

NOTE

NOTHING IS YOURS, EVERYTHING IS
INFRINGING:
THE DELICATE STATE OF COPYRIGHT IN VIDEO GAME
LIVESTREAMS

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I. INTRODUCTION

Video games are arguably the world's most valuable entertainment industry, with the International Trade Administration putting the value of the global video game industry for 2020 at \$159.3 billion, almost double the value of other sectors of media & entertainment.¹ Of course, at around \$60 for the most anticipated AAA titles,² not everyone can afford to play every game on release day.³ Regardless of a game's price, there are a variety of reasons someone might choose not to play a particular title themselves, but to watch someone else do so. For example, they may not have the skill to perform at the level they would like, it may be a genre they don't enjoy playing but want to know about, or they may just want to see how someone else reacts to the game. These are just some of the situations that might lead someone to the world of video game livestreaming,

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- ¹ Compare Andres Lahiguera, *Media and Entertainment: Video Games Sector*, INT'L TRADE ADMIN., <https://www.trade.gov/media-entertainment-video-games-sector> [<https://perma.cc/B4CX-B6JX>] (valuing the global video game industry at 159.3 billion in 2020), with *Media and Entertainment: Music Sector*, INT'L TRADE ADMIN., <https://www.trade.gov/media-entertainment-music-sector> [<https://perma.cc/X8XG-YPJC>] (valuing the global music industry at \$80.2 billion in 2020), and *Media and Entertainment: Filmed Entertainment Sector*, INT'L TRADE ADMIN., <https://www.trade.gov/media-entertainment-film-sector> [<https://perma.cc/D54L-39KG>] (valuing the US Film and Television industry at \$85 billion in 2020), and *Media and Entertainment: Text Publishing Sector*, INT'L TRADE ADMIN., <https://www.trade.gov/media-entertainment-text-publishing-sector> [<https://perma.cc/MQC2-H3NE>] (valuing the global text publishing industry at \$42.5 billion in 2019).
- ² See *Glossary: AAA Games*, ARM, <https://www.arm.com/glossary/aaa-games> [<https://perma.cc/LQ5E-8F4E>] (defining AAA games as "a classification used within the video gaming industry to signify high-budget, high-profile games that are typically produced and distributed by large, well-known publishers"); Rob Fahey, *The \$70 AAA Price Point: It's About Time*, GAMES INDUSTRY, <https://www.gamesindustry.biz/the-usd70-aaa-price-point-its-about-time-opinion> [<https://perma.cc/RJF4-YRG4>] (Nov. 20, 2020) (commenting on an expected increase in AAA games price to \$70, from the \$60 which "was effectively established at the start of the Xbox 360 / PS3 generation, back in 2005").
- ³ See Colette Bennett, *Video Games Are Getting a Major Price Hike*, THE STREET (Sept. 13, 2022, 5:37 PM), <https://www.thestreet.com/technology/video-games-are-getting-a-major-price-hike> [<https://perma.cc/5645-EHQD>] (quotes game publisher executives on trends in increasing game prices and the shift towards subscription models).

which has itself become a highly profitable and influential aspect of the video game industry.⁴

The combination of artistic audiovisual components and technical software found in video games stretches the already somewhat uncomfortable fit of copyright's application to computer software.⁵ The emergence and rapid growth of the video game livestreaming industry, including the development of professional competitive video game leagues known as Esports⁶, may be finally tearing the seams of copyright's application to video games.⁷ Copyright holders have until now largely turned a blind eye to the widespread infringement on their content through streaming, based on the belief that it serves as a kind of free advertising⁸ or because they found the cost of imposing strict control too high.⁹

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- ⁴ See, e.g., Joe Tidy & David Molloy, *Twitch Confirms Massive Data Breach*, BBC NEWS (Oct. 6, 2021), <https://www.bbc.com/news/technology-58817658> [<https://perma.cc/C632-2FVM>] (reporting on leaked data reporting income of major channels on Twitch, one of the leading platforms for video game livestreaming).
- ⁵ See Kyle Coogan, *Let's Play: A Walkthrough of Quarter-Century-Old Copyright Precedent as Applied to Modern Video Games*, 28 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 381, 383 (2018).
- ⁶ See Justin Ronquillo, *The Rise of Esports: The Current State of Esports, Its Impacts on Contract Law, Gambling, and Intellectual Property*, 23 INTELL. PROP. & TECH. L.J. 81, 81 (2019).
- ⁷ Yang Qiu, *A Cure for Twitch: Compulsory License Promoting Video Game Live-Streaming*, 21 MARQ. INTELL. PROP. L. REV. 31, 35 (2017) ("As the market value of video game streaming increases, some potential copyright disputes are aggravated.").
- ⁸ See, e.g., Elizabeth Chung, *Gotta Catch 'Em All! The Rise of Esports and the Evolution of Its Regulations*, 22 SMU SCI. & TECH. L. REV. 231, 245 (2019) (citing a panelist at a 2018 America Bar Association conference panel on the rise of Esports as saying that livestreaming by popular creators can garner publicity and boost sales for a game); John T. Holden et al., *A Short Treatise on Esports and the Law: How America Regulates Its Next National Pastime*, 2020 U. ILL. L. REV. 509, 540 (2020) ("Game producers have flexed their copyright muscles to restrict third parties from selling rights to streams of tournament play, but have seemingly turned a blind eye to unauthorized and very commercial streaming by gamers.").
- ⁹ Nintendo has generally been the most protective of the major game publishers over the use of their copyrighted content, instituting widespread takedown notices and demonetizing videos featuring their games. They briefly ran the Nintendo Creator's Program, where YouTube creators agreed

What remains uncertain is how modern courts might apply the decades-old arcade game litigation that established the current state of copyright over video games to the state of the more complex modern industry.¹⁰

II. THE STATE OF STREAMING GAMEPLAY

Although video games have existed since arguably the 1950s, the trend towards players streaming their gameplay is obviously more recent.¹¹ In considering the relationship between streaming and copyright law, it is important to understand how the current state of video game livestreaming came to be and

to split advertising revenues for permission to use Nintendo's copyrighted content on their channel. The program was controversial and widely disliked among creators, and in late 2018 Nintendo announced the end of the program, replacing it with guidelines allowing for officially released content to be posted online as long as there is creative input such as commentary from the creator. See Stefanie Fogel, *Nintendo Is Shuttering Its Controversial YouTube Creators Program*, VARIETY (Nov. 29, 2018, 10:00 AM), <https://variety.com/2018/gaming/news/nintendo-ending-creators-program-1203047993> [<https://perma.cc/ARV9-99SH>]; Emma Kent, *Nintendo Scraps Controversial Creators Program, Making Life Easier for Youtubers*, EUROGAMER (updated Nov. 29, 2018), <https://www.eurogamer.net/nintendo-scraps-creators-program-making-life-much-easier-for-youtubers> [<https://perma.cc/43MP-MKFT>] (describing the "rocky years packed with criticism" for the program and how it was ended after a new round of copyright strikes resulted in a "reputation for harsh copyright policies").

¹⁰ See Coogan, *supra* note 5, at 383 ("current precedent—created by extensive litigation in the 1980s over early arcade games—may be a round hole into which the square peg of today's highly complex video games would have difficulty fitting").

¹¹ See *The First Video Game?*, BROOKHAVEN NAT'L LAB'Y, <https://www.bnl.gov/about/history/firstvideo.php> [<https://perma.cc/6N2A-PELK>] (exploring how Tennis for Two, which debuted in October 1958 as an interactive science exhibit, influenced the birth of video games and could be considered the first video game; describing the gameplay as

a two-dimensional, side view of a tennis court on the oscilloscope screen, which used a cathode-ray tube similar to a black and white television tube. The ball, a brightly lit, moving dot, left trails as it bounced to alternating sides of the net. Players served and volleyed using controllers with buttons and rotating dials to control the angle of an invisible tennis racquet's swing.).

the scope of the current industry. This Part will describe the development of livestreaming video games and the common types of livestreams.

A. ORIGINS OF LIVESTREAMING GAMES

For those skeptical of why someone would watch a stranger livestream themselves playing a video game, there are at least two roots of the activity which might be more familiar. First is the general tendency of fans of popular media to engage in “fan labor,” or the creation of works expanding on, interpreting, or changing aspects of the media they enjoy.¹² Perhaps the most widely known form of fan labor is fan fiction, or fan-written stories using existing characters and worlds, which dates back at least as far as the Star Trek fan zines of the 1960s.¹³ The second is the experience, familiar to many, of having to watch a friend or family member play a video game when they themselves ran out of quarters for the arcade machine, or because there was only one controller, or simply because the game was only built as a single-player experience.¹⁴

The most direct ancestors of modern video game livestreaming are gameplay videos shared among online communities and fan forums in the 1990s, such as the “demo” files produced from the 1996 game *Quake*.¹⁵ These videos tended to be just the gameplay video with sometimes audio.¹⁶ The commentary and reactions that have become signature to the streaming community now were not part of these recordings. The predecessor to that aspect can be more closely

¹² See Mel Stanfill & Megan Condis, Editorial, *Fandom and/as labor*, TRANSFORMATIVE WORKS & CULTURES, Mar. 15, 2014, <http://journal.transformativeworks.org/index.php/twc/article/view/593/421> [<https://perma.cc/JP4Y-9GTE>].

¹³ See THE FAN FICTION STUDIES READER 82 (Karen Hellekson & Kristina Busse eds., 2014) (tracing the history of fan fiction to stories published in early fan zines, or fan made magazines, the earliest of which focused on the original Star Trek series).

¹⁴ Robinson Meyer, *It's Totally Normal to Watch Other People Play Video Games*, THE ATLANTIC (Sept. 3, 2014), <https://www.theatlantic.com/technology/archive/2014/09/itstotally-normal-to-watch-other-people-play-video-games/379476/> [<https://perma.cc/J3F4-PZV3>].

¹⁵ Howard S. Chen, *Gameplay Videos and Fair Use in the Age of Tricks, Glitches and Gamer Creativity*, 25 B.U. J. SCI. & TECH. L. 675, 683 (2019).

¹⁶ Patrick Klepek, *Who Invented Let's Play Videos?*, KOTAKU (May 6, 2015), <https://kotaku.com/who-invented-lets-play-videos-1702390484> [<https://perma.cc/BC5C-AQJ4>].

traced to the written forum posts which combined screenshots of gameplay with text commentary.¹⁷ The rise of video sharing platforms like YouTube popularized players pairing their commentary with the gameplay footage either in on-screen text, narration, or with an overlaid video of themselves.¹⁸ Advancements like wider availability of greater bandwidth supported sharing the gameplay in real time through livestreaming, and let creators share their commentary, talk with the viewers, take suggestions, and generally build a strong personal brand.¹⁹

Not all video gameplay is livestreamed—there is a significant amount of gameplay footage and commentary still pre-recorded—but livestreaming will be the focus of this Note. Twitch.com (“Twitch”), owned by Amazon, is the largest platform for streaming video games, followed by YouTube.²⁰ Twitch is a general livestreaming platform, not exclusive to video games, but the platform originally diverged from the gaming section of another website, Justin.tv, and most of the

¹⁷ See *id.*

¹⁸ See *id.*; Joseph Stanichar, *Let’s Plays Are as Fun as Ever: Why We Still Love Watching Other People Play Videogames*, PASTE MAGAZINE (Mar. 1, 2023) <https://www.pastemagazine.com/games/youtube/why-do-people-watch-lets-plays> [<https://perma.cc/RKS4-5Y8X>] (noting overlaid graphics as one reason the author enjoys a particular Lets Play creator); Gene Park, *Once ‘A New Art Form,’ Let’s Play Videos Are Facing a Glut*, WASH. POST (May 3, 2019) <https://www.washingtonpost.com/arts-entertainment/2019/05/03/once-new-art-form-lets-play-videos-are-facing-glut/> [<https://perma.cc/F8WK-BFDW>] (tracing the history of Let’s Plays, including commentary on videos that “were very short with a big face reacting” not performing as well as they used to on YouTube).

