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Let's Play, Let's Infringe? Let's Play Videos Uploaded to YouTube, Copyright Infringement, and the Fair Use Defense.

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I. Introduction

The state of legality of Let's Play style video uploads to YouTube is currently unknown. Do Let's Play style video uploads infringe the video game creator's copyright? If they do, does the fair use defense provide the uploader an escape from liability? These issues are addressed in this article, and in order to better illustrate this topic, Rooster Teeth's "Let's Play – New Super Mario Bros. U Part 1" YouTube video and the underlying work, Nintendo's "New Super Mario Bros. U," will be used as a case study.

Part II of this article details Nintendo's "New Super Mario Bros. U" and Rooster Teeth's "Let's Play – New Super Mario Bros. U Part 1," to enhance the reader's understanding of the intellectual property and the unauthorized and unlicensed derivative work in question. Part II additionally describes in detail the genre of Let's Play videos. In short, Let's Play videos take captured footage of the audiovisual component of a video game as played by a video game player; the player adds commentary – sometimes insightful, sometimes humorous—and then uploads the Let's Play to video services such as YouTube.

Part III addresses the question of whether video games are copyrightable and establishes that Nintendo has a valid copyright in "New Super Mario Bros. U." Interestingly, video games are not copyrightable as works themselves. Rather, the audiovisual component of a video game may be copyrightable as well as the underlying source code of the video games may be copyrightable as a literary work. For purposes of this paper, I am concerned solely with the copyright in the audiovisual aspect of the video game. Additionally, Part III describes the reproduction right, right

to prepare derivative works, and public performance right held by Nintendo as a part of its so-called copyright “bundle of rights” recited in 17 U.S.C. § 106. In short, the reproduction right allows for copies of the work to be made, which poses an interesting question in the context of video games, because the audiovisual work is what receives copyright protection. The right to prepare derivative works allows the copyright holder to prepare works based upon their protected work, which includes adaptations and transformations. The final right is the public performance right, which provides the copyright holder the exclusive right to show or transmit the copyrighted work publicly; in the context of video games, this includes the showing or transmitting publicly of the audiovisual aspect of the video game; but the counter-question is: are not video games *meant to be played*? This is where the notion that the audiovisual component of the video game being the protected work is pivotal. Violation of these exclusive rights by Rooster Teeth will be shown, as Rooster Teeth makes a copy of the audiovisual component of Nintendo’s video game, Roster Teeth created an unlicensed and unauthorized derivative work – its Let’s Play video, and Rooster Teeth publicly performed Nintendo’s audiovisual work in the video game by uploading its Let’s Play video to YouTube for millions to view.

Part IV of this article discusses the fair use defense, which provides an escape from copyright liability, in the context of infringing Let’s Play video uploads to YouTube, such as Rooster Teeth’s “Let’s Play – New Super Mario Bros. U Part 1.” The fair use factors considered by the court in arriving to a conclusion that an allegedly infringing use is fair are: purpose and character of the use (and is the use transformative?); the nature of the copyrighted work; the amount and substantiality of the portion of the used in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for or value of the copyrighted work.

Part V discusses the implications of a finding for or against fair use on ad-revenue, Let's Plays as a genre, and similar emerging technologies. Finding against a fair use may stifle the Let's Play genre as well as analogous live broadcasts of video games being played, and ad-revenue may be stripped from the creators of Let's Plays, or at the minimum split. Conversely, finding in favor of fair use would promote the vitality of the genre and the emerging analogous technologies, and allows creators of Let's Plays to receive all ad-revenue generated from their videos.

Part VI concludes this article, noting that video game creators have a copyright in the audiovisual component of their video games and that Let's Plays violate their exclusive rights pursuant to their copyright. However, a court should deem Let's Plays' use of the protected audiovisual component of a video game as fair. The result of such determination has monetary and technological implications.

II. Description of Works

A. Description of Nintendo's "New Super Mario Bros. U"

Nintendo is one of the big three video game companies in today's home video game console market, alongside Sony (PlayStation) and Microsoft (Xbox). Among other Mario-centric video games, Nintendo has developed "New Super Mario Bros. U" for its latest video games console, "Wii U."¹ Released on November 18, 2012, "New Super Mario Bros. U" is a 2D platformer.² In the main Story mode of this video game, up to five players can participate in saving

¹ Peter Brown, *New Super Mario Bros. U Review*, GAMESPOT (Nov. 17, 2012), <http://www.gamespot.com/reviews/new-super-mario-bros-u-review/1900-6400232/>.

² *Id.* A 2D platformer is a style of video game in which the player controls the character to jump between suspended platforms and over obstacles in order to advance through the video game. The 2D aspect of this game refers to the flat level design as opposed to the overall visual design. In "New Super Mario Bros. U," this 2D platformer is also side-scrolling, following a linear flat level design from point "A" (which is the start of the level on the left hand side) to point "B" (which is the end of the level on the right hand side). See *The Video Game Critic's Glossary of Video Game Terms*, THE VIDEO GAME CRITIC (updated March 15, 2011), <http://videogamecritic.com/extras/glossary.htm> ("Platform Game: A game that requires you to jump on platforms of various sizes. These games also typically involve collecting items and jumping on enemies. Examples include Super Mario Bros (NES), Sonic the Hedgehog (Genesis) and Jak and Daxter (PS2).").

Princess Peach from the evil Bowser's grasp.³ Four players can use Wii Remote controllers to control Mario, Luigi, Blue Toad, and Yellow Toad, while the fifth player can use the Wii U tablet controller to aid (or deviously obstruct) the other players by placing up to four platforms at any given time on the level, stunning enemies, and interacting with the level environments in various ways.⁴

In addition to the Story mode, "New Super Mario Bros. U" offers three other game modes: Coin Battle, Challenge, and Boost Rush.⁵ Coin Battle has players pitted against one another to collect coins.⁶ Challenge mode contains five types of trials: Time Attack (in which one player plays against the clock), Coin Collection (in which one player must collect or not collect as many coins as possible), 1-Up Rally (in which one player must consecutively jump on enemies' heads without touching the ground in order to earn 1-Ups), Special (in which various scenarios are faced, such as dodging fireballs with only one block to stand on), and Boost (in which the focus is on the Wii U tablet controller player to help the other player reach goal or accomplish a specific task).⁷ The last mode, Boost Rush, has the objective of getting through the level as quickly as possible, but the player must collect coins in order for the level to scroll forward. Coin Battle, Challenge, and Boost Rush use levels from Story mode in addition to custom levels.⁸

³ *New Super Mario Bros. U*, NINTENDO, <http://newsupermariobrosu.nintendo.com/gameplay/> (last visited Nov. 9, 2014). *New Super Mario Bros. U*, NINTENDO, <http://newsupermariobrosu.nintendo.com/characters/> (last visited Nov. 9, 2014). Princess Peach is a damsel in distress, captured by the antagonist, Bowser – the King of the Koopas, a turtle-like race. Bowser is Mario's nemesis.

⁴ Peter Brown, *New Super Mario Bros. U Review*, GAMESPOT (Nov. 17, 2012), <http://www.gamespot.com/reviews/new-super-mario-bros-u-review/1900-6400232/>. *New Super Mario Bros. U*, NINTENDO, <http://newsupermariobrosu.nintendo.com/characters/> (last visited Nov. 9, 2014). The Wii U tablet controller, officially known as the Wii U GamePad, has, among other features, a touch screen. *Wii U™ GamePad*, NINTENDO, <http://www.nintendo.com/wiiu/features> (last visited Nov. 15, 2014) (describing the Wii U tablet controller, including its features and a graphic representation of the controller itself).

⁵ Peter Brown, *New Super Mario Bros. U Review*, GAMESPOT (Nov. 17, 2012), <http://www.gamespot.com/reviews/new-super-mario-bros-u-review/1900-6400232/>.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

An important take-away from this description of the various modes in “New Super Mario Bros. U” is that the audiovisual component of the Story mode – the mode that is the main focus of the video game – is reused often in the other modes. Thus, the Story mode’s audiovisual component is essentially equal to the audiovisual component of the video game as a whole; the reason that this is important is that one of the factors in determining whether the Rooster Teeth’s “Let’s Play – New Super Mario Bros. U Part 1” looks to the amount and substantiality of the portion used in relation to the copyright work as a whole.⁹

B. Description of Rooster Teeth’s “Let’s Play – New Super Mario Bros. U Part 1”

i. Rooster Teeth Productions, LLC – Who are they?

Rooster Teeth Productions, LLC (commonly known as and in this article referred to as Rooster Teeth) is a creative production studio that gained attention for its award-winning online video series, “Red vs. Blue.”¹⁰ The mission statement of Rooster Teeth is to “make the best online content of anyone ever.”¹¹ Rooster Teeth holds the Rooster Teeth Expo (RTX), an annual gaming and Internet convention in Austin, Texas.¹² In 2012, the Rooster Teeth YouTube channel became the 8th most viewed non-music YouTube channel globally; currently, its channel has 7,952,203 subscribers and 3,442,086,937 video views, while “the Rooster Teeth website has 5 million unique monthly visitors with 1.4 million registered community members.”¹³ According to StatSheep, Rooster Teeth’s YouTube channel has potentially earned \$8,605,217.00 in ad-revenue from its

⁹ See Part IV, *infra*.

