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Youtube, Video Games, and Fair Use: Nintendo’s Copyright Infringement Battle with Youtube’s “Let’s Plays” and its Potential Chilling Effects

Nicholas Ribaudo*

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I. INTRODUCTION

YouTube has become the first place to search for a multitude of things whether it be product reviews, music videos, movie trailers, or any viral video.¹

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One of the most interesting developments in the use of YouTube is the surge of “Let’s Plays,” a type of video where people playing video games record their gameplay and provide their own commentary as they play. Let’s Plays (“LPs”) are like going to a friend’s house and watching them playing a video game while having a fun conversation, either about the game or something completely unrelated, except instead of watching them in a living room, you are watching them play online.² Many of these content creators on YouTube use video games as a medium, add their commentary to entertain, and earn ad revenue to make a profit.³ Earlier this year, however, Nintendo launched a new policy, the “Creators Program,” regarding Lets Play YouTube videos.⁴ Under the Creators Program, anyone who uploads content to YouTube using a Nintendo video game property can receive 60% of the profits made from that video, while Nintendo collects 40%, as long as Nintendo approves the video.⁵

Nintendo is now flexing its copyright protections and many YouTube creators are arguing that they have a Fair Use claim to use these video games as part of their own content.⁶ With many other publishers and developers anticipating the results of Nintendo’s plan and how consumers react, the interplay between copyright infringement and Fair Use, in the context of video games on the internet, is now at issue.⁷ If the landscape continues down the path of stricter copyright regulation and litigation against content creators, then the innovation we currently see with the Internet may come to an alarming halt.⁸

This article will focus on the dangers of strict copyright law in the scheme of the Internet, specifically new digital media such as online video sharing. Part II will discuss the background of the new digital age, video games, Nintendo’s role in video games, and their plan to balance everyone’s interests. Part III will

1. See Todd Wasserman, *The Revolution Wasn’t Televised: The Early Days of Youtube*, MASHABLE (Feb. 14, 2015), http://mashable.com/2015/02/14/youtube-history/#Gq_rGHsG9PqT; see also Mem. of Law in Supp. of Defs.’ Mot. for Summ. J. at 8, *Viacom Int’l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010) (Nos. 1:07-cv-02103-LLS), 2010 WL 1004562.

2. See *Frequently Asked Questions*, LET’S PLAY ARCHIVE, <http://lparchive.org/faq> (last visited May 15, 2017).

3. See *id.*

4. NINTENDO CREATORS PROGRAM, <https://r.ncp.nintendo.net/guide> (last visited May 15, 2017).

5. *Id.*

6. See *Why YouTubers like Angry Joe Are Boycotting Nintendo Games*, TWINFINITE, <http://www.twinfinit.net/2015/04/06/why-youtubers-like-angry-joe-are-boycotting-nintendo-games> (last visited May 15, 2017). “Fair Use” is the idea that unauthorized use of copyrighted material is permitted, so long as the use complies with the exceptions in the Copyright Act. See 17 U.S.C. § 107 (2012).

7. See, e.g., Ivan O. Taylor Jr., *Video Games, Fair Use and the Internet: The Plight of the Let’s Play*, 2015 U. ILL. J.L. TECH. & POL’Y 247, 269–70 (2015) (outlining the many attempts by numerous companies, such as Double Fine, Valve, and Blizzard, to appease consumers by allowing their IP to be used in different circumstances while also preventing infringement).

8. See JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET AND HOW TO STOP IT* 42 (Yale Univ. Press 2008).

discuss the law of the land so far in copyright, internet, and video games. Part IV explains the issues we would face if Nintendo's Creators Program is to stand. Part V gives recommendations as to how to address to this issue for the benefit of society and corporations that hold copyright claims.

II. VIDEO GAMES AND ITS TIES WITH THE INTERNET

With the innovation of the Internet and its increasingly diverse uses, much of the video game community blossomed with the ability to communicate, market, display, and even improve video games.⁹ One of the largest communities in video game culture today is the Let's Play community, which would not exist if it were not for the development of YouTube.¹⁰ With the implementation of its new policy, however, Nintendo plans to change the way in which Let's Play creators make a profit off Nintendo's works.¹¹

A. *The Digital Age and the Development of YouTube*

YouTube was created in February of 2005.¹² Within 20 months, Google bought the website, which is now the largest social networking website and largest sharer of videos on the Internet, for \$1.6 billion.¹³ What started as a simple solution for the lack of available outlets to share videos on the Internet and no standard format for online videos, YouTube soon became the primary source for online video sharing.¹⁴ When it launched, one of the earliest videos was an 18-second clip of one of the founders simply stating that one of the

9. See generally Rob Manuel, *Why Video Game Fans Cosplay and Why Game Companies Love It*, INDIEWIRE (Dec. 18, 2014), <http://www.indiewire.com/2014/12/why-video-game-fans-cosplay-and-why-game-companies-love-it-66845> ("developers are no longer looking at the community as merely advertisement but as a way to gauge the wishes of their audience"); see also Kevin Wong, *How We Played With Power: The Secret History of "Nintendo Power"*, COMPLEX (Dec. 2, 2013), <http://www.complex.com/pop-culture/2013/12/how-we-played-with-power-secret-history-of-nintendo-power> (describing the passionate community that was created around video games); Chelsea L. Shepard, *Let Us Play! The Rise of User-Generated Game Media*, THE ONTOLOGICAL GEEK (June 28, 2013), <http://ontologicalgeek.com/let-us-play-the-rise-of-user-generated-game-media> ("By taking established games and applying their own performances to them, gamers are giving themselves agency and creative ability where before we were the ones games were created for (making us the creat-ees, I suppose). This development serves to lower the gulf between creator and audience . . .").

10. Taylor, *supra* note 7, at 248, 251.

11. NINTENDO CREATORS PROGRAM, *supra* note 4.

12. Wasserman, *supra* note 1.

13. *Id.*

14. See Meyoung Cha et al., *I Tube, You Tube, Everybody Tubes: Analyzing the World's Largest User-Generated Content Video System*, ACM INTERNET MEASUREMENT CONFERENCE (Oct. 2007), <https://pdfs.semanticscholar.org/0f72/abea4de4d3b1a47bfa114163b318c9507827.pdf>; see also Todd Spangler, *Netflix Bandwidth Usage Climbs to Nearly 37% of Internet Traffic at Peak Hours*, VARIETY (May 28, 2015, 4:02 AM), <http://variety.com/2015/digital/news/netflix-bandwidth-usage-internet-traffic-1201507187/> (reporting that YouTube is the second largest use of Internet downstream traffic at 15.6%, second only to Netflix's 34.5%).

coolest things about an elephant is its trunk.¹⁵ When it was uploaded, there were very few people on the site.¹⁶ Today, the same 18-second clip counts in at 36 million views.¹⁷ Since YouTube launched, more than 500 million videos have been posted and more than 24 hours of new content is uploaded per minute.¹⁸ The amount of content uploaded to YouTube is astronomical.¹⁹

The site grew over time and Google entered the competition in late 2005 by launching its own “Google Video” service and promising better video quality.²⁰ Although Google Video could not compete with YouTube, Google ultimately won by buying YouTube for \$1.6 billion.²¹ The turning point in YouTube’s successful foothold as an Internet landmark was said to be a Nike advertisement featuring Cristiano Ronaldo, where even YouTube’s creators were surprised to see advertisements being uploaded to their service.²² It was one of the first copyrighted materials to be uploaded to YouTube.²³ Today, YouTube claims about 70% of the most popular videos are copyright protected and owned by third-parties.²⁴

B. Nintendo’s Creation and Growth

Nintendo is the creator, developer, and publisher of many of the video games that so many grew up with and love, such as Super Mario, The Legend of Zelda, Donkey Kong, Kirby, and the Pokémon series.²⁵ As a company, Nintendo started out as a Japanese playing card company and later on, because of the success of its playing cards, expanded its production to become a

15. Wasserman, *supra* note 1; *see also* Jawed, *Me at the zoo*, YOUTUBE (Apr. 23, 2005), <https://www.youtube.com/watch?v=jNQXAC9IVRw>.

