
LEVELING UP COPYRIGHT LAW: FAIR USE ON YOUTUBE AND TWITCH WITH THE RISE OF VIDEO GAME STREAMING

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I. Introduction

Every time someone goes online, they consume copyrighted content.¹ Copyright law grants a creator exclusive rights to their work for a limited amount of time, protecting against theft and providing a public benefit of promoting the progress of science and useful arts.² As technology advances, the scope of copyright evolves to maintain the protection of creative works in modern society, such as the advent

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¹ See *What is Copyright*, U.S. COPYRIGHT OFF. (Sept. 23, 2022), *archived at* <https://perma.cc/P8MA-CM8E> (declaring that people use Copyright when reading books, watching movies, listening to music, or playing video games). See also *Copyright Crash Course - Content on the Web*, UNIV. TEX. LIBR. (Aug. 17, 2022), *archived at* <https://perma.cc/38RN-T9SK> (addressing the misassumption that everything posted on the internet is public domain). “Simply putting the fingers to the save key creates a copyrighted work.” *Id.* Copyright protection is automatic the moment an expression is committed to a tangible medium, such as a computer. *Id.* “[P]ostings of all kinds are protected the same as published printed works.” *Id.* See also *Other Digital Content*, U.S. COPYRIGHT OFF. (Oct. 19, 2022), *archived at* <https://perma.cc/LFN5-VBY3> (asserting that Copyright protection applies to works used on electronic devices and distributed on the internet).

² See *What Is The Purpose of Copyright Law*, COPYRIGHT ALL. (Sept. 23, 2022), *archived at* <https://perma.cc/29WG-FUFQ> (stating that the primary purpose of Copyright is to protect new creative works and secure for a limited time exclusive rights of creators to “promote the progress of science and useful arts.”).

of the internet frontier inducing the *Digital Millennium Copyright Act* (“DMCA”).³ The United States Copyright Office (“USCO”) responded to the internet creating a new space for people to share their original content worldwide by expanding the scope of copyright coverage to account for the new relationship between copyright and the internet.⁴

The creation of the internet made it possible for people to gain access to information, communication, and entertainment online, with them most often engaging with online videos.⁵ Video sharing online

³ See *Copyright Timeline: A History of Copyright in the United States*, ASS’N RSCH. LIBRS. (Sept. 23, 2022) [hereinafter *Copyright Timeline*], archived at <https://perma.cc/FJ7K-JTRS> (noting that Copyright originated in England with the printing press in late 15th century and evolved in the United States to address new technologies). The United States made major revisions to the act in 1831, 1870, 1909, and 1976 to address Copyright reform. *Id.* See also *The Evolution of Copyright Law*, U.S. COPYRIGHT OFF. (Sept. 23, 2022), archived at <https://perma.cc/L259-6JPS> (outlining how Copyright has evolved since the first federal Copyright law to encompass a wide range of works). See also *A short history of the Web*, CERN (Oct. 16, 2022), archived at <https://perma.cc/EZM9-3L24> (recalling how the inventor of the World Wide Web publicly announced the software in August 1991 with the first Web server in the US coming online in December 1991). See also *The Digital Millennium Copyright Act*, U.S. COPYRIGHT OFF. (Sept. 23, 2022), archived at <https://perma.cc/UGU2-DGT4> [hereinafter *DMCA*] (outlining Congress’s updates to U.S. Copyright law to address the internet). See also Virginia Eubanks, *The Mythography of the "New" Frontier*, MIT COMM’N F. (Oct. 15, 2022), archived at <https://perma.cc/GU2A-HCXW> (comparing the internet to innovations such as the automobile, the airplane, the telephone, the television, atomic power, or the microprocessor). Americans conceptualize the internet as the “new frontier” across different examples. *Id.* See also *Copyright Protection on the Internet: Everything to Know*, UPCOUNSEL TECHS., INC. (Sept. 23, 2022), archived at <https://perma.cc/G5HQ-KLMW> (providing an overview of Copyright protection on the internet).

⁴ See Mary Madden, *The Audience for Online Video*, PEW RSCH. CTR. (July 25, 2007), archived at <https://perma.cc/A3R9-GEBK> (describing Bill Gates’s prediction that millions of people will consume and create information on the internet). Video sharing sites are built around user contributions. *Id.* See also *DMCA*, *supra* note 3 (asserting Congress amended U.S. Copyright law “to address important parts of the relationship between copyright and the internet.”).

⁵ See *WHAT IS THE INTERNET USED FOR?*, OBERLO (Oct. 19, 2022), archived at <https://perma.cc/6DUQ-RZD9> (providing data that people’s top uses of the internet are for entertainment, communications, and information). See also Monica Carvalho, *This Is Why Video Is the Most Engaging Type of Content*, MEDIUM (Aug. 25, 2017), archived at <https://perma.cc/9QAR-79JR> (declaring that “[u]sers spend 88% more time on a website that has video.”). Users prefer video content because it encompasses other types of content. *Id.* See also Maryam Mohsin, *10 VIDEO*

played a central role throughout the internet’s history and continues to predominate on online platforms (“platforms”), beginning with “shareyourworld” in 1997 to the notorious YouTube, and now the interactive Twitch.⁶ YouTube and Twitch became staples for people

MARKETING STATISTICS THAT YOU NEED TO KNOW IN 2022 [INFOGRAPHIC], OBERLO (Apr. 13, 2022), *archived at* <https://perma.cc/G94X-GU7B> (highlighting the increase in people in the United States watching digital videos amounts to 244.4 million in 2020). “[V]ideo content among brands is growing because people are more likely to pay attention to it.” *Id.*

⁶ See Madden, *supra* note 4 (noting that online video provides a channel of interactive mass communication in people’s daily life). See also Mohsin, *supra* note 5 (recognizing people are spending more time watching videos online than on television). See also OECD, *An Introduction to Online Platforms and Their Role in the Digital Transformation*, 20 OECD PUBL’G, 19–26 (2019) (defining online platforms as a “digital services that facilitates interactions between two or more distinct but interdependent sets of users . . . who interact through the service via the Internet.”). Online video-sharing services have at least three sets of users who interact in multiple directions by uploading videos, watching videos, and paying the platform to place advertisements. *Id.*

Interactions flow from video uploaders and advertisers to video consumers, but they also flow from consumers back to the uploaders in the form of ratings and comments. In addition, they can flow from consumers to other consumers (again in the form of comments, which themselves may receive positive or negative feedback).

Id. See also *The First Video Sharing Platform – From Where it All Started*, VIDIZMO (Feb. 15, 2022), *archived at* <https://perma.cc/L8JE-BA6L> (declaring shareyourworld the first-ever video-sharing site). See also Rasty Turek, *The History of Online Video (INFOGRAPHIC)*, MEDIUM (Feb. 10, 2016), *archived at* <https://perma.cc/R2QA-SH9Z> (attributing YouTube’s successful launch to the combination of widespread high-speed internet access and the “launch of social media sites like Friendster (2002), MySpace (2003) and Facebook (2004) . . .”). See also *YouTube videos an ‘important cultural artifact’ of our life, says researcher*, CBC RADIO (Oct. 15, 2021), *archived at* <https://perma.cc/D743-6AL9> (describing YouTube as users’ go-to resource for an array of video content and the video encyclopedia of the world). See also Katharine Trendacosta, *Unfiltered: How YouTube’s Content ID Discourages Fair Use and Dictates What We See Online*, ELEC. FRONTIER FOUND. (Dec. 10, 2020), *archived at* <https://perma.cc/CGQ5-FTLD> (characterizing YouTube as the dominant player in the online video market). See James Cook, *Twitch Founder: We Turned A ‘Terrible Idea’ Into A Billion-Dollar Company*, BUS. INSIDER (Oct. 20, 2014), *archived at* <https://perma.cc/AQA9-3LQR> (explaining how Twitch pioneered the practice of streaming “lifecasting.”). See also Jacinda Santora, *Twitch Ads: How They Work and How to Run Them*, INFLUENCER MKTG. HUB (June 28, 2022), *archived at* <https://perma.cc/SWS8-54PS> (noting Twitch’s exponential growth). See also J. Clement, *Gaming video content (GVC) revenue worldwide from 2016 to 2020*, STATISTA (Mar. 7, 2022), *archived at*

to share their video content, whether posting pre-recorded videos or streaming to the audience in real-time (“live streaming”).⁷ The amount of people consuming content each day, especially young people, makes YouTube and Twitch popular platforms for both advertisers and creators to make money.⁸ Once a creator reaches a certain threshold,

<https://perma.cc/628H-UT24> [hereinafter *GVC Revenue*] (stating that Twitch is now the top platform for watching gaming video content worldwide). “Twitch is the most important streaming platform for game-related video content.” *Id.*

⁷ See Law Firm of Conway, Olejniczak & Jerry, S.C., *Copyright Concerns for YouTube and Twitch Content Creators*, L. FIRM CONWAY, OLEJNICZAK & JERRY, S.C. (Oct. 16, 2022), archived at <https://perma.cc/J3NQ-T62F> (stating that “[w]hen you think about the most popular online media and streaming platforms, two names are sure to come to mind: YouTube and Twitch.”). See also *Live Streaming*, INFLUENCER MKTG. HUB (Oct. 16, 2022), archived at <https://perma.cc/A9UY-3DNC> (defining live streaming as a social media feature where one can share unedited, raw footage in real time). See also Eric, *Twitch Vs. YouTube – Complete Comparison*, STREAMERS PLAYBOOK (Aug. 15, 2022), archived at <https://perma.cc/D47U-ZLZK> (comparing YouTube and Twitch as video sharing platforms with Twitch catering to live streamers and YouTube initially for sharing pre-recorded videos). See also Cook, *supra* note 6 (indicating Twitch’s domination of the online video streaming space).

⁸ See Madden, *supra* note 4 (observing that user contribution on video sharing sites provide social and monetary value). See also *How does YouTube make money?*, YOUTUBE (Jan. 29, 2022), archived at <https://perma.cc/L2CX-4QQ4> (declaring that YouTube’s main source of revenue is advertising). See also Salman Aslam, *YouTube by the Numbers: Stats, Demographics & Fun Facts*, OMNICORE (Mar. 14, 2022), archived at <https://perma.cc/RLW8-78RP> (detailing that 55% of marketers advertise on YouTube because YouTube has more than 2 billion active users every month as of July 2022). See also Santora, *supra* note 6 (providing that Twitch’s more than 140 million monthly active users and 15 million daily active users is opportune for advertisers). See also GMI Blogger, *YOUTUBE USER STATISTICS 2022*, GLOB. MEDIA INSIGHT (Dec. 20, 2022), archived at <https://perma.cc/MU7Q-B9KF> (providing statistics YouTube including that “[m]ost YouTube users fall in the age group of 15-35”). “80% of parents in the US, with children aged 11 or under, say their child watches YouTube videos.” *Id.* “YouTube’s global advertising revenue in the third quarter of 2022 equals 7.07 billion U.S. dollars.” *Id.* See also Gerald Kerr-Wilson, *Video Game Streamers: Free promotion, Copyright infringement, or both?*, FASKEN (Mar. 16, 2021), archived at <https://perma.cc/RAG4-SRH2> (explaining how an average “professional” streamer can gain revenue through monetizing their stream by offering subscriptions, accepting donations from fans, paid sponsorship deals, selling merchandise, and advertising revenue). See also Aaron Swerdlow, *The emerging legal battle over video game streaming rights*, VENTUREBEAT (May 27, 2017), archived at <https://perma.cc/L9J4-4RSG> (commenting on how video game streaming benefits the video game makers by expanding a game’s user base, driving sales, and generating free publicity).

they receive monetization from ad revenue.⁹ In turn, YouTube and Twitch must balance protecting the interest of copyright holders and content creators.¹⁰ As daily life becomes more interwoven with the digitized world and people can pursue a career as a YouTube or Twitch Partner, copyright considerations remain at the forefront of legal issues.¹¹

A comparative analysis of YouTube's and Twitch's copyright policies highlights inefficiencies and unfairness in their impact on online creators when the copyright enforcement is unjustified or when a video may qualify as fair use. The criticism of YouTube and Twitch's approach to copyright enforcement raises concerns about the platforms' ability to handle the likely increase in copyright issues related to the prevalence of video game streaming. Whether the

⁹ See Mahnoor Sheikh, *YouTube monetization: Top 10 ways to monetize on YouTube*, SPROUTSOCIAL (Jan. 27, 2022), archived at <https://perma.cc/8L7G-7C4K> (emphasizing that there are more monetization opportunities as a channel's engagement increases). See also *YouTube Partner Program overview & eligibility*, YOUTUBE HELP (Nov. 10, 2022), archived at <https://perma.cc/E4T4-F83E> (explaining the minimum eligibility requirements for a YouTube channel to gain access to monetization as part of the partner program). The channel must have more than 1,000 subscribers and have more than 4,000 valid public watch hours in the last 12 months. *Id.* But see Megan Graham, *YouTube will put ads on non-partner videos but won't pay the creators*, CNBC (Nov. 19, 2020), archived at <https://perma.cc/X9AV-B7XH> (noting that YouTube automatically places ads to all videos that meet its "Advertiser-Friendly Guidelines," regardless of whether the creator is part of the partner program). However, the creator will not receive a share of the revenue from these ads if not part of the YouTube partner program ("YPP"). *Id.* See also *Curious about Twitch ads? Here's everything you need to know*, AMAZON ADS (Nov. 11, 2022), archived at <https://perma.cc/UWU6-DLCD> (describing how "[a]nyone can stream on Twitch, but once creators reach certain benchmarks, they can unlock new features as ways to monetize their channel."). However, "Twitch only serves advertising on channels of Partner and Affiliate streamers." *Id.* See also *Ads Incentive Program*, TWITCH (Nov. 10, 2022), archived at <https://perma.cc/9NX9-YRGA> (detailing how Twitch streamers earn revenue via either a fixed amount per every 1,000 views an ad receives or 55% of the net revenue Twitch receives from each ad).

¹⁰ See *Copyright Concerns for YouTube and Twitch Content Creators*, *supra* note 7 (suggesting content creators face copyright concerns as their numbers grow). Content creators on YouTube and Twitch have lost monetization rights because of copyright laws. *Id.* "YouTube and Twitch have gone a long way to ensure that content creators and copyright holders coexist peacefully." *Id.*

¹¹ See Kaylee Fagan, *We asked famous YouTubers what it's actually like to play video games for a living — here are all the perks and drawbacks that come with the job*, INSIDER (Mar. 17, 2018), archived at <https://perma.cc/T8UA-CH6Z> (reporting on people making their careers online).

platforms are well-equipped to address the intersection between video game streaming and fair use illuminates an area for copyright law to intervene.

II. History

A. Copyright Foundations

Copyright has protected creative works since before the founding of the United States, with England establishing the foundations through the Statute of Anne in 1710.¹² The United States adopted copyright laws through the Copyright Act of 1790 with a similar construction and purpose of balancing the protection of an author's work with the benefit of the public's use.¹³ By granting protection for a fixed term, copyright induces authors to create new works for public enjoyment.¹⁴ The United States integrated copyright into its Constitution and implemented a copyright reform that expanded the scope of protection, aiming to strike a balance between

¹² See *Copyright Timeline*, *supra* note 3 (explaining the origins of copyright stemmed from England's Licensing Act of 1662 that created a register of licensed books). With the rise of the printing press, English authorities wanted to ensure that England had control over the publication of books. *Id.* The United Kingdom's Statute of Anne in 1710 set copyright law's foundation by establishing the principles of an author's ownership over and protection of original works. *Id.*

¹³ See *id.* (explaining that Congress modeled the Copyright Act of 1790 after the Statute of Anne). The Statute of Anne created a "public domain" for literature that limited copyright terms, and "once a work was purchased the copyright owner no longer had control over its use." *Id.* Additionally, "[t]he statute prevented a monopoly on the part of the booksellers and created a 'public domain. . .'" *Id.* See also *What Is The Purpose of Copyright Law*, *supra* note 2 (affirming that "copyright law is intended to serve the purpose of enriching the general public through access to creative work. . .").

¹⁴ See *What Is The Purpose of Copyright Law*, *supra* note 2 (stating that copyright provides protection through provision of property rights). The theory for granting copyright is that by allowing "[c]reators to protect their creative works against theft, creators receive the benefit of economic rewards and the public receives the benefit of the creative works that might not otherwise be created or disseminated." *Id.*

preventing monopolies and incentivizing original creations within the constraints of the "public domain."¹⁵

The United States' approach to implementing sweeping revisions to copyright law's scope and subject matter both brought the US into accord with international policies and also signaled that as science and arts progressed, technological advancements may impact future copyright treatment.¹⁶ Although the 1976 revision extended the

¹⁵ See U.S. CONST. art. 1, § 8, cl. 8 (designating that "[t]he Congress shall have power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."). See also *Copyright Timeline*, *supra* note 3 (reciting U.S. copyright commenced with the Copyright Act of 1790 that granted rights for an initial fourteen-year period with the ability to renew). The 1831 revision extended the term of protection from fourteen years to twenty-eight years. *Id.* In 1870, Congress centralized the administration of copyright from district courts to the Library of Congress. *Id.* The 1909 revision broadened the scope to include musical compositions. *Id.* The granting of public access to the works of authors, artists, and scientists aligned with the Constitutional objective of promoting "[t]he progress of science and the useful arts. . . ." *Id.* Notably, the 1976 revision preempted prior copyright laws and signaled the future of U.S. copyright. *Id.* See also Geoffrey P. Hull, *Copyright*, FIRST AMEND. ENCYC. (Jan. 27, 2023), archived at <https://perma.cc/4EPJ-ZWCT> (describing how copyright is designed to benefit the public). See also Fred Koenigsberg, *The 1976 Copyright Act: Advances for the Creator*, 26 CLEV. ST. L. REV. 515, 515 (1977) (describing the 1976 revision as "[t]he first complete revision of United States copyright law since the Copyright Act of 1909" that had fundamental and sweeping changes to Copyright law). See also *DSOC 2030: Global Garbage Library Research Guide: Copyright, Fair Use, & Public Domain*, CORNELL UNIV. (Jan. 13, 2022), archived at <https://perma.cc/3FND-ZKTM> [hereinafter *DSOC 2030*] (explaining that public domain refers to creative works that are owned by the public rather than an individual author or artist). See also Richard Stim, *The Public Domain*, STAN. UNIV. (Oct. 23, 2022), archived at <https://perma.cc/N8RK-F3BE> [hereinafter Stim, *The Public Domain*] (noting that "most works enter the public domain because of old age."). See also Morris Library, *BRIEF HISTORY OF U.S. COPYRIGHT LAW*, S. ILL. UNIV. CARBONDALE (Jan. 29, 2023), archived at <https://perma.cc/Y7QB-PF4F> (explaining that the idea of balancing the public interest with individual rights has always been an important consideration throughout history). "For example, the public's right to access knowledge should not be limited by the individual author's right to restrict access." *Id.*

¹⁶ See Geoffrey P. Hull, *Copyright Act of 1976 (1976)*, FREE SPEECH CTR. MIDDLE TENN. STATE UNIV. (Dec. 15, 2023), archived at <https://perma.cc/8ZAY-F3AU> (asserting that the Copyright Act of 1976 forms the basis of current US Copyright law and "conform more with those of the rest of the world"). The 1976 revision considers new types of media, including "still photography, motion pictures, or recordings." *Id.* See also *Copyright Law of the United States (Title 17)*,

application of copyright protection, it also codified limitations through the principle of fair use in sections 107 and 108.¹⁷

B. Fair Use: An Affirmative Defense

COPYRIGHT.GOV (Oct. 23, 2022), *archived at* <https://perma.cc/PY7Q-YLX6> (stating that the 1976 Act was a comprehensive revision of the Copyright law in Title 17 and provides the basic framework for the current Copyright law). *See also Copyright Timeline, supra* note 3 (listing the areas the act covered as the "scope and subject matter of works covered, exclusive rights, copyright term, copyright notice and copyright registration, copyright infringement, fair use and defenses and remedies to infringement."). The 1979 revision was undertaken to address the technological impact on Copyright and for the U.S. to adhere to the international Berne Convention. *Id.* Works for hire were now protected for seventy-five years after the author's death. *Id.* *See also The Evolution of Copyright Law, supra* note 3 (detailing the evolution of Copyright from protecting just books, charts, and maps to now "encompassing a wide range of works, such as literary works, music and sound recordings, dramatic works, choreography and pantomimes, visual art works, audiovisual works, and architectural works."). *But see What is Copyright, supra* note 1 (noting what Copyright does not apply to, such as "titles, names, short phrases and slogans; familiar symbols or designs; mere variations of typographical ornamentation, lettering, or coloring; and mere listings of ingredients or contents."). *See also* Jeanne Hamburg & David H. Siegel, *Terminate Copyright Grants Correctly or Risk Losing Your Rights*, NAT'L L. REV. (July 30, 2021), *archived at* <https://perma.cc/WB7K-FFEM> (illustrating the significance of termination rights by using the example of J.K. Rowling being paid 2,500 pounds, or \$3,500, for the right to publish the first Harry Potter manuscript).

