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## Fairness, Copyright, and Video Games: Hate the Game, Not the Player

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### Cover Page Footnote

Fellow, Harvard Law School, Project on the Foundations of Private Law; Graduate Program Fellow, Harvard Law School; S.J.D. candidate, Harvard Law School. For insightful comments and conversations that informed this piece, I thank Oren Bar-Gill, Elettra Bietti, Michael Birnhack, William Fisher, Lawrence Lessig, William McCoy, Gali Racabi, Moti Sorek, and Rebecca Tushnet. I am also grateful to participants in the Internet Law Works-in-Progress Workshop and the Annual Workshop of Israeli Intellectual Property Scholars for allowing me to workshop earlier versions. This research benefited from the support of the Project on the Foundations of Private Law at Harvard Law School.

# Fairness, Copyright, and Video Games: Hate the Game, Not the Player

Shani Shisha\*

*Creative communities often rely on social norms to regulate the production of creative content. Yet while an emerging body of literature has focused on isolated accounts of social norms operating in discrete, small-scale creative industries, no research to date has explored the social norms that pervade the world's largest content microcosm—the sprawling video game community.*

*Now a veritable global phenomenon, the video game industry has recently grown to eclipse the music and motion picture industries. But despite its meteoric rise, the video game industry has provoked little attention from copyright scholars. This Article is the first to explore the shifting role of copyright law in the gaming community, where game developers are increasingly using a complex amalgam of legal and nonlegal tools to regulate creative output. Based on an in-depth analysis of the extralegal norms that govern creative content in the video game industry, this Article distills a richly detailed account of the relationship between video game creators and consumers. It maps the intricate web of interests underpinning the relationship between game developers and consumers; identifies a rich cadre of fairness-driven social norms that permeate the gaming community; and considers the implications of these findings for*

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\* Fellow, Harvard Law School, Project on the Foundations of Private Law; Graduate Program Fellow, Harvard Law School; S.J.D. candidate, Harvard Law School. For insightful comments and conversations that informed this piece, I thank Oren Bar-Gill, Elettra Bietti, Michael Birnhack, William Fisher, Lawrence Lessig, William McCoy, Gali Racabi, Moti Sorek, and Rebecca Tushnet. I am also grateful to participants in the Internet Law Works-in-Progress Workshop and the Annual Workshop of Israeli Intellectual Property Scholars for allowing me to workshop earlier versions. This research benefited from the support of the Project on the Foundations of Private Law at Harvard Law School.

*copyright law. The Article ultimately concludes that strong copyright protection is largely (though not entirely) inessential in areas where norms of fairness drive the production of creative content.*

INTRODUCTION .....	695
I. MODERN-DAY VIDEO GAMES.....	705
A. <i>Digital Video Games</i> .....	705
B. <i>Video Games as a Service</i> .....	708
C. <i>Pro Gaming and Gameplay Streaming</i> .....	718
D. <i>Recap</i> .....	723
II. SOCIAL NORMS: AN ONGOING INQUIRY .....	724
III. FAIRNESS .....	731
A. <i>Competitive Integrity</i> .....	731
B. <i>Wealth Sharing</i> .....	740
C. <i>Labor</i> .....	749
1. <i>Misappropriation Norm</i> .....	750
2. <i>Defining Misappropriation</i> .....	753
3. <i>Enforcement</i> .....	759
4. <i>Gameplay Streams: The Law</i> .....	761
5. <i>Explaining Anti-Appropriation</i> .....	769
D. <i>Taking Stock</i> .....	772
IV. POLICY IMPLICATIONS .....	773
A. <i>Revisiting Copyright Incentives</i> .....	773
B. <i>Decoding Labor</i> .....	784
CONCLUSION.....	790

## INTRODUCTION

The past decade has ushered in a tectonic shift in the world of mass entertainment. From music aggregators to on-demand video streaming, content providers have been wrestling over the attention of consumers across a wide range of content services. But the intensifying competition in the entertainment market has done little to temper the growth of the video game industry. Now a veritable global phenomenon, the video game market has recently grown to

eclipse the music and motion picture industries.<sup>1</sup> In fact, video games now make up the largest entertainment market in the world by an order of magnitude.<sup>2</sup> The most popular video game in the world, *Fortnite* by Epic Games, generated roughly three billion dollars in 2018 alone, far surpassing the highest-grossing movie of all time.<sup>3</sup> This is hardly surprising given the fact that *Fortnite* boasts some 250 million active players.<sup>4</sup> These staggering figures paint a stark picture of an ever-changing world. As traditional forms of

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<sup>1</sup> The film industry's revenues in 2018 totaled \$43 billion. See David Robb, *U.S. Film Industry Topped \$43 Billion In Revenue Last Year, Study Finds, But It's Not All Good News*, DEADLINE HOLLYWOOD (July 13, 2018), <https://deadline.com/2018/07/film-industry-revenue-2017-ibisworld-report-gloomy-box-office-1202425692/> [https://perma.cc/5R7G-QDLV]; Asit Sharma, *The State of the Movie Industry in 2018*, THE MOTLEY FOOL (Sept. 19, 2018), <https://www.fool.com/investing/2018/09/19/the-state-of-the-movie-industry-in-2018.aspx> [https://perma.cc/HRL5-3P5T]. The music industry generated \$9.8 billion in 2018. See RIAA 2018 YEAR-END MUSIC INDUSTRY REVENUE REPORT (2019), [https://perma.cc/7TNS-QAG9]. The video game industry has outperformed both industries, grossing more than \$130 billion in 2018. See James Batchelor, *Global Games Market Value Rising to \$134.9bn in 2018*, GAMES INDUSTRY (Dec. 18, 2018), <https://www.gamesindustry.biz/articles/2018-12-18-global-games-market-value-rose-to-usd134-9bn-in-2018> [https://perma.cc/48J6-FAAM] (noting that the video game industry has generated almost \$135 billion in revenues); Kellie Ell, *Video Game Industry is Booming with Continued Revenue*, CNBC ONLINE (July 18, 2018), <https://www.cnbc.com/2018/07/18/video-game-industry-is-booming-with-continued-revenue.html> [https://perma.cc/JX8S-EWVB] (reporting that the video game industry is projected to gross nearly \$138 billion by the end of the year).

<sup>2</sup> Sheena Jordan, *The Gaming Industry is Now Bigger than Hollywood*, ECONOTIMES (July 19, 2019), <https://www.econotimes.com/The-Gaming-Industry-Is-Now-Bigger-Than-Hollywood-1558784> [https://perma.cc/YW2F-ELY3].

<sup>3</sup> See, e.g., Jon Russell, *Epic Games, the Creator of Fortnite, Banked a \$3 Billion Profit in 2018*, TECH CRUNCH (Dec. 27, 2018), <https://techcrunch.com/2018/12/27/epic-fortnite-3-billion-profit/> [https://perma.cc/QL9Z-EWW5]. *Fortnite* reportedly generates millions of dollars a day. Aisha Hassan, *Fortnite's Creator Made \$7 Billion This Year*, QUARTZ (Dec. 31, 2018), <https://qz.com/1512561/fortnite-developer-tim-sweeney-made-7-billion-this-year/> [https://perma.cc/74HL-YFY4]. Strikingly, *Fortnite* made almost \$300 million in the month of April 2018 alone. Nick Statt, *Fortnite Made Nearly \$300 Million in the Month of April*, THE VERGE (May 24, 2018), <https://www.theverge.com/2018/5/24/17390004/fortnite-battle-royale-money-made-revenue-300-million-april-2018> [https://perma.cc/NA6E-64PT]. The highest-grossing movie of all time is *Avengers: Endgame*, which raked in \$2.79 billion to date. Josh Jackson, *The 20 Highest-Grossing Movies of All Time*, PASTE MAGAZINE (Sept. 12, 2019), [https://perma.cc/Y2FT-ZLVP].

<sup>4</sup> Ben Gilbert, *How Big is 'Fortnite'? With Nearly 250 Million Players, It's over Two-Thirds the Size of the U.S. Population*, BUS. INSIDER (Mar. 20, 2019), <https://www.businessinsider.com/how-many-people-play-fortnite-2018-11> [https://perma.cc/WF48-MR55].

mass entertainment remain stagnant,<sup>5</sup> video games continue to thrive. In the U.K., for example, video games account for more than half of the entire entertainment market.<sup>6</sup> And although video games largely cater to a younger audience, they are growing increasingly popular among older consumers.<sup>7</sup>

Video games are also rapidly gaining traction as vehicles of cultural currency. Games like *Fortnite* have become a mainstay of popular culture, with thousands of YouTube videos mimicking the animated dance moves featured in the game.<sup>8</sup> A recent study also suggests that some players think of *Fortnite* as their primary social media platform.<sup>9</sup> Moreover, a recent poll found that a whopping 75% of Americans have at least one video game player in their household.<sup>10</sup> Video games have likewise crept into other fora of mass

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<sup>5</sup> See Press Release, IFPI Global Music Report, State of the Industry (2018), <https://www.ifpi.org/ifpi-global-music-report-2018/> [https://perma.cc/H8MB-KZLE] (noting that despite three consecutive years of growth in the music industry, “revenues for 2017 are still only 68.4% of the market’s peak in 1999”).

<sup>6</sup> VB Staff, *With Record-Breaking Revenue, the U.K. Game Industry is Blowing Up*, VENTURE BEAT (Mar. 18, 2019, 4:10 AM), <https://venturebeat.com/2019/03/18/with-record-breaking-revenue-the-u-k-game-industry-is-blowing-up/> [https://perma.cc/4LLK-3N5D] (calling attention to the fact that “[i]n 2018, games accounted for more than half of the entire U.K. entertainment market, 51.3 percent, outselling music and video combined, for the first time”).

<sup>7</sup> See, e.g., Erin Lee, *The Cultural Impact of Video Games*, ODYSSEY (Nov. 30, 2015), <https://www.theodysseyonline.com/cultural-impact-video-games> [https://perma.cc/2SPW-6K8T] (observing that 44% of the people who play video games are aged 36 or older); Keith Stuart, *Game Changers: How the Increasing Cultural Significance of Video Games is Reflected in Our Coverage*, THE GUARDIAN (July 21, 2017), [https://perma.cc/SD7F-YJ8A] (“Most modern surveys show the audience for games has an almost even gender split, and the average age of a player is around 35.”).

<sup>8</sup> See David Lumb, *‘Fortnite’ Wants to Put Your Dance in the Game*, ENGADGET (Mar. 30, 2018), <https://www.engadget.com/2018-03-30-fortnite-boogiedown-put-your-dance-in-game.html> [https://perma.cc/S997-8LUS] (pointing out that professional athletes “won’t stop mimicking the game’s weird dances in real life”); Delaney Strunk, *Watching These Professional Dancers Try The “Fortnite Dance Challenge” Will Actually Make Your Day*, BUZZFEED (June 27, 2018), <https://www.buzzfeed.com/delaneystrunk/fortnite-dance-challenge> [https://perma.cc/4U2B-FQ72] (discussing the “new viral internet video challenge” known as the “Fortnite dance challenge”).

<sup>9</sup> NATIONAL RESEARCH GROUP, FORTNITE: THE NEW SOCIAL MEDIA? (2020), [https://perma.cc/3YEB-3UFD].

<sup>10</sup> ENT. SOFTWARE ASS’N, ESSENTIAL FACTS ABOUT THE VIDEO GAME INDUSTRY (2020), [https://www.theesa.com/wp-content/uploads/2020/07/Final-Edited-2020-ESA\\_Essential\\_facts.pdf](https://www.theesa.com/wp-content/uploads/2020/07/Final-Edited-2020-ESA_Essential_facts.pdf) [https://perma.cc/GN8W-6Y6W].

media, and a growing cascade of movies and television shows are now premised on (or inspired by) video games<sup>11</sup>—a clear indication of the cultural force that drives the video game market.

The explosive growth of the video game industry has drawn increased scrutiny from third parties. A spate of recent lawsuits take aim at game developers for allegedly failing to support individual creators. Most notably, game developers have recently faced legal challenges involving claims of copyright infringement with respect to protected choreographies.<sup>12</sup> Other controversies concern the likeness of professional athletes in sports video games.<sup>13</sup> And a number

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<sup>11</sup> See JACK LULE, UNDERSTANDING MEDIA AND CULTURE: AN INTRODUCTION TO MASS COMMUNICATION 418 (2010) (suggesting that, unlike movies of the 1980s, modern-day movies are often derivative of preexisting video games).

<sup>12</sup> One such lawsuit was brought by Alfonso Ribeiro, former star of the show *The Fresh Prince of Bel-Air*. Ribeiro alleged that *Fortnite*'s creators misappropriated his famous dance routine from the show. Amir Vera & Chris Boyette, 'Fresh Prince' Star Alfonso Ribeiro Sues Fortnite Over Use of Dance His Character Carlton Popularized, CNN (Dec. 18, 2018, 11:07 AM), <https://www.cnn.com/2018/12/18/entertainment/carlton-sues-fortnite-video-game/index.html> [<https://perma.cc/9U26-FCZ2>]. Ribeiro subsequently withdrew his lawsuit following the Copyright Office's refusal to register his copyright on the grounds that his dance moves were not elaborate enough to qualify as a choreography. Joe Price, Alfonso Ribeiro Drops Carlton Dance 'Fortnite' Lawsuit Against Epic Games, COMPLEX (Mar. 8, 2019), <https://www.complex.com/pop-culture/2019/03/alfonso-ribeiro-drops-fortnite-lawsuit> [<https://perma.cc/Y876-9SKH>]. Another lawsuit was brought by rapper Terrence Ferguson, known by his stage-name "2 Milly," charging that *Fortnite*'s developers had used his "Milly Rock" dance in the game. Stefanie Fogel, Rapper 2 Milly Is Suing Epic Games over 'Fortnite' Dance Emote, VARIETY (Dec. 5, 2018, 7:33 PM), <https://variety.com/2018/gaming/news/2-milly-epic-games-fortnite-lawsuit-1203080818/> [<https://perma.cc/SM8J-VP67>]. A third lawsuit was brought by the parents of Russell Redd, known as the "Backpack Kid," who claims to have conjured up the dance move colloquially known as "The Floss." See, e.g., Austen Goslin, Backpack Kid is Also Suing Epic Games over a Dance in Fortnite, POLYGON (Dec. 28, 2018), <https://www.polygon.com/fortnite/2018/12/18/18146770/backpack-kid-dance-fortnite-epic-games-lawsuit> [<https://perma.cc/V5NB-SGSX>].

<sup>13</sup> Jason M. Bailey, Athletes Don't Own Their Tattoos. That's a Problem for Video Game Developers, N.Y. TIMES (Dec. 27, 2018), <https://www.nytimes.com/2018/12/27/style/tattoos-video-games.html> [<https://perma.cc/935L-ZQGW>]. As a general matter, people do not own the tattoos inked on their bodies; rather, tattoos are typically owned by the artists who created them. It thus remains unclear whether professional athletes, for example, can commercialize or license their likeness without obtaining permission from the tattoo artists who inked their bodies. Indeed, tattoo artists brought a number of recent lawsuits against video game developers for digitally recreating the likeness of professional athletes, including the tattoos displayed on their bodies. *Id.* And although the conventional

of high-profile trademark cases grapple with the use of marks in video games—consider cases like *E.S.S. Entertainment v. Rock Star Videos, Inc.*, in which the owners of the Play Pen mark alleged that the defendant’s depiction of the “Pig Pen” strip club in the video game *Grand Theft Auto* infringed their rights.<sup>14</sup>

These cases implicate a limited assortment of intellectual property (“IP”) questions. But the intersection of copyright law and video games has thus far eluded scholarly attention. Copyright scholars have been loath to address many of the core questions that spring from the growth of video games.<sup>15</sup> This omission is particularly glaring in light of the emerging body of work devoted to exploring the relationship between IP and social norms. In recent years, IP scholars have increasingly turned their attention to the role of social norms in incentivizing innovation. The literature is awash in scholarly accounts of social norms operating in tandem with, or in opposition to, positive copyright law.<sup>16</sup> Some norms inform

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wisdom is that people are implicitly authorized to display their tattoos in public, including in television interviews, it is debatable whether this implicit license extends to digitally recreated avatars in video games. *Id.*

<sup>14</sup> *E.S.S. Entm’t 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095 (9th Cir. 2008).

<sup>15</sup> Scholarly accounts of the relationship between copyright law and video games are few and far between. These accounts mostly focus on questions of infringement and substantial similarity. *See, e.g.*, Thomas M.S. Hemmes, *The Adaptation of Copyright Law to Video Games*, 131 U. PA. L. REV. 171 (1982); William K. Ford, *Copy Game for High Score: The First Video Game Lawsuit*, 20 J. INTELL. PROP. L. 1 (2012); John Kuehl, *Video Games and Intellectual Property: Similarities, Differences, and a New Approach to Protection*, 7 CYBARIS 314 (2016); Steven B. McKnight, *Substantial Similarity Between Video Games: An Old Copyright Problem in a New Medium*, 36 VAND. L. REV. 1277 (1983).

<sup>16</sup> *See* Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller’s Recipes Be Per Se Copyrightable?*, 24 CARDOZO ARTS & ENT. L.J. 1121 (2007); Jacob Loshin, *Secrets Revealed: How Magicians Protect Intellectual Property Without Law*, in *LAW AND MAGIC: A COLLECTION OF ESSAYS* 123 (Christine A. Corcos ed., 2008); Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651 (2006); Katherine J. Strandburg, *Curiosity-Driven Research and University Technology Transfer*, in 16 *ADVANCES IN THE STUDY OF ENTREPRENEURSHIP, INNOVATION AND ECONOMIC GROWTH* 97 (2005); Jacqueline D. Lipton, *To © or Not to ©? Copyright and Innovation in the Digital Typeface Industry*, 43 U.S. DAVIS L. REV. 143 (2009); Fiona Murray et al., *Of Mice and Academic: Examining the Effect of Openness on Innovation*, 8 AM. ECON. J. ECON. POLICY 212 (2008); Charles Cronin, *Genius in a Bottle: Perfume, Copyright, and Human Perception*, 56 J. COPYRIGHT SOC’Y 427 (2009).



judicial interpretation of the law.<sup>17</sup> Others seek to dislodge the law altogether by introducing a competing, extralegal regime.<sup>18</sup> And countless norms take on a complementary role, operating within the confines of the negative space of copyright law,<sup>19</sup> i.e., in domains left partly or wholly ungoverned by the law.<sup>20</sup> These norms permeate creative industries that thrive despite, or perhaps because of, the lack of formal IP protection. Yet despite the flurry of recent work on norms-based governance of IP, no research to date has examined the social norms that pervade the video game industry.

This Article is the first serious effort to analyze the social norms that govern creative content in the video game community. It maps the complex web of interests underlying the relationship between consumers and video game developers. It then draws out a number of social norms rooted in notions of fairness. In the context of video games, I understand fairness as a repository of three interrelated concepts: (1) competitive integrity, (2) wealth sharing, and (3) labor.

First, I identify norms of competitive integrity.<sup>21</sup> I show that a game's commercial success largely turns on whether it appears to be competitively fair. Games are thought to be unfair when players are allowed to pay money—say, through in-game

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<sup>17</sup> See, e.g., Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1918–19 (2007). See also *infra* notes 162–173.

<sup>18</sup> Consider, for example, the social norms prevalent among web bloggers, who frequently republish (without obtaining consent) entire articles lifted from newspapers. Mark F. Schultz, *Copynorms: Copyright and Social Norms*, in INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE 201, 225–26 (Peter K. Yu ed., 2007). These norms fly in the face of copyright law; although wholesale copying likely amounts to copyright infringement, bloggers and newspapers seem to accept that unlicensed copying in this context is (at least partially) tolerable.

<sup>19</sup> The term “negative space” was coined by Chris Sprigman and Kal Raustiala. See, e.g., Kal Raustiala & Christopher Sprigman, *The Piracy Paradox Revisited*, 61 STAN. L. REV. 1201, 1201–02 (2009) [hereinafter Raustiala & Sprigman, *The Piracy Paradox*]; Elizabeth L. Rosenblatt, *A Theory of IP's Negative Space*, 34 COLUM. J.L. & ARTS 317 (2011).

<sup>20</sup> While copyright law does not effectively extend to jokes and recipes, comedians and top-end French chefs have fashioned a complex, extralegal system of community norms to regulate the unsanctioned use of these works. See Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787 (2008); Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187 (2008).

<sup>21</sup> See *infra* Section III.A.

microtransactions—to obtain a competitive in-game advantage. At bottom, modern video games are social enterprises: they are founded on the social experience that results from interactions between players. More importantly, modern games allow players to compete with and against each other. But in-game competition can only meaningfully arise if everyone stands an equal chance of competing. The success of a video game thus hinges on players' perception of fairness: they must believe that the game affords everyone an opportunity to compete on equal terms. This egalitarian ideal is defied when games permit players to buy competitive enhancements. Players often describe such games in terms of a “pay-to-win” scheme, where one's odds of winning depend upon her ability or willingness to pay.<sup>22</sup> As a result, players largely eschew video games that offer competitive (rather than cosmetic) enhancements through in-game microtransactions.

This account complements the conventional behavioral analysis of microtransactions. Behavioral economists point to systemic consumer misperceptions to explain the proliferation of in-game purchases. They suggest, broadly speaking, that consumers are myopic and over-optimistic, and are thus unlikely to appreciate the costs associated with microtransactions. I contend that systemic misperceptions cannot fully account for the success (and occasional failure) of micropayments. Instead, I argue that a nuanced approach—marrying behavioral economics and norms of fairness—can paint a more complete portrait of why and when microtransactions flourish.

The Article then excavates a second layer of nonlegal norms in the gaming community: norms grounded in perceptions of wealth sharing.<sup>23</sup> I suggest that gamers are positively inclined to support a game when they believe that a substantial portion of the game is offered for free. *Fortnite*, for example, is a free-to-play game; although the basic version of the game itself is free, players can make in-game purchases of premium digital products.<sup>24</sup> This business model proved successful in no small part because the game's

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<sup>22</sup> See *infra* text accompanying notes 186–223.

<sup>23</sup> See *infra* Section III.B.

<sup>24</sup> Elizabeth Matsangou, *How Fortnite Became the Most Successful Free-to-Play Game Ever*, THE NEW ECONOMY (Nov. 14, 2018), [<https://perma.cc/HN49-T858>].

developers appear to be sharing the wealth. They do so by offering the basic version of the game, stripped of many of its cosmetic elements, for free. I show that perceptions of wealth sharing can cultivate a reciprocal community of loyal players, thus increasing the likelihood of commercial success.

Third, I argue that notions of fairness are particularly ubiquitous in online communities clustered around live gameplay streams on the website Twitch, the world's largest hub for gaming streams.<sup>25</sup> Gamers guard forcefully against perceived misappropriations of their gameplay streams, although it is unclear whether gamers hold any rights to such streams. Still, members of the gaming community view such streams as instantiations of hard labor, expertise and (to some extent) artistry. And they consider any misappropriation to be an incident of illegitimate norm violation. I evaluate this anti-appropriation norm, demarcate its contours, and review the enforcement mechanisms that sustain it.<sup>26</sup>

This study brings into focus three disparate norms of fairness. The first two—competitive integrity and wealth sharing—can be traced to the underlying business relationship between video game creators and consumers. These norms inform the prevailing free-to-play pricing model employed by game developers. By contrast, the third set of norms—namely, norms grounded in labor—stem from interactions amongst fellow players. These norms do not directly implicate game developers, but rather govern the ways in which players engage with each other to protect the fruits of their labor, i.e., their gameplay streams. The Article contextualizes these ideas of fairness against the broader landscape of IP theory. And it considers the literature on extralegal norms of fairness to explain how these norms might prove useful in thinking through some of the problems that have long marred copyright law.

This extralegal realm carries implications for our understanding of the interplay between copyright law and ideas of fairness. The

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<sup>25</sup> See Imad Khan, *Why Twitch Is Still the King of Live Game Streaming*, N.Y. TIMES (Dec. 15, 2019), <https://www.nytimes.com/2019/12/15/business/tech-video-game-streaming-twitch.html> [<https://perma.cc/DCR5-T3H9>]. See generally T.L. TAYLOR, WATCH ME PLAY: TWITCH AND THE RISE OF GAME LIVE STREAMING (2018).

<sup>26</sup> See *infra* Section III.C.

Article makes three principal contributions to the literature. First, it develops a rich account of fairness norms in the gaming community. In doing so, it brings to the fore a unique extralegal domain that lurks in the shadows of the world's largest content industry. While an emerging body of literature has so far focused on isolated incidents of social norms operating in discrete, small-scale creative communities, this Article provides meaningful insights into the workings of the largest copyright microcosm in the world—the sprawling gaming community.

Second, this Article lends credence to the oft-invoked claim that copyright law is overbroad. I argue that norms of fairness can mitigate the risks associated with content creation so long as consumers regard as “fair” the content producer’s business model. Norms of fairness therefore counsel against strong IP protection: they minimize the need for strong legal interventions in areas where fairness—rather than the law—drives creativity. To be clear, I am not suggesting that copyright law is entirely redundant. Some measure of legal protection remains necessary to prevent wholesale copying by market competitors. Instead, this Article argues that, to better confront the realities of a fairness-driven world, we should pare back copyright’s scope and reach.

Third, the norms associated with live gaming streams call into question the veracity of the labor theory. According to John Locke’s theory of labor, creators are entitled to natural rights in their works because they had labored to create these works. But norms of fairness in the gaming community illustrate the difficulty of pinpointing what labor actually means in community-specific contexts. This Article ultimately concludes that, despite its salience in some quarters of the globe, the labor theory is ill-suited to shape or otherwise inform copyright law.

Finally, I should say a few words about the limits of this enterprise. The broader scholarship on video games has identified a rich panoply of social norms that suffuse the gaming world—from

“subcultures of geeks,”<sup>27</sup> to norms of video game modifications,<sup>28</sup> to norms of in-game creativity,<sup>29</sup> to the political norms that proliferate among gamers.<sup>30</sup> My inquiry expands upon this scholarship by shedding light on a unique species of norms—that is, norms linked to the regulation of business and content from an IP perspective. Far from offering an exhaustive account, this Article aims to jumpstart a conversation about the relationship between IP and video games more broadly.

I should also clarify that my use of the term “fairness” here is descriptive rather than philosophical. The concept of fairness is itself contested and starkly indeterminate.<sup>31</sup> My goal in this Article, therefore, is to chalk out an account of gamers’ *subjective* perceptions of fairness. I do not claim that these perceptions actually embody ideals of fairness. Nor am I adjudging these perceptions to be normatively desirable. My ambition is to develop a nuanced picture of these perceived notions of fairness in order to work out their broader implications for intellectual property. The norms detailed below—competitive integrity, wealth sharing, and labor—betray wildly divergent ideas of fairness. And so I do not advance a unified,

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<sup>27</sup> LULE, *supra* note 11, at 418 (describing subcultures of “geeks” who find refuge in the “imaginary worlds” of videos games).

<sup>28</sup> William W. Fisher, *The Implications for Law of User Innovation*, 94 MINN. L. REV. 1417, 1421–22 (2010) (observing that “purchasers of computer games routinely modify them”); Pamela Samuelson, *Freedom to Tinker*, 17 THEORETICAL INQUIRIES L. 563, 585 (2016) (discussing modifications to Nintendo video games); *see also* Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965 (9th Cir. 1992) (holding that the use of add-on software to modify the gameplay of Nintendo games does not infringe Nintendo’s rights).

<sup>29</sup> Much of the writing in this vein has focused on the video game *Minecraft*, where players engage with a digital world in which they use various 3D objects to shape their environment. *See, e.g.*, UNDERSTANDING MINECRAFT: ESSAYS ON PLAY, COMMUNITY AND POSSIBILITIES (Nate Garrelts ed., 2014); Maria Cipollone, Catherine C. Schifter, & Rick A. Moffat, *Minecraft as a Creative Tool: A Case Study*, 1 INT’L J. GAME-BASED LEARNING 1 (2014); Greg Lastowka, *Minecraft as Web 2.0: Amateur Creativity and Digital Games*, in 153 AMATEUR MEDIA: SOCIAL, CULTURAL AND LEGAL PERSPECTIVES (Dan Hunter et al. eds., 2012).

<sup>30</sup> *See Lawrence Lessig on What MMOs Can Teach Us About Real Life Politics*, SEED PROJECT, <https://www.seed-project.io/post/lawrence-lessig-on-what-mmos-can-teach-us-about-real-life-politics> [<https://perma.cc/SVF8-53AS>].

<sup>31</sup> *See* Stephanie Plamondon Bair, *Rational Faith: The Utility of Fairness in Copyright*, 97 B.U. L. REV. 1487, 1508–10 (2017) (discussing the concept of fairness as both a philosophical and subjective term, while noting the complexity that surrounds its application and theoretical elaboration).

overarching theory of fairness. I focus instead on describing with clarity the perceived ideas of fairness to which gamers subscribe. At the same time, I recognize that these ideas may fail to meet the threshold for a fully synthesized philosophical account of fairness.

The argument proceeds in four parts. Part I introduces some of the themes central to the resurgence of the video game industry, focusing on the industry's shift to a service-based, online business model. This review is necessarily cursory, but it provides important background for the broader argument. Part II then provides an overview of the literature on nonlegal copyright norms. Through the confluence of business strategy and copyright norms, Part III next explores extralegal gaming norms that circle around notions of fairness. Part IV considers the implications of this analysis for copyright law writ large. A brief conclusion follows.

## I. MODERN-DAY VIDEO GAMES

This Part maps recent developments in the video game industry, focusing on the evolution of video games in the digital age. Specifically, it suggests that the video game industry now relies on a service-based business model—one that is geared toward cultivating long-lasting, online communities of loyal players.

