

Fall 2015

Professional Video Gaming: Piracy That Pays, 49 J. Marshall L. Rev. 217 (2015)

Elizabeth Brusa

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Computer Law Commons](#), [Entertainment, Arts, and Sports Law Commons](#), [Intellectual Property Law Commons](#), and the [Internet Law Commons](#)

Recommended Citation

Elizabeth Brusa, Professional Video Gaming: Piracy That Pays, 49 J. Marshall L. Rev. 217 (2015)

<https://repository.law.uic.edu/lawreview/vol49/iss1/8>

This Comments is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

PROFESSIONAL VIDEO GAMING: PIRACY THAT PAYS

ELIZABETH BRUSA *

I.	INTRODUCTION	218
II.	BACKGROUND.....	221
	A. A Brief History of Copyright Law	222
	B. What Does Copyright Protect?	224
	C. Who Is a Copyright Owner?.....	227
	D. What Rights Are Granted by Copyright?.....	228
	E. Enforcement of Copyright.....	229
	F. The Fair Use Doctrine.....	231
III.	ANALYSIS.....	235
	A. Two Potentially Applicable Cases	236
	1. Cablevision: Streaming of Copyrighted Content Is Not an Unauthorized Reproduction.....	236
	2. Aereo: Streaming of Copyrighted Content Is a Public Performance.....	239
	B. Potentially Infringing Content	241
	1. Real-Time Streaming of Video Gameplay	244
	2. Archived Video of Continuous Video Gameplay.....	246
	3. Tutorials and Walk-Throughs of Video Gameplay.....	249
	C. Potential Defenses to the Potentially Infringing Content.....	251
	1. Fair Use Doctrine.....	251
	2. End User Licensing Agreements	255
IV.	PROPOSAL.....	259
	A. Potential Solutions to the Copyright Infringement Problem	259
	1. Copyright Owners Directly Enforce Their Rights against Infringers	260
	2. Copyright Owners Issue Licenses to Infringers.....	262
	3. Criminalizing Advertising on Webpages Hosting Infringing Content.....	267
	B. Proposed Best Solution to the Copyright Infringement Problem	269
V.	CONCLUSION	270

I. INTRODUCTION

“Game over, man; GAME OVER!”¹ This phrase has been uttered or seen by thousands, if not millions, of gamers over the years. What once was simply an image displayed when play concluded, seen only by those dubbed “nerds,” has worked its way into the common lexicon. Recently, video games have grown in popularity, crossing gender and age barriers.² The majority of video gamers are no longer teen males.³ Further, some highly skilled gamers have founded and joined professional leagues.⁴ Beyond playing video games just for fun, some gamers have even created careers out of this hobby.⁵

This world that used to be reserved for the “nerds” has spilled over into popular culture, gaining a very large following. For instance, consider Celeste Anderson, the first season winner of the viewed-by-millions television show, *King of the Nerds*, on TBS.⁶ Before going on to win the competition, where her “nerdiness” qualifier was professional video gaming, Ms. Anderson posted

* B.A. in English Language and Literature, Northern Illinois University (2005); M.Ed. in Special Education, University of Illinois (2007); J.D., The John Marshall Law School (2016). I would like to thank the editors of THE JOHN MARSHALL LAW REVIEW, Mark Lehman, and my family.

¹ *Aliens*, 20th Century Fox Home Entertainment (1986).

² See Mike Snider, *Wii Finds Home in Retirement Communities, Medical Centers*, USA TODAY (May 15, 2008), available at http://usatoday30.usatoday.com/tech/gaming/2008-05-14-wii-retirement-medical-centers_N.htm (detailing the widespread use of the Wii in retirement centers and among the geriatric population).

³ See *How Much Do You Know About Video Games?* ENTERTAINMENT SOFTWARE RATING BOARD, www.esrb.org/about/video-game-industry-statistics.jsp (last visited Oct. 23, 2014) (describing statistics of the average gamer in 2010, including age (34 years old, with 25% of gamers under 18, 49% between 18 and 49, and 26% over 50), years adult players have been playing video games (12 years), the hours gamers play per week (8 hours), and the gender of all gamers (40% female, 60% male)).

⁴ See *What is eSports?* CALL OF DUTY (Feb. 6, 2014 6:05 PM), https://community.callofduty.com/community/call_of_duty/english/esports/2014/blog/2014/02/06/what-is-esports (describing eSports as competitive video gaming in which gamers compete for cash and other prizes); see also MAJOR LEAGUE GAMING, <http://www.majorleaguegaming.com/> (representing one of the leading eSports leagues that signs professional gamers, hosts video gaming competitions and tournaments, and reports on worldwide eSports news and events).

⁵ See Alex Ceskavich, *These guys have managed to make a living by playing video games*, BUSINESS INSIDER (Mar. 26, 2015), www.businessinsider.com/these-guys-have-managed-to-make-a-living-by-playing-video-games-2015-3 (describing ways in which people earn money by streaming content of themselves playing video games).

⁶ See *King of the Nerds*, TBS, www.tbs.com/shows/king-of-the-nerds.html (last visited Oct. 3, 2014) (providing streaming of previously aired episodes of *King of the Nerds*, which includes Celeste Anderson as the winner of Season 1).

multiple YouTube videos, available to the public, under the username “BiTERSWEET.”⁷ These videos demonstrate Ms. Anderson’s skills at various video games, most notably *Halo*,⁸ and offer tips for playing the games.⁹ Most of these videos have more than a thousand views, with some in excess of ten thousand views.¹⁰

Many gamers turn to Internet hosted video tutorials, like those posted by Ms. Anderson, to discover strategies and cheats and to develop new gaming goals.¹¹ Also, several gamers admiringly watch real-time or archived streaming content of other gamers’ uninterrupted video gameplay.¹² But who really owns the copyrights to this video game content? On the one hand, video game developers would argue they are the rightful copyright owners,¹³ which is further demonstrated by their end user agreements that explicitly state they own all content.¹⁴ On the other hand, consider

⁷ See Celeste Anderson, *Biitersweet*, YOUTUBE, www.youtube.com/user/missceleste/videos (last visited Sept. 10, 2014) (providing links to videos of Ms. Anderson’s video gaming accomplishments, including both videos of Ms. Anderson’s tips and content of Ms. Anderson’s gameplay).

⁸ See HALO OFFICIAL SITE, www.halowaypoint.com/en-us (last visited Nov. 14, 2015) (describing the video game *Halo* and its related sequels).

⁹ See Celeste Anderson, *Biitersweet*, YOUTUBE, www.youtube.com/user/missceleste/videos (last visited Sept. 10, 2014).

¹⁰ *Id.*

¹¹ See, e.g., *Achievements*, WOWHEAD, www.wowhead.com/achievements (last visited Dec. 17, 2015) (listing the current achievements available for players in *World of Warcraft*); *Plants vs. Zombies Achievements*, XBOX ACHIEVEMENTS, www.xboxachievements.com/game/plants-vs-zombies/achievements/ (last visited Dec. 17, 2015) (listing the current achievements available for players in *Plants vs. Zombies*).

¹² See, e.g., *MostAmazingTop10, Top 10 Most Viewed Video Game Channels on YouTube*, YOUTUBE (Oct. 6, 2015), www.youtube.com/watch?v=ZPQoF9ftg0A (describing the top ten most viewed video game channels on YouTube and stating the number of views and number of subscribers for each of the ten channels).

¹³ See *GameSpot Reports: Who ‘Owns’ A Game?*, GAMESPOT, www.gamespot.com/videos/gamespot-reports-who-owns-a-game/2300-6385179/ (last visited Oct. 17, 2015) (describing the conflict of who owns a video game: the developers who created the game or the gamers who play and subsequently inhabit and alter the game and the effect of gamer feedback on video game development); *Who owns the copyright on an in-game screenshot?*, QUORA, www.quora.com/Who-owns-the-copyright-on-an-in-game-screenshot (last visited Oct. 17, 2015) (describing that the video game developer owns the copyrights to images in the video games he develops).

¹⁴ See *End User Definition*, MERRIAM-WEBSTER DICTIONARY, www.merriam-webster.com/dictionary/end%20user (last visited Apr. 3, 2015) (defining an “end user” as “the ultimate consumer of a finished product” and exemplifying “end user” with a sentence describing programmers should consider the needs of end users when developing software). Notably, “end user” is often used with regard to technology to describe the purchaser and user of the technology. See *id.* (defining “end user”). “End user” is a term of art to describe the ultimate consumer of a product. See *id.* (defining “end user”). For the purposes of this

video gamers, who creatively determine unique gameplay strategies, sometimes in manners not even imagined by the game developers, and share their gameplay online. These gamers would argue they adequately transform the video gameplay content as to not be liable for copyright infringement.¹⁵ But, even if these gamers are infringing, other video gamers take it a step further by adding voice overs, transposing the video gameplay onto a new medium, and uniquely editing the content to create walk-throughs and tutorials.¹⁶ These other gamers would argue they complete the requisite transformation to avoid copyright infringement liability.¹⁷ The question is, how can copyright owning developers effectively enforce their rights against infringement while also maintaining gamer loyalty and effective business practices and public relations?¹⁸

Comment, the term “end user gamer” refers to a video game player who did not develop the game.

¹⁵ See *GameSpot Reports: Who ‘Owns’ A Game?*, *supra* note 13 (describing the conflict of who owns a video game: the developers who created the game or the gamers who play and subsequently inhabit and alter the game and the effect of gamer feedback on video game development).

¹⁶ See, e.g., WatchMojo.com, *Top 10 Video Game Tutorial Sequences*, YouTube (Sept. 23, 2014), www.youtube.com/watch?v=MfpT3l_64Zk (describing a video game tutorial as “a sequence in a game where you’re explicitly taught its mechanics and controls” and presenting the top ten video game tutorial sequences as rated by WatchMojo.com).

¹⁷ See *GameSpot Reports: Who ‘Owns’ A Game?*, *supra* note 13 (describing the conflict of who owns a video game: the developers who created the game or the gamers who play and subsequently inhabit and alter the game and the effect of gamer feedback on video game development).

¹⁸ See Steve Chang & Ross Dannenberg, *Hey, That’s MY Game! Intellectual Property Protection for Video Games*, GAMASUTRA, www.gamasutra.com/view/feature/131951/hey_thats_my_game_intellectual_php?print=1 (last visited Oct. 17, 2015) (describing different types of intellectual property involved in video game protection); see also Sydney A. Beckman, *The Copyright Crusher: How Apple’s iTunes Is A Vehicle Designed for Copyright Infringement and Apple’s Legal Liability from Its Creation*, 1 TEX. A&M L. REV. 901, 903 (2014) (stating that copyright laws often trail behind technological advances). Notably, over the past several decades, the Copyright Act has undergone multiple necessary revisions to catch relevant law up to ever-changing technology. *Id.* n.9; see also Jason J. Lunardi, *Guerrilla Video: Potential Copyright Liability for Websites That Index Links to Unauthorized Streaming Content*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1077, 1109 (2009) (stating that streaming cable television should not be considered an unauthorized public performance). Notably, Lunardi’s article was published in 2009. *Id.*; see also *American Broadcasting Companies, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2511 (2014) (holding that streaming of cable television did constitute an unauthorized public performance). Lunardi’s article was published five years before the United States Supreme Court’s landmark *Aereo* case. *Id.*; Lunardi, *supra*. As with Lunardi’s article, this Comment asserts how courts should rule on future issues regarding technological advances. Just as the issue of copyright infringement regarding streaming cable television was settled after Lunardi’s article, the issue of copyright infringing video gameplay content streaming on

This Comment will focus on the legal implications of end user gamers who profit from the infringing use of copyrighted video gameplay content. First, this Comment will explore the relevant copyright law. Next, it will examine some of the various manners in which gamers use copyrighted gameplay material: streaming it in real-time, uploading and archiving copies of continuous gameplay, and using clips of gameplay in tutorial or walk-through videos. Finally, this Comment will explore various methods for combating the unauthorized use of copyrighted video gameplay on the Internet by seeking a solution in which both the video game developers, who own the copyrights, and end user gamers can collaborate to increase marketability and share profits.

II. BACKGROUND

Copyright law was introduced, initially as common law and later codified in statutes,¹⁹ to protect authors' rights in their creations.²⁰ Specifically, copyright law provides a means for creators and holders²¹ of intellectual property to make a living off of their contributions to society.²² As such, an author enjoys a natural right to protect and control the work he has created as a result of his labor.²³ Copyright law encourages artists to continue creating new works of originality.²⁴ Additionally, copyright law encourages and incentivizes copyright owners to preserve protected works by providing some value for such works, which ultimately benefits society.²⁵

the Internet will most likely become settled law once the courts catch up to this new technological advancement.

¹⁹ See *infra* note 26 and accompanying text (describing the history of copyright common law and its later codification).

²⁰ See Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 377 (2004) (noting that technological "advances that make the copying and distribution of works easier have important copyright implications").

²¹ See *Walthal v. Rusk*, 172 F.3d 481, 484 (7th Cir. 1999) (citing 17 U.S.C. § 201(a) (2012)) (stating that copyrights vest in the author, but the author may subsequently license the copyrights to third parties).

²² *Id.*; see also *Sony Corp. of America v. Universal City Studios, Inc.* 464 U.S. 417, 430 (1984) (noting the need for copyright law arose after the invention of the printing press, which allowed for widespread copying of original works of authorship).

²³ Dallon, *supra* note 20, at 377.

²⁴ U.S. CONST. art. I, § 8, cl. 8. (stating, "[t]he Congress shall have Power . . . to Promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

²⁵ See *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191, 197 (3d Cir. 2003) (citing *Sony Corp. of America*, 464 U.S. at 429; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 565, 577 (1994)) (describing copyright law's policy of motivating authors and fostering creativity).

This section will begin with a brief history of copyright law in the United States. It will continue by describing what and whom copyright law protects. Next, this section will explore what rights are granted to copyright owners. Finally, this section will discuss enforcement of copyright law and the Fair Use Doctrine.

A. A Brief History of Copyright Law

United States copyright law arose out of British common and statutory law.²⁶ At first, individual states implemented their own copyright laws.²⁷ Eventually, copyright protection was federally codified in the United States Constitution.²⁸ Since then, United States copyright law has gone through several transformations²⁹

²⁶ See The Statute of Anne, 1710, www.copyrighthistory.com/anne.html (last visited Oct. 17, 2015) (describing the Statute of Anne from the British Library and describing it as the world's first copyright act). After granting various royal privileges and immunities to printers during the years immediately following the invention of the printing press, England codified copyright protection for the first time with the Statute of Anne of 1710. See *id.* (describing the Statute of Anne); see also Dallan, *supra* note 20, at 389-402 (detailing several interim regulations preceding the Statute of Anne and describing the need for formal copyright law).

²⁷ See Dallan, *supra* note 20, at 416-17 (describing copyright laws passed by the several states that ultimately impacted the drafters' inclusion of the Copyright Clause in the United States Constitution).

²⁸ U.S. CONST. art. I, § 8, cl. 8.

²⁹ Edward C. Walterscheid, *Understanding the Copyright Act of 1790: The Issue of Common Law Copyright in America and the Modern Interpretation of the Copyright Power*, 53 J. COPYRIGHT SOC'Y U.S.A. 313, 333 (2006). The Copyright Act of 1790 granted copyright owners a fourteen-year monopoly interest in the rights of maps, charts, and books, after which the copyright owners could apply for an additional fourteen-year extension before the works entered the public domain. *Id.*; see *Golan v. Holder*, 132 S. Ct. 873, 887 (2012) (describing the United States signing onto the Berne Convention). In 1989, the United States signed to the Berne Convention of 1886, which resulted in copyright owners no longer needing to apply for copyrights or provide notice of copyrights on their works; rather, exclusive copyrights automatically vest in the author at the time the work is fixed in a tangible medium. *Id.*; see also *International Copyright*, COPYRIGHT.GOV (Nov. 2009), www.copyright.gov/fls/fl100.html (describing that although official international copyright protection does not exist, authors domiciled in countries that have signed to a copyright treaty, such as the Berne Convention, receive international copyright protection in other countries who have signed to the same treaty); see also *Berne Convention for the Protection of Literary and Artistic Works*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, www.wipo.int/treaties/en/ip/berne/ (last visited Apr. 3, 2015) (providing a full text copy of the Berne Convention and a list of participating countries). See David L. Hitchcock & Kathy E. Needleman, *Current Status of Copyright Protection in the Digital Age and Related Topics*, 8 TEX. WESLEYAN L. REV. 539, 545 (2002) (stating that the United States signed to the World Trade Organization's Trade-Related Aspects of Intellectual Property Agreement ("TRIPS") agreement which further defined United States copyright laws). In 1995, the TRIPS Agreement incorporated the

leading up to the legislation included in the current Copyright Act of 1976.³⁰

The Copyright Act of 1976 awards copyright protection to “original works of authorship fixed in any tangible medium of expression.”³¹ Under The Copyright Act, copyright owning authors are granted exclusive rights in their works for their lifetimes plus seventy years.³²

As technology advanced, copyright law evolved and adapted.³³ In 1996, the World Intellectual Property Organization (“WIPO”) Copyright Treaty restricted the use of technology to create unauthorized reproductions of copyrighted works.³⁴ In 1998, the United States adopted the WIPO Copyright Treaty via the Digital Millennium Copyright Act (“DMCA”).³⁵ The DMCA amended the Copyright Act of 1976 to provide further protections to copyright holders in the ever-changing digital age.³⁶

Berne Convention for multiple countries and eliminated the requirement of providing notice on works to gain copyright protection for them. *Id.*; see also Ruth L. Okediji, *Public Welfare and the Role of the WTO: Reconsidering the Trips Agreement*, 17 EMORY INT’L L. REV. 819, 849-51 (2003) (describing the negotiations that occurred when the TRIPS Agreement was formed and noting those terms important to the United States’ adoption of the TRIPS Agreement).

³⁰ 17 U.S.C. § 101 (2012).

³¹ 17 U.S.C. § 102 (2012).

³² See *Eldred v. Ashcroft*, 537 U.S. 186, 204 (2003) (finding that Congress enjoyed the Constitutional power to increase the duration of existing copyright terms from fifty years to seventy years under the Copyright Term Extension Act of 1998).

³³ See *A Brief History of Copyright and Innovation*, TEACHING COPYRIGHT, www.teachingcopyright.org/curriculum/hs/2 (last visited Oct. 17, 2015) (describing that as technology advances, it often clashes with copyright law, especially under fair use standards, thus requiring the evolution of copyright law and the fair use doctrine).

³⁴ *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 440 (2d Cir. 2001). See WORLD INTELLECTUAL PROPERTY ORGANIZATION, www.wipo.int/portal/en/index.html (last visited Mar. 30, 2015) (acting as the homepage for the World Intellectual Property Organization, which governs international copyright laws for the various countries that have signed on to WIPO). See also, *WIPO Copyright Treaty*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, www.wipo.int/treaties/en/ip/wct/ (last visited Apr. 3, 2015) (summarizing the WIPO Copyright Treaty and offering a full text copy of the WIPO Copyright Treaty, which provides internationally agreed-upon copyright law, and including a list of participating countries). Countries participating in the World Intellectual Property Organization, an agency of the United Nations, agreed to the WIPO Copyright Treaty. *Id.*; see also *Universal City Studios, Inc.*, 273 F.3d at 440 (describing that the United States enacted the DMCA to incorporate the WIPO Copyright Treaty into United States law).