16. Wasserman, *supra* note 1.

17. *Id.*

18. Mem. of Law in Supp. of Defs.’ Mot. for Summ. J. at 8, *Viacom Int’l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514 (S.D.N.Y. 2010) (Nos. 1:07-cv-02103-LLS), 2010 WL 1004562.

19. *Id.*; William Henslee, *Copyright Infringement Pushin’: Google, Youtube, and Viacom Fight for Supremacy in the Neighborhood That May Be Controlled by the DMCA’s Safe Harbor Provision*, 51 IDEA 607, 616, 622 (2011). (“[I]n order to watch all the video uploaded in a single day one would have to watch YouTube twenty-four hours a day, seven days a week for four years.” (emphasis added)).

20. Wasserman, *supra* note 1.

21. *Id.*

22. *Id.*

23. *Id.*

24. Pl. Mem. of Law in Opp. to Defs.’ Renewed Mot. for Summ. J. at 17–18, *Viacom Int’l Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110 (S.D.N.Y. 2013) (Nos. 1:07-cv-02103 LLS), 2013 WL 1750827 (“She “went through all the most viewed/most discussed/top favorites/top rated [videos on YouTube] to try and figure out what percentage is or has copyrighted material. it was over 70%.”).

25. *Nintendo History*, NINTENDO <https://www.nintendo.co.uk/Corporate/Nintendo-History/Nintendo-History-625945.html> (last visited May 15, 2017); Chris Harty, *The 10 Most Iconic Video Game Characters*, THE RICHEST, <http://www.therichest.com/rich-list/most-influential/the-10-most-iconic-video-game-characters-of-all-time/10> (last visited May 15, 2017) (listing three Nintendo characters in its ranking of the top ten video game characters).

generalized toy manufacturer, later experimenting in electronic toys.²⁶

These electronic toys would later develop into the first “video games” developed by Nintendo, including the Mr. Game and Watch series and a game system developed around a light gun, which would later become the “NES Zapper” used in the game Duck Hunt.²⁷ It was not until the creation of the Nintendo Entertainment System (NES) in 1985 that Nintendo would become the video game and intellectual property behemoth we know of today.²⁸ As video games became more and more mainstream – through the 1990s and 2000s – many developers and publishers allowed their intellectual properties to be used in a variety of different manners and mediums.²⁹ However, Nintendo was and still is one of the most stringent protectors of its original intellectual property.³⁰

Nintendo’s new Creators Program lets people earn advertising proceeds on any Nintendo-related content that uses gameplay footage of Nintendo games.³¹ Online video content creators can register specific videos or even their entire channels with Nintendo.³² Individual videos can earn 60% of ad revenue proceeds, and registered channels can earn 70%.³³ The Nintendo Creators Program says that this revenue rate “may be changed arbitrarily.”³⁴ However, it may be better than what existed before, as previously, Nintendo-related content on YouTube only allowed Nintendo and YouTube to earn profit from advertising revenue.³⁵

III. COPYRIGHT LAW AND THE INNOVATION OF TECHNOLOGY

While Congress enacted the current copyright law in 1976, Congress has also attempted to amend it to address the ever-changing societal and business landscape, which relies on rigid copyright laws.³⁶ However, it seems as though the Internet develops and innovates faster than legislators can keep up.³⁷ This has left many grey areas as to whether a copyright is or is not infringed upon,

26. *Nintendo History*, *supra* note 25.

27. *Id.* The Mr. Game and Watch series was a line of simple handheld games featuring a small pixelated man with simple objectives such as juggling or catching falling objects. *Id.*

28. *Id.*

29. *See, e.g.*, Matt Gerardi, *A brief history of video game cereals and their ridiculous commercials*, A.V. CLUB (Sept. 8, 2016), <http://www.avclub.com/article/brief-history-video-game-cereals-and-their-ridicul-242318>; *see also* Dominic Sacco, *The Video Game Licensing Boom*, LICENSING.BIZ (June 27, 2013), <http://www.licensing.biz/sector-spotlights/read/the-video-games-licensing-boom/02690>.

30. *See* Taylor, *supra* note 7, at 269.

31. NINTENDO CREATORS PROGRAM, *supra* note 4.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. 1 William F. Patry, PATRY ON COPYRIGHT § 1:20 (2016).

37. 47 U.S.C. § 230(a)(1)–(5) (2012) (“The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.”).

especially when considering copyright claims and the Internet.³⁸

A. Copyright and Fair Use

The full force of copyright law in the United States comes from the Copyright Act of 1976.³⁹ It provided protections for those with rights to certain content from unwarranted uses.⁴⁰ These protections include the right to:

- (1) to *reproduce* the copyrighted work in copies or phonorecords;
- (2) to prepare *derivative works* based upon the copyrighted work;
- (3) to *distribute copies or phonorecords* of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to *perform the copyrighted work publicly*;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to *display the copyrighted work publicly*; and
- (6) in the case of sound recordings, to *perform the copyrighted work publicly by means of a digital audio transmission*. (emphasis added)⁴¹

It only provides that copyright owners retain many protective rights over their works such as the right to claim authorship, prevent the use of the work or author's name, or prevent destruction of the work.⁴² Works protected under this statute include literary, musical, dramatic, pantomimes and choreographic, pictorial and graphic, motion picture and audiovisual, sound recording, and architectural works.⁴³ However, these protections are subject to §107 of the Copyright Act, more commonly known as the "Fair Use Doctrine."⁴⁴

Section 107 of the Copyright Act codified the long standing common law doctrine of Fair Use where, "we must often . . . look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."⁴⁵ The Fair Use doctrine's ultimate

38. See Henslee, *supra* note 19 at 609–10; see also Jordan Greenberger, *Young Lawyer's Corner: Video Games, Apps, and the Copyright Act*, AM. B. ASS'N SEC. LITIG. (Feb. 19, 2013), <http://apps.americanbar.org/litigation/committees/businessstorts/articles/winter2013-0213-young-lawyers-corner-video-games-apps-copyright-act.html>.

39. 17 U.S.C. §§ 101–810 (2012).

40. §106.

41. *Id.*

42. *Id.*

43. § 102(a).

44. § 107.

45. *Folsom v. Marsh*, 9 F. Cas. 342, 344 (D. Mass. 1841); see Taylor, *supra* note 7, at 252.

goal is to promote useful arts and sciences, which would be better served by allowing the use of the material rather than preventing such use.⁴⁶ Under §107, Fair Use allows for the use of a copyrighted work “for the purposes *such as* criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research”⁴⁷ Including “such as” in the language of the statute shows that this list is not exhaustive; works used for purposes outside the six listed do not automatically constitute infringement.⁴⁸ An analysis of whether Fair Use protects an unauthorized work must consider:

- (1) the purpose and character of the use, including whether it is of commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁴⁹

However, while these factors are explicitly stated in the Fair Use statute itself, there is no bright line rule on how to weigh these factors or determine if any are dispositive.⁵⁰ Since the goal of Fair Use is to promote useful arts and sciences by allowing the use of copyrighted material rather than preventing such use, there have been some attempts at updating copyright law with the advancement of technology.⁵¹ Many of these updates are related to the right of copyright owners to be able to remove improperly used copyrighted material online, while giving internet providers protections against the acts of individuals.⁵²

B. Attempts at Bringing Copyright into the Digital Age

The Communication Decency Act (CDA) of 1996, a piece of landmark legislation, was the most comprehensive attempt at regulating the expansion of copyrighted work on the Internet.⁵³ Section 230 of the CDA states that, “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information

46. Castle Rock Ent., Inc. v Carol Publ’g Group, 150 F.3d 132, 141 (2d Cir. 1998) (quoting U.S. CONST., art. I, § 8, cl. 8).