### A. *Digital Video Games*

The video game industry dates back to the 1970s, with the release of *Pong* by Atari in 1972.<sup>32</sup> Rapidly morphing into a multibillion-dollar industry, the world of video games has undergone two dramatic shifts in recent years. The first involves the transition to digital, online-driven games. The second concerns the shift from one-off transactions to a pricing model based on an ongoing service. And these shifts, in turn, have combined to produce two related

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<sup>32</sup> See Henmes, *supra* note 15, at 171 (noting that “the earliest games appeared in the 1970s”); Ford, *supra* note 15, at 1 (arguing that the video game industry first took shape in 1972); Christian Genetski & Christian Troncoso, *Copyright Industry Perspectives: The Pivotal Role of TPMS in the Evolution of the Video Game Industry*, 38 COLUM. J.L. & ARTS 359, 359 (2015) (“Although there is considerable debate about the industry’s precise birthdate, most point to the early- to mid-1970s as the point at which video games entered into the mainstream consciousness.”).

phenomena: the growth of gameplay streaming and the advent of competitive gaming. I will take up these issues in turn.

The first shift, from physical to digital, is emblematic of the world of content more broadly.<sup>33</sup> The music and television industries, for example, have both shifted to consumption models that are insulated from physical albums (in the music industry) and physical devices (in the television industry).<sup>34</sup> And the video game industry, too, has pivoted to a business model that is largely grounded in digital consumption.<sup>35</sup> While brick-and-mortar stores still offer physical copies of video games, these games increasingly offer a wide range of features that are uniquely accessible online.<sup>36</sup>

Think, for example, of popular video games such as *Mortal Kombat*, *Tekken*, and *Street Fighter*.<sup>37</sup> In the 1990s, these games were all exclusively playable on coin-operated arcade cabinets.<sup>38</sup>

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<sup>33</sup> Ido Kilovaty, *Freedom to Hack*, 80 OHIO ST. L.J. 455, 457 (2019) (discussing the technological shift from hardware to software and recognizing that “[p]hysical objects are being supplemented, and even replaced, by software”).

<sup>34</sup> Major changes in the way people consume television content have been attributed to the rise of Netflix. See Alex Haslam, *How Streaming Services Are Changing the Television Industry*, BESTTECHIE (Sept. 14, 2018), <https://www.besttechie.com/how-streaming-services-are-changing-the-television-industry/> [<https://perma.cc/JX86-8J6V>]; Lanre Bakare, *Netflix Has Forever Changed the Way We Consume Television*, THE GUARDIAN (July 21, 2018), [<https://perma.cc/6SXX-Q5FA>]. In the music industry, streaming accounted for roughly 75% of industry revenues in 2018. See Madison Bloom, *Streaming Made Up 75% of Music Industry Revenue in 2018*, PITCHFORK (Feb. 28, 2019), <https://www.riaa.com/wp-content/uploads/2019/02/RIAA-2018-Year-End-Music-Industry-Revenue-Report.pdf> [<https://perma.cc/4PJJ-KX2P>].

<sup>35</sup> Riordan Zentler, *Digital vs. Physical: How the Video Game Industry Learned from Microsoft’s Missteps*, THE SPOKESMAN REVIEW (Apr. 30, 2020), [<https://perma.cc/2ZQ3-KGSC>] (“For more than a decade, video games have been steadily shifting away from physical sales toward digital distribution, much the same as music and film.”); see also text accompanying *infra* notes 43–45.

<sup>36</sup> Zentler, *supra* note 35.

<sup>37</sup> These are the most popular fighting games in the world. See Brian Altano & Ryan Clements, *Street Fighter vs. Tekken vs. Mortal Kombat*, IGN (Sept. 24, 2012), <https://www.ign.com/articles/2012/09/24/street-fighter-vs-tekken-vs-mortal-kombat-by-the-numbers> [<https://perma.cc/6QWC-KPZE>].

<sup>38</sup> See Chin Osathanunkul, *A Classification of Business Models in Video Game Industry*, 17 INT’L J. MGMT. CASES 35, 40 (2015). Arcade machines typically require players to pay a small amount, often as little as a dime, for a single play. David Murphy, *Hacking Public Memory: Understanding the Multiple Arcade Machine Emulator*, 8 GAMING & CULTURE 43, 45 (2013). Charles Bernstein further reasons that arcade games are grounded in the

But even these games—that is, traditional offline games—have gravitated toward an online model where many of the games’ unique features are only accessible online. For example, consumers must be able to access online servers if they wish to get their hands on new cosmetic designs for existing characters in the game *Tekken*.<sup>39</sup> Put another way, even games that one might purchase at a physical retail store are still very much “online”—though anchored in a physical copy, they are nevertheless bound up with digital servers.

The shift toward digital games is perhaps best evidenced by the explosion of digital sales. Music has become increasingly digital,<sup>40</sup> as has the television industry.<sup>41</sup> The same is true of the publishing industry, where Amazon Kindle books have radically transformed the publishing marketplace.<sup>42</sup> But the pervasiveness of digital goods is most pronounced in the video game market; 80% of video game sales in the U.K., for example, stem from digital transactions.<sup>43</sup> And in the U.S. market, the share of digital sales has increased from 20% in 2009 to an astounding 83% in 2018.<sup>44</sup> Analysts similarly predict that by 2022 video games “will be 100% digital.”<sup>45</sup> The picture is

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economy of time, where better players get to play longer games. Arcade games were thus designed to get players “to part, and keep parting, with their quarters.” Charles Bernstein, *Play It Again, Pac-Man*, in *THE MEDIUM OF THE VIDEO GAME* 155, 157 (Mark J. Wolf & Bernard Perron eds., 1991).

<sup>39</sup> See, e.g., *Downloadable Content for Tekken 7*, STEAM, [https://store.steampowered.com/dlc/389730/TEKKEN\\_7/](https://store.steampowered.com/dlc/389730/TEKKEN_7/) [<https://perma.cc/WL88-TRZ6>] (listing different content packages that can be downloaded for the game *Tekken 7*).

<sup>40</sup> See Bloom, *supra* note 34.

<sup>41</sup> *Id.*

<sup>42</sup> Andrei Maxim & Alexandru Maxim, *The Role of E-Books in Reshaping the Publishing Industry*, 62 *PROCEDIA-SOC. & BEHAV. SCI.* 1046 (2012); PWC, *TURNING THE PAGE: THE FUTURE OF EBOOKS* (2010); David Pierce, *The Kindle Changed the Book Business. Can It Change Books?*, *WIRED* (Dec. 20, 2017), <https://www.wired.com/story/can-amazon-change-books/> [<https://perma.cc/9PPW-FJRQ>].

<sup>43</sup> Wesley Yin-Poole, *UK Video Game Sales Now 80% Digital*, *EUROGAMER* (Jan. 3, 2019), <https://www.eurogamer.net/articles/2019-01-03-uk-video-game-sales-now-80-percent-digital> [<https://perma.cc/742G-R9SU>].

<sup>44</sup> STATISTA RESEARCH DEPARTMENT, *BREAKDOWN OF U.S. COMPUTER AND VIDEO GAME SALES FROM 2009 TO 2017, BY DELIVERY FORMAT* (2019).

<sup>45</sup> Robin Burks, *Video Games Will Be 100% Digital by 2022 Says Analysts*, *GAME NEWS* (June 26, 2018), <https://screenrant.com/video-games-digital-revenue/> [<https://perma.cc/G2UW-QFVJ>]. Another report estimates that digital sales will account for 93% of the market by 2021. Chad Sapienza, *Digital Sales to Account for Nearly 93% of All Video Game*



clear: digital games have toppled physical-form games to claim dominion over the video game market.

### B. *Video Games as a Service*

The growing popularity of digital games has inspired a related shift from a lump-sum pricing model to a service-based pricing scheme. Broadly speaking, game publishers rely on three pricing models: (1) a lump sum (flat fee) model; (2) a subscription scheme; and (3) a free-to-play model.<sup>46</sup>

A lump sum model involves one-off transactions where the consumer purchases a copy of the game, either digital or physical, in exchange for a single, fixed payment.<sup>47</sup> By contrast, under a subscription model, consumers make monthly payments in exchange for ongoing access to the game. Subscription models are most prevalent in the context of multiplayer online games.<sup>48</sup> These are games in which multiple players engage with each other in a massive online world. To access these games, players must pay a monthly subscription fee.<sup>49</sup> And, unlike erstwhile games of the 1980s, multiplayer online games are meant to be played for years, not days or weeks.<sup>50</sup> Players establish “clans” or “guilds,” build communities, and foster long-lasting relationships.<sup>51</sup> The online world that animates these games is rich. It consistently evolves through “expansion packages”:

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*Sales by 2021: Report*, FIN. POST (June 29, 2017), <https://financialpost.com/technology/gaming/digital-sales-to-account-for-nearly-93-of-all-game-sales-by-2021-report> [<https://perma.cc/J6M7-KYE4>]. See also Robert Workman, *Digital Game Sales Reach All Time High During Black Friday Weekend*, COMICBOOK (Dec. 2, 2018), <https://comicbook.com/gaming/news/digital-game-sales-all-time-high-cyber-monday-black-friday/> [<https://perma.cc/X4GU-888T>]; Jessica Conditt, *Console Gaming is at a Crossroads*, ENGADGET (Apr. 19, 2019), [<https://perma.cc/7XZD-DL5Y>] (observing that 2013 was “the first year that digital video game sales overtook physical, claiming 54 percent of the market”).

<sup>46</sup> Kuehl, *supra* note 15, at 324–28.

<sup>47</sup> *Id.* at 324–25.

<sup>48</sup> *Id.* at 325.

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

<sup>50</sup> Stuart, *supra* note 7 (observing that “[t]he last five years have also seen the emergence of games designed to be played, not just for a few days, but for years”).

<sup>51</sup> Helena Cole & Mark D. Griffiths, *Social Interactions in Massively Multiplayer Online Role-Playing Gamers*, 10 CYBERPSYCHOLOGY & BEHAVIOR 575, 575 (2007) (finding that multiplayer games provide opportunities to form strong relationships, with “high percentages of gamers making life-long friends...”).

periodic updates that inject additional content (such as plotlines or characters) into the game's preexisting digital world, thus generating a constant stream of new content to keep consumers engaged over time.<sup>52</sup>

This subscription model mirrors the broader move toward service-oriented transactions. Indeed, digital contents are increasingly licensed to consumers in the guise of a service—an ongoing, long-term commercial relationship where consumers pay a monthly fee in exchange for a license to access information goods. Similar trends have emerged in the music industry, for example, where consumers pay monthly fees to access enormous content libraries offered by aggregators such as Apple Music or Spotify.<sup>53</sup>

Nonetheless, the service-oriented revolution of the digital era runs counter to the romantic vision of copyright law, which contemplates a standalone artist selling her work through one-off transactions.<sup>54</sup> The shift toward service-like transactions is troublesome from a consumer perspective. For one thing, consumers must rely on the content provider for continued access to the licensed content. Consumers might lose access to such content if, say, the content provider changes its business model, goes out of business, revokes the consumers' subscription, or is otherwise forced to remove certain contents from its library.<sup>55</sup> Indeed, in a number of recent high-profile

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<sup>52</sup> OSCAR CLARK, *GAMES AS A SERVICE: HOW FREE TO PLAY DESIGN CAN MAKE BETTER GAMES* 7 (2014) (pointing out that free-to-play games require “a commitment long after the release of the game to sustain it with new content, events, and features.”).

<sup>53</sup> Apple Music, for example, commands a catalogue of some 70 million songs—with a monthly subscription fee ranging from \$5 to \$15. See *Apple Music*, APPLE, <https://www.apple.com/apple-music/> [<https://perma.cc/N9PB-CN2R>].

<sup>54</sup> See Martin Kretschmer, *Digital Copyright: The End of an Era*, 25 EUR. INTEL. PROP. REV. 333 (2003); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship”*, 1991 DUKE L. J. 455 (1991); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the “Author”*, 17 EIGHTEEN CENTURY STUDIES 425 (1984).

<sup>55</sup> Consider, for example, Amazon's decision to remotely delete purchased copies of George Orwell's book *NINETEEN EIGHTY-FOUR* following a dispute with the publisher of Orwell's books. See, e.g., Brad Stone, *Amazon Erases Orwell Books from Kindle*, N.Y. TIMES (July 17, 2009), [https://www.nytimes.com/2009/07/18/technology/companies/18amazon.html?\\_r=0](https://www.nytimes.com/2009/07/18/technology/companies/18amazon.html?_r=0) [<https://perma.cc/QZZ3-5HLN>]; see generally AARON PERZANOWSKI & JASON SCHULTZ, *THE END OF OWNERSHIP: PERSONAL PROPERTY IN THE DIGITAL ECONOMY* (2016).

instances, video game developers have banned players for allegedly violating the terms of service.<sup>56</sup>

Service providers can similarly limit the ability of consumers to make full use of licensed contents. Although many consumers wish to download copies of the contents they consume,<sup>57</sup> service providers routinely cap the number of copies, if any, that consumers may retain.<sup>58</sup> And consumers are also restricted in their capacity to access content on third-party platforms. For example, while Apple allows consumers to download copies of Apple Music songs, these copies can only be accessed on Apple-approved platforms.<sup>59</sup>

To be sure, consumers often fail to discern the difference between ownership and licensing.<sup>60</sup> An oft-neglected reality of the digital age is that consumers rarely acquire title to the digital contents

<sup>56</sup> See Mallory Busch, *World of Warcraft Bans ‘A Large Number’ of Players*, TIME (May 15, 2015), <https://time.com/3860623/world-warcraft-ban/> [<https://perma.cc/RT7L-7SKQ>]; Robert N. Adams, *World Of Warcraft Bans Issued for Players Who Exploited Leveling Potions*, GAMEREVOLUTION (Mar. 22, 2019), <https://www.gamerevolution.com/news/514191-world-of-warcraft-bans-draught-of-ten-lands> [<https://perma.cc/N89N-74RS>]; Blog, *All Reasons for Which You Can Get Banned from WoW*, UNBANSTER (July 8, 2018), <https://unbanster.com/reasons-banned-from-wow/> [<https://perma.cc/QPD6-RTY7>] (reporting that revocations of accounts in *World of Warcraft* usually “come in waves”); Daniel Terdiman, *‘World of Warcraft’ Bans Raise Players’ Ire*, CNET (Mar. 22, 2007), <https://www.cnet.com/news/world-of-warcraft-bans-raise-players-ire/> [<https://perma.cc/MG8E-QLDR>]; Jon Fingas, *Epic Banned over 1,200 ‘Fortnite’ World Cup Players for Cheating*, ENGADGET (Apr. 20, 2019), <https://www.engadget.com/2019-04-20-epic-bans-1200-fortnite-world-cup-players.html> [<https://perma.cc/6KFB-VVUY>].

<sup>57</sup> Surveys show that consumers are particularly troubled by the prospect of being prevented from making private copies of various digital goods. NICOLE DUFFT ET AL., INDICARE, DIGITAL VIDEO USAGE AND DRM, RESULTS FROM A EUROPEAN CONSUMER SURVEY 26–28 (2006).

<sup>58</sup> Netflix, for example, limits the number of copies that consumers may download. *Downloading TV Shows and Movies on Netflix—Help Center*, NETFLIX, <https://help.netflix.com/en/node/54816> [<https://perma.cc/J9VZ-PG8Y>].

<sup>59</sup> *How to Play Apple Music on Windows Media Player*, M4VGEAR, [<https://perma.cc/DL84-K3GA>] (explaining that Apple Music songs are in M4P format with Apple FairPlay DRM protection, which restricts one from playing Apple Music on common media players, such as Windows Media Player, Plex, and VLC Media Player).

<sup>60</sup> See generally Aaron Perzanowski & Chris Jay Hoofnagle, *What We Buy when We Buy Now*, 165 U. PA. L. REV. 315 (2017). Perzanowski and Hoofnagle suggest that consumers are oblivious to the significance of the distinction between licensing and ownership. This misconception is reinforced by sellers like Amazon that employ “Buy Now” banners to mislead consumers into thinking they are purchasing digital goods, despite the fact that they are merely obtaining a limited license to access these goods.

they consume. Instead, they obtain a limited license to access such contents. One example is Amazon's Kindle service. Consumers are largely unaware that by "purchasing" books via Kindle they are merely obtaining a revocable license to access these books.<sup>61</sup> A licensing regime of this sort confers on consumers only a limited array of rights, subject to various limitations. For instance, consumers are often contractually prevented from reselling, lending or otherwise transferring contents they had licensed.<sup>62</sup> And, of course, consumers also face the risk of losing access to such contents if, say, the content provider revokes their license or is forced to remove certain contents from its library.<sup>63</sup>

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<sup>61</sup> Suw Charman-Anderson, *Amazon Ebooks Are Borrowed, Not Bought*, FORBES (Oct. 23, 2012), <https://www.forbes.com/sites/suwcharmananderson/2012/10/23/amazon-ebooks-are-borrowed-not-bought/> [<https://perma.cc/8JXT-C8LP>]; Joel Johnson, *You Don't Own Your Kindle Books, Amazon Reminds Customer*, NBC NEWS (Oct. 24, 2012), <https://www.nbcnews.com/technology/you-dont-own-your-kindle-books-amazon-reminds-customer-1C6626211> [<https://perma.cc/SS9B-ALPK>]; Michael Hiltzik, *E-Book Restrictions Leave 'Buyers' With Few Rights*, L.A. TIMES (Dec. 22, 2012), <https://www.latimes.com/business/la-xpm-2012-dec-22-la-fi-hiltzik-20121223-story.html> [<https://perma.cc/BU9X-5HD8>].

<sup>62</sup> Copyright law entitles consumers to resell copies of protected works without permission from the copyright owner. 17 U.S.C. § 109(a). This entitlement arises under the longstanding first sale doctrine, grounded in the principle that the owner's rights are exhausted upon the first sale of a copy, thus allowing subsequent consumers to transfer copies as they see fit. Nonetheless, the first sale doctrine does not apply to consumers of the sort described above. Rights provided under Section 109 of the Copyright Act specifically attach to "the owner of a particular copy." Licensees are therefore excluded from the reach of Section 109. See generally Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. REV. 889, 901–07 (2011) (discussing the marginalization of copyright exhaustion in the age of digital distribution). Consistent with principles of copyright exhaustion, Section 117 of the Copyright Act similarly authorizes consumers who *own* copies of software programs to make adaptations of that software. 17 U.S.C. § 117(a). In this context, too, licensees are barred from making adaptations according to the language of Section 117.

<sup>63</sup> Another troubling case is that of Linn Nygaard, an IT consultant from Norway who woke up one day to find that her entire Amazon Kindle library had been wiped clean. Citing "abuse of [] policies," Amazon informed Nygaard that her account had been revoked. An avid Kindle consumer, Nygaard was understandably distraught; she received no prior warning and was never given a reason for the revocation of her account. Her entire library, encompassing dozens of books, inexplicably evaporated overnight. See, e.g., Michelle Jaworski, *Amazon Restores Kindle User's Mysteriously-Deleted Account, Still No Explanation*, THE DAILY DOT (Oct. 23, 2012), <https://www.dailydot.com/news/amazon-linn-nygaard-deleted-account-restored/> [<https://perma.cc/65GA-AQKM>].

This discussion homes in on two pricing models: lump-sum and subscription models. And yet these models have been gradually displaced by a third pricing scheme: free-to-play games. A case in point is Blizzard's *World of Warcraft* (WoW).<sup>64</sup> At its zenith, WoW was the most popular subscription-based video game in the world, with a consumer base of ten million active players and 100 million registered accounts in 2009.<sup>65</sup> By 2017, the game banked just shy of ten billion dollars, making it the most successful video game franchise of all time.<sup>66</sup> In recent years, however, WoW's popularity has been dwindling. Analysts predict that the number of WoW subscribers will fall to 4.5 million players by 2023.<sup>67</sup> And WoW's demise is attributable to a larger trend: subscription models are largely ceding ground to free-to-play games.

Free-to-play games, also known as "freemium" games,<sup>68</sup> have grown immensely popular in recent years. These games typically span multiple ecosystems<sup>69</sup> and can be downloaded and accessed online.<sup>70</sup> Freemium games are particularly abundant on

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<sup>64</sup> See Hilde G. Corneliussen & Jill Walker Rettberg, *Introduction*, in *DIGITAL CULTURE, PLAY, AND IDENTITY: A WORLD OF WARCRRAFT READER* 1, 5 (Hilde Corneliussen & Jill Walker Rettberg eds., 2008).

<sup>65</sup> Samit Sarkar, *Blizzard Reaches 100M Lifetime World of Warcraft Accounts*, POLYGON (Jan. 28, 2014), <https://www.polygon.com/2014/1/28/5354856/world-of-warcraft-100m-accounts-lifetime> [<https://perma.cc/C69C-6Z4T>].

<sup>66</sup> Jonathan Leack, *World of Warcraft Leads Industry with Nearly \$10 Billion In Revenue*, GAMEREVOLUTION (Jan. 26, 2017), <https://www.gamerevolution.com/features/13510-world-of-warcraft-leads-industry-with-nearly-10-billion-in-revenue> [<https://perma.cc/NB4M-G5HF#/slide/1>].

<sup>67</sup> See Statista Research Department, *Number of World of Warcraft (WoW) Subscribers from 2015 to 2023 (In Millions)*, STATISTA (Dec. 2, 2016), <https://www.statista.com/statistics/276601/number-of-world-of-warcraft-subscribers-by-quarter/> [<https://perma.cc/YF9L-QNLA>].

<sup>68</sup> Elizabeth Evans, *The Economics of Free: Freemium Games, Branding and the Impatience Economy*, 22 *CONVERGENCE: THE INT'L J. OF RSCH. INTO NEW MEDIA TECHS.* 563 (2015).

<sup>69</sup> Whitson Gordon, *PlayStation or Xbox: Which Game Console Should You Gift?*, NBC NEWS (Oct. 28, 2020, 11:40 AM), <https://www.nbcnews.com/shopping/tech-gadgets/new-ps5-xbox-series-x-n1245059> [<https://perma.cc/XH7X-MPBS>] (noting that, although some games are available exclusively on specific platforms, "most video games come out for both PlayStation and Xbox (as well as desktop PCs)...").

<sup>70</sup> See Eva-Maria Scholz, *Business Models for Digital Goods: Video Games (Free-To-Play Games)*, IPDIGIT (Mar. 18, 2015), <http://www.ipdigit.eu/2015/03/business-models-for-digital-goods-video-games-free-to-play-games/> [<https://perma.cc/6SR9-BTFU>].

smartphones, with *Candy Crush Saga* being the most prominent example.<sup>71</sup> And while these games are technically free, they generate revenue through premium (optional) in-game purchases, often labeled microtransactions.<sup>72</sup> Tellingly, in-game purchases are far more lucrative, on balance, than pre-paid games. In-app purchases “generated ten times more revenue than advertising for games and substantially more than pre-paid games.”<sup>73</sup>

The costs of developing a top-tier video game are comparable to those of producing a feature film<sup>74</sup> and so developers have traditionally resisted the idea of giving away content for free. But that may be changing. In fact, recent freemium games have proven staggeringly profitable. Games like *Fortnite* and *Apex Legends*, the two largest free-to-play games in the world as of 2019, have remained firmly atop the sales charts for months.<sup>75</sup>

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<sup>71</sup> Dean Takahashi, *Candy Crush Saga: 2.73 Billion Downloads in Five Years and Still Counting*, VENTURE BEAT (Nov. 17, 2017, 9:15 AM), <https://venturebeat.com/2017/11/17/candy-crush-saga-2-73-billion-downloads-in-five-years-and-still-counting/> [<https://perma.cc/9SP2-BKAY>]; Matt Kamen, *Five Years On, How Does Candy Crush Keep on Crushing It?*, WIRED (Nov. 14, 2017), <https://www.wired.co.uk/article/king-candy-crush-anniversary> [<https://perma.cc/KHB6-7GCX>]; Stuart Dredge, *Why is Candy Crush Saga So Popular?*, THE GUARDIAN (Mar. 26, 2014), <https://www.theguardian.com/technology/2014/mar/26/candy-crush-saga-king-why-popular> [<https://perma.cc/6DTT-2DS6>].

<sup>72</sup> Nenad Zoran Tomić, *Economic Model of Microtransactions in Video Games*, 1 J. ECON. SCI. RSCH. 17, 18 (2019) (“In gaming terminology, games that are basically obtained free are called free-to-play games, or freemium games, and all purchases that are subsequently performed are called microtransactions.”).

<sup>73</sup> Kuehl, *supra* note 15, at 327 (citing Alexandra McDonald, Jason McDonell, & Caroline Mitchell, *Mobile Apps: Redefining the Virtual California Economy and the Laws That Govern It*, 24 COMPETITION: J. ANTI. & UNFAIR COMP. L. SEC. ST. B. CAL. 86, 88 (2015)).

<sup>74</sup> See, e.g., Luke Villapaz, *‘GTA 5’ Costs \$265 Million to Develop and Market, Making It the Most Expensive Video Game Ever Produced: Report*, INT’L BUS. TIMES (Sept. 8, 2013), <https://www.ibtimes.com/gta-5-costs-265-million-develop-market-making-it-most-expensive-video-game-ever-produced-report> [<https://perma.cc/NAW3-BT4Y>].

<sup>75</sup> Phil Hornshaw, *Fortnite vs. Apex Legends: Comparing Two Titans of Battle Royale*, GAMESPOT (Apr. 5, 2019, 4:49 PM), <https://www.gamespot.com/gallery/fortnite-vs-apex-legends-comparing-two-titans-of-b/2900-2569/> [<https://perma.cc/5V5N-V9PA>] (reporting that while *Fortnite* is still the most popular free-to-play game, *Apex Legends* is quickly catching up and has drawn 50 million players in its first month).

Framed in economic terms, in-game purchases are profitable because they are not salient. The net effect is that consumers tend to believe that free-to-play games cost less than what they actually do.<sup>76</sup> Consumers hence fail to fully account for the costs of in-game microtransactions. Behavioral economists have long recognized that consumers are beset by a battery of systemic failures, most notably myopia and over-optimism.<sup>77</sup> Sellers respond to these shortcomings by (a) crafting extraordinarily complex contracts, and (b) relying on deferred cost schemes.<sup>78</sup> Complex contracts offer multidimensional benefits and charge multidimensional prices. Credit card contracts, for example, are markedly complex: they offer annual fees, basic interest rates, default interest rates, late fees, cash-advance fees, convenience and service fees, and so forth.<sup>79</sup> By offering multidimensional prices, credit card issuers make it nigh impossible for consumers to accurately assess the costs of engaging in the transaction.<sup>80</sup> And so consumers are only able to ascertain salient price dimensions—usually, the low “teaser” rates—while overlooking other price dimensions. These low introductory (up-front) teaser rates serve to obscure higher rates that are typically tucked into the backend of the contract. The upshot is that consumers take note of

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<sup>76</sup> See Kuehl, *supra* note 15, at 327 (“What makes in-app purchases interesting is that many consumers believe the game costs less than in normal circumstances even though it is actually more expensive.”).

<sup>77</sup> Oren Bar-Gill & Ryan Bubb, *Credit Card Pricing: The Card Act and Beyond*, 97 CORNELL L. REV. 967, 975–77 (2012) (discussing myopia and optimism as cognitive biases that limit consumers’ capacity to observe future costs).

<sup>78</sup> OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS 6–10, 17–23 (2012) (suggesting that sellers draft contracts in response to consumers’ systemic cognitive biases).

<sup>79</sup> Bar-Gill & Bubb, *supra* note 77.

<sup>80</sup> *Id.* at 1005–07. As Bar-Gill and Bubb observe:

[t]he behavioral theory posits that issuers offer teaser interest rates to lower the perceived price of a given contract. Teaser rates lower the perceived price to consumers because many of them are optimistic about their ability to pay off an accumulated balance at the expiration of the introductory period and consequently underestimate the probability that they will continue to carry a positive balance after the introductory period expires.

*Id.* at 1006. See also BAR-GILL, *supra* note 78, at 18–21 (recognizing that “[s]ellers design contracts in response to systematic biases and misperceptions of imperfectly rational consumers. In particular, they reduce the total price, as perceived by consumers, by decreasing salient prices and increasing non-salient prices.”).

the former (salient teaser rates) while glossing over the latter (non-salient backend costs).

At the same time, consumers also tend to systemically underestimate the probability that future, seemingly far-removed costs would apply to them. In the credit card example, consumers are likely to assume, often despite evidence to the contrary, that they wouldn't incur late fees. Because consumers are overoptimistic and myopic, they are prone to misjudge the likelihood that contingent, deferred costs would befall them. And they tend to discount the probability of incurring future costs or triggering contingent penalties. These systemic shortcomings limit consumers' capacity to assess the costs arising out of a given transaction, and sellers respond by making it harder still to understand the overly complex contracts that govern these transactions. Sellers do so, in part, through the use of a multilayered pricing scheme.

The use of microtransactions falls squarely within this behavioral framework. Though free-to-play games are technically free, they offer optional features—typically, cosmetic enhancements—that consumers can purchase with in-game currency. There are two ways to obtain in-game currency: players can either buy it or instead play the game and earn in-game currency by completing in-game challenges. But, as a practical matter, the possibility of earning in-game currency through actual gameplay is elusive. Players often have to spend months playing the game to earn only a negligible amount of in-game currency.<sup>81</sup> The process is slow and frustrating, and many players ultimately prefer to simply purchase in-game currency. Elizabeth Evans has argued that developers are leveraging “the economics of impatience,”<sup>82</sup> taking advantage of players' impatience by offering them a shortcut—players can simply purchase

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<sup>81</sup> See Prateek Agarwal, *Economics of Microtransactions in Video Games*, INTELLIGENT ECONOMIST (Nov. 19, 2017), <https://www.intelligenteconomist.com/microtransactions/> [<https://perma.cc/U9F4-YPNW>] (noting that game developers make in-game rewards particularly hard to collect, primarily because these games are ultimately designed “for people to spend money”).

<sup>82</sup> Evans, *supra* note 68, at 576–77. See also MIA CONSALVO, CHEATING: GAINING ADVANTAGE IN VIDEOGAMES 162 (2007) (“For many players, there isn't enough time in their schedules to play as much as they'd like, or they are in a hurry to acquire items or skill levels as soon as possible—sooner than normal gameplay allows.”).



in-game currency, thus sidestepping the arduous process associated with earning currency through lengthy gameplay.

