



COOPERATIVE PLAY: ANTICIPATING THE PROBLEM OF COPYRIGHT INFRINGEMENT IN THE NEW BUSINESS OF LIVE VIDEO GAME WEBCASTS

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I. INTRODUCTION

On August 25, 2014, Amazon bought Twitch.tv for approximately \$1.1 billion, including \$970 million in cash, and the remainder in Amazon stock.¹ What type of venture commands this type of price?

Twitch is a website that webcasts user-generated gaming content.² Game players can host their own channel on Twitch, which webcasts video of their gaming.³ Other Twitch users can then watch those channels and interact with the player and others watching via a dedicated chat room.⁴ While a stream on Twitch may consist solely of a game being played, this is not usually the case, especially for more prominent Streamers.

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¹ Nick Wingfield, *What's Twitch? Gamers Know, and Amazon Spent \$1 Billion on It*, N.Y. TIMES, Aug. 26, 2014, at A1.

² *Id.*

³ Mike Isaac, *Speed and Spectators Create a Nexus for Video Game Players*, N.Y. TIMES, Aug. 27, 2014, at B1

⁴ *Id.*

“Twitch viewers typically see the screen of a [web]caster, featuring the game being played, along with a video feed of the player’s face and a chat window so they can communicate with the player and others watching the action.”⁵ Peak viewership on Twitch can surpass primetime viewership of cable channels like MTV, MSNBC, E!, and CNN, with an audience of over 773,000.⁶ Twitch boasts 1.5 million broadcasters, and its 100 million viewers per month spend an average of 106 minutes watching streamed content on the network per person per day.⁷ It is among the fifteen most-trafficked websites around the world.⁸ As of August 27, 2015, web analytics service Alexa.com estimates that Twitch is the 139th most popular website in the world and the 76th most popular in the United States.⁹

Twitch, and competing video game-centric live streaming sites,¹⁰ represent the face of a new global entertainment industry.¹¹ It consists of Streamers, those who webcast

⁵ Wingfield, *supra* note 1.

⁶ Gregor Aisch & Tom Giratikanon, *Charting the Rise of Twitch*, N.Y. TIMES (Aug. 27, 2014), <http://www.nytimes.com/interactive/2014/08/26/technology/charting-the-rise-of-twitch.html>.

⁷ Chris Morris, *YouTube Gaming Launches to Take On Twitch*, CNBC (Aug. 26, 2015, 11:42 AM), <http://www.cnn.com/2015/08/26/youtube-gaming-launches-to-take-on-twitch.html>.

⁸ Wingfield, *supra* note 1.

⁹ *Twitch.tv Site Overview*, ALEXA, <http://www.alexa.com/siteinfo/twitch.tv> (last visited Sept. 26, 2015). The global popularity rank is calculated by “using a combination of average daily visitors to this site and pageviews on this site over the past 3 months. The site with the highest combination of visitors and pageviews is ranked #1.” *Id.* The site’s United States popularity is similarly “calculated using a combination of average daily visitors to this site and pageviews on this site from users from [the United States] over the past month.” *Id.*

¹⁰ Alternatives include other gaming-focused webcasting sites such as Hitbox.tv or GamingLive.tv, or more general live-streaming services such as UStream. Samuel Gibbs, *Life Beyond Amazon: Live-Streaming Twitch Alternatives*, THE GUARDIAN (Aug. 26, 2014), <http://www.theguardian.com/technology/2014/aug/26/life-beyond-amazon-live-streaming-twitch-alternatives>.

¹¹ The popular Chinese streaming site YY.com also has a significant number of video game Streamers and Viewers, in addition to other live streaming programming such as small concerts. *Planet Money Episode 588: The Technology Tango*, NAT’L PUB. RADIO (Dec. 10, 2014, 4:05 PM), <http://www.npr.org/blogs/money/2014/12/10/369664052/episode-588-the-technology-tango> (“On the site YY, you can scroll through hundreds and hundreds of different video games being played . . . with hundreds and hundreds of people watching the video games. YY has something like 105 million users.”). Additionally, “Wang Sicong, the playboy son of China’s richest man, announced . . . that he’s launching Panda TV, a China-based streaming . . . platform that will compete directly with Twitch.” Adam Mitner, *Who Lost China?*

their gameplay, along with entertaining or informative commentary, and the webcasting platform, like Twitch, that generates revenue from advertising and subscriptions and shares it with the Streamer.¹² Notably absent from the equation are the Copyright Owners, usually the game's developers, who own the copyrights for the games that are played by the Streamer. The exploitation of the Copyright Owners' copyright without their permission creates a tremendous likelihood of litigation. With the influx of money into this new industry,¹³ there are sure to be disputes as to who is entitled to what part or percentage of the revenue, increasing the likelihood of litigation. So, what can be done to allow this burgeoning media industry to grow while ensuring financial fairness?

This note argues that the most effective solution to this problem is neither to change copyright to allow Streamers to use copyrighted material without permission, nor for Copyright Owners to attempt to enforce their rights, but for all parties to come together and contract for a license of rights and distribution of revenue. Part II of this note will describe how this new live video game webcasting industry works, the players involved, and their respective interests. Part III will explore what liability exists for videogame webcasting sites like Twitch and their Streamers. Part IV will discuss the shortcomings of changing copyright law, the shortcomings of Copyright Owners attempting to enforce their rights, and how licensing their copyrights is the best way for Copyright Owners to be sure they get their fair share of this new revenue stream while allowing the industry to grow.

II. THE NEW VIDEO GAME WEBCASTING INDUSTRY

Twitch was not the first to exploit the marriage of webcasting video games and an on-screen personality. The most popular channel on YouTube is Felix Kjellberg, known by the handle PewDiePie.¹⁴ Kjellberg is so popular that he has appeared on a television

Amazon, BLOOMBERGVIEW (Sep. 10, 2015, 10:32 AM), <http://www.bloombergview.com/articles/2015-09-10/amazon-struggles-with-china-market-a-case-study>.

¹² *Twitch Partner Program*, TWITCH, <http://www.twitch.tv/p/partners> (last visited Sept. 26, 2015).

¹³ Aside from the billion-dollar sale to Amazon, Twitch CEO and co-founder Emmett Shear claims that some Streamers earn six-figures a year. CBS This Morning, *Pay for Play: Twitch Turns Gaming Into Spectator Sport*, CBS NEWS (Oct. 10, 2014, 8:42 AM), <http://www.cbsnews.com/videos/pay-for-play-twitch-turns-gaming-into-spectator-sport/>.

¹⁴ Christopher Zoia, *This Guy Makes Millions Playing Video Games on YouTube*, THE ATLANTIC (Mar. 14, 2014), <http://www.theatlantic.com/business/archive/2014/03/this-guy-makes-millions-playing-video-games-on-youtube/284402/>.

show satirizing Streamers.¹⁵ Making “Let’s Play” videos, where he reviews and comments on games for his over thirty-seven million subscribers, Kjellberg made \$7.4 million dollars in 2014.¹⁶ With revenue like that, it should come as no surprise that individuals making “Let’s Play” videos have faced legal action that deprived them of that revenue.¹⁷ Many of these creators claim a fair use defense,¹⁸ but it cannot be denied that they earn their money utilizing others’ intellectual property.¹⁹

There are several distinct groups of participants in this industry, each with their own interests and legal issues: Twitch,²⁰ Streamers, Partners, Performers, Advertisers, Viewers, and Subscribers.²¹ Twitch earns advertising revenue for creating the platform that connects the Streamers, who webcast the gameplay, and Viewers. The Streamer can earn a share of ad revenue from commercials aired on his channel by becoming a

¹⁵ *South Park: #REHASH* (Comedy Central television broadcast Dec. 3, 2014). In this particular episode of the raunchy satire, Kyle’s little brother Ike would rather watch a fictional version of Kjellberg play video games on YouTube than actually play games with Kyle. Upon learning that one can get rich from commenting on video games online, the scheming Cartman begins to webcast himself online commenting on the South Park gang’s activities. In a loosely related, impossible-to-summarize storyline, a music executive muses, “Today, commentary is the content.” *Id.*

¹⁶ Michael Thomsen, *PewDiePie Doesn’t Make Anywhere Close To What He Should Be Making*, FORBES (July 11, 2015, 1:32 PM), <http://www.forbes.com/sites/michaelthomsen/2015/07/11/pewdiepie-doesnt-make-anywhere-close-to-what-he-should-be-making/>.

¹⁷ Zoia, *supra* note 14. “Also typical of most Let’s Players, Varrone was on the receiving end of a copyright claim. Over three years, Nintendo filed Content ID claims against 15 of his videos, and those videos’ ad revenues now go to the company instead of him.” *Id.*

¹⁸ The Copyright Act of 1976 provides that “the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research, is not an infringement of copyright.” 17 U.S.C. § 107 (2010). See discussion *infra* Section III. In this note, I will be discussing The Copyright Act of 1976 and all major amendments thereto, hereafter referred to as the Copyright Act, found in Title 17 of the United States Code.

¹⁹ Zoia, *supra* note 14. “Players often face such threats of legal action. Although their videos help promote companies like Nintendo, and Let’s Players argue that they’re protected by fair use, the gaming industry isn’t thrilled about Let’s Players siphoning ad dollars from its intellectual property.” *Id.*

²⁰ For the purposes of this note, Twitch will be used not only to refer to itself, but possible video game-centric webcasting competitors.

²¹ Throughout this note, certain non-proper nouns will be capitalized, such as Copyright Owner, Streamer, Partner, Performer, Advertiser, Viewer, and Subscriber. This is meant to denote that the people or organizations I’m referring to are in a class of people that interact in this industry and whose roles are further explained at the beginning of Section II of this note.

Twitch Partner.²² As a Partner, the Streamer and Twitch also share revenue earned from “Subscribers,” Viewers who pay a fee to get access to special video archives, high definition streams, and chat features.²³ Many Streamers also have links on their channel that allow Viewers to give money directly to the Streamer.²⁴ While the Streamer is usually the same person playing the games, it is possible there are other people participating in the webcast alongside the Streamer, playing the game, adding commentary, or otherwise contributing to the experience. These additional participants could be classified as Performers. There is also the possibility that the Streamer is a company who has hired Performers to play the game or appear on the stream on their behalf, much like traditional on-air television or radio talent.

Some of the most popular games streamed on Twitch,²⁵ such as World of Warcraft, Counter Strike, and Minecraft, are streamed with the blessing of the Copyright Owner,²⁶

²² Twitch Partner Program, *supra* note 12.

²³ *Id.*

²⁴ Cody Conners, *Who Is Twitch’s Deep-Pocketed Mystery Donor?*, DAILY DOT (July 2, 2014, 1:53 PM), <http://www.dailydot.com/esports/twitch-amhai-donor-warcraft/>.

²⁵ In a list ranking Twitch’s most popular games for January of 2015, ranked by the total number of minutes the games were watched, World of Warcraft was the sixth most popular game, Counter Strike: Global Offensive was the third most popular game, and Minecraft was the seventh most popular game. Jason Maestas, *Top Twitch Games for January 2015*, TWITCH: THE OFFICIAL BLOG (Feb. 3, 2015), <http://blog.twitch.tv/2015/02/top-twitch-games-for-january-2015/>.

²⁶ Blizzard, who owns the copyright to World of Warcraft, has this video policy:

Blizzard Entertainment strongly supports the efforts of its community members who produce community videos (referred to hereafter as a “Production”) using video images, footage, music, sounds, speech, or other assets from Blizzard’s copyrighted products (“Blizzard Content”), subject to a few conditions. . . . First and foremost, note that except as specifically provided herein, Blizzard Entertainment requires that the use of Blizzard Content must be limited to non-commercial purposes. . . . Neither you nor the operator of any website where your Production(s) may be viewed can force a viewer to pay a “fee” to be able to view your Production(s). . . . We understand that many third party websites have a “free” method to see their video content, as well as a ‘premium’ membership service that allows for speedier viewing. For clarity, please note that as long as the website that hosts your Production provides a free method to allow viewers to see the Production, Blizzard Entertainment will not object to your Production being hosted on that site, regardless of the site’s “for pay” premium service plans.