47. § 107 (emphasis added).

48. §101 (“The terms ‘including’ and ‘such as’ are illustrative and not limitative.”); see Pac. & S. Co. v. Duncan, 744 F.2d 1490, 1495 (11th Cir. 1984) (explaining that because a use is not included in the listed uses in the preamble does not mean the use is not to be considered under the fair use factors in 17 U.S.C. § 107).

49. § 107.

50. Campbell v Acuff-Rose Music, 510 U.S. 569, 578 (1994).

51. See Henslee, *supra* note 19, at 617; see also Jihan Joo, *Public Video Gaming as Copyright Infringement*, 39 AM. INTELL. PROP. L. ASS’N Q.J. 563, at 575 (2011).

52. Joo, *supra* note 51.

53. 47 U.S.C. § 230 (1998).

content provider.”⁵⁴ While §230 explicitly does not affect or interfere with federal copyright law, it goes to show Congress’s attempt to provide unique law to govern the adapting landscape of the Internet.⁵⁵ Section 230 of the CDA has been so influential in the development of law in the sphere of Internet content that if §230 were to be repealed, “. . . it wouldn’t take long for the vibrant culture of free speech to disappear from the web. That would be nothing short of a national tragedy.”⁵⁶ Section 230 is the reason why the content creator who uploads a defamatory video, not YouTube, would be liable for any legal claims.⁵⁷ The only way a publisher, such as YouTube, would be liable for a tortious action is if “the website operator is ‘responsible, in whole or in part, for the creation or development of [the alleged tortious] information.’”⁵⁸

Congress then amended the Copyright Act of 1976 by passing the Online Copyright Infringement Liability Limitation Act, as part of the Digital Millennium Copyright Act (DMCA) of 1998.⁵⁹ It expanded the rights of a copyright owner by granting the power of prompt removal of improperly used content from the Internet, and also created a “safe harbor” for online service providers (OSP) from being held liable for the individual acts of users on their services.⁶⁰

One of the most sweeping provisions created by the DMCA, and one of the most pressing issues facing Lets Play creators and YouTube in general, are the “Notice and Take Down Provisions.”⁶¹ As stated above, OSPs will not be liable for the individual acts of its users for copyright infringement, however, this safe harbor ends once the OSP:

- 1) has “actual knowledge,” or is “aware of the facts or circumstances from which infringing activity is apparent;”
- 2) receives “financial benefit directly attributable to the infringing activity . . . [and] has the right and ability to control such activity;” and
- 3) does not “upon notification of claimed infringement . . . respond[] expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.”⁶²

54. § 230(c)(1).

55. § 230(e)(2).

56. Gabe Rottman & Lee Rowland, *New Proposal Could Singlehandedly Cripple Free Speech Online*, AM. C.L. ASS’N (Aug 1, 2013), <https://www.aclu.org/blog/new-proposal-could-singlehandedly-cripple-free-speech-online>.

57. See *Gavra v. Google Inc.*, 2013 WL 3788241 (N.D. Cal. July 17, 2013).

58. *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 401 (6th Cir. 2014) (citing 47 U.S.C. § 230(f)(3)).

59. 17 U.S.C. § 512 (2012) (implementing the 1996 WIPO Copyright Treaty through the DMCA).

60. § 512(a).

61. § 512(c)(1)(A)(iii).

62. § 512(c)(1)(A)–(C).

The notice requirements under Notice and Take Down are as follows:

- (i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.
- (ii) Identification of the copyrighted work claimed to have been infringed, [. . .]
- (iii) Identification of the material that is claimed to be infringing [. . .]
- (iv) Information reasonably sufficient to permit the service provider to contact the complaining party [. . .]
- (v) *A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.*
- (vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.⁶³

In summary, the section provides that once an OSP receives any notice of possible infringement, sufficient under the §512 requirements stated above, they must immediately remove the content, even if that notice is based on the smallest iota of *belief* by the copyright owner.⁶⁴

In a world where technology seems to be constantly sprouting new and innovative ideas, it appears that we have hit a critical moment where future technological innovation may, in turn, violate the outdated law and could possibly curtail creativity.⁶⁵ The current trends in cyberspace law seem to echo these worries, where more and more technology is becoming copyright eligible, and thus may halt technological innovation.⁶⁶

C. Video Games in Copyright

When Congress enacted the Copyright Act in 1976, the video game industry was not influential enough to be incorporated into the Act.⁶⁷ Thus, there is no mention of video games as art, literature, or otherwise in the statute.⁶⁸ The World Intellectual Property Organization has described the complexity of copyright in video games by saying, “video games are complex works of authorship – containing multiple art forms, such as music, scripts, plots, video, paintings and characters – that involve human interaction while executing the game with a computer program on specific hardware. Therefore,

63. § 512(c)(3)(A)(i)–(vi) (emphasis added).

64. See § 512(c)(3)(A)(v).

65. See ZITTRAIN, *supra* note 8.

66. *Id.*

67. See Taylor, *supra* note 7, at 252.

68. See *id.*

video games are not created as single, simple works, but are an amalgamation of individual elements that can each individually be copyrighted.”⁶⁹ While the Supreme Court has yet to provide a bright-line rule on copyright protection for video games, courts have generally accepted that video games are copyrightable as “audiovisual works.”⁷⁰ Audiovisual works under federal copyright law are defined as “works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds. . . .”⁷¹ The most applicable doctrines of copyright law with respect to the display of video games with commentary on YouTube, in the form of Let’s Play videos, includes: exploitation of expression, the first-sale doctrine, and commercial nature.⁷²

Copyright laws protect the developers of video games and programs if the authorship is connected to the program’s original expression of ideas.⁷³ Protections may apply to “literal” and “nonliteral” elements of a program.⁷⁴ A literal element is the computer program’s source and object code, the difference between the two being that source code is the language that humans can understand and use to input code into a computer, which the computer can then turn into object code that only the computer can understand.⁷⁵ Courts have found that a copyright holder sufficiently states a claim for infringement when the source code of the plaintiff’s game is similar or identical to the offending game.⁷⁶ A work’s nonliteral elements are abstract and concern the architecture, organization, and relationships of components, parameters, and macros.⁷⁷ Basically these elements are how the elements created by the source code are supposed to interact with other elements of the game to make the entire game work and flow.

While copyright does not protect ideas but only expression, there must be a balancing test between the copyrightable expression of a work and its unprotected public domain elements. This balance is necessary to provide protection for authors, as well as, to avoid the suppression of future ideas. Next,

69. WORLD INTELL. PROP. ORG., THE LEGAL STATUS OF VIDEO GAMES: COMPARATIVE ANALYSIS IN NATIONAL APPROACHES 7 (July 2013), http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/comparative_analysis_on_video_games.pdf.

70. Joo, *supra* note 51; *see also* Stern Elecs., Inc. v. Kaufman, 669 F.2d 852, 854 n.1 (2d Cir. 1982).

71. 17 U.S.C. §101 (2012).

72. *See* Greenberger, *supra* note 38.

