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# All Your Works Are Belong to Us: New Frontiers for the Derivative Work Right in Video Games

J. Remy Green

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**ALL YOUR WORKS ARE BELONG TO US:<sup>1</sup>  
NEW FRONTIERS FOR THE DERIVATIVE WORK RIGHT IN VIDEO  
GAMES**

*J. Remy Green\**

*In copyright law, the author of an original work has the exclusive right to prepare further works derivative of that original. Video game developers' works are protected by the Copyright Act. As video games take advantage of more advanced technology, however, players are doing more creative, interesting, and original things when they play games. Certain things players do create independent economic value and are the kinds of acts of original authorship our copyright system is designed to encourage. However, since the author of the video game is entitled to the full panoply of rights under the laws of the American copyright regime, they own the exclusive right to prepare works "derivative" of that game.*

*This Article has both descriptive and normative goals. Its descriptive goals are to outline the current legal trends in the video game space and to demonstrate the huge economic stakes at play.*

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<sup>1</sup> This title is a reference to a famously terrible translation of the Japanese game "Zero Wing," where the player is informed that "[a]ll your base are belong to us. . . . [Y]ou have no chance to survive make your time." Luke Winkie, *25 Years Later, 'All Your Base Are Belong to Us' Holds Up*, DAILY DOT (June 4, 2016, 6:00AM), <https://www.dailydot.com/unclick/all-your-base-are-belong-to-us-25th-anniversary/>.

\* Juris Doctor, University of Chicago 2016; Associate with Fried, Frank, Harris, Shriver & Jacobson. I want to offer a very heartfelt thank you to the people who have worked closely with me on this paper, especially those in the Canonical Ideas in Legal Thought class workshop at the University of Chicago and those on the amazing staff at NC JOLT. I'd also like to take this chance to specifically thank my friends, family, editors, and mentors, Professor Jonathan Masur, Hannah Cook, David Reed, Katherine Walling, Stephanie Venskoste, Jennifer Cook, Howard Green, Darcy Ross, Liz Sanders, and Kathleen Riley for their very useful commentary, feedback, support, willingness to laugh at my jokes, and for just generally putting up with me talking through my ideas on this paper. All my thanks are belong to you.

*Its normative goals are to offer a number of different ways of explaining how derivative works of video games are created and to suggest several modes of understanding how cases where ownership of these works is disputed should be decided. These modes include philosophical thought experiments, critical analysis of what exactly a game is, analysis of what kind of game underlies the second order work in question, and application of the liability/property rule framework from law and economics literature.*

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## I. INTRODUCTION

Video games are protected as audio-visual works under the United States Copyright Act,<sup>2</sup> and creators of such works are offered an exclusive right to prepare derivative works from their copyrighted creations.<sup>3</sup> This exclusive right allows a copyright holder to prohibit anyone from preparing a work derivative of her original; she can even ask a court to require the destruction of any infringing work after winning a claim for infringement.<sup>4</sup> Copyright law attempts to strike a delicate balance between the interests of those who create a work and the interests of the public in being able to use that work. As video games become more sophisticated, gameplay<sup>5</sup> involves more self-expression than ever before. The interest of the gaming public in using games to express themselves has started to more directly conflict with the interests of the creators

<sup>2</sup> Copyright Act, 17 U.S.C. §§ 101–1332 (2012).

<sup>3</sup> *Id.* § 106.2. § 101 clarifies that “a ‘derivative work’ is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work.’”

<sup>4</sup> *Id.* § 503(b). This right is not, by any means, absolute. A number of limitations—fair use, for example—cabin the holder’s ability to enforce her exclusive right. *See id.* § 107.

<sup>5</sup> “Gameplay is the formalized interaction that occurs when players follow the rules of a game and experience its system through play.” KATIE SALEN & ERIC ZIMMERMAN, RULES OF PLAY: GAME DESIGN FUNDAMENTALS 3 (2004).

of those games. Game developers have struck very different balances in how they try to enforce these rights. Copyright law aims to “promote the [p]rogress of [s]cience and useful [a]rts” by offering those engaged in expression an exclusive right to their works.<sup>6</sup> With this rise of player self-expression, however, the legal system will need to start answering difficult questions about how we should allocate the rights at issue in this emerging space.

As a starting point, the rights at stake are significant. The market for independent works prepared using a video game has more money in it than the proverbial banana stand.<sup>7</sup> South Park’s “Make Love, Not Warcraft” episode made prominent use of machinima<sup>8</sup>—an art-form that uses the models and settings in video games to generate computer animation—to place its characters within Blizzard Entertainment’s virtual world (of Warcraft).<sup>9</sup> The episode was created by having players play and record in Blizzard’s online game World of Warcraft—much like a puppet show—and then having voice actors dub new audio over the resulting video.<sup>10</sup> It was a huge success and has won myriad awards, including a 2007 Primetime Emmy.<sup>11</sup>

Another example involves the predecessor to World of Warcraft, Warcraft III. Warcraft III included a “world editor” as a separate application alongside the game proper.<sup>12</sup> The editor was meant to

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<sup>6</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>7</sup> See *Arrested Development: Top Banana* (Fox television broadcast Nov. 9, 2003) (“There’s always money in the banana stand!”).

<sup>8</sup> See *Machinima*, OXFORD ENG. DICTIONARY, <https://en.oxforddictionaries.com/definition/machinima> (last visited Feb. 4, 2018).

<sup>9</sup> Dan Iverson, *South Park: “Make Love, Not Warcraft” Review*, IGN (Oct. 5, 2006), <http://www.ign.com/articles/2006/10/05/south-park-make-love-not-warcraft-review>.

<sup>10</sup> *Make Love, Not Warcraft*, IMDB, <http://www.imdb.com/title/tt0850173/> (last visited Feb. 4, 2018).

<sup>11</sup> *59<sup>th</sup> Creative Arts Emmy Awards*, ACAD. TELEVISION ARTS & SCI., [https://web.archive.org/web/20090917174713/http://www.emmys.tv/awards/2007pt/nominations\\_crtv.php?action=search\\_db](https://web.archive.org/web/20090917174713/http://www.emmys.tv/awards/2007pt/nominations_crtv.php?action=search_db).

<sup>12</sup> *Warcraft III: Reign of Chaos*, BLIZZARD, <http://us.blizzard.com/en-us/games/war3/> (last visited Jan. 23, 2018) (“Expand your world with the Warcraft World Editor. Design Custom 3D maps and create missions with scripts for units, spells, event triggers, and more.”).

allow players to set up maps with customizable objectives and terrain in order to play the game's war simulation.<sup>13</sup> One custom map, called "Defense of the Ancients," or DOTA, gained massive popularity and now Valve Entertainment, an unaffiliated publisher, has developed a sequel called DOTA 2.<sup>14</sup> Valve Entertainment recently hosted a tournament for the game with a prize pool topping \$24 million.<sup>15</sup> Another spiritual successor to DOTA, Riot Games' League of Legends, hosts an annual world championship with live viewership that has topped 60 million.<sup>16</sup> According to one source, all ten of the top ten prize pools in competitive video gaming history were handed out in tournaments for DOTA-type games.<sup>17</sup> Of course, these figures are only what the developers offer to encourage players to excel—the money the developer makes on the game, events, and merchandise far exceeds these numbers, and this amount excludes the money players and video platforms make from advertising and sponsorship. The larger point is that millions of players share their experience playing games with Let's Play<sup>18</sup> videos and streaming

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<sup>13</sup> *Id.*

<sup>14</sup> Valve and Blizzard recently settled a trademark suit over the rights to the name "DOTA." Blizzard had announced a game they called, "Blizzard DOTA," and Valve claimed that by contracting with the creators of the mod, they had obtained the rights to the name "DOTA." The terms of the settlement were not disclosed. Interestingly, however, the two have not litigated rights to the game's copyright. Mike Schramm, *Blizzard and Valve Settle DOTA Argument, Blizzard DOTA Is Now Blizzard All-Stars*, ENGADGET (May 11, 2012), <https://www.engadget.com/2012/05/11/blizzard-and-valve-settle-dota-argument-blizzard-dota-is-now-bl/>.

<sup>15</sup> See *Largest Overall Prize Pools in E-Sports*, E-SPORTS EARNINGS, <http://www.esportsearnings.com/tournaments> (last visited Jan. 24, 2018).

<sup>16</sup> *The League of Legends Worlds Final Reached 60 Million Unique Viewers*, DOT ESPORTS, <https://dotsports.com/league-of-legends/news/lol-worlds-final-viewership-18796> (last visited Feb. 4, 2018).

<sup>17</sup> The fifth and sixth ranked tournaments were for League of Legends, while the rest of the top 10 (bottoming out with a \$3 million prize pool at number 10) are held exclusively by DOTA 2 tournaments. See *Largest Overall Prize Pools in E-Sports*, E-SPORTS EARNINGS, <http://www.esportsearnings.com/tournaments> (last visited Jan. 24, 2018).

<sup>18</sup> See *FAQ*, LET'S PLAY ARCHIVE, <https://lparchive.org/faq> (last visited Jan. 24, 2018) ("L[et's Play]s show a video game being played while the player talks about what they're doing in commentary with video, screenshots or both. Rarely

live play on various streaming video platforms, generating untold amounts of money in advertising revenues.

These examples make abundantly clear that at some point soon, for derivative works of video games, the legal system will have to figure out who owns what—and who should. While some cases on point do exist, they have not dealt with the complexity that exists in this space and have not kept pace with the technological developments. In this Article, I will work to solve at least some of this puzzle through a series of case studies. Section II lays out the broad contours of four paradigmatic examples of ways video games can be used to create a derivative work. Section III analyzes each of these in depth, using the law as it stands now. Finally, Section IV argues that the results of that analysis are both normatively incorrect and occasionally comically absurd, and Section V proposes better modes of understanding the interaction between video games and the derivative work right.

First, however, let's put together a framework to build our understanding upon. Let us imagine a game—Original Game—produced by the firm Developer. At the moment Developer “fixe[s]” Original Game in a “tangible medium of expression,” she gains the protections of the Copyright Act as long as the Original Game is an “original work[] of authorship.”<sup>19</sup> A “tangible medium” is any medium of expression from which the work can be “perceived, reproduced, or otherwise communicated.”<sup>20</sup> So, for example, when Nintendo fixes a version of Super Mario Brothers in a tangible medium, they gain the full panoply of rights offered by the Copyright Act.<sup>21</sup>

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some sections are done ‘off screen’ or sped up, but in most cases the playthrough is a complete run of the game done in informative or humourous [sic] style so as to keep your attention. You know how you are.”).

<sup>19</sup> 17 U.S.C. § 102 (2012).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* § 106 (providing that the owner of a copyright has the exclusive right—subject to exceptions—to, *inter alia*, reproduce the work, prepare derivative works, distribute copies, and perform the work publicly or via digital audio transmission).

Next in our story, Developer's game is played by Player. Player records their gameplay and commentary—creating an audio-visual work we will call Gameplay Work—and broadcasts that work on a video-streaming Platform. Let's also stipulate that Player's Gameplay Work has sufficient originality to cross the Copyright Act's threshold for an "original work[] of authorship."<sup>22</sup> Consider the following more specific take on the same example: Player streams their gaming sessions (Gameplay Works) on Platform Twitch.tv, where people watch them play Developer Nintendo's Original Game, "Mario." In the feed's audio track, they add their own running commentary on the game and play the game in an original and creative way that entertains viewers.<sup>23</sup> Twitch.tv makes money by selling advertising via commercials during the player's stream and on their website.<sup>24</sup>

We thus see the four major groups whose interests are implicated in this space: Developers, Players, Platform Owners, and Consumers. It is also important to note that the Consumers here are only the Consumers for the Gameplay Work. The interests these parties have, generally speaking, can be described as follows:

Developer	Right to prepare derivative works based on Original Game; financial gain from Original Game; incentives to create Original Game
Player	Financial gain from Gameplay Work; incentives to create Gameplay Work
Platform	Financial Gain from Gameplay Work
Consumer	Enjoyment of Gameplay Work; interests in having alternate ways to experience Original Game

<sup>22</sup> *Id.* § 102. I stipulate this because the fact-based inquiry is one that courts already do well and discussing it does not add any depth that is interesting.

