the television show *Seinfeld*, holding that the books retelling of the show through trivia insignificantly altered the original copyrighted work.¹¹⁹ LP commentary can range from critical insights on the value of game play, to startled shouts, politically incorrect statements, and indecipherable vulgarity.¹²⁰ In this regard, many copyright holders argue that merely shrieking vulgarity over a copyrighted work is not a significant change to regard its appropriation as transformative art.¹²¹ Regardless, through critical insights, some LP creators bring an additional level of innovation to the underlying work, clearly sufficient enough to satisfy a transformative analysis under *Equals Three* and significantly alter the original work under *Castle Rock Entertainment*.¹²²

LP videos are transformative. While the literal video game content in LP videos remain unchanged, LP videos include commentary critiquing or reviewing the game, giving hints on how to beat a difficult section, or the player's reaction to parts of the game. The level of commentary must substantially alter the underlying material, and unedited vulgarity or other unsubstantial comments over a copyrighted work may not produce a significant change. Still, because a fair use analysis of alleged copyright infringement is done on a case-by-case basis, it is unlikely that cases of LP videos evidencing a lack of substantial change would be detrimental to the genre as a whole. Therefore, this factor should favor creators of LP videos.

B. THE NATURE OF THE COPYRIGHTED WORK

The second factor is an assessment of “the nature of the underlying work.”¹²³ The second prong of the fair use analysis is comprised of two

116. See Zoia *supra*, note 4.

117. See Feist Publ'n, Inc. v. Rural Telephone Serv. Co., 499 U.S. 340, 358–59 (1991).

118. See *id.*

119. See *Castle Rock Entm't, Inc. v. Carol Publ'g Grp.*, 150 F.3d 132, 143 (1998).

120. See Rob Walker, *PewDiePie Is the Most Popular YouTube Star in the World. Why?*, YAHOO FIN. (Sept. 3, 2014), <https://finance.yahoo.com/news/pewdiepie-truly-why-96476190194.html>.

121. *Id.*

122. See *Equals Three, LLC v. Jukin Media, Inc.*, 139 F.Supp.3d 1094, 1105 (2015); see also *Castle Rock Entm't*, 150 F.3d at 143.

123. Copyright Act of 1976, 17 U.S.C. § 107 (2018).

elements: (1) the extent to which the underlying work is creative or factual and (2) whether the work is published or unpublished.¹²⁴

1. Creative or Factual

This element looks at how much creativity was needed to produce the original work.¹²⁵ When conducting a fair use analysis, the less creative the underlying material is, the more this factor favors fair use. Facts generally cannot receive copyright protection to prevent ownership of material that rightfully belongs in the public domain.¹²⁶ Accordingly, names, telephone numbers, and addresses cannot be protected by copyright because the material is merely factual.¹²⁷ However, factual information may be protected, “if it features an original selection or arrangement.”¹²⁸ Therefore, scientific articles, historical accounts, and nonfiction are also protected under copyright law.

While factual information in original selection or an arrangement are protected under copyright law, they are not afforded the highest level of protection, because the work does not evidence a high level of creativity. On the other hand, if the original work requires a considerable amount of creativity, such as a fictional work, it enjoys greater legal protection, and its appropriation is less likely to be protected under the fair use defense.¹²⁹

Video games are highly creative content. Video games usually are fictitious, extremely imaginative, creative content. A great deal of effort goes into the stylization and story-lines of video games. Part of the appeal of a video game is the vision of the product, which can include gameplay, visual style, story, and cinematics.¹³⁰ Video game companies often employ highly skilled video game designers, illustrators, and motion graphic artists to design the underlying content and can spend up to sixty million dollars to ensure in development cost.¹³¹ Therefore, this factor is favorable to copyright holders.

124. *See id.*

125. Copyright protection requires the work to contain a modicum of creativity. Factual information does not require creativity, and thus, it is not copyrightable. *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 345 (1991) (noting that the “requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be”).

126. *See id.* (stating that “facts and discoveries, of course, are not themselves subject to copyright protection”).

127. *See id.* at 363.

128. *Id.* at 348.

129. *See generally id.* at 358–59 (discussing that creative works “requires only that the author make the selection or arrangement independently and that it display some minimal level of creativity.” However, this case asserts that there are a “narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent”).

130. *See How Much Does It Cost To Make A Big Video Game?*, KOTAKU (Jan. 15, 2014), <https://kotaku.com/how-much-does-it-cost-to-make-a-big-video-game-1501413649>.