73. *Id.*

74. Comput. Assocs. Int’l, Inc. v. Altai, Inc. 982 F.2d 693, 702 (2d Cir. 1992).

75. *Id.*; JAMES GRIMMELMANN, INTERNET LAW: CASES AND PROBLEMS 23–25 (Semaphore Press, 5th ed. 2015).

76. *See* *Computer Assocs. Int’l*, 982 F.2d at 702; *Miller v. Facebook, Inc.*, 2010 WL 2198204, at *6 (N.D. Cal. May 28, 2010); *M. Kramer Mfg. Co., Inc. v. Andrews*, 783 F.2d 421, 446 (4th Cir. 1986).

77. *Computer Assocs. Int’l*, 982 F.2d at 702.

an evaluation of whether there is an infringement is based on whether there is substantial similarity between the copyrighted expression and the alleged infringer's game.⁷⁸ Because nonliteral elements are more open to interpretation, courts are more willing to give copyright protection to expressive elements such as labels, board designs, playing cards, and graphical works; it is more complicated for a court to grant copyright protection for a relationship between different process or macros because of their non-physical and transforming nature.⁷⁹

Not all unauthorized exploitation is copyright infringement, however.⁸⁰ The First-Sale doctrine of copyright law allows an owner of a lawful copy of the work to sell or dispose of the copy without authorization by the copyright owner.⁸¹ This prevents the copyright owner from using his right to control distribution once the work is put into the stream of commerce by sale.⁸² However, a large caveat is that most copyright owners create licensing agreements upon sale.⁸³ These agreements state that users only acquire a license to use a copy of the software and do not acquire any title to the work, limiting the rights the user truly has when purchasing software.⁸⁴

One of the most compelling factors in determining non-infringing uses is whether the derivative work is of a commercial nature or is used for nonprofit educational purposes.⁸⁵ Courts consistently hold that to find commercial exploitation through direct infringement there must be financial reward tied to infringement.⁸⁶ If the motive is profit from exploitation without paying the price, whether that be a licensing fee, sale, or customary price, then the commercial nature is clear.⁸⁷ However, courts are willing to find Fair Use if there is a broader public interest motive.⁸⁸ Most of the analysis of commercial nature will come from the potential sales impacted by the infringing use.⁸⁹ While there has been copyright litigation involving video games, the courts have not yet had a case of first impression when it comes to this new development of LPs.⁹⁰

78. Tetris Holding, LLC v. Xio Interactive, Inc., 863 F. Supp. 2d 394 (D.N.J. 2012).

79. Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 617 (7th Cir. 1982).

80. See Greenberger, *supra* note 38.

81. 17 U.S.C. § 109(a) (2008).

82. Quality King Distribs., Inc. v. L'Anza Research Int'l, Inc., 523 U.S. 135, 152 (1998).

83. Adobe Sys. Inc. v. Kornrumpf, 780 F. Supp. 2d 988, 994 (N.D. Cal. 2011).

84. *Id.*

85. *Campbell*, 510 U.S. at 578.

86. Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 922 (2d Cir. 1994).

87. Harper & Row, Publishers, Inc. v. Nat'l Enters., 471 U.S. 539, 562 (1985).

88. Twin Peaks Prods. v. Publ'ns Int'l Ltd., 996 F.2d 1366, 1375 (2d Cir. 1993).

89. Meeropol v. Nizer, 560 F.2d 1061, 1070 (2d Cir. 1977).

90. See Greenberger, *supra* note 38.

IV. APPLICATION

With Nintendo's Creators Program in place, many YouTube content creators have boycotted playing Nintendo's games as a sign of disapproval of the policy.⁹¹ Several of these boycotts are coming from the community Nintendo directly markets.⁹² Interestingly enough, Nintendo has not filed any formal infringement lawsuits against Let's Play content creators either, instead deciding to institute the Creators Program policy as a way to deal with the new form of media.⁹³

A. *Viacom v. YouTube and Content ID*

First of all, how does YouTube fall into this statutory framework of Copyright, Publishers, and OSP? As of April 2013, YouTube is legally defined as an OSP protected under the Safe Harbors of the DMCA.⁹⁴ In March of 2007, Viacom International, Inc. sued YouTube and Google for copyright infringement by uploading and hosting videos of Viacom owned content in a \$1 billion lawsuit.⁹⁵ Viacom filed multiple takedown notices on content available on YouTube.⁹⁶ The lawsuit tested the boundaries of the DMCA on whether sites like YouTube should be given Safe Harbor protections under 17 U.S.C. § 512 while providing an online service to host content on behalf of a third party.⁹⁷ Viacom claimed that YouTube possessed actual knowledge of the infringement, failed to act expeditiously to stop it, received a financial benefit, and did not just store the content of other creators on their own servers at the discretion of the user.⁹⁸ Both parties agreed that "(1) videos are uploaded by users to the YouTube server; (2) during the process of storing the videos, copies are made of that video by YouTube's system; and (3) YouTube then streams on demand the videos that have been posted by the user."⁹⁹ However, there was dispute as to whether this qualified YouTube as an OSP under the

91. See *Why YouTubers like Angry Joe Are Boycotting Nintendo Games*, *supra* note 6.

92. Angry Joe, one of the most vocal opponents of Nintendo's program, stated: "It's not enough that I went out and bought a \$300 Wii U console . . . [that] I bought four pro controllers at 50-60 bucks a piece . . . that I bought [four \$40 Wiimote controllers] so we can have this play session and share it online. . . . It's not enough that I bought four-plus games for the system – spent over \$900. That's not enough for Nintendo." *Id.*

93. *Id.*

94. *Viacom Int'l Inc. v. YouTube, Inc.*, 676 F.3d 19, 18–30 (2d Cir. 2012).

95. *Id.* at 25–27.

96. *Viacom Int'l Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110, 119 (S.D.N.Y. 2013).

97. *Id.* at 122–23; see also *Viacom v. Youtube*, ELECTRONIC FRONTIER FOUNDATION (Nov. 11, 2015), <https://www.eff.org/cases/viacom-v-youtube> (explaining that the decision could affect "other online services including eBay, Blogger, Flickr, Scribd, Amazon, and many others.") It is also probative to note, since Google bought YouTube, Google is a named party in this suit and therefore, the court may well decide that parent companies are just as liable for the acts of companies which are providing these services.)

98. *Viacom Int'l*, 940 F. Supp. 2d at 113.

99. Henslee, *supra* note 19, 628–29.

DMCA.¹⁰⁰ Viacom claimed it did not, claiming that YouTube committed direct infringement and was liable of inducement.¹⁰¹

In the end, the Court held that YouTube is protected as an OSP as long as YouTube does not possess specific knowledge of “blatant” infringement.¹⁰² However, the Court explicitly stated that no outermost limits had been set on what mens rea is required for blatant infringement.¹⁰³ General knowledge or awareness is simply not enough.¹⁰⁴ The Court rested its decision on the legislative history of the DMCA and the Committee notes, which showed that the purpose of the provisions were, “to leave current law in its evolving state and, instead, to create a series of ‘safe harbors’”¹⁰⁵ While the Court did not hold that YouTube must search out the infringing content and remove the material on its own accord, they held that YouTube’s three strike rule against offenders and its take down policy are in accordance with the DMCA.¹⁰⁶

While the Court in *Viacom* did not force YouTube to actively weed out copyright infringements on its site, YouTube already provided a system that screens for infringing material called Content ID. “Content ID” allows copyright owners to find potential infringing uses of their content or material.¹⁰⁷ The way Content ID works is that when a copyright owner wants to search YouTube for potential infringement, they give YouTube a copy of their audio and video material which is stored in a database.¹⁰⁸ When a content creator uploads a new video, YouTube checks it against the database, and if a match is found, YouTube flags the video as a copyright infringement, which stops processing and revenue for the infringing video.¹⁰⁹ However, it is largely debated as to whether this process truly gets at the heart of the matter at protecting copyrighted material, or if it simply hurts content creators.¹¹⁰ If these content creators acquire too many Content ID strikes which have been shown to

100. *Viacom Int’l Inc. v. YouTube, Inc.*, 718 F. Supp. 2d 514, 516 (S.D.N.Y. 2010).