This dynamic is fueled by consumer psychology. Microtransactions are not salient to consumers. Indeed, while the up-front price of a video game is salient, down-the-line microtransactions are not. People fail to fully consider future microtransactions when they make the decision to download the game and start playing it. And even when future costs do figure into this initial calculus, consumers tend to underestimate how often they would actually make in-game purchases over an extended period of time. And the fact that players can technically earn in-game currency by simply playing the game is likely to further compound this problem by creating the initial impression that microtransactions can be avoided altogether. Further, microtransactions typically take the form of small increments, with each transaction averaging only a few dollars.<sup>83</sup> This again clouds the aggregate costs associated with microtransactions in the long run. People are myopic and are thus unlikely to accurately assess the aggregate amount of money they will spend on in-game purchases over an extended period of time.

Finally, as discussed before, game developers deploy a system of in-game currency to further mask the true costs of acquiring in-game goods.<sup>84</sup> Consumers are less likely to appreciate how much money they are actually spending when they feel as if they are spending digital, rather than real, money.<sup>85</sup> The conversion rate between real-world and in-game currency also fluctuates frequently, depending on various “seasonal deals” offered to consumers.<sup>86</sup> The

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<sup>83</sup> Tomić, *supra* note 72, at 18 (“[M]ost of the applications for mobile operating systems are sold at a price that falls under the category of micropayment—usually only a few dollars.”).

<sup>84</sup> Vanshika Dhyani, *The Psychology of Freemium Games*, UX PLANET (June 8, 2020), <https://uxplanet.org/the-psychology-of-freemium-games-69024d80273b> [<https://perma.cc/K3MZ-595K>].

<sup>85</sup> *Id.* (observing that “games use a virtual equivalent of real money (coins, gems, hearts, etc.) to create a psychological barrier between virtual spending and real currency spent”).

<sup>86</sup> Geoffrey Goetz, *Why Free-To-Play App Pricing is So Effective, and What You Can Do About It*, GIGAOM (Aug. 24, 2013), <https://gigaom.com/2013/08/24/why-free-to-play-app-pricing-is-so-effective-and-what-you-can-do-about-it> [<https://perma.cc/J65J-HUGT>].

use of multiple conversion rates between real-world money and in-game currency serves to foster the illusion of getting a better deal.<sup>87</sup>

In sum, free-to-play games are attractive to consumers because their salient price appears to be low—much lower than it actually is. They generate revenues, therefore, through their nonsalient price dimensions, namely in-game microtransactions.

A note on the scope of the preceding analysis. First, this inquiry is merely explanatory. I do not mean to suggest that free-to-play games are normatively undesirable. While freemium games differ meaningfully from pre-paid games, a full exploration of their merits is beyond the scope of this Article. It's also important to note that, ultimately, players seem to derive a great deal of utility from the premium digital contents they acquire. One recent study found that 78% of those who had spent \$50 or more on in-game purchases felt like they had received “their money's worth” and were generally pleased with their experience.<sup>88</sup> Second, although I certainly find this behavioral account persuasive, I argue that other factors are also at play. As I suggest below, ideas of fairness are equally important when considering the commercial success of free-to-play games and the viability of the business strategy that underlies them.

Third, as this discussion illustrates, free-to-play games constitute an ongoing service. In the case of free-to-play games, the relationship between consumers and video game makers is ongoing: to fully access all of the game's features, including any additional “premium” cosmetic designs, players must buy into the provider's service by constantly making in-game purchases. Video game creators, for their part, also view these games as part of a long-term service, and work to regularly release new (premium) digital contents that would keep consumers engaged for a sustained period of time. The critiques levelled against subscription models therefore apply with equal force to free-to-play games. In particular, players must

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<sup>87</sup> *Id.*

<sup>88</sup> Matthew Diener, *Exclusive: 78% of Mobile Gamers Spending \$50+ on IAP Say They've Received 'Their Money's Worth'*, POCKET GAMER (Aug. 19, 2013, 6:30 PM), <https://www.pocketgamer.biz/news/53063/exclusive-78-of-mobile-gamers-spending-50-on-iap-say-theyve-received-their-moneys-worth/> [<https://perma.cc/NF2C-QB4K>].

shoulder the potential risk of losing access to the game, say, when they allegedly violate its terms of service.

Fourth, this discussion is somewhat perfunctory. It does not consider alternative revenue streams for game makers. Indeed, some developers collect and sell data about consumer habits,<sup>89</sup> while others rely on advertisements.<sup>90</sup> Moreover, my analysis does not engage with the concerns that attend the exploitative nature of in-app purchases in games marketed at children.<sup>91</sup> Finally, this discussion does not account for the differences between games played on mobile phones and those played on other platforms;<sup>92</sup> rather, it focuses on the most conspicuous aspects shared by both.

### C. *Pro Gaming and Gameplay Streaming*

Equipped with an understanding of the industry's prevailing pricing structure, we can now explore two related phenomena: competitive gaming and gameplay streams.

Competitive gaming is an ascendant trend. Competitive gamers, often called “professional gamers,” are video game players who regularly participate in gaming tournaments.<sup>93</sup> They compete for professional prestige, intra-community recognition, and money: gaming tournaments offer hefty monetary prize pools, sometimes to the

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<sup>89</sup> McDonald, McDonell, & Mitchell, *supra* note 73, at 88 (“Apps can access a mobile-device-user’s contacts, text messages, photos and videos, credit card information, and even facial features. They can then combine user data with the mobile device’s unique ID, wireless signals, and geolocation history to create a down-to-the-minute profile of any user, whether or not an app is open or in use.”).

<sup>90</sup> *Id.* at 87.

<sup>91</sup> A number of class actions have been brought against Apple and Google for promoting games that facilitate in-game purchases by minors. *See, e.g.*, *In re Apple In-App Purchase Litig.*, 855 F. Supp. 2d 1030 (N.D. Cal. 2012); *Imber-Gluck v. Google, Inc.*, No. 5:14-01070-RMW, 2014 U.S. Dist. LEXIS 98899 (N.D. Cal. July 21, 2014). Both cases are referenced in McDonald, McDonell, & Mitchell, *supra* note 73.

<sup>92</sup> *See* Anna Tobin, *Is Mobile Phone Gaming Taking Over From Console Gaming?*, FORBES (Oct. 11, 2018, 6:41 AM), [<https://perma.cc/HY8E-EABA>] (observing that a number of factors—including ease of use, lower prices, and interoperability—have contributed to the popularity of mobile games as compared to traditional video games).

<sup>93</sup> Juho Hamari & Max Sjöblom, *What Is Esports and Why Do People Watch It?*, 27 INTERNET RSCH. 211, 211 (2017).

tune of millions of dollars.<sup>94</sup> Many tournaments are held at massive convention centers that accommodate a diverse crowd of players, game developers, and spectators.<sup>95</sup> Tournaments are frequently promoted as part of a professional “tour” or “series,” where players can win ranking points and qualify for the tour finals. The 2019 *Fortnite* tour finals, for example, boasted a stunning prize pool of \$100 million.<sup>96</sup> In the past few years, gaming tournaments have been streamed regularly on YouTube and Twitch, and occasionally aired on ESPN.<sup>97</sup> These tournaments have attracted millions of viewers.<sup>98</sup> At times, gaming tournaments have overshadowed some of the biggest sporting events in the world, such as the NCAA finals.<sup>99</sup>

The analogy between competitive gaming and professional sports strikes a familiar chord. Competitive gaming has long been stylized as a form of “eSports,” or electronic sports. Juho Hamari and Max Sjöblom define eSports as “a form of sports where the primary aspects of the sport are facilitated by electronic systems.”<sup>100</sup> Michael Wagner marshals a more substantive definition that turns on the unique skills that competitive players possess. He defines eSports as “an area of sport activities in which people develop and train mental or physical abilities in the use of information and communication technologies.”<sup>101</sup>

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<sup>94</sup> Sam Nordmark & Jerome Heath, *The Top 10 Highest Prize Pools in Esports*, DOT ESPORTS (Jan. 18, 2021), <https://dotesports.com/general/news/biggest-prize-pools-esports-14605> [<https://perma.cc/JX6Y-SR9P>].

<sup>95</sup> See David Bloom, *Esports Stadiums Are Popping Up Everywhere*, FORBES (May 31, 2019), <https://www.forbes.com/sites/dbloom/2019/05/31/esports-stadiums-are-popping-up-everywhere/?sh=305a38f92521> [<https://perma.cc/YA7K-W4Q8>].

<sup>96</sup> Jordan Crook, *Fortnite Goes Big on Esports for 2019 with 100 Million Prize Pool*, TECHCRUNCH (Feb. 22, 2019), <https://techcrunch.com/2019/02/22/fortnite-goes-big-on-esports-for-2019-with-100-million-prize-pool/> [<https://perma.cc/C8JX-UXP6>].

<sup>97</sup> Steven Impey, *Most-Watched Esports Events Record 190.1m Streaming Hours*, SPORTSPRO (Dec. 7, 2018), <https://www.sportspromedia.com/news/esports-tournaments-record-live-streaming-hours> [<https://perma.cc/57Y4-HZL6>].

<sup>98</sup> See *id.*

<sup>99</sup> Jennifer Booton, *27 Million Watched This Video Game Tournament—Matching NCAA Final Audience*, MARKET WATCH (July 29, 2015), <https://www.marketwatch.com/story/a-new-sports-industry-is-blossoming-online-and-its-already-worth-billions-2015-05-29> [<https://perma.cc/PND3-S2DS>].

<sup>100</sup> Hamari & Sjöblom, *supra* note 93, at 211.

<sup>101</sup> Michael G. Wagner, *On the Scientific Relevance of Esports*, INT’L CONF. ON INTERNET COMPUTING 437, 440 (2006).

What motivates gamers to become competitive players? Jo Bryce and Jason Rutter claim that the upsurge in competitive gaming springs from the social qualities of gaming. They observe that, “[i]f public gaming events were only about gaming,” we would see “a diminishment of [public gaming] events” following the rise of online games.<sup>102</sup> Donghun Lee and Linda Schoenstedt contend that competitive drive is one of the principal motives that galvanize people to engage in eSports gaming.<sup>103</sup> For eSports gamers, they explain, “it is important...to be better than others, to win over others, and to be faster and more skilled in their game experience.”<sup>104</sup> Other commentators have likened competitive gamers to chess players, suggesting that professional gamers need to “demonstrate persistence, discipline, and intelligence; perform with extraordinary competence under intense pressure and scrutiny; work cooperatively with fellow workers or teammates; and achieve a high level of financial success.”<sup>105</sup>

But competitive gaming is not just about competition. It’s also about the social experience that results from interactions between fellow gamers. “Part of the attraction of public gaming events,”<sup>106</sup> Bryce and Rutter note, “is not just to be challenged and compete but to be seen to do so.”<sup>107</sup> Indeed, it is about the underlying impulse to “make eye contact with other members of the gaming community.”<sup>108</sup> Relatedly, some commentators have tried to understand why people watch competitive gaming. Hamari and Sjöblom, for example, point to a number of factors that play a role in stimulating eSports viewership.<sup>109</sup> They claim that escapism, the urge to acquire

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<sup>102</sup> See Jo Bryce & Jason Rutter, *In the Game— In the Flow: Presence in Public Computer Gaming* (2001) (unpublished manuscript), available at [<https://perma.cc/7NDD-QRVV>].

<sup>103</sup> Donghun Lee & Linda J. Schoenstedt, *Comparison of eSports and Traditional Sports Consumption Motives*, 6 ICHPER-SD J. RSCH. 39 (2011).

<sup>104</sup> *Id.*

<sup>105</sup> Kyle Faust et al., *Competitive and Professional Gaming: Discussing Potential Benefits of Scientific Study*, 3 INT’L J. CYBER BEHAV. PSYCH. & LEARNING 67, 67 (2013).

<sup>106</sup> Bryce & Rutter, *supra* note 102.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Hamari & Sjöblom, *supra* note 93, at 214–17.

knowledge about the games being played, novelty, and athlete aggressiveness all have a positive impact on eSports viewership.<sup>110</sup>

The emergence of competitive gaming has occasioned yet another related phenomenon: live gameplay streaming. Gameplay streams are live (real-time) videos of people playing video games.<sup>111</sup> These streams are typically run by the players themselves; in fact, players can stream directly from a variety of gaming consoles (such as PlayStation or Xbox) without access to an actual computer.<sup>112</sup> The most popular platforms for live gaming streams are Twitch.tv and YouTube.<sup>113</sup> The former, a subsidiary of Amazon,<sup>114</sup> is the more popular of the two.<sup>115</sup> Introduced in 2011, Twitch grew into a massive streaming behemoth almost instantaneously.<sup>116</sup> The website was the fourth largest source of peak Internet traffic in the United States in 2014, ahead of such industry giants as Facebook and Hulu.<sup>117</sup> Millions of people stream on Twitch monthly, and millions more watch these streams. With an average of 6.9 million monthly streamers and almost 2.1 million concurrent viewers at any given

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<sup>110</sup> *Id.* at 211.

<sup>111</sup> Keith Stuart, *Fights, Camera, Action: The Beginner's Guide to Streaming Video Games*, THE GUARDIAN (Aug. 17, 2020), <https://www.theguardian.com/games/2020/aug/17/beginners-guide-to-streaming-video-games> [<https://perma.cc/G5Y5-RMBL>] (“Streaming a game means broadcasting yourself via the internet while you play, so that other people can watch you on their computer, phone or games console.”).

<sup>112</sup> *Id.*

<sup>113</sup> Jurre Pannekeet, *More People Are Streaming on Twitch, but YouTube Is the Platform of Choice for Mobile-Game Streamers*, NEWZOO (Feb. 14, 2019), <https://newzoo.com/insights/articles/more-people-are-streaming-on-twitch-but-youtube-is-the-platform-of-choice-for-mobile-game-streamers/> [<https://perma.cc/LB4L-6JB6>].

<sup>114</sup> See Eugene Kim, *Amazon Buys Twitch for \$970 Million in Cash*, BUS. INSIDER (Aug. 25, 2014), <https://www.businessinsider.com/amazon-buys-twitch-2014-8> [<https://perma.cc/G8N2-3U5K>].

<sup>115</sup> Steve Boxer, *Youtube Live Makes Inroads into Twitch's Streaming Domination*, GREEN MAN GAMING (Apr. 23, 2019), [<https://perma.cc/TN64-N7RX>].

<sup>116</sup> David Hoppe, *The Rise and Importance of Twitch in Esports*, GAMMA LAW (June 9, 2018), [https://gammalaw.com/the\\_rise\\_and\\_importance\\_of\\_twitch\\_in\\_esports/](https://gammalaw.com/the_rise_and_importance_of_twitch_in_esports/) [<https://perma.cc/62SD-46N7>].

<sup>117</sup> Emanuel Maiberg, *Twitch Ranked 4th in Peak Internet Traffic, Ahead of Valve, Facebook, Hulu*, GAMESPOT (Feb. 9, 2014, 2:34 PM), <https://www.gamespot.com/articles/twitch-ranked-4th-in-peak-internet-traffic-ahead-of-valve-facebook-hulu/1100-6417621/> [<https://perma.cc/E37G-AABM>].

moment,<sup>118</sup> Twitch is one of the most widely watched platforms in the world, surpassing most television networks.

Twitch allows players to launch their own streaming channels. Viewers can subscribe to these channels by paying a modest monthly fee.<sup>119</sup> This enables subscribers to obtain access to a range of customized emojis, called “emotes.”<sup>120</sup> Each channel features an active chat session, a “stream chat,” where casual viewers, followers, and subscribers can interact.<sup>121</sup> The stream chat typically inhabits a rectangular pane that stretches across the right side of the screen. These channels—and their stream chats—are home to diverse subcommunities that bind together members of various gaming communities. As I explain in greater detail below, Twitch effectively serves as a global locus for vibrant gaming communities.

To illustrate, consider the Twitch channel run by notable *Fortnite* streamer Tyler Blevins, most commonly known by his online alias “Ninja.”<sup>122</sup> Having launched his Twitch channel in 2009, Blevins initially streamed various multiplayer online games before switching over to *Fortnite* shortly after the game’s launch in 2017.<sup>123</sup> His popularity quickly soared. As of June 2019, he is the most widely followed streamer on Twitch, with over fourteen million followers.<sup>124</sup> He streams daily, typically for stretches of up to

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<sup>118</sup> *Twitch Statistics & Charts*, TWITCH TRACKER, <https://twitchtracker.com/statistics> [<https://perma.cc/UXK6-BDLL>].

<sup>119</sup> Brad Stephenson, *Twitch Subscriptions: How They Work*, LIFEWIRE (Sept. 11, 2020), <https://www.lifewire.com/twitch-subscriptions-4147319> [<https://perma.cc/VEL9-7WBS>].

<sup>120</sup> See Preston Byers and Gökhan Çakır, *A Guide to the Most Popular Twitch Emotes*, DOT ESPORTS (Mar. 29, 2020), <https://dotesports.com/culture/news/twitch-emotes-meaning-guide-23140> [<https://perma.cc/4L93-Q8HK>].

<sup>121</sup> Sarah Perez, *Twitch Launches Always-On Chat Rooms for Channels*, TECH CRUNCH (Feb. 15, 2018), <https://techcrunch.com/2018/02/15/twitch-launches-always-on-chat-rooms-for-channels/> [<https://perma.cc/6S67-9A2L>].

<sup>122</sup> Natalie Jarvey, *Superstar Gamer Tyler “Ninja” Blevins Sets a Course for Hollywood*, HOLLYWOOD REP. (July 31, 2020), [<https://perma.cc/6TFU-2R7E>].

<sup>123</sup> Timothy J. Seppala, *‘Fortnite’ Streamer Ninja Is the First to 10 Million Twitch Followers*, ENGADGET (Aug. 3, 2018), <https://www.engadget.com/2018-08-03-ninja-10-million-twitch-followers.html> [<https://perma.cc/R57Z-TLVE>].

<sup>124</sup> Kevin Webb, *Ninja Wants to Be More Than Just ‘The Fortnite Guy,’ But the World’s Most Popular Gamer is Headed into Uncharted Territory*, BUS. INSIDER (June 2, 2019), <https://www.businessinsider.com/ninja-fortnite-guy-pro-gamers-streamers-2019-5> [<https://perma.cc/R66K-WA9W>].

twelve hours at a time.<sup>125</sup> Seizing on the popularity of *Fortnite*, Blevins has become something of an Internet sensation and was the first eSports player featured on *ESPN The Magazine*.<sup>126</sup> Blevins also maintains a YouTube channel where he uploads daily “highlights” videos extracted from his Twitch streams.<sup>127</sup> His YouTube channel, following in the wake of his successful Twitch channel, is steadily expanding and has already amassed twenty-two million subscribers<sup>128</sup> and almost two billion views to date.<sup>129</sup>

Blevins’ story is one of perseverance and success. And it is also the story of a powerful cultural phenomenon: people love watching gameplay streams, and do so en masse. Gameplay streamers like Blevins have thus become modern-day celebrities. I investigate the world of streaming in greater depth in Part III.C. below, where I examine the social norms that govern interactions between gameplay streamers, community members, and game developers.

#### D. Recap

This Part provided background on emergent trends and contemporary business models in the video game industry. It first explored the shift from physical games to digital, online-exclusive games, focusing on the various pricing models employed by game developers. It then considered the resultant business model: modern video games are developed, marketed, and sold on the basis of an ongoing

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<sup>125</sup> Kevin Webb, *This New Video Shows How the World’s Most Popular Gamer Turned His Basement into a Mind Blowing State-Of-The-Art Studio*, BUS. INSIDER (Nov. 12, 2018), <https://www.businessinsider.com/video-ninja-red-bull-home-streaming-studio-absolutely-amazing-2018-11> [<https://perma.cc/YTH7-97VF>].

<sup>126</sup> Elaine Teng, *Living The Stream*, ESPN THE MAGAZINE (Sept. 18, 2018), [https://www.espn.com/espn/feature/story/\\_/id/24710688/fortnite-legend-ninja-living-stream](https://www.espn.com/espn/feature/story/_/id/24710688/fortnite-legend-ninja-living-stream) [<https://perma.cc/3LUA-EQZ9>]; Stefanie Fogel, *Ninja: First Esports Player Featured on ESPN Magazine Cover*, VARIETY (Sept. 18, 2018), <https://variety.com/2018/gaming/news/ninja-espn-magazine-cover-1202947409/> [<https://perma.cc/F3HA-L7HV>].

<sup>127</sup> Tom Gerken, *Twitch: How Ninja was Unseated as Most-Subscribed Streamer*, BBC NEWS (Feb. 21, 2019), <https://www.bbc.com/news/blogs-trending-47305665> [<https://perma.cc/84ZJ-R96W>].

<sup>128</sup> Brittany Vincent, *Twitch Streamer ‘Ninja,’ One of the Biggest Names in Fortnite, Is Abandoning the Platform*, NBC NEWS (Aug. 2, 2019), [<https://perma.cc/4MCK-RPTZ>].

<sup>129</sup> *Ninjashyper YouTube Stats, Channel Statistics*, SOCIAL BLADE, <https://socialblade.com/youtube/user/ninjashyper> [<https://perma.cc/VRH8-85AZ>].



service, rather than a singular, one-off transaction. Finally, the discussion tracked two recent trends in the video game community: the rise of competitive gaming and the emergence of gameplay streaming. In what follows, I take a step back to review the broader literature on social norms and copyright law, laying the groundwork for my substantive analysis of extralegal gaming norms in Part III.

## II. SOCIAL NORMS: AN ONGOING INQUIRY

A sophisticated body of literature grapples with the prevalence of social norms in creative industries.<sup>130</sup> In the past fifteen years, scholars have studied the extralegal norms that govern communities of high-end French chefs,<sup>131</sup> stand-up comedians,<sup>132</sup> roller derby skaters,<sup>133</sup> drag queens,<sup>134</sup> bloggers,<sup>135</sup> fan fiction writers,<sup>136</sup> fans of

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<sup>130</sup> By “social norms” I mean social conventions (rules of behavior) that (1) emerge from decentralized processes, (2) are regularly followed out of a sense of duty, (3) and are policed through the use of social sanctions. See Jack P. Gibbs, *Norms: The Problem of Definition and Classification*, 70 AM. J. SOC. 586 (1965); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997); Eric A. Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1699 (1996); JON ELSTER, *THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER* 99 (1989); Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1919–29 (2005); H.L.A. HART, *THE CONCEPT OF LAW* 90 (1994); Benjamin C. Zipursky, *Legal Obligations and the Internal Aspect of Rules*, 75 FORDHAM L. REV. 1229 (2006).

<sup>131</sup> See Buccafusco, *supra* note 16. See also Fauchart & von Hippel, *supra* note 20.

<sup>132</sup> See Oliar & Sprigman, *supra* note 20.

<sup>133</sup> See David Fagundes, *Talk Derby to Me: Intellectual Property Norms Governing Roller Derby Pseudonyms*, 90 TEX. L. REV. 1093 (2012).

<sup>134</sup> See Eden Sarid, *Don't Be a Drag, Just Be a Queen—How Drag Queens Protect their Intellectual Property Without Law*, 10 FIU L. REV. 133 (2014).

<sup>135</sup> See Schultz, *supra* note 18, at 225–26.

<sup>136</sup> See Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW & CONTEMP. PROBS. 135 (2007); see generally Anupam Chander & Madhavi Sunder, *Everyone's A Superhero: A Cultural Theory of “Mary Sue” Fan Fiction as Fair Use*, 95 CALIF. L. REV. 597 (2007).

jambands,<sup>137</sup> hackers,<sup>138</sup> documentary filmmakers,<sup>139</sup> magicians,<sup>140</sup> tattoo artists,<sup>141</sup> perfumers,<sup>142</sup> typeface designers,<sup>143</sup> adult entertainers,<sup>144</sup> nineteenth century publishers in the U.S.,<sup>145</sup> software developers,<sup>146</sup> clowns,<sup>147</sup> graffiti artists,<sup>148</sup> and even Hebrew authors operating in Mandate Palestine.<sup>149</sup>

A significant subset of studies focus on areas where copyright law appears to provide little or no protection. A survey of the literature further suggests that social norms are frequently developed, directed, and inculcated by creative producers, namely authors.<sup>150</sup>

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<sup>137</sup> See Schultz, *supra* note 16.

<sup>138</sup> See STEVEN LEVY, *HACKERS: HEROES OF THE COMPUTER REVOLUTION* (2001); Tim Jordan & Paul Taylor, *A Sociology of Hackers*, 46 SOCIO. REV. 757 (1998); see generally Peter T. Leeson & Christopher J. Coyne, *The Economics of Computer Hacking*, 1 J.L. ECON. & POL'Y 511, 517–524 (2005); Orly Turgeman-Goldschmidt, *Meanings that Hackers Assign to their Being a Hacker*, 2 INT'L J. CYBER CRIMINOLOGY 382 (2008).

<sup>139</sup> See Patricia Aufderheide, *How Documentary Filmmakers Overcame Their Fear of Quoting and Learned to Employ Fair Use: A Tale of Scholarship in Action*, 1 INT'L J. COMM. 26 (2007); Kristin Thompson, *Report of the Ad Hoc Committee of the Society for Cinema Studies, "Fair Usage Publication of Film Stills,"* 32 CINEMA J. 3 (1993); ASS'N OF INDEP. VIDEO & FILMMAKERS ET AL., *DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES IN FAIR USE* (2005), [http://archive.cmsimpact.org/sites/default/files/fair\\_use\\_final.pdf](http://archive.cmsimpact.org/sites/default/files/fair_use_final.pdf) [<https://perma.cc/6S6E-U67S>].

<sup>140</sup> See Loshin, *supra* note 16.

<sup>141</sup> See Aaron Perzanowski, *Tattoos & IP Norms*, 98 MINN. L. REV. 511 (2013).

<sup>142</sup> See Cronin, *supra* note 16.

<sup>143</sup> See Lipton, *supra* note 16.

<sup>144</sup> See Kate Darling, *IP Without IP? A Study of the Online Adult Entertainment Industry*, 17 STAN. TECH. L. REV. 655 (2014).

<sup>145</sup> See ROBERT SPOO, *WITHOUT COPYRIGHTS: PIRACY, PUBLISHING, AND THE PUBLIC DOMAIN* (2013).

<sup>146</sup> See, e.g., YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006); Josh Lerner & Jean Tirole, *The Economics of Technology Sharing: Open Source and Beyond*, 19 J. ECON. PERSP. 99 (2005).

<sup>147</sup> See David Fagundes & Aaron Perzanowski, *Clown Eggs*, 94 NOTRE DAME L. REV. 1313 (2019).

<sup>148</sup> See MARTA ILJADICA, *COPYRIGHT BEYOND LAW: REGULATING CREATIVITY IN THE GRAFFITI SUBCULTURE* (2016).

<sup>149</sup> See MICHAEL D. BIRNHACK, *COLONIAL COPYRIGHT: INTELLECTUAL PROPERTY IN MANDATE PALESTINE* (2012); Michael D. Bimhack, *Hebrew Authors and English Copyright Law in Mandate Palestine*, 12 THEORETICAL INQ. L. 201 (2011).

<sup>150</sup> Kal Raustiala & Christopher Jon Sprigman, *When Are IP Rights Necessary? Evidence from Innovation in IP's Negative Space*, in 1 RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW 309, 314 (Peter S. Menell & Ben Depoorter eds., 2019)

While there is a great deal of variance across different creative communities, a few examples might prove illustrative. One example is a study by Emmanuelle Fauchart and Eric von Hippel on the social norms that govern communities of gourmet French chefs.<sup>151</sup> They find that French chefs use three extralegal norms to protect their interests: an anti-appropriation norm that prevents chefs from precisely copying others' recipes; a norm that prevents a chef from passing on recipe-related information that was disclosed to her by a peer; and a norm against the use of a recipe without crediting its original author.<sup>152</sup> This system of social ordering materialized despite—and, indeed, because of—the lack of copyright protection for culinary recipes.<sup>153</sup> So the norms embraced by French chefs complement (or perhaps subvert) the law by extending effective protection to creative works that are otherwise non-copyrightable.

A second example involves stand-up comedians. Copyright law protects comedy to a limited extent. The fundamental problem is that jokes often turn on a core premise or structure—an idea—and are thus susceptible to sophisticated copying. Fellow comedians can copy a joke by putting their own spin on it. They can do so by copying the joke's core idea while expressing it in a different way.<sup>154</sup>

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[hereinafter Raustiala & Sprigman, *When Are IP Rights Necessary?*] (“These social norms are almost exclusively producer norms, and typically reflect a shared sense of professional or artistic identity that allows such norms to develop and become entrenched.”).

<sup>151</sup> Fauchart & von Hippel, *supra* note 20.

<sup>152</sup> *Id.* at 192–94.

<sup>153</sup> *Id.* at 187–88. Indeed, U.S. courts have resisted attempts to recognize recipes as copyrightable on the grounds that recipes constitute processes or methods of operation. The Seventh Circuit, for example, has opined that recipes are not copyrightable because they merely “describe a procedure by which the reader may produce many dishes.” *Publ’ns Int’l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 481 (7th Cir. 1996) (holding that “there can be no monopoly in the copyright sense in the ideas for producing certain foodstuffs”).

<sup>154</sup> Oliar & Sprigman, *supra* note 20, at 1801–05. There are at least two additional reasons for copyright’s lackluster protection of jokes. First, jokes are often not fixed in a tangible medium of expression. Sometimes jokes evolve—namely, come into existence—as a result of an exchange with members of the audience during a comedy show. Second, joke theft poses a substantial evidentiary challenge: to mount a successful legal claim, the author must establish that the joke was indeed stolen, rather than independently conceived by the alleged misappropriator. Jokes generally draw on (and are closely enmeshed in) common, identifiable life experiences. That is what makes them funny. And it is for this reason that different comedians might often craft jokes that share similar characteristics or a common starting point, without necessarily “stealing” from one another. *See id.*

And, because copyright law does not extend to ideas,<sup>155</sup> joke “theft” would often fall outside the law’s positive space. As a result, infringement claims are both costly and difficult to prove. Focusing on this low-IP environment, Dotan Oliar and Christopher Sprigman describe the development of a complex system of social norms designed to address copying, authorship, and joke transfer.<sup>156</sup> These norms are enforced through myriad extralegal sanctions, such as group boycotts (where fellow comedians and comedy clubs refuse to work with an infringing comedian)<sup>157</sup> and, in extreme cases, even violence.<sup>158</sup>

Along similar lines, Eden Sarid has studied the extralegal norms that govern the world of drag queens. Sarid documents a system of self-ordering that encompasses various intellectual goods: drag personae, live drag “numbers,” “signature songs” (that is, songs closely associated with particular performers), jokes performed during a live number, and non-signature songs.<sup>159</sup> As Sarid explains, this nonlegal system allows drag queens to protect a wide repertoire of intellectual assets, including ideas and concepts.<sup>160</sup>

In short, extralegal copyright norms are largely producer-driven. They operate within the negative space of copyright law and are usually reinforced through interactions between community members in close-knit communities, such as those of high-end French chefs

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<sup>155</sup> See 17 U.S.C. § 102(b) (excluding from copyright protection “any idea, procedure, process, system, method of operation, concept, principle, or discovery”). See also *Mazer v. Stein*, 347 U.S. 201 (1954) (noting that under copyright law, “protection is given only to the expression of the idea—not the idea itself”).