³⁵ *Universal City Studios, Inc.*, 273 F.3d at 440; see also 17 U.S.C. § 512 (2012) (codifying limitations on copyright infringement liability for materials posted on the Internet).

³⁶ See Kenneth Hwang, *Blizzard Versus Bnetd: A Looming Ice Age for Free Software Development?*, 92 CORNELL L. REV. 1043, 1059 (2007) (stating “[t]he DMCA was originally intended to ‘bring U.S. copyright law squarely into the

B. What Does Copyright Protect?

Copyright protection applies to “original works of authorship fixed in any tangible medium of expression.”³⁷ There are three requisite elements to gain copyright protection: (1) originality, (2) authorship, and (3) fixation.³⁸ As to the first element, originality, which is also called minimal standards of creativity, courts look to original creation rather than uniqueness.³⁹ Notably, video games have been found to satisfy this element.⁴⁰

The second element to gain copyright protection is authorship.⁴¹ Courts have construed the term “author” broadly as to include any creator of a work, noting that the quality of the creation or the artistic ability of the author is immaterial.⁴² Again, courts have found that video games satisfy this element as their developers fall within the confines of “authorship” under the Copyright Act.⁴³

digital age,’ without carving out wholesale changes to existing copyright law”). See *Universal City Studios, Inc.*, 273 F.3d at 440 (stating the DMCA adopted the WIPO Copyright Treaty in the United States and further provides preventative measures against anticircumvention of technologically protected copyrighted materials); see also 17 U.S.C. § 512 (2012) (codifying limitations on copyright infringement liability for materials posted on the Internet). For the purposes of this Comment, it is unnecessary to delve deeply into the DMCA.

³⁷ 17 U.S.C. § 102 (2012).

³⁸ *Id.*

³⁹ See *Feist Publications v. Rural Telephone Service*, 499 U.S. 340, 345 (1991) (finding that the Constitution requires works to be original in order to enjoy copyright protection, and defining original works as those created solely by the author and have “at least some minimal degree of creativity”).

⁴⁰ See *Atari Games v. Oman*, 979 F.2d 242, 247 (D.C. Cir. 1992) (finding that video games have creative elements satisfying the requisite originality to be copyright protectable and that video games, when considered as a whole work rather than disjointed, individual images, can meet the “minimal creative spark required by the Copyright Act and the Constitution”); see also *Feist*, 499 U.S. at 363 (finding “[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity”). For the sake of this Comment, copyrightability of video games is not considered, and it is presumed that video games satisfy the elements to attain copyright protection.

⁴¹ 17 U.S.C. § 102 (2012).

⁴² *Bleistein v. Donaldson Lithographing*, 188 U.S. 239, 250-52 (1903). In *Bleistein*, a travelling circus had hired the plaintiff’s lithographing company to design and produce three posters advertising the circus. *Id.* at 248. Once the circus ran out of posters provided by the plaintiff’s company, the circus employed the defendant lithograph company to make copies of the posters the plaintiff’s company had created. *Id.* The court stated that the lack of artistic quality of the pictures on the posters did not preclude the plaintiff’s lithograph company from authorship. *Id.* at 250-52.

⁴³ See *Atari, Inc. v. Amusement World, Inc.*, 547 F. Supp. 222, 226 (D. Md. 1981) (describing how video games qualify for copyright protection under the Copyright Act as audiovisual works); see also 17 U.S.C. § 102 (2012) (codifying

The final element necessary to gain copyright protection is fixation of the work⁴⁴ in a tangible medium.⁴⁵ As video games are fixed in a digital medium in which they are played on a monitor, video games satisfy this element.⁴⁶ Because video games fulfill the requisite elements (and presumably overcome the following limitations), they receive copyright protection as audiovisual works.⁴⁷

Simply satisfying these three elements does not always guarantee copyright protection.⁴⁸ Despite fulfilling the requisite elements, there are several limitations on attaining copyright protection, including the inability to copyright ideas or utilitarian elements of a work.⁴⁹ Copyright law does not protect an idea itself, but rather the conveyance of that idea in a fixed medium.⁵⁰

the general subject matter of copyrightable works).

⁴⁴ See 17 U.S.C. § 101 (2012) (describing audiovisual works as those “that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied”); see also *Red Baron-Franklin Park, Inc. v. Taito Corp.*, 883 F.2d 275, 278 (4th Cir. 1989) (finding video games are copyrightable specifically as audiovisual works).

⁴⁵ See 17 U.S.C. § 101 (2012) (noting that “a work is fixed in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration”). See also *Golan*, 132 S. Ct. at 887 (finding that copyrights automatically vest in the author at the time the work is fixed in a tangible medium and a requirement notice is no longer necessary under the Berne Convention). A work need not be published or contain a copyright notice to be copyright protectable; rather, copyright protection begins the moment the work is fixed in a tangible medium. *Id.* See also *International Copyright*, *supra* note 29 (describing the effect of the Berne Convention on United States copyright law, including eliminating notice requirements).

⁴⁶ See *Atari, Inc.*, 547 F. Supp. at 226 (describing how video games qualify for copyright protection under the Copyright Act).

⁴⁷ *Red Baron-Franklin Park, Inc.*, 883 F.2d at 278.

⁴⁸ See 17 U.S.C. § 103 (2012) (specifying that “the copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material” and dictating that “protection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully”). Accordingly, only portions of works that are novel, in that they are distinctly separate from preexisting works, are afforded copyright protection. *Id.* Additionally, only portions of works that are lawfully used are afforded copyright protection. *Id.*

⁴⁹ *Id.*

⁵⁰ See 17 U.S.C. § 102(b) (2012) (stating that “[i]n no case does copyright protection for an original work of authorship extend to any idea . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work”); see also Brian Casillas, *Attack of the Clones: Copyright Protection for Video Game Developers*, 33 LOY. L.A. ENT. L. REV. 137, 155 (2013) (discussing

Although the idea is not protected, the author's precise means of expressing it may still enjoy copyright protection.⁵¹

Like ideas, utilitarian components of works are ineligible for copyright protection.⁵² Utilitarian components of works are those that serve a functional purpose rather than express a creative idea.⁵³ However, components of a work that are original expression may still enjoy copyright protection even if the work as a whole serves a functional purpose.⁵⁴ Therefore, despite the functionality of computer software, including that used in video games, original elements of software are eligible for copyright protection.⁵⁵

that "copyright will not protect an idea, only its expression").

⁵¹ *Nichols v. Universal Pictures*, 45 F.2d 119, 121 (2d Cir. 1930). Courts determine the distinction between ideas and expression by applying Judge Learned Hand's abstractions test. *Id.* at 121-22. *See, e.g., Sheldon v. Metro-Goldwyn Pictures*, 81 F.2d 49, 55-56 (2d Cir. 1936) (finding that a movie using more than the basic storyline idea of a play, including use of the "same city and the same social class," the fact that the movie's heroine "tracked" the play's heroine in more ways than just a "wanton" personality, the fact that the "threat scene [was] carried out with almost exactly the same sequence of event and actuation," the use of poison for death scene, and the use of a district attorney investigation in lieu of a trial, infringed on the play's copyright). Notably, though, copying elements beyond the general basic idea may infringe on the author's copyrighted expression. *Id.*

⁵² *See* 17 U.S.C. § 103 (2012) (defining the limitations of copyrightable works); *see also Baker v. Selden*, 101 U.S. 99, 107 (1879) (proffering a functionality analysis to determine whether a work serves too much of a utilitarian purpose to enjoy copyright protection); *see also Mazer v. Stein*, 347 U.S. 201, 217-18 (1954) (limiting the application of *Baker* to consideration of copyrighted material only, without regard for what purpose the allegedly infringing work would serve).

⁵³ *See Pivot Point Int'l, Inc. v. Charlene Products, Inc.*, 372 F.3d 913, 925-26 (7th Cir. 2004) (quoting *Carol Barnhart Inc. v. Economy Cover Corp.*, 773 F.2d 411 (2d Cir. 1985)) (describing analysis of whether a component of a work is utilitarian or non-utilitarian and noting that utilitarian works are not copyrightable); *see also* 17 U.S.C. § 103 (2012) (describing the limitations of copyright protection).

⁵⁴ *See Mazer*, 347 U.S. at 218 (finding "nothing in the copyright statute to support the argument that the intended use or use in industry of an article eligible for copyright bars or invalidates its registration," thereby rendering statuettes of dancing figures which served the utilitarian purpose of lamp bases copyrighted). Specifically, respondents created the statuettes and copyrighted them as works of art. *Id.* at 202. However, the statuettes served a utilitarian function as they acted as lamp bases that housed wiring and affixed lamp shades. *Id.* Petitioners copied the statuettes and created and sold their own lamps based upon the copied mold. *Id.* at 203. Petitioners alleged that the statuettes were ineligible for copyright protection because of their utilitarian use as lamp bases. *Id.* The *Mazer* Court held for the Respondents, finding the statuettes copyright protected. *Id.* at 218.

⁵⁵ *See Whelan Assocs. v. Jaslow Dental*, 797 F.2d 1222, 1237-38 (3d Cir. 1986) (analyzing computer code as a literary work capable of copyright protection); *see Tetris Holding, LLC v. Xio Interactive, Inc.*, 863 F. Supp. 2d 394, 401 (D.N.J. 2012) (describing criticism of *Whelan* and ways in which other courts have moved away from *Whelan's* holding). *Whelan* was greatly criticized

C. Who Is a Copyright Owner?

Under the Berne Convention, to which the United States is a signed member, the author of a work is the owner of the copyrights for his work.⁵⁶ In the United States, an author of a copyrightable work is most often the work's creator.⁵⁷ A copyright owner may transfer some or all of his exclusive rights in a copyrighted work to a third party by selling the copyright or by issuing a license.⁵⁸

A joint authorship occurs where more than one author intends to create an original work.⁵⁹ Joint authorships result in each author enjoying equal and undivided interests in the copyright.⁶⁰

and largely rejected by commentators and subsequent courts for essentially awarding patent-like rights to the copyright holder of the computer program. *Id.* Subsequent courts have sought to use different analyses for software copyright issues. *Id.*; *see, e.g.*, *Computer Assocs. Int'l v. Altai*, 982 F.2d 693, 706-12 (2d Cir. 1992) (proffering an abstraction-filtration test, which looks to identify components of the program that are not copyright protectable and ultimately determine whether any original expression within the program remains); *see also* *Softel v. Dragon Med. & Scientific Commc'ns*, 118 F.3d 955, 963-64 (2d Cir. 1997) (differing from *Computer Assocs. Int'l* in that it examines the manner in which the programmer compiled the unprotected components of the program). The court found copyright protection available where this compilation is original. *Id.* at 964.

⁵⁶ *See Golan*, 132 S. Ct. at 887 (describing that the United States signed to the Berne Convention in 1989, thereby incorporating its guidelines into American copyright law); *see also International Copyright*, *supra* note 29 (describing the effect of signing onto the Berne Convention).

⁵⁷ *Help: Author*, COPYRIGHT.GOV, www.copyright.gov/eco/help-author.html (last visited Oct. 17, 2015).

⁵⁸ *See Circular 75: The Licensing Division of the Copyright Office*, COPYRIGHT.GOV, <http://copyright.gov/circs/circ75.pdf> (last visited Oct. 17, 2015) (describing different types of copyright licenses recognized under United States law). A copyright owner can issue an exclusive license, a non-exclusive license, a compulsory license, or an open source license. *See id.* (describing different types of copyright licenses recognized under United States law). 17 U.S.C. § 203 and § 304(c) (2012) bestow in the copyright owner the power to terminate a prior transfer or license of the copyrighted work. *See id.* (describing different types of copyright licenses recognized under United States law); *see also* 17 U.S.C. § 203 (2012) (describing an author's rights of termination of transfers and licenses for copyrighted works); 17 U.S.C. § 304(c) (2012) (describing an author and his heirs' first term ownership of copyrights).

⁵⁹ *See* 17 U.S.C. § 201(a) (2012) (defining a joint authorship as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole").

⁶⁰ *Id.*; *see also* *Janky v. Lake Cnty. Convention & Visitors Bureau*, 576 F.3d 356, 363 (7th Cir. 2009) (finding that a "do-wop ditty" song was a work of joint authorship because the co-authors intended to create a joint work and each of the contributors' ideas are independently copyrightable); *compare with* *Thomas v. Larson*, 147 F.3d 195, 206-07 (2d Cir. 1998) (finding that because the playwright for the musical *Rent* did not intend for the corporation, Dramaturg, to be a co-author, Dramaturg did not enjoy rights in *Rent* and was therefore not entitled to royalty payments).

Therefore, each co-author of a joint authorship owns copyright in the work.⁶¹

D. *What Rights Are Granted by Copyright?*

A copyright owner gains a bundle of exclusive rights in his work.⁶² One right a copyright owner enjoys is the right of reproduction, which entails the right to produce copies of the copyrighted work.⁶³ “Copies” are defined as “material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”⁶⁴ Third parties who reproduce copyrighted works without volition are not liable for infringement.⁶⁵

A copyright owner also enjoys the right of distribution.⁶⁶ This right entails the ability “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.”⁶⁷ Notably, infringement of a copyright owner’s distribution right does not turn on whether the intended audience actually receives the unauthorized distribution.⁶⁸ Rather, merely making the copyrighted work available without permission is sufficient to establish infringement.⁶⁹ Very similar to the right of distribution, a copyright

⁶¹ 17 U.S.C. § 101 (2012).

⁶² See 17 U.S.C. § 106(1) (2012) (listing the exclusive rights granted by copyright); see also *Golan*, 132 S. Ct. at 887 (describing that pursuant to the Berne Convention, copyrights automatically vest in the author at the time the original work is fixed in a tangible medium).

⁶³ 17 U.S.C. § 106 (2012).

⁶⁴ 17 U.S.C. § 101 (2012).

⁶⁵ *CoStar Grp. v. LoopNet*, 373 F.3d 544, 555 (4th Cir. 2004).

⁶⁶ 17 U.S.C. § 106(3) (2012).

⁶⁷ *Id.*

⁶⁸ See *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997) (finding no need for the public to actually obtain the unauthorized reproduction of the copyrighted work, but merely making such reproduction available constitutes infringement). In *Hotaling*, the plaintiffs created, copyrighted, and published as microfiche a collection of genealogical research materials. *Id.* at 201. Defendant later obtained a copy of the microfiche, made additional microfiche and paper copies of it, and gave it to branches of its library. *Id.* Plaintiffs sued for copyright infringement on the basis that Defendant created unauthorized copies and caused unauthorized distributions of the protected microfiche. *Id.* at 202. The *Hotaling* Court held that simply having copies of the copyrighted research materials available for distribution at its library, even without evidence of instances of distribution, constitutes copyright infringement on the basis of an unauthorized distribution to the public. *Id.* at 203.

⁶⁹ *Id.* at 203.

owner also enjoys the right of public performance or display of the copyrighted work.⁷⁰

Copyright owners also enjoy the exclusive right to create derivative works that stem from their own copyrighted works.⁷¹ Yet, the law imposes limitations on a copyright owner's powerful right to create derivative works.⁷² For instance, the derivative work must be independently copyright protectable.⁷³ Additionally, the new work must be substantially similar to the copyrighted work to be a derivative work.⁷⁴ Moreover, there are exceptions that protect the unauthorized creation of derivative works which ensure that the creators of such works are not liable for infringement.⁷⁵

E. Enforcement of Copyright

The Buenos Aires Convention required copyright owners to provide notice of copyright directly on their works.⁷⁶ However, after

⁷⁰ See 17 U.S.C. § 106 (2012) (outlining the exclusive rights granted to copyright owners); see also 17 U.S.C. § 106(4) (describing the copyright owner's rights to public performance); 17 U.S.C. § 106(5) (describing the copyright owner's exclusive rights to public display of particular copyrighted works).

⁷¹ 17 U.S.C. § 106(2) (2012) (granting the copyright owner the right "to prepare derivative works based upon the copyrighted work"); see also 17 U.S.C. § 103 (2012) (describing a derivative work as not enjoying copyright protection); see also 17 U.S.C. § 101 (2012) (defining a "derivative work" as "a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted" and noting "[a] work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of scholarship, is a 'derivative work'").

⁷² See *Circular 14: Copyright in Derivative Works and Compilations*, COPYRIGHT.GOV, <http://copyright.gov/circs/circ14.pdf> (last visited Jan. 15, 2016) (describing how to create derivative works, how to copyright such works, and some limitations on such works).

⁷³ Compare *Mirage Editions v. Albuquerque A.R.T.*, 856 F.2d 1341, 1343-44 (9th Cir. 1988) (finding that no derivative work was created by cutting and gluing the copyrighted work to ceramic tiles because no reproduction was created and the ceramic tiles lacked necessary elements of creativity) with *Pickett v. Prince* 207 F.3d 402, 404-08 (7th Cir. 2000) (finding that a guitar shaped like Prince's symbol constituted a derivative work, despite the change in functionality, and, therefore, infringed Prince's copyrights).

⁷⁴ See *Litchfield v. Spielberg*, 736 F.2d 1352, 1356-58 (9th Cir. 1984) (holding a movie not a derivative work of a screenplay due to a lack of substantial similarities between the two works).

⁷⁵ See, e.g., 17 U.S.C. § 107 (2012) (codifying the Fair Use Doctrine as part of the Copyright Act). See also discussion *infra* Part I.F (describing the Fair Use Doctrine and limitations on the application of fair use).

⁷⁶ See *The Buenos Aires Convention* (May 1, 1911), http://ipmall.info/hosted_resources/lipa/copyrights/The%20Buenos%20Aires%20Convention.pdf (detailing the terms regarding copyright law to which the United States agreed). Such notice is provided by a superscripted, circled letter

1989, when the United States joined the Berne Convention, the need to provide notice of or register for copyright was eliminated.⁷⁷ The typical path of enforcement against copyright infringement is civil action.⁷⁸ But, domestic and international criminal sanctions for copyright infringement are now gaining popularity with the rise of piracy.⁷⁹

Courts use a two-pronged test to establish copyright infringement: “(1) ownership of the copyright; and (2) infringement—that the [alleged infringer] copied protected elements of the [copyright owner’s] work.”⁸⁰ This second prong is otherwise known as copy-in-fact.⁸¹ Copy-in-fact can be established either directly or

“C” (“©”) that follows the copyrighted work’s title. *Id.*

⁷⁷ *Golan*, 132 S. Ct. at 887 (2012) (stating that when the United States signed to the TRIPS Agreement, it incorporated the Berne Convention); *see also* Charles Garnier, Paris v. Andin Int’l, Inc., 36 F.3d 1214, 1219 (1st Cir. 1994) (stating that after joining the Berne Convention, notice of copyright is no longer required for works to gain copyright protection under United States law).

⁷⁸ *See Stopping Copyright Infringement*, COPYRIGHT.GOV, www.copyright.gov/help/faq/faq-infringement.html (last visited Oct. 17, 2015) (describing that the U.S. Copyright Office lacks authority to prosecute copyright infringers, but offers avenues of recourse for copyright owners whose works have been infringed upon).