Blizzard Video Policy, BLIZZARD ENTM’T, <http://us.blizzard.com/en-us/company/legal/videopolicy.html> (last visited Sept. 26, 2015). Valve, owner of Counter Strike, and Mojang, owner of Minecraft, have similar video

usually noted in their Terms of Service. However, each of the Copyright Owner's Terms of Service seem to draw a similar line: they allow users to monetize videos as long as they are available to the public without a fee.²⁷ In theory, this system works fine with Twitch's current model. For whichever reason one may speculate a Copyright Owner would allow this, that the videos are free advertisements for their games, or that these allowances keep the Copyright Owners in the good graces of their fans, or that they do not see the videos as harmful to business, the fact remains that their intellectual property is being exploited by someone else. After all, unless there is a written agreement, there is no transfer of any copyrights,²⁸ and the service provider may be able to unilaterally change its terms of service at any time.²⁹ This means that these Copyright Owners, who are allowing Twitch and its Streamers to use their intellectual property, may be able to take that right away at any time and request that the stream be taken down.³⁰ In that situation, Twitch could be left without content and the professional Streamer could be left without a livelihood. This is not the ideal situation for a growing business. If a Streamer is investing both time in building a brand and community of fans, and money in buying equipment to make quality webcast, something needs to change. Similarly, Copyright Owners need a way to earn revenue from the exploitation of their copyrighted material, both as a matter of principle and as a replacement revenue stream for any sales lost by those who replace their experience playing a game with watching someone else play it.

policies on their websites. See *Legal Info: Valve Video Policy*, VALVE, <http://www.valvesoftware.com/videopolicy.html> (last visited Sept. 26, 2015); *Minecraft End User License Agreement*, MOJANG, https://account.mojang.com/documents/minecraft_eula (last updated Dec. 11, 2013, 3:22 PM).

²⁷ *Id.*

²⁸ 17 U.S.C. § 204(a) (2011) ("A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent."). *But see* *Falcon Enters. v. Publisher's Serv.*, 438 F. App'x 579, 580 (9th Cir. 2011) ("[A] nonexclusive license is not considered a transfer of ownership under § 101 and may be agreed to orally or implied through conduct.").

²⁹ This is a complicated and evolving area of the law, but not one I would imagine Copyright Owners would be shy about utilizing if so inclined. See Venkat Balasubramani, *Court Blesses Instagram's Right to Unilaterally Amend Its User Agreement—Rodriguez v. Instagram*, TECH. & MKTG. L. BLOG (Mar. 6, 2014), <http://blog.ericgoldman.org/archives/2014/03/court-blesses-instagrams-right-to-unilaterally-amend-its-user-agreement-rodriguez-v-instagram.htm>.

³⁰ This would be done via a DMCA Takedown Notice. See discussion *infra* Section III.

III. INFRINGEMENT FREE-FOR-ALL: STREAMERS' INFRINGEMENT AND DERIVATIVE RIGHTS, THE FAIR USE DEFENSE AGAINST INFRINGEMENT, AND THE DMCA SAFE HARBOR

Copyright is a complicated area of law, and it is important to understand what rights Copyright Owners have and how Streamers infringe on those rights by webcasting on Twitch. Streamers and others may even create derivative rights in new copyrightable works created by webcasting and archiving the video while still being liable for infringement.³¹ However, Twitch and other online service providers may be protected by the safe harbor provision of the Digital Millennium Copyright Act.³² Streamers' only hope to avoid liability would be to claim a fair use defense.³³

Since video games have been held to be copyrightable material, both in their expressions in the form of literary material as code³⁴ and also as audiovisual work when the games are being played on a screen,³⁵ their creators have these exclusive rights:

(1) to reproduce the copyrighted work in copies . . . ; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies . . . 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 . . . audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary . . . works . . . 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.³⁶

³¹ See 17 U.S.C. § 106(2) (2011).

³² See 17 U.S.C. § 512 (2011).

³³ See 17 U.S.C. § 107 (2010).

³⁴ *Apple Comput., Inc. v. Franklin Comput. Corp.*, 714 F.2d 1240, 1249 (3d Cir. 1983) (“[A] computer program, whether in object code or source code, is a ‘literary work’ and is protected from unauthorized copying, whether from its object or source code version.”).

³⁵ “In 1986 we concluded, in agreement with other courts of appeals, that video games are copyrightable as audiovisual works” *Red Baron-Franklin Park, Inc. v. Taito Corp.*, 883 F.2d 275, 278 (4th Cir. 1989).

³⁶ 17 U.S.C. § 106(1)-(6).

A. PUBLIC PERFORMANCE

Under the Copyright Act, the webcasts by Streamers on Twitch constitute a public performance: “To ‘perform’ a work means to . . . in the case of . . . [an] audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.”³⁷ “To perform or display a work ‘publicly’ means . . . to transmit or otherwise communicate a performance . . . of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.”³⁸ Streamers are webcasting video games, held to be copyrightable audiovisual works, to the public through the Internet, which obviously uses a device or process.³⁹ Therefore, unless the Streamer has a license from the Copyright Owner, the essential core of this business, webcasting copyrighted content, is infringement.

B. DERIVATIVE WORK

Despite the Streamer’s likely infringement, they do create new rights in the new work that is created when they webcast. Twitch allows Streamers the option of saving the public performances in videos and archiving them for Viewers to watch at a later time.⁴⁰ While a live performance itself is not copyrightable if it is not fixed in a medium of

³⁷ 17 U.S.C. § 101 (2011). While the images in a video game are not always in an identical sequence like a movie, this issue has been addressed:

True, the exact order of images will vary somewhat each time a video game is played depending on the skill of the player, but there will always be a *sequence* of images. As the House Report accompanying the Copyright Act states, although “[t]he showing of portions” of an audiovisual work “must . . . be sequential to constitute a ‘performance’ rather than a ‘display’ . . . no particular order need be maintained.”

Red Baron-Franklin Park, 883 F.2d at 279 (alteration in original).

³⁸ 17 U.S.C. § 101.

³⁹ The court went through the same analysis in *Red Baron-Franklin Park*, holding that an arcade publicly performed the game Double Dragon. 883 F.2d at 278-79. That case, however, did use a different definition of “public” in the Copyright Act: “(1) to perform . . . it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.” *Id.* at 278 (quoting 17 U.S.C. § 101).

⁴⁰ *Videos On Demand*, TWITCH, <http://help.twitch.tv/customer/portal/articles/1575302-videos-on-demand> (last updated Mar. 30, 2015, 4:19 AM).

expression,⁴¹ “work consisting of sounds, images, or both, that are being transmitted, is ‘fixed’ for purposes of this title if a fixation of the work is being made simultaneously with its transmission.”⁴² Therefore, since the stream would need to be simultaneously “fixed,” in this case as archived video saved on Twitch’s servers, the Streamer has a copyright interest.⁴³ Any archived videos of these public performances would then be their own derivative works, as they are works “based upon one or more preexisting works.”⁴⁴

With the addition of a video feed of the Streamer, audio commentary by the Streamer, and graphics placed on the screen by the Streamer, each new element of the archived video becomes protectable as part of the derivative work. “However, in order to qualify for a separate copyright as a derivative . . . work, the additional matter injected in a prior work, or the manner of . . . otherwise transforming a prior work, must constitute more than a minimal contribution.”⁴⁵ What minimum contribution is necessary for an archived webcast to qualify for its own copyright is unknown, but courts have found that bar to be fairly low, as merely “panning and scanning” a public domain movie,⁴⁶ or arranging a compilation of film clips,⁴⁷ have qualified. In *Feist*

⁴¹ There is no copyright protection for a work unless it is “fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. § 102(a) (2011).

⁴² 17 U.S.C. § 101.

⁴³ “Fixed” is defined as being “in a tangible medium of expression when its embodiment in a copy . . . by or under the authority of the author, is sufficiently permanent or stable to permit it to be . . . reproduced . . . for a period of more than transitory duration.” *Id.* Since the stream itself would likely be considered “transitory,” it would not be sufficient for any copyrights to attach to the work.

⁴⁴ A “derivative work” is defined as:

[A] work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work.”

Id.

⁴⁵ MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 3.03[A] (Matthew Bender, Rev. Ed. 2015). *See also* *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363 (1991) (“As a constitutional matter, copyright protects only those constituent elements of a work that possess more than a de minimis quantum of creativity.”).

⁴⁶ *Maljack Prods. v. UAV Corp.*, 964 F. Supp. 1416, 1427-28 (C.D. Cal. 1997) (finding that resizing a film to fit a different sized screen was sufficiently creative to warrant copyright protection).

Publications, Inc. v. Rural Telephone Service Co., the Supreme Court found, “The vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be.”⁴⁸ So, what is the low bar for Streamers on Twitch? Will the webcast of a game with a watermark identifying the Streamer’s channel suffice? What if there is additional text on screen? Or, does the Streamer need to be audible and commenting on the video? With the bar as low as it is, I would suggest a webcast of mere gameplay would suffice.

The recorded and archived video should not be confused with the Streamer’s manipulation of the game. In *Midway Manufacturing Co. v. Artic International, Inc.*, plaintiff Midway sued defendant Artic for copyright infringement.⁴⁹ Artic was selling two circuit boards, one which could be inserted into Midway’s “Galaxian” arcade machine to speed up gameplay, and another which contained sounds and images almost identical to Midway’s “Pac-Man” games.⁵⁰ The court held that the “creative effort” that goes into playing a game does not make it copyrightable:

In the *WGN* case, we held that the creative effort required to do that did not make the sequence of images appearing on a viewer’s television screen the work of the viewer and not of the television station that transmitted the images. Playing a video game is more like changing channels on a television than it is like writing a novel or painting a picture. The player of a video game does not have control over the sequence of images that appears on the video game screen. He cannot create any sequence he wants The most he can do is choose one of the limited number of sequences the game allows him to choose. He is unlike a writer or a painter because the video game in effect writes the sentences and paints the painting for him; he merely chooses one of the sentences stored in its memory, one of the paintings stored in its collection.⁵¹

⁴⁷ See generally *Roy Exp. Co. Establishment of Vaduz v. Columbia Broad. Sys., Inc.*, 503 F. Supp. 1137 (S.D.N.Y. 1980).

⁴⁸ 499 U.S. at 345.

⁴⁹ 704 F.2d 1009, 1011 (7th Cir. 1983).

⁵⁰ *Id.* at 1010-11.

⁵¹ *Id.* at 1011-12 (discussing *WGN Continental Broadcasting Co. v. United Video, Inc.*, 693 F.2d 622 (7th Cir. 1982)). “The question is whether the creative effort in playing a video game is enough like writing or painting to make each performance of a video game the work of the player and not the game’s inventor. We think it is not.” *Id.* at 1011.

We can accept the argument that video games of the 1980s were simple: the player had little freedom to move objects on the screen, let alone express an idea within the confines of the game. Maybe characters could move up and down, left and right. Maybe the player could shoot a pixel in a single direction at another group of pixels. However, at what point in the evolution of video games can a game itself act as typewriter or paintbrush, allowing a player to both conceive of an idea and express it in a unique way? At what point does that expression become fixed, and therefore copyrightable? As will be discussed more fully below, there is a point where gameplay becomes copyrightable user-generated content.

1. Joint Authorship

Sometimes a Streamer is not alone in their venture and has two or more Performers on a channel at any particular time.⁵² This is important for two reasons: first, if a Performer, by appearing in the webcast, or Viewer, by directing the Streamer, can be found to be a co-author of the new derivative work, then they are liable for copyright infringement. Secondly, if they are a co-author of a derivative work, they are entitled to profit from the exploitation of that work.

“If his work is written ‘with the intention that [his] contribution . . . be merged into inseparable or interdependent parts of a unitary whole,’ then the merger of his contribution with that of others creates a joint work.”⁵³ Coauthors of a copyrightable work can contract with each other, stating they are or will be co-owners of the joint work, but Streamers who are novice businesspeople may not have the foresight to decide whether or not theirs is or will be a joint work.⁵⁴ “The language of the statute . . . provides that for a work to be a ‘joint work,’ there must be (1) a copyrightable work, (2) two or more ‘authors,’ and (3) a mutual intent of the authors to merge their work.”⁵⁵

With regards to the intent of authors to merge their work, courts have stated, “In the absence of a contract, the inquiry must of necessity focus on the facts.”⁵⁶ In

⁵² One episode of CBS This Morning focused on the aptly named “Father Son Gaming” channel, hosted by father and son Bill and Jason Munkel, where they stream their play of first person shooting games. CBS This Morning, *supra* note 13.

⁵³ NIMMER & NIMMER, *supra* note 45, § 6.05 (quoting 17 U.S.C. § 101 (2010)).

⁵⁴ A “joint work” is defined as “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.” 17 U.S.C. § 101.

⁵⁵ Brown v. Flowers, 196 F. App’x 178, 186 (4th Cir. 2006) (citing 17 U.S.C. § 101).

⁵⁶ Aalmuhammed v. Lee, 202 F.3d 1227, 1235 (9th Cir. 2000).