¹⁷ *See U.S. Copyright Office Fair Use Index*, COPYRIGHT.GOV (Aug. 2022), *archived at* <https://perma.cc/MLY5-REFP> [hereinafter *Fair Use Index*] (defining fair use as a "legal doctrine that promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances."). The 1976 Copyright Act codified the judge-created doctrine of fair use. *Id.* *See also Fair Use*, AM. LIBR. ASS'N (Sept. 23, 2022), *archived at* <https://perma.cc/AF3F-NBRQ> [hereinafter *Fair Use: American Libr.*] (describing the Fair Use Doctrine as "one of the most important limitations on the exclusive rights of the copyright holder."). The addition of the fair use doctrine was "based on a history of judicial decisions that recognized that unauthorized infringements of copyright were 'fair uses.'" *Id.* *See also Copyright Timeline, supra* note 3 (explaining that the 1976 revision was the first time the fair use doctrine was codified). *See also Revising Section 108: Copyright Exceptions for Libraries and Archives*, COPYRIGHT.GOV (Oct. 23, 2022), *archived at* <https://perma.cc/8M97-8U8S> (noting the Copyright limitations established in 1976, such as authorizing libraries to reproduce and distribute Copyrighted work without permission when for the purpose of scholarship, preservation, and interlibrary loan).

The fair use doctrine embodies the right for creators to use copyrighted material to spur new works of their own.¹⁸ Copyright law recognizes that fair use serves a social function in providing the public with access to new cultural works that otherwise society could lose due to arbitrary reasons or greed.¹⁹ Section 107 of Title 17 regarding copyright lists four factors to assess whether fair use applies, providing a way for people to use portions of copyrighted work without permission, such as for commentary, criticism, news reporting, and scholarly reports.²⁰ Although 17 U.S.C.A. § 107 provides a rather vague definition of the fair use doctrine, it demonstrates Congress's

¹⁸ See *Code of Best Practices in Fair Use for Online Video*, CTR. MEDIA & SOC. IMPACT (Sept. 23, 2022), archived at <https://perma.cc/8WCR-LJWW> (declaring that fair use, when applicable, is a right, not a mere privilege). See also *Can I Use Someone Else's Work? Can Someone Else Use Mine?*, U.S. COPYRIGHT OFF. (Sept. 23, 2022), archived at <https://perma.cc/55LF-VJHZ> (acknowledging that the fair use doctrine makes it permissible to use limited portions of a work). See also *The Evolution of Copyright Law*, *supra* note 3 (stating that fair use encompasses the consideration of copyright users by "providing certain exceptions and limitations to the owner's exclusive rights.").

¹⁹ See *Fair Use: American Libr.*, *supra* note 17 (explaining that fair use supports the creation and dissemination of works shared to the public as compared to strict application). See also *The Evolution of Copyright Law*, *supra* note 3 (recognizing that the fair use doctrine "allow[s] works to be used in ways that achieve the overall goals of the copyright system."). See also *Code of Best Practices in Fair Use for Online Video*, *supra* note 18 (noting the cultural value of copying as part of Copyright law and that social bargain is at the heart of Copyright law).

The bargain is this: we as a society give limited property rights to creators, to reward them for producing culture; at the same time, we give other creators the chance to use that same copyrighted material without permission or payment, in some circumstances. Without the second half of the bargain, we could all lose important new cultural work just because one person is arbitrary or greedy.

Id.

²⁰ See 17 U.S.C. § 107 (providing statutory basis for fair use). See also *Fair Use Index*, *supra* note 17 (listing four factors to assess whether fair use applies). The factors include:

1. [p]urpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes...
2. [n]ature of the copyrighted work...
3. [a]mount and substantiality of the portion used in relation to the copyrighted work as a whole...
- [and]
4. [e]ffect of the use upon the potential market for or value of the copyrighted work....

Id.

intent for courts to determine fair use on a case-by-case basis.²¹ In addition to the statutory factors present in Section 107, courts may also consider whether the new use of copyrighted work constitutes good faith to help frame the analysis of the fair use factors.²² The court's consideration of the non-statutory factor of good faith, such as whether a user of copyrighted work attributed the credit to the copyright holder, exemplifies the subjective nature of the court's judgment in determining a finding of fair use.²³

1. Applying the Four Factors of Fair Use

Courts exert their discretionary authority to determine whether a case is fair use or not by balancing a series of guidelines based on the four factors of fair use.²⁴ The first factor focuses on the purpose and

²¹ See *Fair Use: American Libr.*, *supra* note 17 (asserting that Section 107 broadness derives from Congress' intent for courts to make the final determination if the use is fair on a case-by-case basis). The vagueness provides tremendous flexibility by "presenting broad principles with no reference to numerical limits on the portion of a work used, or the length of time a work can be used." *Id.*

²² See *Code of Best Practices in Fair Use for Online Video*, *supra* note 18 (denoting the consideration of whether the user acted reasonably and in good faith). See also Richard Stim, *Measuring Fair Use: The Four Factors*, STAN. UNIV. (Oct. 23, 2022), archived at <https://perma.cc/B92M-FFXM> [hereinafter Stim, *Measuring Fair Use*] (describing the "fifth" fair use factor). See also Joseph Tromba, *Is Fair Use Actually Fair in the Digital Age for Good-Faith Creators: A Call for a Broader Interpretation of the Fair Use Doctrine in the Digital Age*, 33 *TOURO L. REV.* 1283, 1306 (2017) (arguing that "[a]s copyright law continues to live in this digital age, the focus on good and bad faith needs to become more prevalent.").

²³ See *Code of Best Practices in Fair Use for Online Video*, *supra* note 18 (explaining that providing credit or attribution where possible can show good faith). See also Stim, *Measuring Fair Use*, *supra* note 22 (recognizing that a judge or jury's personal sense of right or wrong may affect the fair use analysis). Although offensiveness is not a fair use factor, it may influence a court's decision. *Id.*

For example, in one case a manufacturer of novelty cards parodied the successful children's dolls the Cabbage Patch Kids. The parody card series was entitled the Garbage Pail Kids and used gruesome and grotesque names and characters to poke fun at the wholesome Cabbage Patch image. Some copyright experts were surprised when a federal court considered the parody an infringement, not a fair use.

Id.

²⁴ See *What is Fair Use*, MUSICIANS INST. LIBR. (Mar. 15, 2022), archived at <https://perma.cc/42BH-UNCH> (explaining that the court decides Fair Use rather than the user or author). "The court uses a series of guidelines commonly referred to as

character of the use, including whether such use is for commercial, nonprofit, or educational purposes.²⁵ Courts use this factor to identify the category of the work and determine whether the use is transformative.²⁶ A use is transformative when it adds something new rather than serving as a substitute for the original work.²⁷ The second factor courts consider pertains to the copyrighted work's nature, such as whether the material is factual or creative.²⁸ The use of a creative work may be less likely to fall under the protection of fair use than a

The Four Factors to determine if something is a fair use or not[.]” *Id.* See also *Fair Use*, COLUM. UNIV. LIBR. (Oct. 23, 2022), archived at <https://perma.cc/GE4E-W4KH> [hereinafter *Fair Use: Columbia Univ.*] (noting that fair use is a balancing test where all four factors need to be applied). See also Richard Stim, *Fair Use: The Four Factors Courts Consider in a Copyright Infringement Case*, NOLO (Oct. 24, 2022), archived at <https://perma.cc/9BC2-DE2Q> [hereinafter Stim, *Fair Use Factors*] (emphasizing that “[t]he drafters of the Copyright Act were careful to advise that the fair use doctrine expressed in Section 107 was intended only as a guideline.”). “In theory, all four factors are equally important. In practice, however, courts often focus on the first and fourth factors, considering the nature of the infringement and the effect on the copyright holder’s market.” *Id.* See also *Fair Use: American Libr.*, *supra* note 17 (noting the vague definition of fair use because Section 107 is not meant to be specific). See also *Code of Best Practices in Fair Use for Online Video*, *supra* note 18 (explaining that lawyers and judges use a “rule of reason” rather than following a specific formula when deciding whether an unlicensed use of copyrighted material is “fair”).

²⁵ See 17 U.S.C. § 107(1) (declaring that “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes . . .” is a factor in determining whether the use of the work was fair use). See also *Fair Use Index*, *supra* note 17 (listing the statutory framework for fair use analysis).

²⁶ See *What is Fair Use*, *supra* note 24 (conceptualizing transformative work as whether the user dramatically changed the work to now take on a different meaning, such as parody). Courts will balance the purpose and character of the use against the other factors. *Id.* See also *Code of Best Practices in Fair Use for Online Video*, *supra* note 18 (noting the trend in fair use case law strongly supports using transformativeness as a core measure to analyze how the use repurposes Copyrighted works). But see *Fair Use: American Libr.*, *supra* note 17 (asserting that a finding of fair use depends on an application of all four factors, not merely the purpose).

²⁷ See *Fair Use Index*, *supra* note 17 (defining transformative).

²⁸ See 17 U.S.C. § 107(2) (considering “the nature of the copyrighted work” in a fair use analysis). See also *What is Fair Use*, *supra* note 24 (noting the difference between material that is informational, scientific, or factual compared to artistic works). “[F]acts cannot be copyrighted.” *Id.* See also *Fair Use Index*, *supra* note 17 (comparing the use of a creative work, such as a novel, movie, or song, and a factual work, such as a news article).

factual work because of copyright's inherent purpose of encouraging creative expression.²⁹

The third factor courts balance is the quantity and quality of the portion used in relation to the copyrighted work as a whole.³⁰ Although the Section 107 definition of fair use does not reference numerical limits to the portion or length of the used work, such vagueness affirms Congress's intent to have the courts decide the issue on a case-by-case basis.³¹ Generally, the more substantial the portion of copyrighted work used, the less likely courts will find for fair use.³² However, courts have found for fair use even if someone included the entire work and conversely denied fair use with only a minimal amount employed.³³ Thus, the court may determine that an individual's use of a small portion of copyright material does not qualify for fair use protection because it shows the "heart of the work," but may determine

²⁹ See *Fair Use Index*, *supra* note 17 (focusing on the nature of Copyrighted work because facts cannot be copyrighted). See also *Fair Use: Columbia Univ.*, *supra* note 24 (asserting that fair use applies more broadly to nonfiction). "Courts are usually more protective of art, music, poetry, feature films, and other creative works than they might be of nonfiction works." *Id.*

³⁰ See 17 U.S.C. § 107(3) (listing that "the amount and substantiality of the portion used in relation to the copyrighted work as a whole" is a Fair Use factor). See also *Fair Use Index*, *supra* note 17 (describing the third fair use factor as the analysis of both the quantity and quality of the copyrighted material used).

³¹ See *Fair Use: American Libr.*, *supra* note 17 (commenting that Section 107 is not meant to be specific because Congress intended for Fair Use to be determined on a case-by-case basis). "This vagueness provides tremendous flexibility, but also leads to much uncertainty." *Id.* "[I]t is up to the court to make the final determination if a use is fair." *Id.*

³² See *Fair Use Index*, *supra* note 17 (explaining how courts use the third factor). "If the use includes a large portion of the copyrighted work, fair use is less likely to be found; if the use employs only a small amount of copyrighted material, fair use is more likely." *Id.* See also *Fair Use: American Libr.*, *supra* note 17 (affirming that generally the more quantity used, the less likely it falls within Fair Use). See also *Stim, Fair Use Factors*, *supra* note 24 (supporting that Fair Use is more likely found when a user takes less). See also *What is Fair Use*, *supra* note 24 (supporting that the use of a short excerpt is less impactful to the original author than if the whole work was used).

³³ See *Fair Use Index*, *supra* note 17 (noting the different contexts that a court has found Fair Use). See also *Fair Use: Columbia Univ.*, *supra* note 24 (presenting that courts have ruled against Fair Use even with small amounts used). See also *Sony Corp. of Am. V. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984) (holding that use may still be fair even when the entirety of the Copyrighted work is reproduced).

in other situations that an individual using the entire piece constitutes fair use, such as when used for parody or commentary.³⁴

Notably, the fourth factor's focus on the market effects influences courts to likely deny fair use and rule in favor of the original author when the use of the copyrighted work adversely affects its current or future market, as such use could deprive the copyright owner of income, except in cases of parody.³⁵ However, fair use may apply to a creator's commercialized activities, as the analysis' application extends beyond nonprofit material.³⁶ Although the courts weigh each factor, most often considering the first and fourth factors, the fourth factor's required inquiry into the market impact can complicate the four-pronged analysis.³⁷ Considering the four factors cumulatively,

³⁴ See *What is Fair Use*, *supra* note 24 (explaining that quantity is not always a factor because courts consider the “heart of the work.”). See also *Fair Use: Columbia Univ.*, *supra* note 24 (explaining that the “heart of the work” encompasses the most extraordinary or creative elements, such as a journalistic “scoop”). See also Stim, *Measuring Fair Use*, *supra* note 22 (alerting that a user of Copyrighted work is “more likely to run into problems” when using “the most memorable aspect of a work.”). “For example, it would probably not be a fair use to copy the opening guitar riff and the words ‘I can’t get no satisfaction’ from the song ‘Satisfaction.’” *Id.* But see *Fair Use Index*, *supra* note 17 (stating that using an entire work may be fair under certain circumstances). See also *Fair Use, Columbia Univ.*, *supra* note 24 (explaining that Fair Use may apply to the copying of an entire work depending on how much is needed to achieve a purpose). See also *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 588 (1994) (reasoning that an entire work can be used for parody purposes because “the heart is also what most readily conjures up the [original] for parody, and it is the heart at which parody takes aim.”).

³⁵ See *Fair Use Index*, *supra* note 17 (explaining that the courts use the fourth factor to determine the extent the unlicensed use harms the existing or future market for the Copyright owner’s original work). See also Stim, *Fair Use Factors*, *supra* note 24 (explaining how parody entails a different fair use analysis with regard to the impact on the market). See also *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986) (reasoning that “[i]n assessing the economic effect of the parody, the parody’s critical impact must be excluded.”). Parody is different than a commercial substitution. *Id.* at 438.

³⁶ See Jamie O’Neill, *Lowering Barriers to Entry: YouTube, Fair Use, and the Copyright Claims Board*, 33 *FORDHAM INTELL. PROP. MEDIA & ENT. L. J.* 176, 197 (explaining that “many activities that often fall under fair use ‘are generally conducted for profit in this country,’ meaning that nearly everything would fall out of fair use if it was restricted to solely nonprofit material.”).

³⁷ See *What is Fair Use*, *supra* note 24 (describing the fourth factor as one of the most considered). See also *What is Fair Use*, COPYRIGHT ALL. (Oct. 24, 2022), archived at <https://perma.cc/3KNM-4XXG> [hereinafter *Fair Use Copyright*] (explaining the use of Copyright material that would weigh against Fair Use, such as market harms). See also *Code of Best Practices in Fair Use for Online Video*, *supra*

the first factor concerning transformativeness has the most significant influence on a finding of fair use.³⁸

C. Copyright in the Digital Age

Congress recognized the need to modernize copyright protection in the digital age.³⁹ The DMCA recognized that online service providers ("OSP") experience users infringing copyright and thus established protections for OSP via implementing a notice-and-takedown system, encouraging copyright owners to share their works online, and deterring false copyright management information ("CMI").⁴⁰ Ultimately, the copyright office recognizes that with

note 18 (expressing the prevalence of two key questions judges consider in Fair Use litigation that focus on "whether the use will cause excessive economic harm to the copyright owner."). The first key question is whether the unlicensed use is for different purpose than that of the original such that it "transforms" the material taken from the copyrighted work or if it just repeats the work for the same intent and value as the original. *Id.* The second question pertains to if the material is appropriate in kind and amount, considering the nature of the copyrighted work and of the use. *Id.* See also *Fair Use: Columbia Univ.*, *supra* note 24 (noting the fourth factor's complexity).

³⁸ See O'Neill, *supra* note 36, at 197 (stating that "the more transformative the new work, the less the significance of other factors, like commercialism, in weighing against a fair use finding.").