<sup>23</sup> Again, please do not fight the hypothetical; this example's current primary objective is simplicity. I will discuss examples that *much* more obviously satisfy the originality prong later in the Article.

<sup>24</sup> See *Twitch Partner Program*, TWITCH, <https://www.twitch.tv/p/partners/> (last visited Jan. 15, 2018).



A coherent property system ought to maximize the benefits accruing to each party in this system while minimizing the extent to which incentives and expectations are thwarted. Thus, offering no intellectual property (IP) protections to Developer would result in a world where Original Game is never developed because funding will not exist. Simultaneously, however, offering complete control over uses of Original Game to Developer will result in rent-seeking behavior—that is, behavior seeking to extract maximum value without any additional labor—by Developer,<sup>25</sup> and likely will disincentivize the creation of Gameplay Works.

## II. FOUR PARADIGMATIC CASES

This section lays out four different ways people are (or could be) using video games to create new works. These examples are not meant to be exhaustive by any means. Rather, they were selected because each one illustrates the underlying puzzle from a slightly different angle. As a normative matter, some of them should produce clear intuitions on what rights should belong to whom, while others ought to implicate allocations of rights about which reasonable people could disagree. This section is explicitly structured such that the short “Example” descriptions (that use shorthand provided above and elsewhere) can be easily referenced as you move through the Article, while the other subsections are written to contain and provide more fulsome content and analysis.

### A. *Speedruns: Harder, Better, Faster, Stronger!*

#### 1. *The Example*

Player is an extraordinarily skilled player of Developer’s Original Game, “Mario.” Player streams their completion of the game on Platform Owner Twitch’s website, where Player sets a new world record for a rapid completion, or “Speedrun,” of the game.

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<sup>25</sup> See generally Anne. O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64–3 AM. ECON. R. 291 (1974) (using the phrase “rent-seeking” to refer to behavior that involves seeking to exploit already existing economic and political positions, rather than creating new wealth or value).

Consumers cheer Player on, and some become long-term fans of Player as a gaming celebrity.

## 2. Discussion

Nintendo's Mario is one of the most iconic characters in popular culture.<sup>26</sup> While he has starred in a staggering number of titles, the original Super Mario Brothers remains a cultural touchstone. The game is one that players have completed innumerable times, and now players compete to complete the game at record speeds.<sup>27</sup> As they make these attempts, many players broadcast their efforts over the internet.<sup>28</sup>

Twitch.tv, among other websites, provides a platform for gamers to watch live broadcasts of gameplay.<sup>29</sup> The website advertises that they provide an ability to "[b]roadcast all the games! There's a universe of gaming video waiting to be discovered on Twitch. Whether you're into retro favorites, strategic eSports<sup>30</sup> titles, first-person shooters, or massively multiplayer pasta cooking dating simulators, if you love playing it, you'll find it on Twitch."<sup>31</sup> Those who broadcast are, according to Twitch, "the most dedicated and highly skilled gamers on the planet. They shatter world records. They cruise through the newest titles. They make headlines with world-first accomplishments, and they make it all look easy."<sup>32</sup> Despite these claims, while it is plausible to imagine that Twitch holds a license for massive titles like Mario, it is not plausible that

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<sup>26</sup> See Martin Stezano, *How Super Mario Helped Nintendo Conquer the Video Game World*, HISTORY (Oct. 25, 2017), <http://www.history.com/news/super-mario-history-nintendo-donkey-kong-facts>.

<sup>27</sup> See *About*, SPEEDRUN.COM, <https://www.speedrun.com/about> (last visited Jan. 23, 2018) ("Speedrunning is the act of playing a video game with the intent of completing it as fast as possible, for the purposes of entertainment and/ or competition.").

<sup>28</sup> *Id.*

<sup>29</sup> *About*, TWITCH, <http://www.twitch.tv/p/about> (last visited Jan. 23, 2018).

<sup>30</sup> Competitive video gaming, pronounced "Eee-Sports." See generally *Esports*, GUARDIAN, <https://www.theguardian.com/games/esports> (last visited Jan. 23, 2018).

<sup>31</sup> *About*, TWITCH, <https://web.archive.org/web/20121019173447/http://www.twitch.tv:80/p/about>.

<sup>32</sup> *Id.*

Twitch holds licenses to actually broadcast “all the games.” Since the platform encourages “Partners”<sup>33</sup> to stream whatever games they feel like playing, and those games almost certainly include games from developers who are either obscure, long defunct, or otherwise unlikely to have contracted with Twitch, it seems inevitably true that Twitch has streamed games for which it has no licensing agreement.<sup>34</sup> The players on Twitch treat their streams as a platform to interact with fans and often take fan requests or recommendations on games. Some streamers will play random independent games online at a fan’s request, or will otherwise pick random titles. Though it is extremely likely that Twitch has licenses to stream popular titles by major developers, the sheer volume of obscure games by independent developers that exists makes it extraordinarily unlikely that Twitch is even capable of negotiating such contracts.<sup>35</sup>

Since some games are particularly suited to speed running, and that fact influences the communities who build up around these games, it is likely that the players and communities take little account of whether or not Twitch or other streaming platforms have bargained for the right to broadcast their game of choice.<sup>36</sup> In effect, then, high transaction costs would cause great difficulty for Speedrun communities (if they didn’t die out completely) where developers were able to enforce their exclusive rights to prepare derivative works of their games.

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<sup>33</sup> See TWITCH, *supra* note 24. Partners are “an exclusive group of the world’s most popular video game broadcasters, personalities, leagues, teams, and tournaments.” *Id.*

<sup>34</sup> It is unlikely that these rights holders are going to object at the moment; free publicity is rarely bad. However, in the same way that record industry groups maintain that free streams and downloads of music cut into sales revenues, it is plausible that soon game industry groups will adopt this view.

<sup>35</sup> See Kongregate, an online platform that hosts “thousands upon thousands” of free Flash games, uploaded by their developers. Kongregate, *About*, FACEBOOK, <https://www.facebook.com/pg/kongregate/about/> (last visited Jan. 23, 2018).

<sup>36</sup> See Ben Bertoli, *How to Start Speedrunning Video Games*, KOTAKU (Jan. 8, 2018, 12:42 PM), <https://kotaku.com/how-to-start-speedrunning-video-games-1796984207>.

## B. *Academic Criticism: Derivative Works of Derivative Works?*

### 1. *The Example*

Player plays Original Game and records a video, Gameplay Work, of Player doing so and commenting on it. Player uploads Gameplay Work to Platform. Consumer is a feminist scholar preparing a presentation on the social roles played by female characters in video games. Consumer takes Gameplay Work, trims out Player's commentary, and uses the clippings of the Gameplay Work to make points about Original Game.

### 2. *Discussion*

As video games enter the cultural mainstream, cultural and artistic criticism also become more common and are key features of the transition. Unlike a book or film critic, a video game critic cannot capture moments she means to critique as easily. If the critique is in video form and gameplay is involved, a critic might reasonably want to use a clip of the game being played by a professional (rather than recording and using her own game sessions). The critic could thus make sure that her audience focuses on the point being made, rather than her personal technical skill. An illustration: critic Anita Sarkeesian authors feminist critiques of tropes used in video games. Her critique is presented in multimedia video format; she introduces ideas as a news-style talking head and then continues to explain ideas as the camera cuts to illustrative clips from the games she discusses.<sup>37</sup> One piece critiques the frequent use of the "damsel in distress" trope and sequences together a series of women crying out for help from a male protagonist in a large variety of games.<sup>38</sup> In producing these videos, Sarkeesian occasionally uses clips obtained from gamers who produce "Let's Play" style videos.<sup>39</sup> These videos document a play-through of a video game, always including commentary by the gamer. A Let's Play differs from, say, a walkthrough or strategy guide in that it focuses on one player's

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<sup>37</sup> See, e.g., Feministfrequency, *Damsel in Distress: Part 1 — Tropes vs Women in Video Games*, YOUTUBE (Mar. 7, 2013), [https://www.youtube.com/watch?v=X6p5AZp7r\\_Q](https://www.youtube.com/watch?v=X6p5AZp7r_Q) (collecting sources).

<sup>38</sup> *Id.* at 10:45.

<sup>39</sup> See LET'S PLAY ARCHIVE, *supra* note 18.

individual, idiosyncratic experience with the game, frequently injected with jokes, emotional outbursts, commentary, or other remarks from the player.<sup>40</sup> Sarkeesian's use, however, removes nearly, if not all, of these gamers' expressive content.<sup>41</sup>

### *C. Machinima: Creative Spark Not Included*

#### *1. The Example*

Player plays Developer's Original Game, Halo. Player uses Original Game's multiplayer option to record and stitch together video vignettes, publishing these on Platform YouTube as an existentialist comedy video series titled "Red vs. Blue."

#### *2. Discussion*

Red vs. Blue, featuring footage created in Bungie Studios' "Halo," has achieved massive success.<sup>42</sup> The show does not meaningfully interact with Bungie Studios' intergalactic war story.<sup>43</sup> Instead, with echoes of Beckett's "Waiting for Godot," it presents an existential commentary on the nature of warfare from the perspective of the common foot soldier, using Halo's epic heroic overtones as an ironic stage.<sup>44</sup> As a matter of process, Rooster Teeth, the creator of Red vs. Blue, opened up the game's multiplayer mode and had one player act as a camera, while the other players used their in-game avatars like puppets, moving them around.<sup>45</sup> Later, the team

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<sup>40</sup> *Id.*

<sup>41</sup> Elements like the gamer's score remain visible, while their own audio commentary is either removed or they are silent during the particular clip that is used.

<sup>42</sup> Eric Francisco, *How 'Red vs. Blue' Built an Empire and Invented a Whole Genre*, INVERSE (Apr. 11, 2017), <https://www.inverse.com/article/29928-red-vs-blue-rooster-teeth-season-15-interview>.

<sup>43</sup> *Id.*

<sup>44</sup> Again, if Bungie chose to sue Rooster Teeth, Rooster Teeth could raise a very strong fair use defense, describing the work as a parody. *See* Copyright Act § 107, 17 U.S.C. § 107 (2012).

<sup>45</sup> *See* Francisco, *supra* note 42.

overdubbed an audio track to tell their own story, only tangentially related to Bungie's work.<sup>46</sup>

In the show's first episode, for example, a pair of the game's super-soldiers stand together in an iconic multiplayer level.<sup>47</sup> One asks, "You ever wonder why we're here?" The other immediately waxes philosophical: "It's one of life's great mysteries, isn't it? Why are we here? I mean, are we the product of some cosmic coincidence or, is there really a God watching everything? You know, with a plan for us and stuff. I don't know man, but it keeps me up at night."<sup>48</sup> After an awkward pause, the first soldier says, puzzled, "What? I meant, 'why are we out here, in this canyon?'"<sup>49</sup>

Their discussion continues, as they observe that they are trapped in "a box canyon in the middle of nowhere, with no way in or out," where the "only reason that we set up a red base here, is because they have a blue base over there. And the only reason they have a blue base over there is because we have a red base here."<sup>50</sup> In this conversation, Red vs. Blue calls into question the entire world of multiplayer video games; the viewer is forced to ask herself about the significance of similar games of death match, capture the flag, or any number of other rules and assumptions baked into the games she plays. All of this is accomplished solely by replacing the game's audio and making liberal use of the open-ended design of Halo's multiplayer mode.

#### *D. What's in a Game? (Spoiler Alert: Another Game)*

##### *1. The Example*

Developer's Original Game, Warcraft III, has a map editor. Player uses the tools offered by this map editor to create Gameplay Work "Defense of the Ancients," or "DOTA." Player then goes on

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<sup>46</sup> *Id.* The show occasionally makes mention of Halo's larger plot, but mostly sticks to the affairs of the characters invented for the series.