<sup>156</sup> See Oliar & Sprigman, *supra* note 20.

<sup>157</sup> *Id.* at 1817–18 (“A number of interviewees told us of instances where they made clear to comedy club booking agents that they would not appear in the same evening’s lineup with someone they believed either had stolen their material or had a reputation of stealing jokes... Intermediaries—club owners, booking agents, agents, and managers—sometimes also refuse to deal with thieves.”).

<sup>158</sup> *Id.* at 1819–20.

<sup>159</sup> Sarid, *supra* note 134, at 148–51.

<sup>160</sup> *Id.* at 150 (“Perhaps the most notable distinction between IP law and the drag domain is the lack of distinction in the drag domain between ownership of an idea or concept [e.g., a signature singer] and ownership of its expression [the dance performed to the sounds of that signature singer’s songs]. Both receive similar protection in the drag domain.”).

and stand-up comedians.<sup>161</sup> These norms also typically permeate creative spaces in which the costs of innovation are relatively low. Jokes, recipes, and drag personae are materially cheap to produce. By contrast, industries in which innovation is costly (like the pharmaceutical industry) require significant pecuniary incentives to ensure optimal levels of innovation. Such industries are unlikely to spur high levels of innovation through social norms alone.

Further, while social norms are often limited to the negative space of IP, some norms map onto the positive space of copyright law, specifically under the fair use doctrine. There are different assumptions about what constitutes fair use in different communities. Attempts to concretize these assumptions often take shape under the guise of codes of best practices—that is, codex-like documents that purport to set forth principles of best practices for reproducing works within a particular community.<sup>162</sup> These documents, in turn, serve as a baseline against which courts assess whether a particular defendant has made fair use of a copyrighted work.<sup>163</sup> Take, for example, the Agreement on Guidelines for Classroom Copying.<sup>164</sup> This agreement aims to provide guidance on the reproduction of protected contents for the purpose of teaching or research.<sup>165</sup> And courts have occasionally taken this agreement to represent prevalent industry standards for reproduction, holding that noncompliance with the guidelines might bar a defendant’s claim for fair use.<sup>166</sup>

Creative communities can also enlist such formalized tools to fend off third-party lawsuits. A prime example is the Statement of

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<sup>161</sup> Raustiala & Sprigman, *When Are IP Rights Necessary?*, *supra* note 150, at 316 (“[M]any of these industries [in which social norms emerge] are small, though not all are. Modest size appears to help create the sort of community of interest and sense of shared professional identity that can originate and perpetuate robust social norms.”).

<sup>162</sup> See Aufderheide, *supra* note 139.

<sup>163</sup> See *id.*

<sup>164</sup> See *Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with Respect to Books and Periodicals*, in UNITED STATES COPYRIGHT OFFICE, REPRODUCTION OF COPYRIGHTED WORKS BY EDUCATORS AND LIBRARIANS 6, <https://www.copyright.gov/circs/circ21.pdf> [<https://perma.cc/T9JV-C96R>] [hereinafter “*Agreement on Classroom Copying*”]; see also Rothman, *supra* note 17, at 1918–19.

<sup>165</sup> *Agreement on Classroom Copying*, *supra* note 164.

<sup>166</sup> See, e.g., *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381, 1390–91 (6th Cir. 1996). *But see* *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014).

Best Practices in Fair Use crafted by independent documentary filmmakers.<sup>167</sup> Most notably, the Statement suggests that, as a general matter, filmmakers should be allowed to capture “copyrighted media content in the process of filming something else.”<sup>168</sup> Under this standard, material that was captured incidentally while filming, like a poster displayed in the background of a shot, constitutes fair use.<sup>169</sup> And filmmakers have been able to invoke compliance with these practices as evidence of fair use.<sup>170</sup> As these examples make clear, some creative communities have successfully harnessed social norms—written down and codified as statements of best practices—as a shield against third-party rightsholders.

Clearance norms present yet another example of social norms that sometimes seep into the fair use analysis.<sup>171</sup> These norms, which are especially ubiquitous in traditional media industries, compel those who wish to use a work to obtain a license for doing so. And these norms apply even when it is unclear whether the work in question is protected or whether using it would be permissible as fair use. In *Ringgold v. Black*, for example, the Second Circuit reasoned that the defendants cannot make a fair use claim because they failed to comply with clearance norms by obtaining a license.<sup>172</sup> The court admonished the defendants for failing to pay the “customary price” for the work, thus adversely affecting its licensing market.<sup>173</sup>

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<sup>167</sup> See DOCUMENTARY FILMMAKERS’ STATEMENT OF BEST PRACTICES IN FAIR USE (2005), <https://cmsimpact.org/wp-content/uploads/2016/01/Documentary-Filmmakers.pdf> [https://perma.cc/36T2-3GKF].

<sup>168</sup> *Id.* at 5.

<sup>169</sup> *Id.*

<sup>170</sup> See Aufderheide, *supra* note 139, at 30–31; Patricia Aufderheide & Peter Jaszi, *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers*, FINAL REP. TO CTR. FOR SOC. MEDIA 4, 4, 26 (2004); Thompson, *supra* note 139; ASS’N OF INDEP. VIDEO & FILMMAKERS ET AL., *supra* note 139.

<sup>171</sup> Aufderheide & Jaszi, *supra* note 17071; Rothman, *supra* note 17, at 1911–16.

<sup>172</sup> *Ringgold v. Black Ent. Television*, 126 F.3d 70, 72–73 (2d Cir. 1997).

<sup>173</sup> *Id.* at 81. The widely spread practice of licensing, even in situations where using protected works might constitute fair use, has resulted in an increasingly narrow interpretation of fair use as courts have come to treat the practice of licensing as part of the works’ “potential market.” See James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 887 (2007). See also Matthew Africa, *The Misuse of Licensing Evidence in Fair Use Analysis: New Technologies, New Markets, and the Courts*, 88 CALIF. L. REV. 1145, 1160–61, 1164 (2000).

Some scholars have offered a more systematic treatment of extralegal copyright norms. One example is the work of Jennifer Rothman. Focusing on a wide tranche of social norms, Rothman draws a distinction between aspirational norms and litigation avoidance norms.<sup>174</sup> Aspirational norms aim to effectuate changes with respect to the allocation of IP rights, while litigation avoidance norms seek primarily to avoid or mitigate the risk of litigation.<sup>175</sup> Rothman also offers a vivid analysis of the ways in which courts treat social norms—as evidence of market effects; as a proxy for what should be done; as a proxy for what is reasonable; as evidence of what is generally done; and as evidence of what the parties intended.<sup>176</sup>

Mark Schultz provides another excursion into the realm of non-legal copyright norms. Schultz argues that social norms might prove fruitful in combating online piracy.<sup>177</sup> Because conventional strategies of deterrence and legal enforcement have largely failed, Schultz endorses an alternative strategy consisting of educational efforts to shape social norms. He posits that social norms, properly conceived, can in fact drive compliance with copyright law.<sup>178</sup>

Finally, a recent contribution by Amy Adler and Jeanne Fromer sheds light on the extralegal sanctions that routinely accompany community norms.<sup>179</sup> Adler and Fromer draw attention to two categories of self-help remedies: shaming and retaking of the (infringing) copy.<sup>180</sup> Particularly fascinating is their exposition of retaking norms—for example, the brand Suicide Girls responded to an artist's unauthorized use of Suicide Girls photographs by “retaking” the infringing photographs and then selling them at a low price to undercut the infringer's market.<sup>181</sup> Interestingly, Adler and Fromer appear to assume that this mechanism for extralegal enforcement can arise “without the backdrop of a single close-knit community,

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<sup>174</sup> Rothman, *supra* note 17, at 1909.

<sup>175</sup> *Id.* at 1909–11, 1924.

<sup>176</sup> *Id.* at 1931–46.

<sup>177</sup> Schultz, *supra* note 18.

<sup>178</sup> *Id.* at 228–35.

<sup>179</sup> Amy Adler & Jeanne Fromer, *Taking Intellectual Property into Their Own Hands*, 107 CALIF. L. REV. 1455, 1457 (2019).

<sup>180</sup> *Id.* at 1459–92.

<sup>181</sup> *Id.* at 1463.

which legal scholars tend to see as a prerequisite to enforcing extralegal norms.”<sup>182</sup>

The preceding discussion, while not exhaustive, should offer a glimpse into the voluminous literature on social norms and copyright law. It begins by reviewing a number of extralegal norms that populate the negative space of copyright law, and then turns to explore the interplay between social norms and positive copyright law, focusing on the fair use doctrine and the courts’ deference to statements of best practices. Finally, it takes note of three overarching accounts that seek to make sense of social norms as a larger phenomenon in the context of copyright law.

### III. FAIRNESS

This Part advances a tripartite argument about norms of fairness in the video game community. First, I argue that the success of a game is largely dependent on its widespread perception as being competitively fair. Second, I claim that notions of fairness are also baked into the concept of wealth sharing that informs free-to-play games; these games offer a fully playable—though somewhat skeletal—version of the game for free, and thus generate the impression that the game’s developers are sharing their wealth. Third, gameplay streamers frequently cite ideas of labor in claiming ownership over their gameplay streams. Specifically, they contend that misappropriation cuts against the time, effort, and skill that went into producing these gameplay streams. I take up each of these issues in turn.

#### A. *Competitive Integrity*

The first cluster of fairness norms center on notions of competitive integrity in video games. Modern games are social enterprises that derive from, and are rooted in, communities of gamers. This also explains in part the surge in competitive gaming and gameplay streaming. But the social aspects of video games are not entirely

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<sup>182</sup> *Id.* at 1457. This assessment is objectionable. Adler and Fromer discuss a number of decentralized, largely digital communities. But these communities are no less close-knit than traditional communities. After all, digital communities often rely on robust, online networks of dispersed members. The gaming case study is further proof that dispersed individuals can weave meaningful relationships on the basis of thick communitarian ties.



distinct from their competitive qualities. Players typically form social bonds against the backdrop of some sense of communal belonging that is grounded in a desire to compete with others, and to be seen doing so.<sup>183</sup> And, as I suggest in what follows, the competitive impetus that drives gaming communities is closely entangled with the concept of fairness.

What does “fairness” mean in this context? Simply put, I argue that a game’s commercial success is dependent on its perception as being competitively fair. In the eyes of video game players, games are unfair or exploitative when players can pay money—say, through in-game microtransactions—to obtain a competitive in-game advantage. In a sense, this view is informed by the egalitarian notion that a player’s ability to compete in the game should turn solely on her skill, not her ability to pay.<sup>184</sup> In a world where video game players have come to think of themselves as “electronic athletes,” concepts of meritocracy are especially poignant. The notion of competitive meritocracy proceeds from the proposition that everyone should get the chance to prove their worth, no matter their financial standing.

To video game players, skill matters. Composure matters. Hard work matters. Yet none of these qualities, however desirable, are fully attainable when players can simply pay money to get a headstart in the game. This is because modern games are ultimately community-based enterprises by their very nature—they are meant to be experienced by multiple players interacting with each other.<sup>185</sup> So in situations where some players can simply purchase an in-game advantage, others are denied the opportunity to fairly engage with them on a level playing field. This scenario is often described by gamers in terms of a “pay-to-win” scheme, where one’s odds of winning (or competitively engaging with others) are contingent upon

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<sup>183</sup> See *supra* text accompanying notes 105–108.

<sup>184</sup> This is not to say that perceptions of in-game meritocracy reflect normative ideals of fairness. Developing one’s in-game skills requires time—and time is a scarce resource for many. Hence, it’s important to note that these perceptions rest on a narrow conception of meritocracy; one that may not be “fair” when considered in a broader context.

<sup>185</sup> The same is true of modern single-player games as well. These games give rise to robust communities of players who talk about the game, help each other master it, and ultimately experience it together.

her capacity or willingness to pay in order to obtain an advantage. As the discussion below makes evident, pay-to-win is a persistent (and often fatal) trope within the gaming community.<sup>186</sup>

A rash of recent cases buttress this point rather markedly. A central example is the video game *Star Wars Battlefront II*. Launched in 2017, *Battlefront II* was a successor to the game's immensely successful first iteration.<sup>187</sup> Though the game features a single-player playing mode, its centerpiece is a multiplayer online mode where dozens of players populate a Star Wars-themed digital world and engage each other in combat.<sup>188</sup> The players are sorted into two teams, each consisting of players who must work in concert to achieve a strategic goal by killing members of the opposite team.<sup>189</sup> The characters are all drawn from the larger Star Wars universe: Jedi Knights and rebels on the one side, Sith Lords and imperial troops on the other.<sup>190</sup> Jedi Knights (and related characters) are labeled "heroes" while Sith Lords (and related characters) are dubbed "villains."<sup>191</sup> All characters in the game are customizable and can be

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<sup>186</sup> See Kati Alha et al., *Free-to-Play Games: Professionals' Perspectives* (2014) (unpublished manuscript), available at [http://www.digra.org/wp-content/uploads/digital-library/nordicdigra2014\\_submission\\_8.pdf](http://www.digra.org/wp-content/uploads/digital-library/nordicdigra2014_submission_8.pdf) [<https://perm.a.cc/XF4D-J42L>] (reporting that one of most common critiques of free-to-play games is directed at what gamers call "pay-to-win, which means that the players with the most money to use get unfair advantage over players who do not use money"). See also Eustance Huang, *Americans Largely Won't Pay to Win a Video Game—But Chinese Gamers Will*, CNBC (May 30, 2018), <https://www.cnbc.com/2018/05/30/pay-to-win-video-games-differences-between-us-and-chinese-gamers.html> [<https://perma.cc/9A85-PU2C>]; Jason McKinnon, *The Biggest Problem with Video Game 'Pay To Win' Business Models*, NERD INFINITE (Oct. 13, 2017), <http://www.nerdinfinte.com/the-biggest-problem-with-video-game-pay-to-win-business-models/> [<https://perma.cc/RXG6-5W8U>]; Natalya Pomeroy, *Effort Alone Isn't Enough for Victory with The Pay-To-Win System*, STUDY BREAK (Jan. 30, 2018), <https://studybreaks.com/culture/pay-to-win/> [<https://perma.cc/JAJ8-SRRR>].

<sup>187</sup> The original game, *Star Wars Battlefront*, was released in 2015. See *Star Wars Battlefront*, ELEC. ARTS, <https://www.ea.com/games/star-wars/star-wars-battlefront> [<https://perma.cc/2A5K-L9LZ>].

<sup>188</sup> Jason Nichols, *Star Wars: Battlefront II—Game Modes Explained*, SCREENRANT (May 31, 2020), <https://screenrant.com/star-wars-battlefront-game-modes-explained/> [<https://perma.cc/22NT-JWFU>].

<sup>189</sup> *Id.*

<sup>190</sup> See *Battlefront II Heroes and Villains*, STAR WARS BATTLEFRONT WIKI: FANDOM, [https://swgames.fandom.com/wiki/Battlefront\\_II\\_heroes\\_and\\_villains](https://swgames.fandom.com/wiki/Battlefront_II_heroes_and_villains) [<https://perma.cc/RH9A-ENJP>].

<sup>191</sup> *Id.*

equipped with various capabilities that enhance their effectiveness in battle.<sup>192</sup> Yet these capabilities are not randomly dispersed amongst players; instead, they are bundled together in the form of random “loot crates” that players can purchase with in-game currency.<sup>193</sup> Further, some of the characters themselves were initially locked off upon release and could only be unlocked with in-game currency as well.<sup>194</sup> Each loot crate held the promise of unlocking some capabilities, characters or cosmetic designs.<sup>195</sup>

*Battlefront II* has been under siege from the outset. Despite being one of the most coveted franchises in the world—cast under the umbrella of the lucrative Star Wars universe—the game’s initial launch proved disastrous. While *Battlefront II*’s design was lauded as a “monumental achievement that could only have come out of the modern AAA studio system,”<sup>196</sup> the game’s launch was ridiculed as “chaotic,”<sup>197</sup> with some suggesting it was reminiscent of “a plane crashing into the side of the mountain.”<sup>198</sup> Virtually every review of the game pointed out that it was afflicted by “significant, sustained

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<sup>192</sup> See *Ability*, STAR WARS BATTLEFRONT WIKI: FANDOM, <https://battlefront.fandom.com/wiki/Ability> [<https://perma.cc/JQ7N-MFFT>].

<sup>193</sup> See Tom Regan, *DICE is Taking a ‘Good, Hard Look’ and ‘Reassessing’ Battlefront 2’ Loot Crates*, FANDOM (Nov. 8, 2017), <https://www.fandom.com/articles/dice-battlefront-2-loot-crate-interview> [<https://perma.cc/76LZ-QWSV>].

<sup>194</sup> See Jason Schreier, *EA Defense of Star Wars Battlefront II Becomes Most Downvoted Reddit Comment Ever*, KOTAKU (Nov. 13, 2017), <https://kotaku.com/ea-defense-of-star-wars-battlefront-ii-becomes-most-dow-1820396527> [<https://perma.cc/P4LQ-MBZ8>].

<sup>195</sup> Some critics assert that the practice of requiring payment for loot boxes amounts to a form of gambling. See generally Mark D. Griffiths, *Is The Buying of Loot Boxes in Videogames a Form of Gambling or Gaming?*, 22 GAMING L. REV. 52 (2018); Marcus Carter, *‘Loot Boxes’ and Pay-To-Win Features in Digital Games Look a Lot Like Gambling*, THE CONVERSATION (Nov. 26, 2017), [<https://perma.cc/L6JR-R79P>].

<sup>196</sup> Dave Thier, *‘Star Wars Battlefront 2’ Review: The Empire Screws Up*, FORBES (Nov. 21, 2017), <https://www.forbes.com/sites/games/2017/11/21/star-wars-battlefront-2-review-the-empire-screws-up/?sh=2d0661746e3a> [<https://perma.cc/3ZZU-89GB>].

<sup>197</sup> See Daniel Chamberlin, *What Battlefront II Means for Game Monetization*, GAMASUTRA (Nov. 29, 2017), [<https://perma.cc/5TS7-6X4F>].

<sup>198</sup> See Thier, *supra* note 196.

criticism,”<sup>199</sup> amounting to nothing short of a total “disaster[.]”<sup>200</sup> But the vitriol visited upon *Battlefront II* concerned neither its price nor design; rather, it focused on its system of microtransactions.

As is the case with most online games today, in-game currency in *Battlefront II* can be earned in one of two ways: players can either purchase it with real-world money, or simply play the game and (gradually) earn it. The latter option, consistent with standard in-game currency schemes, is notoriously slow and arduous. Some critics have estimated that, on average, players would have to play the game—or “grind it,”<sup>201</sup> as it were—for 40 hours to earn only a minute amount of in-game currency.

This microtransaction structure differs from the one described in Part I in two meaningful ways. First, *Battlefront II* was not a free-to-play game; copies of the game sold for \$60,<sup>202</sup> on par with other big-feature video games. This was somewhat unusual because most microtransaction-based games are free-to-play. I return to this point in Part III.B. below. Second, the premium content offered to consumers was itself different—while many freemium games limit in-game purchases to cosmetic enhancements (new designs or new “skins” for existing characters), *Battlefront II* broke with this convention by offering in-game competitive enhancements; i.e., unique capabilities that can attach to specific characters. For instance, the character known as Emperor Palpatine, one of the game’s principal villains, can be equipped with a lightning strike attack. In-game enhancements, however, can make this attack last longer and inflict

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<sup>199</sup> See, e.g., Matt Wales, *EA Admits It “Got It Wrong” over Star Wars Battlefront 2 Loot Boxes*, EUROGAMER (Apr. 16, 2018), <https://www.eurogamer.net/articles/2018-04-16-ea-admits-it-got-it-wrong-over-star-wars-battlefront-2-loot-boxes> [https://perma.cc/W65P-KKQ4].

<sup>200</sup> See Gita Jackson, *A Guide to The Endless, Confusing Star Wars Battlefront II Controversy*, KOTAKU (Nov. 21, 2017), <https://kotaku.com/a-guide-to-the-endless-confusing-star-wars-battlefront-1820623069> [https://perma.cc/HFY2-R8K2]; Sean Buckley, *After Battlefront II Mess, EA Admits It Has an Image Problem*, CNET (Apr. 13, 2018), <https://www.cnet.com/news/after-battlefront-ii-ea-admits-to-image-problem/> [https://perma.cc/BQ4Y-TYHX].

<sup>201</sup> “Grinding” is defined by Techopedia.com as “playing time spent doing repetitive tasks within a game to unlock a particular game item or to build the experience needed to progress smoothly through the game.” *Grinding*, TECHNOEDIA <https://www.techopedia.com/definition/27527/grinding> [https://perma.cc/746F-BW7D].

<sup>202</sup> See Chamberlin, *supra* note 197.

greater damage on opponents.<sup>203</sup> A “maxed-out” Palpatine, armed with all available enhancements, could easily overwhelm opponents—especially those who have not yet acquired premium enhancements.<sup>204</sup> Further, and perhaps more puzzlingly, *Battlefront II* also offered premium characters that were accessible through in-game microtransactions.<sup>205</sup> In particular, Darth Vader, the most well-known character in the franchise, could only be accessed through in-game currency.<sup>206</sup>

Players were incensed. Given the game’s multiplayer mode, the decision to offer purchasable competitive advantages struck many players as an act of disrepute and greed.<sup>207</sup> The response was swift and acute. Players felt deceived, many labeling the game a pay-to-win scheme.<sup>208</sup> As a result, sales for the game failed to meet early projections.<sup>209</sup> Scores of players turned to Reddit to bemoan the game’s microtransaction system. One commenter protested that the character Darth Vader remained inaccessible even to consumers who had paid for a Deluxe Edition of the game.<sup>210</sup> Others estimated that players would have to play the game for thousands of hours in order to earn enough in-game currency to unlock all of the game’s

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<sup>203</sup> Palpatine’s lightning attack has been described as “game-breaking” given its effectiveness in battle. Heather Alexandra, *Battlefront II’s Emperor Palpatine Was Quietly Removed from the Game*, KOTAKU (July 10, 2018), <https://kotaku.com/battlefront-ii-emperor-palpatine-was-quietly-removed-f-1827489522> [<https://perma.cc/HN9V-7942>].

<sup>204</sup> *Id.*

<sup>205</sup> See Jeff Grubb, *Star Wars: Battlefront II Publisher Reduces Time to Unlock Heroes like Darth Vader by 75%*, VENTUREBEAT (Nov. 13, 2017), [<https://perma.cc/3BPV-3ULU>].

<sup>206</sup> *Id.*

<sup>207</sup> See, e.g., Alex Volkrijk, *Star Wars Battlefront 2: Did EA’s Corporate Greed Ruin a Perfect Game?*, RENEGADE REP. (Dec. 18, 2017), [<https://perma.cc/AP9A-RTNU>].

<sup>208</sup> See Bill Lavoy, *Is Star Wars Battlefront 2 Pay to Win?*, SHACK NEWS (Nov. 16, 2017), <https://www.shacknews.com/article/102157/is-star-wars-battlefront-2-pay-to-win> [<https://perma.cc/8ESL-7JTW>]; Oscar Dayus, *Star Wars Battlefront 2’s ‘Pay-To-Win’ Complaints Are “Hard To Dodge,” Says Dev*, GAMESPOT (Oct. 20, 2017, 3:11 AM), <https://www.gamespot.com/articles/star-wars-battlefront-2s-pay-to-win-complaints-are/1100-6454189/> [<https://perma.cc/A8XH-PYD6>]; see also sources cited in *supra* notes 195–197.

<sup>209</sup> Imran Khan, *EA Misses Star Wars: Battlefront II Target, Plans to Reintroduce Microtransactions Soon*, GAMEINFORMER (Jan. 30, 2018), [<https://perma.cc/3YM8-J58M>].

<sup>210</sup> See Schreier, *supra* note 194.

optional content.<sup>211</sup> The game's publisher, Electronic Arts (EA), issued a response on the website—yet that response sparked even greater opprobrium and is now the most down-voted post in Reddit history.<sup>212</sup> EA's stock value soon plummeted.<sup>213</sup> The game's average consumer score on the ratings platform Metacritic was a measly 0.9 out of 10.<sup>214</sup>

The various strands of criticism that sprung up following the game's release shared one common theme: an unqualified rejection of the game's microtransaction structure. Players were displeased that the game offered competitive, rather than cosmetic, enhancements for consumers who were willing to shell out a few dollars. The message, simply put, was that pay-to-win games are not competitively fair. EA relented shortly thereafter: it did away with microtransactions altogether yet promised that an overhauled system for microtransactions would be introduced in the future.<sup>215</sup> Moreover, in the aftermath of the controversy surrounding *Battlefront II*, a U.S. Senator introduced a bill to ban “loot boxes” and pay-to-play microtransactions.<sup>216</sup>

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<sup>211</sup> Derek Stauffer, *Spend 4528 Hours or \$2100 to Unlock Star Wars: Battlefront II Content*, SCREENRANT (Nov. 15, 2017), <https://screenrant.com/star-wars-battlefront-2-content-unlock-time/> [<https://perma.cc/A8JB-NKZU>].

<sup>212</sup> Schreier, *supra* note 195. See also Zach Zwezen, *EA Received a Guinness World Record for Most Downvoted Comment in Reddit History*, KOTAKU (Sept. 7, 2019), <https://kotaku.com/ea-received-a-guinness-world-record-for-most-downvoted-1837955807> [<https://perma.cc/BU4L-9XCE>].

<sup>213</sup> Tae Kim, *EA's Day of Reckoning is Here After 'Star Wars' Game Uproar, \$3 Billion in Stock Value Wiped Out*, CNBC (Nov. 28, 2017), <https://www.cnbc.com/2017/11/28/eas-day-of-reckoning-is-here-after-star-wars-game-uproar.html> [<https://perma.cc/4ZE9-7UAB>]; Jasmine Henry, *Electronic Arts Stock Drops in Value by \$3.1 Billion*, GAME RANT (Nov. 29, 2017), <https://gamerant.com/electronic-arts-stock-drop-battlefront/> [<https://perma.cc/629N-SRGH>].

<sup>214</sup> Jimmy Donnellan, *Metacritic Users Review Bomb Star Wars Battlefront 2*, CULTURED VULTURES (Nov. 16, 2017), <https://culturedvultures.com/metacritic-users-review-bomb-star-wars-battlefront-2/> [<https://perma.cc/WN4R-9MAP>].

<sup>215</sup> Eddie Makuch, *Disney, Lucasfilm Respond to Star Wars: Battlefront 2 Microtransaction Controversy*, GAMESPOT (Nov. 20, 2017), [<https://perma.cc/QYG4-4QM9>].

<sup>216</sup> Jason Schreier, *U.S. Senator Introduces Bill To Ban Loot Boxes and Pay-To-Win Microtransactions*, KOTAKU (May 8, 2019), <https://kotaku.com/u-s-senator-introduces-bill-to-ban-loot-boxes-and-pay-1834612226> [<https://perma.cc/V47R-6SWQ>].

The ordeal that blighted *Battlefront II* is by no means an isolated incident. In the past few years, a polyphony of different games faced vociferous criticism for allegedly running pay-to-win schemes. A non-exhaustive catalogue includes games such as *Dungeon Keeper*,<sup>217</sup> *Fallout 76*,<sup>218</sup> *Borderlands 3*,<sup>219</sup> *Black Desert Online*,<sup>220</sup> and *ArcheAge*,<sup>221</sup> to name just a few. And a recent study conducted by a data research company likewise concluded that:

the concept of micropayments is not fundamentally flawed in and of itself, as only 2.4% of gamers would rather pay for everything upfront; rather, it is the context in which the system is deployed that determines each gamer's response. For example, more than two-thirds of gamers (68.6%) explained that 'cosmetic only' micropayments are 'okay'—i.e. they have no problem with individual players making in-game purchases as long as they don't alter the core parameters of the game. As echoed by dozens of respondents, if microtransactions allow a player to make their character or property look better, without

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<sup>217</sup> Jim Sterling, *Dungeon Keeper Mobile Review—Wallet Reaper*, THE ESCAPIST (Feb. 2, 2014, 4:00 AM), [https://perma.cc/L9BD-R54W] (condemning the game for hiding “behind the mask of ‘free to play,’” while in fact requiring players to pay in order to advance in the game).

<sup>218</sup> Lou Contaldi, *Fallout 76 Stirs More Controversy in Alleged Pay-to-Win Microtransactions*, DUAL SHOCKERS (Apr. 6, 2019), https://www.dualshockers.com/fallout-76-repair-kit-microtransactions/ [https://perma.cc/5TMF-CE6H] (reporting that “Fallout 76 courts ‘utility’ microtransactions with new Repair Kits, that strays from their original promise of keeping the Atomic Shop cosmetic only”); see also Jester Valdez, *Fallout 76 Update Brings Controversial ‘Pay-To-Win’ Repair Kits into Play*, TECH TIMES (Apr. 10, 2019), https://www.techtimes.com/articles/241222/20190410/fallout-76-update-brings-controversial-pay-to-win-repair-kits-into-play.htm [https://perma.cc/3A39-C934].

<sup>219</sup> To deflect initial pre-release reports that the game would feature pay-to-win microtransactions, the game's developers released a statement clarifying that the game would only feature cosmetic in-game purchases. See Asher Madan, *Borderlands 3 Doesn't Feature Pay-To-Win Microtransactions Says Gearbox's Randy Pitchford*, WINDOWS CENT. (May 1, 2019), [https://perma.cc/9FFX-ACR8].