³⁹ See Tamara Franklin, *Copyright and Fair Use in the Digital Age*, THE TILT (Sept. 28, 2019), archived at <https://perma.cc/GX2W-WS2L> (expressing that the DMCA was enacted in an "effort to move the nation's copyright law into the digital age."). See also Anthony Hall, *The Ultimate Guide to Digital Millennium Copyright Act*, COPYRIGHTED.COM (Aug. 7, 2022), archived at <https://perma.cc/8FZQ-U68K> (describing how the internet and digital word created a "surge in copyright issues faced by artists, writers, authors, and photographers who publish their work online and then find it on non-authorized websites."). "Back in the previous non-Internet century artists didn't face copyright issues as frequently as it wasn't so easy to steal and spread around someone else's work." *Id.*

⁴⁰ See *DMCA*, *supra* note 3 (providing that the DMCA introduces § 512, 17 U.S. Code § 1201, and 17 U.S. Code § 1202). See also *Digital Millennium Copyright Act*, CORNELL L. SCH. LEGAL INFO. INST. (Feb. 2022), archived at <https://perma.cc/SYS7-7Z3R> [hereinafter *Digital Millennium*] (noting that the DMCA combined four proposed bills with other revisions, filling-in gaps within U.S. law that the WIPO Copyright Treaty addressed). See also *Digital Millennium Copyright Act*, ALA (Oct. 25, 2022), archived at <https://perma.cc/5TTM-378X> [hereinafter *American Library, DMCA*] (alerting that Title 17 of the U.S. Code incorporates the DMCA). The "DMCA tilts strongly in favor of copyright holders." *Id.*

evolving online developments, the current internet policy cannot be one-size-fits-all approach.⁴¹

1. Breaking down the DMCA

Following the World Intellectual Property Organization's ("WIPO") Copyright Treaty of 1996, the US amended Title 17 in 1998 to incorporate the DMCA, which contained multiple provisions addressing the intersection between copyright law and the internet.⁴²

⁴¹ See *Copyright Protection on the Internet: Everything to Know*, *supra* note 3 (listing what copyright on the internet covers). Unauthorized sharing of Copyrighted design, links, text, graphics, audio, video, and original content triggers a Copyright violation. *Id.* See also *10 Copyright Laws Every Video Producer Should Know About*, MOTIONCUE (Sept. 25, 2022), *archived at* <https://perma.cc/9QLR-4GAW> (advising internet content's high susceptibility to Copyright infringement). Someone online does not need to have legal documentation to own the copyrights. *Id.* "Under the US copyright law, simply by being the creator of the video and putting it in a 'tangible' form, you own the copyrights of your content." *Id.* However, it is recommended to add a copyright logo and register your content with the Copyright Office. *Id.* See also *Section 512 Study*, COPYRIGHT.GOV (Oct. 25, 2022), *archived at* <https://perma.cc/UM4F-BSVZ> (stating that "internet policy in the twenty-first century cannot be one-size-fits-all.").

⁴² See 17 U.S.C. §§ 1201–1205 (providing the provisions for Copyright Protection and Management Systems). See also *Digital Millennium*, *supra* note 40 (asserting that President Clinton signed the DMCA to bring the World Intellectual Property Organization Copyright Treaty of 1996 into the laws of the United States). When people refer to the DMCA they are talking about multiple provisions. *Id.* See also *American Library, DMCA*, *supra* note 40 (stating that the DMCA is a landmark legislation that serves to "meet the demands of the Digital Age and to conform U.S. law to the requirements of World Intellectual Property Organization (WIPO)."). See also *DMCA*, *supra* note 3 (noting the introduction of the Digital Millennium Copyright Act in 1998). See also Glen Sears, *6 Facts on the Road to Actually Understanding the DMCA*, MEDIUM (July 20, 2015), *archived at* <https://perma.cc/2Q9U-ZVTK> (explaining that DMCA represents Congress's interest in updating Copyright legislation to align with WIPO's new treaties and establish protections for businesses operating in the new digital world). See also Hall, *supra* note 39 (describing that the "aim of DMCA is to balance the interests of copyright owners and users and look into any sort of copyright infringement that surface in the digital world."). "DMCA is intended to regulate digital media and deal with copyright challenges the digital world faces." *Id.* See also *Section 512 Study*, *supra* note 41 (acknowledging that changes to the internet ecosystem affects Copyright policy).

While Congress understood that it would be essential to address online infringement as the internet continued to grow, it may have been difficult to anticipate the online world as we now know it, where each day users upload hundreds of millions of photos,

Whereas Section 1201 implements anticircumvention measures for copyright holders and Section 1202 similarly makes it illegal for someone to intentionally distribute fake CMI, Section 512 protects service providers from potential liability when a person uses the platform to infringe copyright.⁴³ The notice-and-takedown system of Section 512 requires the service provider to meet specific criteria to avoid liability and also enables the service provider to cooperate with copyright holders to remove the infringing content.⁴⁴

videos, and other items, and service providers receive over a million notices of alleged infringement.

Id.

⁴³ See Megan, *What is DMCA anti-circumvention?*, ODIN L. MEDIA (Oct. 9, 2019), archived at <https://perma.cc/CNE5-RGUB> (explaining § 1201 anticircumvention measures). Examples of circumvention activities include the “removal of watermarks from photographs, bypassing DRM in order to copy a game, movie, etc., and trafficking in devices or tools that help other people circumvent access-control and copy-control measures.” *Id.* See also *Section 1201 Study*, COPYRIGHT.GOV (Oct. 26, 2022), archived at <https://perma.cc/QFK3-JP53> (explaining how § 1201 employs access and copy controls to prohibit circumvention and protect Copyright holders’ works). See also *Copyright Management Information (CMI)*, COPYRIGHT ALL. (Oct. 25, 2022), archived at <https://perma.cc/6FBV-HPBH> (defining Copyright management information (CMI) as “the information about a Copyrighted work, its creator, its owner, or use of the work that is conveyed in connection with a Copyrighted work.”). CMI examples include the Copyrighted work’s title, ISBN number or Copyright registration number, names, and terms and conditions for use of the work. *Id.* See also *DMCA*, *supra* note 3 (explaining that § 512 both enables Copyright owners to circumvent litigation when infringement occurs and provides online service providers with legal assurances). Section 512 shields online service providers from monetary liability. *Id.* The creation of safe harbors limits other forms of potential liability for Copyright infringement. *Id.* See also *Section 512 Study*, *supra* note 41 (identifying five principles from the 2020 evaluation of § 512).

⁴⁴ See *DMCA*, *supra* note 3 (advising that online service providers must meet certain conditions to avoid liability by cooperating with Copyright owners). For example, the online service provider must publicly include the contact information for the agent designated to receive Copyright owners’ notices. *Id.* See also *A Guide to YouTube Removals*, ELEC. FRONTIER FOUND. (Oct. 25, 2022), archived at <https://perma.cc/UVN6-4MBP> (explaining that an online service provider must implement a notice-and-takedown system in order to qualify for the “DMCA safe harbor.”). See also *Copyright Protection on the Internet: Everything to Know*, *supra* note 3 (recommending that every website should list restrictions on content in its terms of use and clearly state that the website is protected by Copyright). *Id.* See also *What Is The DMCA Notice and Takedown Process?*, COPYRIGHT ALL. (Oct. 25, 2022), archived at <https://perma.cc/YXW8-CY3N> (explaining the notice-and-takedown process).

2. Copyright on YouTube and Twitch

Video-sharing platforms such as YouTube and Twitch have copyright policies that inform creators of their copyright protection, exceptions such as fair use, how to make claims, and the repercussions of infringement.⁴⁵ Both platforms use a three-strikes policy approach to DMCA takedown requests that impose repercussions on a channel's monetization abilities and viewership, with the third strike

The process entails the copyright owner (or the owner's agent) sending a takedown notice to a service provider requesting the provider to remove material that is infringing their copyright(s). A service provider can be an internet service provider (e.g., Comcast), website operator (e.g., eBay), search engine (e.g., Google), a web host (e.g., GoDaddy) or other type of online site-operator.

Id. See also Sears, *supra* note 42 (emphasizing the DMCA's takedown notice importance in modern technology industries). See also *YouTube DMCA Policy Explained*, DoNOTPAY (Oct. 25, 2022), archived at <https://perma.cc/62DB-BGCD> (explaining that "DMCA takedown enables Copyright owners or their agents to send takedown requests to service providers, website hosts, or third-party users that infringed their copyrights.").

⁴⁵ See *What are Copyright Exceptions?*, YOUTUBE (Jan. 27, 2022), archived at <https://perma.cc/CH94-RVHJ> (listing Copyright rules and policies, including how someone can make a copyright claim and the exceptions that exist). See also *What action does YouTube take for copyright infringement?*, YOUTUBE (Apr. 18, 2024), archived at <https://perma.cc/4T27-US69> (presenting that YouTube deals with copyright infringement by either issuing strikes that lead to account termination or using Content ID that allow YouTube to track, monetize, or block uploads without issuing strikes). See also Karan Singh, *All You Need to Know About YouTube's Copyright Policy*, SWARIT ADVISORS (Sept. 22, 2021), archived at <https://perma.cc/PZ68-JXXE> (describing YouTube's detailed Copyright policies). See also *YouTube DMCA Policy Explained*, *supra* note 44 (providing a brief overview of the two Copyright methods and their features). YouTube cautions that the improper claims can result in legal penalties and partnership termination. *Id.* See also *Frequently asked questions about Fair Use*, YOUTUBE HELP (Feb. 10, 2023), archived at <https://perma.cc/PY93-KHBX> (providing answers to common Fair Use questions). See also *Copyrights and Your Channel*, TWITCH (Oct. 26, 2022), archived at <https://perma.cc/M8LZ-JKU7> (providing an explanation of Copyright law implications on Twitch). Twitch provides streamers with tools to understand confusing Copyright law and make informed decisions about using Copyrighted material in order to avoid an infringement. *Id.* See also O'Neill, *supra* note 36, at 194 (presenting how Twitch followed in YouTube's footsteps with regards to its copyright detection after Twitch faced issues with creators using music content in their streams).

automatically terminating the account.⁴⁶ Twitch provides rightsholders with the ability to directly send Twitch's designated copyright agent a Notification of Claimed Infringement, compared to YouTube offering a Content ID match system to address copyright infringement.⁴⁷ The platforms recognize the possibility of wrongful

⁴⁶ See *YouTube DMCA Policy Explained*, *supra* note 44 (recognizing that "when YouTube receives a notice from the copyright owner, it is required to take down the video in question to retain the DMCA protection."). See also Carla Marshall, *Copyright Claims vs. Copyright Strikes: Here's the Difference*, VIDIQ (Apr. 21, 2023), archived at <https://perma.cc/6SPM-FV7C> (emphasizing that a strike reflects YouTube's view that a channel is losing good standing, which negatively affects some channel features like a stop to any live streaming or monetization). See also Track Club, *Copyright Claim vs Strike On YouTube: What's the Difference?*, TRACK CLUB (Aug. 17, 2022), archived at <https://perma.cc/YR9J-8Q7N> (declaring that Copyright strikes adversely affect the user's entire YouTube channel). See O'Neill, *supra* note 36, at 192 (describing the cumbersome process a claimed channel may experience after receiving a suspension). "[I]f a YouTube channel was suspended due to copyright violations, which occurs after three strikes within 90 days, then the creator must email, fax, or mail YouTube with contact information, the supposedly infringing URLs, they must consent to federal jurisdiction, and include a statement why the removal was mistaken."

Id. See also *Copyright strike basics*, YOUTUBE HELP (Nov. 16, 2022), archived at <https://perma.cc/Q2V6-5C36> (providing that a Copyright strike acts as a warning but may affect the creator's monetization ability). If a channel gets three Copyright strikes, then YouTube will cancel all of their YouTube accounts, take down all of their videos, and won't allow the user back as a creator on the platform. *Id.* However, if a channel is part of the YouTube Partner Program, then it will have seven additional days to act after receiving three Copyright strikes before your channel is disabled. *Id.* See also Simona Tolcheva, *YouTube Copyright Rules: What Creators Need to Know*, MAKEUSEOF (July 8, 2022), archived at <https://perma.cc/DJD6-9ERY> (expressing that YouTube's Copyright strike policy does not consider the infringer's intent and will implement consequences for violating the rules). See also *Copyrights and Your Channel*, *supra* note 45 (expressing that Twitch's policy terminates repeat offenders who accrue multiple Copyright strikes from DMCA takedowns).

⁴⁷ See *Digital Millennium Copyright Act Notification Guidelines*, TWITCH (July 19, 2021), archived at <https://perma.cc/HT6L-RBAG> (advising Copyright holders of the option to submit a written notification of claimed infringement by providing Twitch's designated Copyright agent with the specific information). See also *Overview of Copyright management tools*, YOUTUBE HELP (Jan. 27, 2023), archived at <https://perma.cc/7EFG-NM4X> (listing YouTube's Copyright protection methods as a Copyright takedown webform, a Copyright match tool, a content verification program, and Content ID). See also Taylor B. Bartholomew, *The Death of Fair Use in Cyberspace: YouTube and the Problem with Content ID*, 13 DUKE L. & TECH. REV. 66, 84–85 (2015) (commenting on YouTube's Copyright claim options). See

copyright claims and provide avenues for a creator to resolve a copyright strike.⁴⁸ In practice, however, the difficulties a content creator faces when confronting a copyright action, such as lacking financial resources needed to dispute the claim and lacking support from the platform itself, dissuades them even if fair use applies.⁴⁹

also Singh, *supra* note 45 (describing the Content ID system as unique). In the case of a Content ID match, YouTube itself files a copyright claim for the owner, thus “releasing the owner to take action by himself.” *Id.* The copyright holder then has three options, whether to monetize the infringer’s video, block the video, or get viewer data on the video. *Id.* YouTube will consider the copying of even a small portion of a YouTube video as a Copyright infringement. *Id.* See also *Learn about Content ID claims*, YOUTUBE HELP (Nov. 16, 2022), archived at <https://perma.cc/5JE7-JVTX> (noting that Copyright owners usually choose to track or monetize videos rather than block them, with the claimed video having an active Content ID). Content ID claims differ from Copyright removal requests and Copyright strikes because they don’t impact your channel or account. *Id.* See also *Copyright strike basics*, *supra* note 46 (noting that Content ID claims do not result in a strike). See also *A Guide to YouTube Removals*, *supra* note 44 (notifying that YouTube will let creators know if a match occurs). A creator will know if their video has been matched because a note will appear next to the video on the “My Videos” page. *Id.* In most cases, no human looks at the videos because YouTube’s computers spot the match and apply the “Block” usage policy automatically. *Id.*

⁴⁸ See *Copyrights and Your Channel*, *supra* note 45 (expressing that Twitch respects creator’s rights and has a policy that empowers creators to take action against wrongful allegations of Copyright infringement). A creator can send a counter-notification or ask the Copyright holder to retract their claim. *Id.* See also *Submit a Copyright removal request*, YOUTUBE HELP (Jan. 20, 2023), archived at <https://perma.cc/9WEH-3NCE> (highlighting that removal requests are invalid when Fair Use applies). See also *Copyright strike basics*, *supra* note 46 (listing the three ways to resolve a Copyright strike on YouTube). A creator can wait 90 days for it to expire, get a retraction from the claimer, or submit a counter notification. *Id.* A counter notification can be used when a creator thinks their video was removed by mistake or qualifies as Fair Use. *Id.*

⁴⁹ See O’Neill, *supra* note 36, at 180 (arguing that “YouTubers of any level of popularity often lack the resources to defend themselves against infringement claims, even ones that can be defended with fair use”). “YouTube has little incentive to support individual creators, rather than movie studios, when such disputes do occur due to the lack of legal threat that individual YouTubers pose.” *Id.* As a result, it is extremely rare for a YouTuber to bring a lawsuit against a copyright owner, who has nothing to lose by submitting a claim. *Id.* at 213. See also Benjamin Boroughf, *The Next Great YouTube: Improving Content ID to Foster Creativity, Cooperation, and Fair Compensation*, 25 ALB. L.J. SCI. & TECH. 95 (2015) (stating that “Content ID denies authors who have uploaded original content, public domain content or even fair use content the ‘opportunities to tap into the advertising revenue generated’ by their work.”). “Content ID’s system that favors claimants and lacks any human

D. Fighting for Fair Use Hosseinzadeh v. Klein, 276 F. Supp. 3d 34 (S.D.N.Y. 2017)

In *Hosseinzadeh v. Klein*, 276 F. Supp. 3d 34 (S.D.N.Y. 2017), YouTubers facing a copyright claim decided to take on costly litigation to defend content creators' ability to make videos under fair use.⁵⁰ *Hosseinzadeh v. Klein* exemplifies the reality of YouTube's copyright system interacting with a fair use defense.⁵¹ Matt Hoss, a content creator on YouTube, sued fellow YouTubers Ethan and Hila Klein claiming that the Kleins infringed on his copyright by making a video reacting to one of his videos.⁵² The Southern District Court of New York ruled in favor of the Kleins because their criticism and commentary on Hoss's video represented a classic example of fair use.⁵³

involvement limits a YouTuber to two options: sign over monetization rights 'or lose access to the most popular online distribution channel.'" *Id.* at 113. *See also* Jeanette Braun, et al. v. Rebekah M. Day, et al., No. 1:2023cv16856 (N.D. Ill. filed Dec. 15, 2023) (presenting a defamation case against YouTubers for saying that the plaintiff filed "frivolous copyright claims."). *See also* *The Girlies vs. Janet*, GOFUNDME (Dec. 26, 2023), *archived at* <https://perma.cc/UM9F-NXP2> (exemplifying the financial resources and time commitments YouTubers face to defend against a lawsuit). Defendants sought fundraising from their viewers to support them in "dealing with this mess" and to "bring awareness to the loopholes in the [YouTube] moderation system that allow copyright abuse that infringes on [the] right to free speech." *Id.*

⁵⁰ *See* Jessica Voegelé, *Where's the Fair Use? The Takedown of Let's Play and Reaction Videos on YouTube and the Need for Comprehensive DMCA Reform*, 33 *TOURO L. REV.* 589, 617 (2017) (noting that the defendants wanted to prove their case in court to set an example for all YouTube subscribers of what kinds of reaction videos constitute Fair Use). Quoting the defendant's attorney, "[t]his case not only affects [the defendants'] ability to produce videos, but affects the ability of many other content creators who make 'react' videos." *Id.* *See also* *Hosseinzadeh v. Klein*, 276 F.Supp.3d 34, 40 (S.D.N.Y. 2017) (providing that the defendants submitted a DMCA counter notification challenging the takedown on the basis that the Klein video was fair use).

⁵¹ *See* Terrica Carrington, *Exploring the Bounds of Fair Use: Hosseinzadeh v. Klein*, COPYRIGHT ALL. (Feb. 27, 2018), *archived at* <https://perma.cc/HU5S-FPLS> (commenting on the Fair Use case).

⁵² *See generally id.* (providing background for the case).

⁵³ *See id.* (explaining that the first factor weighed toward a finding of Fair Use because the Klein video criticizing many facets of the Hoss video constitutes legitimate commentary). "Among the best recognized justifications for copying from another's work is to provide comment on it or criticism of it." *Id.*

Notably, *Hosseinzadeh v. Klein* highlighted how the consideration of reasonableness plays a critical role in analyzing the third factor of fair use.⁵⁴ Although the Kleins used the majority of Hoss's content, their commentary and critique throughout their reaction video made the portion used reasonable and transformed the piece such that it did not substitute the original.⁵⁵ Thus, the Kleins successfully won summary judgment because of their ability to support a showing of fair use.⁵⁶ The Court not only balanced the traditional fair use factors, but also considered that the Kleins acted in

⁵⁴ See *id.* (stating that reasonableness is a critical part of the third Fair Use factor). The analysis for the amount and substantiality of the portion used, must "consider not only 'the quantity of the materials used' but also 'their quality and importance' in relation to the context of the use." *Id.*

⁵⁵ See Carrington, *supra* note 51 (explaining that the third Fair Use factor "looks at the amount and substantiality of the portion used in relation to the copyrighted work as a whole."). Summarizing the reaction video's use of the Copyrighted work.