Aalmuhammed v. Lee, the court laid out a few factors to be considered in the absence of a contract when considering joint authorship.⁵⁷ “First, an author ‘superintend[s]’ the work by exercising control. . . . Control in many cases will be the most important factor.”⁵⁸ In the case of Twitch, this would also likely be the most important factor. There may be two or three Performers on screen, but does one Performer have control over the webcast while the other only provides commentary or interacts with Viewers? How much does that control matter? In *Aalmuhammed*, the court also asks whether the “putative coauthors make objective manifestations of a shared intent to be coauthors.”⁵⁹ Of course, “the best objective manifestation of a shared intent . . . is a contract saying that the parties intend to be or not to be co-authors.”⁶⁰ Absent a contract, do they call themselves collaborators? Are they represented as an integral part of the channel? The last factor in *Aalmuhammed* is whether “the audience appeal of the work turns on both contributions and ‘the share of each in its success cannot be appraised.’”⁶¹

The interactivity of the Streamers and their audience also raises some questions as to the possibility that the derivative may in fact be a joint work. For example, the fact that a Streamer may sometimes take direction from his audience may count as a contribution to the work on the audience’s part. However, it has been held that “[t]o be an author, one must supply more than mere direction or ideas The supplier of an idea is no more an ‘author’ of a program than is the supplier of the disk on which the program is stored.”⁶² On Twitch, there is a real-time interaction between the Streamer and his audience. What if there is a sufficiently long conversation between Streamer and audience member? Are they then co-authors of the work?

⁵⁷ *Id.* at 1234.

⁵⁸ *Id.* (citations omitted). In the context of this case, the joint authorship in dispute was over a film. The court expanded on this factor by describing control as being in “a person ‘who has actually formed the picture by putting the persons in position, and arranging the place where the people are to be—the man who is the effective cause of that,’ or ‘the inventive or master mind’ who ‘creates, or gives effect to the idea.’” *Id.* (citations omitted). Here, the court found that a consultant may have contributed to a film, but the directed had control and was the sole author of the film. *Id.* at 1236.

⁵⁹ *Id.* at 1234.

⁶⁰ *Aalmuhammed*, 202 F.3d at 1235.

⁶¹ *Id.* at 1234.

⁶² *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1087 (9th Cir. 1989) (citation omitted).

2. Work For Hire

Performers may also be employees of an organization or be specifically commissioned to stream, and any copyrightable material they create may be property of their employer under the work for hire doctrine.⁶³ In the Copyright Act, a “work for hire” is defined as either “(1) a work prepared by an employee within the scope of his or her employment” or “(2) a work specially ordered or commissioned for use . . . as a part of a motion picture or other audiovisual work . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.”⁶⁴

The leading case on work for hire is *Community for Creative Non-Violence v. Reid*.⁶⁵ In this case, the Community for Creative Non-Violence hired Reid to make a sculpture.⁶⁶ The court held:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. . . . No one of these factors is determinative.⁶⁷

⁶³ “In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author . . . and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.” 17 U.S.C. § 201(b) (2011).

⁶⁴ 17 U.S.C. § 101 (2010).

⁶⁵ 490 U.S. 730 (1989).

⁶⁶ *Id.* at 732-34.

⁶⁷ *Id.* at 751-52 (citations omitted). The Court found that while the “CCNV members directed enough of Reid’s work to ensure that he produced a sculpture that met their specifications,” most of the other factors leaned towards Reid being an independent contractor. *Id.* at 752. The Court found CCNV was not the author of the sculpture, but may be a joint author if the lower court found so on remand. *Id.* at 753.

As lengthy as this list seems, it should be noted that the factors listed are “among the other factors,” and therefore this list is not exhaustive.⁶⁸ Without a specific example, there are numerous ways this test could theoretically be applied, but it will nevertheless remain important to Streamers or any corporation who may wish to hire a Streamer. If a party agrees in writing that it will be a work for hire, it should be fairly straightforward that whoever made the contract with the Streamer would own any copyrights in the derivative. In the situation that no writing exists, the above test would need to be applied. Again, determining whether or not the person on screen is the author of webcast is important both for the right to exploit the derivative and for infringement liability.

3. User Generated Content

In the years since *Midway Manufacturing Co.* was decided, video games have gotten significantly more complicated, and many games encourage players to create their own content within the game. In 1998, the court found that user-created levels likely infringe on the copyright’s underlying content.⁶⁹ In *Micro Star v. FormGen Inc.*, Micro Star sought a declaratory judgment that it did not infringe on the copyright of FormGen’s “cool”⁷⁰ first person shooter Duke Nukem 3D.⁷¹ Aside from twenty-nine levels of shooting through hordes of evil aliens, “[t]he game also include[d] a ‘Build Editor,’ a utility that enables players to create their own levels. With FormGen’s encouragement, players frequently post[ed] levels they have created on the Internet where others can download them.”⁷² Micro Star then packaged 300 of these levels on a CD called Nuke It, so FormGen sought a preliminary injunction on packaging and distributing the Nuke It.⁷³

For FormGen to show the likelihood of success on the merits of its claim, it was required to show Micro Star copied its copyrighted expressions.⁷⁴ “In order to

⁶⁸ *Id.* at 751.

⁶⁹ *Micro Star v. FormGen Inc.*, 154 F.3d 1107, 1114 (9th Cir. 1998).

⁷⁰ *Id.* at 1109 (“FormGen Inc. . . . own[s] the rights to Duke Nukem 3D . . . an immensely popular (and very cool) computer game. . . . Players explore a futuristic city infested with evil aliens and other hazards. The goal is to zap them before they zap you, while searching for the hidden passage to the next level.”).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

understand FormGen’s claims, one must first understand the way [Duke Nukem 3D] works. The game consists of three separate components: the game engine, the source art library and the MAP files.”⁷⁵ The game engine is the software program itself.⁷⁶ The source art library is just what it sounds like: a collection of images.⁷⁷ The MAP files act as a sort of schematic, telling the game engine to build the environment with specific images from the source art library at specific locations.⁷⁸

The court said, “To prove infringement, [FormGen] must show that [Duke Nukem 3D’s and Nuke It’s audiovisual displays] are substantially similar in both ideas and expression.”⁷⁹

Similarity of ideas may be shown by comparing the objective details of the works: plot, theme, dialogue, mood, setting, characters, etc. Similarity of expression focuses on the response of the ordinary reasonable person, and considers the total concept and feel of the works. FormGen will doubtless succeed in making these showings since the audiovisual displays generated when the player chooses the [Nuke It] levels come entirely out of [Duke Nukem 3D’s] source art library.⁸⁰

Here, it appears that the court is not so concerned about individual pieces of the game’s art from the source art library, or use of the game’s engine, but the overall display of the game, suggesting that the new levels may supplant any possible sequels FormGen may have planned:

The work that Micro Star infringes is the [Duke Nukem 3D] story itself—a beefy commando type named Duke who wanders around post-Apocalypse Los Angeles, shooting Pig Cops with a gun, lobbing hand grenades, searching for medkits and steroids, using a jetpack to leap over obstacles, blowing up gas tanks, avoiding radioactive slime. A copyright owner holds the right to create sequels, and the stories told in the [Nuke It] MAP files are surely sequels, telling new (though somewhat repetitive) tales of

⁷⁵ *Micro Star*, 154 F.3d at 1110.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 1112 (quoting *Litchfield v. Spielberg*, 736 F.2d 1352, 1356 (9th Cir. 1984)).

⁸⁰ *Id.* (citations omitted).

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Duke's fabulous adventures. A book about Duke Nukem would infringe
for the same reason, even if it contained no pictures.⁸¹

The court did not say conclusively that the levels infringed on FormGen's copyright,⁸² but it did say FormGen had a likelihood of success on the merits.⁸³ However, there is no doubt that the level of sophistication in both video games and video game players has increased between 1998 and the more recent past, and predictably, the level of sophistication of user generated content has increased as well.

a. Second Life Cases

One recurring party in the evolution of copyright and video games is game developer Linden Lab and its massively multiplayer online virtual world known as Second Life.⁸⁴ This may be contributable to the fact that, "[a]s part of its effort to attract a community of creative users, Second Life allows users to economically exploit their creativity (including their copyrights) within Second Life."⁸⁵

In one such Second Life case, *FireSabre Consulting LLC v. Sheehy*, the court considered the concept of fixation with regards to user-generated content.⁸⁶ In *FireSabre*, one user of the massively-multiplayer online game created and registered a copyright for in-game content and later sued a licensee of that content for infringement.⁸⁷

⁸¹ *Micro Star*, 154 F.3d at 1112 (citation omitted).

⁸² *Id.* at 1110 ("According to FormGen, the audiovisual displays generated when [Duke Nukem 3D] is run in conjunction with the [Nuke It] CD MAP files are derivative works that infringe [on its copyright]. Is FormGen right? The answer is not obvious.").

⁸³ *Id.* at 1114 ("Because FormGen will likely succeed at trial in proving that Micro Star has infringed its copyright, we reverse the district court's order denying a preliminary injunction and remand for entry of such an injunction.").

⁸⁴ Massive multiplayer online games "offer [players] the opportunity to interact with thousands of players worldwide in virtual environments that continue to exist whether or not any particular person is playing at the moment." Mark Wallace, *The Game is Virtual. The Profit is Real.*, N.Y. TIMES (May 29, 2005), http://www.nytimes.com/2005/05/29/business/yourmoney/the-game-is-virtual-the-profit-is-real.html?_r=0.

⁸⁵ GREG LASTOWKA, VIRTUAL JUSTICE: THE NEW LAWS OF ONLINE WORLDS 191 (2010).

⁸⁶ No. 11-CV-4719 (CS), 2013 U.S. Dist. LEXIS 139550 (S.D.N.Y. Sept. 26, 2013).

⁸⁷ *Id.* at *9.

“Second Life is an internet-based simulation in which users appear via digital characters called ‘avatars’ and interact with a computer-generated environment.”⁸⁸ Each player starts with a digital “island,” and the plaintiff was hired by the defendant to change the island’s topography and landscaping by “terraforming” the defendant’s island.⁸⁹ The plaintiff alleged copyright infringement when the defendant continued to display a copy of the copyrighted material of the island’s “terraforming in the game.”⁹⁰ The plaintiff made a motion for summary judgment, and the defendant made a cross-motion for summary judgment.⁹¹

The defendant claimed that the “terraforming” could not be copyrighted because it was not fixed. The court rejected that claim, saying:

Here, Plaintiff’s designs existed on Linden’s data servers and were visible within Second Life for some period of time—whether days, weeks, months, or longer—that is clearly of more than “transitory duration.” The work was “sufficiently permanent . . . to permit it to be perceived” by the students who interacted with the Ramapo Islands simulation. The fact that the students were able to alter Plaintiff’s terraforming designs does not remove them from copyright protection in the first instance. In this regard I see no distinction between the terraforming designs and a drawing created on a chalkboard or a sculpture created out of moldable clay. That someone else could come along and, with or without permission, alter the original piece of art does not mean the art was too transitory to be copyrighted in the first place.⁹²

The court found a “genuine dispute[] of material fact exist[ed] as to . . . the existence and extent of infringement.”⁹³ However, beyond the question of fixation, there was no dispute over whether or not the “terraforming” was copyrightable. There was no discussion whether or not it was sufficiently creative enough to be copyrightable, as previously discussed in *Midway Manufacturing Co.* Additionally, even if Linden Lab did not allow their users to retain copyrights in their creations, Second Life has no story

⁸⁸ *Id.* at *2.

⁸⁹ *Id.* at *2-4.

⁹⁰ *Id.* at *9-10.

⁹¹ *Id.* at *1.

⁹² *FireSabre*, 2013 U.S. Dist. LEXIS 139550 at *16 (alteration in original).

⁹³ *Id.* at *35.

of which to speak, as there was with Duke Nukem 3D in *Micro Star*. However, these parameters remain too vague to be useful to protect those who would want assurance that they have rights in their creative work within video games. What if it had been argued that the “terraforming” was not creative enough to warrant copyright protection? If a game has a narrative, would a player’s new creative work be subsumed into infringement of the story, as a replacement for a sequel, as in *Micro Star*? And if these new works were copyrightable, would they be derivative rights of the game’s Copyright Owner, or does the game act more as typewriter or paintbrush, allowing the player to create their own new, independent work? For the purposes of our discussion on Twitch, this distinction is important because, if it is a new, non-derivative work, the Streamer would have every right to publicly perform it as a webcast, and if it is an infringing derivative work, the Streamer would also be infringing by webcasting the work.