<sup>220</sup> Jennifer Locke, *Is Black Desert for Xbox One Pay-to-Win?*, WINDOWS CENT. (Mar. 6, 2019), https://www.windowcentral.com/black-desert-xbox-one-pay-win [https://perma.cc/4W3M-8T42].

<sup>221</sup> See Qunit Lyn, *Trion Responds to Player Pay-To-Win Concerns Regarding ArcheAge Progression Servers*, MMOBOMB (Apr. 5, 2018), [https://perma.cc/WSX2-LU4V].

altering capabilities or gameplay, the overarching sentiment is that this presents no issue.<sup>222</sup>

Elizabeth Evans has suggested, in keeping with this theme, that “[a]ccessing rewards that are otherwise only available via skill and perseverance via non-gaming means is seen within much of games culture as an antithesis to gameplay.”<sup>223</sup> This again points to the concept of fairness and, in particular, fair gameplay. While players are not necessarily hostile to the idea of in-game purchases as such, they resoundingly dismiss in-game purchases that provide competitive advantages.

But if norms of competitive integrity are well-entrenched, why have so many game developers attempted to flout them? Why have we seen so much friction around pay-to-win games in recent years? The answer is that norms of competitive integrity metastasized quickly, and some developers were likely caught off-guard by the rapid evolution of these norms among players. So, while developers were initially slow to catch up, the escalating discord over in-game fairness eventually impressed upon them the need to comply with now-familiar norms of in-game integrity.

What lessons might be extracted from this analysis? The most important insight is that perceptions of fairness attach to games that appear to be competitively fair. Games are thought to be competitively fair when they allow players to compete on a level playing field. By contrast, games are deemed unfair when they offer competitive advantages via microtransactions. While players seem willing to accept *cosmetic* enhancements as legitimate, the same cannot be said for *competitive* enhancements. Games that provide competitive enhancements are often maligned as pay-to-win schemes. And, in a world abuzz with norms of competitive integrity, players decry pay-to-win games as unfair. These games deny players the opportunity to engage with each other on equal terms. They thus cut against the competitive instinct that underlies the gaming community. Players want to compete with and against each other. But

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<sup>222</sup> QUTEE, GAMING TODAY: A REPORT BY QUTEE INTO HOW PLAYERS REALLY FEEL ABOUT GAMING IN 2018, available at <https://s3.amazonaws.com/qutee-reports/Qutee-Gaming-Today-Report.pdf> [<https://perma.cc/U4RY-9MMB>].

<sup>223</sup> Evans, *supra* note 68, at 574.



meaningful competition can only arise when players feel like everyone stands an equal chance of competing, irrespective of one's ability or willingness to pay.

This fairness-driven account complements my discussion of behavioral economics. It explains why in-game transactions can, at times, provoke harsh criticism from community members.<sup>224</sup> Indeed, this brief overview demonstrates that microtransactions can prove deleterious when they provide competitive, rather than cosmetic, advantages. Accordingly, while behavioral misperceptions explain why in-game purchases are largely profitable,<sup>225</sup> norms of competitive integrity can enrich our understanding of why, in some instances, the inverse is true.

The next subpart explores a second layer of norms, premised on the business model of freemium games and the ways in which they embody (concrete or illusory) ideals of wealth sharing.

### *B. Wealth Sharing*

Freemium games are lucrative because of their pricing model. As discussed above, a number of related factors contribute to the popularity of these games.<sup>226</sup> First, freemium games are successful in part because in-game purchases are not salient to consumers, who tend to systemically underappreciate the likelihood of making future micropayments. Second, premium contents can only be purchased with in-game currency, which can be earned, technically, by playing the game. This gives rise to the impression that players can avoid spending real-world money. Third, this system of in-game currency serves to further camouflage the real costs associated with micropayments; to assess how much they are spending on the game over time, players must convert real-world currency to in-game currency. Fourth, game developers deploy a system of dynamic pricing. They offer ever-shifting seasonal deals and bundle packages, thereby changing the conversion rate between real-world and in-game currency on a regular basis. As a result, players are more likely to feel like they are getting a good deal.

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<sup>224</sup> See text accompanying *supra* notes 76–88.

<sup>225</sup> See Kuehl, *supra* note 15, at 327.

<sup>226</sup> See text accompanying *supra* notes 76–88.

Combined, these pricing techniques are particularly effective. Yet their effectiveness hinges not only on consumer behavioral misperceptions, but also on perceptions of wealth sharing. *Fortnite*, the most popular game in the world today, provides a vivid illustration.

Released by Epic Games (“Epic”) in 2017, *Fortnite* has taken the world by storm.<sup>227</sup> Widely recognized as the most popular game in the world, *Fortnite* has broken a dizzying array of sales records and has attracted millions of fans. But *Fortnite* was hardly Epic’s first success story. Years before the game’s release, Epic was principally known in the industry as the company behind the Unreal Engine<sup>228</sup>—a game engine that drives dozens of the most successful video games in the industry.<sup>229</sup> For years, the Unreal Engine has been leveraged to develop, power, and run a bevy of successful games from third-party developers. In fact, the licensing market for the Unreal Engine has traditionally been Epic’s primary source of revenue.<sup>230</sup>

In 2012, Epic made the decision to move away from its traditional role as a licensor and publisher of boxed, marketing-driven games. Instead, Epic sought to mutate into to a leaner company willing to give away much of its content for free.<sup>231</sup> Initially, *Fortnite*

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<sup>227</sup> Kim Key, *Why Fortnite Was in Beta for So Long*, SCREENRANT (July 9, 2020), <https://screenrant.com/fortnite-beta-early-access-years-long-time-why/> [<https://perma.cc/Z439-NCW9>].

<sup>228</sup> Brian Crecente, ‘Fortnite’ Dance Lawsuits: *The Carlton, the Floss, the Milly Rock, What Is Going On?*, VARIETY (Dec. 18, 2018), <https://variety.com/2018/gaming/news/fortnite-dance-lawsuit-1203092141/> [<https://perma.cc/PK24-HE67>].

<sup>229</sup> Daniel Kayser, *Dozens of Games to be Featured in the Unreal Engine Booth at GDC 2019*, UNREAL ENGINE (Mar. 29, 2019), <https://www.unrealengine.com/en-US/blog/dozens-of-games-to-be-featured-in-the-unreal-engine-booth-at-gdc-2019> [<https://perma.cc/26YP-3RR4>]. A game engine is a software-development environment. It enables developers to create games using the engine’s rendering utility, physics engine, and a collection of other software elements, including sound, animation, networking, artificial intelligence, streaming, memory management, scene graph, and cinematics. See Jeff Ward, *What is a Game Engine*, GAME CAREER GUIDE (Apr. 29, 2008), [https://www.gamecareerguide.com/features/529/what\\_is\\_a\\_game\\_.php](https://www.gamecareerguide.com/features/529/what_is_a_game_.php) [<https://perma.cc/5536-BUDZ>]; Michael Lewis & Jeffrey Jacobson, *Game Engines in Scientific Research*, 45 COMMS. OF THE ACM 27 (2002); Eike Falk Anderson et al., *The Case for Research in Game Engine Architecture* (unpublished manuscript), available at [<https://perma.cc/6U6N-5LKP>].

<sup>230</sup> Crecente, *supra* note 228.

<sup>231</sup> *Id.*

was developed in-house as a side project. Epic soon realized, however, that it would make good sense to release *Fortnite* as a free-to-play, ever-expanding (service-based) game. In describing that decision, Epic CEO Tim Sweeney recalled: “I would describe it as seeing the writing in the wall.... There was an increasing realization that the old model wasn’t working anymore and that the new model was looking increasingly like the way to go.”<sup>232</sup> At the same time, an influx of cash from a deal with an investment company allowed Epic to drop the monthly fee it was charging for use of its game engine, instead extracting a royalty cut from anything created with the engine.<sup>233</sup> In the summer of 2017, a paid beta version of *Fortnite* was released.<sup>234</sup> A year later, in September 2018, Epic announced it would be releasing a new, free-to-play mode called “Fortnite Battle Royale.”<sup>235</sup> Similar to the multiplayer mode of *Battlefront II*, the Battle Royale mode was essentially a digital “sandbox” in which 100 players were engaged in combat, each vying to be the last surviving team or player. The free-to-play mode was an instant sensation. In just two weeks, it drew 10 million players.<sup>236</sup> Within a year, 45 million players were playing the game.<sup>237</sup> As of March 2019, as many as 250 million gamers play the game on a regular basis.<sup>238</sup>

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<sup>232</sup> See Daniel Liberto, *How Tencent Changed ‘Fortnite’ Creator Epic Games’ Fortunes*, INVESTOPEDIA (Oct. 29, 2018), <https://www.investopedia.com/news/how-tencent-changed-fortnite-creator-epic-games-fortunes/> [<https://perma.cc/V44L-4ZQJ>].

<sup>233</sup> See *id.* (“Epic used Tencent’s cash injection to drop the monthly charge for its game engine and give it away to anyone who wanted to use it”); Tyler Wilde, *Unreal Engine Games No Longer Owe Royalties on Their First \$1M in Revenue*, PC GAMER (May 13, 2020), <https://www.pcgamer.com/unreal-engine-games-no-longer-owe-royalties-on-their-first-dollar1m-in-revenue/> [<http://perma.cc/N8MJ-SF9M>] (describing the current royalty scheme for Epic’s Unreal Engine).

<sup>234</sup> Matt Brian, *The Rise and Rise (and Rise) of ‘Fortnite’*, ENGADGET (Mar. 17, 2018), <https://www.engadget.com/2018-03-17-fortnite-battle-royale-record-breaker.html> [<https://perma.cc/7G3M-UYUG>].

<sup>235</sup> *Id.*

<sup>236</sup> Eddie Makuch, *Fortnite: Battle Royale Has Hit 10 Million Players in Two Weeks*, GAMESPOT (Oct. 12, 2017), <https://www.gamespot.com/articles/fortnite-battle-royale-has-hit-10-million-players-/1100-6454008/> [<https://perma.cc/57Q4-GXGS>].

<sup>237</sup> Scott Duwe, *Fortnite: Battle Royale Has Hit a Milestone of 45 Million Players*, GAMEPUR (Jan. 17, 2018), <https://www.gamepur.com/news/fortnite-battle-royale-45-million-players> [<https://perma.cc/2VF8-LUXM>].

<sup>238</sup> Gilbert, *supra* note 4.

The monetization scheme of *Fortnite* is straightforward. As a freemium game, players need not spend a single dime to download the game and play it. *Fortnite* offers players a completely free multiplayer experience.<sup>239</sup> However, similar to other free-to-play games, players can choose to purchase a variety of optional, premium digital goods. One example is the Battle Pass, which provides players with access to a variety of premium costumes (“skins”), stickers, and emotes (animated dance moves).<sup>240</sup> Players can alternatively purchase most of the premium content separately.<sup>241</sup> To make an in-game purchase, players must use V-Bucks, the in-game currency. They can buy V-Bucks with real-world money or slowly earn V-Bucks by playing the game.<sup>242</sup>

The conversion rate between V-Bucks and real-world currency, however, is far from straightforward: \$1 is worth 100 V-Bucks, though the more one buys, the better the deal. So, for example, a player who spends \$100 on V-Bucks would be getting 13,500 V-Bucks (instead of 10,000).<sup>243</sup> Various limited deals are also on offer at different times, as players can buy, say, a bundle of 2800 V-Bucks for \$20 (instead of \$28).<sup>244</sup> The Battle Pass runs 950 V-Bucks and unlockable items usually go for 200 to 800 V-Bucks.<sup>245</sup>

Part of the secret to *Fortnite*'s success is that the game relies on popular culture, primarily through the use of emotes—animated dance moves derived from hip hop culture. Unsurprisingly, some commentators have criticized the use of popular culture in *Fortnite* as an attempt to profiteer from black culture. Notable hip-hop artist Chance the Rapper, for instance, argued that “[b]lack creatives created and popularized these dances but never monetized them.

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<sup>239</sup> Crecente, *supra* note 228 (“‘Fortnite Battle Royale’ is a free-to-play game. That means you don’t have to spend a penny to get the game.”).

<sup>240</sup> See *Battle Pass*, FORTNITE WIKI: FANDOM, [https://fortnite.fandom.com/wiki/Battle\\_Pass](https://fortnite.fandom.com/wiki/Battle_Pass) [<https://perma.cc/Z7BA-YLSN>].

<sup>241</sup> Crecente, *supra* note 228.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> See *Buy Fortnite—2,800 V-Bucks*, MICROSOFT STORE, [<https://perma.cc/QXK4-2Y82>].

<sup>245</sup> See *Battle Pass Season 5*, EPIC GAMES STORE, <https://www.epicgames.com/fortnite/en-US/battle-pass/season-9> [<https://perma.cc/25HL-DFVE>].

Imagine the money people are spending on these Emotes being shared with the artists that made them.”<sup>246</sup>

So far, the discussion moved along well-trodden lines, illustrating that *Fortnite*'s success can be explained on the basis of behavioral economics and a strong appeal to popular culture. Still, the core ambition of this subpart is to bring out a previously underexplored aspect of the game's popularity; namely, perceptions of wealth sharing that arise among *Fortnite* players. In short, I argue that perceptions of fairness, couched in ideas of wealth sharing, account for much of the success of *Fortnite*'s business model. As it turns out, players have little qualms about paying for (non-competitive) digital goods. This is largely because players feel that it's fair: the publisher charges nothing for the actual game—thus giving away a huge portion of its content for free—and instead charges a premium for in-game digital goods. In other words, *Fortnite*'s business model proved successful because the developers appear to be sharing their wealth. They do so by offering the basic version of the game, stripped of many of its cosmetic elements, for free.

To clarify, I do not mean to suggest that players never complain about *Fortnite*'s in-game transactions; quite the contrary, they often bristle at what they consider too high a price for a particular in-game design. But, importantly, these complaints are almost always isolated: players rarely, if ever, contest the practice of using in-game microtransactions *as such*.

Messages posted to the *Fortnite* forum on Reddit underscore this point. One user posted a message titled “V bucks are too expensive,” challenging the price of the Battle Pass while at the same time explaining: “I feel pride in supporting the developer for once. I don't feel like the battle pass is a rip off or anything like that.”<sup>247</sup> And while that user—and other users commenting on that post—felt that some of the unlockable designs were overpriced, they all largely agreed that the use of in-game microtransactions is itself justified.

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<sup>246</sup> Jordan Darville, *Chance the Rapper Calls on Fortnite to Pay Rappers for Their Animated Dances*, THE FADER (July 13, 2018), <https://www.thefader.com/2018/07/13/chance-the-rapper-fortnite-rappers-emotes> [<https://perma.cc/M2SJ-TMM2>].

<sup>247</sup> See *V Bucks Are Too Expensive*, REDDIT, [https://www.reddit.com/r/FortNiteBR/comments/86dgup/v\\_bucks\\_are\\_too\\_expensive/](https://www.reddit.com/r/FortNiteBR/comments/86dgup/v_bucks_are_too_expensive/) [<https://perma.cc/M9SX-WVBN>].

Moreover, many invoked the idea of “support” and were positively inclined to support a developer whom they trust and consider fair.

Another user responded to a different post by similarly acknowledging that “[cosmetic costumes] are 100% optional and provide no competitive advantage. The game itself is free [ . . . ] so a lot of people want cool cosmetics as well as supporting the developers for doing an amazing job.”<sup>248</sup> A recurring theme here is the desire to support the developers of the game. And in this context, too, players seem to recognize the idea of competitive fairness—the notion that no competitive advantages should be provided through micropayments. Equally important is the emphasis on the fact that the game is free. Players appear to believe that it’s fair for the publisher to charge money for premium designs when the publisher has no other streams of revenue. As one player put it:

If these cosmetics are the only way that the [*Fortnite*] devs are bringing in a profit, then it would make sense that they be priced by how much it costs to develop the game as a whole. A game like [*Fortnite*], with over 100 devs, has to cost a good bit of money, therefore justifying a ‘high’ price. The whole ‘I would buy skins if they were cheaper’ argument is based on the false assumption of their worth. Cosmetics are merely an avenue for players to support the further development of a great game.<sup>249</sup>

Similar sentiments have been echoed in many comments on the *Fortnite* forum on Reddit.<sup>250</sup> In fact, virtually every message

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<sup>248</sup> See *Unfair V-Buck Prices for Europe*, REDDIT, [https://www.reddit.com/r/FortNiteBR/comments/7qztn1/unfair\\_vbuck\\_prices\\_for\\_europe](https://www.reddit.com/r/FortNiteBR/comments/7qztn1/unfair_vbuck_prices_for_europe) [<https://perma.cc/87T6-3G9V>].

<sup>249</sup> See *Skin Prices: Why I Think They MAY Be Fair*, REDDIT, [https://www.reddit.com/r/FortNiteBR/comments/7gmzer/skin\\_prices\\_why\\_i\\_think\\_they\\_may\\_be\\_fair/](https://www.reddit.com/r/FortNiteBR/comments/7gmzer/skin_prices_why_i_think_they_may_be_fair/) [<https://perma.cc/G7UF-3DD6>] (italics removed).

<sup>250</sup> A search for terms such as “expensive,” “pricy,” “skins,” or “V-Bucks” will reveal countless comments pressing a similar point in response to complaints about prices. For some of the most popular *Fortnite* subreddits, see FORTNITE: BATTLE ROYALE: REDDIT, <https://reddit.com/r/FortNiteBR/> [<https://perma.cc/2MCK-HJEC>], FORTNITE COMPETITIVE: REDDIT, <https://reddit.com/r/FortniteCompetitive/> [<https://perma.cc/LYH2-V5DS>], and FORTNITE: REDDIT, <https://reddit.com/r/FORTnITE/> [<https://perma.cc/KUF8-PU5J>].

contesting microtransaction prices is met instantaneously with respondents advising that in-game microtransactions are fair, even if excessive at time, because no money is charged for playing the game.<sup>251</sup> And these ideas collectively draw on the trope of “supporting the devs” to offer a powerful endorsement of microtransactions.

What stems from these accounts is a fairly nuanced picture. Several ideas come to the fore. First, it is fair to charge a premium for in-game designs given the fact that *Fortnite* is a free-to-play game. Second, players express a need or desire to “support the developers” for their perceived contribution or service to the community. Third, and relatedly, the idea of loyalty figures prominently in players’ discussions of in-game purchases. In responding to complaints about high prices, players often profess a sense of loyalty or commitment toward the game’s developers.

I argue that these themes can be coherently bound together by reference to the overarching idea of fairness as an incident of wealth sharing. The crux of the argument is that players are engaging in reciprocal behavior: they believe the developers to be sharing the wealth (by not charging money for the game itself), and thus reciprocate by “supporting the devs” and displaying “loyalty” through their embrace of in-game microtransactions.

The notion of reciprocity has roots in behavioral theory. Behavioral scientists have long touted reciprocity as a major force driving human behavior. At first blush, the notion of reciprocity seems to fly in the face of traditional assumptions that inform economic analysis: that is, that people seek to further self-regarding interests. But this picture is incomplete. While some studies find that people often behave in selfish ways under some circumstances, scholars widely

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<sup>251</sup> See *I Feel Skins Are a Bit Pricey*, REDDIT, [https://www.reddit.com/r/FortNiteBR/comments/7ip61w/i\\_feel\\_skins\\_are\\_a\\_bit\\_pricey/](https://www.reddit.com/r/FortNiteBR/comments/7ip61w/i_feel_skins_are_a_bit_pricey/) [<https://perma.cc/U6FR-VB47>]; *Skin Prices and the “It’s a Free Game” Excuse*, REDDIT, [https://www.reddit.com/r/FortNiteBR/comments/8wcqzl/skin\\_prices\\_and\\_the\\_its\\_a\\_free\\_game\\_excuse/](https://www.reddit.com/r/FortNiteBR/comments/8wcqzl/skin_prices_and_the_its_a_free_game_excuse/) [<https://perma.cc/62ZY-P68S>]; *Nothing in This Game is Exclusive, Stop Complaining About It*, REDDIT, [https://www.reddit.com/r/FortNiteBR/comments/8bf03k/nothing\\_in\\_this\\_game\\_is\\_exclusive\\_stop/](https://www.reddit.com/r/FortNiteBR/comments/8bf03k/nothing_in_this_game_is_exclusive_stop/) [<https://perma.cc/ND4S-YQXT>]; see also sourced cited in *supra* notes 247–249.

agree that people are also meaningfully attentive to considerations of fairness and, in particular, ideas of reciprocity.<sup>252</sup>

This literature has yielded interesting insights. What might explain the disparity between selfish and fairness-driven behavior? Scholars believe that the notion of reciprocity can account for individuals' willingness, or lack thereof, to engage in fairness-driven behavior.<sup>253</sup> People are likely to repay the actions of others by acting in a similar fashion.<sup>254</sup> Researchers describe reciprocity as an entrenched, almost innate, behavioral trait.<sup>255</sup> People can tap into this reciprocal impulse when faced with a choice about how to interact with others.<sup>256</sup> Specifically, as some studies have found, people are, at core, "conditional cooperators"—they are hard-wired to cooperate, if only they perceive others to be acting in a like-minded manner.<sup>257</sup> People tend to think of fairness in relational terms. Their actions are dependent on the actions and intentions of others. And recent studies suggest that people would go to great lengths to

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<sup>252</sup> Ernst Fehr & Klaus M. Schmidt, *A Theory of Fairness, Competition and Cooperation*, 114 Q. J. OF ECON. 817, 818 (1999). One could argue that, in a sense, reciprocity is in fact about promoting one's self-interests; you scratch my back, and I'll scratch yours. This argument comports with the conventional wisdom that reciprocity is one of the primary principles animating international law; namely, the idea that reciprocity promotes self-regarding goals by facilitating international cooperation. *See, e.g.*, Francesco Parisi & Nita Ghei, *The Role of Reciprocity in International Law*, 36 CORNELL INT'L L.J. 93 (2003). But while reciprocity can be explained on the basis of self-interest, it is decidedly informed by ideas of fairness that are largely germane to people's perceptions of their social interactions. I say more on this in the remainder of this subpart.

<sup>253</sup> Schultz, *supra* note 16, at 698–701.

<sup>254</sup> *See* Ernst Fehr & Simon Gächter, *Fairness and Retaliation: The Economics of Reciprocity*, 14 J. OF ECON. PERSP. 159, 159–60 (2000). *See also* Golnaz Tabibnia, Ajay B. Satpute & Matthew D. Lieberman, *The Sunny Side of Fairness: Preference for Fairness Activates Reward Circuitry (and Disregarding Unfairness Activates Self-Control Circuitry)*, 19 PSYCH. SCI. 339 (2008) (arguing that ideas of fairness and reciprocity are enforced by neural mechanisms).

<sup>255</sup> *See, e.g.*, LIXING SUN, *THE FAIRNESS INSTINCT: THE ROBIN HOOD MENTALITY AND OUR BIOLOGICAL NATURE*, 99 (2013) (suggesting that fairness evolved as an evolutionary trait).

<sup>256</sup> *See* Linda Bloom & Charlie Bloom, *Honoring the Rule of Reciprocation*, PSYCH. TODAY (Oct. 10, 2015), [<https://perma.cc/XM6M-Y9WC>].

<sup>257</sup> Schultz, *supra* note 16, at 699 (observing that "[p]eople are thus conditional cooperators. They are willing to cooperate, but their continuing cooperation depends on what others are doing, the intentions of others, and how well others are doing (for better or worse) relative to themselves").



vindicate their sense of fairness or reciprocity. Some would even be willing to take on risks—or sustain losses—in order to “punish” others whom they perceive to have wronged them.<sup>258</sup> Reciprocity, it seems, is almost a fact of human nature.

As this discussion suggests, reciprocity is an incident of fairness. People engage in reciprocal behavior because they believe that to be fair. They do so in a host of social contexts and, most relevant to our discussion, in their interactions with content creators. A case in point is Mark Schultz’s study of jambands.<sup>259</sup> Schultz investigated the social norms that pervade fan communities of jambands, such as Grateful Dead or Phish. These bands, Schultz argues, support and even encourage free copying and distribution of their music from live shows, while demanding that other performances, like recorded studio sessions, be legally purchased.<sup>260</sup> This practice has powerful implications for the relationships between content creators and consumers. By allowing some shows to be freely copied, these bands are thought to be “sharing the wealth.”<sup>261</sup> And this practice, in turn, gives rise to a perception of fairness as fans believe that these jambands are treating them fairly, unlike other commercial bands. Schultz thus suggests that fan communities of jambands are reciprocal and hence engender loyalty.<sup>262</sup>

The themes identified in Schultz’s study—reciprocity, fairness, loyalty, and wealth sharing—all play a role in the gaming community. As discussed above, players often enlist ideas of loyalty, fairness, and wealth sharing (as a manifestation of reciprocity) in their interactions with game developers and fellow community members. Perceptions of wealth sharing abound among players. And these perceptions, I argue, account for at least some of *Fortnite*’s success,

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<sup>258</sup> *Id.* at 700 (referencing Fehr & Schmidt, *supra* note 252, at 818) (“People will cooperate and incur a cost in order to punish others—for example, socially snubbing somebody who violates community norms or taking a risk to steal from an employer who is perceived as unfair.”).

<sup>259</sup> *Id.* at 653, 668.

<sup>260</sup> *Id.* at 668–91.

<sup>261</sup> *Id.* at 714 (quoting a fan as saying: “While I have never seen the band, I have heard them many times through this site....These types of bands are small and not wealthy but let us listen to their music for free.”).

<sup>262</sup> *Id.* at 688–89.

because they legitimate the game's microtransaction structure and catalyze players to "support the devs" and display loyalty.

### C. Labor

The third subset of fairness norms arise out of gameplay streams. As discussed above, gameplay streams are self-produced, live videos of people playing video games. The most popular platform for gameplay streams is Twitch, where players can set up their own channels, amass throngs of followers, and solicit donations.<sup>263</sup> Gameplay streams on Twitch are accompanied by concurrent live "stream chats," where viewers can interact both with each other and with the streamer.<sup>264</sup> Some streamers, though not all, superimpose a graphic "overlay" on their videos: an overlay is a graphic feature that usually displays the streamer's name and logo, as well as various design elements that the streamer finds desirable.<sup>265</sup> Streamers can also design custom emojis, called emotes, to be used by subscribers in the stream chat. Gameplay streams often stretch for hours on end—it's not at all uncommon for a popular streamer to stream for eight hours straight.<sup>266</sup> In addition, streamers are expected to interact with their audience, so they must play the game while remaining fairly responsive to messages posted to the stream chat.<sup>267</sup>

This subpart explores the norms of fairness underlying gameplay streams. It begins by examining the norm against perceived misappropriation of gameplay streams. It then delimits with greater

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<sup>263</sup> *How Twitch.tv Works and Its Business Model*, INVESTOPEDIA, <https://www.investopedia.com/articles/investing/082115/how-twitchtv-works-and-its-business-model.asp> [<https://perma.cc/SF3M-DWA7>].

<sup>264</sup> See text accompanying *supra* notes 118–124.

<sup>265</sup> The demand for graphic Twitch overlays has ballooned in recent years, with hundreds of websites and designers offering overlay design services for pay. See, e.g., TWITCH OVERLAY, <http://twitchoverlay.com> [<https://perma.cc/55F6-HAEB>]; STREXM, <http://strexm.tv> [<https://perma.cc/HLR6-34N3>]; STREAMLABS, <http://streamlabs.com> [<https://perma.cc/S6VV-GTDS>]; STREAMPLAY, <http://streamplaygraphics.com> [<https://perma.cc/SGT7-R95Q>].

<sup>266</sup> See *infra* Section III.C.5.

<sup>267</sup> See William A. Hamilton, Oliver Garretson, & Andruid Kerne, *Streaming on Twitch: Fostering Participatory Communities of Play Within Live Mixed Media*, PROC. OF THE SIGCHI CONF. ON HUM. FACTORS IN COMPUTING SYS. 1315, 1316 (Apr. 2014), <https://ecologylab.net/research/publications/streamingOnTwitch.pdf> [<https://perma.cc/W7QZ-PAKW>].

precision the contours of that norm, betraying some of the ambiguity and nuance associated with its application. It next outlines the mechanisms used to enforce that norm, before turning to consider the workings of copyright law, explaining why the law is only partly calibrated to protect gameplay streams.

### 1. Misappropriation Norm

Streamers often take direct steps to deter against misappropriation of their gameplay streams: they frequently submit takedown notices<sup>268</sup> or bring claims via YouTube's Content ID system.<sup>269</sup> They also take to Twitter and other platforms to shame alleged infringers and call attention to infractions of their perceived rights.

The prototypical case of infringement involves YouTube: infringers often record, in whole or in part, Twitch gameplay streams and then repost them on YouTube.<sup>270</sup> One notable streamer, for example, posted a message to Twitter announcing that he had successfully taken down a YouTube video featuring contents lifted from his Twitch streams.<sup>271</sup> Another streamer posted a message suggesting he had similarly been able to take down an infringing YouTube video, labeling the purported infringer a "leech."<sup>272</sup> And even some of the biggest streamers in the world, such as Richard Blevins, have previously intimated that they would not hesitate to take down "infringing" videos.<sup>273</sup> Moreover, many streamers affix ominous copyright notices to their streams. These notices typically caution against

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<sup>268</sup> See text accompanying *infra* notes 325–327.

<sup>269</sup> See Rebecca Tushnet, *All of This Has Happened Before and All of This Will Happen Again: Innovation in Copyright Licensing*, 29 BERKELEY TECH. L.J. 1447, 1457–78 (2015) (reviewing YouTube's Content ID system).

<sup>270</sup> See, e.g., Luke Winkie, *That Highlight Channel You Love Isn't Exactly Legal, But It Isn't Going Anywhere Either*, DOT ESPORTS (Sept. 12, 2016, 09:12 AM), <https://dotesports.com/earthstone/news/twitch-youtube-highlight-channels-legality-3872> [<https://perma.cc/YC2S-A929>] (describing the work of a famous YouTube channel whose contents consist of clips lifted from Twitch and other YouTube channels). In the balance of this Section, I will outline a number of other prominent examples.