Here, the Klein video uses 3 minutes and 15 seconds of the Hoss video, which is only 5 minutes and 24 seconds long. That's roughly 60% of the underlying work, and without context, it sounds excessive. But in this case, those 3 minutes and 15 seconds are divided into "a number of short segments of plaintiff's work, interspersing ... commentary and critique along the way."

Id. See also Venkat Balasubramani, 'Reaction' Video Protected By Fair Use—*Hosseinzadeh v. Klein*, TECH. & MKTG. L. BLOG (Aug. 25, 2017), archived at <https://perma.cc/Y2LX-2MQE> (commenting on how the courts considered the "Kleins' use of the work was perhaps extensive, but was necessary to achieve their intended commentary and critique."). See *Hosseinzadeh v. Klein*, 276 F. Supp. 3d 34, 47 (S.D.N.Y. 2017) (reasoning that the Klein video does not serve as a market substitute for the Hoss video). "[A]nyone seeking to enjoy [the original video] on its own will have a very different experience watching the Klein video, which responds to and transforms the Hoss video from a skit into fodder for caustic, moment-by-moment commentary and mockery." *Id.* The Klein video cannot "usurp a market that properly belongs to the copyright-holder" because it does not "offer [] a substitute for the original" *Id.* See also Voegelé, *supra* note 50, at 627 (quoting the Kleins that "[i]f a viewer had any real interest...they would go directly to that video which is merely a mouse click away on YouTube instead of sitting through [our] constant interruptions and commentary.").

⁵⁶ See Carrington, *supra* note 51 (summarizing the court's reasoning for its holding).

The court held that "here, the 'extent' and 'quality and importance' of the video clips used by defendants were reasonable to accomplish the transformative purpose of critical commentary," adding that such a critique would "lose context and utility" without incorporating those clips. Factor three is an inquiry not only into how much of the original work was used, but also whether that amount is reasonable given the use.

Id.

good faith.⁵⁷ *Hosseinzadeh v. Klein* also illustrates a court's disdain for a copyright holder using the court system because of online criticism.⁵⁸

III. Facts

A. Criticism of Copyright on YouTube and Twitch

Users have been critical of both YouTube and Twitch's copyright policies, citing their abrasive approach to enforcement and discouragement of fair use.⁵⁹ Twitch notably upset its users with its

⁵⁷ See Balasubramani, *supra* note 55 (explaining how the court analyzed the Fair Use factors). “In looking at the first factor, the court highlights various aspects of the Klein video that contain criticism and comment . . .” *Id.* “The second factor weighs against Fair Use because the work is creative.” *Id.* The courts recognized that considering the third factor, the Klein's use was extensive but necessary for their video's purpose. *Id.* “The fourth factor weighs in favor of fair use as consumers of one will not view it as a substitute for the other . . .” because the experience of watching the reaction video is very different than the experience of watching the original Copyrighted work. *Id.* The Klein's actions were supported by good faith. *Id.* See also *Triller Fight Club II LLC v. The H3 Podcast*, CASE NO.: 2:21-CV-03942 (representing a new lawsuit that the defendants from *Hoss v. Klein* are again fighting for Fair Use).

⁵⁸ See Balasubramani, *supra* note 55 (explaining the court as not receptive to cases where plaintiffs assert Copyright claims after being criticized online). “The core of Hosseinzadeh's claim, as the Kleins note, is that he does not like being made fun of. And that's never a good basis to sue.” *Id.* “Courts are not very receptive to these lawsuits.” *Id.*

⁵⁹ See Matt Binder, *False YouTube Copyright claim takes down Lofi Girl's years-long livestream*, MASHABLE (July 11, 2022), archived at <https://perma.cc/W68P-3JR8> (reporting on the prevalence of YouTube channels experiencing false Copyright claims and YouTube creator's frustration at the platform's Copyright system). See also Bijan Stephen, *Twitch streamers are getting blindsided by years-old copyright notices*, THE VERGE (June 8, 2020), archived at <https://perma.cc/TGS6-USXW> (commenting that Twitch's mass DMC takedown represents the “larger question” of whether “the way we handle copyright on the internet [is] broken?”). See also Eric Ravenscraft, *Twitch Is Headed For a Copyright Disaster*, MEDIUM (May 28, 2021), archived at <https://perma.cc/8G6F-7FED> (highlighting that rampant takedown notices have a chilling effect on Fair Use).

ContentID discourages fair use by replacing the legal copyright system with an effective system that's far more stringent. ContentID, for example, doesn't question whether the ten-second clip you used was for a critical review (which is generally permissible under fair use), it just flags that it's *there*, and lets the

controversial decision in October 2020 to remove flagged content en masse without allowing streamers to dispute it.⁶⁰ Online creators continuously criticize YouTube for not engaging in a case-by-case analysis of copyright claims.⁶¹ Specifically, users believe that YouTube carelessly takes down non-infringing content and that YouTube's Content ID, a uniquely automated system that immediately takes down a video for possible infringement, inherently avoids fair

rights holder decide if they want to take your money. If you don't like that, you can try to appeal, but if the appeals process decides you're in the wrong, you get a dreaded copyright strike.

Id. See also *A Guide to YouTube Removals*, *supra* note 44 (noting YouTube's lack of human oversight when claiming a video, such that "sending a dispute might well trigger the first human review of [a channel's] video.").

⁶⁰ See O'Neill, *supra* note 36, at 194–95 (commenting on Twitch's decision to delete all past VODs that had been flagged for infringement without allowing streamers to submit a counter-notification).

⁶¹ See Celes Keene, *YouTube Criticized over Copyright Strike System*, LEXOLOGY (Aug. 16, 2022), *archived at* <https://perma.cc/D9L8-7Y7G> (listing reasons why content creators are frustrated with YouTube's inadequate Copyright system, including its reliance on automation, lack of verification, and issuance of strikes before fully investigating). See also Jessica A. Magaldi et al., *ALL'S FAIR IN LOVE AND WAR BUT NOTHING'S FAIR USE ON YOUTUBE: HOW YOUTUBE POLICIES FAVOR COPYRIGHT OWNERS AND HINDER LEGAL FAIR USE*, Soc. SCI. RSCH NETWORK (Apr. 6, 2020) (arguing that "[e]ven though the copyright laws protect the creators of transformative derivative works as a legitimate fair use, to participate on a platform such as YouTube is to consent to the rule it chooses to employ and enforce.").

use considerations.⁶² The news that extorters abuse the strike policy further exacerbates such concerns.⁶³

YouTube's 2022 transparency report revealed that out of the low number of disputes filed against copyright claims, more than half resolved in favor of the uploader.⁶⁴ However, the number of YouTube creators who may disagree with but don't challenge the claims they

⁶² See Timothy Geigner, *YouTube Streamer Hit With Demonetization Over Copyright Claims To Numbers '36' And '50'*, TECHDIRT (Jan. 24, 2020), archived at <https://perma.cc/9ZZF-7NN5> (exemplifying the wide openness for abuse and error of YouTube's Copyright and demonetization practices). See also Binder, *supra* note 59 (demonstrating the prevalence of making false Copyright claims). See also 10 *Copyright Laws Every Video Producer Should Know About*, *supra* note 41 (explaining YouTube's Content ID match system). The Content ID first involves a creator uploading original reference files to the platform and then uses an automated "search and match" function to find any infringing use. *Id.* If triggered, the system immediately takes down the infringer's video and sends a breach warning. *Id.* See also Ryan Noormohamed, *Computer Blown: How an Objective Standard of Good Faith Could Transform the Internet*, 19 TUL. J. TECH. & INTELL. PROP. 167, 185–86 (2016) (explaining the Content ID system can avoid Fair Use considerations completely). Content ID remains outside the law by not sending a DMCA notification, resulting in the Content ID system ability to avoid Fair Use considerations completely, rather leaving Fair Use determinations in the hands of the subjectively good faith efforts of Copyright owners. *Id.*

⁶³ See Tom Gerken, *YouTube's copyright claim system abused by extorters*, BBC NEWS (Feb. 14, 2019), archived at <https://perma.cc/D937-N3PH> [hereinafter Gerken, *YouTube abused by extorters*] (reporting on abuses of YouTube's Copyright claims system to extort money from channels). See also Lindsay Dodgson, *YouTube channels are being held hostage with false copyright claims, but the platform's hands are tied*, INSIDER (June 2, 2020), archived at <https://perma.cc/Y3LS-RZVQ> (reporting on how YouTube channels can easily receive an unfounded Copyright strike when extorters exploit the platform's flawed Copyright claim system). DMCA laws make YouTube not responsible for Copyrighted content uploaded by their users, meaning that anyone and everyone can easily file claims against who they please. *Id.*

⁶⁴ See *YouTube Copyright Transparency Report H2 2021*, YOUTUBE (Jan. 26, 2023), archived at <https://perma.cc/9JFA-7X54> (providing data on balancing the need to protect creators from the significant disruption that can result from the abuse or otherwise invalid use of YouTube's tools). "Uploaders have filed counter notifications in response to over 5% of removal requests from the first half of 2022 made through the webform" *Id.* "Fewer than 1% of all Content ID claims made in the first half of 2022 have been disputed." *Id.* "Over 55% of those disputes resolved in favor of the uploader, either because claimants voluntarily released the claim or they did not respond to the dispute in time." *Id.* See also Ernesto Van der Sar, *Fewer Rightsholders Use YouTube Content ID, But They Flag More Content*, TORRENTFREAK (Nov. 9, 2022), archived at <https://perma.cc/PBS6-U8Z8> (noting that 3,690,786 disputes were filed during the first half of the year, and more than half were resolved in favor of the uploader).

receive remains unknown.⁶⁵ Although YouTubers have the alternative to bring a claim to the Copyright Claims Board (“CCB”) to assert non-infringement, it is yet to be seen whether the CCB, which was recently established on June 16, 2022, serves as a viable solution for YouTubers seeking to defend their content from copyright claims.⁶⁶

The tension between copyright and fair use on platforms remains a prominent issue.⁶⁷ For example, Ethan Klein, the same defendant from the *Hosseinzadeh v. Klein* case, once again asserts fair use in response to a May 2021 suit from Triller, *Triller Fight Club II LLC. v. The H3 Podcast*, 2:21-cv-03942, (C.D. Cal.), arising from his YouTube video commenting on a 45-second clip of the Jake Paul v.

⁶⁵ See O’Neill, *supra* note 36, at 212 (noting the unknown extent of Copyright abuse on YouTube “because we do not have an actual way of measuring or viewing how many YouTubers receive claims they disagree with, but know challenging them could lead to far worse consequences.”). “YouTube may want [the success rate of disputing claims] to show YouTubers that they can dispute and be successful. But it also shows that YouTube’s system is broken on clear cut cases the majority of the time.” *Id.*

⁶⁶ See *Copyright Claims Board to Begin Accepting Claims Later This Month*, COPYRIGHT.GOV (June 2, 2022), *archived at* <https://perma.cc/YB3Q-HSB2> (declaring that the CCB began accepting claims on June 16, 2022). See also O’Neill, *supra* note 36, at 217 (arguing that the CCB “presents an opportunity for an easy, lower-cost path for content creators to declare non-infringement on videos that have been struck or limited by YouTube. . . .”). “For the CCB to be a viable alternative, YouTubers would need an incentive to go to the CCB rather than just allow for a DMCA or Content ID claim” *Id.* at 219. See also *Electronic Filing and Case Management System*, COPYRIGHT CLAIMS BD. (Jan. 26, 2023), *archived at* <https://perma.cc/ZH78-LW35> (listing that as of Jan. 26, 2023, nine claims have been made to the CCB involving YouTube videos).

⁶⁷ See Gerken, *YouTube abused by extorters*, *supra* note 63 (reporting on YouTube channel that was abusing Copyright claims to extort money from channels playing Minecraft). The extorters would file Copyright claims and then threatened to issue a third “strike”, which would result in the channel’s deletion, unless they received money. *Id.* “They made it so easy to take somebody’s channel down – they strike a few videos and your channel is terminated This is something that can affect more channels in the future and they need to fix this right now.” *Id.* See also Tom Gerken, *YouTubers face £4,600 bill over Copyright claims*, BBC NEWS (Jan. 13, 2020), *archived at* <https://perma.cc/2XKR-JVZJ> [hereinafter Gerken, *bill over Copyright claims*] (highlighting another instance where channel paid money to avoid being terminated). “If you don’t pay they’ll start striking your channel – they’ll basically remove our channel if we don’t pay them.” *Id.* See also Noormohamed, *supra* note 62, at 185–86 (emphasizing that “it was not common practice to include a statement of Fair Use consideration in an initial takedown request.”).

Ben Askren fight days after the boxing event.⁶⁸ Notably, a video game company filed *Bungie, Inc. v. Luca Leone*, 2:2022cv00981, (W.D. Wash.), on July 15, 2022, a copyright infringement suit against a Twitch streamer for using modifications of its gameplay.⁶⁹ In April 2023, YouTube restricted a prominent channel, PointCrow, and issued two copyright strikes against it following Nintendo's multiple takedown requests of his videos involving both modified and unmodified gameplay.⁷⁰ Eric Morino, the creator of the PointCrow

⁶⁸ See Steven Asarch, *Triller is suing YouTuber Ethan Klein's podcast for \$50 million, claiming he illegally distributed Jake Paul's fight*, INSIDER (May 12, 2021), archived at <https://perma.cc/47YW-NEUU> (reporting on new lawsuit alleging Copyright infringement for showing a clip of a boxing match). "My coverage of the fight was totally fair use, I showed 45 seconds of Jake knocking out Ben and commenting non-stop." *Id.* See also Andy Maxwell, *H3 Podcast Asks Court to Throw Out "Fatally Defective" Triller Copyright Lawsuit*, TORRENTFREAK (Sept. 7, 2021), archived at <https://perma.cc/3SHD-RX4Z> (applying the Fair Use factors to the Triller Copyright lawsuit). With regards to the fourth factor of the effect on the market, the defendant says the court must distinguish between "biting criticism that merely suppresses demand and copyright infringement which usurps it." *Id.* See also Geoff Weiss, *Ethan, Hila Klein Say They've Prevailed In 2 Of 4 Recent Lawsuits*, TUBEFILTER (Jan. 14, 2022), archived at <https://perma.cc/KFX6-FFHH> (reporting on that the two suits decided so far out of four lawsuits, the Kleins won both of them).

⁶⁹ See Compl. at 2, *Bungie, Inc. v. Luca Leone*, 2:2022cv00981 (alleging that the defendant violated the plaintiff's copyright in multiple ways). See also Kris Holt, *Bungie sues 'Destiny 2' player over alleged threats and cheating*, ENGADGET (July 18, 2022), archived at <https://perma.cc/D2X3-QF5T> (presenting information on how streamer threatened the game studio).

⁷⁰ See Erik Petrovich, *EVERYONE WANTS TO KNOW WHY POINTCROW'S ZELDA VIDEOS ARE BEING TAKEN DOWN*, SVG (Apr. 17, 2023), archived at <https://perma.cc/P7RH-GYWS> (reporting that PointCrow and another YouTube channel received copyright strikes from Nintendo for videos on both modded and unmodded gameplay footage). See also Amie Gammons, *Nintendo Targets Zelda Modders and Streamers with Copyright Strikes Ahead of Tears of the Kingdom Release*, FUTURE GAME RELEASES (Apr. 17, 2023), archived at <https://perma.cc/Y7QL-P8WW> (noting that PointCrow claims he obeyed Nintendo's content policies and explained that he appealed the initial takedowns, but was then hit with Nintendo issuing multiple copyright strikes against his YouTube channel). See also Carver Fisher, *PointCrow pleads with Nintendo to reverse copyright strikes ahead of ToTK release*, DEXERTO (Apr. 14, 2023), archived at <https://perma.cc/QLB6-HY93> (asserting that Nintendo's content guidelines for Let's Play videos overwrite existing terms of service and don't expressly prohibit modifying games). See also Margaret Rouse, *Modification*, TECHOPEDIA (Feb. 2, 2017), archived at <https://perma.cc/6LAC-K47S> (explaining modification in gaming as "the process of editing or changing the structure, syntax or code of a game.").

channel, questioned the validity of Nintendo and YouTube's actions.⁷¹ He asserts that in addition to fair use, his videos lawfully followed Nintendo guidelines for Let's Play videos, and that he did not violate the company's terms of service because he never encouraged piracy of Nintendo's games, never sold the modifications, and only used custom code which was free of Nintendo's assets.⁷² Such instances heighten the importance and complexity of platforms reconciling competing interests and appeasing both content creators and copyright holders.⁷³

"Modification is performed to allow a gamer to play a game different from its original released version." *Id.*

⁷¹ See Gammons, *supra* note 70 (expressing PointCrow fears that Nintendo's actions may set a dangerous precedent for content creators by making it "difficult for creators to post creative concepts without fear of copyright strikes, even when they abide by Nintendo's guidelines."). PointCrow wrote an open letter to Nintendo, urging the company to not take the creativity away from online content creators. *Id.* See also Ethan Gach, *Nintendo Escalates War On Popular Zelda YouTuber Behind Multiplayer Breath Of The Wild Mod*, KOTAKU (Apr. 14, 2023), archived at <https://perma.cc/SB5M-KNSQ> (expressing that Morino defends his Let's Play videos and accuses Nintendo of "flouting its content creator guidelines to target him.").

⁷² See Wes Fenlon, *Aggressive Nintendo copyright strikes on YouTube push Breath of the Wild multiplayer modders into taking down mod*, PC GAMER (Apr. 14, 2023), archived at <https://perma.cc/9C3M-V2WG> (presenting PointCrow's argument that his videos are Fair Use and did not violate Nintendo's terms). See also Petrovich, *supra* note 70 (affirming that YouTube and Nintendo's reasons for taking down multiple videos remains unclear). Fans believe Nintendo's actions may be because of other upcoming game releases, "but that doesn't explain why Nintendo is bringing down its iron fist." *Id.* Compare with Aaron Greenbaum, *NINTENDO CONTINUES TO TARGET STREAMERS*, SVG (Nov. 20, 2020), archived at <https://perma.cc/B78D-X2RV> (reporting on a theory that Nintendo's issuance of DMCA takedowns towards Twitch streamers was because it didn't want anyone to stream the game prior to the official US release date). See also Richik Bhattacharya, *Streamer from New Zealand was banned from Twitch for playing Forspoken on stream*, SPORTSKEEDA (Jan. 24, 2023), archived at <https://perma.cc/P5CR-6WRX> (reporting on a video game developer issuing a copyright strike to a streamer who streamed the game that was under embargo before its official release date). Although he was in the New Zealand time zone, he broke the stipulations of the embargo as it was set to end at a later time zone. *Id.*

⁷³ See Anthony Dreyer & David Lamb, *How To Mitigate Copyright Risks Of Video Game Streaming*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Dec. 11, 2019), archived at <https://perma.cc/Y34L-6CGJ> (noting that video game streaming presents a legal uncertainty for copyright owners, streamers, and streaming platforms). See also O'Neill, *supra* note 36, at 194 (recognizing that Twitch used to be much more lenient than YouTube with regards to Copyright). See also Ravenscraft, *supra* note 59 (arguing that Twitch must start taking sides if it does not want to prohibit every

B. Copyright in the Age of Gaming Streamers

Video game streaming on YouTube and Twitch represents an increasingly popular and profitable new media for the platforms, streamers, and video game developers but poses a regulatory gray area.⁷⁴ Copyright protections apply to video games once they exist in a tangible form but only cover the creative elements of the game's audiovisual material.⁷⁵ This may include specific characters, scene

user from uploading copyrighted content). *See also* Fisher, *supra* note 70 (highlighting the legal uncertainty for creators who are left questioning the future of the content they're allowed to make).