¹⁰ *About Rooster Teeth Productions*, ROOSTER TEETH <http://roosterteeth.com/about/index.php> (last visited Nov. 9, 2014).

¹¹ *Id.* Rooster Teeth, *Rooster Teeth 10-Year Anniversary Reel*, YOUTUBE, https://www.youtube.com/watch?v=NB_nOHLnk9I at 0:35 (uploaded Apr. 25, 2013).

¹² *About Rooster Teeth Productions*, ROOSTER TEETH <http://roosterteeth.com/about/index.php> (last visited Nov. 9, 2014).

¹³ *About Rooster Teeth Productions*, ROOSTER TEETH <http://roosterteeth.com/about/index.php> (last visited Nov. 9, 2014). *Channel Statistics*, STATSHEEP, <http://www.statsheep.com/RoosterTeeth> (last visited Nov. 20, 2014).

5,926 uploaded videos.¹⁴ Rooster Teeth “has been featured by hundreds of major publications and networks including MTV, G4, The New York Times, the Wall Street Journal, Rolling Stone Magazine, Wired Magazine, and many more.”¹⁵ In this article, the content produced by Rooster Teeth in question is its “Let’s Play – New Super Mario Bros. U Part.” Since the term “Let’s Play” may be unfamiliar, it is informative to explore it briefly.

ii. Let’s Play Defined

While dictionaries do not provide a definition of this term, a common understanding of what constitutes a “Let’s Play” is a video “showing a screen captured video of a gaming session wherein the player provides commentary over what is happening.”¹⁶ Most Let’s Play videos are complete playthroughs of a video game done in an informative or humorous style in order to retain the viewer’s attention; rarely are some sections done “off-screen” or sped up.¹⁷ In other words, the uploader is showing the entirety of the video game’s audiovisual expression.

This type of video, most often uploaded to YouTube, may seem trivial and insignificant. That could not be further from the truth. In fact, the Wall Street Journal recently published an article regarding another YouTube uploader, PewDiePie.¹⁸ Felix Kjelberg, whose YouTube handle is PewDiePie, uploads Let’s Play videos to YouTube.¹⁹ Though the article does not explicitly label his videos as “Let’s Plays,” it notes that Kjelberg’s videos are of him “simply play[ing] games and

¹⁴ *Channel Statistics*, STATSHEEP, <http://www.statsheep.com/RoosterTeeth> (last visited Nov. 20, 2014).

¹⁵ *About Rooster Teeth Productions*, ROOSTER TEETH <http://roosterteeth.com/about/index.php> (last visited Nov. 9, 2014).

¹⁶ Patrick White, *Fan Fiction More Creative Than Most People Think*, KANSAS STATE COLLEGIAN (Apr. 18, 2013), <http://www.kstatecollegian.com/2013/04/18/fan-fiction-more-creative-than-most-people-think/>.

¹⁷ *Frequently Asked Questions*, LET’S PLAY ARCHIVE <http://lparchive.org/faq> (last visited Nov. 9, 2014). “Off-screen” refers to footage or gameplay not showed in the video. “Sped up” refers to the footage or gameplay being increased in rate, such as two times the normal speed of gameplay (think “fast forwarding”).

¹⁸ Sven Grundberg and Jens Hansegard, *YouTube’s Biggest Draw Plays Games, Earns \$4 Million a Year: Cussing, Comic Videogame Reviewer PewDiePie Has 27 Million Subscribers*, THE WALL STREET JOURNAL (updated June 16, 2014, 7:09 PM), <http://online.wsj.com/articles/youtube-star-plays-videogames-earns-4-million-a-year-1402939896>.

¹⁹ *Id.*

allow[ing] his audience—mostly teenagers—to peer in on his experience and hear random opinions interspersed with odd behavior. He contorts, screeches, swears, sings and even ‘twerks’ to portray his feelings.”²⁰ Kjelberg’s videos are a slight variant on Let’s Play videos in that there is a small video of him actually playing the game in the corner of the uploaded video, while still showing the video of the captured playthrough.²¹ Kjelberg and his videos are very informative of the financial success such Let’s Play videos can have.

As of the publication date of the Wall Street Journal article concerning Kjelberg, he had 27 million subscribers to his YouTube account and “has parlayed his persona into a brand name that pulls in the equivalent of \$4 million in ad sales a year, most of it pure profit. In December 2012, PewDiePie signed on with Maker Studios, a producer of online content that takes a cut of ad sales. Maker Studios – which counts on PewDiePie as its most important personality – sold itself to Walt Disney Co. earlier this year in a deal that could be worth close to \$1 billion, depending on certain performance targets.”²² It is clear that there are significant financial prospects from Let’s Play videos uploaded to YouTube, which is insightful in contemplating the character and purpose of the use factor in the fair use determination.²³ Just as significant is the influence the Let’s Play genre has on the video game industry. For example, Kjelberg uploaded a video to YouTube entitled, “FLAPPY BIRD – DONT [*sic*] PLAY THIS GAME!”, on January 27, 2014.²⁴ In this video,

²⁰*Id.*

²¹ An example of Kjelberg’s variant of a Let’s Play video in which a small video of him completing the playthrough of the video game can be found at: PewDiePie, *Ib – Part 1 (+Free Download) Let’s Play Ib Walkthrough Playthrough*, YOUTUBE, <https://www.youtube.com/watch?v=c7ni13SAUns&list=PLB309706C5A82E1F1> (uploaded July 26, 2012).

²² Sven Grundberg and Jens Hansegard, *YouTube’s Biggest Draw Plays Games, Earns \$4 Million a Year: Cussing, Comic Videogame Reviewer PewDiePie Has 27 Million Subscribers*, THE WALL STREET JOURNAL (updated June 16, 2014, 7:09 PM), <http://online.wsj.com/articles/youtube-star-plays-videogames-earns-4-million-a-year-1402939896>.

²³ See Part IV, *infra*.

²⁴ PewDiePie, *FLAPPY BIRD – DONT [*sic*] PLAY THIS GAME!*, YOUTUBE, <https://www.youtube.com/watch?v=lQz6xhlOt18> (uploaded Jan. 27, 2014). Sven Grundberg and Jens Hansegard, *YouTube’s Biggest Draw Plays Games, Earns \$4 Million a Year: Cussing, Comic Videogame Reviewer PewDiePie Has 27 Million Subscribers*, THE WALL STREET JOURNAL (updated June 16, 2014, 7:09 PM), <http://online.wsj.com/articles/youtube-star-plays-videogames-earns-4-million-a-year-1402939896>.

Kjelberg plays through two game apps on his iPad, one of which was “Flappy Bird.”²⁵ This was before millions of people downloaded and played “Flappy Bird,” and Kjelberg’s video “helped propel ‘Flappy Bird’ and its Vietnamese developer from obscurity into a world-wide sensation.”²⁶ This shows a positive market effect on the underlying work, which is important in evaluating the fourth fair use factor – the effect of the use upon the potential market for or value of the copyrighted word.²⁷ Additionally, Let’s Play videos are inadvertently shaping the video game industry, “as developers have started making games that aren’t just fun to play, but also to watch others play on YouTube...”²⁸ Moreover, the PlayStation 4, Sony’s latest video game console, has made clips of games easily shareable as a fully integrated function of the console.²⁹

Some game developers respond positively to Let’s Play videos. Kjelberg has videos on “Goat Simulator,” a video game developed by Coffee Stain Studios AB.³⁰ Anton Westbergh is the chief executive officer of Coffee Stain, and he told the Wall Street Journal that “[h]aving guys like PewDiePie playing our game has been tremendous marketing...[a]nd for us, there have been no costs involved.”³¹ Majong, the developer of the popular game, “Minecraft,” has an end-user license agreement (EULA) that states, *inter alia*: “Within reason you’re free to do whatever you want with screenshots and videos of the Game. By ‘within reason’ we mean that you can’t make any commercial use of them or do things that are unfair or adversely affect our rights. *If you upload*

²⁵ PewDiePie, *FLAPPY BIRD – DONT [sic] PLAY THIS GAME!*, YOUTUBE, <https://www.youtube.com/watch?v=lQz6xhlOt18> (uploaded Jan. 27, 2014).

²⁶ Sven Grundberg and Jens Hansegard, *YouTube’s Biggest Draw Plays Games, Earns \$4 Million a Year: Cussing, Comic Videogame Reviewer PewDiePie Has 27 Million Subscribers*, THE WALL STREET JOURNAL (updated June 16, 2014, 7:09 PM), <http://online.wsj.com/articles/youtube-star-plays-videogames-earns-4-million-a-year-1402939896>.

²⁷ See Part IV, *infra*.