131. *See id.*

2. Published or Unpublished

Further considerations include whether the work is published or unpublished.¹³² Courts afford a higher protections to unpublished works.¹³³ In *Harper & Row v. Nation Enterprises*, the Supreme Court held that granting an author the right to first publication¹³⁴ grants an “obvious benefit to author and public alike in assuring authors the leisure to develop their ideas free from fear of expropriation.”¹³⁵ Granting authors the right to perfect their work freely outweighs “any short-term” value “to be gained from premature publication.”¹³⁶ Therefore, the fact that an author’s work is unpublished is a factor tending to negate the defense of fair use.¹³⁷

Video games are not provided heightened protection as an unpublished work. Much of the underlying work that LP videos appropriate are published and readily available for public consumption. Therefore, this factor should favor creators of LP videos.

It is not clear whether LP videos would be protected under the second factor of the fair use test. While video games are creative material, which should generally afford it a high standard of protection, the underlying work is published. Hence, this factor is split and is not considerable assistance in determining whether LP videos constitute fair use. It is important to note, that in *Triangle Publications, Inc. v. Knight-Rider Newspapers, Inc.*, the Fifth Circuit stated this factor was the least determinative of the four factors.¹³⁸

C. THE AMOUNT AND SUBSTANTIALITY OF THE PORTION USED IN RELATION TO THE COPYRIGHTED WORK AS A WHOLE

The third factor in a fair use inquiry is “the amount and substantiality of the portion used in relation the copyrighted work as a whole.”¹³⁹ This prong is comprised of two elements: (1) the quantity of the underlying appropriated work in relation to the whole, and (2) the quality and importance of the material used.¹⁴⁰

132. See *N.Y. Times v. Roxbury Data Interface*, 434 F. Supp. 217, 221 (D.N.J. 1998).

133. See *Harper & Row Publisher v. Nation Enter.*, 471 U. S. 539, 551 (1985).

134. The right of first publication is an author’s right to be the first publisher of their work. *Id.* at 553. The right of first publication grants the authors the time to edit their work. *Id.* at 555. Without this, authors may rush to the market with their work for fear of premature publication by someone else. *Id.* at 551.

135. *Id.* at 555.

136. *Id.* at 551.

137. See *id.* at 555.

138. See *Triangle Publ’n, Inc. v. Knight-Ridder Newspapers, Inc.*, 626 F.2d 1171, 1176 (1980) (stating that the second factor “neither supports nor hurts . . . claim that a fair use defense is appropriate here”).

139. Copyright Act of 1976, 17 U.S.C. § 107 (2018).

140. *Id.*

1. Quantitative Analysis

This element looks at a numerical analysis of the underlying work taken for new use.¹⁴¹ Courts must consider the extent of the copied portion in relation to the copyrighted work as a whole.¹⁴² There are no hardline numerical limits to how much of the material can be copied. In general, the less that is used, the more likely the use will be considered fair.¹⁴³ Conversely, the more underlying work that is appropriated by an alleged infringer, the less likely that its adoption will be excused as fair.¹⁴⁴

In *Sony Computer Entertainment America, Inc. v. Bleem*, the Ninth Circuit determined that the defendants use of copyrighted screenshots in a commercial advertisement were the equivalent of “1/30th of a second’s worth of the video game,” and thus permissible as it only constituted a minimal appropriation.¹⁴⁵ Unlike in *Sony*, LP videos are not second long screen grabs and instead, vary in length and appropriated content used. LP videos can document the entirety of a video game. As LP videos show these animations for long durations, LP videos use a substantial portion of the underlying material. Therefore, this factor could favor copyright holders.

However, using most or all of a work does not preclude a finding of fair use if the use does not evidence the ordinary effect of suggesting a finding against fair use.¹⁴⁶ This inquiry readdresses the first factor: purpose and character of use.¹⁴⁷ Courts have ruled in favor of fair use when works are transformative, even when large amounts of a work is used.¹⁴⁸ A transformative work is not a per se duplication of the original work and does not supplement the copyrighted material. Thus, a transformative work will not adversely affect the market of the copyrighted work, no matter how much is appropriated.¹⁴⁹

As noted, LP videos are transformative. Several LP videos are substantially creative due to extensive preparation, comprehensive commentary and criticism, clever editing and visual displays. Thus, if LP videos are found to be transformative, substitution is unlikely and the quantity of the work appropriated may not be indicative of a finding against fair use. Therefore, this factor could favor creators of LP videos.