101. *Id.*

102. *Viacom Int’l*, 940 F. Supp. 2d at 123; *Viacom Int’l*, 718 F. Supp. 2d at 524.

103. *Viacom Int’l*, 718 F. Supp. 2d at 527.

104. *Viacom Int’l*, 940 F. Supp. 2d at 116.

105. *Viacom Int’l*, 718 F. Supp. 2d at 518 (citing S. REP. NO. 105–190, at 8 (1998)).

106. *Viacom Int’l*, 940 F. Supp. 2d 110.

107. *How Content ID Works*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2797370>. (last visited May 11, 2017).

108. *Id.*

109. *Id.*

110. Paul Tassi, *The Injustice Of The YouTube Content ID Crackdown Reveals Google’s Dark Side*, FORBES (Dec. 19, 2013),

<http://www.forbes.com/sites/insertcoin/2013/12/19/the-injustice-of-the-youtube-content-id-crackdown-reveals-googles-dark-side> (“The system has dramatically more false positives than legitimate claims. Content creators have had their own self-created music and games flagged under the system. YouTubers have had their own in-person interviews flagged. Some have been punished for using videos widely identified as fair use, just because another organization (falsely) claimed them as their own content through Content ID. The entire Content ID process is not only flawed in finding infringing content, but operates under a “guilty until proven innocent” system. When a claim is filed, money will automatically be diverted into the pockets of whoever made the claim, and can only be reversed if the claim is disputed.”).

not be truly accurate and is overbroad in its enforcement, can shut down a channel and ruin a creator's base and reputation. In the interest of fairness to those content creators who are falsely accused of infringement Fair Use may be used as security.

B. "Let's Plays" as Fair Use

By looking at the statutory language of 17 U.S.C. §§ 106-07, and the way in which courts have interpreted copyright infringement, LPs as well as other video games used on YouTube are at risk of being removed or left without any benefit to the creator if the ad revenues are stripped by policies such as Nintendo's Creators Program.¹¹¹ A Let's Play uses video games as a platform; however, it is the commentary that gives the video entertainment value beyond displaying images or video of a video game alone.¹¹² If video games themselves are "audiovisual works," then LPs are simply a derivative work of those audiovisual works.¹¹³ However, the courts have held that a work that is simply an unauthorized exploitation of another does not mean it automatically qualifies as copyright infringement.¹¹⁴

Although there is commercial use in many YouTube videos through ad revenue, the exploitation is not directly for profit or financial gain but for creation, with corporate restrictions on expression.¹¹⁵ Many Let's Play creators have paid a hefty start-up cost by spending money to buy the game and console, having sponsorship with YouTube, and using computer hardware and software to even create the content.¹¹⁶ Thus, LPs are not truly exploiting the copyrighted work simply for commercial use.¹¹⁷ It could even be argued that LPs are being offered for a public use, like stand-up comedy or the video equivalent of a video game walkthrough.¹¹⁸ Since these LPs are simply showing video game gameplay to their followers, they cannot replace the experience of buying and playing the game for oneself. It may very well be the

111. See NINTENDO CREATORS PROGRAM, *supra* note 4.

112. See *Frequently Asked Questions*, *supra* note 2.

113. See Joo, *supra* note 51; see also *Stern Elecs.*, 669 F.2d at 854 n.1 (2d Cir. 1982).

114. See *supra* Part II – C ("Not all unauthorized exploitation is copyright infringement . . .").

115. For an explanation of why some YouTubers boycotted, see *Why YouTubers like Angry Joe Are Boycotting Nintendo Games*, *supra* note 6 (showing many YouTubers agreed with PewDiePie's assessment that "the people who have helped and showed passion for Nintendo's community are the ones left in the dirt the most").

116. See Bobby Bernstein, *Top Gear for Making Let's Play Videos: Pewdiepie Edition*, HEAVY, <http://heavy.com/games/2015/01/top-best-gear-equipment-microphone-camera-headset-headphones-mouse-keyboard-lets-play-videos-pewdiepie> (last updated Mar. 20, 2017); *Why YouTubers like Angry Joe Are Boycotting Nintendo Games*, *supra* note 6 ("It's not enough that I went out and bought a \$300 Wii U console. It's not enough that I bought four pro controllers at 50-60 bucks a piece. It's not enough that I bought [four \$40 Wiimote controllers] so we can have this play session and share it online with people. It's not enough that I bought four-plus games for the system – spent over \$900. That's not enough for Nintendo.").

117. See *Harper & Row*, 471 U.S. at 562.

118. See *Twin Peaks Prods.*, 996 F.2d at 1375.

opposite, that the publicity will boost the video game sales rather than impede upon them.¹¹⁹

It also seems Nintendo is implicitly consenting to LPs as Fair Use, and thus conceding that LPs are a legitimate form of audiovisual media under Fair Use. If so, then the creator's right to profit from content is being curtailed.¹²⁰ Currently video game developers such as Blizzard, 2K Games, and Valve embrace Lets Plays and include such uses in their licensing agreements for the games.¹²¹ There is a website, Twitch.com, whose sole purpose is to provide a service for live video game streaming, ranging from one person playing a game alone to massive corporate sponsored gaming tournaments.¹²² It is interesting to note that Nintendo's 2015 World Championships were streamed live by Twitch services.¹²³ Hence, Nintendo seems to conflicted on whether to consider LPs as Fair Use or infringement, and is making a profit from both sides.¹²⁴ If video games were to be treated as Fair Use, then policies would need to be put in place to address this issue of infringing upon the content creator's rights to profit and to protect the future innovation of the Internet.

C. Innovation and Generativity

Jonathan Zittrain notes in *The Future of the Internet and How to Stop It* that earlier technology, which was more open-sourced, such as the Apple II, promoted more generativity and innovation to produce unanticipated changes through unfiltered contributions, as compared to closed-source platforms such as Apple's iPhone.¹²⁵ Zittrain explains that innovation is the ability to naturally and logical progression of technology whereas generativity" is "a system's capacity to produce unanticipated change through unfiltered contributions from

119. See *Meeropol*, 560 F.2d at 1070.

120. Nintendo even acknowledges "gameplay videos" on the program's website. See NINTENDO CREATORS PROGRAM, *supra* note 4.

121. *Blizzard Video Policy*, BLIZZARD ENT., <http://us.blizzard.com/en-us/company/legal/videopolicy.html> (last visited May 15, 2017) (Blizzard developed *World of Warcraft* and *StarCraft*); 2K David, *Policy on Posting Copyrighted 2K Material*, 2K, <http://support.2k.com/hc/en-us/articles/201335153-Policy-on-posting-copyrighted-2K-material> (2K Games developed *Borderlands* and *BioShock*); *Legal Info: Valve Video Policy*, VALVE, <http://www.valvesoftware.com/videopolicy.html> (last visited May 15, 2017) (Valve developed the *Portal* series and *Half-Life* series).

122. See Joo, *supra* note 51.

123. See *Nintendo*, TWITCH, <http://www.twitch.tv/nintendo/v/6181714> (last visited May 15, 2017) (noting the live stream is currently still available for on demand viewing and that Nintendo's Twitch channel has been active since at least Apr. 8, 2014. See also http://www.twitch.tv/nintendo/profile/past_broadcasts).