C. DMCA SAFE HARBOR

Twitch and other eligible service providers may avoid copyright infringement liability by virtue of the safe harbor provisions in the Digital Millennium Copyright Act, better known as the DMCA.⁹⁴ Within the DMCA are four sections that limit liability for website operators for four different kinds of services:⁹⁵ services that have transitory digital network communications,⁹⁶ services that use system caching,⁹⁷ services that store information residing on systems or networks at direction of users,⁹⁸ and services that refer or link users to an online location containing infringing material or infringing

⁹⁴ This is especially important for commercial ventures. One commentator noted:

Although websites can forego the DMCA safe harbors without violating copyright law, as a practical matter virtually all commercial websites in the U.S. that deal with third-party content attempt to follow and fall within the safe harbors. Indeed, it would be foolish, if not a breach of corporate fiduciary duty, for any such company not to do so.

Edward Lee, *Decoding the DMCA Safe Harbors*, 32 COLUM. J. L. & ARTS 233, 233-34 (2009).

⁹⁵ NIMMER & NIMMER, *supra* note 45, § 12B.02.

⁹⁶ See 17 U.S.C. § 512(a) (2011).

⁹⁷ System caching is “intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider . . . which is used on some networks to increase network performance and to reduce network congestion generally, as well as to reduce congestion and delays to popular sites.” NIMMER & NIMMER, *supra* note 45, § 12B.03 (citations omitted). See also 17 U.S.C. § 512(b).

⁹⁸ See 17 U.S.C. § 512(c).

activity.⁹⁹ For the purposes of Twitch, we'll examine the "transitory digital network communications" provision at 17 U.S.C. § 512(a), which applies to the live webcasts, and the "information residing on systems at behest of users" provision at 17 U.S.C. § 512(c), which applies to the archived videos stored on Twitch.

1. Safe Harbor Eligibility

In order to be eligible for safe harbor protection under the DMCA, a website or service must meet three requirements: first, the party must be a "service provider" as defined under 17 U.S.C. § 512(k)(1)(B).¹⁰⁰ Second, the service provider must show it has adopted and reasonably implemented a "repeat infringer" policy that "provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network."¹⁰¹ Finally, the service provider must accommodate "standard technical measures" that are "used by copyright owners to identify or protect copyrighted works."¹⁰² Would Twitch likely be eligible for protection under the safe harbor provisions? Let us look at each eligibility requirement, one at a time.

a. Service Provider

First, the site must be a "service provider" as described in 17 U.S.C. § 512(k)(1)(B). That statute defines a "service provider" as:

[A] provider of online services or network access, or the operator of facilities therefor, and includes [an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received].¹⁰³

Twitch is a provider of online service that offers the transmission of webcasts, chosen by the Streamer, between the Streamer and Viewers, and Twitch does not modify the

⁹⁹ See *id.* § 512(d).

¹⁰⁰ *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 27 (2d Cir. 2012).

¹⁰¹ *Id.* (quoting 17 U.S.C. § 512(i)(1)(A)).

¹⁰² *Id.* (quoting 17 U.S.C. §§ 512(i)(1)(B), (i)(2)).

¹⁰³ 17 U.S.C. § 512(k)(1)(A)-(B).

content of the material as sent or received. By this standard, Twitch would be considered a “service provider” as defined in the DMCA.

b. Termination Policy

Second, the site must demonstrate that it has adopted and reasonably implemented a policy that provides for the termination, in appropriate circumstances, of subscribers and account holders who are repeat infringers. This requirement comes from 17 U.S.C. § 512(i)(1), which states, in part:

The limitations on liability established by this section shall apply to a service provider only if the service provider—(A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers¹⁰⁴

“To fulfill the requirements of 17 U.S.C. § 512(i), a service provider must (i) adopt a policy that provides for the termination of service access for repeat copyright infringers; (ii) inform users of the service policy; and (iii) implement the policy in a reasonable manner.”¹⁰⁵

Twitch’s website has a page devoted solely to its DMCA takedown guideline.¹⁰⁶ It claims, “It is [Twitch’s] policy to respond to clear notices of alleged copyright infringement that comply with the Digital Millennium Copyright Act. In addition, we will promptly terminate without notice the accounts of those determined by us to be ‘repeat infringers.’”¹⁰⁷ After advising the reader to consult with counsel, the page lists what Twitch requires in order to comply with a takedown notice, what it requires from a counter-notification, and the contact information for Twitch’s designated copyright agent.¹⁰⁸ Again, it seems likely Twitch would meet this requirement.

¹⁰⁴ *Id.* § 512(i)(1), (i)(1)(A).

¹⁰⁵ *Wolk v. Kodak Imaging Network, Inc.*, 840 F. Supp. 2d 724, 744 (S.D.N.Y. 2011).

¹⁰⁶ *Digital Millennium Copyright Act Notification Guidelines*, TWITCH, <http://www.twitch.tv/user/legal?page=dmca-guidelines> (last visited Sept. 26, 2013).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

Finally, a site must prove that it accommodates and does not interfere with standard technical means by which Copyright Owners may identify protected copyright works.¹⁰⁹ This requirement comes from 17 U.S.C. § 512(i)(1)(B) and § 512(i)(2), which defines standard technical measures as:

[T]echnical measures that are used by copyright owners to identify or protect copyrighted works and—(A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process; (B) are available to any person on reasonable and nondiscriminatory terms; and (C) do not impose substantial costs on service providers or substantial burdens on their systems or networks.¹¹⁰

For example, in *Square Ring, Inc. v. Doe*, Square Ring claimed UStream infringed on its copyright by webcasting a live mixed martial arts fight.¹¹¹ When determining if UStream had accommodated and not interfered with standard technical measures, the court found that, Square Ring had “not presented any evidence that [the service provider] sought to conceal, delete, or suppress its ability to identify the . . . Broadcast. . . . Square Ring’s monitoring agent was able to readily identify the channel names and URLs of the three purportedly infringing streams on the day that they were broadcast.”¹¹² Square Ring even alleged that “the Square Ring ‘logo is clearly displayed’ in the webcast.”¹¹³ The court found that these facts satisfied this eligibility condition.¹¹⁴

Based on the above example, it seems that accommodating and non-interference can be accomplished by doing nothing. However, on August 6, 2014, Twitch announced it had partnered with a company called Audible Magic, which would be muting copyrighted audio in its on-demand videos:

¹⁰⁹ 17 U.S.C. § 512(i)(1)(B).

¹¹⁰ *Id.* § 512(i)(2), (i)(2)(A)-(C).

¹¹¹ No. 09-563 (GMS), 2015 U.S. Dist. LEXIS 7742 (D. Del. Jan. 23, 2015).

¹¹² *Id.* at *16.

¹¹³ *Id.*

¹¹⁴ *Id.*

When music in the Audible Magic database is detected (“Flagged Content”), the affected portion of the VOD will be muted and volume controls for that VOD will be turned off. Additionally, past broadcasts and highlights with Flagged Content are exportable but will remain muted. The Audible Magic technology will scan for third party music in 30 minute blocks—if Audible Magic does not detect its clients’ music, that portion of the VOD will not be muted. If third party audio is detected anywhere in the 30-minute scanned block, the entire 30 minutes will be muted.¹¹⁵

Courts have clarified § 512(m) of the DMCA, which states the safe harbor is not conditioned on affirmatively monitoring the site, “except to the extent that such monitoring comprises a ‘standard technical measure’ Refusing to accommodate or implement a ‘standard technical measure’ exposes a service provider to liability.”¹¹⁶ Therefore, it is possible that if a Copyright Owner alleged infringement, the Copyright Owner could allege that AudibleMagic or other content identification software was a “standard technical measure,” and Twitch’s non-implementation of such a measure would mean it was not accommodating standard technical measures and would no longer be protected by the DMCA’s safe harbor. Based on the evidence at hand, it seems likely Twitch would also meet this final eligibility requirement.

2. 512(n) Construction

It is important to note that, even if Twitch fails to meet the requirements of one of the safe harbor’s specific functions, it is not precluded from being protected under another function.¹¹⁷

According to subsection 512(n), a service provider could enjoy the 512(a) safe harbor even if its information location tools were also protected by (or failed to satisfy) subsection 512(d). . . . Similarly, finding *some* aspects of

¹¹⁵ Elizabeth Baker, *Important: Changes To Audio In VODS*, TWITCH: THE OFFICIAL BLOG (Aug. 6, 2014), <http://blog.twitch.tv/2014/08/3136/> (emphasis in original removed).

¹¹⁶ *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 41 (2d Cir. 2012) (citation omitted).

¹¹⁷ “Subsections (a), (b), (c), and (d) describe separate and distinct functions for purposes of applying this section. Whether a service provider qualifies for the limitation on liability in any one of those subsections . . . shall not affect a determination of whether that service provider qualifies . . . under any other such subsection.” 17 U.S.C. § 512(n) (2011).

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the system outside the scope of subsection 512(a) would not preclude a ruling that *other* aspects *do* meet 512(a) criteria.¹¹⁸

3. DMCA Non-Policing Provision

The DMCA does not require a service provider to police its service for infringing content, explicitly stating, “Nothing in this section shall be construed to condition the applicability of [the safe harbor provisions] on—(1) a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure complying with the provisions of subsection (i).”¹¹⁹

4. Transitory Digital Network Communications

Now that we know how the DMCA Safe Harbor works, and we know that Twitch would likely be eligible, let us examine if Twitch would actually qualify. 17 U.S.C. § 512(a) of the DMCA’s safe harbor provision says, in part, that:

A service provider shall not be liable for monetary relief . . . for infringement of copyright by reason of the provider’s transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections¹²⁰

However, transmissions are only protected if:

- (1) the transmission of the material was initiated by or at the direction of a person other than the service provider;
- (2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;

¹¹⁸ A & M Records, Inc. v. Napster, Inc., No. C 99-05183 MHP, 2000 U.S. Dist. LEXIS 6243, at *17-18 (N.D. Cal. May 5, 2000) (citation omitted) (emphasis in original).

¹¹⁹ 17 U.S.C. § 512(m), (m)(1).

¹²⁰ *Id.* § 512(a).

(3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;

(4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and

(5) the material is transmitted through the system or network without modification of its content.¹²¹

On its face, Twitch seems to meet most of these requirements, as (1) the transmissions are initiated by Streamers, not by Twitch; (2) the webcast is carried out automatically; (3) the recipients of the webcast are whichever viewers go to a Streamer's specific Twitch channel; and (5) the content is not modified as it is sent from the Streamers to the Viewers. However, the fourth requirement seems slightly more difficult to reconcile, as it requires "no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections."¹²² Twitch keeps a copy of the stream accessible for fourteen days, even when not creating an archived version of the video.¹²³ If a court found this was longer than "reasonably necessary for the transmission," as it likely would, Twitch may not be protected under the provision. And if Twitch is not protected under that provision, is it still protected if it satisfies the next provision?

5. Information Residing on Systems at Behest of Users

The other applicable safe harbor provision, that service providers are not liable for copyrighted content uploaded by users, 17 U.S.C. § 512(c), provides, in part:

¹²¹ *Id.* § 512(a)(1)-(5).

¹²² *Id.* § 512(a)(4).

¹²³ Emmet Shear, *Update: Changes To VODs On Twitch*, TWITCH: THE OFFICIAL BLOG (Aug. 6, 2014), <http://blog.twitch.tv/2014/08/update-changes-to-vods-on-twitch/> ("Going forward, we're increasing default rolling storage for past broadcasts from 3 days to a maximum of 14 days, for everyone For Turbo subscribers and members of the Twitch Partner Program, that storage is increased to a maximum of 60 days.").

A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider.¹²⁴

Twitch’s service, which allows Streamers to upload their webcast to Twitch and choose which video will remain available as archived video, falls within this description. However, as we should now expect from the DMCA, there’s more to it than that. 17 U.S.C. § 512(c)(1)(A) of the DMCA requires that the service provider:

- (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
- (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
- (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material.¹²⁵

“Knowledge or awareness alone does not disqualify the service provider [from the safe harbor’s protection]; rather, the provider that gains knowledge or awareness of infringing activity retains safe-harbor protection if it ‘acts expeditiously to remove, or disable access to, the material,’” as required by 17 U.S.C. § 512(c)(1)(A)(iii).¹²⁶ The meaning of actual knowledge, and why a service provider with actual knowledge would not be protected under the safe harbor, is self-evident. What level of knowledge, besides actual knowledge, would get the service provider in trouble?

a. Red Flag Knowledge

Section 512(c)(1)(A)(ii) is known as the ‘red flag’ knowledge provision.¹²⁷ “Red flag” knowledge is distinguished from actual knowledge as it arises where “the provider was subjectively aware of facts that would have made the specific infringement ‘objectively

¹²⁴ 17 U.S.C. § 512(c).