⁷⁹ *Id.* *See also Circular 92: Copyright Law of the United States of America and Related Laws Contained in Title 17 of the United States Code*, COPYRIGHT.GOV, www.copyright.gov/title17/92chap5.html#506 (last visited Nov. 11, 2015) (outlining in Section 506 various criminal offenses for copyright infringement); *see also* Irina D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 HARV. J.L. & TECH. 469, 481-82 (2011) (describing the history of criminal sanctions for copyright infringement in the United States).

⁸⁰ *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 481 (9th Cir. 2000) (citing *Smith v. Jackson*, 84 F.3d 1213, 1218 (9th Cir. 1996)). *See also Feist Publ’ns, Inc.*, 499 U.S. at 361 (analyzing alleged copyright infringement); *Harper & Row Publishers, Inc. v. Nation Enter.s.*, 471 U.S. 539, 548 (1985) (analyzing alleged copyright infringement).

⁸¹ *See Paycom Payroll, LLC v. Richison*, 758 F.3d 1198, 1204 (10th Cir. 2014) (describing copy-in-fact as a factual analysis to decide whether the alleged infringer actually copied the copyright protected work).

indirectly.⁸² Copyright can also be contributorily⁸³ or vicariously infringed upon.⁸⁴ Contributory infringement occurs where a third party facilitates or provides the means for an infringing party to violate an author's copyright.⁸⁵ Vicarious infringement occurs where a third party has the ability to legally control or cease an infringing party's actions or otherwise acts to induce an infringing party to violate an author's copyright.⁸⁶

F. *The Fair Use Doctrine*

Fair use is an affirmative defense codified in section 107 of the Copyright Act.⁸⁷ Fair use allows for infringement of "a copyrighted work, including such use by reproduction . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."⁸⁸ The policy behind fair use is to balance the rights of the copyright holder and the right of the public to have access to information.⁸⁹ Courts apply a four factor test to determine whether an infringing work illegally copies protected elements of the original work.⁹⁰ This factor test

⁸² *Id.*; see also *Three Boys Music Corp.*, 212 F.3d at 481 (noting that direct copy-in-fact looks to whether the copyrighted work is actually copied and reproduced in the allegedly infringing work). Indirect copy-in-fact occurs "[a]bsent direct evidence of copying" and "proof of infringement involves fact-based showings that the defendant had 'access' to the plaintiff's work and that the two works are 'substantially similar'." *Id.* Access looks to a chain of events or widespread dissemination of events. *Id.* Substantial similarity considers the commonalities between the copyrighted work and the allegedly infringing work. *Id.* at 485. Notably, for the types of potentially infringing content discussed in this Comment, there is no need to conduct an indirect infringement analysis. This is because the types of potentially infringing content discussed in this Comment involve direct lifting of continuous video gameplay and uploading it to the Internet. See discussion *infra*, Part III.B (describing and exemplifying the particular types of potentially infringing content discussed in this Comment). Therefore, the potentially infringing content at issue in this Comment infringe via direct copy-in-fact. Discussion *infra* Part III.B.

⁸³ See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019 (9th Cir. 2001) (describing contributory copyright infringement).

⁸⁴ *Id.* at 1022-23.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ 17 U.S.C. § 107 (2012).

⁸⁸ *Id.*

⁸⁹ See *Sony Corp. of America*, 464 U.S. at 425 (describing how the Fair Use Doctrine supports the First Amendment policy of providing access to information to the public); see also *Harper & Row Publishers, Inc.*, 471 U.S. at 549 (describing the necessity for the Fair Use Doctrine to uphold the Constitution's policy behind copyright law).

⁹⁰ See *More Information on Fair Use*, COPYRIGHT.GOV, (Sept. 2015), <http://copyright.gov/fair-use/more-info.html> (describing the four fair use factors: "(1) [p]urpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes. . . (2) [n]ature of the

looks to “(1) the purpose and character of the use . . . ; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion of the work as a whole; and (4) the effect of the use upon the potential market for and value of the copyrighted work.”⁹¹ The four-factor analysis avoids a bright line test and rather requires a case-by-case examination following the general guidance provided by the statute’s examples of permissible use.⁹²

The first factor looks to the work’s purpose and character.⁹³ If the work in question falls into one of the categories listed in the statute, a presumption will weigh in favor of fair use.⁹⁴ However, this presumption is rebuttable if the work is created with the goal of “supersed[ing] the original.”⁹⁵ In addition, courts also look to whether the use is transformative or “adds something new” when compared to the original.⁹⁶ The more transformative the work, the

copyrighted work. . . (3) [a]mount and substantiality of the portion used in relation to the copyrighted work as a whole. . . (4) [e]ffect of the use upon the potential market for or value of the copyrighted work”); *see generally Sony Corp. of America*, 464 U.S. 417 (1984) (applying a fair use analysis); *Campbell*, 510 U.S. 569 (1994) (applying a fair use analysis); *Harper & Row Publishers, Inc.*, 471 U.S. 539 (applying a fair use analysis).

⁹¹ 17 U.S.C. § 107 (2012).

⁹² *Campbell*, 510 U.S. at 577-78; *Sony Corp. of America*, 464 U.S. at 432-33; *Harper & Row Publishers, Inc.*, 471 U.S. at 549.

⁹³ *See* 17 U.S.C. § 107 (2012) (stating the first factor as “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes”).

⁹⁴ *See* *Wright v. Warner Books, Inc.*, 953 F.2d 731, 736 (2d Cir. 1991) (noting a strong presumption in favor of fair use where a defendant’s use of copyrighted material falls under one of the examples described in the statute, such as criticism, scholarship, or research); *see also* *Robinson v. Random House, Inc.*, 877 F. Supp. 830, 840 (S.D.N.Y. 1995) (recognizing that the Fair Use Doctrine more readily permits use of copyrighted material for purposes such as “criticism, comment, news reporting, teaching, . . . scholarship, or research” as opposed to commercial use).

⁹⁵ *See* *Haberman v. Hustler Magazine, Inc.*, 626 F. Supp. 201, 210 (Mass. 1986) (dictating that the fair use defense fails when copyrighted work is published “with a view, not to criticize, but to supersede the use of the original work”); *see also* *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (noting that a fair use analysis should consider the “degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work”).

⁹⁶ *See* *Campbell*, 510 U.S. at 579 (establishing in this landmark case that “[t]he central purpose of this investigation is to see, in Justice Story’s words, whether the new work merely ‘supersede[s] the objects’ of the original creation. . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’ Although such transformative use is not absolutely necessary for a finding of fair use. . . the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works”).

more likely a court will find the first factor weighs in favor of a finding of fair use.⁹⁷

The second fair use factor assesses “the nature of the copyrighted work.”⁹⁸ Courts also refer to this factor as “purpose and character” of the work and look to the whether the work is published or unpublished, as well as if the work is fictional or non-fictional.⁹⁹ Defendants who base their infringing works on fictional works are less likely to find this factor favors their case for fair use.¹⁰⁰ Additionally, defendants who base their infringing works on unpublished works are less likely to find this factor weighs in their favor.¹⁰¹

The third factor evaluates the amount of the copyrighted work used.¹⁰² Courts have not established a bright line test regarding amount and substantiality but rather look to whether the defendant copied “more than is reasonably necessary.”¹⁰³ Amount and substantiality requires both a quantitative and qualitative analysis.¹⁰⁴ The quantitative analysis looks to the amount of the

⁹⁷ See *Salinger v. Colting*, 641 F. Supp. 2d 250, 256 (S.D.N.Y. 2009) (noting that mere alterations in a new work that fail to “add[] something new, with a further purpose or different character” and don’t “alter[] the first with new expression, meaning or message” are not transformative and therefore fail to fulfill the first factor of a fair use analysis) (quoting *Campbell*, 510 U.S. at 570). Moreover, “just because a work recasts, transforms, or adapts an original work into a new mode of presentation, thus making it a derivative work, . . . does not make the work transformative in the sense of the first fair use factor.” *Salinger*, 641 F. Supp. 2d at 262 (quoting *Castle Rock Ent., Inc. v. Carol Pub. Group, Inc.*, 150 F.3d 132, 143 (2d Cir. 1998)).

⁹⁸ 17 U.S.C. § 107 (2012).

⁹⁹ See *Robinson*, 877 F. Supp. at 841 (S.D.N.Y. 1995) (explaining that courts often find the nature of the copyrighted work factor of a fair use analysis favoring infringement and not fair use when the original work is creative or fictional).

¹⁰⁰ See *Bridge Publ'ns, Inc. v. Vien*, 827 F. Supp. 629, 635 (S.D. Cal. 1993) (noting that creative works, as opposed to informational works, are “less likely to be deemed fair”).

¹⁰¹ See *Harper & Row Publishers, Inc.*, 471 U.S. at 554 (recognizing that the “[u]npublished nature of a work is a key, though not necessarily determinative, factor tending to negate a defense of fair use” raised in copyright infringement action) (quoting S. REP. NO. 94-473, at 64 (1975)).

¹⁰² See 17 U.S.C. § 107 (2012) (stating that the third factor looks to “the amount and substantiality of the portion used in relation to the copyrighted work as a whole”).

¹⁰³ See *Chicago Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 629 (7th Cir. 2003) (stating that “the fair use copier must copy no more than is reasonably necessary (not strictly necessary—room must be allowed for judgment, and judges must not police criticism with a heavy hand) to enable him to pursue an aim that the law recognizes as proper”).

¹⁰⁴ See *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 606 F. Supp. 1526, 1537 (Cal. 1985) (explaining that when evaluating the fair use factor, a court should consider both the quality, looking to whether the alleged infringement takes an “essential element” of the original work, and quantity, specifically the amount of the work that was allegedly used).

original work used in comparison to the whole of the original work.¹⁰⁵ In some instances publishing the entirety of a copyrighted work does not necessarily prevent a successful fair use defense,¹⁰⁶ but other courts have noted “[c]opying an entire work weighs against finding of fair use.”¹⁰⁷ On the other hand, the qualitative analysis looks to whether the heart of the work was taken.¹⁰⁸ A defendant who takes quantitatively small, but important, parts of a work will likely find this factor does not weigh in his favor.¹⁰⁹

The fourth and final factor assesses “the effect of the use upon the potential market for or value of the copyrighted work.”¹¹⁰ Courts must balance the gain denied to the copyright holder against the public benefits derived from use.¹¹¹ Generally, the lower the effect on the market, the more likely a court will find this factor weighs in favor of a defendant’s fair use.¹¹² However, an absence of a

¹⁰⁵ See *Wright*, 953 F.2d at 738-39 (choosing to analyze the third fair use factor by examining the amount and substantiality of the copyrighted work as opposed to the amount and substantiality of the allegedly infringing work).

¹⁰⁶ See *Belmore v. City Pages, Inc.*, 880 F. Supp. 673, 678 (D. Minn. 1995) (stating that copying the entirety of an article did not “preclude a finding of fair use”).

¹⁰⁷ *Advanced Computer Servs. of Mich., Inc. v. MAI Systems Corp.*, 845 F. Supp. 356, 365 (E.D. Va. 1994).

¹⁰⁸ See *Norse v. Henry Holt & Co.*, 847 F. Supp. 142, 146 (N.D. Cal. 1994) (recognizing that “[q]ualitatively, even small taking [of copyrighted material] may be actionable if they are the ‘heart of the’ [copyrighted material]”).

¹⁰⁹ See *United States v. Am. Soc. of Composers, Authors & Publishers*, 599 F. Supp. 2d 415, 431 (S.D.N.Y. 2009) (describing a qualitative versus quantitative analysis). In *American Society*, “a substantial portion of the infringing work (the previews [of ringtones]) was copied verbatim, which is evidence of the qualitative value of the copied material (the copied ASCAP music).” *Id.* (internal quotations and citations omitted). The Court reasoned “[b]ecause the expressive value of the music was copied and because that expressive value constitutes the previews in their entirety, we find that . . . the third factor weighs in favor of ASCAP.” *Id.* (internal quotations and citations omitted). See also *Harper & Row Publishers, Inc.*, 471 U.S. at 554 (finding infringement and no fair use defense for a magazine that published quotes from the “heart” of unpublished presidential memoirs because the magazine’s publication usurped the copyright owner’s right of first publication).

¹¹⁰ 17 U.S.C. § 107 (2012).

¹¹¹ See *Wright*, 953 F.2d at 739 (stipulating that analyzing the fair use factor concerning the effect on the market “requires us to balance ‘the benefit public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied’”) (quoting *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981)).

¹¹² See *Meeropol v. Nizer*, 560 F.2d 1061, 1069-70 (N.Y. 1977) (applying a fair use analysis, focusing on the fourth factor, to a case in which the natural children of the Rosenbergs alleged the author and publisher of a book about the Rosenberg trial infringed upon their parents’ copyright protected letters). The Court provided if an infringing work has a minimal effect on the market, then more infringing use of the copyright protected work may be afforded fair use protection. *Id.* The Court further noted that “where use is made of underlying historical facts, such use will be entitled to complete freedom, but it is otherwise

detrimental monetary effect on a plaintiff is not dispositive.¹¹³ Courts will also look to whether a defendant's work will act as a "market substitute for copyrighted material,"¹¹⁴ but not whether a defendant's work actually harms the market for the copyrighted work or its derivatives.¹¹⁵

III. ANALYSIS

Presently, many instances of potentially copyright-infringing video gameplay exist on the Internet.¹¹⁶ However, at this time courts have not heard cases on this matter.¹¹⁷ Therefore, even potentially applicable or analogous case law on this particular issue is sparse. This section will begin by describing the two leading cases that courts would find most helpful in deciding the instances of potential infringement presented in this Comment. This section will then present three types of content created by video game end users that potentially infringes upon video game copyright owners' rights, and it will analyze how courts might handle such instances in light of the two on-point cases. Finally, this section will predict affirmative defenses that alleged end user infringers can raise and conclude by analyzing how courts might respond.

if there is verbatim copying of original copyrighted material." *Id.* at 1070.

¹¹³ See *Marcus v. Rowley*, 695 F.2d 1171, 1177 (Cal. 1983) (stating that just because an infringing work does not result in "measurable pecuniary damage," the infringing work is not inherently protected as fair use).

¹¹⁴ *Belmore*, 880 F. Supp. at 679.

¹¹⁵ See *Burnett v. Twentieth Century Fox Film Corp.*, 491 F. Supp. 2d 962, 971 (Cal. 2007) (explaining that when evaluating this fair use factor, courts should look at both the actual market harm the infringement caused and also consider the continued financial harm that could be caused within potential markets if the infringer's conduct remains unchecked) (citing *Campbell*, 510 U.S. at 590). "This factor requires the court to weigh 'the benefit the public will derive if the use is permitted against the personal gain the copyright owner will receive if the use is denied.'" *Burnett*, 491 F. Supp. 2d at 971 (quoting *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1403 (9th Cir. 1997)).

¹¹⁶ See, e.g., HH Gaming, *Diablo 3 Walkthrough- part 1 Full game 1080p Max settings Story Walkthrough D3 DIII*, YOUTUBE, www.youtube.com/watch?v=wgRJeD2IkNs (last visited Oct. 17, 2015) (providing a walkthrough of *Diablo 3*, which exemplifies an instance of potentially infringing video gameplay on the Internet).

¹¹⁷ See Rudie Obias, *11 Times Video Games Led to Lawsuits*, MENTAL_FLOSS, <http://mentalfloss.com/article/55078/11-times-video-games-led-lawsuits> (last visited Oct. 17, 2015) (describing instances in which video games have been the issue of lawsuits; notably, instances of Internet-based copyright infringement are not included); see also Kyle Orland, *Game makers face uphill battle proving copyright infringement in court*, ARSTECHNICA (Feb. 2012), <http://arstechnica.com/gaming/2012/02/game-makers-face-uphill-battle-proving-copyright-infringement-in-court/> (describing the difficulty video game developers encounter when trying to establish copyright infringement).

A. Two Potentially Applicable Cases

Courts have yet to hear substantial litigation on the issue of copyright infringement for uploading copyrighted video gameplay to the Internet.¹¹⁸ However, even though they don't deal with video games, two recent cases specifically take on the issue of streaming copyright infringing content: *The Cartoon Network LP v. CSC Holdings, Inc.* (hereinafter "*Cablevision*")¹¹⁹ and *American Broadcasting Companies, Inc. v. Aereo, Inc.* (hereinafter "*Aereo*").¹²⁰ *Cablevision* holds that streaming of copyrighted content does not infringe upon copyright holders' exclusive rights of reproduction.¹²¹ *Aereo* holds that streaming of copyrighted content does infringe upon copyright holders' exclusive public performance rights.¹²² The law set forth in *Cablevision* and *Aereo* may guide future courts' analyses of streaming copyright infringing video game content on the Internet.

1. *Cablevision: Streaming of Copyrighted Content Is Not an Unauthorized Reproduction*

Cablevision created a hybrid Digital Video Recorder ("DVR") and Video On Demand ("VOD") system that allowed users to remotely store recorded television without a typical DVR machine.¹²³ Customers can play back previously recorded television through their standard cable box with the use of Remote Storage DVR ("RS-DVR") software in a manner similar to watching VOD television.¹²⁴ By housing the recorded television content on a remote server, rather than the customer's individual cable box, the RS-DVR is akin to a VOD system.¹²⁵ At the same time, by making available only television content the customer recorded at the time it was originally broadcast, the RS-DVR is similar to a standard DVR machine.¹²⁶

¹¹⁸ See Ivan O. Taylor Jr., Note, *Video Games, Fair Use and the Internet: The Plight of the Let's Play*, 2015 U. ILL. J.L. TECH. & POL'Y 247, 257 (2015) (stating, "[c]ases involving video game companies and the affirmative defense of fair use of copyright infringement are limited").

¹¹⁹ *The Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008).

¹²⁰ *Am. Broad. Companies, Inc.*, 134 S. Ct. 2498.

¹²¹ *The Cartoon Network LP*, 536 F.3d at 130.

¹²² *Am. Broad. Companies, Inc.*, 134 S. Ct. at 2511.

¹²³ *The Cartoon Network LP*, 536 F.3d at 124.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* See also Jonathan Strickland & James Bickers, *How DVR Works*, HOW STUFF WORKS, <http://electronics.howstuffworks.com/dvr1.htm> (last visited Apr. 5, 2015) (describing how DVR machines function).

The Cablevision RS-DVR works by splitting the data stream¹²⁷ that television content providers send to broadcasting companies into two streams.¹²⁸ This allows one data stream to be concurrently transmitted to the live television feed while the second stream is routed to a Broadband Media Router (“BMR”), which buffers and reformats the data stream before sending it to the Arroyo server.¹²⁹ The Arroyo Server, which provides data storage, contains two buffers.¹³⁰ When customers select to record television content, the data flow from the primary buffer to a secondary buffer and eventually overwrite previously recorded data on the customer’s hard drive.¹³¹

Importantly, the primary buffer for the RS-DVR “holds no more than 0.1 seconds of each channel’s programming at any time” before it is overwritten by new incoming data.¹³² This results in “[t]he data buffer in the BMR hold[ing] no more than 1.2 seconds of programming at any time.”¹³³ The issue arose because Cablevision failed to acquire proper licensing from its television content providers, who in turn sued Cablevision for copyright infringement of their exclusive rights to reproduction and public performance.¹³⁴

The *Cablevision* Court identified that the RS-DVR implicated the television content providers’ rights of reproduction and public performance.¹³⁵ The Court began its analysis by identifying that the RS-DVR sent data through the primary buffer before and regardless of whether a customer requested a recording.¹³⁶ Looking to the Copyright Act, the Court defined copies as reproducible material objects fixed by some method.¹³⁷ Then, the Court noted “a work is

¹²⁷ See *What is a Data Stream*, WISEGEEK, www.wisegeek.com/what-is-a-data-stream.htm (last visited Oct. 17, 2015) (defining a data stream as “an information sequence being sent between two devices”).