¹⁹ See Harris Heller, *Creator Camp: Engaging Viewers*, TWITCH, <https://www.twitch.tv/creatorcamp/en/paths/establish-your-brand/engaging-viewers/> [<https://perma.cc/T2PA-YV7A>]; *Technology Advancements Impacting Esports Gaming*, IXIE (Feb. 12, 2024), <https://www.ixiegaming.com/blog/technology-advancements-in-esports-gaming/> [<https://perma.cc/3RD8-8U5X>] (noting 5G and streaming technology as impacting the growth of esports by allowing faster connections and real-time engagement with viewers).

²⁰ See Imad Khan, *Why Twitch Is Still the King of Live Game Streaming*, N.Y. TIMES (Dec. 15, 2019), <https://www.nytimes.com/2019/12/15/business/tech-video-game-streaming-twitch.html> [<https://perma.cc/6FE9-JCZ5>]; Amanda Khan, *2022 Yearly Video Game Live Streaming Trends Report*, STREAM HATCHET (Feb. 8, 2023) <https://streamhatchet.com/blog/blog-2022-yearly-video-game-live-streaming-trends-report/> [<https://perma.cc/3NC6-5YXN>] (“Twitch continues to dominate the live streaming landscape; the top 29 live streaming creators last year broadcast on Twitch.”).

top content remains video game related.²¹ Both Twitch and YouTube allow creators to livestream their gameplay and later post a recording of that stream to their channel for viewers to watch or rewatch on demand.²² Regardless of whether they appear on Twitch or YouTube, most streamers use a format similar to that exemplified in Figure 1.²³ Most of the viewer's screen is taken up by the gameplay footage, with a smaller window containing a view of the player (called the "facecam"), and a "chat box" to one side or below where audience members can write messages.²⁴ There may also be a banner on the bottom of the screen with information about the channel and stream being viewed.²⁵ While engagement with the player through the facecam and responding to comments in the chat box is a big part of building a brand in streaming, not all streamers actually appear visually on their streams, either replaced by an avatar or with no facecam at all.²⁶

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- ²¹ Seung Woo Chae & Sung Hyun Lee, *Sharing Emotion While Spectating Video Game Play: Exploring Twitch Users' Emotional Change After the Outbreak of the COVID-19 Pandemic*, 131 *COMPUT. IN HUM. BEHAV.*, Jan. 31, 2022, at 2 (finding that as of December 2020, 84% of Twitch streaming content was video game related).
- ²² See A. Houssard et al., *Monetization in Online Streaming Platforms: An Exploration of Inequalities in Twitch.tv.*, 13 *SCI. REPS.* 1303 (2023), <https://www.nature.com/articles/s41598-022-26727-5#citeas> [<https://perma.cc/9WR2-XKPG>]; *Live Streaming Guide*, YOUTUBE, <https://kstatic.googleusercontent.com/files/061c6a9aa3a434e3d8d0a3306e2416191b065aaf3b1aadff04f723191b3ec8384a915b05bcb4da60862b75881e2a7168e2e46f0f41bc00dc1e9647d30044a8e5> [<https://perma.cc/9WU9-J2K8>] (providing an overview for the YouTube livestreaming process including engaging with viewers and making the video available on-demand after the stream).
- ²³ See Shwetang Parthasrthy, *Twitter Ecstatic as Alexandria Ocasio-Cortez's Among Us Stream Makes Twitch Record*, *ESSENTIALLY SPORTS* (Oct. 21, 2020, 12:31 PM), <https://www.essentiallysports.com/twitter-ecstatic-as-alexandria-ocasio-cortezs-among-us-stream-makes-twitch-record-esports-news/> [<https://perma.cc/7QYZ-NDLH>].
- ²⁴ See Taylor Clark, *How to Get Rich Playing Video Games Online*, *THE NEW YORKER* (Nov. 13, 2017), <https://www.newyorker.com/magazine/2017/11/20/how-to-get-rich-playing-video-games-online> [<https://perma.cc/C54M-AHV5>].
- ²⁵ See *id.*
- ²⁶ See Mary Osborne, *The Real Reason These Streamers Won't Show Their Faces*, *SVG* (Mar. 11, 2021, 12:02 PM) <https://www.svg.com/351126/the-real-reason-these-streamers-wont-show-their-faces/> [<https://perma.cc/92X4-XKCA>]



Figure 1. Congresswoman Alexandria Ocasio-Cortez's Stream of "Among Us" in 2020

For both Twitch and YouTube, livestreams are primarily monetized through subscriptions to the creator's channel, payments from viewers during a stream, and advertising or sponsorship deals.²⁷ A leak of Twitch data in 2021 made public the revenues from channels in the period of August 2019 to October 2021.²⁸ Of the top ten channels, eight were either primarily engaged in or became popular by livestreaming video games, and made between \$2.9 and \$8.4 million over those fourteen months.²⁹ Those figures were based on records of payments

(outlining various reasons, often privacy or anxiety, that some popular streamers hide their face); *Want to Step Up Your Gaming? Add A Facecam.*, LOGITECH (Dec. 7, 2017) <https://blog.logitech.com/2017/12/07/want-step-gaming-add-facecam/> [<https://perma.cc/KDN2-XL8E>] (noting that audience engagement is central to livestreaming and arguing that having a facecam increases engagement).

²⁷ See *Monetize Your Content*, TWITCH: CREATOR CAMPS, <https://www.twitch.tv/creatorcamp/en/paths/monetize-your-content/> [<https://perma.cc/PA6P-T828>]; *How to make money on YouTube*, YOUTUBE CREATORS, <https://www.youtube.com/creators/how-things-work/video-monetization/> [<https://perma.cc/AGK4-ZGNH>].

²⁸ Tidy & Molloy, *supra* note 4.

²⁹ See Max Miceli & Alex Tsiaoussidis, *Full List of All Twitch Payouts (Twitch Leak)*, DOT ESPORTS (July 13, 2022, 10:00 PM), <https://dotesports.com/streaming/news/full-list-of-all-twitch-payouts-twitch-leaks> [<https://perma.cc/KMK2-QSLM>]; see also Kartikay Mehrotra & Matt Day, *Twitch Hack Reveals How Much Its Top Game Streamers Make*, TIME, <https://time.com/6104734/twitch-hack-streamer-salaries/> [<https://perma.cc/F9DG-ZFG2>] (Oct. 6, 2021) (noting the leak of data as

made by Twitch to the channels, so likely do not include other revenue streams such as sponsorship deals or payments made by fans directly to creators through other services like Patreon.³⁰ The top-earning channel, Critical Role, features gameplay of another kind, called “actual play,” which refers to people streaming themselves playing table top role playing games like Dungeons & Dragons.³¹ Critical Role has been successful enough at this to parlay their popularity into multiple animated series on Amazon Prime adapted from their livestreams.³²

showing revenue for “game streamers” and singling out Critical Role as both top earners and having a different kind of content than Twitch’s dominant game streaming); Max Miceli, *How Much Money Do Altoar and Sound Alerts Make on Twitch? Twitch Leaks*, DOT ESPORTS (Oct. 11, 2021) <https://dotesports.com/streaming/news/how-much-money-do-altoar-sound-alerts-make-on-twitch> [<https://perma.cc/E3KJ-5JCM>] (describing how number 8 on the earnings list, Altoar, earns revenue from his “Sound Alerts”).

- ³⁰ See Tidy & Molloy, *supra* note 4; see also Dave Johnson, *What is Patreon? Everything You Need to Know About the Subscription Service for Content Creators*, BUS. INSIDER (Nov. 18, 2020, 11:49 AM), <https://www.businessinsider.com/guides/tech/what-is-patreon> [<https://perma.cc/9PE8-MKXD>] (describing Patreon as “a membership platform that connects content creators with fans and supporters. Mainly, it offers financial tools that let supporters subscribe to projects that give creators a predictable income stream as they continue to create content”).
- ³¹ Em Friedman, *How the First Decade of Actual Play Has Defined the Template*, POLYGON (Sept. 14, 2022, 11:00 AM), <https://www.polygon.com/23334732/how-the-first-decade-of-actual-play-has-defined-the-template> [<https://perma.cc/K2E8-NR2J>] (tracing the development of the actual play livestream genre); see also Miceli & Tsiaoussidis, *supra* note 29.
- ³² See Todd Spangler, *Amazon Inks Critical Role to Overall TV and First-Look Film Deal, Greenlights ‘Mighty Nein’ Animated Series*, VARIETY (Jan. 25, 2023, 11:00 PM), <https://variety.com/2023/tv/news/critical-role-might-nein-series-amazon-prime-video-deal-1235502070/> [<https://perma.cc/55TS-9XCC>] (reporting on the announcement of a multi-year TV and film first-look deal between Critical Role and Amazon Prime following the success of the second season of their show *The Legend of Vox Machina*, adapted from the group’s first live-streamed campaign).

B. ESPORTS

Competitive video gaming has existed as long as there have been video games. From “Tennis for Two” pitting in-person players against each other³³ to the battles of King of Kong,³⁴ to the current billion-dollar esports industry.³⁵ The relationship between game publishers and such competition has varied wildly over time and with different publishers.

For many competitive gamers, being allowed to play at all may be considered a win. Some publishers are particularly resistant to their games being played professionally and/or competitively. Nintendo is perhaps most notorious for this, both in how they have treated competitive *Smash Bros.* and their now-abandoned Nintendo Creator Program.³⁶ *Smash Bros.* is a platform-based fighting series where players control popular characters from across Nintendo properties trying to deal damage and ultimately knock opponents off floating platforms.³⁷

³³ See BROOKHAVEN NAT’L LAB’Y, *supra* note 11.

³⁴ See THE KING OF KONG: A FISTFUL OF QUARTERS (Picturehouse 2007) (following the mid-2000s battles between players Steve Weibe and Billy Mitchell to have the high score in the arcade game *Donkey Kong*).

³⁵ See With 21.0% CAGR, Global eSports Market Size Worth USD 5.48 Billion in 2029, FORTUNE BUS. INSIGHTS (Sept. 15, 2022), <https://www.globenewswire.com/en/news-release/2022/09/15/2516874/0/en/With-21-0-CAGR-Global-eSports-Market-Size-Worth-USD-5-48-Billion-in-2029.html> [https://perma.cc/6RLY-738V] [hereinafter *With 21.0% CAGR*] (valuing the Esports industry in 2021 at \$1.22 billion and projecting 2022 value at \$1.44 billion).

³⁶ See Fogel, *supra* note 9; Kent, *supra* note 9 (noting Nintendo’s “reputation for harsh copyright policies”); Jess Wetherbed, *Nintendo Shuts Down Smash World Tour ‘Without Any Warning’*, THE VERGE (Nov. 30, 2022), <https://www.theverge.com/2022/11/30/23485811/nintendo-smash-world-tour-shut-down-event-tournament> [https://perma.cc/ZA6D-8H99] (reporting on Nintendo demanding the 2023 Smash World Tour cease and noting past events they shut down).

³⁷ See Daniel Starkey & Jeffrey L. Wilson, *The 7 Best Super Smash Bros. Alternatives*, PCMAG (Aug. 6, 2022), <https://www.pcmag.com/picks/the-best-super-smash-bros-alternatives> [https://perma.cc/SG3Q-HJU8]; Kevin Webb, *‘Super Smash Bros. Ultimate’ Brings More Than 70 Characters to the Nintendo Switch — Here They All Are*, BUSINESS INSIDER (Nov. 6, 2019), <https://www.businessinsider.com/every-super-smash-bros-character-2018-11#1-mario-donkey-kong-1981-1> [https://perma.cc/3U2A-L9U2] (listing the

Tournaments based on the game have been held since at least 2002,³⁸ but Nintendo has historically been either silent or openly hostile towards them.³⁹ Nintendo has been known to threaten *Smash Bros.* tournaments, especially those planning to stream their competitions, with legal action,⁴⁰ and series creator Masahiro Sakurai said that competition strayed from his vision for the game.⁴¹ It was only in November 2021 that Nintendo, along with partner Panda, announced North America's first *Smash Bros.* tournament circuit licensed by Nintendo.⁴²

characters featured in the most recent Smash game as of 2019, and where they originally appeared).