124. If Nintendo sees Let's Plays as infringement, and allows such videos to exist under their Creators Program at their consent, they earn profits from the ad revenue splitting. If Nintendo sees the videos as Fair Use, then they make ad revenue from their own sanctioned streams on YouTube and Twitch, plus the revenue from those buying the games to make their own Let's Plays.

125. See ZITTRAIN, *supra* note 8, at 2.

broad and varied audiences.¹²⁶ An “open source” code is a source and object code that is openly available at no charge, completely open to improvements, adaptations, and manipulations.¹²⁷ In contrast, “closed source” code is source code that is not open to any manipulation, works solely with the developer’s proprietary software, and only exists in object code.¹²⁸ When a platform has the characteristics or framework to flourish outside of academia, then it allows people from all over the world to create and invent.¹²⁹ Apple and Windows operating systems are closed sources; however, the systems are designed so that anyone can create a new code that can run on those systems, making the computer do new and unexpected functions. For example, the trend of “jail breaking” iPhones¹³⁰ allows users to use various methods to circumvent the phone’s closed source code and install third-party apps not available on the Apple App Store and not sanctioned by Apple.¹³¹ This current dispute between Nintendo and LPs could see a similar result to the Apple App Store, bringing the end of innovative Internet use of copyrighted material.¹³²

The innovation and popularity of LPs may not be as surprising when viewed through Zittrain’s perspective in that LPs are simply the populous generativity of “Nintendo Power.”¹³³ Nintendo Power was a Nintendo created and published magazine giving gamers advice, hints, and walkthroughs to many of Nintendo’s own video games.¹³⁴ With the advancement of the Internet and its openness to innovation, however, walkthrough and game tips could be found easily online.¹³⁵ What started as online text walkthroughs developed into text with screenshots, and then into informative video walkthroughs and commentary, which was finally transformed into entertaining focused LPs.¹³⁶ Soon, Nintendo Power, like many other forms of paper media, became obsolete.¹³⁷ LPs simply replaced Nintendo Power through the generativity of the Internet and its users.

Zittrain notices that platforms tether their products and close it off from

126. *Id.* at 70.

127. Christian H. Nadan, *Open Source Licensing: Virus or Virtue?*, 10 TEX. INTELL. PROP. L.J. 349, 352 (2002).

128. James Gibson, *Once and Future Copyright*, 81 NOTRE DAME L. REV. 167, 175 (2005).

129. *See* ZITTRAIN, *supra* note 8, at 42.

130. Adam Theierer, *iPhone 2.0 cracked in hours. . . what was that Zittrain thesis again?*, TECHLIBERATION (July 10, 2008), <http://techliberation.com/2008/07/10/iphone-20-cracked-in-hours-what-was-that-zittrain-thesis-again/>.

131. Kevin Rogers, *Jailbroken: Examining the Policy and Legal Implications of iPhone Jailbreaking*, 13 U. PITT. J. TECH. L. POL’Y 1 (2013) (explaining the legal implications of jailbreaking iPhones, as it is still unclear if jailbreaking is copyright infringement since the procedure breaches Apple’s copyrighted OS, or if the hacking is Fair Use).

132. *See generally* ZITTRAIN, *supra* note 8, at 3–5.

133. Wong, *supra* note 9; Shepard, *supra* note 9.

134. Wong, *supra* note 9; Shepard, *supra* note 9.

135. Wong, *supra* note 9; Shepard, *supra* note 9.

136. Wong, *supra* note 9; Shepard, *supra* note 9.

137. Wong, *supra* note 9; Shepard, *supra* note 9.

innovation due to many reasons, such as cyber security or privacy.¹³⁸ This poses the question of whether the balance between not allowing innovation and security issues, such as cyber security, is correct.¹³⁹ Zittrain separates his analysis into the three phases in how innovation fails: first is “The Rise and Fall of Generative Net,” second is the “Stall,” and lastly his solutions.¹⁴⁰ With Nintendo becoming stricter on its copyright protections and many other developers waiting in the wings to see how Nintendo’s plan goes, we could very well be headed into the “stall” of the internet, which Zittrain describes as a place where there is no longer any generativity in the Internet due to excessive guidelines and restrictions.¹⁴¹ Last Year, Reggie Fils-Aime, President and Chief Operating Officer of Nintendo America, stated in an interview with video games news blog *Kotaku* that “the first thing we needed to do was make sure that the content that’s out there was representative of the franchises . . . These are our lifeblood. These are our children. We needed to make sure that the content there was reflective of what these franchises are.”¹⁴² Nintendo, of course, does not want their products to be misrepresented.¹⁴³ Claiming copyright on such a new and innovative use of digital media, however, could stop any more innovation in this field and potentially stall the generativity of video sharing on the Internet.¹⁴⁴ Using copyright claims in order to halt an entire genre of media on YouTube is the type of action the Copyright Act seeks to stop.¹⁴⁵ The act explicitly states that the Copyright Royalty Judges are “to minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.”¹⁴⁶ Let’s Plays and video game content on YouTube are the epitome of a “prevailing industry,” commonly featuring as some of the top YouTube channels, exceeding millions of subscribers, and making millions of dollars.¹⁴⁷

D. Nintendo’s Chilling Effect through Notice and Take Down.

Nintendo’s Creators Program allows creators to earn 60% of ad revenue proceeds, and “registered channels” can earn 70%.¹⁴⁸ In order to understand the

138. See ZITTRAIN, *supra* note 8, at 9.

139. *Id.*

140. See generally *id.*

141. *Id.* at 40–43.

142. Stephen Totilo, *Nintendo’s Plan To Work With YouTubers Sounds Ambitious*, KOTAKU (June 16, 2014), <http://kotaku.com/nintendos-plan-to-work-with-youtubers-sounds-ambitiou-1591683075>.

143. *Id.*

144. See generally ZITTRAIN, *supra* note 8 at 54–57.

145. 17 U.S.C. § 801(b)(1)(D) (2006).

146. *Id.*

147. Ross Miller, *PewDiePie’s response to making \$7.4 million is exactly why he’s so successful*, THE VERGE (July 7, 2015), <http://www.theverge.com/2015/7/7/8909553/pewdiepie-7-4-million-response-felix-kjellberg-youtube> (“He makes a lot of money doing so. The latest figure is \$7.4 million, . . . he’s now up to 37.7 million subscribers and over 9 billion views”).

148. NINTENDO CREATORS PROGRAM, *supra* note 4.

drastic cut this truly makes in creators' paychecks, YouTube's ad revenue requires explanation. Ad revenue is calculated by a Cost-Per-Thousand Rate (CPM), where for every 1,000 views, the creator will make a set rate.¹⁴⁹ In 2012 the average CPM on YouTube was \$9.35, and in 2013 the average was \$7.60.¹⁵⁰ However creators may be making more or less than this CPM based on a variety of variables during negotiations.¹⁵¹ YouTube has full discretion to change and amend the policies on how creators earn revenue from the videos they make, and has recently implemented such change by planning an entirely new subscription based premium service.¹⁵² Before Nintendo's new policy, creators received an average 55% share from YouTube from the overall ad revenue.¹⁵³ Under Nintendo's Creators Program, YouTube will still receive 45% of the ad revenue, Nintendo claims 22%, leaving the creator with roughly 33%.¹⁵⁴

It seems rather obvious that Nintendo's new program is aimed at the Let's Play creators on YouTube considering there was outrage from the community in the past when Nintendo refused to pay creators any proceeds from ad revenue.¹⁵⁵ The issue, however, is that the new Creators Program has wide sweeping and unseen side effects to how YouTube and its creators make

149. *YouTube Partner Earning Overview*, YOUTUBE HELP (Oct. 11 2015), <https://support.google.com/youtube/answer/72902?hl=en>.