141. *Id.*

142. *Id.*

143. *See Sony Comput. Entm’t Am. Inc. v. Bleem LLC*, 214 F.3d 1022, 1028 (2000).

144. *Id.*

145. *Id.*

146. *See Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 449 (1984).

147. *See Copyright Act of 1976*, 17 U.S.C. § 107 (2018).

148. *See Sony Corp.*, 464 U.S. at 449 (noting that videotaping for the purpose of viewing at a later time had no effect on the market because the videotaping of television programs “merely enables a viewer to see such a work which he had been invited to witness in its entirety”); *see also Harper & Row Publisher v. Nation Enter.*, 471 U. S. 539, 564 (1985) (explaining that even substantial quotations might qualify as fair use “in a review of a published work or a news account of a speech” but not in a scoop of a soon-to-be-published memoir).

149. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 570 (1994).

2. Qualitative Analysis

Additionally, courts have evaluated substantive analysis into this prong, and this factor now considers both the quantitative and the qualitative significance of the underlying work.¹⁵⁰ This factor asks whether the “heart” of the copyrighted work is duplicated.¹⁵¹ Even the use of a small percentage of a work can make the third factor unfavorable to the defendant if the “heart” of the work is copied. In *Harper*, the Supreme Court refused to find fair use even where only a minimal amount of a long novel was copied because the appropriated section was the “essence” of the entire piece of the underlying work.¹⁵² If the “heart” of the work is copied, it is tantamount to a taking of the entirety of the work, and the less likely that its appropriation will be excused as fair.¹⁵³

LP videos consist of a recording of displays of a video game. Similar to *Harper*, copyright owners assert the visual displays of an LP video is the “heart” of the underlying work.¹⁵⁴ However, LP uploaders argue that the heart of a video game is not the displays themselves, but the fact that the games are playable.¹⁵⁵ This argument relies on the theory that the attraction to video games is that it gives individuals the chance to play a role.¹⁵⁶ Video games are functional. Gameplay, making decisions such as walking into a building, using certain battle moves, and conversing with other characters, results in achievements and winning levels. But the game must be played to experience those achievements. Regarding LP videos, the viewer merely watches the video game on YouTube. They have no opportunity to make any gameplay decisions. LP videos are inactive, and are as much actually playing a video game, as watching a football game on television is actually participating in the sport. The game must be played to go to the “heart” of the original game itself.¹⁵⁷ While the display of a video game is appropriated for LP videos, the alleged essence of the work, its playability, is not. Instead, the appeal of LP videos is derived from the vicarious enjoyment of watching someone else play a video game.¹⁵⁸ Therefore, this factor could favor creators of LP videos.

150. See *Harper & Row Publishers*, 471 U.S. at 544.

151. See *id.* at 600.

152. See *id.*

153. See *id.* at 564–65.

154. See Andrew Przybylski, *Getting to The Heart of The Appeal of Videogames*, PSYCHOL. SCI. (Aug. 3, 2011), <https://www.psychologicalscience.org/news/releases/getting-to-the-heart-of-the-appeal-of-videogames.html> (noting that “new research led by scientists at the University of Essex investigated the idea that many people enjoy playing videogames because it gives them the chance to ‘try on’ characteristics which they would like to have as their ideal self.”).

155. See *id.*

156. See *id.*

157. See *id.*

158. See Lee, *supra* note 26.

While LP videos display a significant portion of a video game, as a transformative work, LP videos do not supplement the market of video games. Further, the video game displays themselves are arguably not the “heart” of the copyrighted work. Therefore, this factor could favor creators of LP videos.

D. THE EFFECT OF THE USE UPON THE POTENTIAL MARKET FOR OR VALUE OF THE COPYRIGHTED WORK

The fourth factor in a fair use inquiry is “the effect of the use upon the potential market for or value of the copyrighted work.”¹⁵⁹ In *Stewart v. Abend*, the Supreme Court articulated that the fourth factor is the “most important, and indeed, central fair use factor.”¹⁶⁰ This element requires a consideration of the economic impact the allegedly infringing work may have on the market for the original work.¹⁶¹ This factor requires proof that either the particular use is harmful, or that if it should become widespread, it would adversely affect the market of the original work.¹⁶² This factor is determinative of a conclusion of the first element: the purpose and character of the use.¹⁶³ In *Campbell*, the Supreme Court held that parodies do not harm the marketability of the original copyrighted work because, as a transformative work, they serve different market functions.¹⁶⁴ Therefore, if the allegedly infringing use causes a marked change in the existing work, sufficient enough to transform the original work into a new one, its use will be deemed to serve a different market function, and its appropriation will weigh towards a finding of fair use.¹⁶⁵