- ³⁸ See Aron Garst, *The Smash Bros. Community: An Oral History*, POLYGON (Oct. 2, 2019, 11:00 AM), <https://www.polygon.com/2019/10/2/20887994/the-smash-bros-community-an-oral-history> [<https://perma.cc/W4UH-2GRD>].
- ³⁹ See Ethan Gach, *Nintendo Back on Its Bullshit, Shuts Down Another Smash Bros. Tournament [Update]*, KOTAKU (Aug. 30, 2021), <https://kotaku.com/nintendo-back-on-its-bullshit-shuts-down-another-smash-1847585646> [<https://perma.cc/79EC-QM7H>] (covering two smash tournaments that shut down after legal threats from Nintendo).
- ⁴⁰ See *id.*; Jenna Pitcher, *Nintendo Wanted to Shut Down Super Smash Bros. Melee Evo Event, Not Just Stream*, POLYGON (July 11, 2019) <https://www.polygon.com/2013/7/11/4513294/nintendo-were-trying-to-shut-down-evo-not-just-super-smash-bros-melee> [<https://perma.cc/S842-ZF4L>] (reporting on Nintendo shutting down Smash stream and in-person tournament).
- ⁴¹ See Camden Brazile, *Sakurai Reveals 'Melee' Was Never Meant to Be Played Competitively or At All*, HARD DRIVE (Aug. 9, 2022), <https://hard-drive.net/sakurai-reveals-melee-was-never-meant-to-be-played-competitively-or-at-all/> [<https://perma.cc/84XY-RR4L>] (quotes Sakurai from Japanese interview saying he never intended the game to be played competitively).
- ⁴² Liam Doolan, *Nintendo Announces "First-Ever" Officially Licensed Smash Bros. Championship Circuit for North America*, NINTENDO LIFE (Nov. 18, 2021), <https://www.nintendolife.com/news/2021/11/nintendo-announces-first-ever-officially-licensed-smash-bros-championship-circuit-for-north-america> [<https://perma.cc/J57G-9WU4>].

Currently, the most successful and most organized esports leagues use a franchise model based on traditional sports leagues.⁴³ The publisher of the game controls, or at least sponsors, the league and offers franchise deals to cities to put together a team to compete in the league.⁴⁴ Perhaps the best example of this is the Overwatch League. *Overwatch* can be played in several modes, but the one relevant here features players in two opposing teams of six, with players controlling one of dozens of possible characters with various weapons and abilities to achieve objectives like controlling parts of the game arena, or “map.”⁴⁵ Activision Blizzard, the publisher of *Overwatch*, has licensed twenty franchises in cities around the world to compete in the Overwatch League.⁴⁶ They set a minimum salary for players and enforce rules of professionalism surrounding player eligibility, apparel, and trades.⁴⁷

⁴³ See Phillip Jones, *Cooperative Gaming – Joint Employer Status in Esports*, 2020 ESPORTS BAR ASS’N J. 22, 27–28 (2020) (describing the current structure of esports leagues with particular focus on Overwatch League); see also Ronquillo, *supra* note 6, at 81; Kai Ryssdal & Nicholas Guiang, *Esports Have Exploded, but the Profits Haven’t Followed*, MARKETPLACE (Jan. 19, 2023) <https://www.marketplace.org/2023/01/19/esports-have-exploded-but-the-profits-havent-followed/> [https://perma.cc/A36Z-X94N] (discussing the path to profitability for esports, particularly noting that esports like League of Legends which are supported by their publisher are able to operate at a loss until they can become profitable); Matthew Robson, *The 7 Most Popular eSports Leagues*, GAMERANT (Dec. 17, 2022) <https://gamerant.com/most-popular-esports-leagues/> [https://perma.cc/3P4M-BQHD] (ranking the most popular esports leagues and noting the millions of viewers and millions of dollars in prize money at tournaments).

⁴⁴ Jones, *supra* note 43, at 27–28.

⁴⁵ Joe DeMartino, *Overwatch 101: What You Need to Know About Blizzard’s Team-based Shooter*, ESPN (Mar. 26, 2020, 8:42 PM) https://www.espn.com/esports/story/_id/28960008/overwatch-101-need-know-blizzard-team-based-shooter [https://perma.cc/8QP5-BU38].

⁴⁶ Jones, *supra* note 43, at 27–28.

⁴⁷ See *id.* at 28.

As one of the more hands-on publishers in esports, Activision Blizzard also oversees the streaming of matches like that pictured in Figure 2,⁴⁸ with exclusive streaming rights currently granted to YouTube.⁴⁹ A full match stream can feature gameplay from twelve different players, some of whom may be using the same character, but none of whom will be producing precisely the same video output as their competitors.⁵⁰ Unlike other kinds of livestreaming, streams of professional esports matches generally do not include a chat box, and players' communication is based more on coordination with their teammates than commentary for the audience, with third-party commentators like those in traditional sports broadcasts taking the place of commentary and audience engagement elements.⁵¹ Along with streaming, Activision Blizzard has organized live matches with in-person audiences like first Overwatch League Grand Final, held in the Barclay's Center in New York, and pictured in Figure 3.⁵² While

⁴⁸ See Overwatch Esports, *Overwatch League, @sanfranciscoshock vs Houston @outlaws Playoffs Highlights Day 6*, YOUTUBE (Nov. 5, 2022), https://www.youtube.com/watch?v=Sg7FQRm_fW8&t=57s [<https://perma.cc/VYS9-W4TD>] (showing highlights from an Overwatch match, including several different competitors with the team makeups at the top of the screen showing the various characters, some the same, that the competitors are using and showing the perspective of various players during a match. Characters used are also shown below the player's facecam, showing that some players are using the same character but experience different perspectives on the match).

⁴⁹ Todd Spangler, *YouTube Scores Exclusive Streaming for Activision Blizzard's E-Sports, Including Overwatch and Call of Duty Leagues*, VARIETY (Jan. 24, 2020) <https://variety.com/2020/digital/news/youtube-exclusive-activision-blizzard-e-sports-overwatch-call-of-duty-1203479140/> [<https://perma.cc/E99P-LPPC>]; see also Adam Stern, *Sources: YouTube's Deal With Activision Blizzard Valued At \$160M*, THE ESPORTS OBSERVER (Feb. 13, 2020), <https://archive.esportsobserver.com/sources-youtube-actiblizzard-160m/> [<https://perma.cc/UYG8-GF4C>].

⁵⁰ See Overwatch Esports, *supra* note 48.

⁵¹ See *id.* (showing the lack of chat box in an Overwatch League match stream); see also Liz Richardson, *Overwatch League Introduces 2022 Talent Lineup, Features Several Former Contenders Casters*, DOT ESPORTS (April 11, 2022, 2:00 PM) <https://dotesports.com/overwatch/news/overwatch-league-introduces-2022-talent-lineup> [<https://perma.cc/KE7L-BV5R>] (reporting on the announcement of the league's broadcasters, hosts, and analysts for the 2022 season).

⁵² See James Pickard, *The Top 8 Plays from the Overwatch League Grand Finals*, RED BULL (July 30, 2018, 4:58 AM), <https://www.redbull.com/us->

Activision Blizzard's involvement with the Overwatch League can be good for players in the league, it has also resulted in them becoming very strict and sensitive to any outside parties wanting to host competitive games of *Overwatch*.⁵³



Figure 2. Screenshot of an Overwatch League Match



Figure 3. 2018 Overwatch League Grand Finals at the Barclays Center In New York

en/overwatch-league-grand-finals-top-plays-highlights [https://perma.cc/894Y-9K44] (providing highlights from the Grant Final match of the Overwatch League in 2018 as well as the photo in Figure 3 from the before event showing the large viewing screens with the team logos and a footage of commentator above the two teams of six on stage, as well as a portion of the crowd).

⁵³ Jones, *supra* note 43, at 28.

These leagues are built around centralizing the highest levels of already competitive games.⁵⁴ The recent movement towards officially licensed competitions may be viewed simply as developers recognizing the easiest way to capitalize on the livestreaming market.⁵⁵ Moving competition from twelve players sitting at computers across the world to twelve players sitting at computers in an arena does not seem like a big leap. The in-person viewership aspect also has history, as competitive matches have been long been a feature of video game conventions like E3 and Pax,⁵⁶ but those convention matches may soon find themselves under threat if they are not part of or approved by an official league.⁵⁷ As with traditional sporting events, there are potential markets both for in-person audience viewing and streaming.⁵⁸

⁵⁴ See Kelsey Ridenhour, *Traditional Sports and Esports: The Path to Collective Bargaining*, 105 IOWA L. REV. 1857, 1876–77 (2020) (noting that the traditional method of organizing for esports team was self-organizing, and the rise in popularity and franchising with modern leagues like for Overwatch and League of Legends led to investment in teams).

⁵⁵ See Houssard et al., *supra* note 22, at 2–3 (describing methods of monetization on the livestreaming platform “Twitch” and explaining that monetization requires streamers to exploit social affordances allowed by the platform and foster a sense of community among fans).

⁵⁶ See Lianna Tedesco, *16 Biggest Gaming Conventions In The World (From Smallest To Largest)*, GAMERANT (Dec. 6, 2023) <https://gamerant.com/gaming-conventions-world-smallest-largest-ranked/> [<https://perma.cc/S26D-NW2R>].

⁵⁷ See Jake Nordland, *Controversial New Nintendo Esports Guidelines Come into Effect for Smash*, *Esports Insider*, GSI SPORTS INSIDER (Nov. 17, 2023), <https://esportsinsider.com/2023/11/nintendo-esports-guidelines-smash> [<https://perma.cc/6G6P-5NC7>] (reporting on guidelines from Nintendo on the use of their games in esports and noting that they make hosting tournaments cost prohibitive for smaller, regional events and conventions by adding restrictions on maximum size and monetization options).

⁵⁸ See Jones, *supra* note 43, at 23.

Although it does not lend itself as easily to professionalization like the head-to-head matches of a game like *Overwatch* or *Smash Bros.*, there is another huge area of competitive gameplay in speedrunning. Speedrunning is basically trying to finish a game as quickly as possible, often by exploiting glitches that allow a player to skip through parts of the game.⁵⁹ Other times, if the game is more open-world and does not force the player to follow a particular path or plot, it can be a show of exceptional skill at the game to go directly to the final boss and defeat them with beginner abilities and equipment.⁶⁰ Speedrunning is somewhat controversial among game developers, with some developers seeking to eliminate all exploitable glitches and others encouraging the practice and knowingly leaving potentially exploitable mistakes in a game's code.⁶¹ Competitive speedrunning is popular both at in-person conventions and for online viewers who track records in various games and categories, but there is rarely, if ever, a monetary prize for setting the fastest time.⁶² Figure 4 shows the SPEEDRUN.com leaderboard for a

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- ⁵⁹ See Joe Koning, *Play It Faster, Play It Weirder: How Speedrunning Pushes Video Games Beyond Their Limits*, THE GUARDIAN (Sep. 28, 2021 1:30 PM) <https://www.theguardian.com/culture/2021/sep/29/play-it-faster-play-it-weirder-how-speedrunning-pushes-video-games-beyond-their-limits> [https://perma.cc/R3XT-3AWW].
- ⁶⁰ See Ali Jones, *Dark Souls Speedrun Record Considered Unbeatable for 3 Years Gets Absolutely Smashed Thanks to a Silent Hill Fan and the Last Weapon Anyone Expected*, GAMESRADAR (Feb. 28, 2024) <https://www.gamesradar.com/dark-souls-speedrun-record-considered-unbeatable-for-3-years-gets-absolutely-smashed-thanks-to-a-silent-hill-fan-and-the-last-weapon-anyone-expected/> [https://perma.cc/6ACN-2Y76].
- ⁶¹ See Matti Robinson, *Lunistice's Developer Built the Game for Speedrunning*, GAMERANT (Dec. 13, 2022) <https://gamerant.com/lunistice-interview-balance-speedrunning-casual-game-design/> [https://perma.cc/KP4D-X9HB].
- ⁶² See SPEEDRUN.COM, <https://www.speedrun.com/sm64> [https://perma.cc/L9L8-SET8] (showing the various live leaderboards for speedrunning *Super Mario 64*); Aron Garst, *PACE Is Bringing Competition and Controversy to Speedrunning*, ESPN (Apr. 24, 2019) https://www.espn.com/esports/story/_/id/26597705/pace-bringing-competition-controversy-speedrunning [https://perma.cc/SU6T-XTUF] (reporting on a competitive speedrunning organization that would be disruptive to the community in part because of the availability of prize money at the events); see also PAX, <https://east.paxsite.com/en-us/schedule.html> [https://perma.cc/E7JX-Y2VM] (showing speedrunning

particular category of speedrunning for the game *Super Mario 64*, where the player used the original N64 console and collected all 120 stars available in the game.⁶³ The figure also indicates the wide variety of speedrunning categories and variants tracked, from different numbers of stars collected in the rune to using different consoles to play, as well as statistics such as the total number of recognized attempts on their leaderboard. The competitive aspect of speedrunning is more individual and less centralized, and therefore lacks the team aspect that gives esports an appeal more like the major American sports leagues.