¹²⁸ *The Cartoon Network LP*, 536 F.3d at 124.

¹²⁹ *Id.*; see also *What is Buffering and How Can You Reduce It?*, BROADBANDDEAL (Mar. 25, 2013), www.broadbanddeals.co.uk/what-is-buffering/ (describing buffering as the process by which content is downloaded so that content can stream). Buffering is essential to view content without having to download the content’s entire media file. *Id.* Basically, buffering allows several seconds of content to download to the memory of the machine on which one wishes to view streaming content. *Id.* Then, after those seconds are viewed, the downloaded content is erased and replaced with the following seconds’ worth of content. *Id.* This process allows content to be viewed as a stream rather than requiring a full download. *Id.*; see also *In Computing, What Is a Buffer?*, WISEGEEK www.wisegeek.org/in-computing-what-is-a-buffer.htm (last visited Apr. 5, 2015) (describing how buffering functions).

¹³⁰ *The Cartoon Network LP*, 536 F.3d at 124.

¹³¹ *Id.*

¹³² *Id.* at 124-25.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 126.

¹³⁶ *Id.* at 127.

¹³⁷ *Id.* (quoting 17 U.S.C. § 101).

‘fixed’ in a tangible medium of expression when its embodiment . . . is sufficiently permanent or stable to permit it to be reproduced . . . for a period of more than transitory duration.”¹³⁸ Synthesizing these definitions, the Court concluded that a copy of an original work is only created when a work is sufficiently fixed in a tangible medium.¹³⁹ This requires both the work to be “embodied in a medium . . . and it must remain thus embodied ‘for a period of more than transitory duration.’”¹⁴⁰

The Court concluded that data were embodied in both buffers either before the data were projected to the live television stream or sent to the Arroyo hard drive storage at the customer’s request.¹⁴¹ However, considering the fact that the data in the buffers were automatically overwritten at least every 1.2 seconds, the copyrighted works failed to remain in the buffers for longer than a period of transitory duration.¹⁴² Therefore, the data failed to be fixed in the buffers.¹⁴³ Because of this lack of fixation for more than a transitory duration, the Court held that the data streaming through the buffers were not copies under the Copyright Act’s definition.¹⁴⁴ Therefore, Cablevision’s RS-DVR did not infringe upon the television content providers’ exclusive rights of reproduction.¹⁴⁵

¹³⁸ *The Cartoon Network LP*, 536 F.3d at 127 (quoting 17 U.S.C. § 101) (emphasis in original).

¹³⁹ *The Cartoon Network LP*, 536 F.3d at 127.

¹⁴⁰ *Id.* (quoting Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 8.02(B)(3), at 8-32 (2007)). The Court noted that “transitory duration” was included in the definition intentionally, and therefore, not all instances of “loading a program into a form of RAM always results in copying”. *Id.* at 128.

¹⁴¹ *The Cartoon Network LP*, 536 F.3d at 129.

¹⁴² *Id.* at 130.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* The *Cablevision* Court also considered whether the streaming of copyrighted content, which individual end users uniquely controlled, constituted a public performance. *Id.* at 134. The Court noted that the Copyright Act provides copyright owners the exclusive right of public performance of such copyrighted works as motion pictures and audiovisual works. *Id.* Considering the Copyright Act’s definition of the Transmit Clause, the Court held that “[b]ecause each RS-DVR playback transmission is made to a single subscriber using a single unique copy produced by that subscriber. . . such transmissions are not performances ‘to the public,’ and therefore do not infringe any exclusive right of public performance.” *Id.* at 139.

But, in issuing this decision, the Court expressly pointed out that, “[t]his holding. . . does not generally permit content delivery networks to avoid all copyright liability by making copies of each item of content and associating one unique copy with each subscriber to the network, or by giving their subscribers the capacity to make their own individual copies”. *Id.* Furthermore, it is essential to note that *Aereo* specifically overruled this portion of *Cablevision*. See *Am. Broadcasting Companies, Inc.*, 134 S. Ct. at 2511 (overruling *Cablevision* with regard to public performance).

2. Aereo: Streaming of Copyrighted Content Is a Public Performance

Aereo¹⁴⁶ created a “system . . . of servers, transcoders, and thousands of dime-sized antennas housed in a central warehouse.”¹⁴⁷ Each Aereo customer controlled an individual antenna.¹⁴⁸ Then, when the customer selected a currently broadcasting show he wished to watch from Aereo’s website, the customer’s individual antenna picked up the broadcasting signal for that show.¹⁴⁹ The antenna transmitted the broadcast to a transcoder,¹⁵⁰ which in turn translated the signal to a data format capable of Internet transmission.¹⁵¹ Next, the data were sent to a folder, individual and specific for each Aereo customer and housed on the Aereo hard drive, where a unique copy was saved.¹⁵²

The copy was saved for several seconds and then streamed over the Internet to the Aereo customer.¹⁵³ As a result, Aereo’s Internet broadcast continuously streamed data several seconds delayed after the original television broadcast for the duration of the show.¹⁵⁴ The Aereo Court was tasked with determining whether Aereo “performed” according to the Copyright Act,¹⁵⁵ and if so, whether Aereo performed “publicly.”¹⁵⁶

¹⁴⁶ *American Broad. Companies, Inc.*, 134 S. Ct. at 2500. Aereo, Inc. “sells a service that allows its subscribers to watch television programs over the Internet at about the same time as the programs are broadcast over the air”. *Id.*

¹⁴⁷ *Id.* at 2503.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ See *Transcoding Definition*, TECHTARGET, <http://searchsoa.techtarget.com/definition/transcoding> (last visited Oct. 17, 2015) (defining transcoding, which occurs in a transcoder, as “the ability to adapt digital files so that content can be viewed on different playback devices”).

¹⁵¹ *Am. Broad. Companies, Inc.*, 134 S. Ct. at 2503.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* “Aereo emphasizes that the data that its system streams to each subscriber are the data from his own personal copy, made from the broadcast signals received by the particular antenna allotted to him. Its system does not transmit data saved in one subscriber’s folder to any other subscriber. When two subscribers wish to watch the same program, Aereo’s system activates two separate antennas and saves two separate copies of the program in two separate folders. It then streams the show to the subscribers through two separate transmissions—each from the subscriber’s personal copy.” *Id.*

¹⁵⁵ 17 U.S.C. § 106 (2012).

¹⁵⁶ *Am. Broad. Companies, Inc.*, 134 S. Ct. at 2503. The determination of whether Aereo publically performed is critical as an unauthorized public performance constitutes copyright violation. *Id.*; see also 17 U.S.C. § 106 (2012) (codifying an unauthorized public performance as an instance of copyright infringement); see also *Jewell-La Salle Realty Co. v. Buck*, 283 U.S. 202, 203 (1931) (finding the Jewell-La Salle Realty Company infringed upon the American Society of Composers, Authors and Publishers’ copyrights when the Jewell-La Salle Realty Company caused an orchestral performance of which the American Society of Composers, Authors and Publishers’ held the exclusive

In determining whether Aereo “performed,” the Court first looked to community antenna television (“CATV”), recognizing old law¹⁵⁷ that “broadcasters perform” and “viewers do not perform”¹⁵⁸ and that “a CATV provider ‘falls on the viewer’s side of the line.’”¹⁵⁹ The Court pointed to the old CATV law, reasoning that just as simply using amplifying equipment did not make viewers performers, likewise providing such equipment to viewers did not make CATV providers performers.¹⁶⁰ The Court then looked to the Transmit Clause, codified in section 101 of the Copyright Act, and determined the Transmit Clause overruled the old law.¹⁶¹ The Court reasoned, “[t]he Clause thus makes clear that an entity that acts like a CATV system itself performs, even if when doing so, it simply enhances viewers’ ability to receive broadcast television signals.”¹⁶² The Court noted Aereo clearly acted as more than a simple equipment provider, and as such, “Aereo, and not just its subscribers, ‘performs (or transmits).’”¹⁶³

Next, the Court compared Aereo to the traditional CATV cable companies.¹⁶⁴ The Court noted that the only, and presently insignificant, difference was that the CATV cable companies “transmitted constantly; they sent continuous programming to each subscriber’s television set.”¹⁶⁵ Contrastingly, the Court stated that “Aereo’s system remains inert until a subscriber indicates that she wants to watch a program” and “[o]nly at that moment, in automatic response to the subscriber’s request, does Aereo’s system activate an antenna and begin to transmit the requested program.”¹⁶⁶ Based on Aereo’s comparison to the CATV cable companies, the Court held

rights of non-dramatic performance and considering various damages for such infringement).

¹⁵⁷ *Am. Broad. Companies, Inc.*, 134 S. Ct. at 2503. “Old law” is a term of art that the *Aereo* Court used to indicate that the law had later been overruled. *Id.* Presumably, the *Aereo* Court found comparison to the CATV old law important, despite its no longer being good law after the Copyright Act overruled it, as the facts surrounding the CATV technology are similar to those presented in the *Aereo* case. *Id.*

¹⁵⁸ *Id.* at 2505 (quoting *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 398 (1968)).

¹⁵⁹ *Am. Broad. Companies, Inc.*, 134 S. Ct. at 2505 (quoting *Fortnightly Corp.*, 392 U.S. at 399).

¹⁶⁰ *Am. Broad. Companies, Inc.*, 134 S. Ct. at 2505 (quoting *Fortnightly Corp.*, 392 U.S. at 398-400). The Court also recognized old law that “the reception and rechanneling of broadcast television signals for simultaneous viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer.” *Id.*

¹⁶¹ *Id.* at 2506.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 2507.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

that Aereo actually performed rather than simply supplying equipment.¹⁶⁷

Next, the Court considered whether Aereo's performance was "public" in light of the Transmit Clause.¹⁶⁸ The Court looked to the Copyright Act's definitions: "[t]o transmit a performance" is 'to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent' . . . [and] to 'perform' an audiovisual work means 'to show its images in any sequence or to make the sounds accompanying it audible.'¹⁶⁹ Interpreting this, the Court held that "when an entity communicates the same contemporaneously perceptible images and sounds to multiple people, it transmits a performance to them regardless of the number of discrete communications it makes."¹⁷⁰ The Court reasoned "whether Aereo transmits from the same or separate copies, it performs the same work; it shows the same images and makes audible the same sounds," ultimately concluding that "when Aereo streams the same television program to multiple subscribers, it 'transmits a performance to all of them.'¹⁷¹

The Court went on to state "the subscribers to whom Aereo transmits television programs constitute 'the public'" as the Copyright Act defines the public as "a large group of people outside of a family and friends."¹⁷² Further, the Court reasoned that even though "Aereo's subscribers may receive the same programs at different times and locations," . . . "the public need not be situated together, spatially or temporally" within the confines of the Transmit Clause.¹⁷³ Accordingly, the Court ultimately held that, pursuant to the Transmit Clause, Aereo publicly performed copyrighted works.¹⁷⁴

B. Potentially Infringing Content

The lack of precedent regarding Internet-based video game copyright infringement provides minimal guidance regarding how courts would rule on this issue. As they are closest on-point with the issue of Internet-based video game copyright infringement, the *Cablevision* and *Aereo* cases provide some predictability as to how

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 2508 (quoting 17 U.S.C. § 101). Also, the Court noted that the Transmit Clause specifically allows for a performance to be public "whether the members of the public capable of receiving the performance. . . receive it. . . at the same time or at different times." *Am. Broad. Companies, Inc.*, 134 S. Ct. at 2509 (quoting 17 U.S.C. § 101).

¹⁷⁰ *Am. Broad. Companies, Inc.*, 134 S. Ct. at 2509.

¹⁷¹ *Id.*

¹⁷² *Id.* at 2509-10 (quoting 17 U.S.C. § 101).

¹⁷³ *Am. Broad. Companies, Inc.*, 134 S. Ct. at 2010.

¹⁷⁴ *Id.* at 2511.

courts would rule on this issue.¹⁷⁵ This section will analyze different methods by which video game end users potentially infringe copyright by uploading and streaming video game content to the Internet.

Advances in technology have brought new and never before imagined copyright issues to the forefront.¹⁷⁶ Specifically, Internet technology allowed the video gaming community to flourish and prosper.¹⁷⁷ As video games became increasingly multi-player, gaming communities responded with local area network (“LAN”) parties.¹⁷⁸ Video gaming culture no longer revolves merely around

¹⁷⁵ See discussion *supra* Part III.A (analyzing the *Cablevision* and *Aereo* cases).

¹⁷⁶ See Peter S. Mendell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 66 (2002) (stating that current copyright law is inadequate for the needs of the digital age). Notably, Mendell's article discusses copyright protection for computer software, specifically coding, and considers issues regarding downloading content files as they relate to the DMCA. *Id.* Nonetheless, the concept of evolving technology and the need for copyright laws to likewise adapt spans issues beyond the copyrightability of computer software and downloading content. See *id.* (stating that current copyright law is inadequate for the needs of the digital age). See also Steven Pepe, *Multimedia Computing: Copyright Law's "Last Stand"*, 12 TOURO L. REV. 143, 144-45 (1995) (describing that the United States' copyright laws have traditionally followed behind advances in technology). Notably, Pepe's article was published twenty years ago. *Id.* Although the issues presented in Pepe's article involve outdated and different technologies than those considered in this Comment, the concept of copyright law consistently “lagg[ing] behind” current technology still rings true. *Id.*

¹⁷⁷ See, e.g., *About Quake and Quakeworld*, [QUAKEWORLD.NU, www.quakeworld.nu/about](http://www.quakeworld.nu/about) (last visited Nov. 8, 2015) (describing *Quake*, one of the first online video games, released in 1996); *Ultima Online*, [ULTIMA ONLINE, http://uo.com/](http://uo.com/) (last visited Nov. 8, 2015) (providing information regarding the online video game *Ultima Online*, which was also one of the first online video games, debuting in 1997); *Starcraft*, [BLIZZARD ENTERTAINMENT, http://us.blizzard.com/en-us/games/sc/](http://us.blizzard.com/en-us/games/sc/) (last visited Nov. 8, 2015) (providing information regarding the online video game *Starcraft*, which was released in 1998, and was likewise one of the first online video games); see also *PlayStation 2X Network Adaptor*, [AMAZON.COM, www.amazon.com/PlayStation-2X-Network-Adaptor-2/dp/B000051QDD](http://www.amazon.com/PlayStation-2X-Network-Adaptor-2/dp/B000051QDD) (last visited Nov. 8, 2015) (offering for sale an adaptor for a PlayStation 2 console to connect to the Internet. Without such an adaptor, the PS2 and earlier generation video gaming consoles lacked the ability to connect to the Internet); *Xbox Wireless Adaptor MN740*, [AMAZON.COM, www.amazon.com/Xbox-Wireless-Network-Adapter-MN740/dp/B00005QBX9/ref=sr_1_6?s=videogames&ie=UTF8&qid=1447016843&sr=1-6&keywords=xbox+network+adapter](http://www.amazon.com/Xbox-Wireless-Network-Adapter-MN740/dp/B00005QBX9/ref=sr_1_6?s=videogames&ie=UTF8&qid=1447016843&sr=1-6&keywords=xbox+network+adapter) (last visited Nov. 8, 2015) (offering for sale an adaptor for an Xbox console to connect to the Internet. Like the PS2, the Xbox was unable to connect to the Internet without such an adaptor); see also *PS3-PlayStation 3 Console*, [PLAYSTATION.COM, www.playstation.com/en-us/explore/ps3/](http://www.playstation.com/en-us/explore/ps3/) (last visited Nov. 8, 2015) (describing the PlayStation 3 console, which debuted in 2006, and select featured games, which make use of the Internet and network connectivity).

¹⁷⁸ *What is a LAN Party?* WISEGEEK, www.wisegeek.com/what-is-a-lan-party.htm (last visited Oct. 22, 2014) (describing LAN parties as events where

gameplay at arcades or friends' homes; the Internet connects gamers across the world, spawning communities and even professional careers.¹⁷⁹

Now, as gamers are able to connect to one another via the Internet, which allows gamers to speak to one another with voice over IP programs.¹⁸⁰ Additionally, gamers can maintain centralized community webpages that feature calendars, recruitment materials, applications for membership, and discussion boards.¹⁸¹ This increase of gaming connectivity and the rise of widespread gaming community membership led to entrepreneurial endeavors consisting of potentially copyright infringing products.¹⁸² This Comment will examine three examples of potentially copyright infringing content, including: (1) live streaming of gameplay, (2) publicly posted and archived videos of gameplay, and (3) publicly posted videos of game tutorials or walk-throughs.¹⁸³

gamers meet at a central location and connect their computers to a single network while playing a common video game).

¹⁷⁹ See *Terms of Service*, COUNTER LOGIC GAMING, <http://clgaming.net/tos> (last updated Nov. 2011) (describing copyright infringement and other intellectual property rules for the website and team). Because of the recognized establishment of these teams, several of these gamers most likely have acquired proper licensing to use copyrighted information. See *id.* (describing the terms of service for gaming teams). Such players are not the focus of the present Comment. E.g., KOREAN E-SPORTS ASSOCIATION, <http://e-sports.or.kr/> (last visited Oct. 21, 2014) (professional video game association in Korea); TESPA, <http://tespa.org/> (last visited Oct. 23, 2014) (professional video game association for collegiate gamers with several independent chapters); ELECTRONIC SPORTS ASSOCIATION OF AMERICA, <http://esportsusa.org/> (last visited Oct. 23, 2014) (the United States' largest video game association).

¹⁸⁰ See, e.g., VENTRILLO, www.ventrilo.com/ (last visited Oct. 23, 2014) (describing its product as software that allows users to communicate clear quality sound and voice over the Internet).

¹⁸¹ See, e.g., PEACHY KEEN, <http://peachykeenguild.com/> (last visited Oct. 22, 2014) (website for *World of Warcraft* guild, which details the guild's progression and achievements, recruitment needs, calendar of upcoming events, and discussion boards); LEAGUE OF LEGENDS CLAN AND TEAM RECRUITMENT FORUM, <http://forums.na.leagueoflegends.com/board/forumdisplay.php?f=23> (last visited Jan. 29, 2016) (recruitment on official *League of Legends* website for clans that gamers can join); Matt Hughes, *Skyrim Factions and Guilds Guide*, GAMES RADAR (Dec. 2, 2011), www.gamesradar.com/skyrim-factions-and-guilds-guide/ (describing various factions gamers can join for social interaction in *Skyrim*); BATTLE.NET, <http://us.battle.net/en/> (last visited Oct. 23, 2014) (offering a free Internet community forum for players and a central Internet hub from which gamers can play online video games).

¹⁸² See discussion *supra* Parts III.B.1, 2, and 3 (describing the application of intellectual property law to each of the three scenarios).

¹⁸³ *Id.* Although similar, these three scenarios are distinctive with regard to the manner in which intellectual property law properly applies to them.