²⁸ Sven Grundberg and Jens Hansegard, *YouTube’s Biggest Draw Plays Games, Earns \$4 Million a Year: Cussing, Comic Videogame Reviewer PewDiePie Has 27 Million Subscribers*, THE WALL STREET JOURNAL (updated June 16, 2014, 7:09 PM), <http://online.wsj.com/articles/youtube-star-plays-videogames-earns-4-million-a-year-1402939896>.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

*videos of the game to video sharing and streaming sites you are however allowed to put ads on them.*³² Thus, Majong expressly allows users to make Let's Play videos, upload them, and monetize them. Other developers, such as Nintendo, do not seem to be as supportive of Let's Play videos. In 2013, when the YouTube Content ID program marked Let's Play videos as matching identification of Nintendo copyrights, Nintendo did not require the Let's Play videos to be taken down but rather took the monetization from ad-revenue.³³ On May 27, 2014, Nintendo announced a new ad-revenue sharing program, which would allow "proactive" creators of YouTube Let's Play videos featuring Nintendo content to receive some of the ad-revenue.³⁴ The finding for or against fair use affects these varying ad-revenue schemes (and possibly avoids them).³⁵

iii. Rooster Teeth's "Let's Play – New Super Mario Bros. U Part 1"

Now I turn my attention to Rooster Teeth's "Let's Play—New Super Mario Bros. U Part 1." Rooster Teeth uploaded this Let's Play video to YouTube on March 13, 2013.³⁶ Five members of Rooster Teeth are doing this Let's Play: Michael is controlling Mario, Gavin is controlling Luigi, Ray is controlling Yellow Toad, and Jack is controlling Blue Toad (all four playing on Wii remote controllers), and Geoff is the fifth player playing on the Wii U tablet controller.³⁷ This Let's Play video is true to form of other Let's Play videos. The images and sounds portrayed in

³² *Minecraft End User License Agreement*, MOJANG https://account.mojang.com/documents/minecraft_eula (updated Dec. 11, 2013) (emphasis added).

³³ Joe Mullin, *Nintendo Kicks "Let's Play" Videos Off YouTube Then Slaps Ads On Them*, ARS TECHNICA (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/>. Ian Miles Cheong, *Nintendo Flexing Copyright Clout on YouTube Let's Play Channels*, GAMEFRONT (May 15, 2013), <http://www.gamefront.com/nintendo-flexing-copyright-clout-on-youtube-lets-play-channels/>. VBEUZEVIL (Ryan Parreno), *YouTube Content ID Sweep Adversely Affecting Nintendo Vloggers*, NINTENDO ENTHUSIAST (Dec. 10, 2013), <http://nintendoenthusiast.com/news/youtube-content-id-sweep-adversely-affecting-nintendo-vloggers/>.

³⁴ Katie Williams, *Nintendo Announces Affiliate Program for YouTube Let's Play Creators: Creators May Now Be Entitled to a Share of the Ad Revenue*, IGN (May 27, 2014), <http://www.ign.com/articles/2014/05/28/nintendo-announces-affiliate-program-for-youtube-lets-play-creators>.

³⁵ Discussed in Part V, *infra*.

³⁶ Rooster Teeth, *Let's Play – New Super Mario Bros. U Part 1*, YOUTUBE, <https://www.youtube.com/watch?v=wml7epUINGo> (uploaded Mar. 13, 2013).

³⁷ *Id.*

this twenty-five minute and three second video (which is the first video in a series of four) are captured from these five members of Rooster Teeth's playthrough of "New Super Mario Bros. U" accompanied with overlaid player commentary.³⁸ The sound of the underlying audiovisual work³⁹ is used in this Let's Play, though it is not as loud as the commentary the five members provide which is the focal audio. Rooster Teeth's "Let's Play – New Super Mario Bros. U Part 1" is installment one of four in which Michael, Gavin, Ray, Jack, and Geoff play through the entire Story mode of Nintendo's video game.⁴⁰ There are no cuts or off-screen portions of the audiovisual expression from Nintendo's video game, nor is footage sped up. The Story mode of Nintendo's "New Super Mario Bros. U" is performed in full, at a normal rate of play, through the four videos in Rooster Teeth's Let's Play series of this video game. In "Let's Play – New Super Mario Bros. U Part 1," the five Rooster Teeth members complete the first world of the Story mode, which consists of multiple levels.

Rooster Teeth's "Let's Play – New Super Mario Bros. U Part 1" contains commentary from all five players, starting at 0:09 in the video. Right from the beginning, these five players start adding humorous commentary and commence cursing. Commentary ranges from cheering each other on, insults hurled at one another, petitioning the tablet player to quit menacing the rest of the team, random references, commentary on the game itself in what is being observed as they play, informative commentary on the game itself, and commentary on the game itself as critique or review of the video game.

³⁸ *Id.*

³⁹ Discussed in Part III, *infra*.

⁴⁰ There are four parts that constitute Rooster Teeth's Let's Play of the video game, in which the entire Story mode is played. Note that the third and fourth installments appear on a subsidiary YouTube channel account of Rooster Teeth, known as "LetsPlay" [*sic*]. Rooster Teeth, *Let's Play – New Super Mario Bros. U Part 2*, YOUTUBE, <https://www.youtube.com/watch?v=6UR5GKEXkfA> (uploaded Apr. 3, 2013). LetsPlay, *Let's Play – New Super Mario Bros. U Wii U Part 3*, YOUTUBE, <https://www.youtube.com/watch?v=dt3Es6aQXks> (uploaded Apr. 10, 2013). LetsPlay, *Let's Play – New Super Mario Bros. U Wii U Part 3*, YOUTUBE, <https://www.youtube.com/watch?v=tmwvt-bNLY0> (uploaded July 15, 2013).

Examples of the five players cheering each other on are: “Dude, we tossed that level like a dirty salad”⁴¹ upon completing a level; “Hey, Luigi, good fucking call, bro”; “Nice, man”; and “Dude, you clutched⁴² it.”⁴³

Examples of the five players insulting one another include: “Jack, you don’t have a squirrel suit? You suck”; and “What are you dick heads doing over there?”⁴⁴

Examples of the four Wii remote controller players begging the tablet controller player, Geoff, to quit menacing them are: “Geoff, don’t block the pipe”; “Move that thing Geoff!”; “Stop changing the direction of the fucking cog!”; and “Good grief, Geoff! Give it a rest!”⁴⁵

Examples of their random references include: “A Whole New World,” in a singing voice, singing the song from Disney’s “Aladdin”; “Alright, alright, alright, alright,” in a singing voice, singing “Hey Ya” by Outkast; “Hey-a, Luigi, eugh, eugh,” impersonating poorly the voice of Luigi; “It’s-a me, Mario...I’m-a Joe Pesci-o,” impersonating the voice of Mario (and referencing the actor, Joe Pesci); “This is going to be like Brokeback Yoshi,” upon the characters getting on Yoshis,⁴⁶ alluding to the film “Brokeback Mountain”; and “Heynnngh, heynnngh,” mimicking the noise Yoshi makes while jumping.⁴⁷

⁴¹ Suffice it to say that this crude sexual remark is actually said in celebration of a job well done.

⁴² Used in the informal sense: to succeed in a close-call situation.

⁴³ Rooster Teeth, *Let’s Play – New Super Mario Bros. U Part 1*, YOUTUBE, <https://www.youtube.com/watch?v=wml7epUINGo> (uploaded Mar. 13, 2013).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Yoshi is a dinosaur character of the franchise, and the players mount Yoshis as a human would a horse.

⁴⁷ Rooster Teeth, *Let’s Play – New Super Mario Bros. U Part 1*, YOUTUBE, <https://www.youtube.com/watch?v=wml7epUINGo> (uploaded Mar. 13, 2013).

Examples of commentary on the game itself in what is being observed as they play are: “I got a mushroom!”;⁴⁸ “I’m on top of the world!”; “Coin city!”;⁴⁹ “Someone got an extra life”; “I’m fucking flying, bitches!”; and “We just murdered Jack,” upon forcing his character off the screen, causing his death.⁵⁰

Examples of commentary on the game in an informative way are as follows: “Guys, guys, you can fly higher with the squirrel suit if you shake it [the Wii controller]!”; “When we walk on your blocks [talking to the Geoff the tablet controller player] it fills your star meter up, I think”; and “Is Geoff making us spawn?” “Uh, yeah, he’s popping the bubble.”⁵¹

Finally, examples of critical or review-like commentary on the game as a video game include: “This is awesome,” upon completing the first level; “It’s like a fucking saw trap,” describing the interconnected cogs obstacle in one of the levels; “Cancer’s hit you hard,” describing the characteristic of a boss at the end of a level in that he is bald; “[inaudible] freaking fun!” “I agree, guys, I’m having a blast”; “They’re suicidal,” describing Baby Yoshis propensity at the beginning of a level to walk off a platform to their demise; “This [baby] Yoshi thing is awesome” praising the new character in the franchise, baby Yoshi, and its ability to float; and “Is that me? I don’t know which one I am. I have no idea where I’m at right now. I thought I was the one up top,” which effectively is a critique on the game in that there is so much going on that it is hard to locate one’s player sometimes.