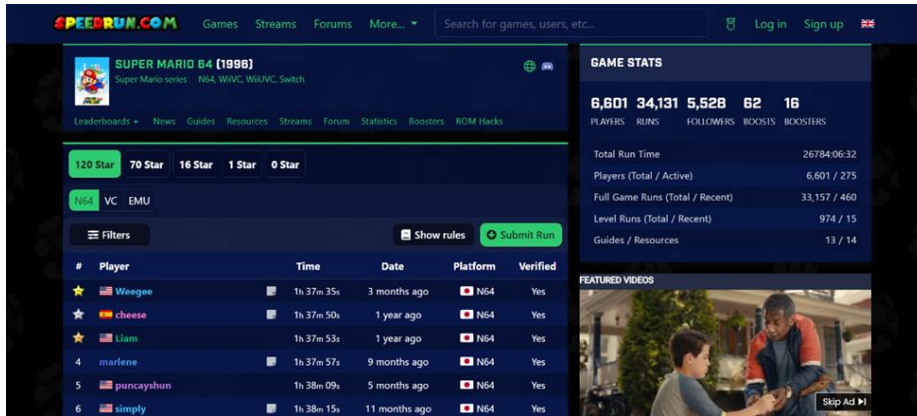


Figure 4. Speedrun.com Leaderboard for Super Mario 64 as of March 2023

C. NON-COMPETITIVE VIDEO GAME STREAMING

Outside of competitive gaming is an arguably much larger market of livestreaming video games. Given that competitive gaming requires either the game to provide competition to participate in or paths to make attempted speedrunning worthwhile, non-competitive streams have a wider range of game genres to explore and do not require the technical skill of esports.⁶⁴ These streams includes various formats such as Walkthroughs, Let's Plays, and what this Note will refer to as Exploitation streams.⁶⁵ Any kind of video game stream may be

Super Mario Bros. 2 & 3 as a live event scheduled at the video game convention Pax East).

⁶³ SPEEDRUN.COM, *supra* note 62.

⁶⁴ See Coogan, *supra* note 5, at 383.

⁶⁵ Dan Hagen, *Fair Use, Fair Play: Video Game Performances and "Let's Plays" as Transformative Use*, 13 WASH. J. L. TECH. & ARTS 245, 250 (2018) (outlining the types of gameplay formats in video game live streaming).

referred to as a Let's Play, especially since videos in any of these formats are often titled something like "Let's Play [game title],"⁶⁶ but for the purposes of this Note, a Let's Play is a particular format of stream which will be defined later in this section.

Walkthroughs may be the oldest kind of video game stream. In these videos the player simply plays the game largely as intended by the publisher, with a kind of educational or informative purpose, showing the audience how to reach certain achievements or simply what the gameplay looks like.⁶⁷ Like the *Quake* demo files previously referenced, these tend not to show the whole game, are more likely to not feature the player visually, and may not feature any voiceover either.⁶⁸ They grew out of, and pre-recorded versions are still often a part of, online written instruction guides to games like the popular Walkthroughs published by sites like GameFAQs or IGN.⁶⁹ For example, a player trying to find all of a certain collectable in a game might go to one of these Walkthroughs to get in-game footage showing exactly how to find them. Although a motivated viewer could probably compile an entire game's worth of gameplay footage from published Walkthroughs, their typically short and limited nature tends to leave them outside the interest of copyright owners.⁷⁰

⁶⁶ See generally Klepek, *supra* note 16 (explaining origin of the "Let's Play" video format and describing examples of various Let's Plays, with each entitled, "Let's Play [game title]").

⁶⁷ See *How Walkthrough Videos Can Grow Your Gaming Channel*, CREATOR HANDBOOK (June 1, 2017) <https://www.creatorhandbook.net/how-walkthrough-videos-can-grow-your-gaming-channel-e4d66e4e6c46/> [<https://perma.cc/WTV5-RDKK>].

⁶⁸ See *id.*

⁶⁹ Kayla Dube, *8 Best Sites for Video Game Strategy Guides*, ONLINE TECH TIPS (June 30th, 2021) <https://www.online-tech-tips.com/gaming/8-best-sites-for-video-game-strategy-guides/> [<https://perma.cc/JDT6-RJJ7>].

⁷⁰ See *How Walkthrough Videos Can Grow Your Gaming Channel*, *supra* note 67.

Let's Plays are perhaps the most popular format of livestreaming and the one most threatened by copyright enforcement.⁷¹ Any type of game can be streamed as a Let's Play, though the most popular genres tend to be either those that can be played completely in a short session like the battle royale game⁷² *Fortnite* or open-world games with little or no narrative like the sandbox game⁷³ *Minecraft*.⁷⁴ Battle royale games let a streamer pop in and play a few matches with some guaranteed action, while leaving the flexibility to engage with the audience between matches and the potential for something new and different in each round.⁷⁵ The other most popular option are streams playing all the way through a more narratively driven game like a role-playing or horror game, usually over the course of multiple streams.⁷⁶ Through both of these, the audience can get a sense of the full experience of the game and follow the progress of their favorite creator either through the narrative or as they improve their skills.

⁷¹ James Duffy, *What Is a "Let's Play," and Why Are They so Popular?*, THE SMART WALLET (Feb. 10, 2022) <https://thesmartwallet.com/what-is-lets-play/?articleid=15489> [<https://perma.cc/VKN3-LS6X>].

⁷² Christopher Livingston & Morgan Park, *The Best Battle Royale Games*, PC GAMER (Nov 17, 2023), <https://www.pcgamer.com/battle-royale-games/> [<https://perma.cc/DW6B-ZFV6>]; Paul Kelly, *Best Battle Royale Games on PC 2024*, PCGAMESN, <https://www.pcgamesn.com/best-battle-royale-game> [<https://perma.cc/MMM6-PWSK>] ("Each one of these multiplayer games revolves around one core idea: lots of players go in, and only one leaves. Battle royale is a violent, unpredictable, and frenzied multiplayer mode where the only goal is to endure until you're the sole survivor.").

⁷³ Margaret Rouse, *Sandbox Game*, TECHOPEDIA (Feb. 13, 2024), <https://www.techopedia.com/definition/3952/sandbox-gaming> [<https://perma.cc/PYR6-BET2>] (defining sandbox as "a type of immersive video game that encourages players to explore and interact with a virtual environment. The objective of a sandbox game is for the player to learn about the game's features, mechanics, and limitations through trial and error.").

⁷⁴ *Most Watched Games on Twitch*, TWITCH TRACKER (March 2024), <https://twitchtracker.com/games> [<https://perma.cc/ABX2-ZRPS>] (tracking the most viewed games streaming on Twitch over the previous week).

⁷⁵ Duffy, *supra* note 71; H.B. Duran, *Analysts Say Battle Royale Mode Presents Opportunities For Marketers*, A LIST DAILY (July 18, 2018) <https://www.alistdaily.com/entertainment/battle-royale-marketing/> [<https://perma.cc/9WX2-K2AS>] (discussing the potential value of battle royale games as "a spectator sport").

⁷⁶ *Id.*

Exploitation streams refer to videos where a streamer intentionally exploits or exposes some glitch in the game,⁷⁷ but not generally in order to do better or complete the game more quickly like with speedrunning. These videos draw on a history of speculation and experimentation about what is possible to do in a game.⁷⁸ Prior to streams, playgrounds and gaming magazines were superspreaders of rumors like a cheat code to get Lara Croft's clothes off in the original *Tomb Raider*⁷⁹ or how to find the glitch Pokémon "MissingNo."⁸⁰ With streaming, such rumors can be quickly proven one way or another, and these streams can also influence games themselves, even if only for a joke. For example, a glitch in the game *Hitman 2* called the "homing briefcase" resulted in a briefcase that could be thrown at a target character and would slowly follow them until it hit, including turning around corners.⁸¹ Streamers hopped on the rumor and videos popped up of people proving that it worked and testing the limits of the homing ability.⁸² While the glitch was eventually fixed, the popularity of the

⁷⁷ Chen, *supra* note 15, at 678 (describing these videos as "glitch exploitation" videos, which "simply show the player fooling around with game's mechanics or glitches in humorous ways, without speed as an animating factor.").

⁷⁸ OutsideXbox, *7 Urban Legends We Believed for Way Too Long*, YOUTUBE (July 13, 2017), https://www.youtube.com/watch?v=o86E_Me6oZA [<https://perma.cc/R6B3-BTXH>] (listing seven popular myths around video games and how they have influenced or been referenced in later games).

⁷⁹ Alan Wen, 'Tomb Raider' at 25 – Ian Livingstone Talks About the Birth of Lara Croft, NME (Nov. 1, 2021), <https://www.nme.com/features/gaming-features/tomb-raider-at-25-ian-livingstone-talks-about-the-birth-of-lara-croft-3084441> [<https://perma.cc/S3H3-7WQQ>] (referencing the infamous and fake "Nude Raider" cheat code in a retrospective on the Tomb Raider series).

⁸⁰ Craig Elvy, *Pokémon's MissingNo Glitch Explained: How It Really Happened*, SCREENRANT (Aug. 15, 2019) <https://screenrant.com/pokemon-games-missingno-glitch-explained/> [<https://perma.cc/V9MR-TDD2>].

⁸¹ Tyler Wilde, *We'll Never Forget Hitman 2's Most Legendary Weapon: The Homing Briefcase*, PC GAMER (Jan. 20, 2021), <https://www.pcgamer.com/well-never-forget-hitman-2s-most-legendary-weapon-the-homing-briefcase/> [<https://perma.cc/9XNN-PQJF>]; see also Fraser Brown, *Watch Hitman 2's Homing Briefcase Chase Someone for 2 Minutes*, PC GAMER (Aug. 9, 2019), <https://www.pcgamer.com/watch-hitman-2s-homing-briefcase-chase-someone-for-2-minutes/> [<https://perma.cc/XBX9-LDUT>] (reporting on a video from a player showing the homing briefcase following a target for over two minutes).