⁷⁴ *See* J. Clement, *Gaming video content worldwide – Statistics & Facts*, STATISTA (Aug. 31, 2023), *archived at* <https://perma.cc/U2DB-HK5D> (providing data supporting that “[t]he industry of watching other people play video games [on platforms] continues to surge in popularity” and that streamer monetization is big business). In 2020, the number of gaming video content (GVC) viewers reached a record 1.2 billion, which fueled a massive boost in GVC revenue. *Id.* *See also* Amy Thomas, *Can you play? An analysis of video game user-generated content policies 1* (CREATE, Working Paper No. 6, 2022) (attributing video game's position as a front-runner in entertainment to the newest generations). “[P]laying and sharing of video game content is perhaps the most culturally important, go-to storytelling form, and it is undeniable that they make up a large part of life online.” *Id.* *See also* Darren Geeter, *Twitch created a business around watching video games — here's how Amazon has changed the service since buying it in 2014*, CNBC (Feb. 26, 2019), *archived at* <https://perma.cc/7VJY-VEV7> (recognizing that YouTube and Twitch have capitalized on livestreaming by incorporating the popular media form of video games). *See also* Gage Meyers, *Video Game Streams and Fair Use*, LINKEDIN (Oct. 26, 2020), *archived at* <https://perma.cc/GK8T-4XT9> (emphasizing that “major platforms like Youtube [sic] and Twitch make a significant amount in revenue from content creators playing Copyrighted video games on their platform.”). *See also* Joanna Mrsich, *Streamer or Infringer? Copyright Law in the Video Game World*, WASH. J. L. TECH. & ARTS (Jan. 29, 2021), *archived at* <https://perma.cc/VA2T-L6GA> (commenting on how the video game industry generates billions of dollars each year). *See also* Dreyer & Lamb, *supra* note 73 (commenting on how video game streaming's increased popularity appears to rival traditional media outlets and creates a legal gray area for Copyright owners, streaming services, and individual content creators). *See also* *Video Games*, WORLD INTELL. PROP. ORG. (Sept. 24, 2022), *archived at* <https://perma.cc/VHM7-6HJ4> (commenting on the complexity of a video game's legal protections and Copyright challenges). *See also* Alex Banaga, *How To Copyright a Video Game and Prevent Infringement*, DONOTPAY (Oct. 26, 2022), *archived at* <https://perma.cc/T24Q-NVHN> (describing Copyright laws in the video gaming industry as a gray field).

⁷⁵ *See* Carlton Felds, *Getting Creative with Video Games: Copyright, Public Domain, and Fair Use*, JDSUPRA (Sept. 12, 2019), *archived at* <https://perma.cc/PFN4-3VXN>

images, specific storylines, dialogue, original music, and the game's code and software, which could also be trademarked.⁷⁶ However, ideas and functional features are not copyrightable, substantively the "scènes à faire" or "for the game mechanics;" accordingly the moment a video game exists for the public, copyright does not protect against other people developing a game based on similar principles, as is the case between the popular battle-royal games of Fortnite and PUBG.⁷⁷

Video game copyright is thus nuanced because it protects elements to the extent that someone else cannot duplicate them but

(presenting that Copyright in a video game "exists as soon as at least some of the creative expression of the game has been fixed in some tangible media – on paper, in software, on film, etc."). "[C]opyright exists in your work of art, whether or not you register it." *Id.* See also Nicole Lamberson, *Find Video Games in Copyright*, LIBR. OF CONG. (Sept. 12, 2022), *archived at* <https://perma.cc/JZN4-UYV9> (listing a video game's two Copyright-protected components and stating that "copyright law protects video games from the moment they are fixed in a tangible form of expression.").

⁷⁶ See ANDY RAMOS ET AL., *THE LEGAL STATUS OF VIDEO GAMES: COMPARATIVE ANALYSIS IN NATIONAL APPROACHES* 9 (World Intell. Prop. Org. ed., 2013) (listing a video games creative elements as the audio elements, video elements, and computer code). "[O]ther subject matter eligible for copyright protection can include the video game script, its plot and other literary works; well-developed characters; choreographies and pantomimes; and maps and architectural works." *Id.* See also *Stern Electronics, Inc. v. Kaufman*, 669 F.2d 852, 856-57 (2d Cir. 1982) (holding that the visual and aural aspects of video games are copyrightable material under the Copyright Act of 1976). *But see* Banaga, *supra* note 74 (noting that Copyright can apply to a finished game "but when it comes to its specific parts, not everything is covered by the existing copyright regulation."). See also Sonali D. Maitra, *It's How You Play the Game: Why Videogame Rules Are Not Expression Protected by Copyright Law*, AM. BAR ASS'N (Apr. 2015), *archived at* <https://perma.cc/K8Z8-8WP7> (explaining that Copyright does not apply to "neither ideas nor functional elements—such as procedures, processes, systems, or methods of operation . . .").

⁷⁷ See Maitra, *supra* note 76 (explaining that "[g]ames rules have never been copyrightable, and the idea of a game is just one uncopyrightable aspect of a work."). "[N]either abstractions nor functional features are copyrightable." *Id.* "Once a game has been made public, nothing in the copyright law prevents others from developing another game based on similar principles." *Id.* See also Banaga, *supra* note 74 (commenting on how Copyright does not protect the game mechanics, which is the idea behind the game, nor scenes à faire, such as necessary parts in a planetary exploration game or a racing game). "An author cannot report copyright infringement if someone is using the same general concept." *Id.* See also Bryan Wirtz, *How to Copyright a Video Game*, GAMEDESIGNING (Sept. 19, 2022), *archived at* <https://perma.cc/4HGA-PEPA> (providing the example of PUBG and Fortnite to illustrate how Copyright does not apply to game mechanics). Although the battle royale concept is the same, "[t]he games don't play the same way" because Fortnite added elements that changed things. *Id.*

does not require a significant difference between them.⁷⁸ Although copyright protects derivative works, derivative works that qualify as fair use are not infringing.⁷⁹ Thus, courts consider the game's context when determining whether it infringes on another copyrighted game instead of solely looking at the commonality of sharing the same idea.⁸⁰

1. Streamers' Use of Video Game Copyright

Copyright enforcement for video game streaming remains an unprecedented and vulnerable area, as streamers have no legal duty to seek permission from designers to upload their gameplay, and online

⁷⁸ See Banaga, *supra* note 74 (noting the nuance to a video game's Copyrighted elements). For example, someone cannot infringe on a specific pink castle in a video game, but they can use another pink castle without significant differences. *Id.* A video game can have a specific princess, but another game can create another princess. *Id.* Copyright protects only specific parts of a storyline; a princess living in a castle is not a specific storyline. *Id.* See also Wirtz, *supra* note 77 (providing examples of the nuance to Copyright protection for video game elements). For example, similar characters such as King Kong and Donkey Kong are able to both exist in their respective video games, but a video game cannot include a specific character, such as "Master Chief." *Id.* Copyright does not protect general storyline, such as "a hero saving a princess from a dragon, but specific things, like an almost-orphaned Harry Potter going to a wizard school called Hogwarts[.]" *Id.*

⁷⁹ See Felds, *supra* note 75 (stating that Copyright applies to creating derivative works). But see Mallory King, *CAN DERIVATIVE WORKS BE COPYRIGHTED?*, TRAVERSE LEGAL (June 2, 2017), archived at <https://perma.cc/B5AL-KQ4N> (explaining that derivative works can be considered transformative Fair Use). See also *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013) (holding that derivative works can be considered transformative Fair Use). The derivative use was transformative because it manifested an entirely different aesthetic. *Id.* "[S]econdary work may constitute a fair use even if it serves some purpose other than those (criticism, comment, news reporting, teaching, scholarship, and research). . . ." *Id.* See also Alex Leturgez-Coñaniz, *Thinking Before Modding—Players Don't Own What They Make*, KBL ROCHE (Jan. 18, 2022), archived at <https://perma.cc/AKT2-ZAGE> (explaining that modding is viewed as Copyright infringement because it is the publishing of derivative works may qualify as Copyright infringement). However, a court could consider a derivative work as Fair Use and thus not infringement. *Id.*

⁸⁰ See Maitra, *supra* note 76 (explaining that "in the context of games, §102(b) means that rules, game mechanics, and any other functional elements—in addition to the overall idea—of a game are *not* copyrightable."). Courts apply the test of "whether two games have the same 'idea' only (which means no infringement) or something more in common (possible infringement)." *Id.* See also *United States v. Reichert*, 747 F.3d 445, 455 (6th Cir. 2014) (reasoning that the DMCA provides video game corporations greater Copyright protection).

platforms are left to determine the appropriate balance of permitting creative license and risking vicarious liability.⁸¹ Video game creators such as Bungie Inc. and Nintendo recently issued claims over video game modifications, viewing them as derivative works that violate copyright, impact brand identity, and confuse consumers.⁸² Moreover, Nintendo's April 2023 takedowns targeting YouTube channels that played unaltered games elevates the lack of clarity surrounding video

⁸¹ See Mrsich, *supra* note 74 (emphasizing that there is “no precedent for the enforcement of copyright within the video game streaming and uploading realm . . .”). Streamers are “not required to gain permission from game developers and publishers to record and upload their gameplay online . . .” *Id.* “Hours upon hours of copyright protected gameplay is uploaded to Twitch, YouTube, TikTok, and countless other platforms.” *Id.* See also Meyers, *supra* note 74 (arguing that the industry could collapse if streamers were held liable for Copyright infringement for playing and recording video games). See also Scott Alan Burroughs, *A Twitch in Time: Legal Issues Catch Up With Popular Game-Broadcasting Platform*, ABOVE THE L. (Sept. 5, 2018), archived at <https://perma.cc/E4ZE-MZCE> (providing that an online platform may face legal questions related to vicarious liability for streaming's potential Copyright issues, but thus far Twitch has “stayed out of the courts”). See also Bennett Herbert, *Game Over: Copyright Issues in the Modern Video Game Landscape*, 90 U. CIN. L. REV. (Apr. 16, 2021), archived at <https://perma.cc/5R7U-XRUW> (arguing that online streaming sites must balance their interest of avoiding vicarious liability with providing a space for their users to comfortably create content). See also Dreyer & Lamb, *supra* note 73 (noting in 2019, that “there has not been a publicly litigated copyright infringement case brought against a streamer, or streaming platform, by a video game developer or publisher.”). But see Paul Tassi, *Bungie Now Suing ‘Destiny 2’ Cheaters, Copyright Trolls, Ban Evaders And Serial Harassers*, FORBES (July 19, 2022), archived at <https://perma.cc/BT24-KMKS> (reporting on the July 2022 news that a video game company is suing a streamer for Copyright infringement and cheating in its game). See also Tyler Wilde, *Should streamers pay game developers to stream their games?*, PCGAMER (Oct. 22, 2020), archived at <https://perma.cc/3B89-9UUX> (arguing that it is worth exploring the legal and ethical questions around streaming's future because they're “hardly settled.”).

⁸² See Cody D. Campbell, *LEGAL EXPERT TELLS US WHY NINTENDO IS SO STRICT ABOUT FAN MODS*, SVG (Nov. 28, 2022), archived at <https://perma.cc/SD7W-3PGF> (explaining that the reason companies such as Nintendo actively targeted fan-made mods is to protect brand identity and not consume consumers). See also Compl. at 21, *Bungie, Inc. v. Luca Leone*, 2:2022cv00981 (W.D. Wash. July 15, 2022) (explaining that the streamer “infringed Bungie's copyright in *Destiny 2* as an audiovisual work each time that he used cheat software to create an unauthorized derivative work of *Destiny 2*.”). The lawsuit also alleges that the streamer's use of a third-party software results in an unfair advantage and ruins honest gamer's experience of playing the game. *Id.* at 1.

game streaming, copyright, and fair use.⁸³ When a streamer plays a game, the consistency of sights and sounds invoke copyright protection, regardless of the streamer's participation, thus leaving the streamer vulnerable to copyright infringement claims unless they have a valid license, authorization, or can assert their right to fair use.⁸⁴

a. Finding of Fair Use?

⁸³ See Gammons, *supra* note 70 (reporting on Eric Morino, the creator behind the channel PointCrow, facing multiple Nintendo copyright claims over both his multiplayer modifications of the *Breath of the Wild* game and other unmodified gameplays). PointCrow claims he obeyed Nintendo's content policies and explained that he appealed the initial takedowns but was then hit with Nintendo issuing multiple copyright strikes against his YouTube channel. *Id.* See also Fisher, *supra* note 70 (emphasizing PointCrow's argument that his videos are within guidelines, don't violate the rules, and that Nintendo's Copyright rules are "incredibly uneven.").

⁸⁴ See Mrsich, *supra* note 74 (noting that streamer's do not have any legal right without a written license to stream a copyright holder's video game). See also Kerr-Wilson, *supra* note 8 (explaining how a streamer playing a video game on his or her channel may give rise to a claim of copyright infringement for statutory damages because he or she is communicating graphics, text, music, and voice actors' performance without consent of the copyright owner). See also Voegelé, *supra* note 50, at 605 (explaining that "player's participation in the game did not make a difference because the sights and sounds of the game overall remained constant during each play . . ."). This "repetitive sequence of a substantial portion of the sights and sounds of the game qualifies for copyright protection as an audiovisual work." *Id.* The author recommends that streamers preventively obtain company's authorization before uploading Let's Play videos. *Id.* at 606. See also James Williams, *How to Use Copyrighted Material on Twitch: 3 Best Practices*, TINGEN L., PLLC (Feb. 4, 2022), archived at <https://perma.cc/PS9Z-JUTP> (emphasizing that streamers cannot and should not use Copyrighted work unless they have a license to use the content or if the use falls under the doctrine of "fair use."). See also Dan Hagen, *Fair Use, Fair Play: Video Game Performances and "Let's Plays" as Transformative Use*, 13 WASH. J. L. TECH. & ARTS 245, 250 (2018) (noting that a streamer may have a Fair Use defense when the type of the game, its genre and content characteristics supports whether a streamer's use as qualifies as "transformative" or whether the game has strong underlying Copyright protection). For example, whether the gameplay experience is long plays and walk throughs, speedruns, conventional let's plays, or E-sports. *Id.* But see Carlton Fields, *Getting Creative with Video Games: Copyright, Public Domain, and Fair Use*, JDSUPRA (Sept. 12, 2019), archived at <https://perma.cc/PFN4-3VXN> (concluding that "[f]air use is likely not going to be a good defense for a video game that incorporates someone else's copyrighted work into the game."). See also Dreyer & Lamb, *supra* note 73 (recognizing Copyright's doctrine of implied license "where, similar to equitable estoppel, a streamer could argue that by its inaction a Copyright owner has indicated that the streamer had a license to stream the game.").

Fair Use is a prominent defense against copyright claims that may apply to the legality of a streamer's actions.⁸⁵ Whether a streamer has a fair use defense is predicated on a court's subjective interpretation of the statutory factors and good faith, a determination that further litigation would clarify and reinforce.⁸⁶ A finding of fair use may be likely when a streamer significantly transforms the original game's purpose and character, changes the nature of the medium, and does not deprive the market of the work by replacing the video game industry.⁸⁷ However, a streamer's video that does not meet such

⁸⁵ See Dreyer & Lamb, *supra* note 73 (proposing Fair Use as a defense to the question of the streaming's legality). "However, it is unclear whether a typical stream would qualify as fair use under the factors set forth in Section 107 of the Copyright Act." *Id.*

⁸⁶ See Meyers, *supra* note 74 (arguing that the subjective nature of Fair Use determinations makes it difficult to make an accurate prediction of how a future court will rule). See also Dreyer & Lamb, *supra* note 73 (noting that both sides of the Fair Use defense have persuasive arguments and "the viability of these arguments likely will not be clear until they are tested in a specific factual scenario."). See also Voegelé, *supra* note 50, at 606 (enforcing that a court determines whether a streamer's commentary and criticism constitutes Fair Use upon consideration of the four statutory Fair Use factors).

⁸⁷ See Meyers, *supra* note 74 (applying the Fair Use factors to video game content creators). See also Dreyer & Lamb, *supra* note 73 (listing factors that support finding Fair Use for streamers, such as providing commentary on the game, "which is specifically called out in the Copyright Act as a favored type of fair use . . ."). The commentary also "suggest that streaming acts a significant transformation of the original work, as the work itself is meant to be a game played directly by a player, while streaming is more akin to a television program or article discussing the game." *Id.* When the type of game is multiplayer or esports, the stream likely does not supplant the market for the original work itself (and in some cases may even stimulate the market for the game). *Id.* See also Swerdlow, *supra* note 8 (noting that a majority of viewers have already purchased the video game they are watching a streamer play). See also J. Clement, *Most popular Twitch channels worldwide as of November 2022, ranked by number of followers*, STATISTA (Nov. 11, 2022), archived at <https://perma.cc/RQ9C-93UZ> (noting that an advantage of live streaming is the ability to interact more with the audience). See also Eric, *Why Do People Watch Twitch*, STREAMERS PLAYBOOK (Aug. 15, 2022), archived at <https://perma.cc/Y4AS-HUWS> (noting the different reasons people watch a streamer's gameplay, such as for entertainment, community, or to get better at the game). See also Phillip Caron, *Streamers Are Becoming Indispensable to Video Game Marketing*, MEDIUM (Nov. 27, 2020), archived at <https://perma.cc/NA43-C3U6> (providing perspective of a viewer's relationship towards a streamer). "Many of us invest hundreds of hours into our favorite personalities and will gladly pay the \$4.99 a month for unrelenting entertainment." *Id.* See also Thomas, *supra* note 74, at 1 (concluding that streamers contribute to the value of games in the entertainment

factors, combined with the fact that video game streaming inherently reveals the heart of the work, unlikely qualifies for fair use protection.⁸⁸

C. Dynamic between Game Developers and Streamers

Video game creators do not typically enforce their copyrighted works against either the streamer or the platform for streaming gameplay.⁸⁹ However, Nintendo represents a notable exception as it has a history of contesting Let's Play videos before it changed its approach from a closed-business model to a more liberal strategy.⁹⁰

industry because of their recreation, reinterpretation, and extension of the game world).