<sup>47</sup> *Id.*

<sup>48</sup> Red vs. Blue, *Season 1, Episode 1 - Why Are We Here? | Red vs. Blue*, YOUTUBE, (Mar. 6, 2015), <https://www.youtube.com/watch?v=9N8IpxO6rKs&list=PL2vBnPCQT4WL1hmcoq8EOTO-kx6kZPTsi>.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

to meticulously duplicate the Gameplay Work using all new code, and separately publishes this duplicate as “DOTA 2.” Player ultimately goes through Platform, a consumer-facing sales application or store, to sell the second Gameplay Work (DOTA 2) to Consumers.

## 2. Discussion

Blizzard’s Warcraft III is a “real-time strategy game,” a game “that involves base building and/or management, resource gathering, unit production, and semi-autonomous combat, all conducted in real time (rather than being turn-based), for the purpose of gaining/maintaining control over strategic points on a map (such as the resources and command centers).”<sup>51</sup> The game also includes an asset called a “World Editor,” which provides users with a set of tools used to create new maps and scenarios.<sup>52</sup> These tools are all pre-existing pieces of the game.<sup>53</sup> Terrain, buildings, and units that appear elsewhere in the game can be deployed, automated, and otherwise used to create narrative experiences within Blizzard’s world.<sup>54</sup> It is tempting to suggest that to the extent that the map editor standing alone created a work of original expression, that expression was the same as the expression of Warcraft III as a whole; the editor simply allowed users to reorganize, reuse, and manipulate the set pieces that made up Warcraft III’s epic fantasy battles.

A group of players, most recently led by a user called IceFrog, developed a game called “Defense of the Ancients” using the map editor in Warcraft III.<sup>55</sup> Defense of the Ancients, or DOTA, ran in

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<sup>51</sup> See Richard Moss, *Build, Gather, Brawl, Repeat: The History of Real-Time Strategy Games*, ARS TECHNICA (Sept. 15, 2017, 6:03 AM), <https://arstechnica.com/gaming/2017/09/build-gather-brawl-repeat-the-history-of-real-time-strategy-games/>.

<sup>52</sup> See BLIZZARD, *supra* note 12.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> See *History of DotA*, GOSU GAMERS, (Aug. 26, 2011, 9:55 PM), <http://www.gosugamers.net/dota/features/36824-history-of-dota>.

I am simplifying the story somewhat, because I do not believe the complexities of the chain of various lead developers, or the game’s spiritual predecessor “Aeon of Strife,” created in another Blizzard game’s map editor, are complexities that meaningfully change the analysis. However, if you are curious about the small

the Warcraft III engine, drawing from pre-existing game art resources. According to documents filed by Blizzard in opposition to competitor Valve's attempt to register the DOTA mark with the trademark office,

[t]he [End User License Agreement] prohibits the use of Warcraft III or the World Editor for any commercial purpose without Blizzard's prior written consent. In addition, the EULA restricts any distribution of "New Materials [defined as modifications of Warcraft III created using the World Editor] on a stand-alone basis . . . through any and all distribution channels, including, but not limited to, retail sales and on-line electronic distribution without the express written consent of Blizzard."<sup>56</sup>

Therefore, Blizzard's End User License Agreement ostensibly prohibits the sale of Warcraft III modifications, or "mods." As the DOTA mod developed, and the mod community gained more skills, they figured out how to replace art assets with new content, importing art files created elsewhere into the Warcraft III engine.<sup>57</sup> Finally, even the engine<sup>58</sup> was replaced; Valve—who currently employs the DOTA developer IceFrog—is currently promoting a DOTA sequel (DOTA 2) that runs entirely on its own engine.<sup>59</sup>

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dramas and particular ins and outs that led to the game, this Article offers more than enough depth.

<sup>56</sup> Tim Edwards, *Decoding Blizzard and Code's Trademark Dispute: Who Really Owns DOTA?*, PC GAMER, (Feb. 16, 2012), <http://www.pcgamer.com/decoding-blizzarde28099s-trademark-dispute-who-really-owns-dota/>.

<sup>57</sup> *Id.*

<sup>58</sup> While it is a crude description, one might imagine a particular game as consisting of art assets (what the game looks like), an engine (providing the rules and physics of the game), game pieces (units, characters, etc., and rules for how they behave), and coding for specific scenarios (basically, sets of instructions for how to place art and game pieces when the player encounters them). DOTA 2 is a particularly interesting example because by the time it is published as "DOTA 2," while its lineage from Warcraft III is indisputable, there is literally nothing that was in Warcraft III (that is, not even one line of code) left in DOTA 2. This is explored more explicitly *infra* Part III.

<sup>59</sup> See DOTA 2, <http://www.dota2.com/play/> (last visited Jan. 23, 2018).



DOTA 2 is an odd creature, to say the least. It is built to replicate the experience of the original Warcraft III mod as faithfully as possible, while simultaneously updating the graphics, eliminating bugs, and providing a modern matchmaking platform for players.<sup>60</sup> Essentially, the idea was to keep the heart and soul of the DOTA mod that ran on the Warcraft III engine, while improving the user experience. When announcing DOTA 2, Valve's spokespeople noted that, "it probably doesn't make a lot of sense for us to go in and change a lot of [the gameplay], so the core gameplay is the same [as the mod]."<sup>61</sup> They further noted that "it's going to be most of the heroes that you're familiar with from Dota."<sup>62</sup>

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<sup>60</sup> Warcraft III was released in 2002, and its graphics are very out of date. See BLIZZARD, *supra* note 12.

<sup>61</sup> See Charles Onyett, *Valve's Next Game*, IGN (Jan. 7, 2011), <http://web.archive.org/web/20121109072424/http://www.ign.com/articles/2011/01/07/valves-next-game>.

<sup>62</sup> *Id.* The "heroes" are the game's lineup of about 100 playable characters.



Figure 1: A comparison of models in the original mod (left) and updated in DOTA 2 (right). First, Murloc Nightcrawler (top left) and Slark the Nightcrawler (top right). Second, Black Arachnia, the Broodmother (bottom left and right).

This collection of goals is well achieved. The updated art is cleaner<sup>63</sup> and more readable, as seen in Figure 1, and the game seems to have been well accepted by fans of the original DOTA mod.<sup>64</sup> There are some notable changes, however. Names of some heroes were changed slightly; for example, “Alleria the Windrunner is now Lyrlei the Windranger” and “Murloc Nightcrawler is now simply Slark the Nightcrawler.”<sup>65</sup> These notably remove explicit references to Blizzard’s canon; Alleria is a character that has reappeared in

<sup>63</sup> See *supra* Figure 1.

<sup>64</sup> See, e.g., *Dota vs Dota 2, Which Do You Like Better?*, MMO CHAMPION (Sept. 17, 2013, 2:16 AM), <http://www.mmo-champion.com/threads/1343597-dota-vs-dota-2-which-do-you-like-better>. Of course, this is purely anecdotal, but the opinions in this thread seem to be representative. There are some complaints, but the consensus seems to be that “it’s basically the same game but nicer looking and with minor improvements;” that “it’s basically exactly DOTA, but with its own engine, so the same game . . . better.” *Id.*

<sup>65</sup> See *Changes from DotA*, DOTA 2 WIKI, [http://dota2.gamepedia.com/Changes\\_from\\_DotA](http://dota2.gamepedia.com/Changes_from_DotA) (last updated Nov. 28, 2017, 00:16); see also *supra* Figure 1.

multiple Blizzard games, while Murlocs are an iconic species that appear all over the Warcraft canon, and even in stuffed animal form.<sup>66</sup> To the extent that some of these names are different, it is often a token change: “Windrunner” becomes “Windranger,” “Stonebreaker” becomes “Stonebreak,” “Furion the Prophet” becomes “Nature’s Prophet,” and “Mirana Nightshade, Priestess of the Moon” becomes “Mirana, the Princess of the Moon,” among others.<sup>67</sup> Names are chopped off in favor of titles; for example, “Kael the Invoker” is just “Invoker” now, “Darchow the Enigma” is just “Enigma.”<sup>68</sup>

Of course, the amount that various characters have changed between the mod and DOTA 2 varies. Some, like the hero “Black Arachnia the Broodmother,” barely change at all: her name, appearance, and abilities remain virtually identical.<sup>69</sup> In both games, she is a giant black spider-like creature with red accenting marks. Her abilities even retain the same names: she can “Spawn Spiderlings,” “Spin Web,” use an “Incapacitating Bite,” and has an “Insatiable Hunger.”<sup>70</sup> Other characters are much less immediately recognizable, but their abilities still remain.<sup>71</sup> What is interesting here is this: the characters are not the characters from Warcraft III, but the characters from the DOTA mod. The elements that tied these characters to Warcraft III, however—use of Blizzard’s iconic

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<sup>66</sup> See *Alleria Windrunner*, WOWWIKI, [http://wowwiki.wikia.com/Alleria\\_Windrunner](http://wowwiki.wikia.com/Alleria_Windrunner) (last visited Jan. 23, 2018).

<sup>67</sup> See DOTA 2 WIKI, *supra* note 65.

<sup>68</sup> *Id.*

<sup>69</sup> *Compare Broodmother*, DOTA 2 WIKI, <http://dota2.gamepedia.com/Broodmother> (last updated Jan. 29, 2018, 00:51) (describing DOTA 2’s Broodmother), *with Broodmother*, DEFENSE OF THE ANCIENTS <https://web.archive.org/web/20120215163312/http://www.playdota.com/heroes/broodmother> (describing the original mod’s Broodmother).

<sup>70</sup> Broodmother, *supra* note 69.

<sup>71</sup> *Compare Pandaren Brewmaster*, DEFENSE OF THE ANCIENTS, <https://web.archive.org/web/20120215163344/http://www.playdota.com/heroes/pandaren-brewmaster> (describing the original mod’s Pandaren Brewmaster), *with Brewmaster*, DOTA 2 WIKI, <http://dota2.gamepedia.com/Brewmaster> (last updated Jan. 29, 2018, 00:47 AM) (describing DOTA 2’s Brewmaster, who is, importantly, no longer a panda).

“Murloc” characters, for example—have been carefully and studiously removed.

### III. WHOSE COPYRIGHT IS IT, ANYWAY?

This section examines the paradigmatic examples laid out in Part II and outline the contours of how current law would treat the Gameplay Work involved in each. I will also put forward some normative takes on this treatment. For ease of reading, Section A here corresponds to Section A in Part II, Section B to Section B, and so on. The first examples I discuss are relatively straightforward and are intended to give a lay of the land before we address the more difficult hypotheticals posed by Machinima in Section C and DOTA 2 in Section D.

#### A. *Speedruns: Slow and Steady Wins the Copyright*

The following example is perhaps the most simple and concise. Both normatively and descriptively, the result should be that the Gameplay Work infringes Developer’s original game. The major difference between a speedrun and a traditional play of a game is the speed at which it takes place. Indeed, that is the point. Depending on the game, various degrees of creativity are involved in figuring out the fastest route through a game.<sup>72</sup> However, the primary sources of creativity in the creation of the Gameplay Work here are decisions like which parts of the game to complete, which difficulty to play on, or which items to collect.<sup>73</sup> The most creative play frequently requires a player to skip though parts of the game or manipulate flaws (“glitches”) in the game to increase the speed of the run.<sup>74</sup> Importantly, then, the creativity involved in a speed run is in removing content, rather than adding it.<sup>75</sup>

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<sup>72</sup> See Speedrun.com, *supra* note 27; see also Rules, SPEED DEMOS ARCHIVE (Oct. 22, 2015), [https://web.archive.org/web/20151022020158/http://speeddemosarchive.com/lang/rules\\_en.html](https://web.archive.org/web/20151022020158/http://speeddemosarchive.com/lang/rules_en.html).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Of course, Player’s commentary might be subject to its own analysis standing on its own (rather than as part of the audio-visual Gameplay Work), but that analysis is freestanding and handled ably by existing copyright law.