⁴⁸ Mushrooms are items that make a character grow in size in addition to granting the character survivable to enemies’ attacks. For example, a character without having a mushroom will die to an enemy attack, whereas a character with a mushroom will decrease in size after being hit by an enemy attack; that character will subsequently die should he get hit by another attack.

⁴⁹ Noting the amount of coins currently available on the level to collect. Earning 100 coins grants a player a 1-UP, which is an extra life.

⁵⁰ Rooster Teeth, *Let’s Play – New Super Mario Bros. U Part 1*, YOUTUBE, <https://www.youtube.com/watch?v=wML7epUINGo> (uploaded Mar. 13, 2013).

⁵¹ *Id.*

I would also be remiss if I did not mention that their commentary often comes in the form of short expletives or expressive, short phrases, such as: “FUCK! SHIT!”; “GOD DAMNIT, GEOFF!”; “Fuck you”; “WHAT THE FUCK!”; and “OH GOD! OH GOD, NO!”. As can be seen by the above quoted examples, the commentary of these five members of Roost Teeth is funny, exciting, and keeps the viewer interested.

This commentary is instructive as to the transformative-nature of the Let’s Plays, encompassed by one of the factors used in determining fair use.⁵² Moreover, the critical or review-like commentary seems to suggest that the Let’s Play is similar to an example of non-copyright-infringing fair use that the preamble to 17 U.S.C. § 107 contemplates, namely uses for “comment” or “criticism.”⁵³ Likewise, the informative commentary might suggest that the Let’s Play is similar to the “teaching” examples contained in the same preamble,⁵⁴ though Let’s Plays probably do not find themselves in the traditional classroom setting.⁵⁵

III. Nintendo’s Copyright in “New Super Mario Bros. U” and Copyright Infringement

A. Copyrightability of Video Games

17 U.S.C. § 102 states the subject matter of copyright: “(a) Copyright protection subsists...in original works of authorship 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. Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound

⁵² See Part IV, *infra*.

⁵³ See Part IV, *infra*.

⁵⁴ See Part IV, *infra*.

⁵⁵ But does that make Let’s Plays less educational or less of a teaching tool? I think not.

recordings; and (8) architectural works.”⁵⁶ Easily noted is the apparent lack of copyright protection for video games. In 1983, the United States Court of Appeals for the Seventh Circuit tackled this issue in *Midway Mfg. Co. v. Artic Int’l, Inc.*⁵⁷ This Court gave a brief, simplified, overview of how video games work: “Playing a video game involves manipulating the controls on the machine so that some of the images stored in the machine’s circuitry appear on its picture screen and some of its sounds emanate from its speaker.”⁵⁸ The Court quotes and cites the definitional section of the Copyright Act of 1976, § 101, for the definition of an audiovisual work: “‘Audiovisual works’ are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.”⁵⁹ While the court initially admits that “[i]t is not immediately obvious that video games fall with this definition,” it nevertheless concludes that video games can be protected as audiovisual works as it is consistent with the legislative intent that the Copyright Act of 1976 be flexible.⁶⁰

Pertinent to this article is the copyrightability of the audiovisual component of Nintendo’s “New Super Mario Bros. U.” As shown above, video games can be protected by copyright as an audiovisual work, but Nintendo’s video game must still be an original work of authorship fixed in

⁵⁶ 17 U.S.C.A. § 102 (West 2014).

⁵⁷ *Midway Mfg. Co. v. Artic Int’l, Inc.*, 704 F.2d 1009 (7th Cir. 1983).

⁵⁸ *Id.* at 1010.

⁵⁹ *Id.* at 1011 (citing 17 U.S.C.A. § 101 (West 2014)).

⁶⁰ *Midway Mfg. Co.*, 704 F.2d at 1011. Video games can be copyrightable as literary works in their computer program object code and source code as well as copyrightable as an audiovisual work. *See Midway Mfg. Co. v. Srohon*, 564 F.Supp. 741 (N.D.Ill. 1983). Audiovisual display of a video game is an appropriate subject for copyright, even if the underlying computer program is not copyrighted. *Stern Electronics, Inc. v. Kaufman*, 523 F.Supp. 635 (E.D.N.Y. 1981), *aff’d* 669 F.2d 852 (2d Cir. 1982). *See, also, Red Baron-Franklin Park, Inc. v. Taito Corp.*, 883 F.2d 275, 278 (4th Cir. 1989) (acknowledging its agreement with other courts of appeals in reaffirming its previous holding that “video games are copyrightable as audiovisual works.”), rehearing denied, cert. denied, 110 S.Ct. 869 (1990). *Stern Electronics, Inc. v. Kaufman*, 669 F.2d 852, 856 (2d Cir. 1982) (holding that player participation does not render a video game non-protectable by copyright as an audiovisual work).

any tangible medium of expression from which it may be perceived.⁶¹ Originality “means only that the work was independently created by the author (as opposed to copied from other works), and that it possess at least some minimal degree of creativity.”⁶² Nintendo has independently created “New Super Mario Bros. U,” as it has not copied the game from other works, and the video game certainly satisfies the minimal degree of creativity. Regarding authorship, the Supreme Court states that an “author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection.”⁶³ Nintendo is the author of “New Super Mario Bros. U” as the employer of various employees who worked on the video game within their scope of employment and as the party who commissioned any work on the video game under work for hire agreements.⁶⁴ The final element is that the work must be fixed in a tangible medium of expression from which it can be perceived. The audiovisual aspect of a video game is fixed in that it is permanently embodied in a material object – a memory device – from which it can be perceived.⁶⁵ “New Super Mario Bros. U” is fixed on physical discs, and through the aid of a Wii U video game console and monitor, the audiovisual component of the video game is readily perceived by the players. Since Nintendo has satisfied the originality, authorship, and

⁶¹ 17 U.S.C.A. § 102 (West 2014).

⁶²Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991). Originality is not novelty. “[A] work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.” Feist Publications, Inc., 499 U.S. at 345.

⁶³ Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989).

⁶⁴ 17 U.S.C.A. § 201(b) (West 2014) states that “In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, 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.A. § 101 (West 2014) defines a work for hire as “(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 contribution to a collective work, as 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...” As common sense would have, many people are involved in the development and creation of a video game, just like the countless number of people involved in the production of a film. I am assuming here that Nintendo’s employees were working within the scope of employment and therefore Nintendo is the imputed author, and I am assuming that if Nintendo did use any independent contractors in the development and creation of “New Super Mario Bros. U,” it had properly executed work for hire agreements and therefore Nintendo is the imputed author.

⁶⁵ Stern Electronics, Inc. v. Kaufman, 669 F.2d 852, 855 (2d Cir. 1982).

fixation requirements of copyright, and the audiovisual aspect of a video game is an appropriate subject matter of copyright protection, copyright subsists automatically in the audiovisual component of Nintendo's video game upon fixation.⁶⁶

B. Exclusive Rights of Copyright Holder

The exclusive rights of copyright holders in their works are enumerated in 17 U.S.C § 106, and they are as follows: "...the owner of copyright under this title has the exclusive right to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission."⁶⁷

Relevant to this article are the reproduction right, the right to prepare derivative works, and the public performance right. Rooster Teeth violates each of these three exclusive rights, although only one exclusive right need be violated to constitute copyright infringement.

Starting with the reproduction right, it is important to recognize that the audiovisual component of a video game is copyrightable and that the reproduction right held by the copyright

⁶⁶ Subsist is defined by Merriam-Webster Dictionary Online as: "to exist or continue to exist." MERRIAM-WEBSTER DICTIONARY ONLINE (2014), <http://www.merriam-webster.com/> (last visited Nov. 21, 2014). Thus once the three requirements are met, and the subject matter is appropriate, copyright subsists or exists in the work.

⁶⁷ 17 U.S.C.A. § 106 (West 2014).

holder pertains to and protects that audiovisual component, not the video game itself.⁶⁸ That being said, if the underlying computer (system as a whole) or computer code is reproduced from which the audiovisual may be perceived, then the reproduction right of the copyright holder in the audiovisual is also violated.⁶⁹

Next is the right to prepare derivative works. “A ‘derivative work’ is 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.’ ”⁷⁰

Finally, the last copyright exclusive right pertinent to this article is the public performance right. This is peculiar in the video game realm, because, once more, the video game itself is not copyrightable. Because what is relevant in this article is the copyrighted audiovisual component of Nintendo’s “New Super Mario Bros. U,” the public performance right must be viewed in this context. Section 101 of the Copyright Act states that “[t]o ‘perform’ a work means to recite, render, *play*, dance, or act it, either directly or by means of any device or process or, *in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.*”⁷¹ Regarding the “public” component of public performance, Section 101 of the Copyright Act states that “[t]o perform...a work ‘publicly’ means – (1) to perform...it

⁶⁸ The exclusive rights pertain to what is protected by copyright, here the audiovisual expression.