⁸⁸ See Meyers, *supra* note 74 (arguing that assuming content creators play through the entire game, there is no need to ask if the 'heart' was used because the whole body of work was appropriated.). "It is easy to imagine this factor swaying a court against a finding of fair use." *Id.* See also Dreyer & Lamb, *supra* note 73 (arguing that the video game is the main focus of the stream and listing factors against Fair Use). "[M]any streams are commercial in nature, copy large portions of the game being streamed (and in many instances perform the heart of the game) and often feature the streamer talking over video of straight game-play." *Id.* Additionally, the argument could be made that "streamers are not necessarily transforming the original work so much as they are adding their own creative elements on top of the work." *Id.*

⁸⁹ See Swerdlow, *supra* note 8 (explaining how a game developer or publisher, as Copyright owners of a game's images and video, can limit how a streamer uses the video game online). "[A] video game developer may refuse to permit legal videos or images from their games, and could have their attorney send unauthorized users of their content legal takedown notices or sue unauthorized game streamers." *Id.* If such situation were to occur, streamers have limited legal responses except in the case that the stream satisfies the Fair Use exemption. *Id.* See also Mrsich, *supra* note 74 (attributing the environment of video game infringement to not enough game publishers and developers enforcing their Copyrighted works). See also Dreyer & Lamb, *supra* note 73 (stating that "in many instances, copyright owners may accept — or even welcome — certain potentially infringing activity.").

⁹⁰ See Magaldi et al., *supra* note 90 (examining how Nintendo asserted that a YouTube creator's Let's Play video of Twilight Princess was a Copyright violation under YouTube's policy and redirect the advertising revenues earned from the videos). Nintendo could have benefited by supporting and nurturing the creative output of Let's Play videos rather than requesting the take down of such derivative works or take possession of the advertising revenues. *Id.* at 12. The company eventually pursued an above-the-line advertising strategy benefiting from the streamer's wide community of enthusiasts. *Id.* See also Nicholas Ribaud, *Youtube, video games, and Fair Use: Nintendo's Copyright infringement battle with*

Although Nintendo recognizes the right to monetization by Let's Play creators who add creative input and commentary, its decision to issue copyright claims on PointCrow's videos brings into question the future dynamic between game developers and video game streamers.⁹¹ With video game streaming's growing popularity and the ability for streamers to monetize such content, online debate questions whether game developers should get paid for the streaming of their work.⁹² Thus, the relationship between streamers and video game companies

Youtube's "Let's Plays" and its potential chilling effects, 6 BERKELEY J. ENT. L. & SPORTS L. 114, 116–137 (2017) (criticizing Nintendo's controversial approach to go after a Let's Play video creator). *See also Nintendo Game Content Guidelines for Online Video & Image Sharing Platforms*, NINTENDO (Nov. 29, 2018), *archived at* <https://perma.cc/V9QT-CEP9> [hereinafter *Nintendo Guidelines*] (asserting that Nintendo did change its policy to a more liberal one).

⁹¹ *See Nintendo Guidelines*, *supra* note 90 (declaring that the company encourages content creators to use Nintendo Game Content in videos and images that feature one's creative input and commentary but denouncing the upload or livestream of footage without one's own creative input). "As long as [creators] follow some basic rules, [Nintendo] will not object to [the] use of gameplay footage and/or screenshots captured from games for which Nintendo owns the copyright" *Id.* *See also* Fisher, *supra* note 70 (highlighting the legal uncertainty for creators who are left questioning the future of the content they're allowed to make).

⁹² *See* Tommy I., *Making Money Streaming Video Games On YouTube: Tips And Strategies For Maximizing Your Earnings*, TUBEAST (Jan. 18, 2023), *archived at* <https://perma.cc/L6K3-C3L7> (affirming video game streaming's incredible popularity as a pastime and profession throughout recent years). Video game streamers make money from ad revenues, sponsorships, and donations. *Id.* *See also* Luca Chiovato, *Gaming's Live-Streaming Audience Will Hit One Billion Next Year & 1.4 Billion by 2025*, NEWZOO (May 6, 2022), *archived at* <https://perma.cc/4RTS-N3E6> (projecting that video game streaming's audience will reach 1.4 billion in 2025). *See also* Antonina Marc, *Which Live Streaming Platform Pays The Most? [2023]*, INSTREAMLY (Jan. 13, 2023), *archived at* <https://perma.cc/N9MS-XFPH> (evaluating five game streaming platforms and which pays the most). *See also* Thomas, *supra* note 74, at 1 (asserting that streamer's use of video games creates a tension to the regulation of Copyrighted works). *See also* Kerr-Wilson, *supra* note 8 (highlighting the tension video game creators feel towards streamers who earn revenue playing the creator's game without consent). The suggestion that streamers should pay for licenses from game publishers to use their titles online as a way to share the revenue earned by their gameplay is "generally met with a strong negative reaction . . . from the streaming community who point out the enormous benefit to game publishers from the promotional effect of streaming and who wave the banner of 'fair use.'" *Id.* *See also* Wilde, *supra* note 81 (presenting the argument that "streamers should be paying the developers and publishers of the games they stream.").

provides insight into why a video game company would decide to pursue or avoid strict copyright enforcement.⁹³

1. Streaming's Promotional Value: A Help or a Hindrance?

The community of viewers that a streamer fosters present a potential consumer base for the video game developers, creating a business dynamic between video game streamers and game developers.⁹⁴ A streamer's popularity, whether the viewers are fans of

⁹³ See Kerr-Wilson, *supra* note 8 (providing business and legal explanations for the lack of Copyright enforcement in video game streaming). "The 'business' answer arises from the symbiotic nature of the streamer/game publisher relationship." *Id.* See also Petrovich, *supra* note 70 (expressing how Nintendo should not target well-known YouTubers because their videos serve as free advertising for the company). See also Fenlon, *supra* note 72 (emphasizing that video game streamers create free promotion for the games, extend the life of the games, and results in more fans ultimately buying the games). See also Kevin Vanstone, *Esports Platforms and Partnerships Enabling the Next Generation of Gamers*, INN (Sept. 21, 2020), archived at <https://perma.cc/B3S4-4P6A> (explaining the benefits video game companies receive from streamers). See also Ravenscraft, *supra* note 59 (pointing to games like Minecraft that explicitly allow for streaming in their license agreements). "Other publishers simply turn a blind eye to game streaming, because getting highlighted by popular streamers often leads to more sales, while suing streamers is a fast track to a PR disaster." *Id.*

⁹⁴ See Swerdlow, *supra* note 8 (affirming that video game streamers foster a community of viewers that are "especially lucrative for advertisers, video game makers, and streamers."). Streams frequently encourage viewers to purchase games. *Id.* Developers, from a business perspective, may adopt streamers as a fundamental and profitable area of the video game industry. *Id.* Video game developers would benefit by a "synergistic bond between video game platforms, developers and streamers." *Id.* See also Nitish Pahwa, *What Mythic Quest Gets Right (and Wrong) About Sexism in the Gaming Industry*, SLATE (May 7, 2021), archived at <https://perma.cc/KR9K-49R3> (acknowledging the importance for developers to have a good and healthy relationship with streamers they engage with). See also Wilde, *supra* note 81 (providing the EA's Game Changers program as an example of the relationship between streamers and publishers tightening). Streamer's gameplay can benefit those makers of competitive or sandbox games, despite infringing on developer's Copyrights. *Id.* The ability to evaluate a game in real-time from watching a streamer's gameplay helps the viewer decide whether a game is in their wheelhouse. *Id.* See also Caron, *supra* note 87 (asserting that it is beneficial for companies to negotiate with streamers because consumers will rely more on video game streamers to guide their purchasing decisions). "Hundreds of thousands watch streamers daily, creating the perfect opportunity [for streamers to grab the attention

the streamer or the game, may either increase revenue for gaming video content (“GVC”) or decrease demand for a specific game, either from negative reviews or from revealing the story.⁹⁵ For example, streamers on YouTube and Twitch helped launch and continue the success of PUBG and Fortnite, whereas a popular streamer’s upload of the entire unedited playthrough of a smaller indie game, “That Dragon Cancer,” did not translate into sales for the studio despite receiving millions of views.⁹⁶

of viewers and] to put products in front of eyes.” *Id.* For example, streamers playing games like “Fall Guys” and “Among Us” brought such games to the viewer’s attention and led to them topping the charts. *Id.* See also Clement, *supra* note 87 (providing an example of how the popularity of a Twitch streamer can have influence over their subscribers).

⁹⁵ See Kerr-Wilson, *supra* note 8 (commenting on the ability for successful streamers to “attract hundreds of thousands or millions of fans and generate a lot of publicity and demand for the games they play online.”). This is especially notable for a smaller indie developer that do not have a large marketing and promotional budget. *Id.* “[T]hat kind of positive attention can turn a relatively unknown title into a viral sensation selling hundreds of thousands of copies.” *Id.* See also Caron, *supra* note 87 (noting that a streamer could put the video game in front of hundreds of thousands of eyes). See also Reyhaan King & Teresa de la Hera, *Fortnite Streamers as Influencers: A Study on Gamers’ Perceptions*, 9 COMPUT. GAMES J. 349, 361 (Sept. 16, 2020) (finding that gamers perceive streamers as entertainers, an inspiration to play, and endorsers). “Since streamers are seen as experts and in some cases ambassadors of the game they are also perceived as *promoting new game mechanics* such as new game modes, new strategies and exploits for gamers to use.” *Id.* See also *GVC Revenue*, *supra* note 6 (providing data supporting that the increased viewers of gaming video content (GVC) on Twitch fueled a massive boost in GVC revenue). But see Pahwa, *supra* note 94 (noting that a streamer who says “[w]hy I’m not going to play X, Y and Z anymore” creates a lot of stress for game developers because of the streamer’s power to influence thousands of other players to leave a game for another). See also Wilde, *supra* note 81 (arguing that streaming lowers the value for viewers of short, story-driven games, rather than encouraging purchases). Games with a short, relatively linear experience, are at a disadvantage when millions of viewers watch a streamer’s gameplay because the stream satisfies the viewer interest. *Id.* For example, indie game developer, Ryan Green, “was upset, because the millions of YouTube views of playthroughs of his game didn’t translate into sales.” *Id.*

⁹⁶ See Brian Feldman, *The Most Important Video Game on the Planet: How Fortnite became the Instagram of gaming*, N.Y. INTELLIGENCER MAG. (July 9, 2018), archived at <https://perma.cc/M7UK-63XW> (attributing *PUBG*’s quick rise the top of the charts and growth to streamers on sites like Twitch rather than from aggressive marketing). “Ninja’s role in the *Fortnite* origin story has to do with the Drake stream . . . Ninja streamed the game with Drake, single-handedly legitimizing *Fortnite* as a mainstream juggernaut.” *Id.* See also Kevin Webb, *‘Fortnite’ was the*

The type of game streamed, such as gameplay driven or a story-based, may also factor into whether the streamer's Let's Play video positively or negatively impacts the game's popularity, driving or decreasing market demand.⁹⁷ Such mass exposure, however, could either benefit the game company, as it did for *Fortnite* and *PUBG*, or could be devastating, as it was for *That Dragon Cancer*.⁹⁸ Game developers may also consider the opinions of a streamer and their audience as an opportunity to gather low-cost research and development insight to help refine future releases.⁹⁹

most important video game of this decade, and it will be for the next one too, INSIDER (Dec. 29, 2019), archived at <https://perma.cc/7B8V-VVY6> (reporting on how Epic Games worked with the most popular creators on YouTube and Twitch to help Fortnite remain at the top of the viewership charts). *But see* Ryan Green, *On Let's Plays*, NUMINOUS GAMES (Mar. 24, 2016), archived at <https://perma.cc/F2ME-LAYU> (expressing that the indie studio has not yet seen a single dollar from sales despite the game's popularity in Let's Play culture). "If you compare the millions of views of the entirety of our game on YouTube to our sales as estimated on SteamSpy, you can hopefully see the disparity." *Id.*

⁹⁷ See Kerr-Wilson, *supra* note 8 (illustrating how not all game publishers benefit equally from a streamer playing their game).

Watching a streamer enjoy a challenging fighting or racing game likely has a positive impact on the sales of that title. However, the same might not be true of shorter, story-driven adventure games which can often share many attributes with movies. If a streamer plays through the full story online, the audience who watches the stream might not be as likely to purchase the game themselves once they know how the story ends, especially if the nature of the game is that each gameplay experience is the same or similar each time so there is limited replay value, or if an important part of the story is based on surprise or twist endings.

Id.

⁹⁸ See Feldman, *supra* note 96 (providing example of *PUBG* and *Fortnite* benefitting substantially from streamers). Compare with Green, *supra* note 95 (recounting how streamer's display of an indie game did not translate into any sales for the small developer).

⁹⁹ See Pahwa, *supra* note 94 (noting the value of getting a streamer's perspective as a *player*, such as what is working for them and what is not, so that developers can recognize how the game experience actually feels for people). See also James Batchelor, *Why developers should design for streamers as well as players*, GAMESINDUSTRY.BIZ (Jan. 5, 2017), archived at <https://perma.cc/8V24-DG53> (explaining how the evolution of streamers and their audience led game developers to take the audience perspective into account when designing games). A game designer now considers how the audience interacts with the game. *Id.* "The key to harnessing this new medium, then, will be designing gameplay that appeals to the audience as much as the player. While eventually this will mean developing new

IV. Analysis

The growing popularity and monetization of streamers displaying copyrightable video games to millions of viewers presents an uncharted area for copyright law where the streamers, platforms, and game creators wrestle with balancing copyright protection of a video game's works and upholding the streamer's right to fair use.¹⁰⁰ Although it is not yet commonplace for video game companies to seek legal action over a streamer's use of their work, which Nintendo's recent actions may foreshadow, creators on YouTube endured claims on non-video game content and an onerous defense processes in the case of non-infringing use.¹⁰¹ The precedent *Hosseinzadeh v. Klein* set

genres and new mechanics, it will also require some innovation with established gameplay formulas." *Id.*

¹⁰⁰ See Geeter, *supra* note 74 (commenting on how livestreaming has become one of the most popular forms of online entertainment today). See also Herbert, *supra* note 81 (arguing that online streaming sites must balance their interest of avoiding vicarious liability with providing a space for their users to comfortably create content). See also Dreyer & Lamb, *supra* note 73 (stating that Copyright law "has not kept pace with the rise of [video game streaming], leaving Copyright owners, streaming services and individual content creators in a legal gray area with respect to intellectual property ownership and infringement."). See also Banaga, *supra* note 74 (explaining that although "[the] rules are there, but a lot of Copyright lawsuits seem to be handled on a case-by-case basis."). See also Meyers, *supra* note 74 (noting that courts have not yet answered the question of whether video game streamers engage in Fair Use).

¹⁰¹ See Dreyer & Lamb, *supra* note 74 (noting in 2019, that "there has not been a publicly litigated Copyright infringement case brought against a streamer, or streaming platform, by a video game developer or publisher."). See also Fenlon, *supra* note 72 (presenting that Nintendo demonstrates that it will selectively enforce their intellectual property and ignore their own policies and licenses). "So if you've uploaded any video that features any Nintendo content, no matter how transformative or directly in line with their published guidelines, you are at risk." *Id.* See also Binder, *supra* note 59 (highlighting YouTube's Copyright issues where "[anyone] with access to YouTube's Content ID system can file a claim on anyone's content . . . [and] can stop a creator from monetizing their videos, collect that creator's ad revenue for themselves, and even end up demonetizing a creator's entire YouTube channel."). See also Dodgson, *supra* note 63 (quoting a YouTuber's disdain for YouTube's copyright system that "provides only one alternative, give all of your private information to whoever Copyright strucked you, or suck it up.").

exemplifies how an online creator's use of copyrighted material, even if extensive, can still qualify as fair use.¹⁰²

Despite the case law, online creators, such as the defendants in *Hosseinzadeh v. Klein*, continue to deal with copyright claims on non-infringing content.¹⁰³ YouTube's overreliance on a flawed automatic review allows the prevalence of inaccurate claims to negatively impact a channel's monetization and viewership without providing the channel's creator the tools to present fair use's applicability, effectively stifling the dissemination of new work.¹⁰⁴ The criticism of YouTube's

¹⁰² See *Hosseinzadeh*, 276 F. Supp. 3d at 47 (S.D.N.Y. 2017) (reasoning that the defendant's extensive use still qualifies as Fair Use because it is transformative and does not serve as a substitute). See also Asarch, *supra* note 68 (describing that the ruling in *Hosseinzadeh v. Klein* set a legal precedent for YouTube commentary videos).

¹⁰³ See Maxwell, *supra* note 68 (reporting on how the defendants from *Hosseinzadeh v. Klein* now once again face another lawsuit pertaining to a video displayed on YouTube, which likely is fully protected under Fair Use). See also Binder, *supra* note 59 (describing that unfounded Copyright claims on non-infringing content "continue to occur over and over again."). "[I]t's incredible just how much of a problem Copyright trolls and false claims are becoming on YouTube." *Id.*

¹⁰⁴ See Geigner, *supra* note 62 (stating that "creators on YouTube operate in constant peril of having their accounts suspended or video revenues taken by others with the recourse for fraud and error being convoluted and lengthy."). See also Bartholomew, *supra* note 47, at 88 (concluding that Content ID shifts the fair use doctrine against the uploader, stifling new works). Content ID significantly discourages creativity, a central tenet of copyright. *Id.* at 68. See also *Copyright strike basics*, *supra* note 46 (listing what happens to a channel when YouTube gives it a strike). See also Trendacosta, *supra* note 6 (discussing how improper takedown requests effectively eliminate relied upon classic Fair Use protections, such as Section 512(f)). The author presents a panel of copyright expert's confusion with the Content ID system and argues that YouTube's policies stifle creator's ability to assert Fair Use efficiently. *Id.* See also Gerken, *YouTube abused by extorters*, *supra* note 63 (commenting that the ease to strike someone's channel is an issue that needs to be fixed). See also Celes Keene, *supra* note 61 (asserting that many believe the "issue comes from YouTube's overreliance on an automated system to review its copyright claims."). "YouTube does not seem to regularly use a second line of defense when it comes to reviewing these claims, and as such, many argue that Copyright strikes are often issued in mistake or preemptively." *Id.* See also Track Club, *supra* note 46 (explaining that a Copyright claim on YouTube allows the claimant "to restrict views and monetization of the video at their discretion."). See Marshall, *supra* note 46 (recognizing the negative effects of one strike, such as losing the ability to live stream or monetize). The risk to a channel subsequently increases because if it receives a second Copyright strike before the first strike has even expired, then the channel will have to wait another 90 days until the second strike has expired. *Id.* The third strike will automatically terminate the account, remove all uploaded

and Twitch’s copyright enforcement and fair use discouragement may signal the platforms’ potential ineptitude in handling the intersection between video game streamers and video game companies if such conflict becomes more prevalent.¹⁰⁵

Unlike as in *Hosseinzadeh v. Klein*, there has not yet been a publicly litigated case of a video game streamer using the legal system to assert their right to fair use.¹⁰⁶ The recent *Bungie, Inc. v. Luca Leone* suit may lead to such a situation, but the streamer’s use of a cheat software and bad faith threats may affect the Court’s determination because the streamer violated the terms of the video game’s license and acted with bad faith, a consideration that underlines the Court’s analysis of fair use.¹⁰⁷ In comparison, Eric Morino, who faced Nintendo’s rampant copyright strikes against his channel in April 2023, may have a good faith argument if Nintendo ever sues him to assert fair use because of his transformative gameplay and added

videos, and ban the creator from creating any new channels. *Id.* Even if a channel disputes the claim, they won’t have access to the revenue until the dispute is resolved. *Id.*

¹⁰⁵ See Geigner, *supra* note 62 (arguing that YouTube’s system is not sustainable because it clearly favors the accuser, particularly given the amount of error and abuse). See also Dreyer & Lamb, *supra* note 73 (predicting that it’s only a matter of time until video game companies assert a Copyright infringement case against a streamer, or streaming platform, by a video game developer or publisher). See also Celes Keene, *supra* note 61 (noting that content creators have been extremely critical of YouTube’s policy that “allows for anyone, without having to prove authority, to file a copyright strike against a channel” and providing an example of “[t]he disastrous effects of such a policy . . .”). “Content creators have been extremely frustrated with what they believe [to] be the inadequacies of copyright law due to YouTube’s copyright system . . .” *Id.*

¹⁰⁶ See Dreyer & Lamb, *supra* note 73 (noting the absence of a publicly litigated case regarding video game streaming but that Fair Use is a streamer’s most prominent defense in potential cases). Compare with Asarch, *supra* note 68 (noting that *Hosseinzadeh v. Klein* set a legal precedent for YouTube commentary videos and Fair Use).