⁸² Wilde, *supra* note 81.

streams eventually prompted publisher IO Interactive to add the briefcase back in as an unlockable item.⁸³ Exploitation streams have many similar characteristics as Walkthroughs or Let's Plays, and at various times might be considered a sub-type of either format. Each kind of livestreaming developed over the course of decades of posting content online, but the tensions with the growth in viewership and revenue since 2020 has highlighted the tensions over copyright in the streams.⁸⁴

D. RECENT GROWTH OF LIVESTREAMING

When the COVID-19 pandemic put a hold on most live sports and entertainment events, the streaming world was one of a few media arenas to see a boost.⁸⁵ Twitch in particular saw its audience more than double from 1.26 million average concurrent viewers to 2.78 million from 2019 to 2021.⁸⁶ Furthermore, a website tracking and analyzing statistics about the platform found that between December 2019 and December 2020, total hours watched grew 53%, the number of users increased by 63%, and the number of streamers grew by 70%.⁸⁷ Some of this growth can be attributed to established streamers capitalizing on a newly captive audience, especially adults returning to old hobbies such as video games that they may have dropped before the pandemic.⁸⁸ However, the pandemic also brought in new creators and audiences to the genre.⁸⁹

⁸³ *Id.*

⁸⁴ Hagen, *supra* note 65, at 248 (noting that the term "Let's Play" was probably first used in 2003).

⁸⁵ Houssard et al., *supra* note 22, at 2.

⁸⁶ *Id.*

⁸⁷ Chae & Lee, *supra* note 21, at 1-2.

⁸⁸ 3, 2, 1 Go! Video Gaming Is at an All-Time High During COVID-19, NIELSEN (June 2020), <https://www.nielsen.com/insights/2020/3-2-1-go-video-gaming-is-at-an-all-time-high-during-covid-19/> [<https://perma.cc/A8PK-59R2>] [hereinafter *Video Gaming*].

⁸⁹ Bijan Stephen, *The Lockdown Live-Streaming Numbers Are Out, and They're Huge*, THE VERGE (May 13, 2020, 12:30 PM), <https://www.theverge.com/2020/5/13/21257227/coronavirus-streamelements-arsenalgg-twitch-youtube-livestream-numbers> [<https://perma.cc/6ULR-7EFP>].

Entertainers and athletes with established audiences but without their normal venues of connecting with those audiences experimented with livestreaming to keep in touch with their fans.⁹⁰ Given the importance of personal branding and engagement with fans for modern athletes and entertainers, streaming was a natural and easy supplement to maintaining their image and potentially expanding their fanbase. For example, in May 2020 Ferrari Formula 1 driver Charles Leclerc went viral when his girlfriend had to subscribe to his Twitch channel to get his attention while he was streaming and tell him that she was locked out of their apartment.⁹¹ Although not on one of the major streaming platforms, the popularity of the “Verzuz” battles on Instagram, where musical artists played songs from their catalogue while the audience voted on who had better tracks, regularly drew hundreds of thousands of live viewers.⁹²

Looking specifically at esports, simulated racing (or “sim racing”) was perhaps the most successful example of benefiting from celebrity involvement during pandemic lockdowns. In Formula 1, many drivers already used simulators, essentially very advanced racing video games, as part of their regular training.⁹³ The governing body of Formula 1 also runs an esports series, and while in-person races were suspended, several drivers from Formula 1 popped in for sessions in the official sim racing.⁹⁴ Athletes across sports are often fans of the video games based on their sport, but the digital nature of modern racing like Formula 1 and the sophistication of sim racing setups lent itself well to the biggest names and top-

⁹⁰ *Video Gaming*, *supra* note 88 (noting various sports league’s use of Esports as “a means to keep fans engaged”).

⁹¹ Alan Baldwin & Ken Ferris, *Esports: Leclerc’s Girlfriend Subscribes to Get Him to Open the Door*, REUTERS (May 18, 2020, 7:46 AM) <https://www.reuters.com/article/us-esports-f1-leclerc/esports-leclercs-girlfriend-subscribes-to-get-him-to-open-the-door-idUSKBN22U1JE> [<https://perma.cc/2E8G-35PP>].

⁹² See *Verzuz: Latest Stories*, COMPLEX, <https://www.complex.com/tag/verzuz> [<https://perma.cc/E34Y-6GBF>] [hereinafter *Verzuz*] (reporting numbers for the top viewed Verzuz streams).

⁹³ Elizabeth SV Tudor, *The Emergence of eSport During Covid-19: How Sim Racing Replaced Live Motorsport in 2020*, 1 J. MOTORSPORT CULTURE & HIST., Nov. 2020, at 4–5 (2020) (quoting current McLaren Formula 1 Driver Lando Norris on the value of simulators to his training, “I had a sim at home when I was younger and it proved invaluable in developing my race craft so although it isn’t “reality”, eSports has nonetheless made a huge contribution to the reality of me reaching the highest levels of motorsport”).

⁹⁴ See *id.* at 3, 15.

level talent from the traditional sport participating in the esport.⁹⁵ Even after the return of in-person racing, figures like two-time Formula 1 Champion and current Red Bull Racing driver Max Verstappen have continued their involvement with esports racing in events like the 24 Hours of Le Mans Virtual,⁹⁶ and Formula 1 teams have continued their involvement and investment in esports racing.⁹⁷

While some of these celebrities have gone back to their normal venues, others have found streaming to be an accessible and lucrative option. T-Pain is by most metrics a successful rapper, with fifteen top-10 hits to his name (though none in the last decade),⁹⁸ and now he says he makes more money from streaming video games on Twitch than he does music.⁹⁹ While some streamers might be said to gain popularity following whatever the top viewed games or genres are, these celebrity streams highlight the way that personalities, and not the games themselves, are often the draw for viewers. Whether they brought their fame to livestreaming or found their fame through livestreaming, streamers are still subject to the threat of copyright enforcement by game publishers.

III. COPYRIGHT LAW

Having now established how video game livestreaming developed and the current state of the industry, we must now consider how existing copyright law applies. Although these streams are a large and growing industry, it exists on

⁹⁵ See *id.* at 4–5.

⁹⁶ See Martin Robinson, *F1 Champion Max Verstappen Dubs Le Mans Virtual “A Clown Show” After Disconnects Force Him to Retire*, EUROGAMER (Jan. 16, 2023), <https://www.eurogamer.net/f1-champion-max-verstappen-dubs-le-mans-virtual-a-clown-show-after-disconnects-force-him-to-retire> [<https://perma.cc/8ATE-42QH>].

⁹⁷ See Haas F1 Team Esports Announces Roster For 2022 F1 Esports Series Pro Championship, HAAS F1 TEAM (Sept. 13, 2022), <https://www.haasf1team.com/news/haas-f1-team-esports-announces-roster-2022-f1-esports-series-pro-championship> [<https://perma.cc/K5HR-M4ZH>] (announcing the official Esports series sister-team of Formula 1 team Haas F1).

⁹⁸ See *T-Pain: Chart History*, BILLBOARD, <https://www.billboard.com/artist/t-pain/> [<https://perma.cc/78M5-9H3W>].

⁹⁹ Mackenzie Cummings-Grady, *T-Pain Reveals He Makes More Money from Playing Video Games than Music*, HIPHOPDX (June 8, 2022, 11:53 AM), <https://hiphopdx.com/news/id.70865/title.t-pain-reveals-he-makes-more-money-from-playing-video-games-than-music> [<https://perma.cc/V32K-JXFG>] (quoting T-Pain from the Steve-O podcast).

a foundation of tenuous legality.¹⁰⁰ This Part will describe the applicable law and the delicate situation of livestreaming without that law.

A. COPYRIGHT RIGHTS IMPLICATED BY LIVESTREAMING

The Copyright Act grants rights holders six exclusive rights over the work: (1) reproduction, (2) production of derivative works, (3) distribution of copies, (4) public performance of the work, (5) public display of the work, and (6) public performance through digital audio transmission.¹⁰¹ Commentators analyzing livestreams generally consider them to implicate two of these exclusive rights—the Public Performance right and the Derivative Works right.¹⁰² Some consider the streams to be unauthorized derivative works, implicating that right and arguing that the best path towards protection for the streamer would be to get status as joint authors over the derivative work of their stream.¹⁰³ However, the end-user license agreements that are included with most games, and which are discussed in more detail in Section III.D, often put strict limits on a player’s right to create derivative works based on the game.¹⁰⁴

Turning to the Public Performance right, “perform” is defined in the Copyright Act as, “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.”¹⁰⁵ The Copyright Act defines “publicly” in two parts, the first addressing physical gatherings and the other known as the “transmit

¹⁰⁰ See *With 21.0% CAGR*, *supra* note 35 (estimating the value of the current esports industry, which makes up only part of overall videogaming livestreaming revenues).

¹⁰¹ 17 U.S.C. § 106 (2018).

¹⁰² See Sebastian C. Mejia, *Fair Play: Copyright Issues and Fair Use in YouTube Let’s Plays and Videogame Livestreams*, 7 AM. U. INTELL. PROP. BRIEF 1, 6–7 (2015); Elizabeth Brusa, *Professional Video Gaming: Piracy That Pays*, 49 J. MARSHALL L. REV. 217, 246–47 (2015); Nicholas Ribaud, *Youtube, Video Games, and Fair Use: Nintendo’s Copyright Infringement Battle with Youtube’s “Let’s Plays” and Its Potential Chilling Effects*, 6 BERKELEY J. ENT. & SPORTS L. 114, 127 (2017); Ivan O. Taylor Jr., Note, *Video Games, Fair Use and the Internet: The Plight of the Let’s Play*, 2015 UNIV. ILL. J.L. TECH. & POL’Y. 247, 250 (2015).

¹⁰³ John Holden & Mike Schuster, *Copyright and Joint Authorship as a Disruption of the Video Game Streaming Industry*, 2020 COLUM. BUS. L. REV. 942, 983 (2020).

¹⁰⁴ *Id.* at 966.

¹⁰⁵ 17 U.S.C. § 101 (2018).

clause” which states, “to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.”¹⁰⁶

Addressing public performance by streaming, the Supreme Court in *ABC, Inc v. Aereo, Inc.* ruled that streaming copyrighted content to individual subscribers does infringe the public performance right.¹⁰⁷ The streaming at issue there was held to qualify as a performance because it used a device, an antennae assigned to a subscriber, to show the images of the original copyrighted TV program and to make its sounds audible to the subscriber.¹⁰⁸ Despite each antennae being devoted to a single subscriber for a single program, the stream was ruled public under the transmit clause because the provider made those images and sounds available to “a public” even if not the public at large.¹⁰⁹ The number of persons receiving the transmission was not the relevant factor, with the Court saying of public performance, “when an entity communicates the same contemporaneously perceptible images and sounds to multiple people, it transmits a performance to them regardless of the number of discrete communications it makes.”¹¹⁰ This ruling gave copyright owners broad ability to enforce public performance rights in livestreaming over the internet, which, combined with the audiovisual protection of gameplay addressed in the next part, lets game producers control the streaming market for games.¹¹¹

B. COPYRIGHT PROTECTION OVER VIDEO GAMES

Encouraging creative works and securing profits as a reward for authors are the two goals of copyright often drawn from the Intellectual Property clause of the Constitution, but courts have usually characterized the economic protection as the primary goal.¹¹² While both goals are premised on the idea that the creation of creative works serves the public good, the economic incentives tangibly

¹⁰⁶ *Id.*

¹⁰⁷ *Am. Broad. Co. v. Aereo, Inc.*, 573 U.S. 431, 431 (2014).

¹⁰⁸ *Id.* at 446.

¹⁰⁹ *Id.* at 447.

¹¹⁰ *Id.* at 447–48.

¹¹¹ *See id.*; *see also* Coogan, *supra* note 5, at 386.