<sup>271</sup> Curtis McCall (@RewindNV), TWITTER (Feb. 20, 2019, 6:40 PM), <https://twitter.com/RewindNV/status/1098366880480251905> [<https://perma.cc/Z25W-E57S>].

<sup>272</sup> Ryan Amaechi (@SylverRye), TWITTER (June 3, 2019, 9:01 PM), <https://twitter.com/SylverRye/status/1135713144427483137> [<https://perma.cc/Z3L2-72W9>].

<sup>273</sup> H3 Podcast Highlights, *Ninja Addresses Jake Paul Clickbaiting Him*, YOUTUBE (Apr. 23, 2018), [<https://perma.cc/7QT6-2R2H>] (starting at 1:45).

the copying or “stealing” of streaming content. One such notice, posted by a prominent Twitch streamer, warned that “[a]ny channel that post[s] this stream content other than [the streamer] on YouTube...infringes upon rights to my content [and] will be penalized accordingly.”<sup>274</sup> Another streamer appended to his channel a brief notice pleading “[d]on’t steal my content, you shady YouTube channels.”<sup>275</sup> Yet another popular streamer quipped, “[s]weet, now we got people stealing footage. Copyright strikes going out.”<sup>276</sup>

Some streamers voice concern over the technological means by which copying of streams is made possible. A notable streamer of *Mortal Kombat*, for example, decried the game’s recording function, which allows players to access in-game recordings of matches played by others.<sup>277</sup> Players can enable automatic recording of their in-game matches, and these recordings are then generated and stored on the game’s servers.<sup>278</sup> This feature has allowed alleged infringers to lift contents (namely, gameplay footage) directly from the game’s servers. Thus, to reproduce a player’s gameplay video, potential infringers need not access the player’s Twitch stream: they can simply access the recordings stored on the game’s servers.<sup>279</sup>

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<sup>274</sup> See Screenshot of Twitch Stream Hosted by KHTX\_Scar on March 13, 2019 (on file with author).

<sup>275</sup> See Screenshot of Twitch Stream Hosted by LTH\_BigD on March 13, 2019 (on file with author).

<sup>276</sup> Carl White (@PerfectLegend), TWITTER (Mar. 18, 2019, 12:13 AM), <https://twitter.com/PerfectLegend/status/1107495324594176000> [<https://perma.cc/Y44Z-S4BM>].

<sup>277</sup> Destroyer (@DestroyerFGC), TWITTER (Apr. 29, 2019, 9:45 AM), <https://twitter.com/DestroyerFGC/status/1122859447360065536> [<https://perma.cc/2ENS-DA2S>].

<sup>278</sup> Andrew Burnes, *Mortal Combat 11 Adds NVIDIA Ansel and Highlights On PC*, NVIDIA (May 17, 2019), <https://www.nvidia.com/en-us/geforce/news/mortal-kombat-11-pc-nvidia-ansel-highlights/> [<https://perma.cc/SN4A-BSCV>].

<sup>279</sup> Why would potential infringers try to avoid lifting contents from a player’s Twitch stream? The answer is that, while it is unclear whether gameplay streams are themselves protected, they typically feature other protected elements: a graphic overlay as well as a recording of the streamer’s voice. As a result, potential infringers are able to minimize their legal exposure by directly extracting gameplay videos from the game’s online servers, thus sidestepping the need to record Twitch streams (and their accompanying overlays and voice recordings). I say more on the legal protection of gameplay stream in Part III.C.4 below.

Many streamers describe the unauthorized use of one's streams in terms of "theft" or "stealing." Some even suggest that the unauthorized use of streams is comparable to the widespread practice of file-sharing in the music industry.<sup>280</sup> To illustrate, consider the crusade launched by two famous streamers, known by their online pseudonyms Pokimane and ZeRo, against what they call "content theft."<sup>281</sup> ZeRo, whose real name is Gonzalo Barrios, is a popular streamer of the game *Super Smash Bros.*, attracting thousands of viewers every night on Twitch. In a lengthy message posted to Twitter, Barrios complained that "people...tak[e] chunks of [his] stream[s] and put[] them on YouTube to make money themselves."<sup>282</sup> He further clarified that this practice regularly takes the shape of compilation-like "highlights" videos based on various clips lifted from his stream, or specific matches cropped out of his stream and uploaded to YouTube as distinct videos.<sup>283</sup> Denouncing such appropriations as "wrong," Barrios warned that he will take steps to remove infringing videos and further asked that fans alert him to future violations.<sup>284</sup>

Another probative example is the controversy surrounding popular streamer Pokimane, whose real name is Imane Anys.<sup>285</sup> After a YouTube user uploaded a video consisting of clips from Pokimane's channel, she hastily placed a copyright strike on the user's channel, exclaiming that she will not tolerate perceived misappropriations of her streams.<sup>286</sup> These sentiments are reflective of the deeply held

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<sup>280</sup> Brant McCaskill (@Bambamguitar), TWITTER (June 6, 2019, 12:24 PM), <https://twitter.com/bambamguitar/status/1136670299024429058> [<https://perma.cc/SX5S-R9VQ>].

<sup>281</sup> Steven Asarch, *Twitch Streamers Pokimane and ZeRo Fight Against Content Theft*, NEWSWEEK (Jan. 2, 2019, 3:28 PM), <https://www.newsweek.com/zero-pokimane-twitch-stream-content-theft-compilation-youtube-1277476> [<https://perma.cc/QW2T-V8YK>].

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* Some high-profile streamers believe that Pokimane's frequent use of the copyright strike system is excessive or otherwise abusive. *See, e.g.*, Virginia Glaze, *KEEMSTAR Accuses Pokimane of Abusing YouTube's Copyright System*, DEXERTO (Dec. 27, 2018), <https://www.dexerto.com/entertainment/keemstar-accuses-pokimane-of-abusing-youtubes-copyright-system-266637/> [<https://perm.a.cc/9DJY-BBPK>] [hereinafter "Glaze,

views of streamers and fans in the gaming community. A user on Reddit, for instance, castigated alleged violators as “thieves,” asserting that YouTube needs to do more to combat “content stealers” who profit from “stolen videos.”<sup>287</sup> The user then listed a number of “compilation channels” known for lifting streamers’ content.<sup>288</sup>

In sum, streamers guard against perceived misappropriations of their streams. Community members view gameplay streams as proprietary intellectual goods owned by streamers. Accordingly, alleged violators are often chastised as “thieves” or “content stealers” worthy of rebuke.

## 2. Defining Misappropriation

The norm against misappropriation of gameplay streams is somewhat nuanced. Though framed in broad terms, it is subject to several contested limitations. First and foremost, many streamers appear to hold the view that appropriation of their streams is permissible to the extent that it is transformative—namely, that it adds value to the original stream.<sup>289</sup> One can add value to the original stream by editing, slashing, or mixing stream content with other content. Transformative use of gameplay streams must also reflect, generally speaking, the appropriator’s own creative voice. So, to escape infringement, alleged appropriators need to make significant changes to the lifted stream, either by mixing it with some other content or by editing it in a way that would mirror the appropriator’s own voice.

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*Keemstar Accuses Pokimane*”]; Virginia Glaze, *PewDiePie Calls Out Pokimane for Copy Striking Smaller YouTube Channels*, DEXERTO (Jan. 11, 2019), [<https://perma.cc/29EE-W473>] [hereinafter Glaze, *PewDiePie Calls Out Pokimane*].

<sup>287</sup> u/TexBoo, *@YouTube why are Twitch compilation channels allowed to Monetize content? They are nothing more than content stealers and there are multiple posts, videos and forum threads about this. Even large Youtubers with millions of subscribers are talking about it. Yet you allow it?*, REDDIT (Sept. 16, 2018, 4:13AM), [[https://www.reddit.com/r/youtube/comments/9g7rze/youtube\\_why\\_are\\_twitch\\_compilation\\_channels/](https://www.reddit.com/r/youtube/comments/9g7rze/youtube_why_are_twitch_compilation_channels/)] [<https://perma.cc/6VBW-GFWW>] [hereinafter *Twitch Compilation Channels*].

<sup>288</sup> *Id.*

<sup>289</sup> Willie Clark, *The (Still) Uncertain State of Video Game Streaming Online*, ARS TECHNICA (Jan. 28, 2018), [<https://arstechnica.com/gaming/2018/01/to-stream-or-not-to-stream-how-online-streaming-game-videos-exist-in-an-ip-world/>] [<https://perma.cc/BW9G-QKCL>].

Much like gameplay streamers, courts also look to transformative use in excusing copyright infringement. They do so under the fair use analysis. Fair use is the principal defense to copyright infringement.<sup>290</sup> Whether a particular use is fair is assessed against four factors.<sup>291</sup> The first and arguably most important factor involves the character and purpose of the use—courts are asked to consider whether the use is commercial and, more importantly, whether it is transformative.<sup>292</sup> This requirement aligns with the notion of transformative use embraced by streamers; it recognizes as transformative any use that adds “something new, with a further purpose or different character, altering the first [work] with new expression, meaning, or message.”<sup>293</sup>

But while many streamers seem to accept that transformative use is permissible in theory, few agree on what this actually means in practice. Let us consider again the two cases described above—the incidents involving Twitch streamers Pokimane and ZeRo. Pokimane herself was quoted as recognizing that copying her streams would be permissible if “you edit videos and actually put effort into it and make it more entertaining for the viewer.”<sup>294</sup> Content from Pokimane’s stream, recall, was used by another YouTube user. Yet, strikingly, the video in question did not involve wholesale

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<sup>290</sup> Margot E. Kaminski & Guy A. Rub, *Copyright’s Framing Problem*, 64 UCLA L. REV. 1102, 1141 (2017) (“The most important defense to copyright infringement is fair use.”).

<sup>291</sup> The fair use doctrine is codified in 17 U.S.C. § 107 (“[T]he fair use of a copyrighted work...is not an infringement of copyright.”). See William W. Fisher, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661, 1662 (1988); see generally Pamela Samuelson, *Possible Futures of Fair Use*, 90 WASH. L. REV. 815 (2015); Clark D. Asay et al., *Is Transformative Use Eating the World?*, 61 B.C.L. REV. 905 (2020).

<sup>292</sup> Asay et al., *supra* note 291, at 906.

<sup>293</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). As the court explained,

[a]lthough such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.

*Id.*

<sup>294</sup> See Asarch, *supra* note 281.

copying on the part of the alleged infringer; rather, it offered commentary on controversies in which Pokimane was embroiled at the time.<sup>295</sup> In his video, the alleged infringer included cropped-out Pokimane clips intermixed with clips and screenshots of another YouTuber with whom Pokimane was supposedly feuding.<sup>296</sup> And, as other notable streamers emphasized, this sort of use surely qualifies as transformative by community standards.<sup>297</sup> The purportedly infringing video was heavily edited and no doubt involved effort and commentary on the part of the secondary user. Thus, lofty ideals aside, Pokimane appeared willing to recognize transformative use as permissible in theory, but grappled with applying this concept in practice, at least when her own content was at issue.<sup>298</sup>

Similar lessons might be gleaned from the incident involving Gonzalo Barrios, known by his online pseudonym ZeRo.<sup>299</sup> As explained previously, Barrios published a widely discussed Twitter post complaining that his Twitch streams are frequently lifted and reposted on YouTube.<sup>300</sup> But, in keeping with community norms, Barrios nonetheless acknowledged that subsequent transformative use would not be offensive to his (perceived) rights. He noted that he does not necessarily object to any secondary use of his Twitch streams, claiming that it would be “great to see” videos in which third parties provide commentary on matches they had played

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<sup>295</sup> See Bowblax, *Keemstar vs. Pokimane Twitter Fight—Bullying SSSniperWolf Fanboy*, YOUTUBE (Nov. 9, 2018), <https://www.youtube.com/watch?v=t9qhlSHrA50> [<https://perma.cc/RGL7-538W>].

<sup>296</sup> *Id.*

<sup>297</sup> See Glaze, *Keemstar Accuses Pokimane*, *supra* note 286; Glaze, *PewDiePie Calls Out Pokimane*, *supra* note 286.

<sup>298</sup> Josh Katzowitz, *YouTuber Pokimane Defends Herself Against PewDiePie’s Copyright Criticism*, THE DAILY DOT (Jan. 14, 2019), <https://www.dailydot.com/upstream/pokimane-pewdiepie-youtube-copyright-claims/> [<https://perma.cc/HWV3-7XHA>]. Pokimane’s response likely betrayed the true reason behind her decision to take action against the alleged infringer—the latter’s video painted an unfavorable picture of her, and Pokimane therefore wanted to remove the video to protect her reputation. “That video was getting a lot of traction at the time,” she said, “and being completely honest, I kind of wanted to be over with all the petty drama.” *Id.*

<sup>299</sup> Andrew Cohen, *Facebook Gaming Signs Super Smash Bros. Star Gonzalo ‘ZeRo’ Barrios*, SPORTTECHIE (Dec. 4, 2019), <https://www.sporttechie.com> [<https://perma.cc/EQ8R-7GV3>].

<sup>300</sup> See Asarch, *supra* note 281.



against him.<sup>301</sup> Barrios intuited that, in such cases, he might see value in contributing his work to someone else's project and further asked that secondary users directly inquire with him about the use of his videos.<sup>302</sup> This view is seemingly consonant with the general approach to transformative use in the streaming community; namely, that secondary use is permissible insofar as it adds something new to the original video.

That said, this view also risks narrowing the scope of transformative use by mandating that any secondary use—including ostensibly permissible transformative use—be subject to clearance by the owner of the original video stream. Should Barrios be the one to make the ultimate determination as to whether the use is transformative? On this view, the task of adjudicating transformative use is entrusted to the owner of the original video, and her alone. This procedural limitation is alarming because (perceived or actual) rightsholders are naturally predisposed to find that secondary uses are non-transformative more often than not.

In addition to transformative use, a number of other limitations cabin the scope of the anti-appropriation norm identified above. One such limitation stems from the nature of online games—players typically face off against other players. As a result, it is commonly accepted that, if a streamer engages with another player online, the latter is herself allowed to upload a self-recorded video depicting her match (or set of matches) with the streamer.<sup>303</sup>

Another extenuating factor circles around the question of whether the original streamer uploaded her contents to YouTube. The issue recently came to a head in a lengthy Twitter discussion ignited by a notable streamer who complained about his Twitch videos being lifted and reposted to YouTube.<sup>304</sup> Though most commenters sympathized with the streamer, a substantial subset of the comments pointed out that the streamer had not uploaded his streams to YouTube; as one commenter suggested, the alleged

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<sup>301</sup> *Id.*

<sup>302</sup> *Id.* (“ZeRo has asked those that want to use his content to email him first...”).

<sup>303</sup> *Id.* (recognizing that other players may upload videos of matches they had played against the streamer).

<sup>304</sup> See Amaechi, *supra* note 272.

copier was actually doing the streamer a favor—by reposting the streamer’s video on YouTube, the copier helped him gain “extra followers.”<sup>305</sup> Others noted that the streamer himself does not operate a YouTube channel, hence suggesting that such infringers in fact take on the role of “good marketing managers [who are] boost[ing] [the streamer’s Twitch] channel.”<sup>306</sup> Still other commenters observed that, while community members would rather watch “official” videos uploaded by streamers themselves, “availability is huge.”<sup>307</sup> Put another way, people hunger for high-quality streaming content and will watch “unofficial” content ripped from streamers if no “official” content is available.<sup>308</sup> And while some users conceded that the streamer could potentially profit from posting his videos himself, others countered that the infringer is generating “coverage and exposure”<sup>309</sup> from which the streamer might benefit. In doing so, the infringer is providing access to content that is otherwise inaccessible. The implication is that the original streamer does not maintain a YouTube channel himself and therefore cannot claim to be harmed by alleged infringers.

This episode tees up rather elegantly the potential limitations of a broad anti-appropriation norm: if the original Twitch streamer does not post her contents to YouTube, others might be justified in doing so. This view can be explained on the basis of monetary harm. Because the original streamer does not monetize gameplay streams by uploading them to YouTube, the streamer wouldn’t be harmed by unauthorized third-party uploads. Alternatively, this view can also be motivated by the desire to ensure public access to gameplay streams: by uploading streams to YouTube, alleged infringers are

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<sup>305</sup> See comment by Nazeyr (@TheVezc), TWITTER (June 3, 2019, 9:04 PM), <https://twitter.com/TheVezc/status/1135713830170812416> [<https://perma.cc/EXQ8-BLBQ>].

<sup>306</sup> See comment by Ejyptian (@Ejyptian), TWITTER (June 4, 2019, 2:10 AM), <https://twitter.com/Ejyptian/status/1135790789643132928> [<https://perma.cc/8VZV-V596>].

<sup>307</sup> See comment by Zachary T. (@PrismoNasty), TWITTER (June 3, 2019, 9:14 PM), <https://twitter.com/Prismonasty/status/1135716500504027142> [<https://perma.cc/9U4P-Y9TH>].

<sup>308</sup> See *id.*

<sup>309</sup> See comment by Ravishing Rick (@Longfut\_), TWITTER (June 4, 2019, 4:34 PM), [https://twitter.com/LONGFuT\\_/status/1136008352373313536](https://twitter.com/LONGFuT_/status/1136008352373313536) [<https://perma.cc/RG4C-MH7W>].

facilitating wider dissemination of such works. Indeed, people derive a great deal of pleasure from watching gameplay streams.<sup>310</sup> And so community members are less likely to take issue with alleged infringements when such infringements implicate streamers who never, or practically never, post on YouTube themselves.

Taken together, these considerations correspond closely to the underlying balance that copyright law seeks to strike between incentives and access.<sup>311</sup> The law embodies a measured tradeoff between two competing considerations: providing sufficient incentives to creators and ensuring that works of authorship ultimately become accessible to society at large. These concerns mirror the debate over whether the streamer is required to post her own contents to YouTube. By failing to do so, she might prevent the dissemination of her work, thus limiting its accessibility. And failure to post streaming content on YouTube might also suggest that YouTube monetization plays little role in incentivizing the original creator.

To put it more concretely, these policy considerations—incentives and access—both pull in the same direction. They support a finding of non-infringement when the streamer failed to independently post contents to YouTube. They arise out of a system of community norms yet appear to comport with the broader policy goals underpinning copyright law.

Discussions along these lines are fairly common. Most gamers agree that streamers hold rights to their gameplay streams, but there remains a significant minority of community members who appear to believe that misappropriations can be excused where the original streamer fails to post her contents to YouTube.<sup>312</sup> These observations are consistent with the literature on the psychology of copying. Scholars have found that, although people often view copying as inherently wrong, they are also inclined to consider a host of fairness-driven factors in excusing infringement, such as whether the copier

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<sup>310</sup> See text accompanying *supra* notes 102–103.

<sup>311</sup> See *infra* Section IV.A.

<sup>312</sup> See text accompanying *supra* notes 304–309.

benefited from the copying, what the copier's intent was, and so forth.<sup>313</sup>

In short, the norm against misappropriation of gameplay streams is subject to one principal qualification: transformative use. Apart from transformative use, community members recognize two additional checks on streamers' rights: (i) a player who directly engages in-game with the streamer is allowed to monetize her self-recorded matches with the streamer; and (ii) whether the streamer herself uploaded her contents to YouTube might be relevant in considering infringement, though it appears that community members are divided on this score.

### 3. Enforcement

Players communicate about repeat infringers. They identify, name, and shame known offenders. And they often help other streamers detect infringing videos by policing the YouTube and Twitch channels run by such repeat infringers.<sup>314</sup> In one case, a prominent streamer took to Twitter to acknowledge that a fellow streamer had notified him of an alleged misappropriation of his stream.<sup>315</sup> And consider again the case of Gonzalo Barrios, whose now-famous Twitter post impassionedlly implored community members to assist him in an effort to combat stream "stealing."<sup>316</sup> These cases illustrate that norm enforcement is often a collective undertaking: community members and streamers work together with an eye toward policing norm violators.

Gamers frequently identify repeat infringers.<sup>317</sup> Condemning such infringers as "leeches" or "vultures,"<sup>318</sup> gamers respond to norm transgression by invoking social sanctions—that is, by inflicting reputational harm through the use of negative campaigns and

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<sup>313</sup> Christopher Buccafusco & David Fagundes, *The Moral Psychology of Copyright Infringement*, 100 MINN. L. REV. 2433, 2466 (2016).

<sup>314</sup> See, e.g., Twitch Compilation Channels, *supra* note 287.

<sup>315</sup> See H3 Podcast Highlights, *supra* note 273 and accompanying text.

<sup>316</sup> See Asarch, *supra* note 281 and accompanying text.

<sup>317</sup> For example, consider the case described in the text accompanying *supra* notes 287–288 (a Reddit post providing a long list of infringing YouTube channels to assist streamers with identifying norm contravention).

<sup>318</sup> *Id.*

shaming.<sup>319</sup> The gaming community is surprisingly tight-knit; different sub-communities typically emerge around different video games.<sup>320</sup> These communities are often divided into two classes of players: casual and professional. Professional gamers, as opposed to casual ones, engage in competitive gaming.<sup>321</sup> And, perhaps more importantly, competitive gamers occupy a position of visibility within the community—they have a large audience on social media and are widely recognized as community leaders.<sup>322</sup> Thus, they wield considerable power and influence, and are well-positioned to dispense harsh reputational sanctions to deter infringers. Social stigma is especially effective as a tool for policing norm violation.<sup>323</sup> And, to be sure, message boards and social media have greatly contributed to the dissemination of negative gossip as a means of enforcing community norms.

Last but not least, gamers also employ formal self-help remedies. Specifically, they often issue takedown notices<sup>324</sup> pursuant to

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<sup>319</sup> ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 57 (1991) (discussing “negative gossip” as a tool for enforcing social norms). The literature on social norms is often traced back to Ellickson’s influential book, which focused on ranchers in Shasta County, California. Ellickson found that, contrary to conventional wisdom, Shasta County ranchers operated with little attention to formal property law, and instead subscribed to a system of extralegal norms.

<sup>320</sup> Keith Stuart, *Gamer Communities: The Positive Side*, THE GUARDIAN (July 31, 2013), <https://www.theguardian.com/technology/gamesblog/2013/jul/31/gamer-communities-positive-side-twitter> [<https://perma.cc/G9RE-UZ6R>] (recounting the history of gaming communities and discussing a number of examples of sub-communities that arose around different games).

<sup>321</sup> See Jayson van Kerckhoven, *Casual vs. Competitive Gaming: What Are The Differences?*, CRITICAL HIT GAMING (July 5, 2018), <https://www.criticalhit.net/gaming/casual-vs-competitive-gaming-differences/> [<https://perma.cc/QMC5-ZVRD>].

<sup>322</sup> See, e.g., The Fortnite Team, *Creative*, EPIC GAMES (Dec. 5, 2018), <https://www.epicgames.com/fortnite/en-US/news/creative> [<https://perma.cc/YJ79-2ZYX>] (identifying the YouTube channels of “Fortnite’s most imaginative community leaders”); Henry Choi, *How to Get a Fighting Game Community to Thrive and Grow*, EVENT HUBS (Dec. 2, 2017), <https://www.eventhubs.com/news/2017/dec/02/how-get-fighting-game-community-thrive-and-grow/> [<https://perma.cc/WL72-DGMV>] (identifying “community leaders” in three subcommunities of popular fighting games).

<sup>323</sup> Fagundes, *supra* note 133, at 1127 (discussing the centrality of social norms to enforcement of derby-name norms); Oliar & Sprigman, *supra* note 20 (analyzing enforcement of the social norms that govern standup comedy).

<sup>324</sup> See text accompanying *supra* notes 271–272.

Section 512 of the Digital Copyright Millennium Act (DMCA),<sup>325</sup> which shields service providers from copyright liability so long as they meet a number of statutory requirements. In particular, the service provider must act expeditiously to remove infringing content upon acquiring actual or “red flag” notice of infringement.<sup>326</sup> The process for submitting a takedown notice on YouTube is fast and simple: in essence, streamers need only fill out a brief online form and identify the source material that was allegedly copied.<sup>327</sup> Takedown notices are thus an efficient means of redressing norm infraction. But, as will become apparent in the next section, it’s not clear what rights, if any, streamers may actually assert in their gameplay streams. Their use of legal self-help tools is therefore questionable. Streamers seem to believe, in conformity with community norms, that gameplay streams are their legal property.<sup>328</sup> Yet that is debatable, as the remainder of this Part suggests.

#### 4. Gameplay Streams: The Law

Community members may leverage any number of legal strategies in asserting legal exclusivity over their gameplay streams. Most

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<sup>325</sup> 17 U.S.C. § 512.

<sup>326</sup> 17 U.S.C. § 512(c). Section 512(i) further requires service providers to adopt a reasonably implemented policy for terminating repeat infringers “in appropriate circumstances.” § 512(i).

<sup>327</sup> *Submit a Copyright Takedown Request*, YOUTUBE, <https://support.google.com/youtube/answer/2807622?hl=en> [<https://perma.cc/88DY-5EMJ>].

<sup>328</sup> It’s worth noting that, at least nominally, Section 512 provides some procedural safeguards to prevent misuse. For example, Section 512 mandates that, in issuing a takedown notice, copyright holders must have a “good faith belief that the use of the material” was at odds with their rights. 17 U.S.C. §§ 512(c)(3)(A)(v), 512(f) (creating a cause of action for bad faith assertion of copyright or fair use). Although the Ninth Circuit has held that copyright holders must consider fair use in good faith before submitting a takedown notice, courts have often interpreted the good faith clause as requiring only a subjectively held state of mind. *See Lenz v. Univ. Music Corp.*, 801 F.3d 1126 (9th Cir. 2015). For that reason, the good faith requirement would be of little use to the vast majority of users. Most users are non-sophisticated and risk-averse, and are thus unlikely to avail themselves of the safeguards specified in Section 512. *But see* Sheri Pan, *Lenz v. Universal Music: Ninth Circuit Amends Opinion to Broaden Fair Use Protections in DMCA Takedowns*, JOLT DIGEST (Apr. 4, 2016), <https://jolt.law.harvard.edu/digest/ninth-circuit-amends-opinion-to-broaden-fair-use-protections-in-dmca-takedowns> [<https://perma.cc/SY7V-UKPU>] (discussing the Ninth Circuit’s revised opinion in *Lenz v. Universal Music Corp.*, where the court held that the copyright owner’s assessment of fair use before filing a takedown notice must be reasonably extensive).

notably, copyright law presents a readily accessible avenue for legal protection. Copyright law is likely to extend to two features that are common to many Twitch streams: a graphic overlay and the streamer's recorded voiceover. Assuming that it is original, a graphic overlay appears to be a protectable graphic work.<sup>329</sup> While many overlays share common themes with respect to colors and standard design elements, they should normally qualify for copyright protection under the law's minimalist originality standard.<sup>330</sup> Similarly, the streamer's voiceover is also likely to qualify for copyright protection as an original sound recording.<sup>331</sup> And while the law requires that protected works be fixed in a tangible medium of expression, overlays and voice recordings satisfy this standard simply by being captured in the streamer's video.<sup>332</sup>

The recording of a streamer's voiceover could nonetheless be challenged on the grounds that it merely embodies an unprotected idea rather than a protected expression.<sup>333</sup> Streamers do not follow a script. They engage with their audience by responding to queries, questions, or comments posted in the stream chat.<sup>334</sup> In effect, the streamer's comments during the live stream resemble a form of a conversation—a conversation between the streamer and her

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<sup>329</sup> 17 U.S.C. § 102(a)(5) (defining “pictorial, graphic, and sculptural works” as protected subject matter).

<sup>330</sup> *See Feist Publ'ns Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1990), where Justice O'Connor clarified that some degree of creativity is essential to originality. She further rejected the “sweat of the brow” doctrine that some lower courts had embraced in holding that works of authorship should be protected inasmuch as their authors expended time and effort to create them. *See id.* at 345, 359–60, 362. At the same time, Justice O'Connor made clear that the amount of required creativity is minimal, stating that “[t]he requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be.” *Id.* at 345.

<sup>331</sup> 17 U.S.C. § 102(a)(7) (defining sound recordings as protectable subject matter).

<sup>332</sup> 17 U.S.C. § 101 (defining a work as “fixed” when it is “sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration”).

<sup>333</sup> *See supra* note 155 and accompanying text.

<sup>334</sup> *Engaging Viewers*, CREATOR CAMP: TWITCH, <https://www.twitch.tv/creatorcamp/en/level-up/engaging-viewers/> [<https://perma.cc/EF5A-TNEZ>].

audience.<sup>335</sup> And some courts have been hesitant to recognize copyrights in interviews and spontaneous conversations, reasoning that these forms of spontaneous speech reflect unprotected ideas or otherwise fail to meet the threshold for minimal creativity.<sup>336</sup>

Another problem stems from streamers' use of voice-chat software to chat with fellow gamers while streaming. A recorded conversation between multiple parties could result in a copyrightable sound recording. But who owns the recording? To establish co-authorship under U.S. copyright law, putative co-authors must demonstrate their mutual intent to create a work of joint authorship.<sup>337</sup> The requirement of mutual intent presents a substantial challenge.<sup>338</sup> In the absence of co-authorship, courts may find that a multiparty sound recording amounts to a collective work consisting of multiple independent contributions.<sup>339</sup> In this scenario, each contributor holds rights to her separate contribution (provided that it is independently copyrightable). If this were the case, streamers would be barred from claiming sole ownership over gameplay streams in which they interacted audibly with multiple other contributors. Alternatively, the streamer could claim to be the sole author of the entire integrated sound recording. Yet that seems unlikely, because the streamer would be required to show that she exercised authority and control over the whole work to such an extent that she in fact

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<sup>335</sup> Of course, when Twitch chats involve hundreds and thousands of participants, a traditional conversation is less likely to materialize. See Azadeh Nematzadeh et al., *Information Overload in Group Communication: From Conversation to Cacophony in the Twitch Chat*, 6 ROYAL SOC. OPEN SCI. 1 (2019).

<sup>336</sup> See, e.g., *Falwell v. Penthouse Intern., Ltd.*, 521 F. Supp. 1204, 1207–09 (W.D. Va. 1981); *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 808 F.Supp.2d 634, 635–36 (S.D.N.Y. 2011); *Suid v. Newsweek Magazine*, 503 F. Supp. 146, 148 (D.D.C. 1980). But see *Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 349 (N.Y. 1968); *Found. for Lost Boys and Girls of Sudan, Inc. v. Alcon Entm't, LLC*, No. 1:15-cv-00509-LMM (N.D. Ga. Mar. 22, 2016).