⁶⁹ *M. Kramer Mfg. Co., Inc. v. Andrews*, 783 F.2d 421, 442 (4th Cir. 1986) (stating that the copyright in the audiovisual display created by the computer program protects not only the audiovisual component from being copied, but also protects the underlying computer from being copied, to the extent that the program embodies video game's audiovisual expression; when an infringer copies the computer program and reproduces the audiovisual expression embodied therein, he has infringed copyright holder's exclusive rights).

⁷⁰ 17 U.S.C.A. § 101 (West 2014).

⁷¹ *Id.* (emphasis added).

at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance...of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance...receive it in the same place or in separate places and at the same time or at different times.”⁷²

Courts have yet to determine whether playing a video game – as in an individual engaging in controlling the video game contents or characters – is a performance.⁷³ This type of performance is distinct from the performance in the context of showing the audiovisual contents of the video game, which is definitely evident and pertinent to this article. But exploring the former type of performance – actually playing the video game – it seems reasonable to estimate that that court would not view such a use as a performance. This conclusion is easily supported by the fact that by virtue of a video game being a game, there must be a license, whether implied or express, to actually play the video game. Video games *are designed to be played*. Other support for this conclusion comes from a Ninth Circuit case in which the Court held that students playing particular educational board games at tournaments sponsored by a nonprofit corporation (there were three tournaments which involved 500 students in the first tournament and culminated in about 900 students in the last tournament) that promoted friendly, academic competition did not constitute a performance.⁷⁴ The Court noted that “[t]he term ‘play’ has not been extended to the playing of games. To do so would mean interpreting the Copyright Act in a manner that would allow the owner of a copyright in a game to control when and where purchasers of games may play the

⁷² *Id.*

⁷³ Jihan Joo, *Public Video Gaming As Copyright Infringement*, 39 AIPLA Q.J. 563, 578 (2011).

⁷⁴ *Allen v. Academic Games League of America, Inc.*, 89 F.3d 614 (9th Cir. 1996).

games and this court will not place such an undue restraint on consumers.”⁷⁵ The Court further noted that the “interpretation of ‘play,’ as used to define ‘perform’ in § 101 of the Copyright Act, has generally been limited to instances of playing music records.”⁷⁶ Finally, the court recognizes my license theory to play a game in stating, “[w]hether privately in one’s home or publicly in a park, it is understood that games are meant to be ‘played.’”⁷⁷ Board games are rather analogous to video games and video games should therefore follow their suit.⁷⁸

While playing a video game may or may not constitute a performance (let alone a public performance), the showing of the images or making audible the sounds of an audiovisual work certainly constitutes a performance under the Copyright Act, especially in the context of the audiovisual component of a video game. The Fourth Circuit held that an operator of an arcade publicly performed the protected audiovisual work of the video game, by virtue of the television monitor displaying a series of images and the loudspeaker making audible the accompanying sounds of the video game’s protected audiovisual expression.⁷⁹ Shortly after this case was decided, Congress enacted the Computer Software Rental Amendments Act of 1990,⁸⁰ which is codified at 17 U.S.C. § 109.⁸¹ The Computer Software Rental Amendments Act of 1990 adds § 109(e), which states: “...in the case of an electronic audiovisual game intended for use in coin-operated equipment, the owner of a particular copy of such a game lawfully made under this title, is entitled,

⁷⁵ *Id.* at 616.

⁷⁶ *Id.* It is important to note that this Court alternatively finds that if playing the board games in a tournament sponsored by the nonprofit corporation was performance under the Copyright Act, the fair use doctrine applied; the tournaments were held to encourage education among students, and the potential market for the games was likely increased because participants in the tournament were required to purchase the games. *Id.* at 617.

⁷⁷ *Id.* at 616.

⁷⁸ Board games are to video games as paperback books are to electronic versions of books. Technology is shifting towards the electronic medium, and until the Copyright Act is amended to further detail how such medium is to be handled, the best we have to go off of in issue presented are physical equivalents.

⁷⁹ *Red Baron-Franklin Park, Inc. v. Taito Corp.*, 883 F.2d 275, 278-79 (4th Cir. 1989), rehearing denied, cert. denied, 110 S.Ct. 869 (1990).

⁸⁰ Computer Software Rental Agreements Act of 1990, PL 101-650, December 1, 1990, 104 Stat 5089.

⁸¹ 17 U.S.C.A. § 109 (West 2014).

without the authority of the copyright owner of the game, to publicly perform or display that game in coin-operated equipment, except that this subsection shall not apply to any work of authorship embodied in the audiovisual game if the copyright owner of the electronic audiovisual game is not also the copyright owner of the work of authorship.”⁸² Thus, by providing an exception to coin-operated arcade owners in exempting their public performance of the protected audiovisual expression of the video game, it is logical to state that showing the images or sounds of the audiovisual component of a video game is performance (whether publicly or privately according to the publicly perform definition and explanation above).

C. Copyright Infringement. Nintendo’s Rights Violated by Rooster Teeth

“Anyone who violates any of the exclusive rights of the copyright owner...is an infringer of the copyright...”⁸³ “[A] plaintiff who claims copyright infringement must show: (1) ownership of a valid copyright; and (2) that the defendant violated the copyright owner’s exclusive rights under the Copyright Act.”⁸⁴ Issues of access and substantial similarity are not at play in this article, because Rooster Teeth actually played Nintendo’s video game, “New Super Mario Bros. U,” and the footage and accompanying sounds captured is used in their “Let’s Play – New Super Mario Bros. U Part 1.” Since I have already demonstrated that Nintendo has a valid copyright in the audiovisual aspect of its video game, I will now address how Rooster Teeth violated Nintendo’s reproduction right, right to prepare derivative works, and public performance right.

Nintendo’s reproduction right is violated by Rooster Teeth. It would be misleading, as noted in the judicial law explicated above,⁸⁵ to say that Nintendo’s reproduction right in “New Super Mario Bros. U” as an audiovisual work could only be violated by the reproduction of the

⁸² 17 U.S.C.A. § 109(e) (West 2014).

⁸³ 17 U.S.C.A. § 501(a) (West 2014).

⁸⁴ *Ellison v. Robertson*, 357 F3d 1072, 1076 (9th Cir. 2004).

⁸⁵ *See* Part III(B), *supra*.

video game in video game format, whether disc-based or otherwise (such as ROM emulation). While creating copies of the video game would certainly infringe Nintendo's reproduction right – because from the copies of the video game the protected audiovisual work may be perceived – that is not the only way Nintendo's reproduction right is infringed. The audiovisual expression, for which Nintendo has copyright protection, is reproduced in Rooster Teeth's "Let's Play – New Super Mario Bros. U Part 1" video. The fact that the source code of the underlying video game is not present in Rooster Teeth's Let's Play is irrelevant because the audiovisual component of the video game is the work that receives protection. Thus, while Rooster Teeth does not make copies of the video game from which the protected audiovisual work can be perceived (*e.g.*, a disc copy of the video game or a ROM copy of the video game for computer emulation), it has made a copy of the protected audiovisual work in its Let's Play video which was uploaded to YouTube – that is to say, Rooster Teeth reproduces the audiovisual expression of the video game in its Let's Play.

Rooster Teeth further violates Nintendo's right to prepare derivative works. Rooster Teeth's Let's Play is actually an unauthorized derivative work, in that, without a license from Nintendo, Rooster Teeth has adapted Nintendo's audiovisual work into a new style of YouTube video with annotations (here commentary), and the video is based upon the audiovisual work for which Nintendo has copyright protection. Without the audiovisual work upon which Rooster Teeth's Let's Play is based, there would be no unlicensed derivative work as created by Rooster Teeth. Instructive are two Ninth Circuit Court of Appeals opinions describing derivative works in the video game realm. They are *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.* and *Micro Star v. Formgen Inc.*⁸⁶

⁸⁶ *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*, 964 F.2d 965 (9th Cir. 1992). *Micro Star v. Formgen Inc.*, 154 F.3d 1107 (9th Cir. 1998).