¹¹² 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 1.03(A)(1) (2022).

memorialize an author's contribution.¹¹³ The Copyright Act of 1976 serves these goals in part by granting authors exclusive rights over works created in seven categories, with the two most applicable to video games being "literary works" and "motion picture and other audiovisual works."¹¹⁴

The code underlying video games is protected under copyright as a literary work, and some courts have ruled that gameplay is protectable as an audiovisual work.¹¹⁵ Taken on its own, the protection for a game's code as a literary work is parallel to the treatment of board games, where the game's instructions and rules are also protected as literary works.¹¹⁶ The design of game pieces, boards, and other items peripheral to the game may also be protected as other kinds of works.¹¹⁷ However, courts have not generally held that playing a board game, even in a tournament setting, constitutes a public performance.¹¹⁸ In *Allen v. Academic Games League of America* the Ninth Circuit found that "play" as used in the definition of "perform" from the Copyright Act had "generally been limited to instances of playing music or records."¹¹⁹ The court also noted that to extend the definition of "play" to gameplay would give the games' copyright owners the ability to restrict where and when purchasers could play the game, which it called an "undue restraint on consumers."¹²⁰ So, the exclusive rights under copyright for a board game do not include an exclusive right to play the games publicly, since that kind of play is covered by the Copyright Act.¹²¹ This definition already benefits the world of livestreaming in one way, where since they do not implicate the performance right of *Dungeons & Dragons* owner Wizards of the Coast, actual play livestreams like *Critical Role* can show hundreds of hours of gameplay based on the rules of *Dungeons & Dragons* without worry about infringing the copyright.¹²² The definition of play from *Allen* has not been applied to the playing of video games, through livestreaming or otherwise.

¹¹³ *Id.*

¹¹⁴ See 17 U.S.C. §§ 102(a)(1), 102(a)(6) (2018).

¹¹⁵ Coogan, *supra* note 5, at 386.

¹¹⁶ See *id.* at 404.

¹¹⁷ See *id.* at 405.

¹¹⁸ *Allen v. Acad. Games League of Am., Inc.*, 89 F.3d 614, 616 (9th Cir. 1996).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² See generally Nellie Andreeva, 'Dungeons & Dragons' Live-Action Series Ordered by Paramount+ from Rawson Marshall Thurber, *eOne & Paramount*

However, when it comes to video game livestreaming and esports, the protection of gameplay as an audiovisual work is most impactful. Although under *Allen* someone could theoretically “play” a video game without implicating the owner’s performance right in the code, it’s hard to imagine how they might do so in practice. Unlike playing a board game, playing a video game requires you to receive some output from the game itself, and it is the reproduction of that audiovisual output that is implicated by livestreaming. The Copyright Act defines audiovisual works as:

[W]orks 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.¹²³

In 1983, the Seventh Circuit established that gameplay for video games is protected separately from the code as an audiovisual work in the *Midway Manufacturing Co. v. Arctic International*.¹²⁴ Defendant Arctic International sold hardware, namely circuit boards, for arcade cabinets which when installed would play a games which closely replicated the audio and visual gameplay of the games *Pac-man* and *Galaxian*.¹²⁵ Although they did not use the same code, these circuit boards were found to infringe the copyright of the *Pac-man* and *Galaxian* owners because of their similarity to the audiovisual gameplay output of those games.¹²⁶

Pictures, DEADLINE (Jan. 10, 2023, 8:00 AM), <https://deadline.com/2023/01/dungeons-and-dragons-live-action-series-paramount-plus-rawson-marshall-thurber-eone-paramount-pictures-1235215486/> [<https://perma.cc/9NJM-7YLZ>] (discussing the status under copyright for playing table-top games is highlighted by the fact that the Critical Role animated series cannot use Dungeons & Dragons copyrights and trademarks, such as the names of spells, characters, or locations from the “Forgotten Realms” supplemental material published by Wizards of the Coast, since those are exclusively licensed by Wizards of the Coast and owner Hasbro to studio eOne for film and television).

¹²³ 17 U.S.C. § 101 (2018).

¹²⁴ *Midway Mfg. Co. v. Artic Int’l, Inc.*, 704 F.2d 1009, 1011 (7th Cir. 1983).

¹²⁵ *Id.*

¹²⁶ *Id.*

The court focused on the phrase “series of related images” from the Copyright Act’s definition of audiovisual work as the basis for their holding that the gameplay qualifies as an audiovisual work.¹²⁷ In considering the impact of the player’s actions, the court said that the players did not exert enough creative effort in playing a game to make the gameplay performance of their work.¹²⁸ The court described the relationship between the players and the gameplay as:

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 out of the images stored on the game’s circuit boards. 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.¹²⁹

However, this application of copyright goes beyond the protection afforded more generally to software developers for copyright to the output of their programs. According to *Midway Manufacturing*, gameplay outputs are unique and ownership of the copyright defaults to the developer because the developer created a limited number of possible outputs that a player might access and produce.¹³⁰ For software more generally, courts like the Ninth Circuit have found that the software developer only owns copyright of the output created by a user “if the program ‘does the lion’s share of the work’ in creating the output and the user’s role is so ‘marginal’ that the output reflects the program’s contents.”¹³¹ This “lion’s share” or “more than marginal” standard has not been fully fleshed out by courts, but it is clear that it would not be enough for the program to simply translate inputs to new outputs to have done the “lion’s share”¹³² A user’s role in

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 1012.

¹³⁰ *Id.*

¹³¹ *Design Data Corp. v. Unigate Enter., Inc.*, 847 F.3d 1169, 1173 (9th Cir. 2017) (quoting *Torah Soft Ltd. v. Drosnin*, 136 F. Supp. 2d 276, 283 (S.D.N.Y. 2001)).

¹³² *See Rearden, LLC v. Walt Disney Co.*, 293 F.Supp.3d 963, 970–71 (N.D. Cal. 2018) (finding that the translation of 2D information into 3D by a program

creating the output may be “more than marginal” when their contributions create an output that shows something more than simply the program’s contents.¹³³

In *Rearden, LLC v. Walt Disney Co.*, the contributions of actors whose faces were recorded and used as the basis for CGI characters were found to be “more than marginal” as the program received inputs of the “subtle and dynamic motions” of the performer and traced the CGI character onto that performance.¹³⁴ Rearden was attempting to claim ownership of the copyright of the performance ultimately seen in the film, but the studio objected.¹³⁵ The software provided by Rearden mapped the performance of the actor onto the design of the character, and Rearden may have had some input into the character’s design, but the program itself simply matched the character to the actor’s performance—the program did not itself generate either the performance or the design of the character.¹³⁶ Because the actor contributed a more than marginal amount to the performance ultimately seen on screen, Disney owned the copyright in that performance, not Rearden who’s software merely translated the performance of the human actor to the image of an alien, beast, etc., giving that performance.¹³⁷ In gameplay terms, the player owned the copyright in their gameplay footage because they contributed significantly to that gameplay, and the game developer merely provided the software that translated their play to the image of an avatar moving or interacting with the environment.

Recognizing that the level of contribution from players and the varieties of gameplay output that may be produced by a modern video game are often much more complex than the kinds of outputs possible in a game like *Pac-man*, many have called for the approach from the *Midway* case to be re-evaluated.¹³⁸

was a significant amount of work, but not enough since “all computer programs take inputs and turn them into outputs”).

¹³³ *Id.* at 969.

¹³⁴ *See id.* at 971.

¹³⁵ *See id.* at 968.

¹³⁶ *See id.* at 967.

¹³⁷ *Id.*

¹³⁸ *See* Shani Shisha, *Fairness, Copyright, and Video Games: Hate the Game, Not the Player*, 31 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 694, 765–66 (2021) (stating that contribution levels from players influences copyrightability and discussing varying commentary); Tyler Ackerson, *It’s Time for the Copyright Act to Patch-in a Statutory License for Video Game Streaming*, 48 *AIPLA Q. J.* 325, 340–41 (2020) (discussing how the *Midway* approach may no longer be operational because video games have gotten much more complex); Hagen,

While there are certainly games still produced with limited playable paths like those of earlier games, in something like the esports space, an *Overwatch* or *Smash Bros.* match has gameplay output that is the combination of contributions by anywhere from two to twelve players, with different outputs for each player and a different sequence of events each match. Since the issue of copyright over gameplay has only been addressed a handful of times by courts since the 1980s, it has not been clear what approach courts might be inclined to apply to video game livestreaming.

C. EXCEPTIONS TO COPYRIGHT

For commentators focused on livestreaming's implications on the public performance right, the fair use doctrine is the one solution for livestreaming.¹³⁹ Originally a judge-made doctrine that was later immortalized in the Copyright Act, fair use creates an exception to copyright infringement for unauthorized uses of a work for certain purposes including criticism, comment, and scholarship.¹⁴⁰ The Act lists the four factors to be considered in analyzing whether a particular use qualifies as fair use:

- (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.¹⁴¹

supra note 65, at 260–61 (stating that *Midway* may no longer be operational because the case was decided when video games were simpler and had less gameplay choices).

¹³⁹ Chen, *supra* note 15, at 380; Hagen, *supra* note 65, at 248; Shisha, *supra* note 138, at 754; James Puddington, *Fair Play: Economic Justification for Applying Fair Use to the Online Streaming of Video Games*, 21 B.U. J. SCI. & TECH. L. J. 413, 414 (2015).

¹⁴⁰ 17 U.S.C. § 107 (2018).

¹⁴¹ *Id.*

The application of these factors tends to be highly case-specific, with courts eschewing bright-line rules that might chill the development of creative works.¹⁴² Given the many formats that game streams can take, relying on an application of fair use is not a safe bet for widespread protection of the livestreaming market, but it could be particularly useful for sectors like esports.

The commercial use factor tends to weigh heavily against a finding of fair use,¹⁴³ and livestreams, at least those relevant here, are typically monetized.¹⁴⁴ Successful application of fair use to video game streams would rely on a finding that the livestreaming is a transformative use of the underlying game. Under the first fair use factor, transformative uses are those that alter the “expression, meaning, or message” of the underlying work.¹⁴⁵ Recently in *Warhol v. Goldsmith*, the Supreme Court clarified that while altering the expression or meaning is relevant to transformative use, a changing purpose or character is a “matter of degree.”¹⁴⁶ This balance of considerations results in a sliding scale where, “if an allegedly infringing work is highly transformative in purpose—like the enumerated uses in Section 107 of the Copyright Act—the less transformative the character must be, and visa versa.”¹⁴⁷ The Court further clarified that, “fair use is an objective inquiry into what a user does with an original work, not an inquiry into the subjective intent of the user, or into the meaning or impression that an art critic or judge draws from a work.”¹⁴⁸ Rather than considering the intent of the user or a judge’s impression, the meaning of a secondary work should be considered “to the extent necessary to determine whether the purpose is different

¹⁴² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (finding that a fair use analysis is always a case-by-case analysis).

¹⁴³ Clark D. Asay, *Is Transformative Use Eating the World?*, 61 B.C. L. REV. 905, 915–16 (2020).

¹⁴⁴ Hagen, *supra* note 65, at 265 (noting that content creators can monetize through running ads or soliciting donations, and that while this character of the use is a relevant consideration in a fair use analysis, companies make copyright claims against videos regardless of whether or not they were monetized).

¹⁴⁵ *Campbell*, 510 U.S. at 579.

¹⁴⁶ *Warhol v. Goldsmith*, 598 U.S. 508, 509 (2023).

¹⁴⁷ Kevin Madigan, *Landmark Warhol Decision Reins in Transformative Fair Use*, COPYRIGHT ALL. (May 19, 2023), <https://copyrightalliance.org/warhol-decision-reins-transformative-fair-use> [https://perma.cc/239D-NUGB].

¹⁴⁸ *Warhol*, 598 U.S. at 512.

from the original.”¹⁴⁹ This shift in focus with regard to transformative use may be a problem for streaming videos like Lets Plays and Walkthroughs, which tend to base their fair use arguments on the reasons an audience will watch a stream as opposed to play a game.¹⁵⁰ However, the court also emphasized the justification of a use, where “a distinct purpose is justified because it furthers the goal of copyright . . . a use may be justified because copying is reasonably necessary to achieve the user’s new purpose.”¹⁵¹ So if a streamer can show a new purpose, then the use of the game’s output may be justified, but that benefit hinges on showing that different purpose.