LP videos are a mixture of original content and copyrighted work. Similar to *Campbell*, LP uploaders argue that LP videos do not harm the potential market for the value of the copyrighted work. LP videos are clearly transformative. LP video commentary is a sufficient addition to create an entirely new experience for the user which should not replace the need for the original video game. As a new transformative work, LP videos serve a different market function. The original work cannot be substituted because of the distinction in “watching” a game and “playing” a game. Watchers of LP videos are unlikely to feel as if they have “played” the video game, and are only likely to skip purchasing the video game if the uploader gives a bad review. Bad reviews, however, are not detrimental to a

159. Copyright Act of 1976, 17 U.S.C. §107 (2018).

160. *Stewart v. Abend*, 495 U. S. 207, 238 (1990).

161. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

162. *See id.*

163. *See id.* at 570.

164. *See id.* at 591.

165. *See id.* at 570.

finding of fair use.¹⁶⁶ Thus, because LP videos are transformative, market substitution is unlikely.

Further, LP videos can increase video games potential marketability, as they promote and advertise the video game.¹⁶⁷ Indie video game developer Mike Bithell noted that when famous YouTube LP personality “Total Biscuit” made a video about his video game he ended up selling eight times as many games as he did when he initially launched the game.¹⁶⁸ Bithell stated “in a matter of hours, I was outselling Assassin’s Creed 3 on Steam. And that’s not rare, every indie who’s received coverage from TB [Total Biscuit], or a Let’s Play from Pewdie or NerdCubed, has a similar story.”¹⁶⁹ LP videos can earn video games a substantial amount of revenue through publicity. Conversely, there is no evidence proving the market harm of LP videos to video game creators. Therefore, it can be assumed that it is unlikely that LP videos cause harm to the market of video game. Therefore, this factor could favor creators of LP videos.

Ultimately, it is unclear if LP videos are protected under the fair use doctrine. Factor one weighs towards a finding of fair use because LP videos are transformed through criticisms, commentary and jokes. Factor two is inconclusive. Factor three weighs towards a finding of fair use because as a transformed work, LP videos are not a commercial substitute for the original work. Further, the underlying work that is copied is arguably not the essence of the work. Finally, factor four suggest a finding of fair use because, as a transformative version of a copyrighted work, LP videos do not impair the market value of the original work. Nonetheless, as previously stated, rather than simply counting up these factors, courts evaluate them together to arrive at a holistic conclusion.¹⁷⁰ The analysis is not a simple calculation of “three in favor, one against.”¹⁷¹

It is important to stress, however, that this Note is not declaring that LP videos are conclusively protected under the doctrine. Rather, this Note is asserting that a conceivable fair use defense is possible, as evidenced by the abovementioned analysis, and LP videos should not preemptively be deemed infringing. Copyright owners should not be able to assert ownership over the intellectual property of an LP video until this ambiguity is cleared. YouTube does nothing to identify possible cases of fair use.¹⁷² This leaves LP content creators vulnerable to intimidation by copyright

166. *See id.* at 592.

167. *See* Asano, *supra* note 1.

168. *See* Jeffrey Matulef, *Nintendo Now Claiming Ad Revenue for YouTube Let’s Play Videos*, EUROGAMER (May 16, 2013), <http://www.eurogamer.net/articles/2013-05-16-nintendo-now-claiming-ad-revenue-for-youtube-lets-play-videos>.

169. *Id.*

170. *See* Perfect 10 v. Amazon.com, 508 F.3d 1146, 1163 (9th Cir. 2007).

171. *Id.*

172. *See* *Nintendo Creators Program End User License Agreement*, NINTENDO, <https://r.npc.nintendo.net/terms/> (last visited Jan. 1, 2019).

holders who, under YouTube's permissive standards, are allowed to claim ownership and revenue of LP videos.¹⁷³ Enter Nintendo Co. Ltd.