¹²⁵ 17 U.S.C. § 512(c)(1)(A).

¹²⁶ *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 30 (2d Cir. 2012) (quoting 17 U.S.C. § 512(c)(1)(A)(iii)).

¹²⁷ *Capitol Records, Inc. v. MP3tunes*, 48 F. Supp. 3d 703, 714 (S.D.N.Y. 2014).

obvious to a reasonable person.”¹²⁸ “General knowledge [of infringement] is insufficient.”¹²⁹

In *Viacom International, Inc. v. YouTube, Inc.*, in a cross-motion for summary judgment, Viacom claimed YouTube did not need to know of specific instances of infringement to be liable and destroy 17 U.S.C. § 512(c) safe harbor protection.¹³⁰ Viacom cited surveys done by YouTube employees that estimated 75% to 80% of all content on YouTube was copyrighted, but the court found “estimates are insufficient, standing alone, to create a triable issue of fact as to whether YouTube actually knew, or was aware of facts or circumstances that would indicate, the existence of particular instances of infringement.”¹³¹ However, explicit reference to copyrighted material on YouTube by employees raised a triable issue of fact as long as the referenced content is the content at issue:¹³²

YouTube founder Jawed Karim prepared a report in March 2006 which stated that, “[a]s of today[,] episodes and clips of the following well-known shows can still be found [on YouTube]: Family Guy, South Park, MTV Cribs, Daily Show, Reno 911, [and] Dave Chapelle [sic].” Karim further opined that, “although YouTube is not legally required to monitor content . . . and complies with DMCA takedown requests, we would benefit from preemptively removing content that is blatantly illegal and likely to attract criticism.” He also noted that “a more thorough analysis” of the issue would be required. At least some of the TV shows to which Karim referred are owned by Viacom. A reasonable juror could conclude from the March 2006 report that Karim knew of the presence of Viacom-owned material on YouTube, since he presumably located specific clips of the shows in question before he could announce that YouTube hosted the content “[a]s of today.” A reasonable juror could also conclude that Karim believed the clips he located to be infringing (since he refers to them as “blatantly illegal”), and that YouTube did not remove the content from the website

¹²⁸ *Viacom*, 676 F.3d at 31.

¹²⁹ *Capitol Records*, 48 F. Supp. 3d at 716.

¹³⁰ *Viacom*, 676 F.3d at 31.

¹³¹ *Id.* at 33.

¹³² *Id.* at 33-34.

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until conducting “a more thorough analysis,” thus exposing the company
to liability in the interim.¹³³

This led to the court vacating the order granting summary judgment and instructing “the District Court to determine on remand whether any specific infringements of which YouTube had knowledge or awareness correspond to the clips-in-suit in these actions.”¹³⁴ On remand, Viacom was unable to prove they did, as “Congress has determined that the burden of identifying what must be taken down is to be on the copyright owner,”¹³⁵ and, “the specific locations of infringements are not supplied: at most, an area of search is identified, and YouTube is left to find the infringing clip.”¹³⁶ “Under § 512 (m), nothing in the applicable section of the DMCA shall be construed to require YouTube’s ‘affirmatively seeking facts indicating infringing activity’ and there was ‘no showing of willful blindness to specific infringements.’”¹³⁷

Twitch should be able to claim the 17 U.S.C. § 512(c) safe harbor protection as long as it follows all of the requirements set out by the DMCA. Unless the Copyright Owner gives the specific location of the infringement and meets other notice requirements in 17 U.S.C. § 512(c)(3)(a), the service provider will not be deemed to have “actual knowledge” or be “aware of facts or circumstances from which infringing activity is apparent” under 17 U.S.C. § 512(c)(3)(b)(i).¹³⁸ This seems to absolve Twitch of liability for the actions of the Streamers using its service.

6. Personal Liability

However, the DMCA requires Twitch to throw its infringing users under the bus. Yes, under the DMCA, the identity of the individual Streamers would not be protected. 17 U.S.C. § 512(h) allows the “copyright owner . . . [to] request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer.” This means that Streamers cannot depend upon the anonymity that comes with many online ventures, and by webcasting any infringing content, they can be

¹³³ *Id.* at 33.

¹³⁴ *Id.* at 34.

¹³⁵ Viacom Int’l, Inc. v. YouTube, Inc., 940 F. Supp. 2d 110, 115 (S.D.N.Y. 2013).

¹³⁶ *Id.* at 116-17.

¹³⁷ *Id.* at 117.

¹³⁸ 17 U.S.C. § 512(c)(3)(b)(i) (2011).

confident that a Copyright Owner has the ability to track them down and litigate as they see fit.

D. VICARIOUS AND CONTRIBUTORY LIABILITY

Even if Twitch meets the statutory requirements, there is one way Copyright Owners can pierce the seemingly impenetrable armor that is the DMCA Safe Harbor: Twitch may still be contributorily or vicariously liable. “To forfeit [the DMCA safe harbor], the [service] provider must influence or participate in the infringement.”¹³⁹ “One infringes contributorily by intentionally inducing or encouraging direct infringement and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it.”¹⁴⁰ Specifically, § 512(c)(1)(B) of the DMCA requires that a service provider does not receive a financial benefit directly attributable to the infringing activity where the service provider has the right and ability to control such activity.

1. Contributory Liability

In *MGM Studios Inc. v. Grokster, Ltd.*, the Supreme Court held that “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”¹⁴¹ However, neither “mere

¹³⁹ *Viacom*, 940 F. Supp. 2d at 118-19. The court then noted examples of not influencing or participating in the infringement:

[W]here the service provider’s influence does not “take the form of prescreening content, rendering extensive advice to users regarding content and editing user content,” *Wolk v. Kodak Imaging Network, Inc.*, 840 F. Supp. 2d 724, 748 (S.D.N.Y. 2012), or where the service provider lists items for sale by users but “is not actively involved in the listing, bidding, sale and delivery of any item,” *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1094 (C.D. Cal. 2001), and “does not preview the products prior to their listing, does not edit the product descriptions, does not suggest prices, or otherwise involve itself in the sale,” *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1110 (W.D. Wash. 2004), its influence on users is not participation in their infringing activity, and does not amount to the required “control” beyond the normal ability of every service provider to decide what appears on its platform.

Id.

¹⁴⁰ *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005).

¹⁴¹ *Id.* at 936-37.

knowledge of infringing potential or of actual infringing uses Nor . . . ordinary acts incident to product distribution, such as offering customers technical support or product updates, support liability in themselves.”¹⁴² What would inducement look like?

Evidence of “active steps . . . taken to encourage direct infringement,” such as advertising an infringing use or instructing how to engage in an infringing use, show an affirmative intent that the product be used to infringe, and a showing that infringement was encouraged overcomes the law’s reluctance to find liability when a defendant merely sells a commercial product suitable for some lawful use.¹⁴³

In *Viacom International, Inc. v. YouTube, Inc.*, the Ninth Circuit suggested, “inducement of copyright infringement under [*Grokster*], which premises liability on purposeful, culpable expression and conduct, might also rise to the level of control under § 512(c)(1)(B).”¹⁴⁴ In *Columbia Pictures Industries v. Gary Fung*, Fung ran websites from which users could download infringing movies.¹⁴⁵ There, the court said, although, “inducement actions do not categorically remove him from protection under § 512(c), they demonstrate the substantial influence Fung exerted over his users’ infringing activities, and thereby supply one essential component of the financial benefit/right to control exception to the § 512(c) safe harbor.”¹⁴⁶

2. Vicarious Liability

“Courts have extended vicarious liability in the copyright context to defendants that have (1) the right and ability to exercise control over a directly infringing party and its activities and (2) obtained a direct financial benefit from the infringing activities.”¹⁴⁷

¹⁴² *Id.* at 937.

¹⁴³ *Id.* at 936 (citation omitted).

¹⁴⁴ 676 F.3d 19, 38 (2d Cir. 2012) (citing *MGM Studios*, 545 U.S. 913 (2005)).

¹⁴⁵ 710 F.3d 1020 (9th Cir. 2013), *cert. denied*, 134 S.Ct. 624 (2013).

¹⁴⁶ *Id.* at 1046.

¹⁴⁷ *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1171 (C.D. Cal. 2002).

Both the Ninth Circuit and Second Circuit have found, “in order to have the ‘right and ability to control,’ the service provider must ‘exert[] substantial influence on the activities of users.’”¹⁴⁸

However, “[e]very service provider is presumed by the DMCA to have the ability to remove (or block access to) material posted on its website, and to exercise that function in its daily business, including removal of infringing material in response to take-down notices,” so that control must be greater than merely the “ordinary power over what appears on the provider’s website.”¹⁴⁹ The court cited *Perfect 10, Inc. v. Cybernet Ventures* as the only example where a court found this greater control.¹⁵⁰ In *Perfect 10*, Cybernet ran a service called “Adult Check,” which acts as a sort of dual quality assurance service and “menu” for affiliated adult websites, Perfect 10 being one of those sites.¹⁵¹ Perfect 10 moved to enjoin Cybernet from using Perfect 10’s copyrights and trademarks.¹⁵² As part of Cybernet’s monitoring of these sites, the affiliates often “receive[d] detailed instructions regard [sic] issues of layout, appearance, and content,”¹⁵³ and Cybernet “refused to allow sites to use its system until they comply with its dictates,”¹⁵⁴ as well as surveying the content of the sites to “make sure that celebrity images do not oversaturate the content found within the sites that make up Adult Check.”¹⁵⁵ The court found a “strong likelihood of success for Perfect 10’s argument that Cybernet has the right and ability to control the participating websites.”¹⁵⁶

¹⁴⁸ *UMG Recordings, Inc. v. Veoh Networks, Inc.*, 718 F.3d 1006, 1030 (9th Cir. 2013); see also *Viacom*, 676 F.3d at 37-38.

¹⁴⁹ *Viacom*, 940 F. Supp. 2d at 117.

¹⁵⁰ *Id.* “This case notes that it has been suggested that control may also be present when the service provider is “actively involved in the listing, bidding, sale and delivery” of items offered for sale, as in *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1094 (C.D. Cal. 2001), or “otherwise controls vendor sales by previewing products prior to their listing, editing product descriptions, or suggesting prices,” as in *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d at 1110.” *Id.* at 118-19.

¹⁵¹ *Perfect 10, Inc. v. Cybernet Ventures*, 167 F. Supp. 2d 1114, 1117 (C.D. Cal. 2001).

¹⁵² *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1153 (C.D. Cal. 2002).

¹⁵³ *Id.* at 1173.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 1174.

b. Financial Benefit Directly Attributable to the Infringing Activity

The first prong of § 512(c)(1)(B) requires that the service provider “does not receive a financial benefit directly attributable to the infringing activity.” The Ninth Circuit Court of Appeals held:

[I]n the context of service providers who charge for their services, that a service provider receives a direct financial benefit from infringing activity where ‘there is a causal relationship between the infringing activity and any financial benefit a defendant reaps, regardless of how substantial the benefit is in proportion to a defendant’s overall profits. Thus, where a service provider obtains revenue from ‘subscribers,’ the relevant inquiry is ‘whether the infringing activity constitutes a draw for subscribers, not just an added benefit.’¹⁵⁷

Yet, in the past, other service providers remained protected because this standard was not met where “there was inadequate proof that ‘customers either subscribed because of the available infringing material or cancelled subscriptions because it was no longer available,’”¹⁵⁸ or “cit[ing] to DMCA legislative history stating that a direct financial benefit cannot be established showing that a service provider ‘receive[d] a one-time set-up fee and flat, periodic payments for service from a person engaging in infringing activities.’”¹⁵⁹ Based on these results, proving the direct financial benefit seemed elusive. In *Fung*, however, the court took a stand:

[W]e hold the connection between the infringing activity and Fung’s income stream derived from advertising is sufficiently direct to meet the direct “financial benefit” prong of § 512(c)(1)(B). Fung promoted advertising by pointing to infringing activity; obtained advertising revenue that depended on the number of visitors to his sites; attracted primarily visitors who were seeking to engage in infringing activity, as that is mostly what occurred on his sites; and encouraged that infringing activity. Given this confluence of circumstances, Fung’s revenue stream was tied directly to the infringing activity involving his websites, both as to his ability to attract advertisers and as to the amount of revenue he received.¹⁶⁰

¹⁵⁷ *Columbia Pictures Indus. v. Fung*, 710 F.3d 1020, 1044 (9th Cir. 2013) (citing *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004)), *cert. denied*, 134 S.Ct. 624 (2013).