150. Eric Rosenber, *How Youtube Ad Revenue Works*, INVESTOPEDIA (Nov. 9, 2015), <http://www.investopedia.com/articles/personal-finance/032615/how-youtube-ad-revenue-works.asp>; Leslie Kaufman, *Chasing their Star, on YouTube*, N.Y. TIMES (Feb. 1, 2014), <http://www.nytimes.com/2014/02/02/business/chasing-their-star-on-youtube.html>.

151. Rosenber, *supra* note 151; Kaufman, *supra* note 151.

152. Rosenber, *supra* note 151; Kaufman, *supra* note 151. During the drafting of this note, YouTube launched a new subscription service called "YouTube Red." With a monthly subscription to YouTube Red, viewers may watch videos on YouTube without having to watch any pre-roll advertisements. Clearly, this undercuts how YouTube pays its content creators. While the program is currently still in its infancy at the time of this writing, there have been discussions as to how profits work under this new model. For viewers who do not subscribe to YouTube Red, profits and ad revenue will remain the same. For the views on content by YouTube Red Subscribers who will not see ads, "YouTube will total up all the income it sees from YouTube Red and divide that among creators based on each creator's share of total minutes watched by YouTube Red users. (The only exception to this is music videos, which will be paid based on share of views, not share of watch time.)" Howard Pinsky, *What YouTube Red Means for Creators*, FULL SCREEN BLOG (Nov. 11, 2015), <http://www.fullscreen.com/2015/10/26/what-youtube-red-means-for-creators/>. It is currently unclear what the exact percentage share creators will get, but the focus has seemed to shift from ad plays to minutes watched by viewers. At this point in time it is too early to determine if this plan will result in less or more revenue for the content creators.

153. Rosenber, *supra* note 151.

154. For example: If a video on YouTube has 100,000 views, and the creator has a contract with YouTube with a \$7.60 CPM, then in total there is \$760 in ad revenue. After being divided into each party's share, YouTube would make \$342, Nintendo makes \$167.20, and the creator will make \$250.80 for their video.

155. Emily Gera, *Nintendo claims ad revenue on user-generated YouTube videos*, POLYGON (Oct. 15, 2015), <http://www.polygon.com/2013/5/16/4336114/nintendo-claims-ad-revenue-on-user-generated-youtube-videos>.

content.¹⁵⁶ For example, does the potential benefit of profit change how the content will be created? Is the Creators Program stopping creators from making content they want to create? Nintendo could technically get profits from game reviews, game tournaments, or even analytical videos about the game or lore itself.¹⁵⁷

The current Notice and Take Down provisions under 17 U.S.C. § 512 (c) that *Viacom* upheld, combined with YouTube’s Content ID service, puts content creators up against great odds to simply publish a video online. As the burden of proof for a takedown claim is simply a “good faith belief,”¹⁵⁸ the Content ID sometimes may find infringing material when none may exist.¹⁵⁹ For example, in May of 2015, a YouTuber “Super Bunnyhop” uploaded a video that was critical of a video game developer, Konami, who is responsible for the Metal Gear Solid series.¹⁶⁰ The video gave details of the impromptu firing of a well-known employee within the company.¹⁶¹ Konami apparently caught wind of the video and issued a takedown notice to YouTube.¹⁶² The video was immediately removed.¹⁶³ However, this was the “notice” Konami sent to YouTube regarding the video:

Work allegedly infringed: METAL GEAR RISING [link removed]

I, in good faith state that:

I am the owner, or an agent authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

I have a good faith belief that the use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law; and

This notification is accurate.

I acknowledge that there may be adverse legal consequences for making false or bad faith allegation of copyright infringement by using this process.

I understand that abuse of this tool will result in termination of my YouTube account.

Authorized Signature: [REDACTED]¹⁶⁴

Note that there is no specificity as to what caused the alleged

156. NINTENDO CREATORS PROGRAM, *supra* note 4.

157. *Id.* (Never explaining specifically the types of videos from which Nintendo may garnish profits).

158. 17 U.S.C. § 512(c)(3)(A)(v) (2012).

159. Tassi, *supra* note 111 (“The system has dramatically more false positives than legitimate claims. Content creators have had their own self-created music and games flagged under the system. YouTubers have had their own in-person interviews flagged.”).

160. Patrick Klepeck, *YouTube Overrides Konami’s Video Takedown*, KOTAKU (May 14, 2015), <http://kotaku.com/youtube-overrides-konamis-video-takedown-1704477268>.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

infringement,¹⁶⁵ yet this video was immediately removed.¹⁶⁶ While the video was reinstated days later, after the creator issued an appeal, the creator was never given any specifics as to the claim.¹⁶⁷ This is the dilemma creators face in this landscape. These procedures create a Chilling Effect for online content creators. Why would someone try to make an online video if there is such a strong possibility that it will be removed? There seems to be no clause in Nintendo's Creators Program stopping Nintendo from doing the same, by rejecting applications of content that is critical of their video games into their Creators Program.¹⁶⁸ Nintendo could use this new policy to effectively expand their Public Relations and Marketing departments by controlling what is said and what is shown about their games.

V. RECOMMENDATIONS

This issue is not without its solutions, however. While there may be many that claim Nintendo's program will successful if left alone and thrives in our capitalistic economy. However, the current copyright law landscape does not create an even playing field for both corporate parties who own copyrights and those smaller content creators. However, this paper argues that the best solution is for the burden of proof to be heightened and the liability shared and shifted by amending the DMCA.

A. *Leave it Alone*

The first recommendation is to leave the system as is, and while this may not be the most impressive recommendation, it could at least withstand a legal test.¹⁶⁹ If Nintendo treats the Creators Program as a "licensing fee" to allow the use of its content then, unfortunately, creators of videos using video games will simply have to take the hit and accept however much money they are allowed to make.¹⁷⁰ The way to get the best deal between creators and copyright holders is to use the strategy creators have already been using, protest and draw attention.¹⁷¹ If Nintendo truly believes that there is a negative reaction from the stricter regulations on LPs, then it will change its policies. However, there is one large issue with this plan. Corporations do not usually respond quickly or attentively to small boycotts, such as a handful of angry video makers.¹⁷²

165. *Id.*

166. *Id.*

167. *Id.*

168. NINTENDO CREATORS PROGRAM, *supra* note 4.

169. *See* Greenberger, *supra* note 38; *see also* Taylor, *supra* note 7, at 267.

170. *See* Taylor, *supra* note 7, at 269. While Nintendo claims they have a "blanket position of declining any [licensing] requests," but the fee that is charged for the use of their video game is a de facto fee for use of their IP for a limited purpose which is, by definition, a license. It mirrors many other companies, such as Sony and 2K Games, that allow limited licenses for use of their IP in limited circumstances, like Let's Plays. *Id.*

171. *Why YouTubers like Angry Joe Are Boycotting Nintendo Games*, *supra* note 6.

172. *Id.*

Transaction costs in contact and negotiation with corporations and the lack of voice for those small content creators are strong policy concerns that support the idea that this situation cannot simply stand.¹⁷³ Unfortunately, acquiescing to the current system leaves open a grey area for corporations which hold copyrights to interpret what is infringement on their own terms.