IV. THE NINTENDO CREATOR PROGRAM

The relationship between YouTube users and Nintendo has been tumultuous.¹⁷⁴ Nintendo Co., Ltd. is a Japanese video game company headquartered in Kyoto, Japan.¹⁷⁵ Founded in 1889, Nintendo is one of the world's oldest, largest and most well-known video game creators, developing video game franchises such as *Super Mario Brothers*, *The Legend of Zelda*, and *Pokémon*. Nintendo has been one of the most aggressive users of Content ID on YouTube.¹⁷⁶ Since 2013, Nintendo claimed all revenue from LP videos found to contain non-licensed Nintendo material from the content creators to themselves.¹⁷⁷ In 2015, Nintendo announced the "Nintendo Creators Program."¹⁷⁸ Nintendo explained:

Nintendo has been permitting the use of Nintendo copyrighted material in videos on YouTube under appropriate circumstances. Advertisements may accompany those videos, and in keeping with previous policy that revenue is shared between YouTube and Nintendo. In addition, for those who wish to use the material more proactively, we are preparing an affiliate program in which a portion of the advertising profit is given to the creator.¹⁷⁹

The Nintendo Creators Program is relatively unprecedented. The affiliate program allows Nintendo to assert ownership of LP videos using Nintendo-related content. YouTube is the sole domain the affiliate program is presently on.¹⁸⁰

The Nintendo Creators Program encourages LP creators to "partner" with Nintendo and allows LP creators to use gameplay footage of Nintendo-related material in uploaded videos.¹⁸¹ Operating as a "limited, non-exclusive, non-transferable license," the Nintendo Creators Program allows the use of "characters, images and intellectual property as identified or

173. See *WHAT IS FAIR USE?*, YOUTUBE, <http://www.youtube.com/yt/copyright/fair-use.html> (last visited Jan. 1, 2019).

174. See Eric Johnson, *Nintendo's YouTube Revenue-Sharing Policy Is Here – With Lots of Strings Attached*, RECODE (Jan. 29, 2015), <https://www.recode.net/2015/1/29/11558312/nintendos-youtube-revenue-sharing-policy-is-here-with-lots-of-strings>.

175. See Tegan Jones, *The Surprisingly Long History of Nintendo*, GIZMODO (Sept. 20, 2013), <https://gizmodo.com/the-surprisingly-long-history-of-nintendo-1354286257>.

176. See Johnson, *supra* note 174.

177. See *id.*

178. See Yannick LeJacq, *Nintendo Has A Plan to Share Money With YouTubers*, KOTAKU (May 27, 2014), <https://kotaku.com/nintendo-has-a-plan-to-share-money-with-youtubers-1582170982>.

179. *Id.*

180. See *Nintendo Creators Program End User License Agreement*, *supra* note 172.

181. See *id.*

described by Nintendo.”¹⁸² To participate, YouTube users must create a Nintendo Creators Program account.¹⁸³

LP creators can register specific videos or entire channels.¹⁸⁴ In return, LP creators earn a part of advertising profits from videos uploaded to YouTube containing Nintendo-related materials.¹⁸⁵ If registering specific videos, Nintendo will grant the content creator sixty percent of the fifty-five percent Nintendo receives from YouTube in advertisement revenue.¹⁸⁶ If registering an entire YouTube channel, Nintendo will grant the content creator sixty percent of the fifty-five percent Nintendo receives from YouTube.¹⁸⁷ However, under this agreement, Nintendo will take thirty percent of revenue earned by all of the channels videos, not just the ones with Nintendo games in them.¹⁸⁸ This agreement grants jurisdiction of any disputes arising under this contract to a Kyoto District Court.¹⁸⁹ The Nintendo Creators Program is the only way for YouTube users to earn revenue from LP videos containing Nintendo-related content since videos featuring Nintendo will otherwise be flagged under Content ID.

A. WHAT ABOUT FAIR USE?

The Nintendo Creators Program seemingly operates outside the fair use defense.¹⁹⁰ Under the Nintendo Creators Program, Nintendo maintains that they own the rights to LP videos using Nintendo-related content, without a consideration of fair use.¹⁹¹ Nintendo is able to claim videos even if only a few seconds of game footage appear in them. If creators dispute Nintendo’s claim, under the Nintendo Creators Program, “YouTube asks Nintendo to decide whether the claim is fair.”¹⁹² Perhaps it is in the best interest of copyright holders to preserve the ambiguity of the fair use defense, as they get to decide the validity of the use of their own content. LP content creators are strong-armed into boundaries of the Nintendo Creators Program, regardless if their use is within their legal rights. For small

182. *Id.*

183. *See id.*

184. *See id.*

185. *See id.*

186. *See* Jeff Grubb, *Nintendo Wants A Taste of Your YouTube Action — And Creators Hate It*, VENTURE BEAT (Jan. 30, 2015), <https://venturebeat.com/2015/01/30/nintendo-wants-a-taste-of-your-youtube-action-and-creators-hate-it>.