1. Real-Time Streaming of Video Gameplay

Some gamers broadcast programs in which they show a live stream of themselves playing video games.¹⁸⁴ One popular hosting site for such streaming services is Twitch.¹⁸⁵ These streams occur in real-time and feature either a screenshot of the actual gameplay, a view of the gamer from a webcam, or both.¹⁸⁶ The public can subscribe to a gamer's Twitch channel to get a notification when the gamer is live-streaming content.¹⁸⁷ Gamers can also archive past streams, which the public can view even when the gamer is offline.¹⁸⁸ In addition to their streaming feed, gamers can modify their channel with links to social media and other websites, advertisements, and requests for donations.¹⁸⁹

The most predictable manners in which real-time streaming gameplay might infringe copyright is either as a derivative work, an unauthorized reproduction, or a public performance.¹⁹⁰ Courts would most likely find that real-time streaming gameplay is not a derivative work because it lacks the requisite transformation; that is, it is simply directly copied and rebroadcast through a different medium absent any creative alterations.¹⁹¹ Although streaming channel owners may create a new soundtrack for the gameplay by speaking over it or adding music, courts would most likely find this

¹⁸⁴ See, e.g., MJXGaming, TWITCH, www.twitch.tv/mjxgaming (last visited Oct. 17, 2015) (streaming video gamer playing FIFA 16).

¹⁸⁵ Doug Aamoth, *What Is Twitch?*, TIME (Aug. 26, 2014), <http://time.com/3181905/what-is-twitch/> (describing Twitch as a company Amazon bought for nearly \$1 billion and ranking Twitch as the site using the fourth most Internet data). Twitch is the leading video game streaming site online. *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ See *Which Subscriptions Are Ad-Free?* TWITCH SUPPORT CENTER, <http://help.twitch.tv/customer/portal/articles/1209280-which-subscriptions-are-ad-free-> (last visited Oct. 23, 2014) (stating that subscriptions cost money and can sometimes allow an ad-free viewing experience). See also *infra* note 252 and accompanying text (describing typical video game end user licensing agreements). Notably, several end user licensing agreements prohibit the use of copyrighted gameplay that is viewable only via paid subscription access. *Id.*

¹⁸⁸ *Videos on Demand*, TWITCH SUPPORT CENTER, <http://help.twitch.tv/customer/portal/articles/1575302-videos-on-demand> (last visited Oct. 22, 2014).

¹⁸⁹ See, e.g., *Ogre2*, TWITCH, www.twitch.tv/ogre2 (last visited Oct. 20, 2014) (streaming of a former professional *Halo* gamer's Twitch channel which features a PayPal link for donations); *PhantomL0rd*, TWITCH, www.twitch.tv/phantoml0rd (last visited Oct. 20, 2014) (streaming of a *League of Legends* gamer's Twitch channel which features advertisements, commercial breaks, and a donation button).

¹⁹⁰ See 17 U.S.C. § 501 (2012) (codifying copyright infringement).

¹⁹¹ See *Campbell*, 510 U.S. at 579 (describing a test for whether a work is sufficiently transformative when considering whether a rap group infringed upon the copyrights of *Pretty Woman* songwriters when the rap group created a parody of *Pretty Woman's* lyrics).

alteration too minimal to constitute the streaming content as a new, original work as the definition of derivative requires.¹⁹² And, even though the streaming changes the medium of the original work from the computer or gaming console to the Internet, courts have found that changing the medium alone fails to constitute a transformative derivative work.¹⁹³ Even if a court found that the streaming gameplay was transformative, because it is the essence of the video game, again being a direct copy, courts would likely find that the streaming work is substantially similar to the copyrighted video game.¹⁹⁴ Therefore, streaming gameplay is most likely prevented from derivative categorization.¹⁹⁵

Similarly, real-time streaming gameplay is most likely not an unauthorized reproduction of a copyrighted work.¹⁹⁶ The nature of live streaming is that it is not stored long enough¹⁹⁷ on servers or in buffers to be classified as an actual copy.¹⁹⁸ As the *Cablevision* Court found that streaming of television programs and movies do not constitute unauthorized reproductions,¹⁹⁹ other courts would probably find that streaming of video gameplay, which would utilize a similar buffer system, is not an unauthorized reproduction.²⁰⁰

¹⁹² *Id.*

¹⁹³ See *Contra Mirage Editions*, 856 F.2d at 1343-44 (stating that a work that is substantially similar to the original work is not a derivative when considering whether an artist who transferred designs from a book to ceramic tiles).

¹⁹⁴ See *Litchfield*, 736 F.2d at 1356-57 (finding a movie not a derivative work of a screenplay due to a lack of substantial similarities between the two works).

¹⁹⁵ See *id.* (finding no infringement where an alleged derivative work lacks substantial similarities to the original work).

¹⁹⁶ See 17 U.S.C. § 501 (2012) (describing copyright infringement). See also discussion *infra* Part III.B.1 (analyzing why a court would most likely rule that real-time streaming of video gameplay is not an unauthorized reproduction).

¹⁹⁷ See *Cartoon Network LP*, 536 F.3d at 130 (stating that the duration of time that content is stored in buffers or servers for streaming purposes is less than the “long enough” requirement for infringement). Thus, although courts have not yet indicated the exact duration of “long enough” to constitute infringement, *Cablevision* provides some guidance. *Id.*

¹⁹⁸ *The Cartoon Network LP*, 536 F.3d at 130 (holding that streaming of copyrighted content does not infringe upon the copyright holders’ right of reproduction).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* See *In Computing, What Is a Buffer?*, *supra* note 129 (describing how buffering functions with regard to streaming content). Copyright owning video game developers could argue that buffering streaming content over the Internet is substantially different than buffering involved in DVR systems. See *id.* (describing how buffering works). As such, copyright owners could argue that streaming live-feeds of video gameplay over the Internet is not analogous to the facts considered by the *Cablevision* Court. See *id.* (describing how buffering works); see also *The Cartoon Network LP*, 536 F.3d at 130 (finding that streaming for DVR purposes does not store data in buffer memories for longer than a transitory duration). See *In Computing, What Is a Buffer?*, *supra* note 129. Copyright owners could argue that because Internet-connecting machines

However, considering *Aereo*, a court would likely find real-time video gameplay streaming to be a public performance of a copyrighted work.²⁰¹ Because the real-time video gameplay stream is a broadcast,²⁰² courts would probably find that it is a performance.²⁰³ Further, just like the *Aereo* Court found that viewers who are not necessarily spatially connected constitute the public, a court would most likely determine that people viewing the real-time streams on their separate computers or tablets still fall within the statutory definition of public.²⁰⁴ Therefore, because end users often lack requisite licenses to publically perform the gameplay, courts would probably determine that such streaming infringes on the video game copyrights.²⁰⁵

2. Archived Video of Continuous Video Gameplay

Another type of potentially infringing video game content includes archived video clips of gameplay.²⁰⁶ These works are similar to live-streamed gameplay in that they merely contain clips

have varying sizes of hard drives, which affect how long data are stored in buffer memories, data may in fact be stored for more than a transitory duration. *See id.* (describing how buffering works); *see The Cartoon Network LP*, 536 F.3d at 130. Where courts find that data are stored in buffer memories for more than a transitory duration, live-streaming of video gameplay does create an unauthorized reproduction and thus infringes copyright. *Id.*

²⁰¹ *See Am. Broad. Companies, Inc.*, 134 S. Ct. at 2510 (holding that streaming copyrighted content constitutes a public performance).

²⁰² *See* 17 U.S.C. § 118 (describing limitations of noncommercial broadcasting). Alleged infringers would argue that streaming content over the Internet does not constitute a “broadcast” as considered by the Copyright Act, and therefore their works do not infringe copyright as public performances. *See id.* (describing limitations to noncommercial broadcasting). Further, alleged infringers would argue that infringing broadcasts have regularly previously included instances of public performances by cable companies, which are quite different from individual end users privately uploading content to the Internet. *See id.* (describing limitations to noncommercial broadcasting).

²⁰³ 17 U.S.C. § 101 (2012) (defining public performance of a work as: “(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.”).

²⁰⁴ *See Am. Broad. Companies, Inc.*, 134 S. Ct. at 2510 (finding viewers individually streaming content constitutes the public).

²⁰⁵ 17 U.S.C. § 501 (2012); 17 U.S.C. § 101 (2012) (defining public performance).

²⁰⁶ *See, e.g., MugetGaming, New Super Mario Bros U Walkthrough Part 1 Playthrough (No commentary)*, YOUTUBE, www.youtube.com/watch?v=GrSpbidyK58 (last visited Oct. 17, 2015) (exemplifying archived video gameplay).

of continuous gameplay with little editing, but they are distinguishable in that they do not stream in real-time.²⁰⁷ Rather, a viewer must hit “play” to begin watching these videos. Moreover, viewers can elect to re-watch these videos multiple times.²⁰⁸ And unlike streamed content, which is not stored for more than a transitory duration in temporary buffer memories,²⁰⁹ archived content is uploaded to servers and stored indefinitely.²¹⁰ Again, as these videos contain copyrighted video gameplay, they may infringe on the video game copyright owner’s rights.²¹¹ If these videos do infringe copyrights, they most likely do so again either as derivative works, unauthorized reproductions, or public performances.²¹²

Courts would most likely find that archived videos of continuous gameplay are not derivative works.²¹³ As with real-time

²⁰⁷ *E.g.*, PhantomL0rd, *2 Player League*, YOUTUBE, www.youtube.com/watch?v=3zNGLtSIyug (last visited Oct. 20, 2014) (depicting an archived video clip of split screen of gameplay and gamer via webcam); *see PhantomL0rd*, *supra* note 189 (allowing the public to view PhantomL0rd’s archived Twitch streams while he is offline); *Heroic Garrosh*, PEACHY KEEN, www.peachykeenguild.com/videos/78765 (last visited Oct. 23, 2014).

²⁰⁸ *See infra* note 219 and accompanying text (taking note that once the video clips have concluded, they can be restarted simply by pressing play again).

²⁰⁹ *See In Computing, What Is a Buffer?*, *supra* note 129 (describing how storage in buffer memories functions for streaming devices).

²¹⁰ *See, e.g.*, Nintendo Unity, *Yoshi’s Story- Boss Rush (All Boss Fights, No Damage)*, YOUTUBE, www.youtube.com/watch?v=cz7NMT_bc-w (last visited Oct. 17, 2015) (exemplifying archived video game content). Other examples of such archived content include video clips that are uploaded to YouTube servers. This content is available until the user who uploaded it to the YouTube servers actively removes it. *See Submit a Copyright Notice Takedown*, YOUTUBE (2015), <https://support.google.com/youtube/answer/2807622> (describing YouTube’s copyright enforcement policy). However, YouTube reserves the right to remove infringing content after notice of a cease-and-desist letter without the permission of the user who uploaded it. *Id.* Therefore, because such archived video gameplay remains stored on YouTube’s servers until end users remove it, it is stored longer than streaming content is stored in temporary buffer memory caches. *See id.* *See, e.g.*, Nintendo Unity, *supra* (exemplifying a video of archived video gameplay that has remained on YouTube’s servers since it was first published on Feb. 2, 2015).

²¹¹ *See* 17 U.S.C. § 501 (2012) (describing copyright infringement). *See also* discussion *infra* Part III.B.2 (analyzing why a court would most likely rule that archived content of video gameplay constitutes copyright infringement).

²¹² *See* 17 U.S.C. § 501 (2012) (describing copyright infringement). *See also* discussion *infra* Part III.B.2 (analyzing how a court would most likely rule on whether archived content of video gameplay constitutes copyright infringement as unauthorized reproductions, public performances, or creation of derivative works).

²¹³ *See Campbell*, 510 U.S. at 579 (describing a test for whether a work is sufficiently transformative when considering whether a rap group infringed upon the copyrights of *Pretty Woman* songwriters when the rap group created a parody of *Pretty Woman*’s lyrics). Copyright owners would probably not allege that end users infringe by creating derivative works for archived copies of streamed content. *See id.* (explaining that a derivative work must be transformative enough to be different from the original work). *See* discussion

streaming of continuous gameplay, archived videos of similar content lack the necessary transformative elements to constitute derivative works.²¹⁴ However, unlike real-time streaming gameplay, courts would probably find that archived videos of gameplay are unauthorized reproductions.²¹⁵ Because the archived videos remain available on the host site's servers for much longer than mere seconds (often for multiple years even), they are actual copies.²¹⁶ Therefore, as the copies exist indefinitely, rather than being quickly overwritten in buffers, this situation is distinguishable from *Cablevision*.²¹⁷

Finally, courts would probably also find that archived videos of gameplay constitute public performances for the same reasons the real-time streaming videos are public performances.²¹⁸ Even though the content would not begin until a viewer hit "play", *Aereo* indicates that a performance would begin upon starting the video.²¹⁹ A

supra, Part III.B.2 (developing arguments regarding end user unauthorized reproductions and unauthorized public performances further). A better argument copyright owning developers could make against end users is that end users infringe by creating unauthorized copies and engage in unauthorized public performances. See discussion *supra*, Part III.B.2 (developing arguments regarding end user unauthorized reproductions and unauthorized public performances further).

²¹⁴ See *Campbell*, 510 U.S. at 579 (describing a test for whether a work is sufficiently transformative when considering whether a rap group infringed upon the copyrights of *Pretty Woman* songwriters when the rap group created a parody of *Pretty Woman's* lyrics); *supra* Part III.B.1 (describing that streaming continuous video gameplay does not constitute a derivative work); see also *Soc'y of Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29, 60 (1st Cir. 2012) (finding infringement for biblical and other holy text translations posted on the Internet not transformative as it nearly copied the previous translations verbatim and required minimal effort to produce, thereby simply superseding the originals).

²¹⁵ See *The Cartoon Network LP*, 536 F.3d at 130 (stating that streaming copyrighted content does not constitute an unauthorized reproduction).

²¹⁶ *Id.*

²¹⁷ *Id.* (finding that, unfortunately for alleged infringers, the nature of the facts suggests that archived videos uploaded to Internet host sites would constitute reproductions, leaving very little room for counterarguments). See *Legislator 1357 Ltd. v. Metro-Goldwyn-Mayer, Inc.*, 452 F. Supp. 2d 382, 391-93 (S.D.N.Y. 2006) (describing how equitable defenses are applied to copyright law). Considering particular cases, alleged infringers may argue that their reproductions were actually authorized by the copyright owners, via EULAs, estoppel, or waiver, but such arguments would be fact intensive and probably rather weak. See *id.* (describing how equitable defenses are applied to copyright law); see also discussion *infra* Part III.C (describing how end user agreements and the fair use doctrine may provide refuge for alleged copyright infringers).

²¹⁸ See *Am. Broad. Companies, Inc.*, 134 S. Ct. at 2510 (holding that streaming content is a public performance); see also discussion *supra* Part III.B.1 (describing that streaming continuous video gameplay does constitute a public performance).

²¹⁹ *Am. Broad. Companies, Inc.*, 134 S. Ct. at 2509-10. See, e.g., Ninsegalover, *Classic Donkey Kong Arcade*, YOUTUBE, www.youtube.com/

predictable counterargument would be that a single person playing content on his computer wouldn't constitute "public;" however, *Aereo* holds that the defined public isn't limited to people temporally connected.²²⁰ Therefore, viewers who watch the videos at different times still constitute the public.²²¹

3. Tutorials and Walk-Throughs of Video Gameplay

Finally, another manner in which video gamers may infringe upon video game copyright owners' rights is by creating video game tutorials, which can also be referred to as walk-throughs or cheat guides, and uploading them to publicly accessible Internet hosting sites.²²² Tutorials and walk-throughs of video gameplay differ from the previous two types of potentially infringing video gameplay content described.²²³ The biggest difference tutorials and walk-throughs have from real-time streaming and archived gameplay is the addition of a soundtrack of the end user's commentary of how to play the video game.²²⁴ These types of end user-created works may be infringing as derivative works, unauthorized reproductions, or public performances.

Unlike the prior examples, courts would most likely find that video game tutorials are derivative works.²²⁵ Courts would most

watch?v=EhFV5-qbbIw (last visited Oct. 17, 2015) (exemplifying a two minute fifty-eight second archived video clip, which stops playing at the conclusion of two minutes fifty-eight seconds and replays from the beginning after a user presses the "play" button again). Accordingly, alleged infringers would argue that they are not engaging in unauthorized public performances because such performances do not begin until another viewer hits "play." *Id.* But see *Hotaling*, 118 F.3d at 203 (finding no need for the public to actually obtain the unauthorized reproduction of the copyrighted work, but merely making such reproduction available to the public constitutes infringement). Therefore, this argument would most likely be unpersuasive because even though the public performance doesn't begin until a viewer starts the stream, the alleged infringers make it possible for the viewer to watch the performance in the first place. *See id.* (finding merely making available copyrighted content constitutes infringement). Courts would most likely analogize end users' uploading archived content that would constitute an infringing public performance upon a viewer hitting "play". *See id.* (finding merely making available copyrighted content constitutes infringement).

²²⁰ *Am. Broad. Companies, Inc.*, 134 S. Ct. at 2509-10.

²²¹ *Id.*

²²² *See, e.g., theRadBrad, Batman Arkham Knight Walkthrough Gameplay Part 1 – Scarecrow (PS4)*, YOUTUBE (Jun. 22, 2015), www.youtube.com/watch?v=3sA7GISclQ (exemplifying a video of both directly copied gameplay and cinematics but also including portions describing the gameplay with an overlaid commentary soundtrack).

²²³ *See id.* (exemplifying a tutorial).

²²⁴ *See id.* (exemplifying a tutorial).

²²⁵ *See Warner Bros. Entm't Inc. v. RDR Books*, 575 F. Supp. 2d 513, 538-39 (S.D.N.Y. 2008) (defining and exemplifying derivative works, noting that not all new works that are based on prior works are inherently derivative and therefore

likely find video game tutorials are sufficiently transformative by incorporating voice-overs, new soundtracks, and sometimes animations to the clips of copyrighted video gameplay.²²⁶ While courts have not ruled specifically on video tutorials for video games, courts have found written video game guidebooks and tutorials infringing as derivative works.²²⁷ As video tutorials are analogous to the written guides, different only in the mediums in which they are fixed, courts would most likely find that video tutorials are also infringing as derivative works.²²⁸

Additionally, courts would most likely determine that video tutorials constitute unauthorized reproductions of copyrighted material for the same reasons archived videos of gameplay are unauthorized reproductions.²²⁹ Even though video tutorials incorporate new original elements and new creative elements, they

infringing, and that derivative works exist where adequate transformation occurs between the original work and the new work). In *Warner Bros.*, a fan of the *Harry Potter* franchise created an encyclopedia of the fantastic world in which the *Harry Potter* books occurred. *Id.* at 518-21. The *Warner Bros.* Court found that the encyclopedia was sufficiently transformative enough to not be merely a derivative work because it repurposed the copyright protected *Harry Potter* information “to give the reader a ready understanding of individual elements in the elaborate world of *Harry Potter* that appear in voluminous and diverse sources.” *Id.* at 539.

²²⁶ Compare discussion *supra* Part III.B.1 (describing how streaming of mere continuous gameplay is not transformative versus the transformative nature of Part III.B.3’s game tutorials); e.g., Icyveinscom, *Hearthstone Heroic Kel’Thuzad- Curse of Naaxramas*, YOUTUBE (Aug. 24, 2014), www.youtube.com/watch?v=GyWJrkRuuV8&list=UUY3wvmERttvoldIkG9Le99w (describing how to prevail at a particular battle in *Hearthstone* by using animations and voiceovers in addition to copyrighted gameplay).