¹⁵⁸ *Fung*, 710 F.3d at 1044 (citing *Ellison*, 357 F.3d at 1079).

¹⁵⁹ *Id.* at 1045 (citing *Perfect 10*, 488 F.3d at 1118).

¹⁶⁰ *Id.*

Therefore, the court found, “Because [Fung met] both prongs of § 512(c)(1)(B), Fung is not eligible for protection under the § 512(c) safe harbor.”¹⁶¹

While Twitch may not exert the sort of control found in *Perfect 10*, the result in *Fung* should be very worrisome for Twitch. The fact that the purpose of the service is largely to allow and encourage users to webcast infringing content alone may satisfy the “right and ability to exercise control over a directly infringing party” prong of vicarious liability. It is unknown if Twitch’s advertising rates are determined by pointing to infringing activity, as they did in *Fung*, but it can hardly be disputed that Twitch obtains advertising revenue depending upon the number of visitors to the sites and attracts a large number of visitors who were seeking to engage in infringing activity. Twitch highlights individual channels on its home page, and a Copyright Owner could argue any time a channel highlighted on the home page had infringing material on it, Twitch was endorsing the infringement. For all the protection the DMCA Safe Harbor offers, it can be sidestepped if Twitch is not careful.

E. FAIR USE

“Fair Use!” has been the battle cry for many who post videos of gameplay online.¹⁶² “[F]air use is defined as ‘a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent,’”¹⁶³ for the purpose of

¹⁶¹ *Id.* at 1046.

¹⁶² A wise man has given credence to the argument for fair use in the realm of “Let’s Play” style videos:

Players often face such threats of legal action. Although their videos help promote companies like Nintendo, and Let’s Players argue that they’re protected by fair use, the gaming industry isn’t thrilled about Let’s Players siphoning ad dollars from its intellectual property . . . Greg Lastowka, who teaches Internet and property law at the Rutgers School of Law-Camden, finds the players’ transformative fair use argument a solid one. He predicts that as Let’s Players gain economic power, they may start challenging developers in court. Or developers may start to bring Let’s Players into the fold, offering them licenses to make Let’s Plays while taking a cut of ad revenue. ‘We’re going to have these authorized amateur creators that are out there, and then we’re going to have other people not realizing you need a license,’ Lastowka said. ‘As the market matures there’s going to be a need to really clear up what the lines are.’

Zoia, *supra* note 14.

¹⁶³ *Acuff-Rose Music, Inc., v. Campbell*, 972 F.2d 1429, 1434-35 (6th Cir. 1992) (quoting *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 560 (1985)).

fulfilling Copyright's goal, "to promote the Progress of Science and useful Arts."¹⁶⁴ 17 U.S.C. § 107 gives us guidance on whether or not a work should be declared a "fair use."¹⁶⁵

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;¹⁶⁶
- (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;¹⁶⁷ and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.¹⁶⁸

"The fair use doctrine thus permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."¹⁶⁹ "The ultimate test of fair use . . . is whether the copyright law's

¹⁶⁴ U.S. CONST., art. I, § 8, cl. 8.

¹⁶⁵ The factors listed in § 107 are not the only factors that may be considered. "The text employs the terms 'including' and 'such as' in the preamble paragraph to indicate the 'illustrative and not limitative' function of the examples given." 17 U.S.C. § 107 (2010).

¹⁶⁶ The Court explains "purpose and character" in this way: "whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is transformative." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (citations omitted).

¹⁶⁷ The Court not only considers how much is taken, but also which part is taken: "This factor calls for thought not only about the quantity of the materials used, but about their quality and importance, too . . . a work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original." *Id.* at 587-88.

¹⁶⁸ This factor is particularly relevant as it most directly implicates derivative works: "[This factor] requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer The enquiry must take account not only of harm to the original but also of harm to the market for derivative works." *Id.* at 590 (citations and quotations omitted).

¹⁶⁹ *Id.* at 577.

goal of ‘promoting the Progress of Science and useful Arts,’ ‘would be better served by allowing the use than by preventing it.’¹⁷⁰

Fair use “is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.”¹⁷¹ Despite this, we can predict some things about what webcasts would or would not qualify as fair use. With regard to the purpose and character of the use, we can predict that a use by a Streamer who is not a Twitch Partner and does not accept money from Viewers would weigh in favor of fair use, as it is a non-commercial use, and that any Streamer that makes money from their webcast and is a Twitch Partner would have a much harder time claiming that defense. Since most video games are created as for-profit ventures, the nature of the work would weigh against fair use. The amount and substantiality of the portion of the game used in relation to the whole would likely vary dramatically between webcasts, but one could predict that a Streamer playing through the entirety of a game would have little chance of a finding of fair use, while a Streamer playing only short snippets of a game would fare better. The effect of the use upon the potential market for or value of the copyrighted work would likely inspire debate, with some calling it free advertising, and others claiming it destroys a player’s need to purchase the game in order to experience many aspects of it. Unfortunately, there is no prototypical Twitch webcast for a comparison, so we must be content with speculation for now.

1. Transformative Fair Use

A popularly cited form of fair use is one where the user claims to be commenting on a work.¹⁷² The text of 17 U.S.C. § 107 specifically states, “[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”¹⁷³ However, “[t]he law imposes no requirement that a work comment on the original or its author in order to be considered transformative, and a secondary work

¹⁷⁰ Castle Rock Entm’t, Inc., v. Carol Publ’g Grp., 150 F.3d 132, 141 (2d Cir. 1998) (citation omitted).

¹⁷¹ Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 560 (1985).

¹⁷² “It’s a popular trend for people to create videos of themselves playing video games or use software while giving commentary. . . . [T]his is somewhat of a gray area, though it has been done pretty widely on YouTube without much repercussion.” Megan O’Neill, *The Complete Guide To Fair Use & YouTube*, ADWEEK (May 6, 2011), <http://www.adweek.com/socialtimes/fair-use-youtube/62896>.

¹⁷³ 17 U.S.C. § 107 (2010).

may constitute a fair use even if it serves some purpose other than those . . . identified in the preamble to the statute.”¹⁷⁴

In *Cariou v. Prince*, Prince, a famous appropriation artist, known to take the work of others and make new art by changing it, did just that with Cariou’s photographs.¹⁷⁵ Cariou released a book of photographs of Jamaican Rastafarians called *Yes Rasta*.¹⁷⁶ Prince took the images in that book and, “altered those photographs significantly, by, among other things, painting ‘lozenges’ over their subjects’ facial features,”¹⁷⁷ and “affix[ing] headshots from *Yes Rasta* onto other appropriated images,”¹⁷⁸ but, “[t]he portions of *Yes Rasta* photographs used, and the amount of each artwork that they constitute, vary significantly from piece to piece.”¹⁷⁹ Merely observing Prince’s work “convince[d the court] of the transformative nature of [twenty-five out of the thirty pieces],” as they “manifest an entirely different aesthetic from Cariou’s photographs.”¹⁸⁰

It has been suggested that gameplay may be transformative enough to qualify as fair use.¹⁸¹ “[T]he ‘heart’ of a claim for transformative use is ‘the use of some elements of a prior author’s composition to create a new one that, at least in part, comments on that author’s works,’” which would certainly seem to apply for most any work with video game footage being the basis for the work.¹⁸²

¹⁷⁴ *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013).

¹⁷⁵ *Id.* at 699-704.

¹⁷⁶ *Id.* at 699.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 700.

¹⁷⁹ *Id.* at 699-700.

¹⁸⁰ *Cariou*, 714 F.3d at 706.

¹⁸¹ “Following [*Cariou v. Prince*], if the aesthetic appeal of a Let’s Play video is perceived as fundamentally different than the appeal of the interactive game, fair use might actually exist.” Greg Lastowka, *All Your Nintendo Let’s Plays Are Belong To Nintendo?*, GAMASUTRA (May 17, 2013, 12:26 AM), http://www.gamasutra.com/blogs/GregLastowka/20130517/192424/All_Your_Nintendo_Lets_Plays_Are_Belong_To_Nintendo.php.

¹⁸² *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1175 (9th Cir. 2012) (quoting *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 580 (1994)).

Still, I would not endorse this point of view. The Second Circuit's approach in *Cariou* has been widely criticized.¹⁸³ The Seventh Circuit Court of Appeals was blunt in its assessment:

[W]e're skeptical of Cariou's approach, because asking exclusively whether something is "transformative" not only replaces the list in §107 but also could override 17 U.S.C. §106(2), which protects derivative works. To say that a new use transforms the work is precisely to say that it is derivative and thus, one might suppose, protected under §106(2). *Cariou* and its predecessors in the Second Circuit do not explain how every "transformative use" can be "fair use" without extinguishing the author's rights under §106(2). We think it best to stick with the statutory list.¹⁸⁴

Courts have long held that they do not wish to be put in the position of deciding the worth of a piece of art,¹⁸⁵ so I find it hard to imagine courts would continue to be so permissive in determining whether or not a work is transformative without consulting the guidelines set out in §107. If I were Twitch or a Streamer, I would not rely on my webcast being sufficiently transformative enough to protect me from liability.

¹⁸³ One commentator reacted to the decision with unease over the fact that the traditional fair use factors are being overlooked:

Of greatest concern to those who practice or follow copyright law is the extent to which transformativeness has become virtually a one-factor test by over-powering factors that would otherwise weigh against fair use, the extent to which that concept has become a euphemism for aesthetic and other value judgments that judges claim to eschew, and the failure of the appellate decision to explain why some works were more transformative than others.

Kim J. Landsman, *Does Cariou v. Prince Represent the Apogee or Burn-Out of Transformativeness in Fair Use Jurisprudence? A Plea for a Neo-Traditional Approach*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 321, 324 (2014).

¹⁸⁴ *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 155 (2015).

¹⁸⁵ *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.").

IV. COOPERATIVE PLAY

For most mediums, Copyright is not designed to deal with so many competing interests at once. What Twitch and Streamers should want more than anything is a way to avoid liability for their obvious infringement, but Copyright Owners would fight against any statutory change that circumvented or curtailed their current rights. All parties want to avoid litigation, but Copyright Owners would bear the brunt of bad press, much like the music industry did when it sued Napster in the early 2000's, and the end result may not ultimately be worth the game industry's time and money. However, all parties would benefit from licensing rights now, while the industry is new and developing.

A. STATUTORY CHANGES ARE NOT THE ANSWER

One option that may be suggested is to change copyright law to allow the public to perform and create derivatives of the copyrighted work without the Copyright Owner's permission. Assuming that Congress would not do something as dramatic as eliminating or altering the fundamental 17 U.S.C. § 106 rights, such as the right to publicly perform a work or create derivative works, etc., there would need to be a way for the public to use a work without permission while allowing Copyright Owners to profit from the use of their work. An existing analogue would be mechanical license for copyrighted musical works.¹⁸⁶ "A mechanical license grants the rights to reproduce and distribute copyrighted musical compositions."¹⁸⁷ "By establishing a mechanical royalty, Congress granted owners of the copyright in a musical work the right to benefit from the mechanical reproduction of their work However, this benefit was offset by a relinquishment of exclusive control via the compulsory license."¹⁸⁸ A Copyright Royalty Board was statutorily established "[t]o make determinations and adjustments of

¹⁸⁶ *What is a Mechanical License?*, HARRY FOX AGENCY, https://www.harryfox.com/license_music/what_is_mechanical_license.html (last visited Sept. 26, 2015). This license, however, does not include the copyright to the sound recordings, so one would need to record their own version of a song to distribute. Consequently, popular songs of the day are exploited in creative ways, sometimes by having them performed by a group of children. See KIDZ BOP (Razor and Tie 2001).

¹⁸⁷ *What is a Mechanical License?*, *supra* note 186.