187. *See Nintendo Creators Program End User License Agreement*, *supra* note 172.

188. *See* Grubb, *supra* note 186.

189. *See* Keza MacDonald, *Nintendo Enforces Copyright on YouTube Let’s Plays*, IGN (May 16, 2013), <http://www.ign.com/articles/2013/05/16/nintendo-enforces-copyright-on-youtube-lets-plays>; *see also Nintendo Creators Program End User License Agreement*, *supra* note 172.

190. *See id.*

191. *See* Steven Bogos, *Nintendo Suddenly Claims Ownership of Many YouTube Videos*, ESCAPIST MAG. (May 6, 2013), <http://www.escapistmagazine.com/news/view/124066-Nintendo-Suddenly-Claims-Ownership-Of-Many-YouTube-Videos>.

192. Cory Doctorow, *YouTube and Nintendo Conspire to Steal from Game Superfans*, BOING BOING (Mar. 27, 2015), <https://boingboing.net/2015/03/27/youtube-and-nintendo-conspire.html>.

content creators, the costs of litigation vastly outweigh the potential revenue generated from a YouTube video. By preemptively discounting an actionable fair use claim via Content ID, YouTube allows Nintendo to assert complete control of LP videos and LP creators hand over rights to their content.¹⁹³ YouTube should have done more to assert the creative fair use rights of content creators, instead of just indiscriminately honoring Nintendo's demands.

It is important to note, that regardless if LP videos constitute fair use or not, YouTube profits. Because the videos are hosted on their domain, YouTube is able to take part in revenue sharing with or without the Nintendo Creators Program.¹⁹⁴ Without the Nintendo Creators Program, YouTube's terms of monetization mandate a two-way split: YouTube provides the content creator with fifty-five percent of advertisement revenue, and retains the additional forty-five percent as a fee for hosting the content. Additionally, The Nintendo Creators Program mandates a three-way split of advertisement revenue. If a user registers a video with the Nintendo Creators Program, YouTube provides Nintendo with fifty-five percent of revenue, still retaining the additional forty-five percent as a fee for hosting the content.¹⁹⁵ Of the fifty-five percent provided by YouTube, Nintendo provides the content creator with thirty-three percent, retaining the additional twenty-two percent as a fee for using Nintendo's intellectual property.¹⁹⁶ This is a loss of twenty-two percent in profit for content creators.

The loss of revenue can damage YouTube content creators, specifically those who make a career off of LP videos.¹⁹⁷ Perhaps this loss in revenue is a harder pill to swallow, considering that fans and creators of LP videos argue that, "Nintendo really, really doesn't need their cash."¹⁹⁸ Instead by taking these sums away, all Nintendo is doing is discouraging LP creators "from continuing to make content from their game."¹⁹⁹

B. CONTRACTUAL OBLIGATIONS

Further, the terms of the contractual obligation under the Nintendo Creators Program poses additional concerns. First, the policy of the Nintendo Creators Program is subject to change. The most enticing portion of the Nintendo Creators Program is the revenue sharing system.²⁰⁰

193. See *Nintendo Creators Program End User License Agreement*, *supra* note 172.

194. See *id.*

195. See *id.*

196. See *id.*

197. See AngryJoeShow, *Youtube Copyright Disaster! Angry Rant*, YOUTUBE (Dec. 11, 2013), <http://www.youtube.com/watch?v=JQfHdasuWtI>.

198. Matulef, *supra* note 168.

199. *Id.*

200. See *Nintendo Creators Program End User License Agreement*, *supra* note 172.

However, the Nintendo Creator's program says that this revenue sharing rate "may be changed arbitrarily."²⁰¹ For "career" YouTube users whose entire income is made from YouTube gaming channels, there is a looming threat of a random change in policy. Further, the license granted under the Nintendo Creators Program is limited and can be revoked or reduced at Nintendo's leisure.²⁰² Thus, at any time, Nintendo could bar the use of specific content. The Nintendo Creators Program, which was launched in 2015, now restricts YouTube users from monetizing live streams of its games, a change announced as late as September 2017.²⁰³ It is unclear why Nintendo introduced this policy, and it is further unclear if any other significant policy changes will follow.