B. Licensing

Academics and YouTubers alike have recommended that the Creators Program by Nintendo should simply be replaced with a licensing fee.¹⁷⁴ It could be argued that this Nintendo Policy is de facto licensing.¹⁷⁵ However, like the issue of letting society and the corporation figure it out, transaction costs in dealing with large corporations are too high for so many small content creators on YouTube.¹⁷⁶ These transactions costs include negotiations, contract disputes, transportation, fees for the actual license, and lawyer's fees may simply be too much for the chance, not even the guarantee, of a license to use a game for one video.¹⁷⁷ If content creators were to be held under a license scheme for Lets Plays, there would be an extensive influx of licensing requests, given how expansive YouTube truly is as a service.¹⁷⁸ Further, licensing is still completely up to the developers and publishers of video games, and still may not allow content creators to upload videos they intend to upload.¹⁷⁹ In practice, a licensing scheme may actually curtail innovation rather than foster it, as many companies do not welcome at the opportunity to allow content creators to upload LPs, with only a few developers currently embrace this form of media.¹⁸⁰ Based on the earlier discussion, where LPs may be viewed as Fair Use, licensing may actual curtail rights of content creators under 17 U.S.C. § 107 as transformative works.¹⁸¹ The additional commentary on top of the existing game play adds “new expression” to the original content, making it no longer about the copyrighted game itself but about what is being said, which could be completely unrelated to the game.¹⁸²

While licensing may make parties feel more secure in what they are doing, it may also create a grey area, as corporations still hold the power to

173. Kevin M. Lemley, *The Innovative Medium Defense: A Doctrine to Promote the Multiple Goals of Copyright in the Wake of Advancing Digital Technologies*, 110 PENN ST. L. REV. 111, 129–130 (2005).

174. See Taylor, *supra* note 7, at 269.

175. See *id.* (see discussion in *infra* note 171).

176. Lemley, *supra* note 174.

177. *Id.*

178. See Henslee, *supra* note 19, at 622 (“[I]n order to watch all the video uploaded in a single day one would have to watch YouTube twenty-four hours a day, seven days a week for four years.”) (emphasis added).

179. See Taylor, *supra* note 7, at 269.

180. *Blizzard Video Policy*, *supra* note 122; 2K David, *supra* note 122; *Valve Video Policy*, *supra* note 122.

181. 17 U.S.C. § 107(1) (2012).

182. See *Campbell*, 510 U.S. at 578–79; Taylor, *supra* note 7, at 260.

determine if your content falls under its licensing policy.¹⁸³ Creating a licensing scheme does not solve this problem, but rather shifts the power to determine if infringement has occurred from the courts to the corporations.¹⁸⁴ The best solution for this issue would need to be sweeping, so that the grey area is removed as much as possible and the corporations and creators are placed on an equal playing field.

C. Congressional Action

Though it may seem impossible in the current political circumstance, Congress has the greatest power to decide the current conflict with video games on the Internet.¹⁸⁵ One of the ways Congress can help is by amending the DMCA, namely the Online Copyright Infringement Liability Limitation Act, so that the burden falls on the copyright owner to prove a prima facie case that the work is a copyright infringement and does not fall under the Fair Use doctrine.¹⁸⁶ I propose that once there is a claim of infringement on content, the Internet Service Provider (ISP) must be put on notice and obtain knowledge of the potential copyright infringement, and *at that point*, the ISP must investigate as to whether there is infringement.¹⁸⁷ The ISP should not take down the alleged infringement and curtail a creator's creativity and product.¹⁸⁸

The "safe harbor" provision has allowed ISPs to become too strict on the material posted by individuals on their websites, where take down notices tip heavily in favor of copyright owners.¹⁸⁹ If ISPs are truly safe under the DMCA and CDA, and carry with them strong protections by law, then it should be the ISP's burden to show that copyright owner's infringement claims are not constricting valid fair use.¹⁹⁰ If they fail on this duty, at that point, it may be said that they had knowledge of the infringement and materially allowed the material to be displayed. If Congress were to act in this manner, they may be able to place both creators and corporations on an equal footing, allowing them to further their works while also working together.

Unfortunately, Congress may have its hands slightly tied if it were to try and change copyright law.¹⁹¹ The legislative history when Congress passed the CDA stated that: "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation."¹⁹² When it comes to civil liability for publishers, government regulation may not be acceptable since oversight on behalf of the government

183. Taylor, *supra* note 7, at 269.

184. *Id.*

185. § 106.

186. See Henslee, *supra* note 19, at 628.

187. § 512(c)(1)–(3).

188. § 512.

189. See Henslee, *supra* note 19, at 628, 631.

190. § 512(c)(3)(A)(iii).

191. 47 U.S.C. § 230(a)(4) (2012).

192. *Id.*

for civil liability may be off limits under §230.¹⁹³ However, since copyright enforcement is under federal law, there may be a way to balance infringement claims through balancing legal burdens and liabilities.

D. Amend Liability

The best and most efficient way to solve the current issue of LPs possibly infringing established copyrights, while protecting the future innovation of the Internet, is for courts or Congress to require a higher legal standard under the DMCA §512(c). The knowledge requirement under §512(c)(1)(A) is held too strictly where many OSPs are being held to not possess “knowledge” even as they know in a general sense that there could be infringement somewhere, since courts require *specific* knowledge, not generalized.¹⁹⁴ This is exemplified by the Court’s decision in *Viacom*. Congress did not enact the DMCA to indemnify any third party service provider, but to “leave current law in its evolving state and, instead, to create a series of ‘safe harbors,’ for certain *common* activities of service providers.”¹⁹⁵ Congress intended the DMCA to act as a step to fight infringement, not a leap toward massive indemnification.¹⁹⁶ Through court decisions, such as *Viacom*, the additional protections have created a de facto blank check for too many OSPs.¹⁹⁷

Most importantly, however, is the issue of the burden for Notice and Take Down provisions. As mentioned earlier, takedown notices need to meet the absolute minimum requirements.¹⁹⁸ However, the clause at issue is the “good faith *belief*” clause.¹⁹⁹ If YouTube continues to use Content ID services, and the burden of policing stays with the copyright owners, then takedown notices should require more than a belief, but some specific facts to prove a *prima facie* case.²⁰⁰ While 17 U.S.C. § 106 does thoroughly protect the rights of copyright owners, it should not curtail the right to free speech and Fair Use at the expense of content creators. With a higher legal standard than good faith belief and a more robust knowledge standard for a takedown notice, the rights and protections of copyright owners, content creators, and OSPs may reach a balance.

When enacting the DMCA, Congress noted that “[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.”²⁰¹ With such policy in mind, the legal standard must be changed to promote the Internet to flourish further since

193. *Id.*
 194. 17 U.S.C. § 512 (c)(1)(A).
 195. S. REP. NO. 105–190, at 8 (1998) (emphasis added).
 196. *Id.*
 197. *See Viacom Int’l*, 940 F. Supp. 2d 110.
 198. § 512(c)(3)(A)(v).
 199. *Id.* (emphasis added).
 200. *See Henslee, supra* note 19, at 628.
 201. S. REP. NO. 105–190, at 8 (1998).

government oversight will be used.

VI. CONCLUSION

There are many legal facets in the area of Internet law. When copyright infringement is added, there is a large conglomeration of rather confusing and ill-equipped laws to address the innovation of the 21st century.²⁰² However, the situation is not hopeless. Thankfully, since many of the laws are vague, there is grey area within the law to allow for expansion to new types of media.²⁰³ Within this grey area, Congress should act to meet the requirements of modern society, nurturing the future innovation and generativity of the Internet, all without upending the establishment of copyright law in the United States.

202. See Henslee, *supra* note 19, at 616–18, 623–26; *see also* Taylor, *supra* note 7, at 252.

203. *See generally* ZITTRAIN, *supra* note 8, at 54–57.