Lewis Galoob Toys, Inc. v. Nintendo of America, Inc. concerns itself with the Game Genie device, which allowed a video game player to alter features of Nintendo's copyrighted video games.⁸⁷ The Game Genie is a device manufactured by Lewis Galoob Toys, Inc., which

allows the player to alter up to three features of a Nintendo game. For example, the Game Genie can increase the number of lives of the player's character, increase the speed at which the character moves, and allow the character to float above obstacles. The player controls the changes made by the Game Genie by entering codes provided by the Game Genie Programming Manual and Code Book....The Game Genie functions by blocking the value for a single data byte sent by the game cartridge to the central processing unit in the Nintendo Entertainment System and replacing it with a new value...The Game Genie is inserted between a game cartridge and the Nintendo Entertainment System. The Game Genie does not alter the data that is stored in the game cartridge. Its effects are temporary.⁸⁸

The Court noted that the "altered displays [created by the Game Genie] do not incorporate a portion of a copyrighted work in some concrete or permanent form."⁸⁹ Quoting in part and citing *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.*, 865 F.2d 1341 (9th Cir. 1988), the Court used an illustrative converse example in the context of transferring artworks from a commemorative book to individual ceramic tiles: "[B]y borrowing and mounting the preexisting, copyrighted individual art images without the consent of the copyright proprietors...[Albuquere A.R.T.] has prepared a derivative work and infringed the subject copyrights. The ceramic tiles physically incorporated the copyrighted works in a form that could be sold."⁹⁰ The Court holds that the audiovisual displays created by the Game Genie are not derivative works.⁹¹

⁸⁷ *Lewis Galoob Toys, Inc.*, 964 F.2d 965.

⁸⁸ *Id.* at 967.

⁸⁹ *Id.* at 968 (emphasis omitted).

⁹⁰ *Id.* (emphasis omitted).

⁹¹ *Id.* (emphasis omitted) ("The Game Genie is useless by itself, it can only enhance, and cannot duplicate or recast, a Nintendo game's output. It does not contain or produce a Nintendo game's output in some concrete or permanent form, nor does it supplant demand for Nintendo game cartridges. Such innovations rarely will constitute infringing derivative works under the Copyright Act." Citing Christian Hadan, *A Proposal to Recognize Component Works: How a Teddy Bears on the Competing Ends of Copyright Law*, 78 CAL. L. REV. 1633, 1667-72 (1990).) The Court proceeds to hold that even assuming that the audiovisual displays created by the Game Genie were derivative works, the audiovisual displays created by the Game Genie were fair use of copyrighted audiovisual displays. *Lewis Galoob Toys, Inc.* 964 F.2d at 969-72.

Micro Star v. Formgen Inc. concerns itself with the manufacture and distribution of a CD Rom containing new levels – or maps – to be used in playing the computer video game, “Duke Nukem 3D.”⁹² Distinguishing this case from *Lewis Galoob Toys, Inc.*, the Court states that

whereas the audiovisual displays created by Game Genie were never recorded in any permanent form, the audiovisual displays generated by [Duke Nukem 3D] from the [Nuke It] MAP⁹³ files are in the MAP files themselves. In *Galoob*, the audiovisual display was defined by the original game cartridge, not by the Game Genie; no one could possibly say that the data values inserted by the Game Genie described the audiovisual display. In the present case the audiovisual display that appears on the computer monitor when a [Nuke It] level is played is described – in exact detail – by a [Nuke It] MAP file.⁹⁴

Rooster Teeth’s “Let’s Play – New Super Mario Bros. U Part 1” permanently contains Nintendo’s protected audiovisual work. Therefore, Nintendo’s right to prepare derivative works based upon its copyrighted audiovisual work is infringed.

Finally, Nintendo’s public performance right is violated by Rooster Teeth. For the reasons set forth above,⁹⁵ it would be trivial to further hypothesize whether playing a video game is public performance, especially in this context where Nintendo’s public performance right in its audiovisual component of its video game is clearly infringed when Rooster Teeth uploaded its Let’s Play to YouTube. Therefore, only the idea of publicly performing the audiovisual work need be entertained and explored.

Starting with the performance aspect of the “public performance” right, Rooster Teeth’s Let’s Play performs the copyright-protected audiovisual work. Pursuant to 17 U.S.C. § 101, Rooster Teeth has performed the audiovisual work in that it has shown the audiovisual work

⁹² *Micro Star*, 154 F.3d 1107.

⁹³ MAP files contain the instructions for the level designs (hence the file extension’s name), as described in *Micro Star*, 154 F.3d 1107.

⁹⁴ *Micro Star*, 154 F.3d at 1111.

⁹⁵ See Part III(B), *supra*.

images in any sequence.⁹⁶ Moreover, Rooster Teeth has performed the audiovisual work in that it makes the accompanying sounds audible.⁹⁷

Regarding the public component of the “public performance” right, Rooster Teeth has posted its Let’s Play to YouTube, and to date, it has 2,249,818 views.⁹⁸ Rooster Teeth has transmitted or otherwise communicated a performance of the audiovisual work to the members of the public via YouTube’s platform.⁹⁹ Because the Computer Software Rental Amendments Act of 1990 exempted coin-operated arcade owners from violating the public performance right, looking at what Congress did not exempt is important: the public performance violation in all other non-coin-operated-arcade-owner contexts, including publicly performing a video game’s protected audiovisual expression by showing the audiovisual work to the public via YouTube. Therefore, not only has Rooster Teeth violated Nintendo’s reproduction right and right to prepare derivative works, it also violates Nintendo’s public performance right of the audiovisual work.¹⁰⁰

IV. The Fair Use Defense¹⁰¹

A. Fair Use Defined

17 U.S.C. § 107 states a fair use limitation on exclusive rights held by the copyright holder.¹⁰² The preamble to this section states that “...the fair use of a copyrighted work...for

⁹⁶ 17 U.S.C.A. § 101 (West 2014).

⁹⁷ *Id.*

⁹⁸ As of Nov. 20, 2014. Rooster Teeth, *Let’s Play – New Super Mario Bros. U Part 1*, YOUTUBE, <https://www.youtube.com/watch?v=wmL7epUINGo> (uploaded Mar. 13, 2013).

⁹⁹ 17 U.S.C.A. § 101 (West 2014). The fact that the members receive it in separate places at different times is immaterial according to 17 U.S.C.A. § 101 (West 2014).

¹⁰⁰ Computer Software Rental Agreements Act of 1990, PL 101–650, December 1, 1990, 104 Stat 5089. *See* Part III(B), *supra*.

¹⁰¹ Before arriving at the Fair Use Defense portion of this article, I would like to note that I attempted to reach out to both Nintendo of America and Rooster Teeth for an interview, wherein I would question them as to their positions on whether Let’s Plays were copyright infringing and whether the fair use defense was applicable. Additionally, I would have sought more market information concerning ad-revenue and whether there are correlations regarding the popularity of Rooster Teeth’s “Let’s Play – New Super Mario Bros. U” and the sales of Nintendo’s video game, but unfortunately Nintendo declined my interview request and Rooster Teeth never responded to my request. Emails on file with the author.

¹⁰² 17 U.S.C.A. § 107 (West 2014).

purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”¹⁰³ The factors to be considered in making a fair use determination “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; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”¹⁰⁴ If a determination of fair use is made, then the copyright-infringer is not liable for its use of the copyright-protected work. Conversely, if a determination of no fair use is made, then the copyright-infringer is liable for his copyright infringement.

Prior to the Copyright Act of 1976, fair use was a judge-made doctrine; in the Copyright Act of 1976, Section 107 describing fair use came into existence, and it was Congress’ intent “to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.”¹⁰⁵ Therefore, “[t]he 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 the law is designed to foster.”¹⁰⁶ Case-by-case analysis is required, because both judicial fair use doctrine and the Copyright Act fair use statute cannot be reduced to bright-line rules.¹⁰⁷

The preamble of 17 U.S.C. § 107 “employs the terms ‘including’ and ‘such as’ in the preamble paragraph to indicate the ‘illustrative and not limitative’ function of the examples given...which thus provide only general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses.”¹⁰⁸ Further, the four fair use factors cannot be

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Campell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (quotation and citation omitted).

¹⁰⁶ *Id.* (quotation and citation omitted).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 577-78 (citation omitted).

treated in isolation from one another, and are to be explored and weighed together “in the light of the purposes of copyright.”¹⁰⁹ With this backdrop, I now proceed to explain each fair use factor, which will then in turn be applied to the Let’s Play context.

The first factor to be weighed in the determination of fair use is the purpose and character of the use. Courts consider whether the alleged infringing use is for criticism, commentary, or news reporting purposes, as the purpose of such an inquiry is to determine if the alleged infringing use is superseding or supplanting the original.¹¹⁰ If the alleged infringing use supersedes or supplants the original, then this factor weighs against a finding of fair use. However, if the alleged infringing use “instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message” – that is to say, is the alleged infringing use transformative? – then this factor would weigh in favor of a finding of fair use.¹¹¹ While a finding of transformative use is not absolutely necessary for a finding of fair use, “the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works... and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”¹¹² Along the lines of whether the alleged infringing use supersedes or supplants the original is another inquiry this factor undertakes: is the alleged infringing use a commercial use or a nonprofit use?¹¹³ If the alleged infringing use is for commercial purposes, that goes against a finding of fair use; conversely, if the alleged infringing use is for nonprofit purposes, that weighs in favor of a finding of fair use.¹¹⁴ “The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but

¹⁰⁹ *Id.* at 578 (citation omitted).

¹¹⁰ *Id.* at 578-79.

¹¹¹ *Id.* at 579.

¹¹² *Id.*

¹¹³ *Harper and Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562 (1985).