Secondly, while initially billed as a "partnership" between YouTubers and Nintendo, the policy behind the Nintendo Creators Program reads more as working "for" Nintendo, rather than "with" Nintendo. Assume a YouTuber makes a video reviewing the gameplay of a Nintendo video game. Under the shared revenue policy of the Nintendo Creators Program, Nintendo receives a portion of the revenue generated from the video. By uploading a video reviewing a video game, LP videos have to share profit with Nintendo for the rights to simply review their game.

Lastly, Nintendo must approve videos before they can generate advertisement revenue.²⁰⁴ The standards of what constitutes an approvable video is unclear, creating a dilemma for LP content creators. Assume then a YouTube user uploads a review harshly criticizing a Nintendo video game. Anything Nintendo does not like, they could conceivably decide is objectionable, and thus, these videos face the possibility of not being approved. The fear of Nintendo subjectively denying videos increases the likelihood of YouTube users not being genuine in their reports of Nintendo-related material. The fair use doctrine was created to prevent such fear. However, with copyright holders policing their own copyright infringement claims, fair use is weakening to the detriment of content creators.

The DMCA safe harbor provision was not established to permit content owners to monetize works produced by content creators. It is meant to prohibit the unlawful distribution of a copyrighted protected work.²⁰⁵ YouTube, through Content ID, permits content owners to own and monetize user-generated content, regardless if the contents creator's inclusion of the copyrighted work constitutes fair use.²⁰⁶ This incentivizes

201. *Id.*

202. Chloe Spencer, *Nintendo Creators Program Will No Longer Let YouTubers Live-Stream*, KOTAKU (Sept. 29, 2017), <https://kotaku.com/nintendo-creators-program-will-no-longer-let-youtubers-1819000987>.

203. *See id.*

204. *See Nintendo Creators Program End User License Agreement*, *supra* note 172.

205. *See* Copyright Act of 1976, 17 U.S.C. § 512 (2018).

206. *WHAT IS A CONTENT ID CLAIM?*, *supra* note 72.

companies to circumvent the exception of fair use. YouTube has done very little to protect the creative fair use rights of content creators.²⁰⁷ Thus, Nintendo is permitted to take advantage of the ambiguous legal circumstance, overlooking the fair use defense and enforcing non-negotiable, overly one-sided contractual obligations.

V. SOLUTIONS

How can YouTube effectively strike a balance between the rights of copyright owners and the rights of content creators? Content ID has burdened the YouTube LP community with plausibly illegitimate claims.²⁰⁸ By automating the process copyright infringement claims with Content ID, YouTube effectively shifts the presumption of fair use against the uploader.²⁰⁹ This Note examines the conflict with LP videos. LP videos are a clear example of a possible fair use claim that is ultimately undermined by Content ID claims, and the subsequent copyright holder response, via the Nintendo Creators Program. It is clear, that for the survival of an online fair use defense, new regulation from Congress is necessary. However, legislation is arduous and time-consuming. It is not a rapid solution to a current problem. Still, there is hope for YouTube to reform their approach. Therefore, changes to YouTube's policies are necessary to protect LP users and content creators like them.

YouTube should maintain the Content ID system. This Note does not argue that the system is entirely ineffectual. It is essential for copyright owners to maintain control of their creative content.²¹⁰ Content ID is an efficient way for copyright holders to protect against blatant instances of copyright infringement.²¹¹ However, Content ID has had disastrous consequences for the doctrine of fair use. If the principle of fair use is to survive on YouTube, Content ID must be proactive in its policies.

A. AUTOMATING FAIR USE

The Content ID system should take steps to automate a fair use analysis into its system. As it stands now Content ID does not account for potential fair use applications of copyrighted work. It would perhaps be inequitable for YouTube to hire a team of copyright lawyers to police potential fair use claims. Thus, the automatic system of Content ID must adapt. Understandably the automated system cannot identify context, and perhaps a holistic consideration of the four fair use factors is out of the question.

207. See *WHAT IS FAIR USE?*, *supra* note 173. (stating that while YouTube acknowledges the fair use factors, YouTube's algorithm cannot make determinations of fair use).

208. See *YouTube Let's Play Celebrities Hit By Draconian Content*, *supra* note 13.

209. See *id.*

210. *WHAT IS A CONTENT ID CLAIM?*, *supra* note 72.