The Seventh Circuit has said that creating a copy of a game that runs more quickly than the original—essentially putting a game into fast-forward—is creating a derivative work, and thus requires authorization.<sup>76</sup> In *Midway v. Artic*,<sup>77</sup> Midway was awarded a preliminary injunction against arcades that installed circuit boards to speed up Midway’s arcade games.<sup>78</sup> By installing these circuit boards, the arcades created versions of Midway games that would run more quickly, thus making the game more difficult, and potentially generating more revenue for the arcade, as the game would go through players’ quarters more quickly.<sup>79</sup>

Midway also contains an extended discussion of how the act of playing video games is creative. The court noted that:

Television viewers may vary the order of images transmitted on the same signal but broadcast on different channels by pressing a button that changes the channel on their television [but] the creative effort required to do that did not make the sequence of images appearing on a viewer’s television screen the work of the viewer and not of the television station that transmitted the images.<sup>80</sup>

Further, the Court reasoned, if a player “cannot create any sequence he wants out of the images stored on the game’s circuit boards,” but must instead “choose one of the limited number of sequences the game allows him to choose,” he is more like a TV viewer with a remote control than like the author of a book; “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.”<sup>81</sup>

Similarly to the player in the *Midway* discussion, a speedrunner is doing some rather flashy, fabulous, and impressive channel changing, but at the end of the day, all he is doing is “choosing one

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<sup>76</sup> *Midway Mfg. Co. v. Artic Int’l, Inc.*, 704 F.2d 1009, 1013 (7th Cir. 1983).

<sup>77</sup> *Id.* at 1009.

<sup>78</sup> *Id.* at 1013.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 1011–12.

<sup>81</sup> *Id.* at 1012.

of the limited number of sequences the game allows him to choose.”<sup>82</sup> As one video game website notes, “[o]bviously, some games lend themselves to speedrunning better than others.”<sup>83</sup> Moreover, non-linear games will have more branches of possibilities meaning more options and might not even have an adequate way to measure when a speedrun is completed, while a completely linear game might not always provide quite enough options to begin with. In short, with some floor for player control of the game, the more a game offers a player the ability to make creative choices, often the less appealing it is for players engaged in speedrunning.

For these reasons, speedrunning poses few problems for the existing copyright system. Speedrunning is a straightforward case where the Gameplay Work presents the Original Game in a way where Developer’s expression is fundamentally unaltered. Of course, push the facts and perhaps the case becomes more difficult, but this example is offered as a ground floor upon which discussion can build.

#### *B. Academic Criticism: A Lawyer’s Answer*

The answer under current law to the puzzle of whether a critic is violating the property rights of a Let’s Play creator is a wishy-washy “maybe, but almost certainly not.” However, it is a great jumping off point for working through the complexity of the Copyright Act’s structure. First, let’s reiterate what’s going on here; Sarkeesian has used Player’s Gameplay Work to critique the Original Work. Were Sarkeesian to be sued by the Developer for violating their derivative work right, Sarkeesian would easily be able to claim fair use as to the Developer. However, that is not the tough question. We want to know what happens when Player sues Sarkeesian, claiming she has produced an unauthorized derivative work of his Gameplay Work.

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<sup>82</sup> *Id.*

<sup>83</sup> See KOTAKU, *supra* note 36.

### 1. *The Fair-Use Test*

To begin, Sarkeesian is easily able to claim fair use as to the underlying work. Courts analyze fair use by weighing four non-exclusive factors:

- (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.<sup>84</sup>

In deciding whether the “purpose and character of the use” is permissible, modern courts emphasize the extent to which a use is “transformative.”<sup>85</sup> While no factor is completely dispositive, the nature of the work prong is considered the heart and soul of the fair use inquiry.<sup>86</sup> That critical first factor is more likely to weigh in favor

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<sup>84</sup> 17 USC § 107 (2018).

<sup>85</sup> Compare *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992) (holding sculptor Koons’ use of a photographer’s work to create his sculpture, “String of Puppies,” was not fair use), with *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006) (holding Koons’ use of photographer’s work in one of his paintings was “transformative,” and therefore fair use).

<sup>86</sup> See Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990) (the first factor is “the soul of fair use”). I will also quickly run through the other factors, but because of the relative importance of the first factor, the other factors might be distracting. For factor (2), the fact that *Gameplay Work* is itself a derivative work should do some work in Sarkeesian’s favor. On (3), Sarkeesian does not use huge portions of the works, but very small clips. Finally, on factor (4), Sarkeesian’s works do not compete with *Let’s Play* videos in the same market. The only way there can be an “effect of [her] use upon the potential market for or value of” *Let’s Plays* is if her works lower the value of the work through its criticism, like a bad review can sink a play. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994). However, the Supreme Court has rejected this idea out of hand, writing “when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act. Because parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically, the role of the courts is

of the creator of a new work the more his use “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”<sup>87</sup>

Among the illustrative examples of fair use offered by Congress is “criticism or comment” of another work; that is because such use is paradigmatically transformative.<sup>88</sup> Critique adds something new to a work; it adds additional perspectives, brings out thematic material, places the work in context, and looks at problematic elements of the work. Let’s look at the Gameplay Work here. As between Sarkeesian and Developer, there are two options: either Gameplay Work is fair use of the original, and hence, not derivative, or it is not fair use, and thus infringes Developer’s derivative work right. If Gameplay Work is not fair use, then Sarkeesian does not have to defend herself against a claim of infringement by Player because Player has no valid rights in Gameplay Work.

## 2. *What Is Being Criticized Matters*

To make this more concrete, consider the following two hypotheticals based on a segment in a video. In one of her pieces, Sarkeesian critiqued the game *Hitman*—a stealth-based game where the player plays an assassin who eliminates a variety of targets—for the violent, highly sexualized options players have with regards to female non-player characters.<sup>89</sup> The player can kill these women and hide their nearly nude bodies in various locations.<sup>90</sup> Imagine the scene: the player is sneaking through a strip club to assassinate a male target somewhere in the building. The player enters through a women’s dressing room, where several scantily clad women are in various stages of undress. The player must decide how to enter without detection. In the clip used, Player’s avatar kills a woman

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to distinguish between biting criticism that merely suppresses demand and copyright infringement, which usurps it.” *Id.*

<sup>87</sup> *Campbell*, 510 U.S. at 579.

<sup>88</sup> *See id.* (holding that 2 Live Crew’s use of the heart of Roy Orbison’s “Oh, Pretty Woman” as a vehicle to critique the original satisfied § 107’s four factor balancing test).

<sup>89</sup> *See* feministfrequency, *Women as Background Decoration: Part 2— Tropes vs Women in Video Games*, YOUTUBE (Aug. 25, 2014), [https://www.youtube.com/watch?v=5i\\_RPr9DwMA](https://www.youtube.com/watch?v=5i_RPr9DwMA).

<sup>90</sup> *Id.*



and hides her corpse in a storage container of some kind. First hypothetical: Developer's intended expression was for Player to sneak through the room without fighting anyone, and the violence is entirely Player's expression. Second hypothetical: Developer intended Player to be able to take these actions, and the Player is not engaged in any other expression.

Looking at the first hypothetical, it may be that it is Player's violent choices directed at women that makes his work transformative. Sarkeesian's critique is thus further transformative because it adds "something new" to Player's work; a message that this kind of conduct within a game is part of a larger, problematic set of tropes that Developers and Players alike fall back on all too frequently. While Developer may not have intended such expression, Sarkeesian's critique takes aim at both the fact that it was available and that there is a work where such expression is made.

On the other hand, it is more difficult if Player has added a piece of originality unrelated (that is, a piece unrelated to the violence) that gets swept up in Sarkeesian's use of the video to critique Developer's expression.<sup>91</sup> What if Player has, in how he executed his gameplay, done something original enough to merit protection? If Player's original expression makes it into Sarkeesian's use of the video (and is unrelated to what Sarkeesian is critiquing), and she is not engaged in a fair use of Player's original gameplay, Player should win the lawsuit.

For the second hypothetical, if Player has done nothing transformative at all, the hypothetical is boring; Sarkeesian wins. However, what if Gameplay Work is transformative, but simply along a different axis? Let's say Player's audio commentary is transformative enough to give him his own protectable rights. To the extent this is true, it is possible that Sarkeesian's use of the video

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<sup>91</sup> See *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997) (finding recounting of the O.J. Simpson trial in the style of Dr. Seuss was not a "parody" or "satire" in the fair use sense, because it did not parody or satirize the work of Dr. Seuss); *Campbell*, 510 U.S. at 597 (Kennedy, J., concurring) ("The parody must target the original, and not just its general style, the genre of art to which it belongs, or society as a whole (although if it targets the original, it may target those features as well).").

reverses that transformation. For example, what if Player made audio commentary while playing and Sarkeesian then goes and removes the audio from the clip? Because Sarkeesian has removed the original expression that gave Player rights in the first place, Player probably should not somehow retain rights in the underlying game. So, perhaps the case in the Hitman example is this: Sarkeesian is critiquing the Original Work, and, by stripping the video of any commentary made by Player, she has removed whatever he did to transform the work. Fair use does not give Player rights to the underlying Original Game, only rights to his own Gameplay Work. Therefore, in this case, Sarkeesian wins as against both Player and Developer.

Of course, this is necessarily fact-based; as mentioned above, perhaps something of Player's protected expression makes it into Sarkeesian's presentation, but she is not actually engaged in criticizing that element.<sup>92</sup> If Player's gameplay is itself creative and transformative enough to get him copyright protections, perhaps this transformation cannot be removed from Gameplay Work. This should not trouble us too much; this is the general nature of fair use claims. While there is plenty of criticism of the inherent unpredictability in fair use cases,<sup>93</sup> that is not a problem unique to the video game world.

### *C. Machinima: All's Fair (Use) in Love and Video Games*

Machinima, like the critiques above, is a ripe field for fair use discussion. In the case of Red v. Blue, it is the irony of the profoundly mundane and absurdist conversations, when set against Halo's epic, grim-dark universe-at-stake, that makes the work appealing. As discussed above, the first factor of fair use has largely

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<sup>92</sup> Compare *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d at 1396, with *feministfrequency, Women as Background Decoration, Part 2: Tropes vs Women in Video Games*, YOUTUBE (Aug. 25, 2014), [https://www.youtube.com/watch?v=5i\\_RPr9DwMA](https://www.youtube.com/watch?v=5i_RPr9DwMA).

<sup>93</sup> See LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004), <http://www.free-culture.cc/freeculture.pdf>.

been interpreted to require analysis of the extent to which a work is merely derivative as opposed to transformative.<sup>94</sup>

However, if we look at some cases, it is not completely clear how this is resolved; fair use is not exactly easy to predict. Artist Jeff Koons was involved in litigation with two opposite results about fair use. In *Rogers v. Koons*,<sup>95</sup> Koons took a black and white postcard that depicted a couple holding a number of puppies and turned it into a three dimensional, colorized sculpture, making several other changes, like placing flowers in the couple's hair, as seen in Figure 2. His aim was to comment on the banality of everyday items.<sup>96</sup> The Second Circuit rejected the idea that Koons was specifically parodying Rogers' work; the banality Koons took aim at was the banality around a larger cultural environment, not something unique to Rogers' work. The Court said in order to claim parody as fair use, Koons would have needed to parody Rogers' work specifically.

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<sup>94</sup> See 17 U.S.C. § 102 (2012).

<sup>95</sup> *Rogers v. Koons*, 960 F.2d 301, 301 (2d Cir. 1992).

<sup>96</sup> See *Rogers*, 960 F.2d at 301.