¹¹⁴ *Id.*

whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”¹¹⁵ If the alleged infringing user “ha[s] not merely the incidental effect but the *intended purpose* of supplanting the copyright holder’s commercially valuable right[s]” then there cannot be fair use.¹¹⁶ This ties in with the notion that “fair use presupposes ‘good faith’ and ‘fair dealing.’”¹¹⁷ Good faith and fair dealing relates to the character of the use by looking at “the propriety of the defendant’s conduct.”¹¹⁸ Thus, for example, a defendant who “knowingly exploited a purloined manuscript” had this factor weighed against it.¹¹⁹

The next factor calls for an inquiry as to the nature of the copyrighted work. “This factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequences that fair use is more difficult to establish when the former works are copied....[C]reative expression for public dissemination falls within the core of the copyright’s protective purposes.”¹²⁰ Thus, a work that is purely creative expression is closest to the core of copyright law protection; this is contrasted with factual works, factual compilations, and news broadcasts which are not within the core of copyright’s protective purposes.¹²¹

The third factor to be weighed in a fair use analysis is the amount and substantiality of the portion used in relation to the copyrighted work as a whole. This “enquiry will harken back to the first of the statutory factors...[as] the extent of permissible copying varies with the purpose and character of the use.”¹²² This factor has both a quantitative and qualitative component to it: “this

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 562-63 (emphasis in original).

¹¹⁷ *Id.* at 562 (quotation and citation omitted).

¹¹⁸ *Id.* (quotation and citation omitted).

¹¹⁹ *Id.* at 563.

¹²⁰ *Campell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994).

¹²¹ *Id.*

¹²² *Id.* at 586-87 (1994) (quotation and citation omitted).

factor calls for thought not only about the quantity of the materials used, but about their quality and importance, too.”¹²³

Finally, the fourth factor is the effect of the use upon the potential market for or value of the copyrighted work. This factor “requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant...would result in a substantially adverse impact on the potential market for the original.”¹²⁴ Thus, the inquiry needs to take in account “not only of harm to the original but also of harm to the market for derivative works.”¹²⁵

While it can be said that unauthorized or unlicensed derivative works presumptively harm derivative markets of the original protected work, there are three other¹²⁶ ways of viewing derivative market harm. They are: public goods theory, foreseeability theory, and principal market theory, which all interrelate to an extent. Even though courts do not explicitly name these theories in weighing this fourth fair use factor, they implicitly give credence to them by virtue of their holdings.

“Copyrights must be broad enough to give authors sufficient incentive to create, yet limited enough to allow others to use and build upon those works.”¹²⁷ In public goods theory, public goods should be available to all at as close to a zero cost as possible, yet it there still must be incentive to authors to create. A copyright holder should thus be protected from harmful uses that detract from the creative incentive, whilst any other uses should be allowed.

¹²³ *Id.* at 587.

¹²⁴ *Id.* at 590 (quotation and citation omitted).

¹²⁵ *Id.* (quotation and citation omitted).

¹²⁶ In my opinion, these other ways are better.

¹²⁷ Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U.L. REV. 969 (2007).

Foreseeability theory is similar in that if a copyright holder cannot foresee a derivative market, then such use should not be considered market harm because it was “unlikely to enhance ex ante incentives to create or distribute copyrighted works.”¹²⁸

Finally, principal market theory, which I hypothesize, looks to the principal market of the underlying copyrighted work. If the principal market of the underlying work is a primary market, then harm to a secondary derivative market should have no bearing in the weighing of this fair use factor.¹²⁹ Conversely, if the principal market for the underlying work is a secondary derivative market, then the harm to the secondary derivative market by an alleged infringing use should be heavily considered when weighing this fair use factor. This concept is perhaps best explained by way of an example: Copyright holder of a sound recording of a musical composition has as its principal market the primary market for selling the song – that is, selling the song to consumers; so any secondary derivative market use, such as sampling the song or parodying it, should not be considered, assuming such secondary derivative market use does not supplant the primary market. Conversely, a copyright holder of a sound recording of a drum loop¹³⁰ has as its principal market the secondary derivative market, not the primary market of selling the sound recording to consumers; his principal market is the *licensing* of the drum loop *for use in the production of other songs – derivative works*. Therefore, for such a copyright holder, the harm of unlicensed or unauthorized uses in the secondary derivative market is critical because permitting such unlicensed or unauthorized derivative uses would dis-incentivize the creative production of the drum loop.

With the fair use defense detailed and the four factors courts use in making a determination for or against fair use explained, I now apply them to Let’s Plays.

¹²⁸ *Id.*

¹²⁹ This is assuming a secondary derivative market does not supplant the primary market.

¹³⁰ Drum loops are a few measures of drumbeats used in producing other songs.

B. Fair Use Factors Applied

The first fair use factor to be weighed in the purpose and character of the use of Let's Plays, specifically Rooster Teeth's Let's Play video, which is the illustrative example in this article. The first inquiry of this factor is whether the Let's Plays supersede or supplant the original. But this is a difficult question to consider, because what is the original? Is it the video game or the copyright protected audiovisual component of the video game? Because the Copyright Act of 1976 did not contemplate all this new video game technology, the Internet, and video sharing services, such as YouTube, an amendment is needed. If the original work is the video game, then Let's Plays do not supersede or supplant the original. However, if the original work is the copyrighted audiovisual work, then Let's Plays certainly supersede or supplant the original. I believe the latter is how the current state of the law would view this, considering copyright protection has not been afforded to video games *as video games*, but rather *as audiovisual works* and/or literary works in their code. However, an argument is easily made that Let's Plays do not supersede or supplant the original, because even though the audiovisual expression is supplanted, the focus of audiovisual works in regard to video games is to play (as in gaming or controlling) the audiovisual work. In fact, it is hard to say that there is a market for the audiovisual component of the video game in and of itself, when the audiovisual component is marketed as part of the video game as a whole (including the code and the ability for players to play it and have the audiovisual display react to the player's input).

The transformative use inquiry as part of the purpose and character of the use factor is next. Rooster Teeth's "Let's Play – New Super Mario Bros. U Part 1," like many other Let's Plays as discussed above,¹³¹ is somewhat transformative. Let's Plays add commentary; while not all

¹³¹ See Part II(B)(ii), *supra*.

commentary is commentary in the critical sense or review sense, some of it is. Recall that one important critical commentary was the fact that keeping track of the character one is controlling on screen is difficult, especially in light of all the action occurring on screen.¹³² Other commentary is informative as to how to play the game,¹³³ and other commentary is humorous.¹³⁴ Viewers watch Rooster Teeth's Let's Play for its funny commentary (comprised of the players talking over one another), though this is all on the backdrop of the audiovisual expression of the video game. Additionally, the genre of the Let's Play style videos is itself something novel that is just recently emerging and is affecting game development as well as new technologies such as live streaming broadcasts of video gameplay,¹³⁵ which weighs in favor of Let's Plays being transformative uses. Even though creators of Let's Plays, at least those that gain in popularity, stand to gain a great commercial profit in the exploitation of the alleged infringing use through ad-revenue, it is imperative to recall that "the more transformative the new work, the less will be the significance of other factors, *like commercialism*, that weigh against a finding of fair use."¹³⁶

Finally, the concept of good faith and fair dealing, which are weighed in the purpose and character of the use factor, is hard to address. The propriety of Let's Play uploaders' conduct is marred if it is viewed that it is their intended purpose to reproduce, use, and show the underlying video game's protected audiovisual work in their Let's Plays. Conversely, there typically is no

¹³² See Part II(B)(iii), *supra*. Other notable critical commentary therein discussed include commentary on the character and level designs as well as praising the video game and the new baby Yoshi character.

¹³³ See Part II(B)(iii), *supra* (describing informative commentary such as how to do different moves or abilities with the characters).

¹³⁴ See Part II(B)(iii), *supra* (detailing the humorous commentary including funny references, insults, and expletives).

¹³⁵ See Part V, *infra* (describing emerging technologies such as Twitch and Ustream through which users broadcast themselves live playing the video game).

¹³⁶ *Campell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). See Part IV(A). See Part II(B)(i), *supra* (stating that Rooster Teeth has potentially earned \$8,605,217.00 to date in ad-revenue from its videos on YouTube). See, also, Part II(B)(ii) (noting that Kjølberg pulls in \$4 million in ad sales per year).

blatant bad faith or malicious intentions of uploaders of these Let's Plays (they are video game fans, after all), and certainly not in the context of the illustrative Rooster Teeth Let's Play example.

Therefore, I would determine this first factor somewhere between favoring a fair use and a wash. The transformative nature of the Let's Play genre is marred by the commercial aspect of the use. Superseding and supplanting in addition to fair use and fair dealing are not clear enough to tip the scale more in favor of a finding of fair use or off-setting in relation to this factor.

The second factor looks at the nature of the copyrighted work. The audiovisual components of video games are creative expression and therefore are close to the core of copyright protection. Yet, be mindful that the more transformative a use, the less important are the other factors. Nonetheless, this factor weighs in against a finding of fair use for Let's Plays.