²²⁷ See *Midway Mfg. Co. v. Publ’ns Intern., Ltd.*, 1994 WL 188531, at *2-3 (N.D. Ill. 1994) (finding that a third party’s “Unauthorized Players’ Guide” book containing over 200 screenshots of a video game infringed upon the video game copyright owner’s rights); see also *Micro Star v. Formgen Inc.*, 154 F.3d 1107, 1114 (9th Cir. 1998) (finding that the video game’s story itself constituted the copyrighted material, and a third party that created a sequel to the game infringed upon the video game copyright owner’s rights).

²²⁸ *Supra* note 227 and accompanying text. Alleged infringers could argue that content uploaded to the Internet is distinguished from creating a guidebook. One argument would be that content on the Internet remains more or less fixed in the same medium as the original work and remains an audiovisual work. See *id.* (exemplifying instances where derivative works were found to be infringing). But see *Mirage Editions*, 856 F.2d at 1343-44 (stating that a work that is substantially similar to the original work is not a derivative). As courts have found merely changing the medium in which a work is fixed does not constitute creation of a derivative work, the opposite will probably hold true in this situation. *Id.*

²²⁹ *The Cartoon Network LP*, 536 F.3d at 130 (stating that streaming of copyrighted content does not constitute an unauthorized reproduction); see also discussion *supra* Part III.B.2 (describing why archived videos of video gameplay are unauthorized reproductions).

still include clips of copyrighted gameplay that constitute copies.²³⁰ Finally, courts would probably determine that video tutorials are public performances of copyrighted video games for the same reasons that real-time streaming and archived videos of video gameplay constitute public performances.²³¹

C. *Potential Defenses to the Potentially Infringing Content*

Courts would most likely find that each of these three types of end user generated content infringes on the rights of the video game copyright owners.²³² However, end users may be absolved of copyright infringement liability.²³³ The strongest arguments potentially infringing end users could make would most likely sound in defenses pursuant to the Fair Use Doctrine or specific video game end user licensing agreements.²³⁴

1. *Fair Use Doctrine*

As for Fair Use, courts would probably find that the first and second factors weigh against the end user content constituting fair use, and the third and fourth factors may also weigh against the end users.²³⁵ As to factor one, which mandates consideration of the

²³⁰ *The Cartoon Network LP*, 536 F.3d at 130. *E.g.*, Tarou, *The Lich King Strategy Guide*, YOUTUBE (July 31, 2010), www.youtube.com/watch?v=8ybTns292Qk (detailing strategy for a boss fight in *World of Warcraft* while displaying continuous, copyrighted gameplay).

²³¹ See discussion *supra* Parts III.B.1 and 2 (explaining how real-time streaming and archived videos of video gameplay constitute public performances).

²³² See discussion *supra* Part III.B (describing the analyses by which courts could find that the three types of video gameplay content addressed in this comment infringe upon the video game copyright owners' rights).

²³³ See discussion *infra* Parts III.C.1 and 2 (describing the arguments allegedly infringing end users could make under the Fair Use Doctrine and provisions under particular End User Licensing Agreements, and analyzing how courts would most likely rule on such arguments).

²³⁴ *Id.*

²³⁵ See 17 U.S.C. § 107 (2012) (codifying the Fair Use Doctrine). Note, this Comment is considering real-time streaming, archive video, and tutorial video end user content as a whole. See *Campbell*, 510 U.S. at 569 (applying a fair use analysis). In an actual Fair Use analysis, courts consider each instance of infringement on a case-by-case basis. See *id.* (applying a fair use analysis). See Taylor, *supra* note 118, at 260 (applying the fair use doctrine to Let's Play video game tutorials). While this Comment argues that most end user generated content stereotypically will not constitute a Fair Use defense, courts may determine that some end user content, specific to particular cases, does in fact deserve Fair Use protection. See *Campbell*, 510 U.S. at 569 (applying a fair use analysis). Compare William Hunter, *Asteroids- Arcade (Atari 1979)*, YOUTUBE, www.youtube.com/watch?v=cZfsnA7dAHI (last visited Oct. 17, 2015) (exemplifying archived video game play through content), with CollegeHumor, *Updated PokeRap (With All 718 Pokemon)*, YOUTUBE (NOV. 15, 2013),

nature of the performance, courts would most likely determine the end user content to be commercial in nature.²³⁶ While the hosting sites may not charge viewers to see the end user content, several end users financially benefit from their copyright infringing real-time streaming, archive videos, or tutorial videos either via donations, partnerships with hosting sites, kickbacks from advertisements, or sales of their own merchandise.²³⁷ The second factor, which considers looking to the nature of the work infringed upon, would likewise fall in favor of the copyright owners.²³⁸

www.youtube.com/watch?v=iRM0-FT0tUA (exemplifying a parody rap song of a video game). Also note that the videos at issue in this Comment are specifically archived streams of continuous gameplay or tutorials of clips of gameplay, absent significant commentary or editing other than narration describing the visual gameplay or strategies. *See id.* (comparing different types of video game content on the Internet); *see* 17 U.S.C. § 107 (2012) (codifying the Fair Use Doctrine). End user generated content functioning as video game reviews or critiques or using clips of gameplay as a parody would most likely qualify as fair use. *See id.* (codifying the Fair Use Doctrine).

²³⁶ *See* Taylor, *supra* note 118, at 260 (applying the Fair Use Doctrine to Let's Play video game tutorials); *see also* 17 U.S.C. § 107 (2012) (juxtaposing the commerciality of a work against whether it "is for nonprofit educational purposes").

²³⁷ *See, e.g., Sky Does Minecraft*, SPREADSHIRT.COM, <http://skydoesminecraft.spreadshirt.com/> (last visited Oct. 23, 2014) (selling tee-shirts and other accessories decorated with signature designs the end user made popular via his *Minecraft* YouTube webpage and other social media pages, which feature clips of copyrighted *Minecraft* gameplay). Sales of end users' own merchandise are most likely possible only as a result of the fame the end users have gained by using the copyrighted material. *See id.* (selling merchandise with signature designs made popular via use of copyright protected video gameplay). Without use of copyrighted material, these end users would not have a fan base and therefore would not have clientele purchasing their merchandise. *See id.* (selling merchandise with signature designs made popular via use of copyright protected video gameplay). Moreover, some of their merchandise includes copyrighted video game images, which itself may be infringement as derivative works. *See id.* (selling merchandise with signature designs made popular via use of copyright protected video gameplay).

²³⁸ *See* Taylor, *supra* note 118, at 260-61 (applying a fair use analysis to a Let's Play video game tutorial for *Resident Evil 5*). As to the first fair use factor, Taylor finds that the Let's Play is arguably transformative because of the commentary and tutorial soundtrack laid over the video game streaming content. *Id.* at 260. Taylor also notes that the alleged infringer is a YouTube partner, and he therefore earns a commercial benefit from posting his video online. *Id.* at 260-61. As to the second fair use factor, Taylor considers Let's Plays to be parodies, and therefore, he renders this prong of the fair use analysis unnecessary. *Id.* For the third fair use factor, Taylor finds Let's Plays to be guilty of using a substantial amount of both the quantity and quality of the original video game work. *Id.* at 261. Taylor argues that Let's Plays fail to substantially change the original content enough to be analogous to the *Campbell* Court's findings of a parody song. *Id.* As to the final fair use factor, Taylor argued that Let's Plays most likely do not have a negative market impact. *Id.* In finding such, Taylor noted that Let's Plays fail to act as true substitutes for original video games, and some video game developers have even

Because video games are creative works of fiction,²³⁹ copyright infringers are given less leeway when using copyrighted video game content under fair use terms.²⁴⁰

The third factor courts consider in a fair use analysis is the amount of copyrighted content that is used in the infringing work.²⁴¹ Even though this factor does not as obviously weigh in favor of the copyright owners and against a finding of fair use, courts would probably still be able to find similarly to the first two factors.²⁴² Because present day video games consist of many, potentially infinite, hours of gameplay, courts would likely determine that the quantitative amount of infringing work used in the end user streaming, archived videos, or tutorial videos is not more than what is reasonably necessary.²⁴³ However, under a qualitative analysis,²⁴⁴ courts would most likely find that the end user works take the heart of the video game work.²⁴⁵

encouraged end user Let's Play creation. *Id.* at 261-62. In totality, Taylor argued that the transformative nature of Let's Plays and the potential negative market impact Let's Plays may have on the original video game market would be the most difficult fair use factors to overcome. *Id.* at 262. Taylor concluded that fair use would be an arguable defense for Let's Plays, but until courts rule on the matter, he cannot definitively ascertain whether Let's Plays are protected as fair use. *Id.*

²³⁹ See Andy Ramos Gil de la Haza, *Video Games: Computer Programs or Creative Works?*, WIPO MAGAZINE, www.wipo.int/wipo_magazine/en/2014/04/article_0006.html (Aug. 2014) (describing different manners in which video games can gain legal protection, one of which being their classification as creative works).

²⁴⁰ See *Robinson*, 877 F. Supp. at 840 (describing how courts analyze the nature of the copyrighted work factor of a fair use analysis); *Bridge Publ'ns, Inc.*, 827 F. Supp. at 635 (describing an analysis of the second fair use factor).

²⁴¹ 17 U.S.C. § 107 (2012).

²⁴² See Taylor, *supra* note 118, at 261 (applying a fair use analysis to Let's Play video game tutorials).

²⁴³ See *Substance, Inc.*, 354 F.3d at 629 (discussing how courts analyze the third fair use factor).

²⁴⁴ See *Hustler Magazine, Inc.*, 606 F. Supp. at 1537-38 (Cal. 1985) (describing how courts analyze this Fair Use factor). Remember, this factor uses a qualitative analysis in addition to the quantitative analysis. See *id.* (describing how courts analyze this fair use factor).

²⁴⁵ See *Norse*, 847 F. Supp. at 146 (stating that this fair use factor makes use of both a qualitative and a quantitative analysis). See, e.g., WatchMojo.com, *Top 10 Hardest Boss Fights in Video Games*, YOUTUBE (Jul. 19, 2014), www.youtube.com/watch?v=UtrHTrJW4AI (counting down the top ten most difficult boss fights across different video game franchises). End user content typically contains exciting video gameplay rather than mundane grinding or levelling. See *id.* (exemplifying video game boss fights). See, e.g., iDeactivateMC, *New Super Mario Bros 2- All Koopaling and Bowser Boss Fights (All Castle Bosses) (Nintendo 3DS)*, YOUTUBE (Oct. 21, 2013), www.youtube.com/watch?v=7VR1-Gnoms8 (exemplifying a compilation of boss fights for *Super Mario Brothers 2*). The content featured on end user video clips is usually that of boss fights or dramatic scenarios. See *id.* (exemplifying video game boss fights). See, e.g., Mionelol, *Solo: Lich King :*, YOUTUBE (Jul. 29,

Finally, courts consider the fourth factor, which looks at market impact, in the fair use analysis.²⁴⁶ Courts would probably find that this factor weighs in favor of the end users in a fair use analysis as the end users' content probably doesn't decrease from the marketability of the video game.²⁴⁷ On the contrary, a strong argument could be made that the end users' works actually promote and advertise the video games, which in turn would raise the copyright owners' profits.²⁴⁸

Conclusively, when balancing the composite of the Fair Use Doctrine's four factors, courts would most likely find that the majority of the factors weigh in favor of the copyright owners and against the infringing end users.²⁴⁹ Accordingly, courts would most

2011), www.youtube.com/watch?v=nkt0sn_BVcM (showing a *World of Warcraft* final boss fight video clip that has received over two million views); *compare with* *Freddy Caty World of Warcraft HD relaxed questing #1 no commentary!*, YOUTUBE (Aug. 15, 2015), www.youtube.com/watch?v=Titk6PpHqps (showing a *World of Warcraft* character completing simple quests and no boss fights, which has received 38 views). Understandably, clips of less exciting and entertaining content fail to draw substantial audiences. *See id.* (showing mundane grinding without boss fights). *See* WatchMojo.com, *Top 10 Video Games With Great Stories*, YOUTUBE (Oct. 15, 2013), www.youtube.com/watch?v=3f47eONJgLA (counting down the top ten video games that incorporate substantial storylines). Video game developers, who are often the copyright owners, incorporate pivotal storylines and climaxes in the types of substantial fights and scenarios that end game users often feature in their streaming, archived video, and tutorial video works. *See id.* (exemplifying well-received video game stories). *See* *Norse*, 847 F. Supp. at 146 (describing a qualitative and quantitative analysis for fair use). Although real-time streams may not always include exciting gameplay content such as boss fights or end game scenarios, they take quantitatively more copyrighted work, so this factor may still weigh against their favor. *See id.* (describing a qualitative and quantitative fair use analysis).

²⁴⁶ 17 U.S.C. § 107 (2012).

²⁴⁷ *See supra* notes 110-112 and accompanying text (describing how courts evaluate market impact in a fair use analysis).

²⁴⁸ *See* Nick Statt, *For Video Game Industry, 2014 Couldn't Escape Slumping Game Sales*, CNET (Jan. 2015), www.cnet.com/news/for-video-game-industry-2014-couldnt-escape-slumping-software-sales/ (describing decreases of video game sales resulting from video game developer price slashing and decreased video gamers purchasing new software as a result of online and used game retailers). Viewing the gameplay via the end users' streaming, archived video, or tutorial works may entice consumers to purchase video games they otherwise would not as opposed to acting as a market substitute for the video games themselves. *Id.*; *see also* Martha C. White, *Game Over? Why Video-Game-Console Sales Are Plummeting*, TIME (Feb. 11, 2013), <http://business.time.com/2013/02/11/game-over-why-video-game-console-sales-are-plummeting/> (describing decreased video game console sales, partially due to the rise of streaming games and mobile games).

²⁴⁹ *But see* Christopher Harbin, *Video Game Playthrough Footage Should Be Fair Use*, THE LEGAL SATYRICON (May 28, 2010, 8:20 PM), <http://randazza.wordpress.com/2010/05/28/video-game-playthrough-footage-should-be-fair-use/> (arguing that video gameplay clips would most likely need to satisfy more of the fair use factors to successfully use a fair use defense for

likely determine that end user real-time streaming, archived videos, and tutorial videos containing copyrighted video gameplay do not qualify for fair use protection.²⁵⁰

2. End User Licensing Agreements

However, end users may seek refuge from lawsuits alleging infringing content from a second potential defense: licensing agreements.²⁵¹ Video games require players to agree to an End User Licensing Agreement (“EULA”) before commencing gameplay.²⁵² Typically, the EULAs describe the video game copyright owners’ rights and the permissions granted to end users with regard to the copyrighted material.²⁵³ However, many video game EULA terms

infringement).

²⁵⁰ See The Program on Information Justice and Intellectual Property & The Center for Media & Social Impact, *Code of Best Practices in Fair Use for Online Video*, CENTER FOR MEDIA & SOCIAL IMPACT (Jun. 2008), www.cmsimpact.org/fair-use/related-materials/codes/code-best-practices-fair-use-online-video#common (detailing best practices in fair use for Internet-based video content and common myths regarding the Fair Use Doctrine). Notably, the instances of potentially infringing content discussed in this Comment, or anything similar to them, are not considered fair use. See *id.*

²⁵¹ See *Design Basics, LLC v. Chelsea Lumber Co.*, 977 F. Supp. 2d 714, 729-35 (E.D. Mich. 2013) (describing express and implied licensing agreements as they apply to copyright protection).

²⁵² See *End User Licensing Agreement (EULA) Definition*, TECHTARGET, <http://searchcio.techtargget.com/definition/End-User-License-Agreement> (last visited Oct. 17, 2015) (defining end user licensing agreements as contracts between software developers and software purchasers); see also *EULA: What’s an end User License Agreement?*, NOLO, www.nolo.com/legal-encyclopedia/eula-whats-end-user-license-agreement.html (last visited Oct. 17, 2015) (describing the legal ramifications of shrinkwrap and clickwrap EULAs).

²⁵³ See, e.g., *Blizzard Video Policy*, <http://us.blizzard.com/en-us/company/legal/videopolicy.html> (last visited Oct. 21, 2014) (granting end users permission to include copyrighted gameplay in their non-commercial works). See Boogie2988, *Copyrightalypse: YouTube Strikes Out Against the Gaming Community*, EXAMINER.COM (Dec. 12, 2013, 8:59 PM), www.examiner.com/article/copyrightalypse-youtube-strikes-out-against-the-gaming-community#sthash.ycE36GEF.dpuf. See also Boogie2988, *YouTube’s Copyright Changes to Gameplay Footage*, YOUTUBE (Dec. 11, 2013), <https://www.youtube.com/watch?v=35P2-kVuHkI> (explaining the changes to YouTube’s copyright policies and the implications they will have on YouTube channel owners, YouTube viewers, the gaming community, and the gaming industry). In December 2013, YouTube employed a new automated method of finding copyrighted material in user-uploaded videos. See *id.*; see also *Copyright on YouTube*, YOUTUBE, www.youtube.com/yt/copyright/ (last visited Oct. 17, 2015) (stating YouTube’s copyright policy). When YouTube discovered infringing content, YouTube sent a cease-and-desist letter to the infringing end user. See *YouTube’s Copyright Changes to Gameplay Footage*, *supra*. Many end users actively made their displeasure about the YouTube changes known. See, e.g., *Copyrightalypse*, *supra* (Boogie2988’s video has over half a million views, and a newspaper site published it). Several video game developers and copyright owners also expressed displeasure with the new policies by granting

are frequently modified and contain confusing language, which can result in end users not fully understanding permissions they are granted regarding copyrighted material at any one time.²⁵⁴

Additionally, EULAs among different games vary, sometimes vastly, in the copyright use permissions they grant end users.²⁵⁵ This can lead to confusing situations where end users legally include copyrighted gameplay in streaming, archived videos, or tutorial videos from one game and mistakenly believe that their

explicit permission for end users to continue to include their copyrighted gameplay in YouTube videos. *See, e.g.*, Deep Silver Twitter, <https://twitter.com/Pewology/status/410523484536983552> (last visited Oct. 22, 2014) (granting permission to use copyrighted gameplay for Deep Silver games, such as *Warhammer*, *Saints Row*, and *Risen*); Capcom Twitter, https://twitter.com/Capcom_Unity/status/410559475959885824 (last visited Oct. 22, 2014) (granting permission to use copyrighted gameplay for Capcom games, such as *Resident Evil*, *Devil May Cry*, and *Street Fighter*); Peter Parrish, *Ubisoft Clarifies YouTube Copyright Stance, Offers Assistance*, INC GAMERS (Dec. 11, 2013), www.incgamers.com/2013/12/ubisoft-clarifies-youtube-copyright-stance-offers-assistance (granting permission to use copyrighted gameplay for Ubisoft games, such as *Assassin's Creed*, *Rainbow Six*, *Splinter Cell*, and *Just Dance*); *Monetizing from Youtube Videos Containing Paradox Interactive Material! Discussion Forum*, PARADOX INTERACTIVE (Jul. 17, 2013), <http://forum.paradoxplaza.com/forum/showthread.php?671169-Monetizing-from-Youtube-videos-containing-Paradox-Interactive-material> (giving end users a letter granting permission to use copyrighted gameplay for Paradox Interactive games).