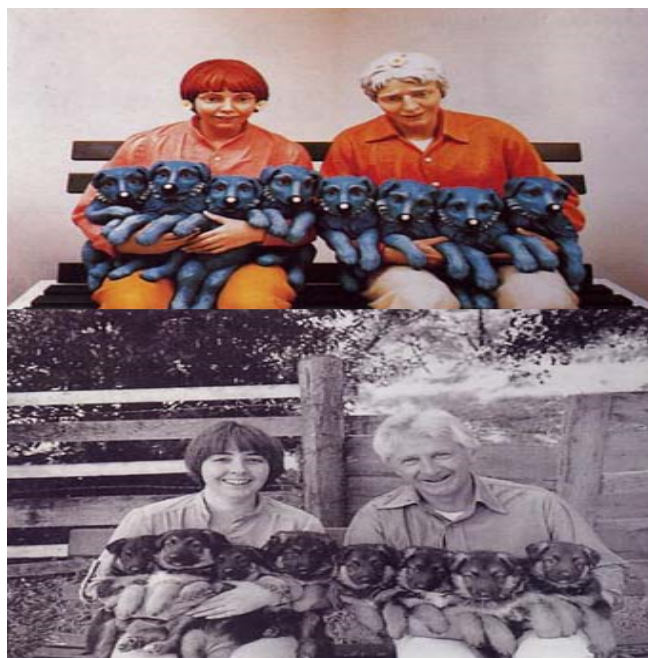


Figure 2: Koons' Sculpture "String of Puppies" (top) and Rogers' photograph "Puppies" (bottom).

In *Blanch v. Koons*,<sup>97</sup> the Second Circuit confronted similar facts and reached the opposite result. Rather than arguing that his works were parodies, this time Koons argued his works transformed the original works enough that the message and nature of the work were no longer the same. The two pictures are shown in Figure 3. Because the purpose of an advertisement and a painting are different, the court was receptive to Koons' suggestion that his work did not supersede Blanch's, but rather used that work as raw material with which to make an entirely different work. Of course, fair use is a multifactor test, and the Blanch case involved something of a perfect storm. On the first factor, the nature of the use, Koons' use was easy to characterize as "transformative" because "where the copyrighted work is used as raw material in the furtherance of distinct creative

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<sup>97</sup> *Blanch v. Koons*, 467 F. 3d 244, 244 (2d Cir. 2006).

or communicative objectives, the use is transformative.”<sup>98</sup> The Second Circuit also placed a thumb on the commercial analysis scale because Koons’ work here was created for an exhibition, and “the public exhibition of art is widely and we think properly considered to have value that benefits the broader public interest.”<sup>99</sup> After discounting the second and third factors,<sup>100</sup> the Second Circuit found, based on admissions by Blanch, that “it is plain that [Koons’ work] had no deleterious effect upon the potential market for or value of the copyrighted work” and concluded that “[t]he fourth fair-use factor greatly favors Koons.”<sup>101</sup>



Figure 3: Koons' painting "Niagara" (left) and Blanch's "Silk Sandals by Gucci" (right).

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<sup>98</sup> *Blanch*, 467 F.3d at 253 (citations omitted). Consider whether this analysis should change where the audience for the copyrighted work is provided “raw material,” say as part of a map editor, by the author of the original work as part of that work.

<sup>99</sup> *Id.* at 254.

<sup>100</sup> The court explicitly discounted the second factor, finding that the “second fair-use factor has limited weight in our analysis because Koons used Blanch’s work in a transformative manner to comment on her image’s social and aesthetic meaning rather than to exploit its creative virtues.” *Id.* at 257. The court also noted that the fact that it reached a different conclusion than the district court on the third factor (the portion of the original used) “does not alter our ultimate conclusion on fair use.” *Id.* at 258. In short, then, because of a variety of special circumstances, the test here turned almost entirely on (1) whether the use was transformative and (2) whether there were any bad market effects upon the original work.

<sup>101</sup> *Id.* at 258.

Red vs. Blue shares much in common with both of the Koons cases; like Koons' work in both, it is likely better to suggest that Red vs. Blue is not a parody of Halo specifically, but a parody of the conventions of first-person shooter games more generally. It mocks the way players are forced to fight the same battle over and over and over again, but this is not a trait unique to Halo.<sup>102</sup> Thus, under *Roger v. Koons*, parody alone probably does not save Rooster Teeth. However, it is almost certainly transformative. When compared side by side with Halo, it is hard to say that Red vs. Blue fails to add something new; Red vs. Blue is an almost entirely new expression, meaning, or message. Most importantly, in this case, it is very clear that Rooster Teeth does exactly what Koons claimed to do in the second case; Rooster Teeth uses Halo as the raw material with which to create their new work. Thus, the analysis moves down to the fourth fair use factor: effect on the market. On this point, it is difficult to say how the analysis should proceed. Unlike the Koons cases, there is a huge overlap in consumers of Halo and consumers of Red vs. Blue. On the other hand, fans of both seem to argue that Red vs. Blue's effect on the market is a positive one.<sup>103</sup> In practice, this rule would be difficult to administer, and more importantly, impossible for parties to predict *ex ante*.

To illustrate just how strange this could get, imagine the following hypothetical (and good luck figuring out what the effect on the market is here). Green vs. Yellow is a show much like Red vs. Blue, but it has not really had much success. Because it is helmed by a minor gaming celebrity, it becomes the butt of a number of jokes in the gaming community. Microsoft, reasonably, gets a little antsy about this negativity reflecting back badly on Halo and sends a number of cease and desist letters but decides not to sue just yet.

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<sup>102</sup> See YOUTUBE, *supra* note 48 (“[The] only reason that we set up a red base here, is because they have a blue base over there. And the only reason they have a blue base over there is because we have a red base here.”).

<sup>103</sup> See, e.g., EGM Staff, *New Microsoft Rule Bans Machinima Directors from Using Their Games*, EGM NOW (Oct. 9, 2012, 5:35 PM), <http://www.egmnow.com/articles/news/new-microsoft-rule-bans-machinima-directors-from-using-their-games/> (noting that a new term in Microsoft Studios' rules for using game content purported to prohibit making money on videos using game footage, and opining “the ban may cut down on a lot of exposure and free advertising for the upcoming *Halo 4*, most assuredly.”).

The cease and desist letters leak, and reflect extremely badly on Microsoft. Halo sales tank. However, all the newly focused attention on Green vs. Yellow spikes its popularity, which in turn, slowly starts to bring Halo sales back up. Thus, assuming that “effect on the market” is the determinative factor, in this scenario it is impossible to predict effect on the market from one moment to the next, let alone as the initial creator of Green vs. Yellow, deciding whether to create Green vs. Yellow.

D. *What’s in a Game?: The Ship of Theseus and George Washington’s Ax.*

For the DOTA 2 example, existing law is very poorly equipped to deal with the way the video game space operates. While we may expect courts to course-correct as they are confronted with fact patterns that show how tortured the doctrine is in this area, the aim of this section is to provide a better doctrinal framework to address those cases.

1. *Current Case Law*

Case law suggests that the terms in Blizzard’s EULA entirely determine the scope of the rights in play. In *Micro Star v. Formgen Inc.*,<sup>104</sup> the Ninth Circuit found that Micro Star’s compilation of levels—called Nuke It or N/I—created in Duke Nukem 3D’s “Build Editor,” infringed upon Formgen’s derivative work rights. Like Blizzard and their “World Editor,” Formgen included a “Build Editor” in their game—allowing players to create their own levels and save them in order to share with other players—and clarified in the terms of service that any levels created “must be offered [to others] solely for free.”<sup>105</sup> Microstar, however, was not satisfied with offering levels for free, and attempted to sell a collection of levels on a CD-ROM. Thus, the decision boiled down to whether the collection of levels offered by Micro Star as “Nuke It” was a derivative work of Duke Nukem 3D because they were meant to be combined with the game to create unauthorized Duke Nukem

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<sup>104</sup> 154 F.3d 1107 (9th Cir. 1998).

<sup>105</sup> *Id.* at 1113.

“sequels”<sup>106</sup>—and thus infringed upon Formgen’s copyright—or whether the level collection was a standalone add-on.<sup>107</sup>

The Ninth Circuit offers several useful metaphors here, but the one that most clearly illustrates how the court regards the map collection—and thus informs us on how the court would resolve the DOTA case—is when it describes the maps as a series of sequels; each one, a mini-Duke Nukem story. The court notes that copyright owners have an exclusive right to make sequels and that “the stories told in the N/I MAP files are surely sequels, telling new (though somewhat repetitive) tales of Duke’s fabulous adventures. A book about Duke Nukem would infringe for the same reason, even if it contained no picture.”<sup>108</sup> Much of the Ninth Circuit’s analysis turns on the fact that, when plugged in, the map pack created instances of “a beefy commando type named Duke who wanders around post-Apocalypse Los Angeles, shooting Pig Cops with a gun, lobbing hand grenades, searching for medkits and steroids, using a jetpack to leap over obstacles, blowing up gas tanks, avoiding radioactive slime.”<sup>109</sup> Similarly, the struggle in DOTA takes place in Blizzard’s Tolkien-esque fantasy world, involving world-wide, epic struggles between elves, trolls, orcs, and mages. Thus, the Duke Nukem copyright included the right to create map packs in Duke Nukem’s Map Editor and distribute them.

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<sup>106</sup> *Id.*

<sup>107</sup> *See* Lewis Galoob Toys v. Nintendo of Am., 964 F.2d 965 (9th Cir. 1992). In *Micro Star*, the Ninth Circuit characterizes Lewis Galoob as follows: “Imagine a product called the Pink Screener, which consists of a big piece of pink cellophane stretched over a frame. When put in front of a television, it makes everything on the screen look pinker. Someone who manages to record the programs with this pink cast (maybe by filming the screen) would have created an infringing derivative work. But the audiovisual display observed by a person watching television through the Pink Screener is not a derivative work because it does not incorporate the modified image in any permanent or concrete form. The Game Genie might be described as a fancy Pink Screener for video games, changing a value of the game as perceived by the current player, but never incorporating the new audiovisual display into a permanent or concrete form.” *Micro Star*, 154 F.3d at 1111 n.4.

<sup>108</sup> *Micro Star*, 154 F.3d at 1112.

<sup>109</sup> *Id.*



Finally, the Ninth Circuit explicitly rejected the idea that there is something special about a game that has a built-in editor of some kind that somehow upends the otherwise salient analysis. The Ninth Circuit rejected Micro Star's argument that Formgen made an implicit invitation to create independent intellectual property in .MAP files—that is, they contractually reserved the ability to control any file made in the Build Editor. The default, the court argued, is that a creator, here the player, reserves all of her rights to prepare derivative works.<sup>110</sup> This suggests that, at least under existing case law, the contract is king; the terms of the written contract override any terms implicit in the nature of the game. Thus, that Formgen specified that all maps “must be offered [to others] solely for free,” and that Micro Star charged customers for their map pack meant that Micro Star's use was infringing.<sup>111</sup>

## 2. *The Ship of Theseus*

The Ship of Theseus is a famous philosophical thought experiment that proceeds as follows: Theseus returned from Crete on a ship the Athenians decided to carefully preserve. Indeed, as the planks slowly rotted and decayed, they were replaced by strong, young timber, and over hundreds of years, every single plank was replaced.<sup>112</sup> The thought experiment asks if the ship, which no longer has a single plank from when Theseus stood on its deck, is still the “Ship of Theseus.” A modern version of the thought experiment also exists in George Washington's axe, which “has three times had its handle replaced and twice had its head replaced!”<sup>113</sup>

The Duke Nukem case runs wonderfully parallel to these thought experiments. Duke Nukem uses three distinct components to produce gameplay: a game engine, a set of art assets, and a .MAP file.<sup>114</sup> The case forces us to look forward and ask: if we replace

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 1113.

<sup>112</sup> See Plutarch, *Theseus*, MIT CLASSICS, <http://classics.mit.edu/Plutarch/theseus.html> (last visited Jan. 23, 2018).

<sup>113</sup> RAY BROADUS, OBJECTS OF SPECIAL DEVOTION: FETISHISM IN POPULAR CULTURE 134 (Popular Press, 1982).