The third factor needed to be applied is the amount and substantiality of the portion used in relation to the copyrighted work as a whole. Quantitatively, Let's Plays typically use the majority of the underlying protected audiovisual of the video game in their captured footage, if not the entire audiovisual work. In Rooster Teeth's "Let's Play – New Super Mario Bros. U Part 1," Rooster Teeth uses about twenty-five minutes of the audiovisual work, taken from the Story mode of Nintendo's video game. Rooster Teeth has a Part 2, Part 3, and Part 4 of its Let's Play series on the video game, and throughout all four Let's Plays, "New Super Mario Bros. U"'s story mode is reproduced, used, and shown in its entirety. Though there are several other modes to Nintendo's video game, the Story mode certainly constitutes the majority of the protected audiovisual work. Therefore, quantitatively, a substantial portion of the audiovisual work is used by Rooster Teeth in all four installments in the aggregate, and still a substantial portion of the audiovisual work, though less than in the aggregate, is used by Rooster Teeth in each individual installment. Because of the sheer substantial amount taken (quantitatively) of the audiovisual expression, qualitatively

the important parts or heart of the protected audiovisual work are used. In sum, the third factor weighs against a finding of fair use for Let's Plays.

Finally, the fourth factor deals with the effect of the use upon the potential market for or value of the copyrighted work. As noted above, this factor considers not just the extent of market harm caused by the Let's Plays, but also whether unrestricted and widespread conduct of creating Let's Plays would result in a substantially adverse impact on the potential market for the video game. Interestingly, if more people create Let's Plays containing footage from the audiovisual work of Nintendo's video game, this would not negatively affect the market for the audiovisual work embodied in the video game or the market for the video game (nor would it negatively affect the market for the audiovisual work as a stand alone work, for there is no market for such). In fact, there is evidence as detailed above in the Flappy Bird context that shows the opposite affect. Market for the underlying audiovisual work embodied in the video game and the video game itself is positively affected by Let's Plays. People see these Let's Plays and are often persuaded to purchase¹³⁷ the video game, which is being played in the Let's Play. However, the inquiry does not end there. Effect on derivative markets must be considered. There does not appear to be a derivative market for the audiovisual work for licensing its use in derivative works. Therefore, there is no effect on the derivative markets for the audiovisual component of a video game. It is still instructive to look at intellectual property law foundations and policies in assessing this effect on potential markets and value of the work fair use factor. I will look at such effects using the three theories as posited above.¹³⁸

¹³⁷ Flappy Bird was a freely downloadable application. However, the increased downloads of the game meant more individuals playing the game, which meant more ad-revenue for the creator of the application.

¹³⁸ See Part IV(A), *supra*.

Under public goods theory, derivative market effect is only truly relevant if such was an incentive in order to create and innovate. If not, the derivative market effect should not be considered, because public goods should be as accessible by as many people and used in as many non-dis-incentivizing derivative works as possible. Copyright holders in the audiovisual work in a video game do not have their derivative market harmed, because they are still incentivized to create and innovate by the uninterrupted sale of their video game, in which the audiovisual work is embodied. Under a foreseeability theory, if the derivative market was foreseeable, then the derivative market is harmed if the use was unlicensed or unauthorized. If it was a foreseeable market, the copyright holder may have depended on it for proper incentive to continue to create and innovate. The market for licensing the audiovisual work of a video game for use in Let's Plays was certainly not foreseeable, as this genre is emerging. After some point in time, Let's Plays may become rather well-known that such licensing of the audiovisual work of a video game is foreseeable. Finally, under the principal market theory, copyright holders of audiovisual works in video games have as their principal market the primary market of selling the audiovisual work as embodied in the video game to the consumer; any secondary derivative market is therefore not the principal market, and as such, the effective of the use on the secondary derivative market should be disregarded, unless it is tantamount to superseding or supplanting the principal primary market. Regardless under which theory market and potential market harm is viewed, this factor favors a finding of fair use.

Overall, the balance of the fair use factors is not mechanical. I can easily see a court finding in favor of fair use just as easily as I can see a court finding against a finding of fair use. Since Let's Plays are rather transformative, the actual market of the video game in which the protected audiovisual expression is embodied is not harmed (and quite possibly, it is actually positively

affected), part of the Let's Plays' commentary can be critical or review-like, and in order not to stifle new expression and emerging genres of videos, I believe a court should find Let's Plays to be a fair use.

V. Why the Determination of a Fair Use Matters

A determination of fair use is pivotal monetarily and technologically. Financially, it directly effects which party receives how much ad-revenue generated from the Let's Play. Partnership agreements between the copyright holder and the Let's Play uploader typically split ad-revenue evenly – each party gets 50%. If the infringing Let's Play video is not a fair use, the copyright holder would be entitled to monetary damages, which would include the ad-revenue generated by the Let's Play. However, if the Let's Play video is a fair use, then the ad-revenue would be entirely retained by the Let's Play uploader; the need for partnership agreements between copyright holder and the Let's Play uploader would no longer be necessary to contractually set a profit-sharing regime, when the whole profit is the Let's Play uploader's alone.

Additionally, technology is affected by a determination for or against a finding of fair use in the context of Let's Plays. If a Let's Play is not considered a fair use, then the Let's Play genre itself might be stifled; despite some creative commentary the Let's Play uploaders add (and creativity is valued by society), this medium may no longer be financially fueled. If the copyright holder receives all the ad-revenue, then the monetary incentive for the Let's Play uploaders to create Let's Plays is gone. This is still true to an extent under a partnership agreement in which ad-revenue is shared. Conversely, determining that Let's Plays are fair uses of the copyrighted works allow Let's Plays to continue to be a healthy, thriving genre. The reach of the fair use determination in regard to Let's Plays does not only affect that genre, but it affects emerging technology, such as those video game players who actively stream themselves playing video games on Twitch or

Ustream. These live streams of players playing video games are similar in most regards to Let's Plays, except for the fact that they are broadcasting live (and some of these live broadcasts are recorded to be viewed later).¹³⁹ Therefore, the determination of a fair use in the context of Let's Plays can easily be found to be analogous to live broadcasts of gameplay via Twitch or Ustream and henceforth applied there.

VI. Conclusion

Let's Play videos uploaded to YouTube certainly infringe the underlying video game's protected audiovisual component, because Let's Plays use all (or practically all) of the audiovisual expression of the video game. Nintendo has a valid copyright in the audiovisual component of "New Super Mario Bros. U," as the audiovisual component of a video game is copyrightable. Nintendo and other video game creators, as copyright holders in the audiovisual component of their video games, have exclusive rights. Those rights include, *inter alia*, the reproduction right, the right to prepare derivative works, and the public performance right. Let's Plays violate these three rights. The reproduction right is violated because Let's Plays make a copy of the audiovisual component of the video game for use in the Let's Play video. The right to prepare derivative works is infringed, because Let's Plays are based upon the protected audiovisual work; in fact, there would be no Let's Plays without the underlying audiovisual expression. Let's Plays employ the audiovisual work without a license or authorization, and so this right is violated. The public performance right is violated, because Let's Plays show the underlying audiovisual work embedded in their video to the public at large via video streaming platforms like YouTube.

¹³⁹ In fact, Major League Gaming (an organization for competitive video gaming) has recently advertised the live game broadcasting streams as a Let's Plays. This goes to show how fast technology expands and how the Let's Play genre is evolving from captured video gameplay footage with commentary to live video game gameplay broadcasts with commentary. Major League Gaming, Twitter (Nov. 19, 2014, 6:30 PM), <https://twitter.com/MLG/status/535213442471579649> ("Has anyone played Far Cry 4? @OpTic_BigTymeR is doing a lets [*sic*] play right now on MLG.tv/BigTymeR!").

Though seemingly copyright infringing, Let's Plays might benefit from a fair use defense. The harsh strikes against a finding of fair use are the commercial aspects (and grand commercial prospects) of Let's Plays, the fact that the underlying protected audiovisual work is close to the core of copyright protection, and the underlying work (the audiovisual component of video games) being used in full. However, support in favor of a determination is the transformative nature of Let's Plays (and the fact that the more transformative the use, the less significant the other factors are, including commercial use), the critical and review-like commentary contained in Let's Plays, and the market for the video game in which the protected audiovisual work is embodied is not harmed at all (and quite possibly, the market for the video game in which the protected audiovisual work is embodied is positively effected). While it is easy to see a court finding for or against a fair use in the context of Let's Plays, a court should find Let's Plays to be a fair use.

The determination for or against fair use has monetary and technological implications. Financially, it directly impacts the ad-revenue monetization of Let's Plays and ultimately how much each party (uploader of the Let's Play and the creator of the video game in which the audiovisual work is embodied) receives. Technologically, the determination for or against fair use in regard to Let's Plays is analogous to emerging technology platforms through which live gameplay broadcasts of video games are streamed and could plausibly be applied in those contexts.