²⁵⁴ *E.g.*, *Minecraft End User License Agreement*, MOJANG, https://account.mojang.com/documents/minecraft_eula (last updated Oct. 27, 2015) (exemplifying a EULA, in this case the EULA for *Minecraft*, written in layperson terms and attempts to use slang and humor). While this may potentially result in more gamers reading the EULA before simply agreeing to it, it can also create the negative consequences of confusing gamers who do not understand the slang. *Id.* Additionally, such a EULA may result in confusing gamers expecting standard legalese in what is expected to be an enforceable contract. *Id.*

²⁵⁵ *Compare* Blizzard Video Policy, *infra* note 257 (granting end users permission to use Blizzard's copyrighted gameplay), *with* Nintendo Copyright Policy, www.nintendo.com/corp/copyright.jsp (last visited Oct. 23, 2014) (forbidding use of any copyrighted work in a public performance or publication generating commercial profits). *But see* Canal de Pelayo, *New Super Mario Bros.*, YOUTUBE, www.youtube.com/watch?v=PRjzqc2l6Yw (Sept. 14, 2005) (featuring *Mario Brothers* gameplay, for which copyrights are owned by Nintendo). This clip has been up for nearly a decade and garnered over 1.9 million views. Viewers can subscribe to the YouTube channel, which contains advertisements, constituting a commercial use. *Id.* *See also* *Software License Agreement*, ACTIVISION, http://store.activision.com/store/atvi/en_US/Content/pbPage.eula_black_ops?resid=VErs3woydhEAAM9v5DgAAACU&rest=1414196248185 (last visited Oct. 23, 2014) (dictating that Activision does not permit any use of its video gameplay in end user videos). Yet, multiple videos featuring Activision's *Call of Duty* gameplay remain on YouTube even after receiving over a billion views. *Id.* *See also* The Syndicate Project, *infra* note 261 (exemplifying end user content featuring *Call of Duty* video gameplay).

inclusion of copyrighted gameplay from another game is likewise legally used.²⁵⁶

Nearly every EULA that grants permission to use copyrighted gameplay in end user created videos limits such authorization to only non-commercial uses.²⁵⁷ However, while still limiting copyrighted gameplay to non-commercial uses overall, some EULAs do allow participation in hosting site partnership programs or inclusion of advertisements before, during, or after videos.²⁵⁸ This is further complicated as several prominent end user real-time streaming, archive video, or tutorial video creators include more than one game's copyrighted work in their single websites.²⁵⁹ This has the effect of end users abiding by some EULAs, allowing for partnership program participation and advertisement use, while

²⁵⁶ See Blizzard Video Policy, *infra* note 257 (dictating that Blizzard, owner of *Starcraft*, has expressly granted end users permission to use copyrighted *Starcraft* gameplay for non-commercial purposes). See Husky Plays, YOUTUBE, www.youtube.com/user/husky/featured (last visited Oct. 23, 2014). HuskyStarcraft has permission from Blizzard to include gameplay of *Starcraft* material on his YouTube channel. *Id.* But see Husky Plays, *Pokemon Blue-Entire Campaign*, YOUTUBE, www.youtube.com/playlist?list=PL37651D18A7584A6F (last visited Oct. 23, 2014) (including a playlist of gameplay of the entire *Pokemon* video game). HuskyStarcraft also has a playlist of *Pokemon* gameplay, which consists of the complete "Blue" campaign. *Id.* See *Terms of Use*, POKEMON.COM www.pokemon.com/us/terms-of-use/ (last visited Oct. 23, 2014) (noting that Pokemon International, the copyright owner of the *Pokemon Blue* game, has not granted general permission or licensing to use their gameplay).

²⁵⁷ See, e.g., *Blizzard Video Policy*, BLIZZARD, <http://us.blizzard.com/en-us/company/legal/videopolicy.html> (last visited Oct. 21, 2014) (including in its EULA permission for end users to publicly distribute and perform gameplay of Blizzard's games, including *Diablo*, *World of Warcraft*, and *Starcraft*, in a non-commercial manner). Notably, Blizzard's terms do allow end users to earn income from using its video gameplay content in very limited manners. *Id.* Under Blizzard's EULA, income cannot be the result of forcing a viewer to pay to view the video. *Id.* But, end users may profit from using Blizzard's video gameplay content by including donation links on their websites or enrolling in host website partnership programs. See *id.* (stating "[t]he only exceptions to this rule are if you participate in partner programs with YouTube, Justin.tv, Blip.tv, Own3d.tv, or Ustream.tv (the 'Production Websites') whereby a Production Website may pay you for views of a Production if you are accepted into their partner program"); see, e.g., Day[9]TV Tip Jar, <http://day9.tv/tipjar/> (last visited Oct. 22, 2014) (requesting donations to continue operation of the Day[9]TV's activities including a popular YouTube channel that plays daily *Starcraft* footage). See also, *supra* notes 253 and 256 and accompanying text (requiring that copyrighted work may be used only in videos that are free for the public to view and are not used commercially).

²⁵⁸ See, e.g., *Blizzard Video Policy*, *supra* note 257 and accompanying text (exemplifying a EULA that allows limited commercial income from participating in web hosting partnership programs).

²⁵⁹ See *supra* note 256 and accompanying text (exemplifying how an end user may permissibly use copyrighted video gameplay content of one game while illegally infringing copyright by using video gameplay in the same manner from a different game).

simultaneously violating other EULAs, which do not grant permission for such commercial activities.²⁶⁰

Moreover, many end user real-time streaming, archive video, or tutorial video creators include links to merchandise stores from their hosting site webpages.²⁶¹ These end users generally lack the fame to promote merchandise sales absent the use of their streaming, archive video, or tutorial video works, which include copyrighted material.²⁶² Therefore, the commercial benefit such end users realize from merchandise sales is a traceable result of their use of copyrighted gameplay.²⁶³ This constitutes a commercial use, which violates most EULAs, and therefore fails to provide the exception under which such end users seek to legally use copyrighted video gameplay.²⁶⁴ So, even where video game copyright owners grant special permissions to end users to incorporate copyrighted gameplay into their streaming, archive video, or tutorial video works, end users who violate other terms of the EULA would most likely be found to be illegally infringing copyright.²⁶⁵

²⁶⁰ See *supra* note 256 and accompanying text (exemplifying how an end user may permissibly use copyrighted video gameplay content of one game while illegally infringing copyright by using video gameplay in the same manner from a different game).

²⁶¹ E.g., Captain Sparklez, YOUTUBE, www.youtube.com/user/CaptainSparklez/about (last visited Oct. 23, 2014) (linking directly to his merchandise website, which sells apparel, accessories, and other gifts, <http://captainsparklez.spreadshirt.com/>, on his YouTube channel that features *Minecraft* gameplay.); The Syndicate Project, YOUTUBE, www.youtube.com/user/TheSyndicateProject/about (last visited Oct. 23, 2014) (linking directly to his merchandise website, which sells apparel, accessories, skins and cases both in the United States and abroad, www.syndicateoriginal.com/, on his YouTube channel that features *Call of Duty* and *Minecraft* gameplay.); Vanoss, YOUTUBE, www.youtube.com/user/VanossGaming/about (last visited Oct. 23, 2014) (linking directly to his merchandise website that sells apparel, accessories, and cases, <http://vanossgaming.spreadshirt.com/>, on his YouTube channel).

²⁶² See, e.g., Patricia Hernandez, *Pewdiepie Responds to Haters, Kills It*, KOTAKU (Jul. 7, 2015), <http://kotaku.com/pewdiepie-responds-to-haters-kills-it-1716384638> (describing Let's Play video game tutorial commentator's career as a college dropout who worked at a hot dog stand, barely affording rent, before he gained fame and fortune solely from posting video game tutorials on YouTube).

²⁶³ *Id.*

²⁶⁴ E.g., *Minecraft End User License Agreement*, MOJANG, https://account.mojang.com/documents/minecraft_eula (last visited Oct. 23, 2014) (allowing end users to upload videos and screenshots of gameplay and permitting use of advertisements on the videos). However, end users cannot commercially profit off *Minecraft* copyrighted work. *Id.* See also *supra* notes 254, 256, 257 and accompanying text (exemplifying other instances of commercial use of copyrighted video gameplay).

²⁶⁵ See *Meridian Project Sys., Inc. v. Hardin Const. Co., LLC*, 426 F. Supp. 2d 1101, 1108-09 (E.D. Cal. 2006) (stating that so long as a EULA includes rights other than those federally protected by the Copyright Act, a breach of

IV. PROPOSAL

The continued existence of uncontested copyright infringing content on the Internet is a substantial problem.²⁶⁶ Video game end users most likely infringe video game developers' copyrights by uploading video game content to the Internet.²⁶⁷ Because video games are often developed by corporations, these corporations are reliant upon the sale of their products for their continued survival and success.²⁶⁸ The fact that it is exceptionally difficult for video game developers to enforce their exclusive rights, especially on the Internet, creates a significant problem.²⁶⁹

This section will present solutions for copyright owners to protect and better enforce their rights. It will analyze each possibility by recognizing its benefits and detriments by evaluating arguments for the proposed solution and counterarguments against implementing the proposed solution. Finally, this section will conclude by proposing that a hybrid of these solutions be employed to decrease end user copyright infringement while being mutually beneficial for the copyright owners' businesses and the creative, but infringing, end users.

A. *Potential Solutions to the Copyright Infringement Problem*

The Copyright Act of 1976 specifically details the exclusive rights copyright owners enjoy, and it states that a person infringes

contract claim is not preempted by federal law). Therefore, where a EULA does not explicitly provide for an end user's use of copyright protected content, the end user is liable for infringement under the Copyright Act. *See id.* (stating that contract claims may be brought in addition to federal claims for breaches of EULAs that contain rights beyond those protected by the Copyright Act).

²⁶⁶ *See supra* Part III (identifying three types of potential infringement, including unauthorized public performances in streaming of both real-time and archived videos, unauthorized reproductions of archived videos uploaded online for an extended period of time, and creations of unauthorized derivative works in video game tutorials).

²⁶⁷ *Id.*

²⁶⁸ *See* Dodge v. Ford Motor Co., 170 N.W. 668, 684 (1919) (finding that a corporation's proper purpose is to earn income for its shareholders). Thus, it is the duty of the video game developing corporations to earn money for their shareholders by producing, promoting, and selling their video game products. *See id.* (describing that corporations are in the business of making money for shareholders); *see also*, *Top 50 Video Game Makers*, IGN, www.ign.com/top/video-game-makers (last visited Dec. 17, 2015) (listing 50 video game developers and describing accomplishments each developer has achieved).

²⁶⁹ *See supra*, Part III (as exemplified by the continued existence of streaming and archived videos of copyrighted gameplay on the Internet).

when he encroaches on those rights.²⁷⁰ Yet, despite such an explicit law, the Internet is saturated with instances of copyright infringement.²⁷¹ It only follows that the present copyright laws and the enforcement of these laws with regard to the Internet are inadequate.²⁷²

1. *Copyright Owners Directly Enforce Their Rights against Infringers*

The first solution to the problem of rampant infringement of video gameplay copyrighted content is for copyright owners to sue infringers.²⁷³ Although this solution would require copyright

²⁷⁰ See 17 U.S.C. § 106 (2012) (describing the exclusive bundle of rights enjoyed by copyright owners, including the rights to reproduce, publicly perform, and create derivative works); 17 U.S.C. § 501 (2012) (delineating copyright infringement as “anyone who violates the exclusive rights of the copyright owner”).

²⁷¹ See Rich Gardella & Jamie Forzato, *US Goes on Offense Against Digital Piracy*, NBC NEWS INVESTIGATIONS (May 28, 2011, 4:25 AM), http://investigations.nbcnews.com/_news/2011/05/28/6732624-us-goes-on-offense-against-digital-piracy (stating that “across all areas of the global Internet, 23.76 percent of traffic was estimated to be infringing on copyrighted material”) (quoting Envisional Ltd., *Technical report: An Estimate of Infringing Use of the Internet* (Jan. 2011), http://documents.envisional.com/docs/Envisional-Internet_Usage-Jan2011.pdf). See also Envisional, *supra*, at 2 (stating “analy[zing] bandwidth usage across the Internet with the specific aim of assessing how much of that usage infringed upon copyright”). Further, the projection that “23.76% of traffic was estimated to be infringing” specifically “excludes all pornography”. *Id.* As a result, the actual amount of infringing content on the Internet may be much greater. *Id.*

²⁷² See William O. Ferron, Jr. et al., *On-Line Copyright Issues, Recent Case Law and Legislative Changes Affecting Internet and Other on-Line Publishers (Part I)*, 79 J. PAT. & TRADEMARK OFF. SOC'Y 5, 23 (1997) (describing how the DMCA impacts copyright law with regard to Internet-based content). See 17 U.S.C. § 512 (2012) (codifying the DMCA). An amendment to the DMCA is an inevitable suggestion when considering a modification to copyright laws on the Internet. See 17 U.S.C. § 512 (2012) (codifying the DMCA). The DMCA safe harbor provisions prevent copyright infringement liability for online service providers (“OSPs”) engaging in four types of traditional activity: “Transitory network communications”; “System caching”; hosting “information . . . at direction of end users”; providing “Information location tools”. 17 U.S.C. § 512 (2012). The DMCA requires that OSPs remove copyright infringing content from their sites. 17 U.S.C. § 512 (2012). As soon as a copyright owner provides notice to an OSP of allegedly infringing content, the OSP must act promptly to remove that content. See 17 U.S.C. § 512(c)(3)(A) (2012) (stating the DMCA requires that copyright owners give proper written notice to OSPs that includes specific, required information). See also 17 U.S.C. § 512(c)(1) (2012) (stating under the DMCA’s safe harbors, so long as the OSP acts in good faith to notify infringing subscribers and take down infringing material upon proper notification from the copyright owner, the OSP will not be liable for infringing copyright).

²⁷³ See *Stopping Copyright Infringement*, COPYRIGHT.GOV, www.copyright.gov/help/faq/faq-infringement.html (last visited Dec. 17, 2015)

owners to continuously monitor and initiate lawsuits against infringing end users, the assistance of “bots”²⁷⁴ would drastically decrease this burden.²⁷⁵ Bots help copyright owners enforce their rights by scouring the Internet for instances of infringement and flagging them for the owners to evaluate and take appropriate enforcement action as necessary.²⁷⁶

However, suing infringing end users may be a kiss of death to a video game copyright owner’s business, resulting in loss of business or possible insolvency.²⁷⁷ Because so many comparable video games are currently on the market, suing video game players would result in a public relations nightmare, ultimately decreasing its sales and its player base as end users would switch to play games published by less litigious copyright owners.²⁷⁸ Additionally, because the Internet is accessible worldwide, jurisdictional issues may further complicate such lawsuits.²⁷⁹

(describing manners in which copyright owners can enforce their copyrights, including litigation).

²⁷⁴ See SEARCHBOTS.NET, <http://searchbots.net/about/> (last visited Nov. 13, 2014) (describing search-bots as robots that “continuously search[] the Internet” for specified content); Todd Gardiner, *How Are Websites with Copyright Infringement Discovered?*, QUORA (May 20, 2013), www.quora.com/How-are-websites-with-copyright-infringement-discovered-Search-bots-humans-etc (answering that instances of copyright infringement on the Internet can be discovered through the use of search-bots). *But see, e.g.*, Stephen Totilo, *Clueless YouTube Copyright Bots Think GTA Sirens Are a Famous Jazz Song*, KOTAKU (Dec. 20, 2013, 11:30 AM), <http://kotaku.com/clueless-youtube-copyright-bots-think-gta-sirens-are-a-1487190437> (demonstrating a YouTube bot mis-flagging sirens on a video featuring *Grand Theft Auto* gameplay as a copyrighted phonorecord of the Sonny Rollins Quartet’s rendition of “St. Thomas”). Thus, these bots are not always successful at discovering infringing content. *Id.*

²⁷⁵ See 17 U.S.C. § 512 (2012) (describing safe harbor provisions for OSPs). Under the safe harbor provisions, because it is the copyright owners who are tasked with monitoring for potential infringement of their rights, bots would alleviate OSPs of this duty. 17 U.S.C. § 512 (2012).

²⁷⁶ See *supra* note 274 and accompanying text (describing what “bots” are and offering an example of problems that can arise when relying too heavily on them).

²⁷⁷ See *Copyrightocalypse*, *supra* note 253 (examining the result of “Copyrightocalypse” and the gaming community’s response, specifically video gamers’ anger when YouTube increased its policing of copyright infringement, readily gives rise to this conclusion).

²⁷⁸ *Id.*; see also Joshua Brustein, *NCAA Legal Controversy Leads to a Slow Summer for Video Games*, BLOOMBERGBUSINESS (Aug. 2014), www.bloomberg.com/bw/articles/2014-08-15/video-game-sales-down-after-cancellation-of-ncaa-game (stating that video game sales as a whole decreased 15% after highly publicized litigation between the NCAA and EA Sports).

²⁷⁹ See Todd Ryan Hambridge, *Containing Online Copyright Infringement: Use of the Digital Millennium Copyright Act’s Foreign Site Provision to Block U.S. Access to Infringing Foreign Websites*, Note, 60 VAND. L. REV. 905, 908 (Apr. 2007) (stating copyright infringers will probably continue infringing beyond the bounds of the United States because foreign countries’ copyright enforcement may be more lax than the United States’, and the United States may not have

2. Copyright Owners Issue Licenses to Infringers

A second option for copyright owners to protect and enforce their rights is licensing. Licenses are contractual obligations governed by basic contract law.²⁸⁰ Significantly, though, the contract law that governs licenses of copyrights simply runs alongside the intellectual property law, rather than preempting it.²⁸¹ “A copyright owner who grants a . . . license ordinarily waives the right to sue licensees for copyright infringement, and it may sue only for breach of contract. So, if the licensee acts outside the scope of the license, the licensor may sue for copyright infringement.”²⁸²

When a person purchases software, such as a video game, either he obtains a copy of the software that he then actually owns, or he obtains a license that grants him limited rights to merely use the software.²⁸³ Typically, because video games include EULAs, which describe the limited rights users have with regard to game content, a person who purchases a video game actually buys a

the jurisdiction to enforce copyright infringement that occurs in foreign countries). Infringing end users who upload copyrighted video gameplay to host websites whose servers are maintained outside of the United States may not be within the reach of United States personal or long-arm jurisdictions. *See id.* (describing the likelihood for copyright infringement to be beyond United States jurisdiction to take advantage of other countries’ more lenient copyright laws). Moreover, infringing end users may reside outside of the United States and therefore not be subject to United States jurisdiction. *See id.* (describing the likelihood for copyright infringement to be beyond United States jurisdiction to take advantage of other countries’ more lenient copyright laws).

²⁸⁰ *See ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450 (7th Cir. 1996) (stating “we treat the licenses as ordinary contracts accompanying the sale of products”). Following contract law, the court in that case determined that because the defendant did not manifest an assent to the terms of the end user license at issue, no contract was formed. *Id.* at 1454- 55. “[A] purchaser does not agree to—and cannot be bound by—terms that were secret at the time of purchase.” *Id.* at 1450.