¹⁰⁷ See *Bungie, Inc. v. Luca Leone*, 2:2022cv00981 at 21 (arguing that the streamer’s use of a cheat software vitiated the license and constituted copyright infringement). See also Mrsich, *supra* note 74 (recounting that “[c]urrent copyright law clearly allows for video game publishers and developers to pursue legal courses of actions against streamers who upload recordings of their game play . . .”). See also Holt, *supra* note 69 (presenting instances of streamers acting in bad faith, such as ban evasion and making threats). See also *Code of Best Practices in Fair Use for Online Video*, *supra* note 18 (designating that the consideration of good faith underlies and influences the way in which courts analyze the Fair Use factors).

commentary.¹⁰⁸ Unlike Luca Leone, he never threatened the game company, which helps a court's consideration of the good faith factor.¹⁰⁹ However, the cost of legal efforts for Morino to defend his videos on fair use grounds and the impact that such litigation would have on his channel make it unlikely for such a case to ever come to fruition.¹¹⁰ Thus, a clear-cut fair use case for videogaming streaming does not yet exist that would set the same precedent that *Hosseinzadeh v. Klein* did more broadly for YouTube videos.¹¹¹

Rather than continuing the status quo where all parties haphazardly deal with enforcement in fair use cases, copyright law should evolve to address the legality of video game streaming.¹¹² As such, copyright law could issue specific guidance clearly informing streamers of their right to use video game content and platforms of their responsibility in balancing fair use while also ensuring that it does not leave the video game companies in the dark.¹¹³ Such a

¹⁰⁸ See Fenlon, *supra* note 72 (expressing streamer's sentiments that they make new creations out of Nintendo's games that would qualify as Fair Use).

¹⁰⁹ See Holt, *supra* note 69 (expressing how Luca Leone acted in bad faith). See also *Code of Best Practices in Fair Use for Online Video*, *supra* note 18 (denoting the consideration of whether the user acted reasonably and in good faith). See also Tromba, *supra* note 22, at 1306 (presenting the importance of distinguishing good faith and bad faith in online Copyright issues). See also Stim, *Measuring Fair Use*, *supra* note 22 (recognizing that a judge or jury's personal sense of right or wrong may affect the fair use analysis and influence a court's decision).

¹¹⁰ See Gach, *supra* note 71 (reporting that "Morino initially planned to appeal the copyright claims, defending his videos on fair use grounds, but he now says those legal efforts could cost millions and could jeopardize the future of his over 1.6 million subscriber YouTube channel.").

¹¹¹ See Asarch, *supra* note 68 (describing that the judge's ruling in *Hosseinzadeh v. Klein* set a legal precedent for YouTube commentary videos). See also Mrsich, *supra* note 74 (recounting that as of January 2021, there had not been legal courses of actions against streamers who upload recordings of game play).

¹¹² See Fisher, *supra* note 70 (noting the uncertainty around the future). See also *Copyright Timeline*, *supra* note 3 (recounting the evolution of copyright law, such as revisions to broaden the scope of copyright, change the term of copyright protection, and address new technologies).

¹¹³ See Kerr-Wilson, *supra* note 8 (reporting on industry research regarding streamer's income). In 2021, a professional streamer, on average, makes between \$3,000 to \$5,000 monthly by streaming for 40 hours a week. *Id.* This does not include money made from other revenue streams, such as advertising, which provides another \$250 for every 100 subscribers, paid sponsorship deals, or merchandise sales. See also *How does YouTube make money?*, *supra* note 8 (declaring that YouTube shares advertising revenue generated with its online

determination, however, may have a different effect on big video game companies that already have an established foundation of financial and community support than compared to small indie creators who rely on sales to sustain their work.¹¹⁴

A. Copyright's tendency for change and adaptation to address new modes of creative expression while maintaining its tenet of Fair Use.

Although US copyright law dates back to the late 1700s, its various amendments throughout the years highlight its ability to adapt to the new issues that arise with the times.¹¹⁵ Despite undergoing changes, copyright law always maintained its tenet of fair use, valuing public access to works to positively benefit society.¹¹⁶ For example, the DMCA amended copyright law to address the new relationship between copyright and the internet but made no change to the fair use

creators). *See also* Meyers, *supra* note 74 (affirming that YouTube and Twitch make a significant amount of revenue from video game streaming). *See also* Mrsich, *supra* note 74 (presenting questions about how the future agreement between streamers and video game Copyright owners may change).

¹¹⁴ *See* Kerr-Wilson, *supra* note 8 (expressing that “not all game publishers benefit equally from having their titles streamed.”). *See generally* Magaldi et al., *supra* note 61, at 5, 12–13 (recounting that Nintendo initially asserted a Copyright claim under YouTube’s policy, redirecting the advertising revenues earned from the videos, but then changed its position to recognize that it could profit from the efforts of Let’s Play creators). *See* Wilde, *supra* note 81 (providing example of Epic Games using streamers to the company’s advantage by using the Support-A-Creator program that sends viewers to the store page of the game they’re streaming). *Compare with* Green, *supra* note 96 (providing an example of an indie game studio that did not benefit financially from streamer’s use). *But see* Caron, *supra* note 87 (providing a narrative example of how seeing a favorite streamer’s gameplay was the only way he knew of the game’s existence).

¹¹⁵ *See generally* *Copyright Timeline*, *supra* note 3 (listing the ways the U.S. has considered and acted on Copyright reform throughout several years). *See also* *Code of Best Practices in Fair Use for Online Video*, *supra* note 18 (asserting that fair use is flexible to the “[c]reative needs and practices [that] differ with the field, with technology, and with time.”).

¹¹⁶ *See* *Copyright Timeline*, *supra* note 3 (declaring that the idea of fair use has been integral to Copyright law since the Statute of Anne originally prevented a monopoly and created a public domain). *See also* *Code of Best Practices in Fair Use for Online Video*, *supra* note 18 (recognizing the social or cultural benefits fair use generates despite the potential costs it imposes on the Copyright owner).

doctrine.¹¹⁷ Rather, the DMCA, despite tilting “strongly in favor of copyright holders,” expressly included exceptions for fair use and protected fair use against being adversely affected.¹¹⁸

Continued protection of fair use signifies the integrality of the doctrine to copyright law and the recognition that the transformation of one author's creative work to spur another creative piece positively contributes to society.¹¹⁹ Thus, copyright law's commitment to such values might inform the approach towards new issues arising from copyright's relationship with online content creators and video game streamers, analogous to how copyright law addressed the introduction of the internet.¹²⁰ It is not unfounded to postulate that copyright law should specifically address content creators' and video game streamers' relationship with fair use on online platforms, as the Copyright Office explicitly acknowledges that internet policy cannot be a one-size-fits-

¹¹⁷ See *DMCA*, *supra* note 3 (listing the way the DMCA amended U.S. Copyright law to address important parts of the relationship between Copyright and the internet).

¹¹⁸ See *American Library, DMCA*, *supra* note 40 (noting that the DMCA tilts strongly in favor of Copyright holders but makes no change to the "Fair Use" Doctrine). See also *DMCA*, *supra* note 3 (protecting fair use by providing counter-notices under section 512 of the DMCA and declarations of noninfringement). See also 17 U.S.C. § 1201(c)(1) (asserting that “[n]othing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.”). See also 17 U.S.C. § 1201(a)(1)(D) (requiring that the Librarian of Congress issue a three-year waiver from the anti-circumvention prohibition when there is evidence that the new law adversely affects or may adversely affect "Fair Use" and other non-infringing uses).

¹¹⁹ See *DSOC 2030*, *supra* note 15 (stating “[a]nyone can use a public domain work without obtaining permission, but no one can ever own it.”). Subtlety may play a role in fair use interpretations. *Id.* See also *Morris Library*, *supra* note 15 (stating that “[t]he founding fathers recognized that everyone would benefit by encouraging the creation and dissemination of creative and intellectual works into our culture and society.”). See also *Code of Best Practices in Fair Use for Online Video*, *supra* note 18 (describing fair use as the most important feature of Copyright's permission to use Copyrighted works without permission under certain conditions).

¹²⁰ See *Copyright Timeline*, *supra* note 3 (providing that Copyright law adjusts to address new technologies). See also *DMCA*, *supra* note 3 (exemplifying that Copyright law amended to address the relationship between Copyright and the internet). See also *Code of Best Practices in Fair Use for Online Video*, *supra* note 18 (recognizing that “[g]amers may record their performances” under the principle of fair use).

all approach and needs to better align with Congress’s original intent of balancing rights and responsibilities.¹²¹

B. YouTube & Twitch’s Flawed Copyright System – “strike now, ask later...”

YouTube’s use of its three-strike policy and Content ID system for copyright claims is not fundamentally inadequate, but also it is not without fault.¹²² In theory, it touts its ability for creators to defend against wrongful copyright claims; however, in practice, it takes on more of a “guilty until proven innocent” approach.¹²³ Online creators are automatically penalized when someone issues a DMCA takedown of their content as it affects their ability to monetize and livestream, and then are left with the burden of proving that their video falls under fair use.¹²⁴ This is challenging because only the legal system can officially determine whether fair use applies, which can be costly and

¹²¹ See *Section 512 Study*, *supra* note 41 (stating that “internet policy in the twenty-first century cannot be one-size-fits-all.”). Although the Copyright Office does not recommend any wholesale changes to Section 512, it recognizes that the safe harbor system today is “unbalanced” and “out of sync with Congress’ original intent. . . . to better balance the rights and responsibilities of online service providers and rightsholders in the creative industries.” *Id.*

¹²² See Geigner, *supra* note 62 (arguing that YouTube’s system is not sustainable because it clearly favors the accuser, particularly given the amount of error and abuse). See also Gerken, *YouTube abused by extorters*, *supra* note 63 (reporting on how YouTube needs to fix the issue of how easy it is for somebody to harm a channel via its current Copyright policies).

¹²³ See *What action does YouTube take for copyright infringement?*, *supra* note 45 (exemplifying that an online creator can submit a counter notification, but the focus of the page is on how YouTube enforces Copyright with no mention of wrongful claims). Compare with *Copyrights and Your Channel*, *supra* note 45 (acknowledging that Copyright claims can be mistakenly or unfairly issued). See also O’Neill, *supra* note 36, at 180 (arguing that “YouTube has little incentive to support individual creators....”). The threat of a channel receiving a strike from a Copyright owner issuing a takedown request “dissuade[s] [a creator] from ever submitting an appeal to a Content ID claim . . .” *Id.* at 190.

¹²⁴ See *Copyright strike basics*, *supra* note 46 (reviewing YouTube’s strike policy). See also *A Guide to YouTube Removals*, *supra* note 44 (reporting on the frequency of “improper notices and/or takedowns based solely on keywords or a purely automated process.”). YouTube’s policies place the burden on the channels, who aim to preserve lawfully uploaded content, to dispute in an “already onerous and intimidating process . . .” *Id.*

inaccessible in addition to intimidating and timely.¹²⁵ However, YouTube could do more to prevent wrongful copyright claims from penalizing a video that would likely qualify for fair use protection in the first place by implementing more rigorous standards, such as utilizing human review of the claim, and not issuing punishments prior to validating the claim.¹²⁶

As such, YouTube's current copyright policies encourage frivolous copyright claiming, as it appears to freely issue copyright claims and then figure out the validity later, which the cases of extorters abusing the system and wrongful copyright takedowns demonstrate.¹²⁷ While YouTube's copyright rules and policies focus on defining copyright, listing exceptions, guiding copyright owners as to how to make claims, and describing the action YouTube takes for copyright infringement, it does little to address what it does to prevent wrongful copyright claims, leading the public to believe that it does

¹²⁵ See Tolcheva, *supra* note 46 (informing that a channel seeking a fair use defense must prove that the use of Copyrighted content was for commentary, review, criticism, or parody). See also *A Guide to YouTube Removals*, *supra* note 44 (summarizing that if a video was removed by the Content ID tool, and the channel will need to decide to dispute the removal, which "will have tweaked the rightsholder's tail."). See also *Frequently asked questions about Fair Use*, *supra* note 45 (alerting that "[a]utomated systems like Content ID can't decide Fair Use because it's a subjective, case-by case [sic] decision that only courts can make."). See also *Code of Best Practices in Fair Use for Online Video*, *supra* note 18 (explaining that judges return to two main questions when considering whether fair use applies, focusing on whether the use will cause excessive economic harm to the Copyright owner).

¹²⁶ See *A Guide to YouTube Removals*, *supra* note 44 (affirming that improper notices and/or takedowns occur too often). In most cases, no human looks at the videos because YouTube's computers spot the match and apply the "Block" usage policy automatically. *Id.* "[S]ending a dispute might well trigger the first human review of [the] video." *Id.* See also *Copyright Claim vs Strike On YouTube: What's the Difference?*, *supra* note 46 (explaining that a Copyright claim on YouTube allows the claimant "to restrict views and monetization of the video at their discretion.").

¹²⁷ See Gerken, *supra* note 63 (reporting on how YouTube has come under fire for its Content ID system and the ease of its policies that make invalid Copyright claims increasingly commonplace). It is easy to make a Copyright claim as an individual only needs to provide their contact information and a description of the Copyright they say has been infringed. *Id.* YouTube "put a Band-Aid on a much bigger issue" but has not provided information regarding how YouTube intends to prevent future extortion attempts. *Id.* See also Binder, *supra* note 59 (describing false copyright claims as the "bane of every YouTuber's existence."). See also Geigner, *supra* note 62 (recommending that YouTube fix the issues with its policies because it runs the likely risk that creators will leave for somewhere else if not).

nothing at all.¹²⁸ YouTube provides various ways for someone to make a copyright claim, such as through submitting a DMCA takedown, utilizing its Content ID system, or other copyright management tools, and subsequently enforces such action against the claimed channel.¹²⁹ YouTube's approach is ineffective and unfair, as YouTube often has to reverse a claim, as detailed in its recent transparency report.¹³⁰

The reversal of an illegitimate claim often takes place a little too late because the claimed channel often already suffered the ramifications of the platform's copyright policies, such as lost monetization and restrictions on using their account.¹³¹ Moreover, although YouTube may reverse a strike if a fraudulent copyright claim occurs, the platform does not offer online creators a way to report copyright abuse or mistake when trying to appeal.¹³² Therefore, YouTube's copyright system appears to undervalue fair use protection

¹²⁸ See *What are Copyright Exceptions?*, *supra* note 45 (asking those who plan to submit a copyright removal request to consider fair use but not providing information about a creator's options when dealing with incorrect copyright claims). For example, the webpage informs what YouTube does to act upon infringement, but not what it does to protect against unfounded claims. *Id.* Compare with *Copyrights and Your Channel*, *supra* note 45 (presenting information that empowers streamers to take action against wrongful allegations of copyright infringement).

¹²⁹ See *What action does YouTube take for copyright infringement?*, *supra* note 45 (providing the various ways to claim a video, such as through webform, copyright match tool, or Content ID). See *A Guide to YouTube Removals*, *supra* note 44 (explaining that YouTube sends the account holder an email upon taking down a video and usually mentions the reason for doing so).

¹³⁰ See *YouTube Copyright Transparency Report H2 2021*, *supra* note 64 (recognizing that invalid requests and abuse can cause significant disruptions to YouTube ecosystem, implicating creators, viewers, and rightsholders). "In Content ID the impact is multiplied due to its automated nature; one bad reference file can impact hundreds or even thousands of videos across the site." *Id.* YouTube reversed the claim on over fifty-five percent of disputes in the first half of 2022. *Id.*

¹³¹ See *Copyright Claim vs Strike On YouTube: What's the Difference?*, *supra* note 46 (providing that a Copyright strike automatically results in a channel's video no longer being viewable or generating ad revenue for the content creator). See also Marshall, *supra* note 46 (describing Copyright strikes as serious offenses). Additionally, if a channel receives a Content ID claim the revenue held in a revenue will be held in a neutral account, which is only released to the party who wins the dispute. *Id.*

¹³² See Dodgson, *supra* note 63 (noting that there is currently no option to report copyright abuse or mistaken claims when a creator appeals). "There needs to be an option when you appeal, or an email you can contact to allow creators to report Copyright abuse, since it is one of the more increasing ways that creators are being silenced by trolls or by people trying to stop criticism. . . ." *Id.*

by quickly issuing violations, regardless of their validity, thus punishing a channel and then trying to retroactively fix the mistake after the damage has already occurred.¹³³

1. Twitch

Twitch began with a more lenient copyright system, for example, by passively allowing streamers to play copyrighted music in the background of their streams until such inaction created a massive backlog of DMCA takedown requests in October 2020, which led Twitch to update their copyright policies and implement a copyright detection system similar to YouTube.¹³⁴ Both platforms provide online creators with the ability to submit a counter-notification to a copyright claim, but Twitch does more to communicate how copyright law interacts with a creator's channel online than YouTube.¹³⁵ Twitch communicates that a DMCA takedown notification can occur even if

¹³³ See *Frequently asked questions about Fair Use*, *supra* note 45 (advising that the “easiest way to deal with Content ID claims is to avoid them in the first place.”). See also Celes Keene, *supra* note 61 (arguing that “YouTube does not seem to regularly use a second line of defense when it comes to reviewing these claims, and as such, many argue that copyright strikes are often issued in mistake or preemptively.”). YouTube’s policy does not require “any proof from [a] fake account that it ha[s] a legitimate claim of copyright infringement” *Id.* “YouTube’s approach to copyright strikes has led to content creators becoming incredibly disgruntled with copyright law in general.” *Id.* See also Geigner, *supra* note 62 (providing example of YouTube issuing a strike on a channel for using two random number, which has a “nearly zero chance that there is anything remotely valid about this copyright claim” yet the claimer takes all the monetization of the channel’s video). See also Binder, *supra* note 59 (reporting on YouTube’s response after penalizing the popular Lofi Girl channel based on a false Copyright claim). The TeamYouTube account tweeted “confirmed the takedown requests were abusive & terminated the claimants account 🙄 we’ve resolved the strikes + reinstated your vids – it can sometimes take 24-48 hours for everything to be back to normal! so sorry this happened & thx for your patience as we sorted it out ❤️[.]” *Id.*

¹³⁴ See O’Neill, *supra* note 36, at 194 (presenting how Twitch followed in YouTube’s footsteps with regards to its Copyright detection after Twitch faced a heavy backlog of DMCA takedown requests pertaining to creators using music content in their streams).