¹⁸⁸ David Kostiner, *Will Mechanicals Break the Digital Machine?: Determining a Fair Mechanical Royalty Rate for Permanent Digital Phonographic Downloads*, 27 HASTINGS COMM. & ENT. L.J. 653, 658 (2004). "This was done in response to *White-Smith Music Publishing Co. v. Apollo Co.*, in which the Supreme Court found that copying a player piano scroll did not constitute infringement of the exclusive reproduction right of the underlying composition." *Id.*

reasonable terms and rates of royalty payments.”¹⁸⁹ Currently, the statutory mechanical royalty rate is 9.10¢ per copy for songs five minutes or less, or 1.75¢ per minute per copy for songs over five minutes.¹⁹⁰

The mechanical rates for games would have to be huge, given that the production budgets and price per unit are much larger for video games than for albums: Rockstar’s Grand Theft Auto V cost \$265,000,000 to produce and market,¹⁹¹ shipping 45 million copies as of February 2015,¹⁹² while Apple only had to pay U2 over \$100,000,000 to distribute one of their albums to 500 million Apple customers.¹⁹³ Additionally, music does not move as many units. The highest selling album of all time is Michael Jackson’s Thriller, which has sold around 50 million units in the twenty-three years since it was released in 1982,¹⁹⁴ compared to Grand Theft Auto V’s 45 million units since September of 2013.¹⁹⁵ Also, what metric does the rate follow? Price per copy? Per day of use licensed? Any option would be problematic.

It is also likely that Copyright Owners would lobby Congress to reject any possible mechanical license provision for video games. Copyright-owning musicians have long been unhappy with the mechanical rates imposed by the federal government. The Songwriter Equity Act was introduced for the second time on March 4, 2015.¹⁹⁶ It aims

¹⁸⁹ 17 U.S.C. § 801 (2011).

¹⁹⁰ *What Are Mechanical Royalty Rates?*, HARRY FOX AGENCY, https://www.harryfox.com/license_music/what_mechanical_royalty_rates.html (last visited Sept. 26, 2015).

¹⁹¹ Luke Villapaz, *'GTA 5' Costs \$265 Million To Develop And Market, Making It The Most Expensive Video Game Ever Produced*, INT’L BUS. TIMES (Sept. 8, 2013, 3:36 PM), <http://www.ibtimes.com/gta-5-costs-265-million-develop-market-making-it-most-expensive-video-game-ever-produced-report>.

¹⁹² Michael McWhertor, *Grand Theft Auto 5 Sells 45M Copies, Boosted by PS4 and Xbox One Versions*, POLYGON (Feb. 3 2015, 5:11 PM), <http://www.polygon.com/2015/2/3/7973035/grand-theft-auto-5-sales-45-million-ps4-xbox-one>.

¹⁹³ Andrew Hampp, *Exclusive: Guy Oseary on U2's \$100 Million Deal With Apple, and What's Next for the Group*, BILLBOARD (Sept. 12, 2014, 10:30 AM), <http://www.billboard.com/articles/business/6251220/guy-oseary-interview-u2-apple-deal-songs-of-innocence>.

¹⁹⁴ Todd Leopold, *Michael Jackson, Pop Music Legend, Dead at 50*, CNN (June 5, 2009, 3:01 AM), <http://edition.cnn.com/2009/SHOWBIZ/Music/06/25/jackson/index.html>.

¹⁹⁵ McWhertor, *supra* note 192.

¹⁹⁶ Ed Christman, *Songwriter Equity Act Re-Introduced to Congress*, BILLBOARD (Mar. 04, 2015, 5:31 PM), <http://www.billboard.com/articles/business/6487798/songwriter-equity-act-introduced-to-congress>.

to amend 17 U.S.C. § 114, so that composition rate courts can consider rates paid for sound recordings when deciding what songwriters should be paid,¹⁹⁷ and § 115, so that “Copyright Royalty Judges [are allowed to] establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.”¹⁹⁸ In a statement regarding the proposed legislation, President of the National Music Publishers Association, David Israelite criticized the current system, saying, “[t]hree-quarters of a songwriter’s income is regulated by the federal government,”¹⁹⁹ and further argued:

While most property rights are valued in a free market, songwriters have suffered under a system that devalues their work and takes away their most basic property rights. As the recent Copyright Office report on music licensing recommended, if songwriters’ royalties must be regulated, they should at least be based on fair market value.²⁰⁰

Copyright Owners want their work to earn them the fair market value, and they would fear that a mechanical license would artificially keep the rate low. One can argue that the public would benefit from having the ability to pay for a license to use games in a creative way, but unless Twitch and an army of aspiring Streamers rise up to demand their legislators create this mechanical license, it is an implausible solution.

B. LITIGATION AND DMCA TAKEDOWNS ARE NOT THE ANSWER

With webcasting, Twitch is bringing the video game industry to a crossroads, much like Napster and peer-to-peer digital music sharing did to the music industry in the early 2000’s:

For a brief, glorious period in the late 90s and early 2000s, [Napster] was being used by many high-school and college students to share and

¹⁹⁷ “The first change proposed is to allow the rates set for the public performance of sound recordings . . . the actual recordings of songs as opposed to the performance of musical compositions . . . to be used as evidence by the judges setting rates for the public performance of musical compositions.” David Oxenford, *Songwriter’s Equity Act Reintroduced – What Does It Propose?*, BROAD. LAW BLOG (Mar. 16, 2015), <http://www.broadcastlawblog.com/2015/03/articles/songwriters-equity-act-reintroduced-what-does-it-propose/>.

¹⁹⁸ Songwriter Equity Act of 2015, H.R. 1283, 114th Cong. § 5(a) (2015).

¹⁹⁹ Christman, *supra* note 196.

²⁰⁰ *Id.*

download media files, mainly MP3s. It conditioned a generation of consumers to expect to be able to access music for free. Then, after its legality was challenged successfully in the courts by Metallica, Napster shut itself down, went bankrupt and faded into obscurity.²⁰¹

So, how should the video game industry respond?

They should certainly not respond as the music industry did, by filing 532 John Doe infringement suits at once.²⁰² They should also avoid suing grandmothers²⁰³ and twelve-year-old girls.²⁰⁴ And they should not respond by suing Twitch.

In December of 1999, the Recording Industry Association of America, a trade group representing the record industry,²⁰⁵ sued Napster.²⁰⁶ Napster, at its peak, had 70 million users.²⁰⁷ It now has 2.5 million paid subscribers as a streaming music service in Latin America and Europe.²⁰⁸ Twitch should be eager to avoid litigation if at all possible, so as to avoid a fate similar to Napster: seven years of litigation, ending with a \$130 million settlement.²⁰⁹

²⁰¹ John McDuling, *Napster Still Exists, and It Has Millions of Streaming Subscribers*, QUARTZ (Feb. 11, 2015), <http://qz.com/342218/napster-still-exists-and-it-has-millions-of-streaming-subscribers/>.

²⁰² John Schwartz, *Recording Industry Is Accusing 532 People of Music Piracy*, N.Y. TIMES (Jan. 21, 2004), <http://www.nytimes.com/2004/01/21/business/21WIRE-MUSIC.html?ex=1098849600&en=6fbab6ab32a03237&ei=5070&hp>.

²⁰³ John Schwartz, *She Says She's No Music Pirate. No Snoop Fan, Either.*, N.Y. TIMES (Sept. 25, 2003), <http://www.nytimes.com/2003/09/25/business/media/25TUNE.html?ex=1098849600&en=6960e362c873ed2e&ei=5070>.

²⁰⁴ *Not-so-Jolly Rogers*, THE ECONOMIST (Sept. 10, 2003), http://www.economist.com/node/2050467/Story_ID=2050467.

²⁰⁵ RIAA, http://www.riaa.com/aboutus.php?content_selector=about-who-we-are-riaa (last visited Sept. 26, 2015).

²⁰⁶ David Kravets, *Dec. 7, 1999: RIAA Sues Napster*, WIRED (Dec. 7, 2009, 12:00 AM), <http://www.wired.com/2009/12/1207riaa-sues-napster/>.

²⁰⁷ Richard Nieva, *Ashes to Ashes, Peer to Peer: An Oral History of Napster*, FORTUNE (Sept. 5, 2013, 9:00 AM), <http://fortune.com/2013/09/05/ashes-to-ashes-peer-to-peer-an-oral-history-of-napster/>.

²⁰⁸ McDuling, *supra* note 201.

²⁰⁹ David Kravets, *Napster Trial Ends Seven Years Later, Defining Online Sharing Along the Way*, WIRED (Aug. 31, 2007, 5:41 PM), <http://www.wired.com/2007/08/napster-trial-e/>.

Due to the cost and complexity of the litigation, a comparative settlement would be hard to justify for the video game industry. The infringement was clear with Napster: users were infringing on record labels' copyrights by making exact copies of copyrighted work. With Twitch and Streamers, it is not as cut and dry. Streamers can claim "fair use" and have a legitimate claim if they're sufficiently commenting on a work, or if the new work is sufficiently transformative. Additionally, Streamers are making derivative works, in which they have their own copyright interest. Twitch and its competitors are going to be more sophisticated with their application of the DMCA Safe Harbor and protecting themselves from being held contributorily or vicariously liable. After all, Twitch gets to learn from file sharing services' mistakes.²¹⁰

That is not to say litigating infringement cases would not become a nightmare for Twitch or Streamers. Twitch would need to stay on its toes, forever hiding behind the DMCA's safe harbor, marshaling its marketing department to avoid contributory or vicarious liability. Copyright Owners would constantly be looking for ways to get past that shield so they could reach Twitch's (and therefore Amazon's) deep pockets. Individual Streamers could face personal financial ruin from infringement suits, and though many of their webcasts will not have a good case for using a fair use defense, Copyright Owners and courts would need to tackle each one individually.

It could all be avoided. Of the Napster fiasco in the early 2000's, *Rolling Stone* editor Steve Knopper mused, "Had the [record] labels charged money for Napster use, a large number of freeloaders probably would have dropped out of the service. But a number would have gladly paid for the privilege, as the huge number of iTunes Music Store customers proved a few years later."²¹¹ I believe the same is true for Twitch and its Streamers – a few may stop webcasting if they have to give a cut of their revenue to the Copyright Owner, and there may be some grumbling, but others will pay, and getting in on the ground floor can pay dividends in the future.

Public relations are another concern. For Nintendo, the bad press has already begun with merely the removal and monetization of YouTube videos. In May of 2013, Nintendo started taking down "Let's Play" videos on YouTube, and after complaints, allowed them back online with advertisements.²¹² Some believed this to be unfair,

²¹⁰ See *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *A & M Records, Inc. v. Napster, Inc.*, No. C 99-05183 MHP, 2000 U.S. Dist. LEXIS 6243 (N.D. Cal. May 5, 2000).

²¹¹ STEVE KNOPPER, *APPETITE FOR SELF DESTRUCTION: THE SPECTACULAR CRASH OF THE RECORD INDUSTRY IN THE DIGITAL AGE* 142 (2009).

²¹² Joe Mullin, *Nintendo Kicks "Let's Play" Videos Off YouTube Then Slaps Ads on Them*, ARSTECHNIA (May 16, 2013, 8:10 PM), <http://arstechnica.com/tech-policy/2013/05/nintendo-kicks-lets-play-videos-off-youtube-then-slaps-ads-on-them/>.

claiming, “[T]he speech of the fans who love Nintendo is actually unfairly being censored (or in this case, monetized) by a copyright owner.”²¹³ Others claimed, “[Nintendo is] basically denying themselves free publicity” by taking down infringing videos.²¹⁴ Nintendo has since attempted to reach a deal with those using their content on YouTube by introducing the Nintendo Creators Program, which allows “registered users 60 percent of the advertising revenue for videos containing Nintendo IP . . . and slightly more to channels fully dedicated to Nintendo content, offering up to 70 percent in ad revenue instead.”²¹⁵ This, too, has been heavily criticized,²¹⁶ but in terms of creating a sustainable model for the future of the video game industry and smaller content creators utilizing the copyrighted works of others, this is a step in the right direction. Plus, anytime one learns they will have to pay for something that they were previously using for free, there will be complaints, legitimate or not.

C. COOPERATION IS THE ANSWER

1. Licenses and Competition

Twitch may be the premier service for live video games webcasts for now, but competition is coming. On August 26, 2015, YouTube and its parent company Google launched YouTube Gaming and began the battle for live streaming gaming supremacy.²¹⁷ When announced, YouTube said it will be a new website “with videos, live

²¹³ *Id.*

²¹⁴ Kris Ligman, *Nintendo Cracks Down on Fan-Made Videos*, GAMASUTRA (May 16, 2013), http://gamasutra.com/view/news/192279/Nintendo_cracks_down_on_fanmade_videos.php.

²¹⁵ Emily Gera, *Nintendo's New YouTube Scheme Lets Fans Profit From Video Creations*, POLYGON (Jan. 29, 2015, 4:56 AM), <http://www.polygon.com/2015/1/29/7937323/nintendo-creators-program-youtube-copyright>.