<sup>114</sup> *Micro Star*, 154 F.3d at 1110.

every component of the game, is it still a derivative work of Duke Nukem? Let's begin by examining how Formgen created Duke Nukem, and how it interacted with Microstar's N/I map pack. When a player booted up Duke Nukem, the computer ran Duke Nukem's game engine. Then, when the player selected a level she wanted to play, the game would go into local files on the computer, drawing up both a .MAP file and a collection of art assets. A .MAP file was basically an exhaustive list that matched art assets to gameplay mechanics. It would say to the engine something like, "there is a thing which the player character cannot walk through here, put the 'brick wall' texture on top of it." Formgen sold the game with an editor that allowed players to create their own .MAP files. Nothing that was part of the Duke Nukem game was actually included in the files produced in the Build Editor. To play off of the Ninth Circuit observations, there is no "beefy commando type named Duke," no images of "post-Apocalypse Los Angeles," and no "Pig Cops." Figure 4 provides a screenshot of Duke Nukem's Build Editor for reference. The files simply contained a series of correspondences: put item #70 at such and such location, put a wall between location

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The game consists of three separate components: the game engine, the source art library and the MAP files. The game engine is the heart of the computer program; in some sense, it is the program. It tells the computer when to read data, save and load games, play sounds and project images onto the screen. In order to create the audiovisual display for a particular level, the game engine invokes the MAP file that corresponds to that level. Each MAP file contains a series of instructions that tell the game engine (and, through it, the computer) what to put where. For instance, the MAP file might say scuba gear goes at the bottom of the screen. The game engine then goes to the source art library, finds the image of the scuba gear, and puts it in just the right place on the screen.<sup>3</sup> The MAP file describes the level in painstaking detail, but it does not actually contain any of the copyrighted art itself; everything that appears on the screen actually comes from the art library. Think of the game's audiovisual display as a paint-by-numbers kit. The MAP file might tell you to put blue paint in section number 565, but it doesn't contain any blue paint itself; the blue paint comes from your palette, which is the low-tech analog of the art library, while you play the role of the game engine. When the player selects one of the N/I levels, the game engine references the N/I MAP files, but still uses the D/N-3D art library to generate the images that make up that level.

*Id.*

A and location B. What Microstar was selling contained a collection of these files. What the Ninth Circuit's decision does, then, is look to the source and the result of a work; as a practical matter, when the map pack was used as intended, it produced Duke Nukem sequels.

We might then see the map pack as an early stage in the ship of

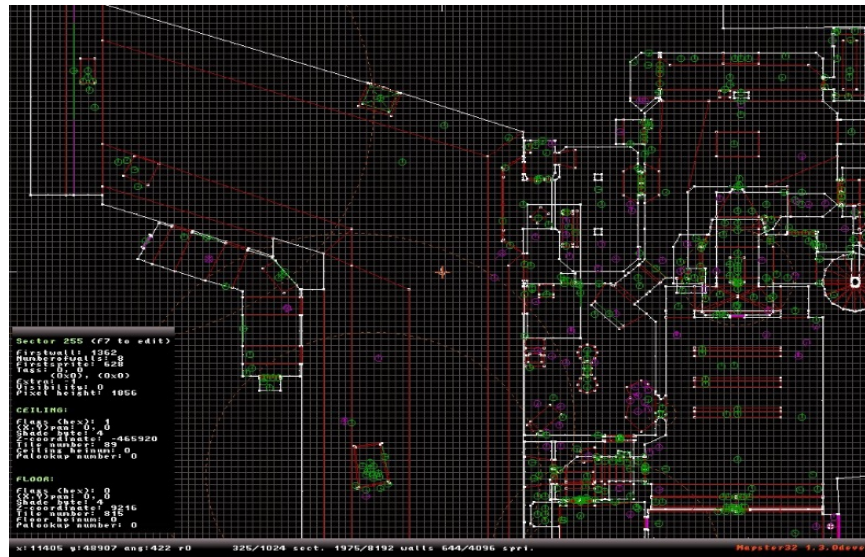


Figure 4: A screenshot of what a player sees when using Duke Nukem's Build Editor. Notice the distinct lack of "beefy commando[s]" and "Pig Cops."

Theseus thought experiment. The first few planks have been replaced, but the product is still essentially Duke Nukem—essentially the same ship. However, DOTA 2 is a game where the maps, then the assets, and then the engine have all been replaced; that game is DOTA 2. Gone is every piece of the original Warcraft III. IceFrog first replaced the maps, then the art, then the engine.

Is DOTA 2 a derivative work of Blizzard's Warcraft III?<sup>115</sup> The correct answer here has to be no; there is almost nothing that remains

<sup>115</sup> Curiously, despite fierce fighting over the DOTA mark, Blizzard did not file suit against Valve claiming that Valve prepared an unauthorized derivative work. The trademark dispute was ultimately settled out of court. See ENGADGET, *supra*

of Blizzard's copyrighted work in DOTA 2.<sup>116</sup> Instead, DOTA 2 retains the things that were added to Blizzard's work by the original DOTA mod, while surgically removing the traces of the underlying Warcraft III. Copyright infringement cases should ask a two-step question: (1) is the work infringing, and (2) did the defendant have access to Plaintiff's work? What we see, particularly in the Duke Nukem case, is such a strong proof of access that courts seem to want to allow plaintiffs to win even when the work does not actually infringe.

#### IV. WHAT'S THE DEAL WITH VIDEO GAMES?

Is there actually anything new or unique going on in this space? In map editing utilities, like the ones at issue in *Micro Star*, or the one involved in creating DOTA, at least some of the game-play more closely resembles working in Microsoft Paint or Word than it does playing the arcade machines at issue in *Midway* or Duke Nukem in *Micro Star*. Rather than providing an engaging experience that is meant to entertain, these editors are meant to encourage players to craft experiences for other players—to participate in the act of creation alongside the developer. In other games, like Minecraft, for example, players produce “creations that will blow your mind,” infused with exactly that spark of creativity that copyright law seeks to protect.<sup>117</sup> In this section, I will identify what makes this space different from others, in order to provide a foundation for Part IV's normative approach.

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note 14. Perhaps if it didn't, we would have seen a legal battle where novel claims like the ones discussed in this Article were made.

<sup>116</sup> Another example of a place where no lawsuit has been filed in a similar context: E.L. James' entirely dull—thus meaning “the people most likely to be turned on by it are lawyers” according to the *New Yorker*—50 Shades of Grey began its life as a derivative work of Stephanie Meyers' *Twilight*. When James removed Meyers' characters and other elements of Meyers' vampire and werewolf ridden world, did 50 Shades, legally speaking, somehow retain the indelible stamp of *Twilight*? See Anthony Lane, *No Pain, No Gain*, *NEW YORKER* (Feb. 23, 2015), <http://www.newyorker.com/magazine/2015/02/23/pain-gain>.

<sup>117</sup> See Matthew Walden, *17 Amazing Minecraft Creations That Will Blow Your Mind*, *GAMESPOT* (Mar. 24, 2015), <http://www.gamespot.com/gallery/17-amazing-minecraft-creations-that-will-blow-your/2900-84/11/>.

A. “Game”: *You Keep Using That Word. I Do Not Think It Means What You Think It Means.*<sup>118</sup>

Imagine if Microsoft, as has been popularly suggested, was truly some kind of “evil empire.”<sup>119</sup> Consistent with a lawful evil alignment,<sup>120</sup> consider the following hypothetical that Microsoft wants to cause the greatest harm to the world, while still operating within the law. Drawing on the near-complete market penetration of Word, Microsoft decides to attempt to claim virtually the entirety of the English-speaking world’s work as its own intellectual property. Enter Microsoft Word with a required/mandatory update: Clippy Adventures. In this update, Microsoft reintroduces the paperclip avatar and describes the application as an open-ended adventure game where players can express themselves. Clippy has his classic adventures (memorable in that oh-so-particular way to anyone who opened up Microsoft Word in the 90’s);<sup>121</sup> he interacts with user’s writing, exclaiming, “It looks like you’re writing a letter. Would you like help?”<sup>122</sup>

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<sup>118</sup> THE PRINCESS BRIDE (20th Century Fox 1987).

<sup>119</sup> See *Evil Empire*, URBAN DICTIONARY (Aug. 21, 2003), <http://www.urbandictionary.com/define.php?term=evil+empire> (defining “evil empire” as “Microsoft”).

<sup>120</sup> See GARY GYGAX, DUNGEON MASTER’S GUIDE 23 (TSR, 1979) (explaining lawful evil alignment, in *Dungeons and Dragons*, describes characters who use systems of rule and law to achieve malicious and corrupt ends, as contrasted with lawful good characters [law abiding heroes] or chaotic evil characters [law breaking evildoers]).

<sup>121</sup> Please never ever show me this tip ever again, thanks.

<sup>122</sup> See Chris Gentilviso, *The 50 Worst Inventions: Clippy*, TIME MAG. (May 27, 2010), [http://content.time.com/time/specials/packages/article/0,28804,1991915\\_1991909\\_1991755,00.html](http://content.time.com/time/specials/packages/article/0,28804,1991915_1991909_1991755,00.html).

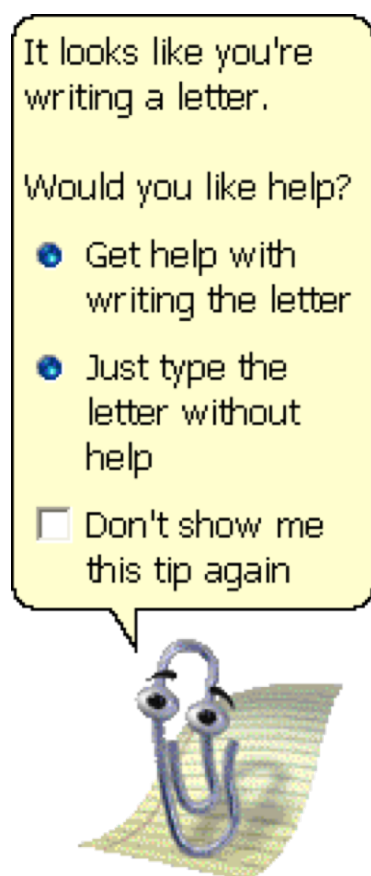


Figure 5: Microsoft's Clippy avatar.

Is this a video game, entitled to copyright protection, that therefore offers Microsoft the ability to prohibit the creation of derivative works (and claim statutory damages for violation of that right)? Most of us would laugh at this hypothetical. It is absurd and implausible. Furthermore, because I hail from the University of Chicago, I risk being burned in effigy<sup>123</sup> if I do not at least suggest that markets can handle this situation. So, yes, markets can probably handle at least part of this absurd hypothetical; if Microsoft attempted to shut down the entirety of the writing public, another firm would enter the market and probably be able to capture all of Microsoft's market share. Even if Microsoft were to leave the

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<sup>123</sup> Or maybe I'd be simply burned in person—that might be more efficient, and apparently, we are big fans of efficiency.

“Clippy Adventures”-type claim hidden deep in a EULA, once they attempted to enforce that claim, likely the very moment they attempted to enforce it, they would face a massive backlash. However, the point of the hypothetical is that figuring out what is and is not a game is not quite as easy as it seems.

Stepping back somewhat, it is important to note that games and video games are different. The Copyright Office says of games generally that “copyright does not protect the idea for a game, its name or title, or the method or methods for playing it.”<sup>124</sup> Further, it does not “protect any idea, system, method, device, or trademark material involved in developing, merchandising, or playing a game. Once a game has been made public, nothing in the copyright law prevents others from developing another game based on similar principles.”<sup>125</sup> Copyright does, by contrast, protect the expression involved in a video game, while leaving the rules unprotected. In *Tetris Holding v. Xio Interactive*,<sup>126</sup> a New Jersey District Court addressed a case where a company blatantly knocked off a game, as shown in Figure 6 below. The novel theory advanced by Xio was basically this: because the expression in your game is really just a set of rules, we can make a near complete clone—Xio’s Mino did include several features that Tetris did not—and we will be legally in the clear. Xio even stated in its briefs that “before developing its games, Xio analyzed the intellectual property laws to determine what parts of Tetris they could use and what parts they couldn’t. Xio discovered that no one had a patent to the rules and other functional elements of Tetris.”<sup>127</sup> Thus, “Xio carefully, intentionally, and purposefully crafted its game to exclude all protected, expressive elements.”<sup>128</sup> The court’s decision is perhaps best seen as a study in what happens when you take doctrine too seriously; the judge declines to state the rule she uses to try to separate the game’s rules

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<sup>124</sup> U.S. COPYRIGHT OFFICE, COPYRIGHT REGISTRATION OF GAMES, (Apr. 2016), <https://www.copyright.gov/fls/fl108.pdf>.