¹³⁵ See *Copyrights and Your Channel*, *supra* note 45 (emphasizing that receiving a DMCA takedown notification is not a determination that a channel engaged in Copyright infringement because notifications can be sent by mistake, fraudulently, or for use constituting fair use). Twitch respects online creator’s rights and maintains a policy that empowers a streamer to take action against wrongful allegations of Copyright infringement by sending a counter-notification or by asking the Copyright holder to retract their claim. *Id.*

the channel did not engage in copyright infringement, clearly informing creators that they can easily submit a counter-notification.¹³⁶ In contrast, YouTube's copyright overview scolds online creators about violations and does not prominently convey that online creators can defend themselves against wrongful allegations of copyright infringement.¹³⁷ A comparison of the platforms communicating their policies may lead to the inference that YouTube focuses on reaching people who make copyright claims, whereas Twitch conveys seeking a balance between online creators and copyright holders.¹³⁸

2. Déjà Vu: Klein Defendant Asserting Fair Use Defense Against Frivolous Suit

Online platforms are not a substitute for the courts, nor do they attempt to be.¹³⁹ However, the platforms' current approach to copyright swiftly punishes innocent online creators and is wrought with errors.¹⁴⁰ Although fair use is a determination for the court, under the status quo, frivolous and unwarranted copyright claims occur with ease, with YouTube and Twitch playing no role in vetting qualification for fair use, leaving online creators on their own as platforms reap the

¹³⁶ See *Digital Millennium Copyright Act Notification Guidelines*, *supra* note 47 (encouraging streamers to know that they have the option to submit a counter-notification and seamlessly detail how to do so).

¹³⁷ See *How can rights holders make copyright claims?*, *supra* note 45 (providing information about how someone can make a Copyright claim, but not including any information about how an online creator can dispute a claim).

¹³⁸ Compare *How can rights holders make copyright claims?*, *supra* note 45 (touting that YouTube provides a number of ways rights holders to make Copyright claims). Compare with *Copyrights and Your Channel*, *supra* note 45 (acknowledging that Twitch respects the rights of its streamers under fair use).

¹³⁹ See *Copyright and Your Channel*, *supra* note 45 (emphasizing that “Twitch is not a copyright court, and isn’t in a position to judge whether you impermissibly used someone’s copyrighted work without their permission or authority.”). See also *Frequently asked questions about Fair Use*, *supra* note 45 (alerting that “Content ID can’t decide fair use because it’s a subjective, case-by-case decision that only courts can make [but] . . . fair use can still exist on YouTube.”).

¹⁴⁰ See Geigner, *supra* note 62 (describing YouTube’s stance on Copyright as a mess that uses “hamfisted method by which the accused is treated as guilty from the get go . . .”).

benefit of the channel's advertisement value.¹⁴¹ If the platforms were empowered through an adjustment to copyright law permitting preliminary assessments of fair use rather than blindly succumbing to copyright claims, then platforms could help prevent online creators from experiencing adverse effects on their non-infringing use.¹⁴²

For example, *Hosseinzadeh v. Klein* was a groundbreaking case of an online content creator not being discouraged from disputing a copyright claim and garnering support from the online community to finance their assertion of the right to fair use.¹⁴³ Despite the Kleins winning the case, they are once again entrenched in a legal battle over one of their videos, this time a reaction to 45 seconds of an outdated influencer boxing match.¹⁴⁴ Currently, the Court in the *Triller Fight Club II LLC. v. The H3 Podcast* has not issued a decision; however, the facts that the defendants are once again asserting fair use, a concept they established precedent for, and also that the courts overseeing two of the four Triller lawsuits ruled in their favor support the likelihood that the Court will find in favor of the H3 Podcast's right to fair use in this case.¹⁴⁵ The significance of this case lies in its demonstration of

¹⁴¹ See Celes Keene, *supra* note 61 (analyzing the criticism of YouTube's Copyright policy, including its lack of verification). For example, YouTube relies on automated means to determine Copyright infringement, frequently issues Copyright strikes or sanctions against a channel before full investigation has resulted and requires no proof of Copyright ownership when filing a claim. *Id.* See also Geigner, *supra* note 62 (listing the issues with YouTube's Copyright and demonetization practices, such as the abuse that YouTube's messy stance on Copyright creates). See also Meyers, *supra* note 74 (affirming that YouTube and Twitch make a significant amount of revenue from video game streaming).

¹⁴² See *Copyright Timeline*, *supra* note 3 (supporting that Copyright Law can be amended to address new issues).

¹⁴³ See *Hosseinzadeh*, 276 F. Supp. 3d at 74 (S.D.N.Y. 2017) (holding that defendant's had valid fair use defense). See also Balasubramani, *supra* note 55 (stating that the Kleins were able to fund the lawsuit because of a GoFundMe page which surpassed its fundraising goal of \$100K).

¹⁴⁴ See Compl. at 2, *Triller Fight Club II LLC v. The H3 Podcast* (Cent. Dist. Cal. 2021) (No. 2:21-CV-03942) (presenting nature of the action). See also Maxwell, *supra* note 68 (presenting defendant's argument that the complaint is "fatally flawed" and a "mangled and mangy mess," because fair use should provide them full protection).

¹⁴⁵ See Weiss, *supra* note 68 (highlighting the Klein's successful outcomes on the recent lawsuits decided).

how YouTube facilitates copyright claims, penalizes online creators, and undermines a creator's ability to assert a fair use defense.¹⁴⁶

C. Video game companies & Streamers: a help or a hindrance

While streamers have not experienced game creators' regular claims of their content the same way non-gaming video creators have, Nintendo's recent actions against videos showing modified or unmodified gameplay may signal a change in the status quo.¹⁴⁷ Although it is understandable for video game companies to be hesitant about modifications as it could confuse market consumers, it does not reasonably justify video game companies overlooking streamers' fair use rights, regardless of adjustments, especially considering the symbiotic relationship shared between video game companies and streamers.¹⁴⁸ The marketability and promotional value provided by

¹⁴⁶ See Maxwell, *supra* note 68 (exemplifying the time and effort YouTube creators incur when trying to fight a “fatally flawed” Copyright claim). See also O’Neill, *supra* note 36, at 180 (explaining that “YouTubers of any level of popularity often lack the resources to defend themselves against infringement claims, even ones that can be defended with fair use.”). See also *A Guide to YouTube Removals*, *supra* note 44 (stating that a channel seeking to defend itself could incur considerable costs).

¹⁴⁷ See Mrsich, *supra* note 74 (attributing the environment of video game infringement to not enough game publishers and developers enforcing their Copyrighted works). See also Fisher, *supra* note 70 (urging Nintendo to remove its strikes and claims and start a dialogue with streamers to productively move forward). “PointCrow showed that content totaling over 55 million views has been either claimed or taken down by Nintendo at this point, making him wary of producing videos based around their games in the future.” *Id.*

¹⁴⁸ See Kerr-Wilson, *supra* note 8 (describing the nature of the streamer/game publisher relationship as symbiotic, but not all game publishers benefit equally from a streamer playing their game). See also Vanstone, *supra* note 93 (attributing the rise in online viewership of popular esports tournaments to increased accessibility of streamers on platforms such as Twitch). See also Magaldi et al., *supra* note 61, at 12 (recognizing the benefits a game company may receive from a streamer playing its game). But see Wilde, *supra* note 81 (arguing that streaming lowers the value for viewers of short, story-driven games, rather than encouraging purchases). See also Maxwell, *supra* note 68 (distinguish between “biting criticism that merely suppresses demand and copyright infringement which usurps it.”). See also Balasubramani, *supra* note 55 (emphasizing that courts are not receptive to lawsuits where plaintiffs assert Copyright claims after being criticized online).

video game streaming differs from traditional copyright enforcement and signals the need for updated copyright laws.¹⁴⁹

The rise of Let's Play videos and video game streaming created a new relationship between video game developers and online streamers that was arguably inconceivable at the time copyright laws were written.¹⁵⁰ Even with the enacting of the DMCA addressing copyright's relationship with the internet, the internet has grown in such a way and led to so much more than was imaginable in the early days of the internet.¹⁵¹ Thus, current copyright law does not fully account for the prospering video game streaming industry and the dynamic between game developers' copyright and streamers' fair use.¹⁵²

1. Fair Use

A streamer's use of a video game will likely qualify as fair use if it meets the statutory factors and is in good faith.¹⁵³ Although a streamer may appropriate large portions of a game, even revealing the entire story as the streamer Markiplier did by posting the full of *That Dragon Cancer*, a streamer's playthrough of a game should inherently qualify as transformative because the streamer adds their character to

¹⁴⁹ See Magaldi et al., *supra* note 61 (recounting Nintendo's transition from enforcing Copyright to allowing use in Let's Play videos). See also Kerr-Wilson, *supra* note 8 (emphasizing that "[s]uccessful streamers can attract hundreds of thousands or millions of fans and generate a lot of publicity and demand for the games they play online."). See also Caron, *supra* note 87 (providing a narrative example of how seeing a favorite streamer's gameplay was the only way he knew of the game's existence).

¹⁵⁰ See Section 512 Study, *supra* note 41 (acknowledging that Copyright law should evolve as the internet continues to grow, which would have been difficult for Congress at the time of enacting the laws to anticipate the online world as we now know it). See also Kerr-Wilson, *supra* note 8 (describing the new "symbiotic nature of the streamer/game publisher relationship.").

¹⁵¹ See Section 512 Study, *supra* note 41 (asserting that the Copyright office believes Copyright law would benefit from further study because of the changes to the internet ecosystem over the years).

¹⁵² See *id.* (stating that "Congress intended to incentivize cooperation between online service providers and rightsholders, but cooperation cannot be the only answer . . .").

¹⁵³ See Dreyer & Lamb, *supra* note 73 (evaluating arguments as whether video game streaming qualifies as fair use under the factors set forth in Section 107 of the Copyright Act).

the experience, which is why viewers choose to watch.¹⁵⁴ The *Hosseinzadeh v. Klein* suit demonstrates that the transformative nature of commentary may outweigh the quantity of work used to achieve a purpose and make it not a substitute for the original work, satisfying the fair use factors.¹⁵⁵ Similarly, the act of the streamer playing a game, even if it reveals the heart, arguably transforms the work into a new creative piece with input separate from the original game, such as the added personality, specific playing techniques, and visual expressions or verbal commentary.¹⁵⁶ As the Kleins noted in their first lawsuit, if anyone was solely interested in watching the original video, they would not care for sitting through the Klein's commentary, with the court supporting that their commentary transforms the work such that it does not offer a substitute for the original.¹⁵⁷

¹⁵⁴ See Voge, *supra* note 50, at 606 (enforcing that the court determines whether a streamer's commentary and criticism constitutes Fair Use upon consideration of the four statutory fair use factors). While this author argues that Markiplier's use of that Dragon Cancer would unlikely qualify as Fair Use, pointing to the minimal commentary, they also affirm that Markiplier's reactions and commentary made the experience even sadder for viewers. *Id.* at 616, 627. *But see* King & Hera, *supra* note 95, at 353 (concluding that "users seek to get emotional satisfaction from streams . . .").

¹⁵⁵ See *Hosseinzadeh v. Klein*, 276 F. Supp. 3d 34, 47 (S.D.N.Y. 2017) (explaining how "transformativeness" creates a very different experience that inherently does not create a market substitute). See also *What is Fair Use*, *supra* note 24 (expressing what use qualifies as transformative). See also *Fair Use: Columbia Univ.*, *supra* note 24 (emphasizing that Fair Use may apply to the copying of an entire work depending on how much is needed to achieve a purpose). See also Caron, *supra* note 87 (expressing that if a viewer makes a personal investment in the streamer's character, then what the streamer plays carries more weight).

¹⁵⁶ See King & Hera, *supra* note 94, at 356 (finding that gamers perceive streamers as entertainers, an inspiration to play, and endorsers, all of which could support "transformativeness"). See also Voge, *supra* note 50, at 615 (commenting on Markiplier's video of the entire 2-hour, unedited play-through of the That Dragon Cancer). Markiplier's video heavily involves showing the game's cut scenes and dialogue because "the purpose of the game is not to overcome obstacles or beat levels but instead to show the gamer what it feels like to live with a dying child . . .". *Id.* Although the stream revealed the heart of the work, viewers of the video expressed that Markiplier's commentary during quieter scenes and his facial expressions when silent make the game's experience even sadder, supporting a finding of "transformativeness." *Id.* at 616.

¹⁵⁷ See Voge, *supra* note 50, at 627 (quoting *Klein*, 276 F. Supp. 3d at 40, *supra* note 50) (stating that "[i]f a viewer had any real interest . . . they would go directly to that video which is merely a mouse click away on YouTube instead of sitting through [our] constant interruptions and commentary.").

Applying such reasoning, people watching a streamer play a video game likely do so because they are interested in the added value that the streamer provides, such as their personality, commentary, or expertise, to the game experience.¹⁵⁸ A viewer of a Let's Play video and a video game streamer does not interact with the video game in the same way as they would have as if they played the game themselves.¹⁵⁹ They are less likely watching to receive spoilers, which may usurp the market without the streamer's presence, and more so watch because of the streamer's added value, such as entertainment or inspiration.¹⁶⁰ Therefore, video game streamers who transform the game experience by adding their personality, a quality that does not usurp the market for the game, should be presumed exempt from copyright enforcement under fair use.¹⁶¹

Copyright law and the application of fair use to the new frontier of video game streaming remain undetermined.¹⁶² A court may regard streamers' Let's Play videos as fair use because they transform the gaming experience for a viewer or the game fundamentally, analogous to how the court in *Hosseinzadeh v. Klein* found the transformative use to not usurp the market.¹⁶³ Cases such as *Bungie, Inc. v. Luca Leone*

¹⁵⁸ See King & Hera, *supra* note 9594, at 353 (finding that viewers watch because it "satisfies both the need for entertainment and the need to improve one's own level of play while engaging oneself with a community of gamers.").

¹⁵⁹ See Wilde, *supra* note 81 (asserting that viewers of a video game stream "never go on to interact with the game in the personal way that [the developers] intended for it to be experienced.").

¹⁶⁰ See King & Hera, *supra* note 95, at 361 (concluding that viewers watch a "streamer for entertainment and to learn in an entertaining way.").

¹⁶¹ See *Code of Best Practices in Fair Use for Online Video*, *supra* note 18 (noting the trend in fair use case law strongly supports using "transformativeness" as a core measure to analyze how the use repurposes copyrighted works). Emerging cultural expression deserves recognition for transformative value as much as more established expression. *Id.* See also King & Hera, *supra* note 95, at 356 (finding that the personality of the streamer is a "key motivator in attracting viewers to a stream . . ."). Conversely, when viewers do not agree with a "streamers' personality or style of presenting content they were less inclined to consume [the streamer's] videos and did not seek their advice to improve gameplay." *Id.*

¹⁶² See *Video Games*, *supra* note 74 (commenting on the complexity of a video game's legal protections and Copyright challenges). See also Banaga, *supra* note 74 (describing Copyright laws in the video gaming industry as a grey field).

¹⁶³ See *Hosseinzadeh*, 276 F. Supp. 3d at 47 (S.D.N.Y. 2017) (explaining how transformativeness creates a very different experience that does not usurp the market). See also *What is Fair Use*, *supra* note 24 (conceptualizing transformative work as whether the user dramatically changed the work to now take on a different meaning).

or a potential future Nintendo lawsuit involving streamers such as PointCrow, may provide guidance signaling the future direction of video game streaming.¹⁶⁴ However, such a case would benefit from a defendant akin to that of Ethan Klein in *Hosseinzadeh v. Klein*, who has both a good faith persuasive fair use defense, unlike Luca Leone, and the monetary ability to pursue litigation, unlike PointCrow.¹⁶⁵ A case analogous to that of *Hosseinzadeh v. Klein*'s impact on YouTubers' fair use has yet to develop in the realm of streamers and video game copyright.¹⁶⁶ Time will tell, but such a future case will help provide more insight into how copyright of video game streaming unfolds.¹⁶⁷

V. Conclusion

Copyright law should once again evolve to address the new technological advancement of video game streaming and its relation to copyright holders and OSPs, such as YouTube and Twitch. The DMCA exemplifies copyright law's inherent ability to incorporate amendments to maintain its focus on protecting creative works for societal benefit throughout modern society. However, as copyright policies on the internet do not function as a "one size fits all" approach, administrative agencies, such as the Copyright Office, or legislative action focusing on YouTube and Twitch should tailor specific provisions of copyright law to account for the growing popularity of

¹⁶⁴ See Compl. at 21, *Bungie, Inc. v. Luca Leone*, 2:2022cv00981 (reflecting the current status of the suit). The plaintiff argues that its license is expressly conditioned on the users' agreement not to use cheat software. *Id.* Thus, the "subsequent use of the software and display of the game on his computer or on stream was infringing." *Id.*

¹⁶⁵ See Holt, *supra* note 69 (presenting Bungie's claims that Leone made threats regarding the studio and its employees, such as "his desire to 'burn down' Bungie's office building" and that "specific Bungie employees were 'not safe' given Leone's intent to move into their neighborhood."). See also *Code of Best Practices in Fair Use for Online Video*, *supra* note 18 (designating that the consideration of good faith underlies and influences the way in which courts analyze the fair use factors). Compare with Gach, *supra* note 71 (emphasizing the financial burden of defending his videos on fair use grounds).

¹⁶⁶ See Dreyer & Lamb, *supra* note 73 (noting the lack of litigation as of 2019). See also Mrsich, *supra* note 74 (recounting that as of January 2021, Copyright holders have not sued streamers who upload recordings of game play).

¹⁶⁷ See Dreyer & Lamb, *supra* note 73 (asserting that it's only a matter of time before there is a case of video game company suing a streamer who has a legitimate fair use defense).

video game streamers monetizing their Let's Play videos of copyrighted video games, and their ability to do so under fair use. Although copyright law holds that the courts determine cases of fair use, the prevalence of inapplicable and questionable copyright claims on YouTube and Twitch exemplifies the antiquated nature of their procedures and their ineptness in handling the abundance of claims prohibitive to timely resolutions.

A change to copyright law that would allow platforms such as YouTube and Twitch to assess preliminarily whether fair use applies to a claimed video could help fix the cracks in their platform's policy implementations and prevent adversely affecting fair use creators. As video game streaming becomes more prevalent and more solidified in online culture, there may be an increase in fair use disputes between streamers and video game companies, despite their uniquely symbiotic relationship. Thus, new amendments to copyright law addressing video game streaming could serve as a beneficial tool to level up copyright protection of creative works. In doing so, copyright law would continue to progress while maintaining the goal of advancing cultural creations for societal enjoyment.