²⁸¹ *Id.* at 1453. Actually, 17 U.S.C. § 103(a) preempts “legal or equitable rights under state law that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103”. *Id.* (internal quotations omitted). So, for licensing issues concerning the exclusive bundle of copyrights codified in the Copyright Act, intellectual property law preempts contract law. *Id.*

²⁸² *MYD Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 939 (9th Cir. 2010).

²⁸³ *Id.* at 938. “[A] software user is a licensee rather than an owner of a copy where the copyright owner (1) specifies that the user is granted a license; (2) significantly restricts the user’s ability to transfer the software; and (3) imposes notable use restrictions”. *Id.* (citing *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1108-09 (9th Cir. 2010)).

license rather than a copy.²⁸⁴ Thus, a person who purchases a video game does not own even his copy of the video game.²⁸⁵ Instead, he merely owns the rights detailed in the licensing agreement, which is typically limited to the right of use.²⁸⁶

a. Voluntary Licensing

Presently, copyright owners can issue voluntary licenses to end users at will.²⁸⁷ When a voluntary license has been issued to an end user, “[t]o succeed in a copyright action, the copying must be beyond the scope of [the] license possessed by the defendant, and the source of the copyright owner’s complaint must be grounded in a right protected by the Copyright Act, such as unlawful reproduction or distribution.”²⁸⁸ Consider the instances of end user infringement presented in this Comment. If the video game copyright owners issued the end users licenses limiting their use of gameplay content to within the game only, and the end users infringed in the manners previously discussed, then the video game copyright owners would have valid causes of action sounding in copyright infringement.²⁸⁹ By uploading video gameplay to the Internet, the end users would be engaging in activity beyond the scope of the license. And, their infringement would implicate rights protected by the Copyright Act.²⁹⁰

If the video game copyright owners issued licenses explicitly permitting end users to create reproductions and derivative works and engage in public performances of the video gameplay, the aforementioned instances of infringement would not be actionable because the end users’ conduct would fall within the scope of the

²⁸⁴ See, e.g., *MYD Indus., LLC*, 629 F.3d at 938-39 (finding that *World of Warcraft* players obtained licenses rather than copies when they purchased the game because “Blizzard. . . imposes transfer restrictions if a player seeks to transfer the license. . . and Blizzard also imposes a variety of use restrictions”). End users would probably argue that they purchase an actual copy of the work as they leave the store with a tangible game cartridge or DVD. See *id.* (describing gamers purchase licenses). However, close examination of many EULAs indicates that this is a false assumption. See *id.* (describing gamers purchase licenses).

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.* So long as doing such is in accordance with applicable contract law. *Id.*

²⁸⁸ *Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Inc.*, 421 F.3d 1307, 1315-16 (Fed. Cir. 2005).

²⁸⁹ See *id.* (stating that even where a license is issued, if a licensee acts beyond the scope of the license and infringes upon a right grounded in the Copyright Act, then the licensee may be sued for copyright infringement).

²⁹⁰ See *supra* Part III (describing how three types of end user conduct potentially infringe on video game owners’ exclusive copyrights by creating unauthorized reproductions and derivative works and by publicly performing the copyrighted work).

licensing agreement.²⁹¹ Specifically allowing for reproductions and public performances of the copyrighted video gameplay in the voluntary licenses eliminates the copyright infringement problem.

Conversely, while modifying typical video game EULAs to reflect the second type of voluntary license described would be beneficial to the infringing end users, such a change could be detrimental to the video game copyright owners. Eliminating reproduction and performance restrictions of copyrighted material would only result in even more reproductions and performances. Where it is free and readily available to access copyrighted video gameplay, the copyright owners lose business from end users who would otherwise purchase their own licenses and view the copyrighted content through the video games themselves.²⁹²

b. Compulsory Licensing

Another type of licensing available to copyright owners are compulsory licensing agreements.²⁹³ The broadcasting industry currently uses compulsory licenses.²⁹⁴ Under the Copyright Act, after a copyright owner has already once permitted the reproduction

²⁹¹ See, e.g., *Music Licensing Agreement*, BEATPICK.COM, www.beatpick.com/public_files/beatpick_agreement_FACSIMILE.pdf (last visited Dec. 17, 2015) (exemplifying a typical music licensing agreement that includes public performance rights).

²⁹² See Blake Snow, *Why most people don't finish video games*, CNN (Aug. 17, 2011), www.cnn.com/2011/TECH/gaming.gadgets/08/17/finishing.videogames.snow/index.html (noting that 90% of video gamers will not play games though to the end, but they can nonetheless view the end on YouTube). Alleged infringers may argue that their ability to view video game content online doesn't detract from their desire to purchase the game. See *id.* (stating gamers don't complete games but can view cinematics on the Internet). On the contrary, alleged infringers would argue that seeing content online would serve the purpose of advertisement and encourage viewers to purchase the game so they could also play it. See *id.* (stating gamers don't complete games but can view cinematics on the Internet). However, this argument is not necessarily grounded in truth. See *id.* (stating gamers don't complete games but can view cinematics on the Internet).

²⁹³ See *Circular 75*, *supra* note 58 (describing different types of copyright licenses recognized under United States law).

²⁹⁴ See 17 U.S.C. § 115 (2012) (describing compulsory licensing for phonorecords, which most commonly entail music). See 17 U.S.C. § 101 (2012) (defining "phonorecords" under the Copyright Act as "material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device"). See 17 U.S.C. § 111 (2012) (explaining compulsory licensing for cable systems). See also *Am. Broad. Companies, Inc. v. Aereo, Inc.*, No. 12-CV-1540, 2014 WL 5393867, at *3 (S.D.N.Y. Oct. 23, 2014) (stating, "[t]ogether, the definition of perform, the transmit clause, and § 111 evince[s] congressional intent to bring the activities of cable systems within the purview of the Copyright Act").

and distribution of his work, he is required to “grant a license upon request to any other person who proposes to make and distribute phonorecords of the work, at a royalty rate set by law.”²⁹⁵ The Copyright Act’s statutory provision for compulsory licensing is not often used.²⁹⁶ Instead, the statute is integral in voluntary licensing negotiations, “mak[ing] the statutory royalty rate a ceiling on the price copyright owners can charge for use of their songs²⁹⁷ under negotiated contracts.”²⁹⁸

Video gameplay is not within the current scope of the Copyright Act’s compulsory licensing provisions.²⁹⁹ If an amendment to the Copyright Act required owners of audiovisual copyrights³⁰⁰ to grant compulsory licenses to infringing end users, copyright owners would again suffer.

Video game copyright owners currently grant non-compulsory licenses for entities to use their works, including gameplay, for advertising purposes.³⁰¹ This one-time grant of an authorized reproduction and distribution or public performance of the copyrighted video gameplay would activate the compulsory license statutes.³⁰² Consequently, if the Copyright Act were revised to include audiovisual works as subject to compulsory licensing, the video game copyright owners would be required to grant compulsory licenses to any end users who request them.³⁰³ Although the compulsory licensee end users would be required to pay royalties,

²⁹⁵ *Recording Indus. Ass'n of Am. v. Copyright Royalty Tribunal*, 662 F.2d 1, 3 (D.C. Cir. 1981) (stating “determination of the appropriate royalty rates is one of the principal functions Congress has assigned to the Copyright Royalty Tribunal”).

²⁹⁶ *Id.* at 4.

²⁹⁷ *See* 17 U.S.C. §§ 115, 111 (2012) (limiting this section of the Copyright Act as currently applicable to the broadcasting industry, most commonly music, which does not include streaming or archived audiovisual content).

²⁹⁸ *Recording Indus. Ass'n of Am.*, 662 F.2d at 3. In such negotiations, “if the owner demands a higher price in voluntary negotiations, the manufacturer can turn to the statutory scheme, but if the owner is willing to accept less than the statutory rate, he is free to do so.” *Id.* at 4. This awards the user of copyrighted works great leveraging power over the copyright owner in licensing agreement negotiations. *Id.*

²⁹⁹ *See* 17 U.S.C. §§ 115, 111 (2012) (describing the types of copyrights subject to compulsory licensing under the present terms of the Copyright Act).

³⁰⁰ *See Atari Games*, 979 F.2d at 247 (detailing that video games are copyrightable). Accordingly, this would include video gameplay as video games are copyrightable as audiovisual works. *Id.*

³⁰¹ *See* GameSpot, *Call of Duty: Black Ops II – Uprising: The Replacers Trailer*, YOUTUBE (Apr. 8, 2013), www.youtube.com/watch?v=o-EZR4p3nDo (exemplifying an advertisement for a video game, which includes video gameplay content). This advertisement does not constitute copyright infringement because broadcasters received a license from Activision to air the video gameplay in the advertisements. *See id.* (exemplifying advertisements for *Call of Duty* that include video gameplay content).

³⁰² *Recording Indus. Ass'n of Am.* 662 F.2d at 4.

³⁰³ *Id.* at 3.

the amount paid to the copyright owners surely would not make up for the loss of potential sales and saturation of the market resulting from the widespread issuance of licenses to use their copyrighted works.

Moreover, as statutory royalties are considered the ceiling for payment negotiations under voluntary licensing,³⁰⁴ video game copyright owners would not be guaranteed a fair royalty payment for use of their works. Licensing negotiations would be further complicated for video game copyright owners as they would be forced to compete with the royalty fee plans for comparable games in the inundated video game market.³⁰⁵ A further hurdle arises in the fact that there is currently no easy way for copyright owners to track the number of views of their works on websites.³⁰⁶ This would result in increased difficulty for the video game copyright owners to enforce collection of royalty payments promised under the compulsory licenses.³⁰⁷

³⁰⁴ *Id.* at 4.

³⁰⁵ See Jeff Bakalar, *You should never, ever, preorder a video game*, CNET (Jun. 13, 2012), www.cnet.com/news/you-should-never-ever-preorder-a-video-game/ (describing that preordering video games generally costs purchasers more money and discourages video game purchasers to spend more money than they absolutely must for a video game). Where an end user can obtain a license to use copyrighted video gameplay for a cheaper price than the price of a license to legally continue to use gameplay he already is, the end user will be more inclined to purchase the cheaper license. See *id.* (encouraging gamers to spend as little money as possible). The idea of paying more for a license than one absolutely must is comparable to the discouraged notion of paying more to purchase a game via preorder. See *id.* (encouraging gamers to spend as little money as possible). This is an even larger issue where the infringing gameplay the end user is currently using is comparable to the type of video game that offers licenses for a lower price. See *id.* (encouraging gamers to spend as little money as possible). Thus, video game copyright owners would not be simply setting licensing prices based on what the end users are willing to pay. See *id.* (encouraging gamers to spend as little money as possible). Rather, copyright owners would be competing with the license costs offered by other copyright owners of comparable video games. See *id.* (encouraging gamers to spend as little money as possible).

³⁰⁶ See Timothy A. Cohan, *Ghost in the Attic: The Notice of Intention to Use and the Compulsory License in the Digital Era*, Note, 33 COLUM. J.L. & ARTS 499, 509 (2010) (describing compulsory licensing as it exists under the current Copyright Act). Typical compulsory licenses require a royalty be paid to the copyright owner each time his work is distributed or publicly performed. *Id.*; see also 17 U.S.C. § 115(e) (2012) (describing royalty payments pursuant to compulsory licensing for phonorecords); 17 U.S.C. § 111(d) (2012) (describing compulsory statutory licensing and royalty fees for retransmission by cable systems); 17 U.S.C. § 118(c) (2012) (describing compulsory licensing and royalty payments for public, noncommercial broadcasting); 17 U.S.C. § 114(d)(2), (3) (2012) (describing compulsory licensing for subscription and non-subscription digital audio transmission, such as Internet radio).

³⁰⁷ See Hambridge, *supra* note 279, at 908 n.15 (stating the United States may lack jurisdiction to enforce copyright in foreign countries). Also, for websites with servers housed outside of the United States, jurisdictional issues

3. Criminalizing Advertising on Webpages Hosting Infringing Content

A third option that could assist copyright owners in enforcing their rights is criminalizing advertising on webpages that host infringing content.³⁰⁸ End users who infringe the most are businessmen who are motivated by income.³⁰⁹ These end users, who receive millions of page views and use their fame³¹⁰ to sell merchandise, are the biggest threats to the video game copyright owners.³¹¹ As a result of the infringement by these end users,

arise with regard to the enforcement of compulsory licensing and the collection of royalties. *Id.*

³⁰⁸ See Chris Smith, *UK Copyright Cops Are Now Advertising on Infringing Websites*, TECHRADAR (Jul. 29, 2014), uk-copyright-cops-are-now-advertising-on-infringing-websites-1259533 (detailing the collaboration between the City of London Police and the Project Sunblock company to reduce advertisements on websites containing copyright infringing content). While this is not widespread practice in the United States, local authorities across the pond have initiated efforts to decrease advertising on websites featuring infringing content. See *id.* (describing collaboration with police to criminalize advertising on websites containing copyright infringing content); see also Rich Trenholm, *Piracy Police Hijack Ads on Copyright Infringing Websites*, CNET (Jul. 29, 2014), www.cnet.com/news/piracy-police-hijack-ads-on-copyright-infringing-websites/ (describing that upon reports of infringing content on a website from copyright owners or search-bots, British police remove and replace the website's advertisements with a notification that the website is under criminal investigation).

³⁰⁹ See, e.g., Christopher Zoia, *This Guy Makes Millions Playing Video Games on YouTube*, THE ATLANTIC (Mar. 14, 2014), www.theatlantic.com/business/archive/2014/03/this-guy-makes-millions-playing-video-games-on-youtube/284402/ (describing how end user PewDiePie earns millions of dollars posting video gameplay to YouTube). PewDiePie continues to post new videos of copyright infringing video gameplay because his income from doing such is so great. See *id.* (describing PewDiePie's income); see also Brian Warner, *The 25 Highest Earning Youtube Stars*, CELEBRITY NET WORTH (May 22, 2013), www.celebritynetworth.com/articles/celebrity/the-25-highest-earning-youtube-stars/ (listing the net worths of popular YouTube stars, including several who upload copyrighted video game content to their webpages, such as PewDiePie, TobyGames, and Yogscast).

³¹⁰ See *supra* note 237 and accompanying text (describing further how end users' fame and subsequent financial success is derived from infringing upon video game copyrights). The end users' fame most commonly results from their use of the copyrighted video gameplay on their websites. *Id.* Where these end users were not infringing, they would lack the fame and branding to make successful merchandise sales. *Id.* Even worse, some end users sell merchandise with copyrighted video game images on it. *Id.* However, such instances of infringement are not the topic of this Comment.

³¹¹ See *supra* note 237 and accompanying text (describing further how end users' fame and subsequent financial success is derived from infringing upon video game copyrights). Because end users earn income from using copyright infringing video game content, the video game developers miss out on the chance to earn this income from using their copyrights themselves. See *id.*

copyright owners lose potential income from sales of their own merchandise and sales of their video games.³¹²

Such large-scale infringing end users earn money via partnership programs with hosting websites and advertisements on their webpages.³¹³ Criminalizing advertising on webpages that contain or stream video of infringing video gameplay would terminate one stream of revenue to these end users.³¹⁴ Moreover, hosting websites, who also earn money from advertisements, would be less inclined to promote ad-free webpages in searches and promotions. This in turn would result in fewer webpage views, which would decrease infringing end users' revenue from host-site partnership programs, thus severing another stream of revenue.³¹⁵ Eventually, where these large-scale infringing end users could no longer profit by using copyrighted video gameplay, they would be far less motivated to continue infringing.

Notably, where advertising on webpages with infringing content would decrease the amount of infringement online, it may also prove detrimental to the video game copyright owners' businesses. As with present EULAs, various copyright owners may choose to enforce their copyrights differently. This could result in large scale infringing users ceasing use of a particular video game that enforces its copyrights and choosing to play a comparable game whose copyright owners are more lenient.

(describing how end users' fame and financial success is derived from infringement).

³¹² See Snow, *supra* note 292 (describing that the vast majority of gamers may never see the end of a game unless they view it online). Even though some gamers will not be dissuaded from playing video games after merely seeing gameplay online, they may complete game challenges much quicker after viewing a tutorial. *Id.* This would result in copyright owners losing potential income from subscription sales. *Id.*

³¹³ See Blizzard Video Policy, *supra* note 257 (discussing examples of partnership programs between end users and hosting sites such as YouTube and Twitch).

³¹⁴ See Lawrence Latif, *AOL, Google, Microsoft and Yahoo Will Stop Serving Ads to Copyright Infringing Websites*, THE INQUIRER, (Jul. 16, 2013), www.theinquirer.net/inquirer/news/2282647/aol-google-microsoft-and-yahoo-will-stop-serving-ads-to-copyright-infringing-websites# (discussing a plan between the federal government and "Google, Yahoo, Microsoft and others [to try] to cut off sources of income for websites peddling copyright infringing content" by "limit[ing] the display of advertisements on websites with content that infringes copyright and engage in counterfeiting").

³¹⁵ See Blizzard Video Policy, *supra* note 257 (discussing examples of partnership programs between end users and hosting sites such as YouTube and Twitch).

B. *Proposed Best Solution to the Copyright Infringement Problem*

As previously discussed, the problem of potentially copyright infringing content on the Internet remaining unchallenged results in damage to video game developers.³¹⁶ While each of the previously proposed solutions to this problem would most likely result in some continued damage to the video game developers, the overall result would be greater than the video game developers not attempting to enforce any of their copyrights.³¹⁷ To best protect and enforce their copyrights, video game copyright owners should employ a combination of the above-discussed solutions. Optimal results would yield from: (1) Issuing voluntary licenses and (2) simultaneously criminalizing advertising on webpages with infringing content. By continuing to allow copyrighted gameplay to be uploaded by licensee end users, copyright owners would not disrupt the current gaming culture. This would encourage end user loyalty to the copyright owners' brands and games, despite the changes in copyright enforcement. Additionally, copyright owners could negotiate for a share of the income end users earn through their use of copyrighted gameplay. Therefore, this solution enables end user gaming culture to continue essentially unchanged while concurrently providing a means for copyright owners to realize some of the profit high-grossing infringers earn. Because the copyright owners' main focus in protecting their rights is for income purposes, this solution will be an ideal compromise.

At the same time, criminalizing advertisements on webpages with infringing content would decrease the total amount of infringement by non-licensee end users. Unlike the issuance of licenses, criminalizing active advertising on particular webpages would require either a statutory modification to a current law or the introduction of a new law. Copyright owners cannot enact such a change on their own. Instead, they must lobby and work with legislatures to effectuate criminalization of advertising on infringing webpages. Once such a law is created, proper law enforcement agencies could pursue violators accordingly.

³¹⁶ See *supra*, Part III.B (describing different instances of potentially copyright infringing content); see also *supra*, Part IV.A (evaluating possible solutions to copyright infringing content and the effect each solution would have on the video game developers).

³¹⁷ See *supra*, Part IV.A (evaluating possible solutions to copyright infringing content and the effect each solution would have on the video game developers).

V. CONCLUSION

Video game copyright infringement harms the entire video gaming market. With gaming becoming increasingly popular in today's society, it is essential that credit and compensation are awarded where due. However, an integral component of video game society involves community and collaboration. Wholly eliminating the ability for the gaming community to share ideas and conquests would also harm the video gaming market. Therefore, it would be mutually beneficial for professional gamers and video game developers to work together to enhance and advance this entertainment sector.