211. *Id.*

However, there are algorithmic procedures YouTube can put which actively provide accounts of fair use.

Consider the first factor: purpose and character of the use. Content ID can easily determine commerciality by determining if the videos are monetized. Further, when considering transformative changes, YouTube should enable content creators preemptively to assert a fair use claim. By requiring additional information of the nuances of individual videos, such as if an LP video is done for review or commentary purposes, YouTube could make an initial preliminary determination of transformative use. In the event of a dispute, this would also allow copyright holders the chance to consider the potentiality of a fair use of their work.

Consider the third factor: the amount and substantiality of the work. YouTube could easily introduce calculations to determine sets of data about the amount of copyrighted work used. Once this information is recorded, YouTube could establish what a substantial amount is in a fair use presumption for its purposes. Further, YouTube already scans for audio in an uploaded video. It would be easy to add a caveat which examined the amount of original commentary in comparison with the copyrighted works.

Admittedly, the second factor (the nature of copyrighted use), and the fourth factor (the effect on the value of copyrighted work), would be difficult to automate. However, YouTube could possibly defer to developers when considering the nature of their material and the impact of the disputed video on their market. This Note does not conclude that considering the estimation of copyright owners as a negative thing. Copyright holders should have a say in the use of their materials and be allowed to add information to the algorithm. Though not an independent determination, it is a better starting point than ignoring fair use altogether.

B. ENFORCING *LENZ*

YouTube must do more to influence copyright holders into considering fair use. In *Lenz v. Universal Music Corp.*, the plaintiff uploaded a 29-second home video clip, featuring her children dancing in the kitchen, as a copyrighted song played in the background.²¹² The owner of the copyright, Universal Music Group, issued a notice to the video, claiming copyright infringement under the DMCA.²¹³ The plaintiff argued that Universal abused the DMCA's procedures by not first considering whether her video was a fair use.²¹⁴ Universal used a computer algorithm which was not programmed to consider fair use.²¹⁵ The United States Court of Appeals for the Ninth Circuit upheld fair use in this case, asserting that a copyright

212. See *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1145, 1149 (N.D. Cal. 2008).

213. *Id.* at 1149–50.

214. See *id.* at 1151.

215. See *id.* at 1149.

holder must first consider fair use before claiming ownership of the allegedly infringing material.²¹⁶ If a copyright owner does not make such a determination prior to asserting ownership of the video, then it may be liable for nominal damages.²¹⁷ Thus, *Lenz* makes one thing clear: copyright holders must at least consider fair use before issuing a claim of ownership on an allegedly infringing video.²¹⁸

By automatically assuming infringement and assuming ownership, Content ID and the Nintendo Creators Program seemingly overrides judicial precedent set in *Lenz*. Under the current scheme, copyright holders do not have to consider fair use. Before filing a Content ID claim, copyright holders should consider the fair use defense. Further, as outlined in *Lenz*, frivolous or vicious Content ID claims should carry a risk of punishment or damages.²¹⁹ With a more disciplinary system in place, copyright holders have an incentive not to abuse the system.

Lastly, YouTube should remove the Nintendo Creators Program from the domain. By circumventing a fair use defense, the Nintendo Creators Program does not follow judicial precedent. YouTube is quiet on the abuse of claims by copyright holders, perhaps with profit incentives, not pushing copyright owners to abide by existing law. It is unfair to content creators to mandate a licensing program, on content they may or may not have an actionable fair use defense on. Instead, Nintendo should abide by the strengthened guidelines of the Content ID claim.

CONCLUSION

LP content creators seemingly can assert a potentially winning fair use defense. However, by ignoring fair use altogether, Content ID ultimately undermines the doctrine of fair use, significantly encroaching creativity that is a central to the balance of copyright law itself. Therefore, changes to YouTube's policies are necessary to protect LP users and content creators like them.

*Natalie Marfo**

216. *See id.* at 1154.

217. These nominal damages may consist of cost and attorney's fees. *Id.* at 1156.

218. *See id.* at 1154.

219. *See id.*

* B.A. in Political Science & Women's, Gender, and Sexuality Studies, State University of New York at Albany, 2016; J.D. Candidate, Brooklyn Law School, 2019. I would like to thank my parents, Harry Sr. and Comfort, my brothers, Harry Jr. and Michael, and my sister Lauren for their support throughout the writing process. I would also like to thank the staff and editors of the Brooklyn Journal of Corporate, Financial & Commercial Law for their hard work and suggestions.