D. END USER LICENSE AGREEMENTS

It is important to note that outside of enforcing their copyright, game publishers have considerable control over how their games are used by players through their Terms of Service and/or End User License Agreements (“EULAs”).¹⁵² EULAs are popularly attached to computer programs as a way around the “first sale doctrine” of the Copyright Act, which lets the purchaser of a copy of a work resell it without restriction from the copyright holder.¹⁵³ These agreements between player and developer most often come as “clickwrap” or “browsewrap” agreements accepted by downloading/accessing the game or a registration with the publishers.¹⁵⁴ In the agreements, the publisher grants a revocable license to the players to use the software and play the game, and the players often waive and turn over rights to any intellectual property they may create in the game, such as the highly customizable characters often found in role-playing games or simulations like *The Sims* series.¹⁵⁵ Very rarely do these licenses leave the player with any rights to content they generate in the game, and when they do, they are

¹⁴⁹ *Id.* at 527.

¹⁵⁰ *See Meyer, supra* note 14 (discussing the various reasons why audiences watch livestreamed video games).

¹⁵¹ *Warhol*, 598 U.S. at 510–11.

¹⁵² *See Suzanne E. Rogers, Transforming with Avatars: Video Game Developer Licensing Considerations*, 65 J. COPYRIGHT SOC’Y U.S.A. 57, 101 (2018).

¹⁵³ *See Bradley F. Abruzzi, Copyright, Free Expression, and the Enforceability of Personal Use-Only and Other Use-Restrictive Online Terms of Use*, 26 SANTA CLARA COMPUT. & HIGH TECH. L.J. 85, 105 (2009).

¹⁵⁴ *See Rogers, supra* note 152, at 100.

¹⁵⁵ *See id.* at 101.

still subject to mandatory use licenses.¹⁵⁶ Often the EULAs do not specifically address streaming, but the requirements of the EULA overall leave streamers in a gray area of compliance with the terms through their streaming.¹⁵⁷

One way to offer clarity would be for courts to apply a statutory override based on the Copyright Act. Section 301 calls for preemption “if the rights at issue are both within copyright’s subject matter as specified at 17 U.S.C. §§ 102 and 103, and equivalent to a federally protected right under § 301.”¹⁵⁸ While a few courts have applied statutory preemption to EULAs where there was a provision overriding recognition of original authorship for user-generated content, none have done so specifically with regard to users’ contracting away their ability to use the content they generate.¹⁵⁹ Outside of copyright, players may be able to challenge EULAs based on unsatisfactory methods of creating an agreement through browsewrap and clickwrap practices,¹⁶⁰ or challenging specific terms as unconscionable, but those approaches would need to be evaluated case-by-case.¹⁶¹

Given the apparent reticence of many game publishers to make copyright claims on unlicensed livestreaming, enforcement of their EULAs has been the favored method for removing unapproved uses of their content, and often the EULA terms hew closely to what might be considered transformative under copyright anyway.¹⁶² The aforementioned “guidelines” that Nintendo adopted when they dissolved the Nintendo Creators Program exemplify this approach. Under the guidelines, creators are allowed to post footage or screenshots of

¹⁵⁶ *Id.* (noting that *The Witcher* and *Second Life* EULAs grant users right to retain copyright in content they generate and grant them the right to publish game content outside of the game).

¹⁵⁷ See Holden & Schuster, *supra* note 103, at 961–62.

¹⁵⁸ See Rogers, *supra* note 152, at 103–04.

¹⁵⁹ See *id.* at 104 (citing Erez Reuveni, *On Virtual Worlds: Copyright and Contract Law at the Dawn of the Virtual Age*, 82 IND. L.J. 261, 286–88 (2007)).

¹⁶⁰ Compare *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1455 (7th Cir. 1996) (holding that a clickwrap agreement requiring the user to scroll through and indicate acceptance of terms was sufficient to make a binding contract), with *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 105 (3d Cir. 1991) (holding that a shrinkwrap agreement included in the software packaging after the buyer accepted a different license was not enforceable).

¹⁶¹ See Rogers, *supra* note 152, at 105.

¹⁶² See, e.g., Fogel, *supra* note 9.

officially released Nintendo titles as long as they add their own commentary.¹⁶³ This indicates the power and control that game publishers would be able to maintain over their intellectual property and its downstream uses, such as livestreaming, even without the threat of direct copyright enforcement.

IV. FAIR USE ANALYSIS OF ESPORTS AND THE POSSIBLE IMPACT OF RECENT CASELAW

Video game livestreaming, and esports in particular, should qualify for a fair use exception for their use of the copyrighted audiovisual content of video games because their use of that content is transformative and has little to no impact on the original work. This Part will (1) go through the four-step fair use analysis as applied to livestreaming and esports and (2) consider how new case law in the field of software infringement might impact that fair use analysis.

A. FAIR USE ANALYSIS OF ESPORTS

With the de-emphasis on transformative use post-*Warhol*, video game livestreams successfully making it through a fair use analysis would likely depend on the success of an argument that they have little to no negative impact on the potential market for the original. However, given the commercial nature and substantiality of the use of the underlying game in livestreaming the transformative purpose it still and important argument to make for the overall fair use analysis. The four factors from the Copyright Act (purpose and character of the use, the nature of the copyrighted work, amount and substantiality of the portion used, and the effect of the use upon the potential market) are fairly malleable by courts, which leads to some variation and unpredictability in their application.¹⁶⁴ The complexity of an esports match and the production of such events make them one of the strongest cases for constituting a transformative use, despite their explicitly commercial purpose.

¹⁶³ See *Nintendo Game Content Guidelines for Online Video & Image Sharing Platforms*, NINTENDO (Nov. 29, 2018), https://www.nintendo.co.jp/networkservice_guideline/en/index.html?n [<https://perma.cc/FZ7S-4U4A>].

¹⁶⁴ David Nimmer, *"Fairest of Them All" and Other Fairy Tales of Fair Use*, 66 L. & CONTEMP. PROBS. 263, 287 (2003).

1. *Purpose and Character of the Use*

The commercial nature and potential of esports is not disputed. However, having that purpose is not the sole determinant of fair use overall, or even for how this particular factor will come out in an analysis, in part because the examination of transformative use is most influential with this factor.¹⁶⁵ Such commercial nature is just one part of the analysis, along with the purposes of the works and balancing against other justification for the copying.¹⁶⁶ In *Warhol*, the use of Warhol's screen-print version of the original photograph was only alleged to be infringing when it was licensed to a magazine, because sale to magazines was the same purpose at the original photograph.¹⁶⁷ Here, while the purposes of an original game and a livestream may be related, they are not the same. The purpose of a video game as released by a developer/publisher would likely be described as entertainment of an audience through performance. However, a court applying this could also fairly find that the Supreme Court's concern for transformative use "swallow[ing] the copyright owner's exclusive right" suggests caution in allowing a secondary user to implicate the public performance right while claiming a different purpose.¹⁶⁸

Aside from the commercial nature, the weakest aspect of esports argument for fair use is the dominant focus on the gameplay in a livestream. As previously mentioned, match streams like those from the Overwatch League tend to lack a chat box or significant commentary from the players themselves. The popularity of streams in other formats like Let's Plays or Exploitation streams is somewhat independent from the actual content of the game as the draw for audiences is more based on the commentary or criticism of the game than having the game played in its original format or aiming at the intended objectives.¹⁶⁹ Considering the kinds of games at issue in a case like *Midway*,¹⁷⁰ it is easy to see how the limited ways a player might find to collect points in a game like *Galaxian* and *Pac-man* provide little room for creative ingenuity. In an Overwatch League match however, players are speaking to and strategizing with their teammates about the type of match being played, how best to use the map to their advantage,

¹⁶⁵ Nicholas Robinson, *From Arcades to Online: Updating Copyright to Accommodate Video Game Streaming*, 20 N.C. J.L. & TECH. 286, 308 (2018).

¹⁶⁶ See *Warhol v. Goldsmith*, 598 U.S. 508, 532–33 (2023).

¹⁶⁷ See *id.* at 534.

¹⁶⁸ See *id.* at 511.

¹⁶⁹ Meyer, *supra* note 14.

¹⁷⁰ *Midway Mfg. Co. v. Artic Int'l, Inc.*, 704 F.2d 1009, 1011 (7th Cir. 1983).

and coordinating the use of different character abilities to achieve the objective.¹⁷¹ While commentary typical of Let's Plays is limited or even absent from esports streams, the wide possibilities of actions from players of modern esports-style games, as well as their interactions with other players (teammates or rivals), still leads to outputs which serve a very different purpose to that of the game itself as an original work. Thus, these possibilities and accompanying outputs should qualify as a creative ingenuity that makes the resulting stream a transformative work.

2. *Nature of the Copyrighted Work*

The major considerations by courts with regard to the nature of the copyrighted work are whether the work is fiction or nonfiction, and whether it is published or unpublished.¹⁷² Fictional or unpublished works are granted stronger protections as they are said to be “closer to the core of intended copyright protection.”¹⁷³ All of the works at issue with video game livestreaming would certainly qualify as published, and the vast majority are fiction, so this factor weighs against fair use. The potentially transformative nature of the use has little or no impact on this factor since it focuses exclusively on the underlying work rather than the alleged infringer.

3. *Amount and Substantiality Used*

For most kinds of video game livestreaming, aside from walkthroughs, this factor most clearly weighs against fair use. While an individual round of play in an esports match may only last a few minutes, matches are made up of multiple rounds and whole tournaments can result in dozens of hours of game content being produced and performed.¹⁷⁴ Over the course of those hours, it is possible that all the characters and all the environments might be used and exposed to the audience.¹⁷⁵ This large amount of use is inherent to livestreaming, as the streamers react and provide commentary based on what is happening in their playthrough,

¹⁷¹ See *Overwatch Esports*, *supra* note 48 (showing match gameplay including interactions between teammates).

¹⁷² See *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.*, 342 F.3d 191, 200 (3d Cir. 2003).

¹⁷³ *Id.*

¹⁷⁴ Ronquillo, *supra* note 6, at 85.

¹⁷⁵ *Id.* at 85–86.

whether those happenings are the result of interactions with other players or the result of predetermined storylines and abilities.

While the amount of the underlying copyrighted work used in esports can clearly be great, the issue of substantiality does bring up other considerations. Substantiality refers to the use of something which embodies the underlying work's "distinctive expression," with courts noting that "the fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material."¹⁷⁶ Finding that a substantial amount of a game was copied in a livestream would most clearly be found in the something like the performance of story elements which are common in a Let's Play.¹⁷⁷ However, in games like those that esports are built around, there is not necessarily a predetermined expression of the game—rather, each match varies based on a number of factors such as the players involved, game mode, and map. While Esports games do have story elements which a streamer could explore and perform to the viewer, the nature of the action in a match is so vague and variable that it would be a stretch to say they are copied from anything explicitly intended by the game's programming as "distinctive expression."¹⁷⁸ One esports attorney describing the advancement of gameplay since the days of *Pac-man* noted, "players control camera angles and placement. Players engage in complex multiplayer matches while making unending split-second strategic decisions, often on three-dimensional maps."¹⁷⁹

Even when a large amount of the underlying work is being used, as in livestreaming, that is not on its own dispositive of a finding against fair use. In *Campbell*, the Supreme Court noted that for the purposes of parody, a more substantial amount of the underlying work might be permitted to be used.¹⁸⁰ The court noted that the nature of parody requires that a substantial portion of the underlying work be used in order both for audiences to recognize the work being parodied and for the new work to effectively comment on the underlying work.¹⁸¹ Video game livestreaming generally, and esports specifically, have similar requirements to parody in that they have to show the gameplay for audiences to recognize the game being played and follow the flow of action in a match, and the

¹⁷⁶ *Harper & Row v. Nation Enter.*, 471 U.S. 539, 565 (1985).

¹⁷⁷ Hagen, *supra* note 65, at 270.

¹⁷⁸ *Harper & Row*, 471 U.S. at 565.

¹⁷⁹ Ryan Fairchild, *Thirty-Five Years Without Player Rights in Gameplay: Is a New Challenger Approaching?*, 2019 ESPORTS BAR ASS'N J. 1, 7 (2019).