<sup>337</sup> 17 U.S.C. § 201 (defining “joint work” as a work “prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole”).

<sup>338</sup> *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 2000) (holding that putative coauthors must “make objective manifestations of a shared intent to be coauthors”).

<sup>339</sup> 17 U.S.C. § 201 (contributions to collective works).



“superintended” the work.<sup>340</sup> In a casual multiparty conversation among friends, it is implausible that the streamer would emerge as the single “master mind” behind the entire sound recording.

Finally, the sound recorded during gameplay streams is often intertwined with the sound emanating from the video game being played. The rights to the recorded sounds of a video game rest with the game’s rightsholders—typically, the publishing studio. And in cases where the sound from the game is intermixed with the recording of the streamer’s voice, the resultant recording may constitute an unauthorized—and potentially unprotected—derivative work.

In short, there are a number of meaningful obstacles to copyright protection of sound recordings in gameplay streams. Recordings of streamer voiceovers often encompass spontaneous conversations or oral statements that might not qualify as copyrightable works. In addition, these sound recordings often result from a conversation between multiple potential authors. They thus implicate limited, fragmented ownership interests. And the voiceover recording might be inseparable from the video game’s sound. As a result, the streamer would be ill-positioned to assert copyright ownership over her recordings.

Apart from the overlay and sound recording embedded in the gameplay stream, streamers could attempt to claim ownership over the actual gameplay footage. But the copyrightability of the gameplay video itself is contestable. The main problem is that it’s unclear whether the streamer is the actual author of the footage. In the language of copyright law, the streamer appears to be merely “performing” the underlying video game. Is gameplay performance a copyrightable contribution?

This point warrants some parsing. One might argue that simply playing a video game does not suffice to generate anything expressive enough to qualify for copyright protection. This is because streamers seem to simply engage with someone else’s work, rather than create an expressive work of their own. Further, the idea that a performance constitutes a copyrightable work appears to rest on a

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<sup>340</sup> *Aalmuhammed*, 202 F.3d at 1234 (holding that the “master mind” of the work is its sole creator—the one who conceives, directs, and executes the idea, thus superintending the work as a whole).

category mistake. The Copyright Act does not treat a performance as a type of “work.”<sup>341</sup> Rather, a performance is a type of action through which one might create or exploit a work of authorship.<sup>342</sup> On this view, although the streamer is performing the relevant work, that performance does not give rise to a standalone “work.” It is instead an exploitation of someone else’s work.

Relatedly, some courts have questioned whether video game performance could be copyrightable. In one early case, the Seventh Circuit mused that “[p]laying a video game is more like changing channels on a television than it is like writing a novel or painting a picture.”<sup>343</sup> In this telling, because the player is faced with a finite menu of pre-defined game sequences, she cannot be the author of any creative work that might result from her gameplay.<sup>344</sup> And while a number of subsequent cases seem to hint at the possibility that player contributions could be classified as (copyrightable) derivative works, these cases largely focus on the status of modifications or add-ons generated by players.<sup>345</sup> It is a separate question whether gameplay performance alone, without in-game modification, can result in a protected contribution.

Nevertheless, some courts have recognized that performances evincing a minimum quantum of creativity could trigger copyright

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<sup>341</sup> 17 U.S.C. § 101 (to perform a work is “to recite, render, play, dance, or act it, either directly or by means of any device or process”).

<sup>342</sup> See Brief for Professors of Intellectual Property Law as Amici Curiae Supporting Respondents’ Petition for Rehearing En Banc, *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015).

<sup>343</sup> See *Midway Mfg. Co. v. Artic Int’l*, 704 F.2d 1009, 1012 (7th Cir. 1982).

<sup>344</sup> *Id.* Another case pointing in the same direction is *Williams Electronics v. Artic Int’l* 685 F.2d 870 (3d Cir. 1982). There, the Third Circuit dismissed the defendants’ argument that creative gameplay could render the player a “co-author of what appears on the screen.” *Id.* at 874. Instead, the court emphasized that, “[a]lthough there is player interaction with the machine during the play mode,” the game relies on a “repetitive sequence [...] and many aspects of the display remain constant from game to game regardless of how the player operates the controls.” *Id.* See also Dan L. Burk, *Electronic Gaming and the Ethics of Information Ownership*, 4 INT’L REV. INFO. ETHICS 39, 42 (2005) (pointing out that “the law has been slow to recognize the contributions of participants in [gaming scenaria]”); Dan L. Burk, *Owning E-Sports: Proprietary Rights in Professional Computer Gaming*, 161 U. PA. L. REV. 1535, 1545–46 (2013).

<sup>345</sup> See, e.g., *Micro Star v. FormGen, Inc.*, 154 F.3d 1107 (9th Cir. 1998).

protection.<sup>346</sup> In particular, courts have occasionally taken the position that sports performances—that is, movements by professional athletes—meet the threshold for copyrightable subject matter.<sup>347</sup> Performances of video games, the argument goes, may therefore prove sufficiently creative for the purpose of copyright protection. And, indeed, the idea that gameplay performance is copyrightable has recently found favor with a number of commentators.<sup>348</sup>

Still, a mounting wave of critical commentary has pushed back against the view that unscripted performances constitute expressive works of authorship under copyright law, even when sufficiently original.<sup>349</sup> It thus remains unclear whether streamers hold any rights

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<sup>346</sup> Justin Hughes, *Actors as Authors in American Copyright Law*, 51 CONN. L. REV. 1 (2019) (concluding that dramatic performances by actors are protected under American copyright law).

<sup>347</sup> *Balt. Orioles, Inc. v. MLB Players Ass'n*, 805 F.2d 663, 669 (7th Cir. 1986). The Seventh Circuit suggested, in a lengthy footnote, that players' performances—that is, their movements while playing the game—were original enough to trigger copyright protection once fixed. *Id.* at 669, n.7. See also PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 2.12.1, at 2-142 (3d ed. 2018). Goldstein opines that “movements of players on the field, if original, constitute copyrightable expression.” *Id.*

<sup>348</sup> Tyler T. Ochoa, *Who Owns an Avatar? Copyright, Creativity, and Virtual Worlds*, 14 VAND. J. ENT. & TECH. L. 959 (2012); W. Joss Nichols, *Painting Through Pixels: The Case for a Copyright in Videogame Play*, 30 COLUM. J.L. & ARTS 101 (2007).

<sup>349</sup> Playing a game—either a sports game or a video game—does not necessarily give rise to a protected “work” in the sense captured by modern copyright law. The question here is whether the performer is creating a protected expression. Are such performances expressive in the sense recognized by copyright law? Some courts have declined to extend protection to sports performances on the grounds that these performances do not qualify as expressive subject matter. See *NBA v. Motorola, Inc.*, 105 F.3d 841, 846 (2d Cir. 1997) (holding that basketball games do not reflect “original works of authorship” under the 1976 Copyright Act). But this approach is vulnerable to criticism; after all, copyright law already protects different categories of unscripted performances that could be described as non-expressive in the sense referenced above. The law extends to the unscripted movements and postures of a dancer—although one can similarly call into question the expressive nature of a choreographic performance. To be sure, part of the problem is that performance is not recognized as an independent category of protectable subject matter. David Nimmer posits that performance should only be recognized as “an element of works potentially subject to copyright protection, but not as a stand-alone category that itself deserves recognition.” DAVID NIMMER, NIMMER ON COPYRIGHT § 2.12(B)(3), at 2-178 (2018). Do gameplay performances actually reflect the type of expressive endeavor meant to be protected under copyright—and, if so, can they be protected under an independent, standalone category of copyrightable subject matter? A full exploration of these questions is beyond the scope of this Article. For a thoughtful discussion of similar concerns in the context of dramatic performances by actors, see Hughes, *supra* note 346, at 3.

to their performance of video games, not least because courts have not yet recognized gameplay as copyrightable subject matter.

To further complicate matters, even if the gameplay performance is itself copyrightable, the resulting stream may constitute an unlawful derivative work.<sup>350</sup> The streamer does not own the rights to the underlying work; the publishing studio does. In other words, the underlying video game remains the property of the publishing studio. Whether the stream in question is an unauthorized derivative work depends on the terms of service that govern the underlying video game. Some developers explicitly disallow streaming.<sup>351</sup> Others permit only non-commercial streaming.<sup>352</sup> And some developers allow players to stream only parts of the game,<sup>353</sup> while others seem to have no policy in place at all.<sup>354</sup> In many cases, then, the resulting stream would amount to an illegal derivative work. And, because gameplay streams are (potentially unauthorized) derivative works, streamers may be precluded from asserting copyright in their streams.

To conclude, copyright law appears to provide some measure of legal protection, though potentially contested, to gameplay streamers. But despite the availability of these legal tools, streamers rarely

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<sup>350</sup> 17 U.S.C. § 103(a) (“[P]rotection for a work employing preexisting material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.”). Although some courts

<sup>351</sup> See *End User Licensing Agreement for Doom Eternal*, BETHESDA, <https://bethesda.net/en/eulas/doom-eternal> [<https://perma.cc/99J6-WCCG>]. Section 3.4 (titled Limitations and Restrictions) bars users from publicly displaying or performing any part of the game.

<sup>352</sup> *Fortnite's* terms of service are instructive. See *Fan Content Policy*, EPIC GAMES, <https://www.epicgames.com/site/en-US/fan-art-policy> [<https://perma.cc/EG77-FARD>] (“Fan Content must have no commercial (i.e., monetary) objective. As an exception to this, fans are permitted to monetize web videos (such as YouTube) with advertisements.”). If enforced, this policy would outlaw Twitch streaming almost entirely: streamers on Twitch rely not only on ads, but also on subscription fees and channel donations.

<sup>353</sup> Megan Farokhmanesh, *Persona 5 Developers Updated Their Streaming Guidelines, But Didn't Fix the Big Problem*, THE VERGE (Apr. 27, 2017), <https://www.theverge.com/2017/4/27/15442580/persona-5-streaming-atlus-screenshots-social> [<https://perma.cc/4H7Y-6RLU>].

<sup>354</sup> For example, the publishing studio Bungie, which develops the popular game *Halo*, appears to generally approve of streaming so long as donations or monetary support are not sought. See *Help: Intellectual Property and Trademarks*, BUNGIE (Jan. 26, 2021), <https://www.bungie.net/en/Help/Article/45842> [<https://perma.cc/UGG2-AZ6M>].

pursue litigation. What could explain the reluctance of streamers to avail themselves of copyright law?

Several reasons come to mind. First, litigation is costly.<sup>355</sup> In the age of fast-paced digital consumption, it's practically impossible to police every single incident of norm violation. Second, community members likely have a limited understanding of copyright law, as do most laypeople.<sup>356</sup> So while streamers seem to command a reasonable understanding of the technical process for submitting takedown notices, this surely does not mean they understand the intricacies of the law. Third, as explained above, gameplay streams are protected to a limited extent—primarily with respect to their accompanying elements, such as the streamer's voiceover and the surrounding overlay. Putative infringers can thus avoid liability by editing out these protected elements. One way to do so, as I noted, is to extract gameplay recordings directly from the game's servers.

Fourth, and most importantly, streamers need not resort to litigation. They can instead enforce their rights through the DMCA notice-and-takedown system. This system enables streamers to swiftly remove unauthorized contents. And while the DMCA provides some (faint) safeguards against misuse—including a counter-notice procedure<sup>357</sup>—streamers rarely face any meaningful resistance from alleged infringers. This is because infringers are ill-informed about the law and, crucially, because they might also subscribe to community norms regarding stream ownership. It's likely that norm infringers assume, like other community members, that streamers own their streams and are acting well within their rights in issuing takedown notices.

Indeed, while streamers often submit takedown notices to ward against unauthorized copying of their gameplay streams, they frequently fail to identify what elements of their streams are in fact

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<sup>355</sup> AM. INTELL. PROP. L. ASS'N, 2017 REPORT OF THE ECONOMIC SURVEY 44 (2017) (reporting that the average cost of copyright litigation ranges from \$200,000 to \$1 million). See generally Shyamkrishna Balganesh, *Copyright Infringement Markets*, 113 COLUM. L. REV. 2277, 2277–80 (2013) (noting that “[l]itigating a copyright claim is no longer an affordable prospect”).

<sup>356</sup> Gregory N. Mandel, *What Is IP For? Experiments in Lay and Expert Perceptions*, 90 ST. JOHN'S L. REV. 659, 667–69 (2016).

<sup>357</sup> 17 U.S.C. §§ 512(g)(2), 512(g)(3).

protected under copyright law. This points to a broader issue, one that is persistent but largely endemic to copyright law—the difficulty of distinguishing protected from nonprotected elements.<sup>358</sup>

### 5. Explaining Anti-Appropriation

The anti-appropriation norm crystalized in this subpart is driven primarily by an idea of labor. Streamers believe that rights to their video streams result from the labor they poured into creating these streams. Doug Martin, famous *Call of Duty* streamer, has recently recalled:

[The] biggest difference between YouTube and streaming is that [ . . . ] streaming is more hours; streaming is easier but it's more time-consuming. You have to be very strict with your schedule. You have to be streaming every single day, 5-6-7 hours a day, whereas [on] YouTube, some of your best videos can literally take you 30 minutes [to make], and they can get a [lot] of views, and you don't have to do anything for the rest of the day.<sup>359</sup>

As this excerpt makes clear, streaming is hard work. Narrowly understood, work means time—and streaming is particularly time-consuming. The most popular streamer in the world, Richard Blevins, spent no less than 3,800 hours streaming *Fortnite* in 2018.<sup>360</sup> These figures are staggering: they translate, roughly, to 11 hours of streaming per day, including weekends. This is why many

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<sup>358</sup> Christopher J. Sprigman & Samantha Fink Hedrick, *The Filtration Problem in Copyright's "Substantial Similarity" Infringement Test*, 23 LEWIS & CLARK L. REV. 571, 579 (2019) (arguing that substantive similarity tests under U.S. law are ill-suited to distinguish protected from nonprotected elements).

<sup>359</sup> See Faze Censor, *Quitting YouTube?*, YOUTUBE (May 22, 2019), <https://www.youtube.com/watch?v=OrXWEoQJKx8&t=173s> [<https://perma.cc/K3HL-2LUV>] (starting at 2:05).

<sup>360</sup> James Loke Hale, *Ninja's Spent 3,800 Hours Streaming 'Fortnite' This Year. That's the Equivalent of 95 40-Hour Workweeks*, TUBE FILTER (Dec. 4, 2018), <https://www.tubefilter.com/2018/12/04/ninja-how-many-hours-streaming-twitch-earnings> [<https://perma.cc/YG6G-HGDR>].

streamers advocate a minimum of four hours of streaming a day.<sup>361</sup> The assumption here is that, in essence, Twitch viewership picks up momentum over time. Extended streaming is therefore a necessity under Twitch's viewership system. And the consequences can be dire. One streamer, for instance, penned a scathing jeremiad observing that the long hours of streaming had nearly cost him his life.<sup>362</sup> As he put it, "[y]ou need[] to spend a *minimum* of eight hours a day, at least six days a week, to get anywhere."<sup>363</sup> His streaming schedule, he said, was so demanding that he could barely spare time to do anything save for streaming and eating.<sup>364</sup>

In brief, streaming involves exceptionally long hours. And while streamers typically stream from the comfort of their homes, they are nonetheless shackled to a ruthless work schedule that requires long work hours and incredible day-to-day consistency.

But for streamers, gameplay streaming involves more than just long hours; it also turns on expertise and skill. Fighting games offer a good example. These games are remarkably complex, and players spend thousands of hours studying these games in a scientific-like fashion, memorizing the frame data of each game. Building on the game's under-the-hood mechanics, players resourcefully craft creative strategies that allow them to specialize in playing particular characters and effectively countering other characters.<sup>365</sup>

A brief primer on frame data might prove useful. A frame is the basic unit of time in a video game; a still frame of graphics is displayed every 1/60th of a second.<sup>366</sup> Thus, if a particular in-game

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<sup>361</sup> Harry Lyles, Jr., *Twitch Streaming Is a Job That's Harder than It Looks. Here's How Gamers Stay Balanced*, SB NATION (Oct. 8, 2019), <https://www.sbnation.com/2019/10/8/20897184/twitch-streamers-gamers-self-care> [<https://perma.cc/XC9W-7JBG>] ("Most streamers are live for anywhere between four and 10 [sic] hours a day (sometimes longer!)...").

<sup>362</sup> Joe Marino, *Trying to 'Make It' as a Twitch Streamer Almost Killed Me*, KOTAKU (Feb. 27, 2017), <https://www.kotaku.com.au/2017/02/trying-to-make-it-as-a-twitch-streamer-almost-killed-me/> [<https://perma.cc/N7T8-K73Y>].

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

<sup>365</sup> *Id.*

<sup>366</sup> David Sirlin, *A Fighting Game First: Showing Frame Advantage*, SIRLIN ON GAME DESIGN (Oct. 4, 2018), <http://www.sirlin.net/posts/a-fighting-game-first-showing-frame->

move launches within 4 frames, it starts in 4/60ths of a second. Each character in a fighting game is typically equipped with 15 to 30 moves. Every move is broken down into numerous different frame data points, reflecting the various phases of the move (e.g., startup, recovery, etc.).<sup>367</sup> Faster moves—that is, moves whose execution involves fewer frames—are advantageous. A five-frame kick move, for example, is superior to a seven-frame kick move, because the former is faster.

Analyzing the full roster of characters featured in the game, players must memorize hundreds, even thousands, of minute data points. They study the frame data underlying thousands of different in-game moves. Indeed, players pour a great deal of talent, ambition, and creativity into these games. To hone their skills, gamers must forge an understanding of the ways in which the game can and should be played. As one streamer pithily explained, “I put 2437 hours on [the video game]... This is my life.”<sup>368</sup> The streamer further noted that he deserves recognition because this is “something [he had] worked for.”<sup>369</sup> Some video games require thousands of hours to learn and truly master. In assessing the effort that goes into streaming, players routinely factor in the time spent studying the game. Their conception of labor thus applies to the hours spent streaming as well as the time spent mastering the game.

Moreover, aside from the raw effort associated with streaming and studying the game, streamers also believe they deserve rewards for the way in which they uniquely execute their vision of the game. One streamer observed:

I feel like playing video games at the highest professional level is an art in and out of itself. You have to

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advantage [<https://perma.cc/ZG87-4G9Y>]; Wesley Yin-Poole, *For the First Time, a Fighting Game Has Turned Frame Advantage into a Visual Effect*, EUROGAMER (Oct. 5, 2018), <https://www.eurogamer.net/articles/2018-10-05-for-the-first-time-a-fighting-game-has-turned-frame-advantage-into-a-visual-effect> [<https://perma.cc/ST9X-Y77K>].

<sup>367</sup> Sirlin, *supra* note 366.

<sup>368</sup> Tommy Tweedy (@TweedyIN), TWITTER (Feb. 18, 2019, 12:22 PM), <https://twitter.com/TweedyIN/status/1097546925178540032> [<https://perma.cc/SS7C-TFW8>].

<sup>369</sup> Tommy Tweedy (@TweedyIN), TWITTER (Feb. 18, 2019, 12:21 PM), <https://twitter.com/TweedyIN/status/1097546775722975232> [<https://perma.cc/95RT-6MHB>].



put your own creativity, mindset, and uniqueness into whatever character/environment that [you're] in, and nobody else can play the way you can!<sup>370</sup>

The idea here is that players do more than simply execute game commands in a technical fashion. Instead, they engage in a creative enterprise that reflects both their talent and creative vision. While video games are built on software code, and while the range of available in-game options is technically finite, no two high-level gamers play alike. Each develops her own unique style based on her understanding of the way in which the game should be played from a creative vantage point.

Accordingly, streamers have a threefold understanding of labor. Depending on the context, labor is associated with (1) the time spent streaming the game; (2) the time required to study the game and acquire expertise; and (3) the value that results from one's execution of her creative vision of the game. This involuted understanding of labor animates streamers' idea of ownership. As one streamer noted, he simply deserves the recognition he "[has] worked for."<sup>371</sup> And this understanding is not limited to streamers alone. Community members overwhelmingly endorse similar ideas based on the notion that streamers work hard to produce "content," and thus merit a measure of protection over the intangible assets they had created.

This tune will sound strikingly familiar to those versed in copyright theory—it brings to mind the Lockean labor theory, which holds that people deserve to own goods that they had created through productive labor.<sup>372</sup> In Part IV.B. below, I revisit the labor theory and explain why, as the gaming case study shows, this theory is poorly tailored to inform copyright law.

#### *D. Taking Stock*

This Part elaborated at length on the concept of fairness in the gaming world. It sorted out three norms of fairness that dominate

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<sup>370</sup> Dominique McLean (@SonicFox), TWITTER (Apr. 23, 2019, 9:40 PM), <https://twitter.com/SonicFox/status/1120864944705220608> [<https://perma.cc/68TA-KE9T>].

<sup>371</sup> See *supra* note 362.

<sup>372</sup> See *infra* Section I.B.

the video game industry. First, I showed that players largely eschew in-game microtransactions to the extent that they provide competitive, rather than cosmetic, enhancements. Second, I explained that the secret sauce to *Fortnite*'s success is partly rooted in the concept of wealth sharing: gamers are positively inclined to support free-mium games because they view these games as facilitating wealth sharing on the part of game creators. Third, I explored gameplay streaming through the lens of the labor theory, suggesting that players guard against perceived misappropriations of their streams given the amount of labor—time, effort, skill, and vision—that they put into producing these streams.

#### IV. POLICY IMPLICATIONS

The preceding analysis identified a complex mosaic of fairness norms in the gaming community. I now draw on this descriptive account in mounting a normative case against strong IP protections. I argue that norms of fairness can produce insights relevant to the justificatory framework of copyright law. More specifically, these norms can minimize the risks associated with content production, and thus undermine the need for strong copyright protection. I similarly cast doubt over the veracity of the labor theory: I show that the concept of intellectual “labor” is tied to a number of different ideas in the gaming community. These ideas vary by context and fail to provide a compelling justification for IP law.

##### *A. Revisiting Copyright Incentives*

The prevailing justification for copyright law is utilitarian. On this account, copyright law is concerned with striking a balance between two conflicting interests: the interest in providing incentives to creators on the one hand, and the interest in ensuring that intellectual works are ultimately disseminated to the public on the other.<sup>373</sup> This account turns on the observation that intellectual

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<sup>373</sup> For an overview of the economic approach to copyright law, see Wendy J. Gordon & Robert G. Bone, *Copyright*, in II ENCYCLOPEDIA OF LAW AND ECONOMICS 189 (Boudewijn, Bouckaert, & Gerrit De Geest eds., 2000); Stanley M. Besen & Leo J. Raskind, *An Introduction to the Law and Economics of Intellectual Property*, 5 J. ECON. PERS. 3, 11–18 (1991).

creations are both nonexcludable and nonrivalrous, thus resembling public goods.<sup>374</sup> As a result, absent exclusive rights, creators wouldn't be able to prevent others from making cheap copies of their works and undercutting their profits.<sup>375</sup> And if the creator cannot recoup the costs of her initial investment, she would presumably choose not to create at all. Copyright law attends to this market failure by providing authors with time-limited, exclusive entitlements in their creations. This scheme is thought to cohere with the promise of the Copyright Clause of the Constitution, namely to "promote the Progress of Science and useful Arts."<sup>376</sup>

At the same time, "the goal of intellectual property law is only to provide the 'optimal incentive,' not the largest incentive possible."<sup>377</sup> Copyright exacts a heavy toll: it allows creators to charge supracompetitive prices, thereby pricing some consumers out of the market. But the costs associated with a heavy-handed copyright regime run deeper. By denying access to some consumers, copyright risks hampering the spread of knowledge and impeding the creation of new works. The process of creation is often referential or cumulative.<sup>378</sup> Authors work within a certain genre or field and draw inspiration from previous work in that field. It's often the case, then, that authors build on preexisting works in creating new ones.<sup>379</sup> And because copyright law limits access to existing works, it may impair the ability of future authors to produce new works. For this reason,

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<sup>374</sup> David W. Barnes, *Congestible Intellectual Property and Impure Public Goods*, 9 NW. J. TECH. & INTELL. PROP. 533, 533 (2011).

<sup>375</sup> See Paula Samuelson, *Should Economics Play a Role in Copyright Law and Policy*, 1 U. OTTAWA L. & TECH. J. 1, 3-4 (2004); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEG. STUD. 325, 326 (1989); see also *Eldred v. Ashcroft*, 537 U.S. 186, 215 (2003) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts' Arts.") (quoting *Mazer v. Stein*, 347 U.S. 201, 219 (1954)).

<sup>376</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>377</sup> Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CALIF. L. REV. 111, 125 (1999).

<sup>378</sup> Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 997 (1997) ("[K]nowledge is cumulative—authors and inventors must necessarily build on what came before them.").

<sup>379</sup> *Id.*

copyright law purports to provide creators with *limited* incentives that would encourage creativity while at once facilitating the dissemination of “information for the public benefit.”<sup>380</sup>

U.S. copyright law is largely premised on this utilitarian approach.<sup>381</sup> But commentators widely agree that the underlying balance between incentives and access is misaligned. Copyright law, many believe, is too protective of copyright holders. And the law consequently fails to safeguard the interests of consumers and subsequent authors in accessing protected works. For decades, scholars have advanced arguments to this effect.<sup>382</sup> Pamela Samuelson, for

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<sup>380</sup> Marshall Leaffer, *The Uncertain Future of Fair Use in a Global Information Marketplace*, 62 OHIO ST. L.J. 849, 851 (2001).

<sup>381</sup> See, e.g., Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 HASTINGS L.J. 433, 433 (2007) (noting that “[n]othing is more fundamental to copyright law than the concept of incentives”); Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1576–77 (2009) (“[C]opyright law in the United States has undeniably come to be understood almost entirely in utilitarian, incentive-driven terms.”); Alex Kozinski & Christopher Newman, *What’s So Fair About Fair Use?*, 46 J. COPYRIGHT SOC’Y U.S.A. 513, 524 (1999) (“The fundamental premise of our copyright law is that the best way to encourage the creation of valuable works is to let authors capture the market value of those works.”). See generally *Harper & Row Pub., Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (recognizing that “[b]y establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas”); Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775, 797 (2003); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1203 (1996); *Twentieth Century Music Corp v. Aiken*, 422 U.S. 151, 156 (1975); *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 187 (1985); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the [Copyright Clause]...is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors....”); *Am. Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 27 (S.D.N.Y. 1992) (“[C]opyright law celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge....The profit motive is the engine that ensures the progress of science.”).

<sup>382</sup> See generally JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001); WILLIAM W. FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* (2004); LAWRENCE LESSIG, *REMIX* (2008); NEIL WEINSTOCK NETANEL, *COPYRIGHT’S PARADOX* (2008); Jane C. Ginsburg, *Can Copyright Become User-Friendly*, 25 COLUM. J. L. & ARTS 71 (2001); Michael Landau, *Has the Digital Millennium Copyright Act Really Created a New Exclusive Right of Access? Attempting to Reach a Balance Between Users’ and Content Providers’ Rights*, 49 J. COPYRIGHT SOC’Y U.S.A. 277 (2001); Niva Elkin-Koren, *Copyright in a Digital Ecosystem: A User Right Approach*, in *EXCEPTIONS AND LIMITATIONS* 132 (Ruth Okediji ed., 2017); James Boyle, *The Second Enclosure Movement*

example, famously argued that the law has trended toward a “maximalist” construction of copyright.<sup>383</sup> Modern copyright law is more robust and sweeping than ever before: copyright owners possess more rights, these rights are interpreted broadly, and they last longer.<sup>384</sup> The needle has moved decidedly toward copyright owners and away from users. And though this trend is not entirely unidirectional,<sup>385</sup> the overall picture is at best contestable. Is this expansive vision of copyright law desirable from a policy perspective? On a utilitarian account, IP can only be justified to the extent that it produces a net positive effect. This doesn’t mean that we’d necessarily be better off with no IP, but it should at least give us pause. And it should provoke a measured reflection on the merits of IP across a wide range of creative industries.

While the evidence is incomplete, the limited glossary presented in Part II can offer a few clues. It shows that numerous creative industries have been doing just fine without formal IP—communities of French chefs, comedians, drag queens, and even fashion designers<sup>386</sup> have managed to sustain relatively high levels of innovation despite the absence of formal IP. These studies appear to support the proposition that the law should be limited in scope: we simply don’t need to shoulder the burden associated with a heavy-handed IP regime where it is unnecessary.

Along the same lines, this Article cautions against strong IP. It suggests that strong IP may be undesirable in communities where

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*and the Construction of the Public Domain*, 66 L. & CONTEMP. PROBS. 33 (2003); Richard A. Epstein, *The Dubious Constitutionality of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. 123 (2002).

<sup>383</sup> Pamela Samuelson, *The Copyright Grab*, WIRED (Jan. 1, 1996), <https://www.wired.com/1996/01/white-paper/> [<https://perma.cc/K3WY-RV7X>].

<sup>384</sup> See generally *supra* note 382.

<sup>385</sup> Most prominently, courts have relied on the fair use doctrine to facilitate public access to protected works. An instructive example is the Google Books Project. Google sought to create a universal body of human knowledge by scanning, indexing, and storing millions of books. The Authors’ Guild brought action for copyright infringement, and Google countered that the scanning of these books—a large majority of which were not in the public domain—amounts to fair use. After a legal dispute that spanned nearly eight years, the District Court for the Southern District of New York sided with Google, holding that its use of the books was fair. *Authors Guild v. Google Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013).

<sup>386</sup> See generally Raustiala & Sprigman, *The Piracy Paradox*, *supra* note 19.

fairness norms are prevalent. Specifically, fairness can reduce the risks that innovators face. Innovation is linked to two principal risks: the risk of commercial failure and the risk of commercial success.<sup>387</sup> If the copyrighted work proves commercially unviable—say, if consumers simply do not want to purchase the author’s book or engage with it—then no amount of IP protection could salvage it. By contrast, if the work fares well in the market, the author faces a different potential risk: she might have to rely on IP to prevent competitors from copying the work and infusing the market with cheap copies. Subsequent copies are often costless and easy to mass-produce. The author might spend two years writing a book, but, once released, copies of the book can be made and digitally distributed at virtually no cost. The author would then be unable to recoup the costs of writing the book. IP protection may thus be necessary to ensure a return on the author’s initial investment.