²¹⁶ “[Felix Kjellberg] . . . called the move shortsighted and said Nintendo forsakes free publicity in seeking to control who can upload and discuss what. He called it a slap in the face to smaller channels and enthusiast YouTubers.” Owen S. Good, *Nintendo Says It Can't Keep Up With Applications to Controversial 'Creators Program'*, POLYGON (Feb. 7, 2015, 11:00 AM) <http://www.polygon.com/2015/2/7/7995705/nintendo-creators-program-applications-approval-process>. “Making the people who can help you reach a younger, engaged audience jump through hoops while you reach into their pockets for a cut is a bad move.” Ben Kuchera, *Devolver Digital Shows Nintendo How It's Done With YouTube Monetization Statement*, POLYGON (Jan. 30, 2015, 1:14 PM), <http://www.polygon.com/2015/1/30/7952605/devolver-digital-nintendo-youtube>.

²¹⁷ Morris, *supra* note 7.

streams, and the biggest community of gamers on the web.”²¹⁸ This site will only be starting in the U.S. and U.K.,²¹⁹ but in the Internet marketplace, I have no doubts that it will expand quickly. There has also been speculation on what YouTube’s existing content ID system will mean for its users and the Copyright Owners.²²⁰ This is all the more reason for Copyright Owners to create a market where they offer licenses to publicly perform and create derivatives of their copyrights and why Twitch or anyone else in the market should try to obtain as many of those licenses, exclusive licenses if possible, as quickly and for as long a time frame as possible. Having Copyright Owners sell licenses will increase competition in this new market.

As many Streamers are entertainment personalities and focus more on their ability to capture an audience’s attention rather than being proficient at a particular game or set of games, their income will rise as Twitch’s competition increases and services need to incentivize Streamers to keep their audience with the service. If a popular Streamer receives a given percentage of ad revenue from ads played during their webcast on Twitch, YouTube Gaming or another similar service can come in and offer that Streamer a higher percentage of the ad revenue in exchange for the Streamer’s ability to bring their fans to that service’s advertisers. The Streamer can then be offered an exclusive webcasting contract with that service. Twitch has already included exclusivity clauses into contracts with some current Twitch Partners.²²¹

²¹⁸ Alan Joyce, *A YouTube Built For Gamers*, YOUTUBE OFFICIAL BLOG (June 12, 2015) <http://youtube-global.blogspot.com/2015/06/a-youtube-built-for-gamers.html>.

²¹⁹ *Id.*

²²⁰ YouTube’s Content ID is exactly what it sounds like:

Content ID is YouTube’s automatic copyright enforcement system that has been the bane of gaming-focused YouTubers for years now Content ID is an algorithm that automatically detects copyrighted video and audio on the behalf of companies, and either threatens to take videos offline altogether, or . . . automatically diverts ad revenue to the company making the claim.

Paul Tassi, *Can YouTube Gaming Survive the ‘Protection’ of Content ID?*, FORTUNE (Aug. 26, 2015 at 10:37 AM), <http://www.forbes.com/sites/insertcoin/2015/08/26/can-youtube-gaming-survive-the-protection-of-content-id/>. “The problem with YouTube Gaming is that Content ID will reportedly be in place and work in real time when games are livestreamed with the service.” *Id.*

²²¹ “GamesBeat has a partnered channel on Twitch, and we were also told that most contracts have an ‘exclusivity agreement’ when we asked about ours. The actual agreement reads as follows: . . . ‘You would not be able to stream live gaming related content on any other service except for Twitch.’” Jeff Grubb, *Twitch’s Partner Contracts Will Keep Most Livestreamers From Also Using YouTube Gaming*, VENTUREBEAT (Aug. 27, 2015, 3:42 PM) <https://venturebeat.com/2015/08/27/twitchs-partner-contracts-will-keep-most-livestreamers-from-also-using-youtube-gaming/>.

Licenses will create a counterbalance that Twitch and other services can use to keep Streamer expenses lower. If a Streamer wishes to webcast a particular game, or if a Streamer primarily webcasts one game because the Streamer specializes in that game or plays that game competitively, that Streamer will be compelled to use the service that has the corresponding license. This will also allow Copyright Owners to have bidding wars on which service can have an exclusive license to webcast a game that is more popular.

Licenses could come in whatever form and with whatever function on which the Copyright Owners and Twitch can agree. The license could be for a given amount of money per game for a set amount of time, like \$1 million for a one-year license to be the exclusive webcasting platform for a particular game. Or, Copyright Owners could sell an exclusive license to their entire copyright library in a bundle for a set amount of time, such as \$10 million for a Copyright Owner's library, including games X, Y, and Z, for a year.

2. Royalties and Monitoring Cost

If Twitch fears that they would end up paying for licenses that might not be utilized, they could try and negotiate for a license where a lower flat rate is paid for the license, plus a royalty fee as determined by looking at factors like the amount of time the license is utilized, the amount of Streamers using the license, the amount of Viewers watching the webcast, and the exclusivity or non-exclusivity of the license. While I commented above that a royalty system imposed by Congress would not be ideal, these rates would be contractual. The market would determine these rates. A royalty system would also impose a monitoring cost, as someone would need to keep track of who was playing which game when, for how long, and for what sized audience. This is unattractive, as Copyright Owners and Twitch would need to apportion this cost, and may ultimately end up having a third party coming in and monitoring Twitch for the Copyrights Owners, much like performing rights organizations do in music.²²² This means some of

²²² Unless each video game company wants to create a new division dedicated solely to monitoring Twitch's uses, they will need someone to do it for them. While the music industry analogy is not perfect, in *All You Need to Know About the Music Business*, music industry attorney Donald Passman describes performing rights organizations this way:

[O]ne of your exclusive rights is the right to perform your composition in public. These are known as performing rights . . . and each user needs your permission to play the song on radio, on television, in nightclubs, in amusement parks, at live concerts, etc. As you can quickly see, it's impossible for every radio station, nightclub . . . to get a separate license To relieve these headaches, we use . . . performing rights societies.

the revenue that could go into the pockets of the Copyright Owners, Twitch, or the Streamers may instead go to these third parties. Yet, if one or all of the parties believe that they will end up with a better deal using a royalty system, it is a possibility.

3. Managing Relationships and Perception

Additionally, licenses can be a tool by which Copyright Owners can control what individual Streamers can use their work. Recently, a gamer named Jason “Bizzarro Flame” Yoon joined a team of video game players sponsored by pornography website YouPorn.²²³ Similarly, another player named Adam “Coastward” Hermosa joined a team sponsored by pornography website Fakku.²²⁴ Yoon and Hermosa both play the game Super Smash Bros. Melee, specializing as the character Ganondorf.²²⁵ I’m not exactly sure what the relationship is between gaming and pornography that makes this a sensible business decision for the adult websites, but it is worth noting that the Super Smash Bros. game franchise is a Nintendo property, and Nintendo has a reputation for specializing in family friendly games.²²⁶ If Nintendo had a license with Twitch, they could make it a condition of the license that their copyrighted games and characters are not to be associated with other brands that may impinge on Nintendo’s reputation as a family friendly company. In this way, Copyright Owners could use licenses to manage relationships and reputations in addition to providing a revenue stream.

DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 234 (7th ed. 2009).

²²³ Imad Khan, *YouPorn’s Esports Team Picks Up a Smash Player*, THE DAILY DOT (last updated June 9, 2015, 8:16 AM), <http://www.dailydot.com/esports/team-yp-bizzarro-flame/>.

²²⁴ Imad Khan, *Hentai Site Fakku Gets Into Esports Sponsorship*, THE DAILY DOT (last updated Apr. 23, 2015, 4:56 PM), <http://www.dailydot.com/esports/fakku-coastward-sponsorship/>.

²²⁵ Rebekah Valentine, *Apparently, Porn Companies Love Ganondorf*, GAMESIDED, <http://gamesided.com/2015/06/10/apparently-porn-companies-love-ganondorf/> (last visited Sept. 26, 2015).

²²⁶ “Nintendo doesn’t need to ape the competition . . . Its focus on family-friendly titles, platformers, and first-party IPs is welcome. Nintendo doesn’t need to get into the business of first-person military shooters.” Erik Kain, *Why The Video Game Industry Needs Nintendo To Succeed*, FORTUNE (Feb. 6, 2014, 12:31 PM), <http://www.forbes.com/sites/erikkain/2014/02/06/why-the-video-game-industry-needs-nintendo-to-succeed/>.

4. Freedom to Grow

Finally, the main reason for all parties to create licensing agreements is peace of mind. Neither Streamers nor Twitch would need to fear copyright infringement suits. Twitch can advertise and market any licensed uses as it pleases, without fear of contributory or vicarious infringement liability. Streamers no longer have to fear that an infringement suit would destroy their personal financial future, or that their livelihood would be taken away when a Copyright Owner starts aggressively enforcing their rights. Copyright Owners would have a new revenue stream, spare themselves the time and expense of litigation, and have to worry a little less about sending out whack-a-mole DMCA Takedown Notices.

V. CONCLUSION

It is important that all parties involved be proactive in working together. The video game-centric webcasting industry's growth shows no signs of slowing or stopping. As time goes on, it is being recognized by an ever-expanding cross-section of the public, recently being discussed by outlets like *ESPN*.²²⁷ The industry's larger events are making headlines and garnering goodwill, such as Awesome Games Done Quick, a semiannual weeklong marathon that raised \$1.5 million for the Prevent Cancer Foundation in January of 2015.²²⁸ Momentum is on the side of Twitch and the Streamers, and the Copyright Owners need to simultaneously get out of their way and make sure they get a fair share. The only way to do that is to be proactive and create licensing agreements.

Thankfully, I believe the industry may have started moving towards working together. Last year, Nintendo went from attempting to block its games from being used in webcast gaming competitions,²²⁹ to organizing its own webcast gaming competition,²³⁰ to sponsoring the same webcast event it originally tried to stop.²³¹ This

²²⁷ Jon Robinson, *Twitch Boosts New Speed-running Trend*, *ESPN* (Jan. 25, 2015, 8:00 AM), http://espn.go.com/blog/playbook/tech/post/_/id/3907/twitch-tv-helps-boost-speedrunning-trend.

²²⁸ Andy Chalk, *Awesome Games Done Quick Raises Over \$1.5 Million for Cancer Research*, *PC GAMER* (Jan. 11, 2015), <http://www.pcgamer.com/awesome-games-done-quick-raises-over-15-million-for-cancer-research/>.

²²⁹ Andrew Goldfarb, *Nintendo Blocks Smash Bros. Melee Streaming At EVO*, *IGN* (July 9 2013), <http://www.ign.com/articles/2013/07/10/nintendo-blocks-smash-bros-melee-streaming-at-evo>.

²³⁰ Evan Campbell, *Super Smash Bros. Invitational Roster Revealed*, *IGN* (May 29, 2014), <http://www.ign.com/articles/2014/05/29/super-smash-bros-invitational-roster-revealed>.

year, Nintendo even webcast the Nintendo World Championships, the first in twenty-five years, on Twitch and YouTube.²³² The next step for Nintendo is to ask Twitch and its Streamers for a cut of their revenue in exchange for a license, like they did with the Nintendo Creator's Program.²³³ While Nintendo may not be hurting for the cash flow or need this new revenue stream to survive (and their investors may disagree), this new revenue stream could help smaller or independent game developers thrive. However, unlike Nintendo, smaller or independent game developers likely do not have the capital or influence necessary to effectuate industry-wide change, the goodwill with Streamers and Viewers to help make any growing pains forgivable, or the huge library of copyrights that would make their absence not only conspicuous, but painful to Twitch and its competitors. The sooner Nintendo or another large Copyright Owner steps up and gets this process started, the better it will be for all parties involved.

²³¹ Evan Campbell, *EVO 2014: Nintendo Now A Sponsor For EVO 2014*, IGN (July 7, 2014), <http://www.ign.com/articles/2014/07/07/nintendo-now-a-sponsor-for-evo-2014>.

²³² Kyle Hillard, *Nintendo Talks The World Championships 2015, The Wizard, And Reveals The Trophy*, GAME INFORMER (June 13, 2015), <http://www.gameinformer.com/b/features/archive/2015/06/13/nintendo-tells-us-about-the-world-championships-2015-the-wizard-and-shows-off-the-trophy.aspx>. This was an event where a group of contestants, consisting of popular Streamers, YouTube personalities, and the winners of a series of qualifying rounds across the United States, competed in multiple Nintendo games in hopes of being crowned, unsurprisingly, the Nintendo World Champion. Nintendo, *Nintendo World Championships 2015*, YOUTUBE (streamed live on June 14, 2015), <https://www.youtube.com/watch?v=J9H8VcU21j4>.

²³³ Gera, *supra* note 215.