¹⁸⁰ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 588 (1994).

¹⁸¹ *Id.*

skill on showcase for players or teams in each league is specific to the underlying game. In the case of parodic music, a song has to use some portion of the original song, be it musical elements or lyrics or both so that the listener recognizes what the original was and can understand how the additions change or riff on that original.¹⁸² An esports match has to use the gameplay output so viewers (and participants) recognize what the original work is and how it works, and the unique and high-level tactics and abilities shown in the game might themselves be considered the change or commentary on the work as they showcase skills honed over hundreds of hours of play and practice.¹⁸³

4. *Effect on the Market for the Copyrighted Work*

Based on the purposes of audience engagement with esports, and video game livestreams more generally, the effect on the market for the copyrighted work is the factor which would weigh most heavily in favor of a finding of fair use. This is also why some publishers have been very lenient in the use of their games for livestreaming.¹⁸⁴ Only certain kinds of economic harm will even be considered by courts as, “the role of the courts is to distinguish between ‘biting criticism that merely suppresses demand and copyright infringement, which usurps it.’”¹⁸⁵ A court is most likely to find that this factor weighs against fair use where the infringing work replaces the market for the original, or fulfills the demand for the original in the market.¹⁸⁶ The primary consideration in determining whether an allegedly infringing work would likely replace the

¹⁸² *Warhol v. Goldsmith*, 598 U.S. 508, 530–31 (2023) (describing the use of an original work in parody and distinguishing the necessity of that copying in parody from satire, which does not require an underlying work).

¹⁸³ Michael Arin, *Esports & Employment After Dynamex*, 2019 ESPORTS BAR ASS’N J. 27, 28 (2019) (“Professionals play their videos games, either competitively, for practice, or for show (streaming), up to 15 hours a day.”).

¹⁸⁴ Cf. Gach, *supra* note 39 (discussing Nintendo’s uniquely harsh reputation for taking down videos using their games); Carolyn Pepper, *Can developers control streamers?*, GAMESINDUSTRY.BIZ (Dec. 28, 2017) <https://www.gamesindustry.biz/can-developers-control-streamers> [<https://perma.cc/NWG7-LCZ3>] (discussing a developer which only issued a takedown after the streamer was caught up in controversy unrelated to their use of the game).

¹⁸⁵ *Campbell*, 510 U.S. at 592 (quoting *Fisher v. Dees*, 794 F.2d 432, 438 (1986)).

¹⁸⁶ *Id.* at 590.

market for the original is if the original producer is likely to create themselves, or license the creation of, a derivative work like that of the alleged infringer.¹⁸⁷

There is no indication that esports, or indeed other kinds of livestreaming, harms the original market for the game itself. It is important to note that many esports games, like *Overwatch*, are “free to play,” meaning there is no up-front cost to download the game, and profits from the game come largely from things like players buying upgrades for their character in the game.¹⁸⁸ While other kinds of livestreaming, like Let’s Plays, might be argued to replace the original market through things like exposing story beats and thereby making an audience member less likely to buy the game and explore the narrative for themselves,¹⁸⁹ the nature of games in esports mean that even the risk of such market replacement is much lower. Even when livestreaming exposes more of a game’s story, the interactive and engaging nature of video games means that an audience member experiencing a game through a stream where they have no control poses no more risk to supplanting the original market than any adaptation of the game for another medium.¹⁹⁰ If the current market of video game adaptations in film and television is any indication, game publishers are not worried about audiences not buying their game because they had the plot spoiled.¹⁹¹

¹⁸⁷ Hagen, *supra* note 65, at 272 (citing *Campbell*, 510 U.S. at 592–93).

¹⁸⁸ Margaret Rouse, *Sandbox Game*, TECHOPEDIA (Feb. 13, 2024), <https://www.techopedia.com/definition/3952/sandbox-gaming> [<https://perma.cc/PYR6-BET2>].

¹⁸⁹ Hagen, *supra* note 65, at 272.

¹⁹⁰ See Krystal Ruiz, *How Live Streaming and Twitch Have Changed the Gaming Industry*, ART 108: Introduction to Games Studies (2020) (noting that the passive nature of livestreaming for the audience encourages them or piques their interest to want to buy and play the game themselves); Jay Peters, *HBO’s The Last of Us TV Show is Pushing the Game Up the Sales Charts*, THE VERGE (Feb. 13, 2023), <https://www.theverge.com/2023/2/13/23597863/hbo-the-last-of-us-tv-show-game-part-i-sales-npd-group> [<https://perma.cc/75KD-WR78>] (reporting on the impact of The Last of Us TV series, which followed the plot of the game closely, increasing sales of the game).

¹⁹¹ See Christopher Cruz, *Hollywood’s Power Players: Why 2023 Will Be the Year of Video Game Adaptations*, ROLLING STONE (Jan. 22, 2023), <https://www.rollingstone.com/culture/culture-lists/hollywoods-power-players-will-2023-be-the-year-of-video-game-adaptations-1234663941/> [<https://perma.cc/6SVE-SSBJ>].

The rise of esports leagues licensed and overseen by game publishers does present a problem for potential independent leagues or competitions in this factor. However, the limitations implied in officially licensed esports streams to do things like criticize the underlying game would leave room for argument that independent leagues or matches still might not replace the market for the original. Viewing licensed leagues or tournaments, like Let's Plays, does not replace the experience of a player interacting with the game themselves, and can also serve as more an advertisement for the original than a replacement. Here comparison to traditional sports leagues is apt, as an audience watching NFL or NBA games does more to promote personal engagement with the activity than it does to replace a desire in individuals to play football or basketball themselves.¹⁹²

B. POTENTIAL IMPACT OF APPLYING *REARDEN*

The *Rearden* case draws on a line of cases not coming from video game protections, but from copyright in the output of computer software more generally.¹⁹³ It makes intuitive sense that, for example, Adobe, the owner and publishers of the popular Photoshop and Illustrator applications, would not be assumed to own copyright in the output created by artists in its program simply because they owned the program.¹⁹⁴ It would certainly not reach the Copyright Act's goal of promoting creative works to have artists lose copyright in their work simply because the tool they used to create it was computer software. However, programs like Photoshop or Illustrator are clearly distinct from video games because they do not generally create a recognizable output without input from the user. The default screen on Photoshop is a blank canvas with the various tools surrounding that the artist can use to create. While there are "sandbox" games like *Minecraft* that are similarly based on giving the player tools to create what they wish in the game world, most games, especially those relevant to esports, have at least some artistic elements built into and produced by the game's program. If a streamer only provided the necessary input on the menu screens to start an *Overwatch* match then put the controller down, the gameplay output could still consist of hundreds of audiovisual elements like other character avatars, weapons,

¹⁹² See Joe Drape & Ken Belson, *Pro Sports Leagues Are Chasing Gen Z Where It Plays*, N. Y. TIMES (Jan 12, 2022), <https://www.nytimes.com/2022/01/12/sports/video-games-nfl-gamers-gen-z.html> [https://perma.cc/6APU-8EBU].

¹⁹³ See Fairchild, *supra* note 179, at 6.

¹⁹⁴ *Id.*

and statistic trackers for the overall match generated independently by the game program.

Rearden does not totally set aside the copyright interest a software publisher might have in the output of their program, but it puts a greater emphasis on the contributions of the program's user to the ultimate output of the program.¹⁹⁵ As applied to esports, it would consider whether the ultimate stream reflects at least "more than marginal" contributions from the player.¹⁹⁶ This is a much lower standard to meet than the contributions required to show transformative use in a fair use analysis. In *Rearden*, the program tracked the actor's performance, their movement and expression, onto the CGI-rendered character, and that performance by the actor was found to be "more than marginal."¹⁹⁷ The tracking of an actor's physical inputs through their performance resulting in movements and performance by a computer-generated character is similar to the contribution made by esports players on their characters. Instead of directly reflecting the movement of an actor's eyebrow onto a character's eyebrow, the game takes inputs from the controller or keyboard and translates them into a wide range of possible movements or actions by the character.

While the line from an actor's performance to the ultimately produced CGI character may be more direct than the line from a player's controller movements to the attacks made by an *Overwatch* character, in both cases, the output produced by the program is highly variable and dependent on the inputs given by the user. In *Midway* the court said the user was merely choosing among potential outputs provided by the game,¹⁹⁸ but the potential outputs of a CGI character in *Rearden* is also limited by the abilities of the program to recognize and translate the inputs provided by the actor, so a similar limit kind of limit existed in both cases, just in different directions.¹⁹⁹ The complex inputs and output possible with a modern esports competitor are more similar to the range of

¹⁹⁵ See *Rearden, LLC v. Walt Disney Co.*, 293 F. Supp. 3d 963, 970 (N.D. Cal. 2018).

¹⁹⁶ See *id.* at 970–71.

¹⁹⁷ See *id.* at 971.

¹⁹⁸ See *Midway Mfg. Co. v. Artic Int'l, Inc.*, 704 F.2d 1009, 1012 (7th Cir. 1983).

¹⁹⁹ Compare *Rearden*, 203 F. Supp. 3d at 971 (finding that the software's contributions on its own "cannot be enough, since all computer programs take inputs and turn them into outputs."), with *Midway Mfg.*, 704 F.2d at 1012 (finding that the contribution of a player could not be enough because they just "choose one of the limited number of sequences the game allows him to choose").

expression by an actor than they are to the simple directional inputs and repetitive outputs possible from a game like *Pac-man* considered by the court in *Midway*.²⁰⁰

Applying *Rearden* to esports livestreaming supports both of the aims of the Copyright Act in encouraging the production of creative works and securing profits for the creators. With regard to production of creative works, those players and matches that fear being shut down, or worse, held liable for infringement, could display their work publicly. Securing profits would be easier for both independent players and those in official leagues. Independent streamers are often subject to demonetization based on copyright claims on their videos, and recognizing their “more than marginal” input in the stream would protect them from having their stream revenue redirected to the game publisher alone.²⁰¹ With that ability to earn revenue and potential competition from independent leagues, players in official leagues would be in a stronger negotiating position with the league on salary or other employment issues. The current approach based on *Midway* keeps players in a position of having to be happy with whatever they are given by the publishers running the league,²⁰² and turning to a *Rearden* approach would put more power in the hands of the players and potentially increase competition in the esports industry overall.²⁰³

V. CONCLUSION

Given the advancement of video game streaming and the recent rapid growth of industries like esports, it is appropriate and necessary to reconsider the application of copyright to video games and their downstream uses. The current combination of precedents granting copyright protection to publishers over any audiovisual output possible within their game and the protections for public performance rights over content streamed online has created a legal environment

²⁰⁰ See generally *Midway Mfg.*, 704 F.2d at 1012 (discussing copyright dispute over “Pac-Man” game).

²⁰¹ Jordan Fragen, *New YouTube Policies Demonetize More Gaming Content*, GAMESBEAT (Dec. 31, 2022) <https://venturebeat.com/games/new-youtube-policies-demonetize-more-gaming-content/> [<https://perma.cc/8BWM-ZGSK>] (reporting on content creator noticing higher rates of demonetization on YouTube after the platforms rolled out new monetization policies for use of video games in videos).

²⁰² See *id.* at 1012 (establishing that video game developed own the copyright in the gameplay, not the players of the game).

²⁰³ See *Rearden*, 203 F. Supp. 3d at 971 (finding that the user of an audiovisual production software can own copyright in the gameplay based on their significant contributions to the output).

for esports and livestreaming more generally that cannot be sustainable in the long-term. Courts should abandon the approach from *Midway* of presumptive copyright for game publishers over the gameplay output as an audiovisual work and apply a test more like *Rearden*, giving greater weight to the contributions of the player in considering copyright of the end product in a livestream like an esports match. This would give all kinds of livestreaming protection from enforcement of publisher's copyright, but it would create a presumption that promotes the goals of the Copyright Act by encouraging streamers to create through their streams and giving them security in the financial incentive to create through streaming.