<sup>125</sup> *Id.*

<sup>126</sup> *Tetris Holding, LLC v. Xio Interactive, Inc.*, 863 F. Supp. 2d 394 (D.N.J. 2012).

<sup>127</sup> *Tetris*, 863 F. Supp. 2d at 399.

<sup>128</sup> *Id.*

from expression, and instead she broadly declares her decision is “guided by case law and common sense.”<sup>129</sup>

This is problematic, though, because video games occupy a space that gives rise to protections that do not exist otherwise. Had *Tetris Holdings* made a board game version that used actual colored blocks to express its rules—something eminently achievable, even if gameplay would be slightly inconvenient and clunky—Xio could have put out an identical board game without infringing. If this case is correctly decided, there is necessarily something special in the way we treat games.

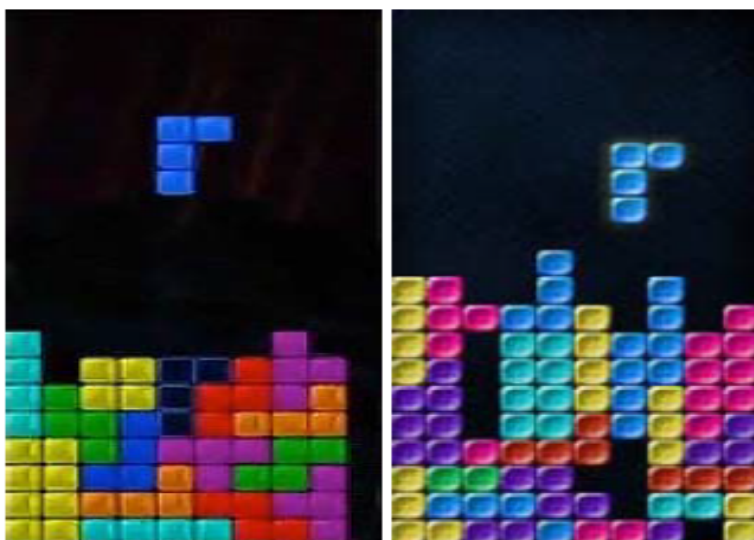


Figure 6: *Tetris* (left) and *Xio's infringing Mino* (right).

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<sup>129</sup> *Id.* at 408. This case might also simply be best seen as standing for the principle that being too clever rarely works out well for anyone. See TERRY PRATCHETT, *HOGFATHER* (Victor Gollancz, 1996) (“The Quirmian philosopher Ventre put forward the suggestion that ‘Possibly the gods exist, and possibly they do not. So why not believe in them in any case? If it’s all true you’ll go to a lovely place when you die, and if it isn’t then you’ve lost nothing, right?’ When he died he woke up in a circle of gods holding nasty-looking sticks and one of them said ‘We’re going to show you what we think of Mr. Clever Dick in these parts . . . .’”).



B. *Linearity: A Metric to Understand the Nature of the Underlying Work*

Is there a point when we no longer call certain things “a game”? Video games that allow non-linear player inputs are unique among copyrightable works in that copyright law currently provides no clear way to separate the non-linear player inputs from the tools that enable creators to create the works. With the exception of the score to John Cage’s 4’33’’<sup>130</sup>—the intentionally blank score in three movements could be confused for blank sheet music paper—non-video game works simply do not pose this set of problems. The video game space has fundamentally changed since the mid-1980’s. If we look at the games at issue in the Seventh Circuit’s decision in *Midway*—*Galaxian* and *Pac-Man*<sup>131</sup>—and compare them to, say, the *Warcraft III* World Editor, it should be clear we have a horse of a different color. Like a time stamp in films, if you take the wave number a player is on in *Galaxian*, you would know exactly what was happening on-screen. Similarly, in *PacMan*, knowing what level the player is on gives a fairly clear idea of what appears on-screen. As the space moves away from linearity in games, we see the emergence of an implicit invitation to the player to put something of themselves—some element of the creative spark that copyright seeks to protect—into the games they play.

It is thus desirable to have a metric to understand to what extent a player is invited to create within a space. In one sense, a measure of linearity may be seen as a metric for whether a part of a work is actually the kind of work contemplated by the drafters of the Copyright Act. The definition of “audiovisual work” (the category we use for video games) in the Act is “[those] works that consist of a series of related images which are *intrinsically intended to be shown* by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any.”<sup>132</sup> If a game is non-linear, then at least some element

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<sup>130</sup> JOHN CAGE, 4’33’’ (1952). This is a piece of music that has become famous because it instructs the musician to play literally zero notes. At the risk of ruining a joke by over-explaining, this example is entirely facetious.

<sup>131</sup> See *Midway Mfg. Co. v. Artic Int’l, Inc.*, 704 F.2d 1009, 1013 (7th Cir. 1983).

<sup>132</sup> Copyright Act of 1976, 17 U.S.C. § 101 (2016) (emphasis added).

of the player's conduct is not part of what is "intended to be shown" by the developer. Instead, that open input is wholly the player's. Perhaps those parts are best seen as no longer part of the game for copyright purposes.

For example, if you remove a Duke Nukem .MAP file (with its own original expression) from its engine and art, it becomes hard to see how it is not an expression wholly the player's own. By adding facts to the hypothetical, it is not hard to picture a court reaching a different result entirely. The Clippy Adventures example is one such case; it is simply impossible to imagine a court doing anything but laughing Microsoft out of court, even if they were doctrinally correct in asserting the claim. Similarly, if there had been another application that could make use of .MAP files, the case would feel different. So, let's say in addition to Formgen's Duke Nukem 3D, that there was another engine/art asset combination available. An unrelated company puts out a game called "Thin White Duke" that, in the place of Duke Nukem, has a skinny, glitzed up rocker named Ziggy; in the place of a gun, a guitar; and in the place of alien Pig Cops, spiders from Mars. This game is able to read the same kind of .MAP files,<sup>133</sup> but produces a game entirely unlike Duke Nukem when doing so. If such a game existed when Microstar released its mappack, it is fairly certain they would have won the case. The combination of a .MAP file that Formgen had nothing to do with, an engine that Formgen had nothing to do with, and a set of art assets that Formgen had nothing to do with should not be held to infringe Formgen's copyright. Yet, copyright law supposedly considers what elements are taken and from where those elements are taken—the law is not supposed to consider what other unrelated works exist. Copyright law is very strange in that our intuition in a case can depend so dramatically on the existence *vel non* an unrelated application.<sup>134</sup>

Perhaps the non-linearity of the Build Editor can do some work here; one might think that things created in the Build Editor should not be held to infringe because the Build Editor is not really a game,

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<sup>133</sup> This Article will assume there are no patent issues.

<sup>134</sup> Recall the only similarity is that they can both read files ending in the extension .MAP.

so much as a medium for expression. It is raw material for expression, not expression itself. Like with so many other issues in technology, we should ask ourselves “what other things, that we currently understand under the law, does this look like?” If the law does not protect board games, then the more a video game is like a board game, the less copyright law should protect it. On the other hand, if the law protects movies, then the more a video game is like a movie, the more protection it should receive.

To use an analogue, we protect books, but we do not protect an empty notebook. Games that are less linear start to look more like a pad of paper and less like a book. The more linear, the more like a book the game is. Offering a limited number of choices to a reader, like in a “Choose Your Own Adventure” book, does not remove the book from copyright protection. However, offer what approaches an infinite number of choices—say a book that begins “It was a dark and stormy night . . . “ then has many pages of blank lines—and such a book no longer should be protected expression.

What if a notebook has a copyrighted character on the cover? We do not think that this character ceases to be protected because she is on the cover of a notebook, but neither do we think that the owner of the character’s copyright will own the contents of the notebook if we remove the cover. Similarly, removing Duke Nukem from the Duke Nukem map pack should probably be enough to remove Formgen’s claim to it. By contrast, if you did a find/replace in *Harry Potter and the Philosopher’s Stone*, replacing every J.K. Rowling character with generic names, the law would consider the work infringing. Therefore, if you simply reskin the Duke Nukem game, but use Formgen’s preexisting maps—that is, replace the art assets, but keep using the .MAP files and the engine—the resulting game should also be held to infringe.

## **V. ONE VIEW OF BOWSER’S CASTLE: LIABILITY RULES AND PROPERTY RULES**

In Calabresi and Melamed’s seminal contribution to law and economics literature, *Property Rules, Liability Rules, and*

*Inalienability: One View of the Cathedral*,<sup>135</sup> they observed that legal entitlements and property rights can be protected by either property, liability, or inalienability rules. With regard to property and liability rules in particular, they looked at nuisance law and how a court might rule when a resident sued a polluter. Looking at existing cases, when the resident was found to have the underlying entitlement, they saw that sometimes a court would issue an injunction against the polluter, thus using a property rule (“Rule 1”).<sup>136</sup> In others, they found that while the court declared that the resident had the entitlement, they would allow the polluter to continue, so long as the polluter paid damages, thus using a liability rule (“Rule 2”).<sup>137</sup> A key insight of the paper examined cases where the polluter had the entitlement; they saw cases where courts used a property rule, but none where a corresponding liability rule was used.<sup>138</sup> A property

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<sup>135</sup> Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L.R. 1089, 1089 (1972).

<sup>136</sup> *Id.* at 1106–07.

<sup>137</sup> *Id.* at 1106–09.

<sup>138</sup> *Id.* at 1115–16.

Nuisance or pollution is one of the most interesting areas where the question of who will be given an entitlement, and how it will be protected, is in frequent issue. Traditionally, and very ably in the recent article by Professor Michelman, the nuisance pollution problem is viewed in terms of three rules. First, Taney may not pollute unless his neighbor (his only neighbor let us assume), Marshall, allows it (Marshall may enjoin Taney’s nuisance). Second, Taney may pollute but must compensate Marshall for damages caused (nuisance is found but the remedy is limited to damages).” Third, Taney may pollute at will and can only be stopped by Marshall if Marshall pays him off (Taney’s pollution is not held to be a nuisance to Marshall).” In our terminology rules one and two (nuisance with injunction, and with damages only) are entitlements to Marshall. The first is an entitlement to be free from pollution and is protected by a property rule; the second is also an entitlement to be free from pollution but is protected only by a liability rule. Rule three (no nuisance) is instead an entitlement to Taney protected by a property rule, for only by buying Taney out at Taney’s price can Marshall end the pollution.

The very statement of these rules in the context of our framework suggests that something is missing. Missing is a fourth rule representing an entitlement in Taney to pollute, but an entitlement which is protected only by a liability rule. The fourth rule, really a kind of partial eminent

rule in the polluter's favor would mean that the polluter could continue polluting ("Rule 3"). The authors then posited a liability rule in the polluter's favor: the polluter could continue to pollute unless the resident paid damages ("Rule 4").

This section proposes applying the same property/liability rule analysis to the derivative work right in the video game space of copyright law. A liability ruling in Player's favor could actually provide a very useful allocation of rights.

#### *A. Application of the One View Framework*

The framework from *One View* is perhaps easiest to conceptualize visually, as it makes clear how the somewhat counterintuitive Rule 4 is derived.