Norms of fairness, this Article suggests, can address both risks at once. First, fairness can reduce the risk of commercial failure. It can diminish the risks surrounding content production so long as consumers regard as “fair” the content provider’s business model. Freemium games present a striking example. To the extent that content providers steer clear from competitive enhancements, micro-transactions can work wonders to boost profits.<sup>388</sup> Freemium games can also give rise to communities of dedicated fans. One commentator has made a similar argument in the context of jambands,<sup>389</sup> and this Article extends and applies these insights to the massive gaming industry. In particular, it contends that ideas of wealth sharing can be conducive to sustaining communities of devoted fans, thus minimizing the risk of consumer defection to potential market competitors. Fairness, in short, is a markedly powerful tool, and content

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<sup>387</sup> Kal Raustiala & Christopher Jon Sprigman, *The Second Digital Disruption: Streaming & the Dawn of Data-Driven Creativity*, 94 N.Y.U. L. REV. 1555, 1604 (2019) (explaining that authors face two main risks: “[T]he *risk of failure*. This is the risk that no one wants to read, watch, or listen to the work that the author creates...[and] the *risk of success*. This is the risk that a work in fact proves to be popular, and that popularity attracts pirates whose unauthorized copies steal away potential customers....”).

<sup>388</sup> See *supra* text accompanying notes 72–73.

<sup>389</sup> See generally Schultz, *supra* note 16; see also *supra* text accompanying notes 259–262.

providers would be well-served by embracing principles of fairness in their business dealings.

In addition, fairness norms hold the promise of addressing the second principal risk that creators face: the risk of commercial success, i.e. that the product would be copied by competitors or consumers. This Article shows that microtransactions, executed correctly, can largely cancel out the risk of piracy. This is because, simply put, there's nothing left to copy. The game itself is freely available. When the content is offered at zero cost, consumers have little incentive to pirate.

Of course, free-to-pay games also offer premium in-game purchases; primarily, cosmetic enhancements released on a periodic basis. But these enhancements are hard to copy. First, copying in-game designs requires expertise, time, and resources. As opposed to file-sharing in the music industry, copying in-game digital goods would require, in effect, using software code to manipulate the game's underlying executing code. Second, and most importantly, copying in-game designs is impractical. Cosmetic in-game designs are hot commodities the minute they are released, but rapidly decrease in value. In many freemium games, such as *Fortnite*, in-game designs are released weekly. Players rush to purchase designs shortly after release: they want their characters to don the latest-and-greatest design, but are likely to lose interest as soon as a new design comes out. By the time copiers might get around to copying the latest in-game design, that design may no longer be in demand. Because in-game designs are held out as popular for only a fleeting moment, copying is unlikely to flourish.<sup>390</sup> The value of in-game designs stems from their

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<sup>390</sup> The rationale for this, as explained above, is simple: copying is not always easy. This is especially true in the context of video games, where copying in-game digital goods requires a great deal of expertise, resources and, most importantly, time. But time is in short supply when in-game designs go out of style, so to speak, in a matter of days. Under these time constraints, piracy is unlikely to present much of a threat. Interestingly, in-game designs seem to differ from the cyclical pattern that engulfs fashion designs. Copying in the fashion industry is rampant, but some argue that piracy supports (rather than arrests) innovation in designs. This is because copying helps to cement fashion "trends." In turn, trends communicate to consumers what designs are presently en vogue and thus drive increased consumption. However, at some point, there's simply too much copying—the trend becomes overused, and consumers move on to the next trend (facilitated by

relative novelty and timely popularity. As a result, they are rarely the subject of widespread copying. This business structure is driven by fairness: for microtransactions to function properly, and for consumers to remain engaged with the game over time, consumers have to regard the game as fair as a matter of competitive integrity and wealth sharing.

Further, in the video game industry, copyright law is rarely used to guard against consumer piracy. In a free-to-play world driven by fairness, the threat of piracy is insubstantial. Instead, game developers invoke IP law to enforce norms of competitive integrity; namely, to prevent players from using various “hacks” or “cheats” to gain an unfair in-game advantage. In one recent high-profile case, the developers of *Fortnite* brought legal action against a fourteen-year-old boy accused of selling “cheats” for the game.<sup>391</sup> The complaint alleged that the defendant infringed the developers’ rights by “inject[ing] unauthorized computer code into [the plaintiffs’] copyright protected *Fortnite* code to allow its users to cheat.”<sup>392</sup> To be sure, players care profoundly about perceptions of competitive integrity. And developers, ever attuned to these perceptions, seem increasingly poised to enforce ideas of competitive integrity.

The legal landscape has therefore shifted. Rightsholders wield copyright law not as a means of preventing copying, but rather as a mechanism for promoting perceptions of fairness. Still, game developers have alternative means of enforcement—they can rely on contractual tools to ban players or revoke their accounts when they use “bots” or “hacks” to cheat their way into obtaining an in-game advantage.<sup>393</sup> So while the use of IP tools may send a strong message, it’s not strictly necessary. And, more importantly, that is not what copyright law is about. The law is fundamentally about incentives. It provides creators with time-limited market exclusivity in order to

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widespread copying of the new, latest-and-greatest design). See generally Raustiala & Sprigman, *The Piracy Paradox*, *supra* note 19.

<sup>391</sup> Corinne Reichert, *Epic Games Settles with 14-Year-Old Over Selling Fortnite Cheats*, CNET (Oct. 8, 2019), <https://www.cnet.com/news/epic-settles-with-14-year-old-over-selling-fortnite-cheats/> [https://perma.cc/A3QF-D3XE].

<sup>392</sup> Complaint at 3, *Epic Games, Inc. v. C.B.*, No. 5:19-cv-250, 2019 U.S. Dist. LEXIS 167416 (E.D.N.C. June 18, 2019).

<sup>393</sup> See sources cited in *supra* note 56.



incentivize innovation. But if no such incentives are necessary, and if competitive integrity can be enforced via non-IP means, then IP law may be at least partly superfluous.

Business strategy has also been key to combating piracy and mitigating production risks in other industries. A prime example is the music industry. For decades, music was predominantly consumed through the sale and purchase of physical albums.<sup>394</sup> The industry then pivoted toward the “iTunes pricing model,” where consumers could pay a modest fee to purchase a single song instead of an entire album.<sup>395</sup> And the music industry today is principally driven by digital streaming—large music aggregators (such as Spotify) provide consumers with access to enormous libraries of music in return for a monthly fee.<sup>396</sup> This latest model has created an equilibrium in which piracy is simply futile. Through a “clever combination of premium and paid services[,]”<sup>397</sup> content providers have been able to effectively counteract music piracy.

A recent study by Christopher Sprigman and Kal Raustiala meshes comfortably with these observations. Sprigman and Raustiala explore the emergence of data-driven creativity; that is, creative content that is informed by the data that content creators collect about consumers’ tastes and preferences.<sup>398</sup> Netflix, for example, curates data about the consumers who use its service.<sup>399</sup> It tracks

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<sup>394</sup> Christopher Sprigman, *The 99 Cent Question*, 5 J. TELECOMM. & HIGH TECH. L. 87, 90 (2006) (“In the not-so-long-ago world before downloads, songs were almost always sold as part of a larger bundle—i.e., individual tracks were packaged with other songs on an album, and marketed together in a variety of formats, including vinyl records, cassettes, and, latterly, CDs.”).

<sup>395</sup> *Id.*

<sup>396</sup> See Tyler Laurence, “Wake Up, Mr. West!”: *Distinguishing Albums and Compilations for Statutory Damages in Copyright within a Streaming-Centric Music Economy*, 26 U. MIAMI BUS. L. REV. 85, 89–90 (2018) (noting that the music industry recently shifted to a “direct-to-consumer streaming model”).

<sup>397</sup> See Jérôme Hergueux & Dariusz Jemielniak, *Should Digital Files be Considered a Commons? Copyright Infringement in the Eyes of Lawyers*, 35 INFO. SOC’Y 198, 198 (2019). Spotify and other music streaming services have adapted to digital piracy by building “a sustainable competitive advantage based on intuitive usability and an excellent understanding of customers’ need.” *Id.*

<sup>398</sup> See Raustiala & Sprigman, *supra* note 387, at 1594 (observing that “information about consumer preferences...flows in to the distributor. When coupled to rapid advances in data analysis techniques, this...becomes a very powerful tool for shaping content.”).

<sup>399</sup> *Id.* at 1584–90.

what consumers watch and for how long.<sup>400</sup> Netflix can then draw on these data in creating content that is best calibrated to satisfy the specific tastes of consumers, thus reducing the risk of commercial failure.<sup>401</sup> Combined with an all-you-can-eat pricing model, where consumers are offered access to a large catalogue of contents in exchange for a monthly fee, Netflix can extinguish or greatly reduce both the risk of commercial failure and the risk of commercial success. Given the rise of data-driven creativity, Sprigman and Raustiala inveigh against strong IP protections. They conclude that, in a world where creators can pin down consumer preferences while deploying pricing models that appeal to consumers across the board, the scope of IP should be narrowed or at least recalibrated.<sup>402</sup>

In line with this model of data-driven creativity, this Article chalks out a model of fairness-driven creativity—namely, a form of content creation that is informed by, and responsive to, ideas of fairness. Consumers are more hospitable to business practices that correspond to ideas of wealth sharing and competitive integrity. When perceptions of fairness hold, consumers may even assist content creators in detecting and policing pirated contents.<sup>403</sup> At bottom, fairness gives rise to notions of reciprocity and loyalty. Fairness therefore fuels consumer dedication and reduces the risk of defection to competitors, while at once lending legitimacy to the content provider's pricing model.

Are these insights generalizable to other industries? Fairness is a central feature of human interaction: people are meaningfully motivated, if only implicitly, by ideas of reciprocity and fairness. And much of the research suggests that the juxtaposition of a smart pricing model (freemium games, Netflix, Spotify) with a fairness-inducing business strategy (no competitive enhancements in video games,

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<sup>400</sup> *Id.* at 1587–88.

<sup>401</sup> *Id.* at 1587.

<sup>402</sup> *Id.* at 1614 (noting that “[i]n this world, copyright protection is far less central, because content is far less central,” hence concluding that “data-driven creativity pushes in the direction of less copyright, and possibly substantially less”).

<sup>403</sup> Mark Schultz's study on the jamband community provides one example. It shows that fans of jambands internalize the bands' preferences as their own, and then police other community members in enforcing these preferences. They do so specifically with respect to the norm against unauthorized distribution of studio recordings. See generally Schultz, *supra* note 16.

limited enforcement of rights in jamband recordings) can yield effective results in different contexts.

Finally, a note on the scope of this Article. I do not mean to suggest that copyright is wholly redundant. Instead, my argument cuts only against *strong* IP protections while recognizing that some (arguably modest) measure of IP remains necessary to combat wholesale copying by market competitors. For example, competitors should not be allowed to make exact copies of the game *Fortnite* and market them under a different title. In other words, some degree of IP protection remains necessary to stave off literal copying by market rivals (or new entrants) attempting to capitalize on the success of others' content. And while consumer piracy is less likely to thrive in a world that brims with data-driven or fairness-driven creativity, copying by market competitors remains a steady, though not always significant, risk. The net result is that some degree of copyright protection would nevertheless be warranted.

It is beyond the scope of this Article to properly assess what level of IP protection would be desirable in this new world. The most trivial challenge is to recalibrate the length of the copyright term. Today, copyrights typically last for 70 years after the death of the author. That means that some works may be protected for well over a century. But in practice, few works carry market value, and most are only commercially viable for short periods of time.<sup>404</sup> Indeed, the law's protective umbrella—extending a century into the future—

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<sup>404</sup> See, e.g., Kristelia García & Justin McCrary, *A Reconsideration of Copyright's Term*, 71 ALA. L. REV. 351 (2019). García and McCrary analyze sales data in the music industry to find that "the vast majority of copyrightable information goods never reach the point of commercial viability." *Id.* at 383. They also find that even for commercially successful musical works, the drop-off in sales "is extraordinarily rapid, falling to one tenth of initial levels well within a year." *Id.* at 391. See also Christopher Sprigman, *Reform(alizing) Copyright*, 57 STAN. L. REV. 485 (2004). Sprigman discusses the now-abolished requirement that copyright holders renew their rights after a relatively short initial term by reregistering their copyright. Sprigman finds that, at a time when authors had to renew their rights to maintain them, many failed to do so. He points out that, historically, approximately 15% of works were renewed, while 85% of works entered the public domain after a relatively short term of protection. *Id.* at 519–21. This suggests that many works were not commercially viable, explaining why owners would rather forgo their rights rather than expend unnecessary resources to renew them. Sprigman therefore concludes that "[t]he majority of creative works have little or no commercial value, and the value of many initially successful works is quickly exhausted." *Id.* at 489.

seems fallaciously excessive and would likely need to be cabined substantially.

Another potential reform might involve the scope of the reproduction right. The Copyright Act grants copyright owners the exclusive right to reproduce their work.<sup>405</sup> The reproduction right sweeps far and wide. It applies to both literal and nonliteral (partial) copying,<sup>406</sup> and it covers both commercial and personal copying, though the latter is more likely to qualify as fair use.<sup>407</sup> Nonetheless, this Article shows that game developers rarely use their rights to prevent *private* copying by consumers. And while some scholars have called for eliminating the reproduction right altogether,<sup>408</sup> I suggest that we might benefit from narrowing its scope. More to the point, we should consider excluding cases of personal use—private copying by consumers—from copyright’s reach, especially in circumstances where widespread distribution of infringing copies is unlikely to follow. After all, private copying is a vanishingly small threat in a world driven by fairness.

This Article advances a rather bold argument about the relationship between copyright law and norms of fairness. One possible objection is that this account of fairness leans too heavily on big-title games like *Fortnite*. It thus papers over other, non-freemium games. Different types of pricing schemes, unlike free-to-play games, actually depend on a strong copyright system. And so my proposal, which seeks to scale back the scope of copyright law, would deliver a death blow to much of the video game industry; it would privilege free-to-play games at the expense of every other pricing scheme. Or so the argument goes.

But this objection is misguided, for two reasons. First, the existence of multiple business models—some of which are supported by strong copyright protections—is not an unalloyed blessing. As this

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<sup>405</sup> 17 U.S.C. § 106(1).

<sup>406</sup> See Pamela Samuelson, *A Fresh Look at Tests for Nonliteral Copyright Infringement*, 107 NW. U. L. REV. 1821, 1822 (2013).

<sup>407</sup> The first fair use factor rests on an assessment of whether the infringing use is “of a commercial nature.” 17 U.S.C. § 107.

<sup>408</sup> See, e.g., Christina Mulligan, *Copyright Without Copying*, 27 CORNELL J.L. & PUB. POL’Y. 469, 470 (2017); Sara K. Stadler, *Copyright as Trade Regulation*, 155 U. PA. L. REV. 899, 928 (2007).

discussion makes clear, copyright law has a price. It limits access to copyrighted works and can effectively frustrate future creativity. So as we think about the scope of copyright law, we should consider the benefits *and* costs of a multifaceted industry. Second, it is important to reiterate that I am not suggesting we eliminate copyright law. Rather, I argue that we should adjust the law to better address the realities of modern content industries.

Another possible objection is that my analysis fails to properly confront anticompetitive concerns. Games like *Fortnite* have built a massive fan base and the developers behind these games exploit norms of fairness to sustain and expand their consumer base. A recent study similarly finds that the video game industry, like other content industries, is trending toward market concentration.<sup>409</sup> It is certainly true that norms of fairness play a role in facilitating these shifts. That said, it is also true that IP law is poorly equipped to address anticompetitive concerns. In fact, rightsholders have often weaponized IP law to achieve the opposite end—to stunt competition by preventing market entrants from challenging incumbents.<sup>410</sup> And while I am sympathetic to competitive concerns, an analysis of how we might best tackle them is beyond the purview of this project.

### B. *Decoding Labor*

Although copyright law is thought to rest on utilitarian grounds, some commentators view IP through the lens of a “natural rights” framework, building on John Locke’s theory of property.<sup>411</sup> They suggest that intellectual property rights constitute a deserved reward for the labor expended in creating a work: by laboring upon otherwise commonly held assets, creators acquire natural rights to these assets.<sup>412</sup> This theory, particularly pervasive in continental Europe, draws from the premise that people are entitled to the fruits of their

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<sup>409</sup> See Glynn Lunney, *Copyright and the 1%*, 23 STAN. TECH. L. REV. 1, 6 (2020).

<sup>410</sup> See Mark A. Lemley & Mark P. McKenna, *Unfair Disruption*, 100 B.U. L. REV. 71, 71 (2020).

<sup>411</sup> See William Fisher, *Theories of Intellectual Property*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 170 (Stephen Munzer ed., 2001); Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1753 (2012); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1540–83 (1993).

<sup>412</sup> Gordon, *supra* note 411, at 1544.

labor. Still other observers, inspired by the writings of Hegel and Kant, contend that the author's personality is reflected in—and so constituted by—her creation. On this account, works of authorship mirror their authors' ongoing personality interests and justify their rights in such works.<sup>413</sup>

Some critics argue that moral rights theories advance an expansive vision of intellectual property, potentially resulting in a more robust grant of rights.<sup>414</sup> This is because the moral rights framework seems to eschew the utilitarian concern for striking a careful balance between incentives and access. And while this expansive view of natural rights is somewhat simplistic,<sup>415</sup> it nonetheless animates concerns over the application of moral rights theories. Critics worry that an embrace of moral rights would result in an imbalanced IP regime that predominantly privileges rightsholders at the expense of users and society at large. Perhaps more damning is Mark Lemley's objection that those who support IP on moral grounds are engaging in a faith-like practice, insulated from facts or reason.<sup>416</sup> The law, Lemley observes, is neither informed by nor comports with a moral

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<sup>413</sup> Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 330 (1988) [hereinafter Hughes, *The Philosophy of Intellectual Property*]; Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383 (1999); Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 971–78 (1982); Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L.J. 81 (1998).

<sup>414</sup> Plamondon Bair, *supra* note 31, at 1495 (“Because moral rights theorists justify intellectual property on very different grounds than utilitarians, they generally tend to favor a broader grant of rights.”).

<sup>415</sup> On Locke's theory of labor, for example, the grant of rights is subject to the “enough and as good” proviso, barring the grant of rights where the remaining commons for others are not “enough and as good.” Another limiting principle finds expression in the waste proviso, which prevents the spoilage of property. These provisos have often been interpreted to suggest that rights should not arise when doing so risks harm to the public domain. See Hughes, *The Philosophy of Intellectual Property*, *supra* note 413, at 313–14; Adam D. Moore, *A Lockean Theory of Intellectual Property*, 21 HAMLIN L. REV. 65, 77–78 (1997).

<sup>416</sup> Mark A. Lemley, *Faith-Based Intellectual Property*, 62 UCLA L. REV. 1328, 1337–38 (2015) (“The adherents of this new religion believe in IP. They don't believe it is better for the world than other systems, or that it encourages more innovation. Rather, they believe in IP as an end in itself—that IP is some kind of prepolitical right to which inventors and creators are entitled.”). Robert Merges, the principal subject of Lemley's critique, has responded by asserting that Lemley mischaracterized his positions. See generally Robert P. Merges, *Against Utilitarian Fundamentalism*, 90 ST. JOHN'S L. REV. 681 (2016).

vision of IP.<sup>417</sup> Lemley is primarily troubled by the prospect that champions of natural rights would support a maximalist vision of intellectual property even where the empirical evidence clearly shows that intellectual property fails to promote, and might even stifle, innovation.<sup>418</sup>

Despite these concerns, moral intuitions shape the way people think about intellectual property. Jeanne Fromer adduces evidence showing that creators are motivated by a concern for labor and personhood.<sup>419</sup> In a similar vein, some studies find that authors bring infringement suits because they believe their moral, rather than economic, interests have been compromised.<sup>420</sup> Similarly, a recent study by Stephanie Plamondon Bair bears witness to the utility of fairness as a vehicle for spurring innovation.<sup>421</sup> She presents evidence showing that (i) perceptions of fairness in the workplace trigger enhanced creativity; (ii) fairness leads to more creative results or products; and (iii) ideas of fairness accord with the way people think about copyright law.<sup>422</sup> Moreover, although courts remain reluctant to expressly invoke moral theories of IP,<sup>423</sup> these theories sometimes drive their decisions.<sup>424</sup>

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<sup>417</sup> Lemley, *supra* note 416, at 1340 (“IP turns out not to map particularly well to a labor-reward instinct. We grant extremely valuable patents to accidental discoverers and extremely valuable copyrights to photographers who happened to be in the right place at the right time. Further, we allow those rights to be enforced even against people who put more productive work into the final product than the IP owner—the companies who actually make products based on an idea sketched out by a patent troll and the artists who remake a photo into an iconic image.”).

<sup>418</sup> *Id.* at 1345 (drawing a line between “theories of IP that are responsive to evidence and those that are impervious to it” and arguing that moral theories fall into the latter category).

<sup>419</sup> Fromer, *supra* note 411, at 1764–81.

<sup>420</sup> See Buccafusco & Fagundes, *supra* note 313, at 2436–37.

<sup>421</sup> Plamondon Bair, *supra* note 31, at 1509.

<sup>422</sup> *Id.* at 1502–08.

<sup>423</sup> ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 89–91 (2011).

<sup>424</sup> Mark A. Lemley & Mark P. McKenna, *Owning Mark(et)s*, 109 MICH. L. REV. 137 (2010). Lemley and McKenna show that courts are often motivated by concerns grounded in ideas of free-riding: courts tend to intuitively assume that it is wrong, or unfair, for competitors to use the owner’s mark even in cases where the competitor’s use clearly does not risk consumer confusion. Lemley and McKenna accordingly identify what they describe as a “free-riding impulse” that underwrites courts’ decisions in trademark cases. *Id.* at 146–56. See also Daniel Gervais, *Improper Appropriation*, 23 LEWIS & CLARK L. REV. 599, 610 (2019) (“A jury might also be tempted to follow an impulse that copying

The evidence suggests that fairness—in particular, labor—looms large in people’s conception of IP. This Article corroborates these insights. It shows that perceptions of fairness are robust and omnipresent in the world’s largest content industry. It finds that creators often deploy community norms to vindicate their labor interests. And they devise creative ways to promote notions of fairness without resort to legal action. But more fundamentally, I suggest that labor theories, despite their pervasiveness in various creative spaces, are ill-suited to inform legal rules.

In exploring this labor-driven conception of fairness, I build on William Fisher’s sophisticated exposition of the labor theory.<sup>425</sup> In his influential essay on theories of intellectual property, Fisher recounts some of the challenges that have long dogged the labor theory, focusing on the question of what actually qualifies as intellectual labor.<sup>426</sup> As Fisher points out, labor can implicate four different concepts. First, labor can mean time and effort—the hours spent creating the work, or the physical and mental effort associated with producing intellectual goods. Second, labor can be understood as referring to an undesirable activity, namely, one “in which [a person] would rather not engage.”<sup>427</sup> Third, labor can be viewed through the prism of its resultant value—the social benefits it confers upon society (think, for example, of valuable inventions in the realm of patents). Fourth, labor can refer to creative activities that yield new ideas.

These conceptions of labor bear a striking resemblance to the way streamers think about their gameplay streams. The picture sketched above shows that, for streamers, labor embodies at least three different concepts: (1) the time spent streaming or playing the game; (2) the time spent acquiring expertise and studying the game;

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that appears as free-riding should be illegal, even though free-riding is not per se illegal.”); Shyamkrishna Balganesch et al., *Judging Similarity*, 100 IOWA L. REV. 267, 288 (2014) (“[T]he law could embrace the reality that moral intuitions relating to labor and free-riding directly influence the assessment of similarity, which in turn serves as a simple proxy for wrongfulness.”). Similar trends pervade copyright cases, as illustrated in Sterk, *supra* note 381.

<sup>425</sup> See Fisher, *supra* note 411, at 185–86.

<sup>426</sup> *Id.*

<sup>427</sup> *Id.* at 185.



and (3) the value that results from one's execution of her creative vision of the game.<sup>428</sup>

Ideas (1) and (2) correspond to Fisher's first definition, where labor centers on time and effort. Streamers put time and effort into streaming (and mastering the game), and therefore believe they are entitled to claim ownership over their recorded streams. Idea (2) can also align with Fisher's second articulation of labor—the process of acquiring expertise can amount to a laborious activity that is undesirable, surely in terms of scope: players spend thousands of hours studying games, and view that process as necessary though taxing.

Idea (3) can plausibly attach to the last two variations on labor—the notion that labor is linked to value, and the belief that labor is associated with a creative, novel process. Indeed, video games are about more than just a mechanical execution of in-game commands. Players view their playing style as unique and creative. They believe that one's playing style reflects her creative voice. For them, labor implicates one's novel, creative vision. And players are often credited with generating value, say, by fleshing out a character; that is, by crafting a particular playing style that utilizes a certain in-game character in a creative, unique way. The upshot is that creative players can forge a path forward, showing other players how the game can and should be played.

In sum, streamers' ever-shifting conception of labor conforms neatly to the different notions of labor explored by Fisher. Streamers view labor as an incident of time and effort. At times, they also believe labor is associated with an unpleasant activity. And, on other occasions, they view labor through the lens of added value or creative novelty: for streamers, labor might therefore refer to the streamer's creative vision or innovative in-game strategy.

The choice among the different conceptions of labor has practical implications. Our conception of labor determines if, and to what extent, the labor theory can in fact justify or ground copyright law. If one insists that labor is reducible to value or meaningful utility, much of copyright law seems out of place. This is because the law's bar for originality is fairly modest: qualifying works need not

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<sup>428</sup> See *supra* Section III.C.5.

provide any distinct social benefits. Similarly, if one takes the position that labor boils down to time and effort, copyright law remains a poor fit. Although authors often put some minimal amount of effort into their creations, no amount of labor is required to qualify for legal protection. The sweat-of-the-brow doctrine, which required a showing of effort as a condition for copyright protection, was jettisoned by the Supreme Court in *Feist*.<sup>429</sup>

Moreover, if professional streamers actually like their work—if they enjoy playing video games—one would be hard-pressed to justify the grant of rights in gaming streams under the second interpretation of labor, i.e., the idea that labor refers to an undesirable activity. Finally, if one accepts the fourth construction of labor, it is similarly hard to justify copyright law. The law requires only a modest amount of creativity. It does not demand that qualifying works be novel in any serious sense. Indeed, one might question whether, and to what extent, the streamers' work spawns something truly novel in the traditional sense. After all, streamers are essentially engaging with someone else's work (the underlying video game), and do not seem to be creating anything new from the vantage point of copyright law.

The *type* of labor at stake is therefore central to our assessment of the theory. But the *amount* of labor is also crucial. This becomes relevant when one tries to apply the labor theory to gameplay streams against the backdrop of the labor performed by the creators of the underlying video game. Robert Nozick was the first to identify the difficulty of distilling a property right that would award the laborer a property interest proportional to her labor.<sup>430</sup> Depending on one's idea of labor, streamers can be viewed as having expended only a modest amount of labor. If we think of labor in terms of time or effort, or in terms of an undesirable activity, it then follows that streamers put only a trivial amount of labor into their streams. The creators of the underlying video game have put, on balance, much more time, effort, and resources into producing the game. Big video games cost hundreds of millions of dollars to make, take years to create, and involve a collaborative enterprise encompassing

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<sup>429</sup> See *Feist*, 499 U.S. at 345, 359–60, 362 (rejecting the “sweat of the brow” doctrine).

<sup>430</sup> ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 174–75 (1974).

hundreds of developers, programmers, and designers. The amount of labor that streamers put in, on the other hand, is proportionately miniscule. Thus, if we take Locke's theory of labor seriously, one might struggle to justify property interests in gameplay streams.

In fact, it is equally difficult to justify rights in gameplay streams even if one takes a more expansive view of streamers' labor: namely, if one accepts that streamers produce something creative and socially valuable. How should the streamers' subsequent contribution be measured in relation to the value or novelty of the underlying video game? In other words, even if we are willing to concede (as I am) that streamers generate goods of value, these goods largely pale in comparison to the grandiose project undertaken by the creators of the underlying game. Many video games are played by hundreds of millions of players around the world and are the products of massive collaborative projects that culminate in beautiful, complex audiovisual works. Gameplay streams, by comparison, fare rather poorly. The value they generate is marginal relative to the underlying video game on which they build. For these reasons, the Lockean labor theory is of little use to those who seek to lay claim to their gameplay streams.

The gaming case study illuminates the fraught foundations of the labor theory. It does so by underscoring the difficulty of pinpointing what labor actually means. Streamers invoke different conceptions of labor in different contexts. This divergence, in turn, constricts our understanding of what labor means and how it might justify the grant of property rights in different cases. Similar concerns arise when one attempts to calibrate the size of the reward given to the laborer against the proportional value of her labor. When considered in relation to the amount (qualitative or quantitative) of labor generated by the laborer, the Lockean theory fails to provide a strong justification for property rights in gameplay streams.

## CONCLUSION

Bridging the divide between business strategy and copyright law, this project joins the burgeoning literature on norms-based governance of intellectual property. And while previous research has focused on discrete, small-scale creative communities, this study

focuses on the largest content industry in the world: the video game industry. It provides insights into the workings of intellectual property in a world driven by fairness, data, and popular culture. To do so, it unpacks three extralegal norms of fairness that underlie content creation in the gaming context: (1) norms of competitive integrity prevalent among video game players; (2) norms of wealth sharing arising out of communities of loyal consumers; and (3) labor-based norms that allow gameplay streamers to claim ownership over their recorded streams.

At bottom, this Article bears witness to the utility of fairness in the overarching framework of copyright. Given the rise of fairness-driven creativity, this analysis presents a cautionary tale militating against strong IP protections. It shows that norms of fairness minimize the need for strong legal interventions in areas where fairness—rather than the law—drives creativity. And it suggests that the labor theory is ill-fitted to inform or otherwise shape copyright law, despite its pervasiveness in the gaming industry.