Entitlement belongs to:	Injunction/Property Rule	Damages/Liability Rule
<b>Resident</b>	Rule 1: Injunction against Polluter.	Rule 2: Polluter may continue polluting if she pays Resident damages.
<b>Polluter</b>	Rule 3: Polluter may continue polluting without paying.	Rule 4: Polluter may continue polluting unless Resident chooses to pay Polluter damages.

In the nuisance context, then, Rule 4 might be seen as a way for a court to reduce the transaction costs and come closer to achieving

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domain coupled with a benefits tax, can be stated as follows: Marshall may stop Taney from polluting, but if he does he must compensate Taney.

*Id.* (internal citations omitted).

the result under Coasean bargaining.<sup>139</sup> Where a court thinks that the parties—if not for endowment effects and the personal animus generally created during litigation—would reach a bargain where Resident gets the right but has to buy it from Polluter, it can set a reasonable price at which Resident can buy out the Polluter's entitlement. Thus, under a Rule 4 regime, the goal is for the party that values the entitlement more to get it, regardless of the legal rule.

Similarly, we can apply this framework to the Developer and the Player, and posit our own Rule 4.

Entitlement belongs to:	Injunction/Property Rule	Damages/Liability Rule
<b>Developer</b>	Rule 1: Injunction against Player; copies of Gameplay Work are destroyed.	Rule 2: Player may continue to produce or sell Gameplay Work if he pays Developer damages.
<b>Player</b>	Rule 3: Player may continue to produce or sell Gameplay Work without paying damages.	Rule 4: Player may continue to produce or sell Gameplay Work unless Developer chooses to pay damages.

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<sup>139</sup> See generally Ronald Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960) (stating that under so called “Coase Theorem,” in a world with zero transaction costs and perfect information, parties will reach the optimal allocation of property rights, such that the initial allocation of rights should be invisible to a post-bargaining observer); see also Edward Morrison, *Coasean Bargaining in Consumer Bankruptcy* 2 (Kreisman Working Papers Series in Housing Law and Policy, Paper No. 5, 2014) (predicting that, in bankruptcy, “[i]f the value of the home is higher in [a debtor’s] hands (because [they] will repay the mortgage) than in the lender’s (which will sell the home at foreclosure), the parties should reach a bargain that allows the debtor to keep her home, even if she files for Chapter 7 bankruptcy.”).

Particularly when litigation has reached a decision in cases where a large firm sues an individual, parties might be reluctant to bargain away the rights a court allocates to them. Furthermore, settlements and bargains outside of court tend to be confidential and thus have less effect on future litigation and rights allocations.<sup>140</sup> Thus if the most socially beneficial result is that the Player cease producing Gameplay Work, but that such a Player be compensated, we might worry we would see such results more rarely unless courts led the way.

Courts deciding copyright cases already have broad discretion that allows them to impose Rules 1, 2, and 3.<sup>141</sup> The Act provides that in a final judgment, “the court *may* order the destruction . . . of all copies or phonorecords found to have been made or used in violation of the copyright owner’s exclusive rights, and of all . . . articles by means of which such copies or phonorecords may be reproduced.”<sup>142</sup> Critically, this leaves the decision of whether to apply a liability or a property rule in the hands of the court. In those cases where a court feels that while the socially productive result is to allow Developer to control its work, such a court could force the firm to bear the social cost of this result by applying a Rule 4 approach. Furthermore, unlike in nuisance cases—where the harm caused by a polluter is often diffused and spread across a number of potential plaintiffs—in derivative work cases, there is only one potential defendant (Player) and one potential plaintiff (Developer).

#### *B. The Efficiency of a Rule 4 Allocation*

In allocating entitlements, from a utilitarian perspective, we seek to create the greatest social welfare. The question that the various allocations we address necessarily asks: who will create more social value if we offer them certain rights, entitlements, or even simply money? We should also ask ourselves things like whether we can expect to contract around the legal default; is this a scenario where the rule does not matter? Or, is this a scenario where the endowment

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<sup>140</sup> Orin S. Kerr, *A Theory of Law*, 16 GREEN BAG 2D 111, 111 (2012).

<sup>141</sup> That is, a pure Rule 1 result would be a finding that the defendant’s work infringes and enjoining its production, a Rule 2 would be infringement with only a monetary penalty and no injunction, and a Rule 3 would be no liability.

<sup>142</sup> Copyright Act of 1976, 17 U.S.C. § 503(b) (2016) (emphasis added).

effect overrides any bargaining to the efficient result? To that end, one more case study is illustrative.

In the past, Nintendo has been very protective of its exclusive rights. More than once, Nintendo has sent legal threats and ended up stopping major fighting game tournaments from either hosting or streaming their smash hit game series, Super Smash Brothers (“Smash Bros.”).<sup>143</sup> One such tournament, the Evo Championship Series, operated by hosting competitions in eight different games.<sup>144</sup> Nintendo chose seven of these games by a direct fan vote but decided to raise money for charity in choosing the eighth title. Players had a choice between 17 possible titles and voted with their wallets, donating money to The Breast Cancer Research Foundation.<sup>145</sup> Players raised over \$223,000 in total, with more than \$94,000 raised because of Smash Bros.<sup>146</sup> Ultimately, Nintendo shut down Evo’s streaming of Smash Bros., but after discussion, decided to let Evo still produce and host the Smash Bros. portion of the tournament.<sup>147</sup>

Normatively, this seems wrong. What does Nintendo stand to lose here? It mirrors many arguments that take place around file sharing, but has a critical difference: unlike a download, a video game stream, a tournament, or any other work discussed in this Article is not a perfect substitute for the Original Game. Let’s play the argument out:

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<sup>143</sup> See Kyle Orland, *Why Nintendo Can Legally Shut Down Any Smash Bros. Tournament It Wants . . . But Hasbro Probably Can’t Shut Down a Similar Scrabble Tournament*, ARS TECHNICA (July 11, 2013, 7:10 PM), <http://arstechnica.com/gaming/2013/07/why-nintendo-can-legally-shut-down-any-smash-bros-tournament-it-wants/>.

<sup>144</sup> *Id.*

<sup>145</sup> See Tracey Lien, *Super Smash Bros. Melee Winner of Evo 2013 Donation Drive (Update): Super Smash Bros. Melee Will Be Included in Evo*, POLYGON (Feb. 1, 2013, 5:23 AM), <http://www.polygon.com/2013/2/1/3940260/super-smash-bros-melee-unofficial-winner-of-evo-2013-donation-drive>.

<sup>146</sup> *Id.*

<sup>147</sup> Jenna Pitcher, *Nintendo Wanted to Shut Down Super Smash Bros. Melee Evo Event, Not Just Stream*, POLYGON (July 11, 2013, 1:59 AM), <http://www.polygon.com/2013/7/11/4513294/nintendo-were-trying-to-shut-down-evo-not-just-super-smash-bros-melee>.



Developer: We are harmed by people streaming games without our permission.<sup>148</sup>

Player: No, you are not. In fact, when I stream your game, I actually increase demand.

Developer: If I think you're helping, I will give you a free license. Otherwise I should have the right to control my brand and say "no."

Player: There are too many of us for that to work; you can't possibly deal with the volume going on here.

It is exactly this scenario that makes Rule 4 is so appealing.<sup>149</sup> there are low externalities to the allocation, and the financial situation is (arguably) predictably asymmetrical in favor of the Developer. Normatively then, perhaps Rule 4 decisions should be the default in this space, at least when allocating entitlements is difficult. If the default state of the world is that players can stream without courts imposing liability or an injunction, we think developers generally benefit. That is, in the absence of any costs to negotiating, rational developers would reach an agreement that allowed Gameplay Works to be created from Original Games. On the other hand, if a particular developer thinks otherwise, it is free to buy out players, and has the resources to do so. Because streams are not an adequate substitute for the original game, we do not have any of the concerns we would normally have about, say, pirated downloads of songs. One should note that the cases that are apt for this application are those cases where a court does not really know where it should award the entitlement—cases where a judge has conflicting normative intuitions. In such cases, Rule 4 ensures that

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<sup>148</sup> Another argument Developers might present is that they are being deprived of revenues from licensing streamers. However, this argument is either circular or conflates "is" and "ought". Their argument either amounts to "we should have a right to revenues because we should have a right to revenues" (circular) or "we *should* have a right to revenues because we *do* have a right to revenues" (is/ought).

<sup>149</sup> Calabresi, *supra* note 138, at 1120 ("Rule four gives at least the possibility that the opposite entitlement may also lead to economic efficiency in a situation of uncertainty.").

the Developer, if they value the entitlement above a certain amount, may buy that right back from Players.

Of course, the suggestion of using Rule 4 does not apply in cases where the entitlement should clearly go to Developer.<sup>150</sup> The broader point is simply that, perhaps, liability rules should be the rule of the day in this space. Courts already ostensibly regularly award Rule 2 judgments.<sup>151</sup> Of course, a liability rule that offers a sufficiently high damage award is indistinguishable from a property rule. Because the copyright regime offers the threat of statutory damages of up to \$150,000 per infringement,<sup>152</sup> sophisticated actors will frequently stay away from conduct that might produce liability.<sup>153</sup>

### C. *A Winner Is . . . Who?*

The decision of who should be awarded the entitlement in the first place is a different question that requires us to ask about the relative elasticity of demand for Developer and Player. If, over the long haul of cases, we award the entitlements to Player, do we get more Gameplay Works—and fewer Original Games? Similarly, if we award entitlements to Developer, do we get more Original Games—and fewer Gameplay Works? In short, whose behavior will change the most depending on where we award the entitlement? Without data, this is not exactly an easy question to answer.<sup>154</sup>

That there is no data does not mean we cannot think through the question; there are several intuitions to ponder. First, Player is typically not a legally sophisticated individual, while Developer is. Developers often have in-house counsel, massive budgets, and liquidity of assets year over year. Thus, one should probably expect

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<sup>150</sup> Recall, for example, the Xio/Tetris example, *supra* note 129.

<sup>151</sup> See, e.g., Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1 (2000) (arguing that without concomitant social costs, legally imposing a fine simply sets the price for a particular right or good).

<sup>152</sup> 17 U.S.C. § 504(c) (2016).

<sup>153</sup> See generally Mitch Stoltz, *Collateral Damages: Why Congress Needs to Fix Copyright Law's Civil Penalties*, ELECTRONIC FRONTIER FOUND. (July 24, 2014), <https://www EFF.ORG/wp/collateral-damages-why-congress-needs-fix-copyright-laws-civil-penalties>.

<sup>154</sup> Such data would also not exactly be easy to generate in a way that led to reliable predictions.

that Developer will be more likely to make choices based on what the legal rule is, while Player will likely make the same decisions regardless (as she will not likely even be aware of the legal rule). Furthermore, one might also expect that over the long run, the more Original Games that exist, the more Gameplay Works will be created.

To see intuitions pushing the other way, one need only look at the other parties in the space because they are also sophisticated parties. If Developer can seek rents from Platforms like Twitch, those Platforms will change their behavior accordingly. If Platform no longer provides Player with a space to broadcast Gameplay Work, we should expect fewer works. Furthermore, it should also be expected that the space will not develop as quickly. If the cost of experimentation is lowered, more innovation should be expected; similarly, if the cost is raised, one should expect a decline in innovation. So, if Player can no longer see the works of other Players on Platform, the cost of innovation is shifted onto individual Players, rather than allowing the creative community to benefit from the works of others.

## VI. CONCLUSION

The market for works created using a video game as the raw material for expression is expanding, and will only continue to get bigger. As more is done with this space, courts and legislatures will need to answer difficult questions about how to allocate rights in this space. The current litany of cases and statutes simply do not provide robust tools for dealing with the difficult cases. This Article has provided several ways of thinking through the problem, in addition to simply working through a descriptive account of the kinds of re-purposing of existing works going on in video game spaces. This Article is not meant to end a conversation, but to start one. This is an area that will only see growth, and the law as it stands simply lacks the right tools to deal with this area. I hope, therefore, that in this Article, I've managed to offer a number of novel lenses through which to see and perhaps ultimately resolve these doctrinal problems.